WHO DIMMED THE *LIGHT*?: HOW *MARSH USA INC. V. COOK* IMPACTS COVENANTS NOT TO COMPETE IN TEXAS

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I. INTRODUCTION

It had been said for many years that the Texas Legislature and the Texas Supreme Court were working at cross-purposes regarding the law on the enforceability of covenants not to compete in Texas.[1] Indeed, this was particularly true during the early 1990s when seemingly what the court gave with one hand was taken away by the legislature with the other hand.[2] However, after several decisions in the covenant-not-to-compete area after *Light v. Centel Cellular Co. of Texas*, many commentators noted a shift and perhaps a new trend towards enforceability.[3] From one perspective, the court's recent decision in *Marsh USA Inc. v. Cook* can be seen as continuing this trend toward enforceability in apparent harmony with the Texas Legislature. Alternatively, the court's decision may be viewed as a radical departure from prior precedent because it gives employers essentially *carte blanche* in obtaining non-compete agreements. As is usually the case, the truth likely lies somewhere in between these extremes.

Changes within this area of the law take on new significance as Texas emerges as a desirable market for new business and industry. Specifically, covenants not to compete give employers more latitude in entrusting employees with sensitive information as well as an incentive to invest in their employees and to develop their skills without fear that the employees

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[1] Michael D. Paul & Ian C. Crawford, *Refocusing Light:* Alex Sheshunoff Management Services, L.P. v. Johnson *Moves Back To the Basics of Covenants Not To Compete*, 38 ST. MARY'S L.J. 727, 728 (2007).

[2] Crystal L. Landes, *The Story of Covenants Not To Compete In Texas Continues . . .*, 33 HOUS. L. REV. 913, 914–916 (1996); *see* Paul & Crawford, *supra* note 1, at 733–736.

[3] Eric Behrens, *A Trend Toward Enforceability: Covenants Not to Compete in At-Will Employment Relationships Following* Sheshunoff *and* Mann Frankfort, 73 TEX. B.J. 732, 738 (2010).

will leave once trained.[4] Hence, covenants not to compete can be powerful tools to encourage business development and growth through human-capital investments.[5] The countervailing consideration is to ensure that covenants not to compete are not used to eliminate competition or to unnecessarily burden or prevent employees from working.[6]

This Note will outline the recent trends and developments in Texas law concerning the enforceability of covenants not to compete. The Note will begin by examining a brief history of the enforceability of covenants not to compete in Texas and outlining the general framework for enforcement as it existed before *Marsh USA Inc*.[7] The Note will then turn to the court's recent decision in *Marsh USA Inc.* and examine the opinion itself, as well as its implications for prior case law and the enforceability of covenants not to compete more generally.[8] Part V will argue that while the decision significantly changes at least one threshold requirement for enforceability, ultimately, this change will not significantly increase the number of enforceable covenants not to compete in Texas; however, it does shift the balance struck by the court in favor of employers.[9]

II. HISTORY OF THE ENFORCEABILITY OF COVENANTS NOT TO COMPETE IN TEXAS

The history of the enforceability of covenants not to compete reflects dueling concerns. On the one hand is an individual's freedom to choose the nature and location of her profession. On the other is the ability of businesses to protect trade secrets, goodwill, and human-capital investments.[10] Generally, a covenant not to compete is defined as a promise, usually in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.[11] In fashioning a framework for enforcement, courts have tried to balance the competing interests of both

[4] Landes, *supra* note 2, at 918.

[5] *See id.*

[6] *Id.*

[7] *See infra* Part II; *see infra* Part III.

[8] *See infra* Part IV.

[9] *See infra* Part V.

[10] Paul & Crawford, *supra* note 1, at 727.

[11] BLACK'S LAW DICTIONARY 420 (9th ed. 2009).

employers and employees.[12] Specifically, covenants not to compete must enable employers to disclose confidential information to their employees and to invest in training their employees without fear that the employees will leverage their newfound knowledge and abilities with other employers.[13] Conversely, covenants not to compete must not afford employers so much protection that they effectively prevent competition from former employees or unnecessarily restrict the employee's right to work.[14]

A. The Common-Law Era

In the beginning, Texas courts followed the traditional common-law rule that refused to enforce any covenants not to compete.[15] Under the old common law, these types of agreements were considered contrary to public policy insofar as they were unreasonable restraints on trade.[16] Over time, this view changed, as did the common law, to recognize that certain restraints on trade were valuable and could be enforced so long as they complied with specific requirements.[17] The impetus for this change was a recognition that covenants not to compete could serve beneficial economic purposes such as encouraging employer investment in employees as well as sharing confidential information with employees in furtherance of their common purpose.[18]

In Texas, the development of the common law and the requirements for the enforceability of covenants not to compete were outlined in *DeSantis v. Wackenhut Corp*.[19] In *DeSantis*, an employer, Wackenhut, brought suit against a former employee, DeSantis, seeking injunctive and monetary relief for an alleged breach of a covenant not to compete that DeSantis had signed at the inception of his former employment with Wackenhut.[20] Under

[12] *See* Landes, *supra* note 2, at 919.

[13] *Id.* at 918.

[14] *Id.*

[15] United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

[16] *Id.*

[17] *See id.* at 280; Chenault v Otis Eng'g Corp., 423 S.W.2d 377, 381 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.).

[18] *Chenault*, 423 S.W.2d at 381; DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 682 (Tex. 1990).

[19] 793 S.W.2d 670, 681–82 (Tex. 1990).

[20] *Id.* at 675–76.

the terms of the covenant, DeSantis had promised not to compete with Wackenhut within a forty-county area of south Texas during and for two years after his employment with Wackenhut.[21] DeSantis had also signed a confidentiality agreement in which he agreed never to disclose any confidential or proprietary information acquired while at Wackenhut and acknowledged that Wackenhut's client list was a valuable and special asset.[22] After deciding a choice-of-law question, the court outlined the common-law requirements for the enforcement of the covenant not to compete.[23] First, the agreement not to compete must be ancillary to an otherwise-valid transaction or relationship.[24] Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest.[25] 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.[26] The court held that since Wackenhut had failed to show either the second or the third requirement, the covenant not to compete was unreasonable and therefore unenforceable.[27]

In addition to the three common-law requirements for enforcement outlined in *DeSantis*, Texas had developed at least one unique requirement

[21] *Id.* at 675.

[22] *Id.*

[23] *Id.* at 681–82.

[24] *Id.* Since many cases took place in the context of an employer-employee dispute, the ancillary requirement was satisfied based on the employment relationship between the two parties. *See id.* Even beyond the employment relationship, a valid ancillary agreement would meet the requirement. *See id.* Hence in *DeSantis*, even without the employment relationship between DeSantis and Wackenhut, the ancillary requirement would be met because DeSantis had also signed a nondisclosure agreement at the inception of his employment with Wackenhut. *Id.* at 676; *see also* Prop. Tax Assocs., Inc. v. Staffeldt, 800 S.W.2d 349, 350 (Tex. App.—El Paso 1990, writ denied); Martin v. Credit Prot. Ass'n, Inc., 793 S.W.2d 667, 669 (Tex. 1990).

[25] *DeSantis*, 793 S.W.2d at 682. Here, the court evaluates the reasonableness of the covenant given the importance of the protectable business interest proffered by the employer. *Id.* Importantly, if the protection afforded by the covenant was greater than necessary to reasonably protect the employer's interest, the court could modify the covenant to be enforceable. *Id*. That is, if the court had found DeSantis' covenant otherwise enforceable, but overly restrictive, the court could have modified the covenant by reducing the geographic restrictions, the duration of the restrictions, etc. *Id.*

[26] *Id.* In evaluating the third factor, the court balances the burdens of the covenant on the employee and public against the benefits of the covenant for the employer. *Id.* The covenant is not enforceable if the former is weightier than the latter. *Id.*

[27] *Id.* at 684.

for (or restraint on) enforcement.[28] In *Hill v. Mobile Auto Trim Inc.*, Texas adopted the Utah common-law precept that prohibited the enforcement of covenants not to compete when the enforcement of the covenant would prevent an employee from obtaining a job that shared a "common calling" with their current employment.[29] This rule was designed to prevent employers from using covenants not to compete primarily as means to suppress competition and to safeguard the public-policy concern that an employee's talents are their own and not to be unreasonably restricted.[30] The effect of this common-calling test was to greatly restrict the types of covenants not to compete that would be enforceable because any covenant that restricted an employee from using a skill that they possessed before their relationship with the employer would be unenforceable.[31]

B. The Covenants Not to Compete Act

In response to *Hill*, and a perceived trend against the enforcement of covenants not to compete, the Texas Legislature responded by enacting the Covenant Not to Compete Act.[32] The Act was designed to permit the enforcement of reasonable covenants not to compete in recognition of their value for commerce within the State.[33] The Act of 1989 outlined the criteria

[28] *See* Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987), *superseded by statute*, Covenants Not to Compete Act, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852–53, *as recognized in* Marsh USA Inc., v. Cook, 354 S.W.3d 764 (Tex. 2011).

[29] *Id.*; Bergman v. Norris of Hous., 734 S.W.2d 673, 674 (Tex. 1987) (holding a covenant not to compete unenforceable against barbers who had left their previous employment because barbering is a common calling).

[30] *See Hill*, 725 S.W.2d at 172.

[31] Marsh USA Inc. v. Cook, 354 S.W.3d 764, 772 (Tex. 2011).

[32] *Id.*; Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852–53 (amended 1993) (current version at TEX. BUS. & COM. CODE ANN. §§ 15.50–.52 (West 2011)); House Comm. On Business and Commerce, Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989) (author of S.B. 946, Senator John Whitmire, explaining that *Hill* severely restricts the enforceability of covenants not to compete in franchise and employment settings and raised questions about their use in other previously acceptable circumstances).

[33] *Marsh USA Inc.*, 354 S.W.3d at 772; House Comm. On Business and Commerce, Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989) (author of S.B. 946, Senator John Whitmire, explaining that it is generally held that covenants not to compete encourage investment in the development of trade secrets and goodwill employee training, provide contracting parties with a means to effectively and efficiently allocate various risks, allow the freer transfer of property interests, and in certain circumstances, provide the only effective remedy for the protection of trade secrets and goodwill).

for the enforcement of covenants not to compete and the procedures and remedies in actions to enforce covenants not to compete.[34] However, in 1993, the legislature amended the Act by slightly revising the criteria for enforcement under Section 15.50 and adding Section 15.52, which provides that the Texas Business and Commerce Code is the exclusive criteria for enforcement and that it preempts any other criterion.[35] The impetus for the revision was to make clear that the Code applied to covenants within the at-will-employment context, as well as to make clear that the Code, not the common law, was the exclusive criteria for enforcement.[36] This revision was necessary because after the initial passage of the Covenants Not to Compete Act, the Texas Supreme Court effectively ignored the statute by still following its common-law precedent.[37]

The text of the Act currently provides 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 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 necessary to protect the goodwill or other business interest of the promisee.[38] The Act also provides specific requirements for covenants not to compete that relate to the practice of medicine and that are enforceable

[34] Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852–53 (amended 1993) (current version at TEX. BUS. & COM. CODE ANN. §§ 15.50–.52 (West 2011)).

[35] Act of June 19, 1993, 73d Leg., R.S., ch. 965, § 3, 1993 Tex. Gen. Laws 4201–02 (current version at TEX. BUS. & COM. CODE ANN. §§ 15.50–.52 (West 2011)) (Section 15.52 provides that "[t]he 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."). The 1993 changes under § 15.50(a) reworded the statute, but made no material changes.

[36] House Comm. On Business and Industry, Bill Analysis, Tex. H.B. 7, 73d Leg., R.S. (1993) (author of H.B. 7, John Carona, explaining that Texas courts have not consistently followed the requirements of Chapter 15 and stating that the purpose of the bill is to ensure that at-will-employment contracts are covered as well as to make clear that the statutory requirements prevail over the common law).

[37] *See* DeSantis v. Wackenhut, 793 S.W.2d 670, 685 (Tex. 1990); *see* Travel Masters, Inc. v. Star Tours, Inc. 827 S.W.2d 830, 832 (Tex. 1991)), *superseded by statute*, Covenants Not to Compete Act, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852–53, *as recognized in* Alex Sheshunoff Mgmt. Servs., L.P., v. Johnson, 209 S.W.3d 644 (Tex. 2006).

[38] TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011).

against a licensed physician.[39] While the text of the Act generally follows the three common-law requirements for enforcement outlined in *DeSantis*, one clear effect of the Act is to remove the common-calling exception outlined in *Hill*.[40] Interestingly, even without the Act, *DeSantis* itself may have removed the common-calling exception from the common-law requirements.[41]

After the Act was passed, there was still some ambiguity about the continued vitality of the common-law requirements and the way that those common-law interpretations survived or were modified by the Act.[42] In *Light*, the court first considered the interplay between the Act and the common law, stating that the Legislature intended the Act to largely supplant Texas common law relating to the enforcement of covenants not to compete.[43] Moreover, the court determined that the Act applied to resolve the dispute at issue in lieu of any other criteria for enforcement of a covenant not to compete.[44] In interpreting the language of the Act, specifically the first requirement that a covenant be ancillary to or part of the otherwise-enforceable agreement, the court developed a two-part test.[45] Under this test, in order for a covenant not to compete to be ancillary to an otherwise-enforceable agreement, (a) 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 (b) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise-enforceable agreement.[46]

III. THE ENFORCEABILITY OF NON-COMPETES: THE GENERAL FRAMEWORK BEFORE *MARSH USA*

As outlined above, under the Covenants not to Compete Act, a covenant is only enforceable to the extent that it contains limitations as to time,

[39] *Id.* § 15.50(b).

[40] *See id.* § 15.50(a); *see also id.* § 15.52.

[41] Travel Masters, Inc. v. Star Tours, Inc., 830 S.W.2d 614, 618 (Tex. App.—Dallas 1991), *rev'd on other grounds*, 827 S.W.2d 830 (Tex. 1991); *DeSantis*, 793 S.W.2d at 683.

[42] *DeSantis*, 793 S.W.2d at 685.

[43] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644 (Tex. 1994), *abrogated by* Marsh USA Inc., v. Cook, 354 S.W.3d 764 (Tex. 2011).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 647.

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 business interest of the promisee.[47] As a threshold matter, any enforceable covenant not to compete must be ancillary to or part of an otherwise-enforceable agreement at the time the agreement is made.[48] The threshold requirement is satisfied when: (1) there is an otherwise-enforceable agreement, to which (2) the covenant not to compete is ancillary to, or part of, at the time the agreement is made.[49]

To satisfy the first prong, the covenant must be a part of an agreement that contained mutual non-illusory promises.[50] Like any other enforceable contract, an enforceable agreement can arise through an exchange of valuable consideration between the parties.[51] However, even absent a contract, Texas case law holds that at-will-employment relationships can satisfy the first prong.[52] Because an employee may quit or be fired at any time, with or without cause, consideration for a promise by either the employee or the employer in an at-will-employment situation cannot be dependent on a period of continued employment.[53] However, this requirement does not foreclose the enforceability of covenants within the at-will-employment context.[54] Rather, at-will employees may contract with their employers on any matter except those that would limit the ability of either employer or employee to terminate the employment at will.[55]

To satisfy the second prong, the court in *Light* devised two requirements to determine whether a covenant not to compete is ancillary to an otherwise-enforceable agreement: (a) 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 (b) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise-enforceable agreement.[56] Hence, only when the employer's consideration gave rise to a protectable business interest

[47] TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011).

[48] *Id.*

[49] *Id.*

[50] *Light*, 883 S.W.2d at 645; Behrens, *supra* note 3, at 733.

[51] Behrens, *supra* note 3, at 733.

[52] Paul & Crawford, *supra* note 1, at 737–39.

[53] *Light*, 883 S.W.2d at 644–45; Behrens, *supra* note at 3, at 733.

[54] Paul & Crawford, *supra* note 1, at 737–739.

[55] *Id.*

[56] *Light*, 883 S.W.2d at 647.

would the covenant be ancillary to an otherwise-enforceable agreement.[57] As many courts observed, this was generally only possible when the employer's consideration was the giving of trade secrets or confidential or proprietary information to the employee in exchange for the non-compete promise.[58]

Only when these threshold requirements were satisfied would courts proceed to determine if the covenant not to compete was itself reasonable in scope, time, and geographical limitation.[59] Interestingly, though these secondary requirements were relatively well-defined under the common law, there is some ambiguity regarding the secondary requirements as outlined in the Act. Specifically, there has not been a definitive Texas Supreme Court case on point since the passage of the Act to address these secondary requirements.[60] Hence, it is not known whether the Act's requirements will be interpreted to be synonymous with those under *DeSantis*.[61]

[57] *See id.*

[58] Marsh USA Inc. v. Cook, 354 S.W.3d 764, 774 (Tex. 2011); Paul & Crawford, *supra* note 1, at 752.

[59] *See Marsh USA Inc.*, 354 S.W.3d at 771.

[60] Several Texas courts of appeals have evaluated these secondary requirements. However, none have taken a definitive stance on the interpretation of the Act's requirements. Most either avoid the issue by finding the threshold requirement unfulfilled, *i.e.* the ancillary requirement, or by analyzing the reasonableness of the covenant not to compete so generally that it could meet either the Act or the *DeSantis* analysis. *See, e.g.*, Stone v. Griffin Commc'n & Sec. Sys., Inc., 53 S.W.3d 687, 693 (Tex. App.—Tyler 2001, no pet.) (considering: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer's need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) whether the restriction adversely affects the interests of the public), *overruled by* American Fracmaster Ltd. v. Richardson, 71 S.W.3d 381 (Tex. App.—Tyler 2001); Gen. Devices, Inc. v. Bacon, 888 S.W.2d 497, 504 (Tex App.—Dallas 1994, writ denied) (holding a covenant not to compete unenforceable as a matter of law because it was not sufficiently limited as to time and territory); Curtis v. Ziff Energy Grp., Ltd, 12 S.W.3d 114, 119 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding a six-month restriction on working for other oil and gas consulting firms in North America reasonable).

[61] *Compare* TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) *with* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 683 (Tex. 1990).

IV. MARSH USA V. COOK

A. Facts and History of the Case

Rex Cook was a former employee of Marsh USA Inc. (Marsh).[62] Beginning his employment in 1983, Cook had risen to the level of managing director of Marsh, a wholly owned subsidiary of Marsh & McLennan Companies, Inc. (MMC).[63] In 1996, MMC granted Cook an option to purchase MMC common stock at a discounted strike price pursuant to MMC's 1992 Incentive and Stock Award Plan.[64] The option period was ten years, and Cook decided to exercise the option in February of 2005.[65] Under the plan, the employee exercising the option had to provide MMC with a Notice of Exercise of Option Letter, a signed Non-Solicitation Agreement, and payment for the stock at the discounted strike price.[66] Cook complied with the terms of the plan, signing the non-solicitation agreement and purchasing the stock.[67] The terms of the non-solicitation agreement provided that if Cook left Marsh within three years of exercising his stock option, then for a period of two years he could not solicit clients or employees from MMC and would not disclose confidential information and trade secrets given to him during his employment with MMC.[68]

Within three years of exercising his stock options, Cook resigned from MMC and immediately began employment with a direct competitor of MMC.[69] Within a week of Cook's resignation, MMC sent him a letter informing him that he had breached the terms of his non-solicitation agreement.[70] MMC filed suit against Cook for breach of contract and breach of fiduciary duty claiming, inter alia, that he violated the terms of the non-solicitation agreement by soliciting MMC clients.[71]

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[62] *Marsh USA Inc.*, 354 S.W.3d at 766.

[63] *Id.* at 766. Marsh & McLennan Companies, Inc. is a parent company for various risk management and insurance businesses. *Id.* Marsh USA Inc. is one such insurance broker and risk-management firm. *Id.*

[64] *Id.*

[65] *Id.* at 767.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* (Cook was hired by Dallas Series of Lockton Companies, LLC.)

[70] *Id.*

[71] *Id.*

The trial court granted Cook's motion for partial summary judgment on the breach-of-contract claim, concluding that the non-solicitation agreement was unenforceable as a matter of law.[72] Marsh non-suited its other claims and appealed the partial summary judgment.[73] The court of appeals affirmed based on *Light*, because the transfer of stock did not give rise to Marsh's interest in restraining Cook from competing.[74] The Texas Supreme Court granted Marsh's petition for review and, in a 6-3 decision, reversed the court of appeals and remanded to the trial court for further proceedings, holding that *Light*'s test was inapplicable and that the non-solicitation agreement was enforceable since it was ancillary to or part of an otherwise-enforceable agreement.[75]

B. Court's Analysis

The court began its analysis by observing that the Covenants Not to Compete Act governed Cook's non-solicitation agreement.[76] Specifically, any agreement that places limits on a former employee's professional mobility or restricts their solicitation of the former employee's customers and employees are restraints on trade and are governed by the Act.[77] Moreover, both parties stipulated that the non-solicitation agreement be governed by the Act.[78] The court then discussed to what extent the non-solicitation agreement was enforceable beyond the nondisclosure of trade secrets and confidential information.[79]

As outlined above, to be enforceable under the Act, a non-compete agreement must be reasonable in time, scope, and geographical limitation.[80] Moreover, and as a threshold matter, the non-compete agreement must be ancillary to or part of an otherwise-enforceable agreement at the time the agreement is made.[81] To satisfy the threshold requirement, courts engage in

[72] *Id.*

[73] *Id.*

[74] *Id.* at 768; Marsh USA Inc. v. Cook, 287 S.W.3d 378, 382 (Tex. App.—Dallas 2009), *rev'd*, 354 S.W.3d 764 (Tex. 2011).

[75] *Marsh USA Inc.*, 354 S.W.3d at 780.

[76] *Id.* at 768.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 771.

[81] *Id.* at 773.

a two-step inquiry.[82] First, there must be an otherwise-enforceable agreement between the parties.[83] Second, the covenant must be ancillary to or part of that agreement.[84]

The otherwise-enforceable-agreement requirement is satisfied when the covenant is part of an agreement that contained mutual non-illusory promises.[85] The court found that there was an otherwise-enforceable agreement between the parties.[86] Indeed, neither party contested this conclusion.[87] Specifically, the agreement in this case existed based on Cook's promise not to solicit Marsh's clients, recruit its employees, or disclose its trade secrets given in exchange for Marsh's promise to sell stock to Cook under the terms of the option agreement.[88] Hence, the non-solicitation and nondisclosure agreement were each otherwise-enforceable agreements.[89]

Satisfied that the first prong was met, the court turned to the second prong of the threshold inquiry, whether Cook's covenant was ancillary to, or part of, the otherwise-enforceable agreement.[90] Under the test established in *Light*, this prong required that the employer's consideration give rise to their interest in restraining the employee's competition.[91] Yet, despite this established precedent, the majority took a different view.[92]

According to the court, one objective of the Texas Legislature in passing the Texas Covenants Not to Compete Act was to restore over thirty years of common law developed by Texas courts, as it existed before the court's ruling in *Hill*.[93] The common law prior to the enactment of the Act only required that non-compete agreements be part of and subsidiary to an otherwise-valid transaction or relationship that gives rise to an interest worthy of protection.[94] The court recognized that the interpretation of the

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *See id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 775, 780.
[93] *Id.* at 772.
[94] *Id.* at 773.

"gives rise" requirement in *Light*, requiring the employer's consideration to give rise to their interest in restraining the employee's competition, was a more stringent requirement that departed from the common-law standard.[95]

Moreover, the more lenient common-law standard was more in line with the plain meaning of the statutory text than the interpretation proffered in *Light*.[96] "There is nothing in the statute indicating that 'ancillary' or 'part' should mean anything other than their common definitions. Ancillary means 'supplementary' and part means 'one of several . . . units of which something is composed.'"[97] Therefore, in the absence of an alternative statutory meaning, the plain meaning of these terms control.[98] Hence, the covenant not to compete must be ancillary to (supplemental) or part of (one of several units of which something is composed) an otherwise-enforceable agreement.[99] The plain meaning of these terms would preclude the interpretation of "gives rise" proffered in *Light*.[100]

Finally, requiring a more restrictive showing under the *Light* test was contrary to the legislative intent behind passing the Covenants Not to Compete Act.[101] The Legislature intended to expand rather than restrict the enforceability of covenants not to compete, which is clearly thwarted by the stricter *Light* interpretation.[102]

Based on these three rationales, the court abandoned the first prong of the *Light* test, which required that the employer's consideration give rise to an interest in restraining the competition of the employee.[103] In lieu of this requirement, the court held that the ancillary requirement would be satisfied so long as the covenant not to compete was supplemental to, or part of, an otherwise-enforceable agreement between the parties, and so long as the covenant was designed to enforce the employee's consideration or return promise in the otherwise-enforceable agreement.[104]

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[95] *Id.* at 773–74.
[96] *Id.* at 774–75.
[97] *Id.* at 775.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 775–76.
[104] *See id.* at 775.

C. Dissent and Response Thereto

In response to the majority opinion, Justice Green delivered a dissenting opinion in which Chief Justice Jefferson and Justice Lehrmann joined.[105] In his dissent, Justice Green voices three main objections to the majority's interpretation of the ancillary requirement of the Covenants Not to Compete Act.[106]

First, Justice Green points out that if, as the legislative history indicates, the goal of the Covenants Not to Compete Act was to codify the common law as it existed prior to *Hill*, then this would tend to support the interpretation proffered in *Light*.[107] The common law required that non-competes be ancillary to an exchange of valuable consideration that justifies or necessitates a restraint on trade.[108] This requirement is more amenable to *Light*'s consideration requirement than it is to the majority's requirement that amounts to a reasonable-relation standard.[109] Moreover, *Light* had been binding precedent for over fifteen years at the time *Marsh USA Inc.* was decided.[110] Since the Legislature had the opportunity to redefine the term ancillary to contravene *Light* and failed to do so, there seems to be no compelling reason to change the interpretation now.[111]

Second, Justice Green urges the court not to depart from *Light* based on stare decisis.[112] While other subsequent decisions had liberalized *Light*'s holding, none had expressly overruled it.[113] Curiously, even the majority opinion never expressly says that it is overruling *Light*, although the much more lenient "give rise" requirement proffered by the majority effectively overrules *Light*'s "give rise" requirement.[114] Moreover, stare decisis is especially important in the context of statutory construction.[115]

Finally, Justice Green argues that as a matter of public policy, the majority should not liberalize the ancillary requirement to the point of only

[105] *Id.* at 788 (Green, J., dissenting).
[106] *Id.*
[107] *Id.* at 789.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 791.
[113] *Id.*at 792.
[114] *Id.* at 788–89.
[115] *Id.* at 792.

requiring a reasonable relation.[116] An interpretation of the ancillary requirement that is as liberal as only requiring a reasonable relationship between the covenant not to compete and the otherwise-enforceable agreement nullifies it as a limiting factor on covenants not to compete.[117] Without some limiting factor in the ancillary requirement, the court essentially relies on the secondary requirements of Section 15.50(a) to ensure that covenants that are "unreasonable" will not be enforced.[118] This is problematic because the reasonableness inquiry under the secondary requirements of Section 15.50(a) only defines the *extent* to which non-compete agreements are enforceable, not whether they are enforceable in the first instance.[119]

The majority's response to Justice Green's dissent really only addresses Justice Green's first two contentions.[120] The majority answers by pointing to other legislative history that indicates that the Covenants Not to Compete Act intended to increase enforceability of covenants not to compete rather than limit their application.[121] Moreover, the majority noted that there is no textual anchor in the Act to *Light*'s interpretation.[122] Finally, in response to Justice Green's stare-decisis argument, the majority concluded that stare decisis does not compel perpetuating a statutory interpretation that cannot be supported by the text of the statute and is not applicable when the rationale of the past decision does not withstand "careful analysis."[123]

V. IMPACT OF THE NEW RULE ANNOUNCED IN *MARSH USA V. COOK*

A. Greater Enforceability of Covenants Not To Compete

One clear effect of the new interpretation of the "give rise" requirement (or alternatively the return to the common-law interpretation) is the increased enforceability of covenants not to compete.[124] At a basic level, the broader interpretation under the common law means that more covenants

[116] *Id.*
[117] *Id.*
[118] *Id.* at 791.
[119] *Id.*
[120] *Id.* at 778–80.
[121] *Id.* at 778–79.
[122] *Id.* at 779.
[123] *Id.* at 779–80.
[124] *See id.* at 775.

satisfy the threshold requirement under the framework for enforcement.[125] More broadly, the court's articulation of the new standard may indicate a preference towards greater enforcement of covenants not to compete.[126]

Under the articulated framework for enforcement of covenants not to compete, a threshold requirement is that (1) there be an otherwise-enforceable agreement, to which (2) the covenant not to compete is ancillary.[127] The ancillary component of the threshold requirement breaks down into two subparts.[128] First, (2)(a) articulates the "give rise" requirement. Second, (2)(b) requires that the covenant be designed to enforce the employee's consideration or return promise in the otherwise-enforceable agreement.[129] The court's new articulation of the "give rise" requirement in *Marsh* is much broader than the restrictive interpretation of *Light*.[130] Specifically, *Light* required that the employer's consideration give rise to an interest in restraining the employee from competing, whereas, under the new interpretation, only the otherwise-enforceable agreement must reasonably give rise to an interest worthy of protection.[131] Because the otherwise-enforceable agreement can generate the interest that is worthy of protection by the covenant, and not the employer's consideration itself, there are many more covenants that would meet the "give rise" requirement of the ancillary part of the threshold inquiry.[132]

More broadly, the court's departure from *Light* indicates a shift towards the increased enforceability of covenants not to compete in Texas.[133] For many years, the Texas Supreme Court struck down every covenant not to compete presented for review.[134] However, beginning with the court's decisions in *Sheshunoff* and *Mann Frankfort*, the Texas Supreme Court

[125] *See id.* at 790, 794 (Green, J., dissenting).

[126] *See id.* at 775.

[127] *Id.* at 771.

[128] *Id.* at 773.

[129] *Id.*

[130] *See id.* at 775.

[131] *Compare* Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647 (Tex. 1994) (requiring that the consideration given by the employer in the otherwise-enforceable agreement give rise to the employer's interest in restraining the employee from competing), *with Marsh USA Inc.*, 354 S.W.3d at 775 (requiring only that the covenant be supplementary or part of an otherwise-enforceable agreement).

[132] *See Marsh USA Inc.*, 354 S.W.3d at 790 (Green, J., dissenting).

[133] *See id.* at 794.

[134] Landes, *supra* note 2, at 930.

embarked on a trend towards enforceability.[135] There is no doubt that the court's decision in *Marsh USA Inc.* continues this trend towards the greater enforceability of covenants not to compete in Texas.[136] Indeed, the court's own opinion reiterates and looks to its opinions in *Sheshunoff* and *Mann Frankfort* as authoritative in changing the requirements articulated in *Light* and moving towards a less-restrictive standard.[137] Furthermore, the court acknowledges that the Legislature's goal in passing the Covenants Not to Compete Act was to promote the enforcement of covenants not to compete.[138] The court embraces this policy goal and furthers its application through its decision.[139]

B. Greater Flexibility for Employers

A corollary to the broader interpretation of the "give rise" requirement is the greater flexibility afforded to employers in crafting covenants not to compete. [140] Under the *Light* interpretation of the "give rise" requirement, employers were forced to ensure that their consideration for the employee's promise gave rise to a protectable interest.[141] This severely limited employers insofar as the only type of consideration that would meet the requirement was confidential information or trade secrets.[142] Under *Marsh USA Inc.*, employers are accorded greater flexibility in structuring and obtaining covenants from their employees because their consideration no

[135] Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 655 (Tex. 2006) (holding 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 and noting that 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); Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 850 (Tex. 2009) (holding that if the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied); Behrens, *supra* note 3, at 738.

[136] *See Marsh USA Inc.*, 354 S.W.3d at 775.

[137] *Id.* at 774–76.

[138] *Id.*

[139] *See id.* at 776.

[140] *See id.* at 775.

[141] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647 (Tex. 1994).

[142] Marsh USA Inc., 354 S.W.3d at 774; Paul & Crawford, *supra* note 1, at 752.

longer must give rise to a protectable interest.[143] Rather, as long as the otherwise-enforceable agreement reasonably gives rise to a protectable business interest, the ancillary requirement is met.[144] Thus, as in *Marsh USA Inc.*, the otherwise-enforceable agreement to which the covenant not to compete is ancillary could be a non-solicitation agreement, or even a confidentiality agreement.[145]

To illustrate, consider the following hypothetical. An employer could sign a confidentiality agreement with an employee such that the employee promised not to disclose any confidential information or trade secrets that the employee received while employed. Ancillary to this agreement, the employer could also get a covenant not to compete from the employee. Here, the otherwise-enforceable agreement would be the confidentiality agreement. Ancillary to this otherwise-enforceable agreement is the covenant not to compete, which is consistent with the Act. Further, the confidentiality agreement is reasonably related to a protectable business interest: the employer's trade secrets and other confidential information.[146] Under the *Marsh USA Inc.* rule, this arrangement is completely legitimate. To accomplish the same effect under the previous *Light* rule, the employer would have to have actually disclosed confidential information to the employee in exchange for the covenant not to compete.[147] Only then would the employer's consideration have given rise to a protectable business interest within the meaning of *Light*.[148]

C. Scope of the New Rule

While the court was unequivocal in repudiating *Light's* requirement that the employer's consideration give rise to a protectable business interest, the scope of the new interpretation announced in *Marsh USA Inc.* remains somewhat uncertain.[149] This uncertainty arises from the interplay of the plain language of the Covenants Not to Compete Act and the old requirements of the common law.[150] As the court explained, the plain

[143] *See id.* at 775.

[144] *See id.*

[145] *See id.* at 773, 775.

[146] *See id.* at 775.

[147] *See* Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647–48 (Tex. 1994).

[148] *See id.*

[149] *See Marsh USA Inc.*, 354 S.W.3d at 775.

[150] *See id.*

language of the statutory text requires that the covenant not to compete be ancillary to (supplementary) or part of (one of several units of which something is composed) an otherwise-enforceable agreement.[151]

When viewed alone, the relaxed "give rise" requirement could greatly expand the number of enforceable covenants not to compete.[152] Under the plain language of the newly articulated "give rise" requirement, the ancillary requirement of the Act could technically be satisfied so long as the covenant not to compete was a part of or supplemental to any kind of enforceable agreement, even if there was no logical connection between the two.[153] For instance, consider the aforementioned hypothetical involving the confidentiality agreement and the covenant not to compete. In that situation, the covenant not to compete meets the ancillary requirement and technically could be enforceable against the employee, even if the employer never discloses any confidential information or any trade secrets to the employee. There is no logical necessity between the enforcement of the covenant and the otherwise-enforceable agreement.[154] In effect, the rule announced in *Marsh USA Inc.* decouples the relationship between the protectable business interest and the covenant not to compete, at least at the threshold stage.[155] To accomplish the same result under *Light*, the employer would have to actually disclose the information, thereby creating a logical connection between the enforcement of the covenant not to compete and the otherwise-enforceable agreement.[156]

However, despite the new breadth of the *Marsh USA Inc.* interpretation, it is probably safe to say that *Marsh USA Inc.* will not lead to a deluge of newly enforceable covenants not to compete. It is important to note that *Marsh USA Inc.* only dealt with one subpart of the ancillary requirement.[157] That is, under the new framework, to qualify as ancillary to an otherwise-enforceable agreement, the covenant not to compete must be supplementary or a part of an otherwise-enforceable agreement, *and* the covenant must be designed to enforce the employee's consideration or return promise in the otherwise-enforceable agreement.[158] The second requirement outlined in

[151] *Id.*

[152] *See id.*

[153] *See id.* at 775–76.

[154] *See id.*

[155] *See id.*

[156] *See* Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647–48 (Tex. 1994).

[157] *Marsh USA, Inc.*, 354 S.W.3d at 773.

[158] *Id.* at 773, 775; *Light*, 883 S.W.2d at 647.

Light is still fully operative to determine whether the covenant not to compete is ancillary to the otherwise-enforceable agreement under the statute.[159]

Moreover, beyond the second requirement under *Light*, similar secondary requirements as were applicable under *DeSantis* have been codified by the statute and are applicable to covenants to be enforced under the Act.[160] Specifically, the Act, in addition to the ancillary requirement, requires that the covenant only be enforced 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 necessary to protect the goodwill or other business interest of the promisee.[161] These secondary requirements echo those outlined in *DeSantis*, viz. that: (1) the restraint created by the agreement not to compete not be greater than necessary to protect the promisee's legitimate business interest; and (2) 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.[162]

It is also important to note, as mentioned before, that the Texas Supreme Court has not addressed this part of the Covenants Not to Compete Act.[163] Hence it is a distinct possibility that the court may interpret this part of the statute to be synonymous with *DeSantis*'s requirements. Indeed, the court left this question open in *DeSantis*.[164]

Even without a definitive ruling from the Texas Supreme Court, courts have been reluctant to abandon *DeSantis*'s requirements completely. Generally, courts acknowledge that under the express language of Section 15.52 the criteria for the enforceability of covenants not to compete are exclusively provided by Section 15.50, and that these criteria preempt any other criteria, including those that existed in the common law prior to the Act.[165] However, when analyzing Section 15.50's requirements courts

[159] *Marsh USA, Inc.*, 354 S.W.3d at 773.

[160] *Compare* TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011), *with* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 683 (Tex. 1990).

[161] TEX. BUS. & COM. CODE ANN. § 15.50(a).

[162] *DeSantis*, 793 S.W.2d at 682.

[163] *Marsh USA Inc.*, 354 S.W.3d at 773.

[164] *DeSantis*, 793 S.W.2d at 684.

[165] Gallagher Healthcare Ins. Servs. v. Vogelsang, 312 S.W.3d 640, 646 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); Goodin v. Jolliff, 257 S.W.3d 341, 350 (Tex. App.—Fort Worth 2008, no pet.).

generally hold that the secondary requirements under Section 15.50 all amount to a requirement that the covenant be reasonable.[166] To determine reasonableness the court then looks to *DeSantis* and its progeny to define when a covenant is reasonable using both prongs of *DeSantis*.[167] Thus, courts backdoor *DeSantis*'s requirements into the analysis even though Section 15.52 requires that Section 15.50 be exclusive.[168]

Thus, given that the second element of the ancillary requirement outlined in *Light* is still fully operative and that the reasonableness analysis under Section 15.50 seems to follow the requirements outlined in *DeSantis*, it is unlikely that the court's ruling in *Marsh USA Inc.* will usher in a new era where virtually any covenant not to compete is enforceable. Rather, courts still have wide discretion in limiting covenants that are overly restrictive and denying enforcement to those that bear no relationship to a protectable interest.[169] The main difference pre-*Marsh USA Inc.* and post-*Marsh USA Inc.* is which requirement serves as the primary limiting factor. Pre-*Marsh USA Inc.*, the primary limitation was fitting in under *Light*'s restrictive "give rise" requirement.[170] If a covenant met this requirement, chances were good that the covenant was enforceable and that it would not be a big hurdle to satisfy the secondary requirements, viz. reasonableness.[171] Post-*Marsh USA Inc.*, the primary limitations are the secondary requirements.[172] Since the ancillary requirement can be met with relative ease, there is no guarantee that the covenant will be enforceable under either the secondary requirements or based on the other prong of the ancillary requirement.

[166] *Gallagher*, 312 S.W.3d at 654; *Goodin*, 257 S.W.3d at 350; John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Gen. Devices, Inc. v. Bacon, 888 S.W.2d 497, 502–03 (Tex. App.—Dallas 1994, writ denied).

[167] *Gallagher*, 312 S.W.3d at 654; *Goodin*, 257 S.W.3d at 350; *John R. Ray & Sons, Inc.*, 923 S.W.2d at 85; *Gen. Devices, Inc.*, 888 S.W.2d at 503.

[168] *See, e.g.*, *Gallagher*, 312 S.W.3d at 654; *Goodin*, 257 S.W.3d at 350; *John R. Ray & Sons, Inc.*, 923 S.W.2d at 85; *Gen. Devices, Inc.*, 888 S.W.2d at 503–04.

[169] *See* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 778 (Tex. 2011).

[170] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647 (Tex. 1994).

[171] *See id.* at 644.

[172] *See* Alex Harrell, *Light Fades Further: the Texas Supreme Court Changes Direction on Covenants Not to Compete*, 75 TEX. B.J. 438, 443 (2012).

D. Shifting the Balance

As mentioned in Part II, in determining the enforceability of covenants not to compete, courts strike a balance between the interests of employers and employees.[173] Specifically, employers value covenants not to compete because they enable employers to disclose confidential information to their employees as well as invest in training their employees without fear that the employees will leverage their newfound knowledge and abilities with other employers.[174] Conversely, employees value the right to freely pursue an honest living in a career path of their choosing.[175] Striking the appropriate balance between these competing interests is key to fostering economic development and prosperity.[176] Weighing the employer's interest too heavily effectively stifles beneficial competition from former employees and unnecessarily restricts the employee's right to work.[177] Whereas, balancing too much in favor of the employee's interest gives employers a disincentive to invest in their employees and discourages economic growth.[178]

While the enforcement of covenants not to compete is still constrained by the reasonableness of the covenant and the second prong of the *Light* test, the balance struck by the court in *Marsh USA Inc.* weighs undoubtedly in employers' favor. Justice Green's public-policy argument in his dissent is especially apt.[179] The effect of the majority's decision in *Marsh USA Inc.* is to eliminate a significant limitation on the enforcement of covenants not to compete by lowering the ancillary requirement threshold.[180] However, under the statute, it is the ancillary requirement, and only the ancillary requirement, that determines whether a non-compete agreement is enforceable in the first instance.[181] The secondary requirements and the statute's reasonableness analysis only serve to define the *extent* to which the

[173] *Marsh USA Inc.*, 354 S.W.3d at 781, 784–86 (Tex. 2011) (Willett, J., concurring); *see* Landes, *supra* note 2, at 919.

[174] *See id.* at 781, 784–86 (Willett, J., concurring); *see* Landes, *supra* note 2, at 918.

[175] *Marsh USA, Inc.*, 354 S.W.3d at 781, 784–86 (Willett, J., concurring); *see* Landes, *supra* note 2, at 918.

[176] *Marsh USA, Inc.*, 354 S.W.3d at 781, 784–86 (Willett, J., concurring).

[177] *Id.*

[178] *Id.*

[179] *Id.* at 788 (Green, J., dissenting).

[180] *Id.* at 789.

[181] *Id.* at 791.

non-compete agreement is enforceable.[182] Hence, so long as the non-compete meets the low threshold of the ancillary requirement, the burden on constraining the enforcement of the covenant is on the employee by showing that it is unreasonable under the circumstances.[183] Stated another way, once the ancillary requirement is met, the non-compete agreement is presumptively valid and enforceable. Indeed, even with *Light*'s second prong (that the covenant must be designed to enforce the employee's consideration or return promise in the otherwise-enforceable agreement), the hurdle in meeting the ancillary requirement is not a high one.

Looking to the secondary considerations to determine reasonableness under Section 15.50(a), the ability of these requirements to cabin the expanded enforceability of non-compete agreements will likely turn on their interpretation and construction in future decisions. Under the prevailing treatment of the reasonableness requirements, employees have some ammunition to defeat the enforcement of a covenant not to compete by showing it is unreasonable under one of *DeSantis*' two considerations, viz. that (1) the restraint created by the agreement not to compete not be greater than necessary to protect the promisee's legitimate business interest; and (2) 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.[184] In any event, it is possible to prevent the enforcement of a covenant not to compete, either completely or by limiting its enforceability, by showing that the covenant is unreasonable.[185] In the latter case, the court would reform the covenant so that its enforcement would be reasonable, i.e. by reducing the geographic area of limitation, the duration of limitation, etc.[186]

Thus, by redefining the ancillary requirement, the court has struck a new balance between the competing interests at stake in enforcing covenants not to compete. Since the ancillary requirement, even with *Light*'s second prong, is a low hurdle to meet, the burden on employers in establishing an enforceable covenant is light. Conversely, the burden is primarily on employees to demonstrate that an otherwise-enforceable covenant not to

[182] *Id.*

[183] *See id.*

[184] *See supra* note 60.

[185] *See supra* note 60.

[186] *See supra* note 60.

compete should not be enforced because it would be unreasonable under the circumstances.

VI. CONCLUSION

Undoubtedly, as Justice Green noted in his dissent to the court's ruling in *Marsh USA Inc.*: "[the court's holding] will make covenants not to compete much more commonplace in instances where there is little risk of unfair competition."[187] However, despite the expanded enforceability of covenants not to compete under *Marsh USA Inc.*, it is unlikely that Texas will witness an explosion of newly enforceable non-compete agreements. Rather, the court's ruling effectively places the risk and burden of expanded enforceability on employees by shifting its balance of the competing interests at stake in favor of employers.

[187] 354 S.W.3d at 794 (Tex. 2011) (Green, J., dissenting).