# DON'T HOP ON THE *BANDERA* WAGON JUST YET: ENFORCING SALE-OF-BUSINESS COVENANTS NOT TO COMPETE IN TEXAS

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## I. INTRODUCTION

"Don't make a promise you can't keep."[1] In Texas, courts usually support this maxim. Nonetheless, in the area of covenants not to compete at least one court of appeals, in *Bandera Drilling Co., Inc. v. Sledge Drilling Corp.*, has chipped away at this premise.[2] A covenant may now be struck down on a technicality, even though both parties intended the agreement to be binding.[3]

Consider this recent saga in the hyper-competitive world of social media. In April 2012, Facebook, Inc. surprised many when it purchased Instagram, Inc., a mobile-based photo-sharing application that generated virtually no revenue on its own.[4] The price tag? One billion dollars.[5] When Instagram was valued at only $500 million the week before, what could Facebook possibly hope to gain that would justify a one billion dollar premium?[6] For one, Instagram itself is no longer a competitor to Facebook's mobile sharing platform.[7] More importantly, the creators of

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[1] I will unofficially attribute this quote to my father, though I am fairly certain he did not come up with that pearl of wisdom all on his own.

[2] *See* 293 S.W.3d 867, 873 n.4 (Tex. App.—Eastland 2009, no pet.).

[3] *See id.* at 874–75.

[4] Bruce Upbin, *Facebook Buys Instagram for $1 Billion. Smart Arbitrage*. FORBES (Apr. 9, 2012, 1:25 PM), http://www.forbes.com/sites/bruceupbin/2012/04/09/facebook-buys-instagram-for-1-billion-wheres-the-revenue/.

[5] *Id.* Facebook, Inc. paid $1 billion in a combination of cash and stock to acquire Instagram, Inc. *Id.*

[6] *See id.*

[7] *See* Om Malik, *Here Is Why Facebook Bought Instagram*, GIGAOM (April 9, 2012, 11:28 AM), http://gigaom.com/2012/04/09/here-is-why-did-facebook-bought-instagram/.

Instagram, Mike Krieger and Kevin Systrom, are no longer a competitive threat to Facebook as innovators, either[8]—at least as long as their covenants not to compete are enforced.

Generally, a covenant not to compete is a promise not to engage in the same type of business for a stated time in the same market as the buyer of a business.[9] For Facebook, that means Krieger and Systrom cannot create a similar photo-sharing application that could potentially compete with Instagram.[10] Such a promise is generally ancillary to either an employment contract or a sale-of-business agreement.[11] Typically, noncompetition covenants are valid to protect business goodwill in the sale of a company.[12] Here, the innovators' noncompetition covenants would prevent them from misappropriating Instagram's goodwill and thereby poaching the application's estimated 30 million users.[13]

At their core, noncompetition covenants protect Instagram's goodwill,[14] which is defined as a business's reputation, patronage, and other intangible assets that are considered when appraising the business, especially for purchase.[15] Intrinsically, Facebook hopes that users' long-developed trust in Instagram will be transferred to Facebook because of its association with Instagram.[16] If Krieger and Systrom transfer Instagram—including its physical assets and the goodwill responsible for its success—then solicit their former users or engage in a similar business, Krieger and Systrom will recapture part of what they sold to Facebook.[17] Fundamentally, covenants not to compete are designed to protect Facebook's investment by

[8] *See id.*; *see also* Josh Constine & Kim-Mai Cutler, *Facebook Buys Instagram for $1 Billion, Turns Budding Rival into Its Standalone Photo App*, TECH CRUNCH (Apr. 9, 2012), http://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/.

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

[10] *See id.*

[11] *Id.*

[12] *Id.*

[13] *See id.*; *see also* Upbin, *supra* note 4 (Instagram boasted almost 30 million users prior to the sale, which took place shortly after Instagram launched an Android compatible application that undoubtedly increased its user base significantly).

[14] *See* 51 TEX. JUR. 3D *Monopolies & Restraints of Trade* § 61 & n.2 (2008) (citing La Rocca v. Howard-Reed Oil Co., 277 S.W.2d 769, 773 (Tex. Civ. App.—Beaumont 1955, no writ)).

[15] BLACK'S LAW DICTIONARY 763 (9th ed. 2009).

[16] *See* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 80.8 (Joseph M. Perillo ed., 2003).

[17] *See* Ins. Center, Inc. v. Hamilton, 129 S.E.2d 801, 805 (Ga. 1963).

preventing the founders from essentially taking back the intangibles of what they have voluntarily sold.[18]

Essentially, the $1 billion purchase price is consideration for Instagram's goodwill, physical property, and other assets, as well as for Krieger and Systrom's agreements not to compete with Instagram.[19] Significantly, a portion of the total purchase price is set aside as consideration for their agreements not to compete, since Facebook would not invest in Instagram without those restrictions.[20]

On the other hand, the market loses one more competitor, which can raise concerns about restraint of trade.[21] Yet restraint of trade is not an issue, where, as here, the buyer does not already compete with the seller.[22] This scenario underscores the basic tenets of Texas noncompete law, which will be introduced more thoroughly below.

[18] *See id.*

[19] *See, e.g.*, Gary P. Kohn, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 639 (1982) (citing McAuliffe v. Vaughan, 70 S.E. 322, 325 (Ga. 1911) (Seller of newspaper received consideration for the sale of the business, the transfer of the goodwill, and the agreement not to conduct a competing newspaper in that same county.)); *see also* Giesel, *supra* note 16, at § 80.8.

[20] *See* 51 TEX. JUR. 3D *Monopolies & Restraints of Trade* § 61 & n.1 (2008) (citing Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 171 (Tex. 1987), *superseded by statute*, TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011), *as recognized in* DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (1990)). It is estimated that Systrom received around $400 million and Krieger netted around $100 million from the sale. *See* Mike Isaac, *Exclusive: Facebook Deal Nets Instagram CEO $400 Million*, WIRED (Apr. 9, 2012, 2:46 PM), http://www.wired.com/business/2012/04/facebook-buys-instagram/.

[21] *See* Giesel, *supra* note 16, at § 80.8 & nn.5–6 (Buyer replacing seller in market effectively prevents seller from entering the field as a competitor.).

[22] In the present scenario, Facebook did not directly compete with Instagram, even though Facebook was rumored to be testing the waters with a similar mobile-based photo-sharing application prior to acquiring Instagram. *See* MG Siegler, *Behold: Facebook's Secret Photo Sharing App*, TECH CRUNCH (June 15, 2011), http://techcrunch.com/2011/06/15/facebook-photo-sharing-app/. Further, the Instagram purchase did not immediately deprive the market of a competitor, since Instagram still operates as a standalone service. *See* Constine, *supra* note 8; *see also* Giesel, *supra* note 16, at § 80.8 & n.5 (Buyer merely replaces seller as a competitor with others.). Thus, the purchase is a permissible restraint of trade. *See* Giesel, *supra* note 16,.at § 80.8 & n.6.

Part II of this article will briefly survey the history of covenants not to compete in Texas and discuss the general requirements for enforceability.[23] In broad strokes, it will illustrate the battle between the Texas Supreme Court and the Legislature over which would pronounce the standard for enforceability.[24]

Part III will navigate the labyrinth of cases addressing covenants not to compete in the sale-of-business context and illuminate the somewhat disjointed decisions from various courts of appeals.[25] The section will set forth the basic requirements for an enforceable covenant not to compete and explain the dynamics between the three required elements: (1) a reasonable territorial restriction; (2) reasonable scope of activity; and (3) reasonable duration of restriction.[26]

Part IV will focus on the Eastland Court of Appeals' decision in *Bandera Drilling Co., Inc. v. Sledge Drilling Corp.* and its potential effect on Texas law.[27] Part IV will expand on the court's analysis in that case and offer possible arguments against the result as well as recommendations for avoiding the same predicament.[28]

Part V will investigate other states' standards for enforceability, particularly their willingness to imply that goodwill is sold in this context.[29] In comparing those standards to *Bandera*, Part V will analyze whether any such approach would be helpful to practitioners in Texas.[30]

## II. INTRODUCTION TO COVENANTS NOT TO COMPETE IN TEXAS

In Texas, as in most states, covenants not to compete are presumptively invalid unless otherwise shown to be enforceable.[31] The current Texas

[23] *See infra* Part II. For a more detailed analysis of Texas case law on this subject, see Jeffrey W. Tayon, *Covenants not to Compete in Texas: Shifting Sands from* Hill *to* Light, 3 TEX. INTELL. PROP. L.J. 143 (1995).

[24] *See infra* Part II.

[25] *See infra* Part III.

[26] *See infra* Part III.A.1–3.

[27] *See infra* Part IV.

[28] *See infra* Part IV.C.

[29] *See infra* Part V.

[30] *See infra* Part V.

[31] *See* Juliette Fowler Homes, Inc. v. Welch Assocs., 793 S.W.2d 660, 662 (Tex. 1990); Martin v. Credit Prot. Ass'n, 793 S.W.2d 667, 668 (Tex. 1990), *superseded by statute,* TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) *as recognized in* Prop. Tax. Assocs., Inc. v. Staffeldt, 800 S.W.2d 349 (Tex. App.—El Paso 1990, writ denied).

Covenants Not to Compete Act ("CNCA") applies to covenants in both the employment and sale-of-business contexts and states:

> [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.[32]

Such a covenant is a restraint of trade and unenforceable as a matter of public policy unless it meets the reasonableness standard.[33] Restraints are unreasonable if they are broader than necessary to protect the legitimate interests of the promisee.[34] While the analysis of such a covenant under this Act is ostensibly straightforward, Texas courts have imposed various requirements to meet that standard.[35] In turn, this has led to an intensely fact-driven analysis with a strong emphasis on equity.

### *A. Contexts of Covenants Not To Compete: Employment vs. Sale of Business*

In the employment context, covenants not to compete are generally disfavored as restraints of trade.[36] Conversely, covenants not to compete ancillary to the sale of a business are more likely to be enforced and are not as strictly scrutinized.[37] There, the buyer and seller are perceived to have

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

[33] *Juliette Fowler Homes, Inc.*, 793 S.W.2d at 662; *Martin*, 793 S.W.2d at 668; Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 951 (Tex. 1960).

[34] DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 682 (Tex. 1990); Henshaw v. Kroenecke, 656 S.W.2d 416, 418 (Tex. 1983).

[35] *See, e.g.*, Hill v. Mobile Auto Trim, 725 S.W.2d 168, 170–71 (Tex. 1987), *superseded by statute*, TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) *as recognized in* DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (1990).

[36] *Hill*, 725 S.W.2d at 170.

[37] Marsh USA, Inc. v. Cook, 354 S.W.3d 764, 790 & n.5 (Tex. 2011) (noting that Section 15.50(a) does not address the distinction between what type of agreement is enforceable to protect goodwill in the context of the sale of a business and the context of a post-employment restriction); *see Hill*, 725 S.W.2d at 177 (Gonzalez, J., dissenting) (noting that courts scrutinize covenants not to compete in employment relationships more closely than those associated with the sale of business).

equal bargaining power, which lessens the need for judicial scrutiny.[38] In contrast, employees rarely enjoy bargaining power equal to an employer's.[39] As a result, employees are more likely to be taken advantage of in the negotiation process.[40]

Also, policy considerations regarding restraint of trade in the sale-of-business context are not as urgent because the buyer is simply replacing the seller in the market, which is not an unreasonable restraint of trade.[41] On the other hand, any time an employee is restrained from working another person is removed from the workforce, which potentially deprives the market of the employee's particular skills.[42] That restriction does implicate restraint of trade concerns.[43]

Most importantly, in the sale-of-business context, the seller is compensated for a noncompete provision through the sale price.[44] However, in the employment context, employees rarely garner significant compensation to justify a covenant not to compete.[45] Such a covenant would most likely affect the employee's ability to earn a living and inhibit his personal freedom.[46]

Again, covenants not to compete in the sale-of-business context are designed to protect the business's goodwill, which adds value to the

[38] Giesel, *supra* note 16, at § 80.8 & n.18 (Courts view the bargaining position of the parties as more equal than in the employment setting.).

[39] *See* CORBIN ON CONTRACTS § 80.9 & n.8. Business entities are presumably better able to reach a voluntary agreement after arm's-length negotiations. *Id.* (citing Marathon Petroleum Co. v. Chronister Oil Co., 687 F. Supp. 437, 439 (C.D. Ill. 1988)).

[40] *Id.* In contrast, employment contracts inherently involve parties of unequal bargaining power, which often results in contracts of adhesion. *Id.* (citing Drumheller v. Drumheller Bag & Supply, Inc., 420 S.E.2d 331, 334 (Ga. Ct. App. 1992)).

[41] *See, e.g.*, Budget Rent-A-Car Corp. of Am. v. Fein, 342 F.2d 509, 515–16 (5th Cir. 1965) (The community is left in the same position it occupied before the sale of a business, "with one going concern"); *see also* Giesel, *supra* note 16, at § 80.8.

[42] RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c (1981).

[43] *See id.*

[44] *See, e.g.*, Hicks v. Doors by Mike, Inc., 579 S.E.2d 833, 835 (Ga. Ct. App. 2003) (Covenants are a significant part of the consideration for the purchase of a business.).

[45] RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c. In the case of post-employment restraint, the harm caused to the employee may be excessive if the restraint prevents him from earning a living if he quits. *Id.* Similarly, the employee's impaired economic mobility would potentially be injurious to the public, as well. *Id.*

[46] *Id.*

business as a going concern.[47] The seller has taken advantage of the added value in negotiating a sale price, so the seller should not be allowed to diminish that asset's value later.[48] The Legislature has codified this preference for enforcing covenants in the sale-of-business context by distinguishing which party bears the burden of proving the covenant is reasonable or unreasonable.[49] In the employment context, the employer, the promisee, must establish the covenant is reasonable.[50] In contrast, the seller of a business, the promisor, must prove the covenant is *unreasonable*.[51]

While covenants incident to the sale of a business are said to follow the same provisions and guidelines as those in the employment context,[52] the analysis in sale-of-business context does not fit the traditional employment covenant framework. Further compounding this issue is the fact that most of the landmark cases in this area involve employment covenants, and the comparison to the sale of business covenant is rarely seamless.[53] In response to this inconsistency, courts often engage in a somewhat contrived, fact-specific analysis to determine whether covenants are enforceable under equitable considerations.

[47] 51 TEX. JUR. 3D *Monopolies & Restraints of Trade* § 61 (2008).

[48] *See id.*

[49] TEX. BUS. & COM. CODE ANN. § 15.51(b) (West 2011).

[50] *Id.*

[51] *Id.*

[52] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644 n.4 (Tex. 1994) (citing DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681–82 (Tex. 1990)).

[53] *See id.* at 643. There the Texas Supreme Court held that "(1) 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 (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement." *Id.* at 647. (emphasis added). The employee's covenant was intended to prevent the employee from using the employer's confidential information against him. *See id.* Thus, the employer had to give the employee confidential information as consideration for the employee's covenant. *See id.* at 647–48. Now, in the sale of business context, that means the buyer has to give the seller confidential information about the business as consideration for the seller's covenant. *See* Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867, 873 n. 4 (Tex. App.—Eastland 2009, no pet.). However, the seller already has any confidential information about the business, as it is his business in the first place. *Id.* (stating employment covenant requirements cannot be applied verbatim to commercial transactions because the restrained party provides rather than receives protectable interest). That said, there are no Texas Supreme Court cases concerning covenants in the sale of business context after *Light*. However, there are courts of appeals cases that indicate *Light* consideration is not required in that situation. *See, e.g.*, *Bandera*, 293 S.W.3d at 869.

### *B. The Tug-of-War Over the Standard for Enforceability: Who Gets the Last Word?*

Prior to 1987, Texas followed the Rule of Reasonableness,[54] which the current CNCA reflects.[55] Simply put, a covenant not to compete is a restraint of trade and will not be enforced unless its terms are *reasonable*.[56] In that year, the Texas Supreme Court decided a case[57] which allegedly reversed the long-standing common law Reasonableness Test.[58] During the next legislative session, lawmakers reacted directly to that decision.[59]

In 1989, the Texas Legislature enacted the CNCA[60] to overrule the Texas Supreme Court's controversial decision and reinstate the Reasonableness Test.[61] Under the Act, there were three requirements for a covenant not to compete to be valid and enforceable.[62] First, the covenant

[54] *See* Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 951 (Tex. 1960).

[55] TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011). The CNCA was designed to reinstate the Rule of Reasonableness of *Weatherford Oil*. *See* House Comm. on Bus. & Com., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. p. 4852 (1989).

[56] *Weatherford Oil*, 340 S.W.2d at 951 (emphasis added).

[57] Hill v. Mobile Auto Trim, 725 S.W.2d. 168, 172 (Tex. 1987), *superseded by statute*, TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) *as recognized in* DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (1990). In *Hill*, the court developed four criteria that noncompete covenants must meet to be enforced. *Id*. at 170. First, "the promisee must have a legitimate interest in protecting business goodwill or trade secrets." *Id.* at 170–71. "Second, the covenant must not be oppressive to the promisor . . . ." *Id.* at 171. "In this respect, the limitations as to time, territory, and activity in the covenant not to compete must be reasonable." *Id.* (citing Frankiewicz v. Nat'l Comp. Assocs, 633 S.W.2d 505, 507 (Tex. 1982); Justin Belt Co., Inc. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973); *Weatherford Oil*, 340 S.W.2d at 951)). "Third, the covenant must not be injurious to the public . . . ." *Id.* (citing *Weatherford Oil*, 340 S.W.2d at 951). Lastly, the noncompetition agreement must be supported by consideration. *Id.*

[58] *See* House Comm. on Bus. & Commerce, Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989).

[59] *See id.*

[60] Act of May 23, 1989, 71st Leg., R.S., ch. 1193, § 1, sec. 15.50, 1989 Tex. Gen. Laws 4852, 4852.

[61] *See id.* at sec. 15.50(2); *see also Weatherford Oil*, 340 S.W.2d at 950 (holding the test to determine the validity of covenants not to compete was "whether [the covenant] imposes upon the employee any greater restraint than is reasonably necessary to protect the business and goodwill of the employer").

[62] *See* Act of May 23, 1989, 71st Leg., R.S., ch. 1193, § 1, sec. 15.50, 1989 Tex. Gen. Laws 4852, 4852. The second and third requirements track the language of *Weatherford Oil*. *See* 340 S.W.2d at 951. However, the first has been fodder for the Texas Supreme Court for years and has led to a strained and overly technical inquiry. *See, e.g.*, Light v. Centel Cellular Co. of Tex., 883 S.W.2d. 642, 647–48 (Tex. 1994).

must be ancillary to or part of an otherwise-enforceable agreement at the time it was made.[63] Second, it must contain reasonable limitations as to time and geographic area.[64] Third, the scope of activity restrained must be reasonable and not impose a greater restraint than necessary to protect the goodwill or other business interest.[65]

Nonetheless, the Texas Supreme Court continued to follow at least some of its own requirements.[66] In 1993, the Legislature revised the CNCA to expressly state that Section 15.50 delineated the *sole* requirements for determining the enforceability of covenants not to compete and that the section preempted any other common law criteria.[67] Despite that apparently straightforward directive, it took nearly fifteen years for the Texas Supreme Court to fall in line.[68]

[63] Act of May 23, 1989, 71st Leg., R.S., ch. 1193, § 1, sec. 15.50(1), 1989 Tex. Gen. Laws 4852, 4852.

[64] *Id.* at sec. 15.50(2).

[65] *Id.*

[66] *See e.g.*, DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681–82 (Tex. 1990); Martin v. Credit Prot., Inc., 793 S.W.2d. 667, 668 (Tex. 1990), *superseded by statute*, TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) *as recognized in* Prop. Tax. Assocs., Inc. v. Staffeldt, 800 S.W.2d 349 (Tex. App.—El Paso 1990, writ denied); Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 832 (Tex. 1991).

[67] Act of May 29, 1993, 73rd Leg., R.S., ch. 965, § 3, sec. 15.52, 1993 Tex. Gen. Laws 4201, 4201.

[68] For example, the *Light* consideration requirement tended to further obfuscate the analysis. *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 648–49 (Tex. 2006). In *Alex Sheshunoff*, the court refocused and clarified *Light* by shifting the analysis from the hyper-technical inquiry into what constituted an otherwise-enforceable agreement to a more intuitive analysis of the reasonableness of the restraints imposed. *See id.* This shift from the technical analysis of contract formation has culminated in the court's recent decision in *Marsh USA, Inc. v. Cook*, which dealt with a noncompetition agreement in the employment context. *See* 354 S.W.3d 764, 776 (Tex. 2011) ("Robust competition and reasonable covenants not to compete can co-exist. Adding more stringent requirements on top of those in the Act is unnecessary to prevent naked restraints on trade and would thwart the Legislature's attempt to enforce reasonable covenants under the Act.") (citing Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 858–59 (Tex. 2009) (Hecht, J., concurring)). As a result, some commentators suggest that *Marsh* has completely done away with the *Light* consideration requirement in either context. *See, e.g.*, Michael D. Paul, Marsh USA, Inc. v. Cook*: One Final Step Away from Light*, 43 ST. MARY'S L.J. 791, 821–23 (2012).

## III. THE CURRENT TEXAS STANDARD

The Texas Rule of Reasonableness mandates that a covenant not to compete is a restraint of trade and will not be enforced unless its terms are reasonable.[69] Where the public interest is not directly involved, the test for determining the validity of the covenant is whether it imposes any greater restraint on the promisor than is reasonably necessary to protect the business and goodwill of the promisee.[70] A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than required for the protection of the promisee or imposes undue hardship upon the person restricted.[71] Further, the duration of the restraint and the geographic territory included are important factors to consider in determining the reasonableness of the agreement.[72] Texas courts of appeals continue to follow the Rule of Reasonableness, with some variations.[73]

### *A. The Rule of Reasonableness*

In determining whether a particular covenant not to compete ancillary to the sale of business is reasonable, all circumstances surrounding the transaction will be considered, including: (1) the nature of the business sold; (2) the purchase price; and (3) existing demands or future trade potential in the territory restrained.[74] Covenants are generally valid where the restraint is reasonable as to both time and locality[75] or as to locality

[69] *See* Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 951 (Tex. 1960); *see also* TEX. BUS. & COM. CODE ANN. § 15.50 (West 2011). It is important to note that the seller bears the burden of establishing that the noncompete limitations are greater than necessary to protect the buyer's interests. *Id.* § 15.51(b) (stating that it is the promisor's burden to establish the noncompete does not meet the reasonableness requirements if the purpose of the agreement to which the covenant is ancillary is not an employment agreement).

[70] *Weatherford Oil*, 340 S.W.2d at 951.

[71] *Id.* (citing RESTATEMENT (FIRST) OF CONTRACTS §§ 515, 516 (1932)).

[72] *Id.*

[73] *See, e.g.*, Oliver v. Rogers, 976 S.W.2d 792, 801 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) ("As we have already seen in *Weatherford*, the duration of a covenant is a fact to be considered in determining whether a covenant meets the test of reasonableness.").

[74] 51 TEX. JUR. 3D *Monopolies & Restraints of Trade* § 62 (2012).

[75] Malakoff Gin Co. v. Riddlesperger, 192 S.W. 530, 532–33 (Tex. 1917) (seller of gin company was bound by covenant not to compete with buyer in the same community as long as buyer operated a gin there); Redding Foods, Inc. v. Berry, 361 S.W.2d 467, 469 (Tex. Civ. App.—Dallas 1962, no writ).

only, with no restriction as to time.[76] Thus, someone could agree not to compete during the remainder of his or her life within a reasonably limited territory.[77] Similarly, a seller can agree not to compete for the remainder of the buyer's lifetime, as well.[78] On the other hand, restraints that are unlimited as to both time and place are void.[79]

### 1. Reasonableness of Time Limitations

In *Oliver v. Rogers*, the seller of an optometrist office entered a noncompetition agreement that was potentially unlimited as to time.[80] The seller argued the covenant was not enforceable because it lacked a fixed time limitation.[81] The Houston Court of Appeals disagreed.[82] In fact, the contract indicated the covenant had to expire after the deaths of the buyers or when the buyers sold the office to a third party.[83] The provision was also subject to an earlier termination by the contract provision that gave the sellers the right of first refusal, should the buyers decide to sell the business

[76] *Redding Foods*, 361 S.W.2d at 469.

[77] *See, e.g.*, York v. Dotson, 271 S.W.2d 348 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.); *Oliver*, 976 S.W.2d at 801 (holding that lack of a time limitation did not render a noncompete unreasonable as a matter of law); Greenstein v. Simpson, 660 S.W.2d 155, 159 (Tex. App.—Waco 1983, writ ref'd n.r.e.) (A person may agree not to enter a similar competitive business for the remainder of his life in connection with the sale of his business.); Clay v. Richardson, 290 S.W. 235, 236 (Tex. Civ. App.—Fort Worth 1926, writ dism'd w.o.j.) (upholding covenant of theater seller never to open a theater again in the town where theater was located).

[78] *Oliver*, 976 S.W.2d at 800–01 (holding the duration of the noncompetition covenant was limited to the lives of the buyers, which was reasonable in light of the small area of territory restrained).

[79] Graphilter Corp. v. Vinson, 518 S.W.2d 952, 954 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

[80] 976 S.W.2d at 801. The contract included the following provision: "First Parties [Rogers] agree that for so long as Second Parties [Oliver and Parker] are not in default as to the covenants and conditions of this contract, First Parties will not open a like or similar optometric business or optical dispensary for the practice of optometry nor grant any Third Party the right to open a like or similar optometric business or optical dispensary under the name T.S.O. (as defined) for the practice of optometry." *Id.* at 795.

[81] *Id.* at 801.

[82] *See id.*

[83] *Id.* at 800–01. The provision indicated that the covenant was only in effect as long as the original buyers still owned the business. *See id.* at 795.

in the future.[84] In light of those time limitations, the court was concerned that the buyers paid over one million dollars for the seller's optometrist office and continued to pay around $100,000 per year in advertising charges to the seller.[85]

Further, the court placed the burden on the seller to show why the covenant, which restricted the seller from opening another office within a three-mile radius, imposed a greater restraint than was necessary to protect the goodwill or other business interests of the buyers.[86] From the court's analysis, it was clear that it would be inequitable to allow the seller to gain more than one million dollars in consideration and continue to earn thousands of dollars in assessments, without enforcing the covenant not to compete.[87] Here, the limited geographic restriction coupled with a significant monetary investment justified a seemingly "unlimited" time restriction.[88] When the territory restricted is greater, an unlimited duration becomes more questionable.[89]

However, courts have been willing to uphold longer time restrictions in the sale-of-business context, particularly when the seller has received a significant sum of money in exchange for that restriction.[90] In *Heritage Operating L.P. v. Rhine Bros., LLC*, the seller of a propane-cylinder-exchange business challenged the ten-year time limitation of a covenant not to compete that prevented him from competing within a seventy-five mile radius of any of city in which the business operated at the time it was sold.[91] The court emphasized that it was reasonable for Heritage to protect its $7 million investment for a ten-year period, particularly when the former

[84] *Id.* at 801. Other clauses in the contract provided that if a third party offered to purchase the buyers' interest in the office, they would first give the original seller an opportunity to purchase their interest on the same terms. *Id.* at 795.

[85] *Id.* at 796.

[86] *Id.* at 801. (citing TEX. BUS. & COM. CODE ANN. § 15.51(b) (West 2011) (seller bears the burden of proving a covenant ancillary to sale of business is unreasonable)).

[87] *See id.* As long as the buyers operated the business, they were required to pay a share of the company's advertising costs in the Houston area. *Id.* at 794.

[88] *See id.* at 801. Then the court distinguished *Wissman v. Boucher*, where a covenant not to compete was held unreasonable because it was unlimited as to both time and space, unlimited as to activities restricted, and the consideration given by the promisee was relatively insignificant. *See id.* (citing 240 S.W.2d 278, 280–81 (Tex. 1951)).

[89] *See id.*

[90] *See, e.g.*, Heritage Operating L.P. v. Rhine Bros., LLC, No. 02-10-00474-CV, 2012 WL 2344864, at *6 (Tex. App.—Fort Worth June 21, 2012, no pet.) (mem. op.).

[91] *Id.* at *1.

owner received $500,000 to agree to that noncompete period.[92] Again, the seller could not establish that the territorial restriction imposed a hardship on him, particularly when he was "semiretired," did not live in Texas, and owned interests in similar businesses across the country.[93] Thus, the significant consideration involved, coupled with a reasonable territorial restriction, justified a longer time period.[94]

### 2. Reasonableness of Scope of Activity Restrained

Typically, a covenant can only restrain the seller from engaging in the same activities that the business is engaged in at the time of sale.[95] For example, in *Stocks v. Banner American Corp.*, the covenant provided the seller would not directly or indirectly do business with, or have any interest in, any business which in any manner competed with the buyer.[96] It also provided the seller would refrain from doing business with any individual, partnership or corporation with whom the seller did business while acting in any capacity with the sold corporation.[97] Citing other courts of appeals, the Texarkana Court held that precluding the seller from soliciting customers from a particular list of clients was a reasonable means of enforcing a covenant not to compete.[98] Nonetheless, that customer list must be limited to those customers existing as of the date of the sale.[99] Including other customers would impose broader restrictions than necessary to protect the purchaser's interests.[100]

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[92] *Id.* at *6.

[93] *Id.* at *5.

[94] *See id.* at *6.

[95] *See, e.g.*, Seline v. Baker, 536 S.W.2d 631, 633 (Tex. App.—Houston [1st Dist.] 1976, no writ); Stocks v. Banner Am. Corp., 599 S.W.2d 665, 668 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

[96] 599 S.W.2d at 666.

[97] *Id.*

[98] *Id.* at 667–68 (citing Toch v. Eric Schuster Corp., 490 S.W.2d 618, 622 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (former employee enjoined from contacting any former customer listed on an attached exhibit and from competing with his former employer in any manner in two counties in Texas where the employee had been his employer's exclusive sales representative); Arrow Chem. Corp. v. Anderson, 386 S.W.2d 309 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) (court enforced a covenant not to compete as modified by the attachment of a list of names and addresses of certain accounts which the former employee would be prohibited from contacting)).

[99] *Id.* at 668. Covenant reformation is discussed more thoroughly *infra* Part III. 0.

[100] *See Stocks*, 599 S.W.2d at 668.

Similarly, in *Seline v. Baker*, a proprietor sold her stock in a Houston-based event-planning business and entered into a covenant not to compete.[101] The buyer attempted to enjoin the seller from directly or indirectly competing with the corporation or becoming interested in any competitor of the corporation within 300 miles of Houston, Texas.[102] After the sale, the corporation drastically expanded the scope of its business activities and opened a branch in Dallas, Texas.[103] The court determined this covenant was unreasonable because the seller could never know with certainty what type of business activity she might properly enter into due to the company's expansion.[104] Thus, the court modified the covenant and only enjoined the seller from engaging in activities that the corporation had been engaged in when it was sold.[105]

Texas courts will also enforce covenants that restrict the seller from aiding another business or entity in competing with the business sold. In *Barrett v. Curtis*, the Dallas Court of Appeals stated that in the context of the sale of a business, the covenant not to compete "must not be oppressive and must not be broader than the business sold."[106] There, Barrett sold his automobile wrecker service in Grand Prairie, Texas to Curtis.[107] The noncompete provision prohibited Barrett from competing directly, and it also barred him from aiding or advising anyone else who would compete with the business sold.[108] However, after the sale, Barrett helped his brother compete with the business Barrett had sold. [109] The court determined that it would be inequitable to allow Barrett to receive consideration for his wrecker service and to assist his brother in competing against the buyer in the same type of service.[110] This is particularly persuasive when the covenant expressly applied only to the wrecker service and explicitly prohibited Barrett from aiding another in competition.[111] Further, because Curtis was not Barrett's competitor prior to the sale, the covenant did not

[101] 536 S.W.2d 631, 633 (Tex. App.—Houston [1st Dist.] 1976, no writ).

[102] *Id.*

[103] *Id.*

[104] *Id.* at 634.

[105] *Id.*

[106] 407 S.W.2d 359, 361 (Tex. Civ. App.—Dallas 1966, no writ).

[107] *Id.* at 360.

[108] *Id.*

[109] *Id.* at 360–61.

[110] *See id.* at 362.

[111] *Id.*

diminish market competition.[112] In sum, Barrett was held to his agreement because it was neither broader nor more comprehensive than the business conveyed.[113]

### 3. Reasonableness of Territorial Restrictions

While most territorial restrictions are rather narrow and depend on the scope of the business's activities,[114] broader territorial restrictions have also been upheld.[115] In certain situations, Texas courts have even found territorial restrictions covering the entire state of Texas to be reasonable.[116] Particularly, when a specialty service or business is sold or when the business's customers hail from various areas within and outside of Texas, a statewide restriction is justifiable.[117]

For instance, in *Caraway v. Flagg*, Caraway sold his Dallas taxidermy business to Flagg, who gave a $2,500 note as consideration for Caraway's covenant not to compete.[118] The covenant restricted the seller from engaging in the taxidermy business in the entire state of Texas for a period of five years.[119] The court found the broad geographic scope was reasonably necessary to protect the buyer in connection with the business sold and was valid.[120] The court reasoned that taxidermy was a specialty and, while most of the customers were from the Dallas area, some came from other places

[112] *Id.*

[113] *Id.*

[114] *See, e.g.*, *id.* at 361.

[115] *See, e.g.*, Richardson v. Webster-Richardson Publ'g Co., 46 S.W.2d 384, 386 (Tex. Civ. App.—Galveston 1932, no writ).

[116] *See, e.g.*, *id.* at 386 (holding a covenant precluding seller of newspaper from publishing any newspaper in Texas for five years, except if employed by the buyer, was reasonable as to both time and geographic area); Caraway v. Flagg, 277 S.W.2d 803, 806 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

[117] *See, e.g.*, *Richardson*, 46 S.W.2d at 386–87 (publisher had acquired wide fame or notoriety for newspaper, and paper boasted considerable circulation throughout the state); *Caraway*, 277 S.W.2d at 806 (finding that taxidermy was a specialty and, while most customers were residents of Dallas, some came from other areas of Texas or other states).

[118] 277 S.W.2d at 804.

[119] *Id.*

[120] *Id.* at 806.

both within and outside of the state. .[121] Thus, the prohibition from engaging in a specialized business within the entire state was reasonable.[122]

Similarly, in *Richardson v. Webster-Richardson Publishing Co.*, Richardson sold a newspaper, the Houston Informer, and conveyed the paper's goodwill in a sales contract.[123] The covenant not to compete restricted Richardson from issuing any newspaper in Texas for a five-year period.[124] Particularly, Richardson had acquired rather wide fame or notoriety as the editor and publisher of the Houston Informer, so any other publication by him would tend to poach the Informer's current subscribers.[125] Further, the newspaper itself had significant circulation throughout Texas.[126] Given Richardson's widespread notoriety and the paper's far-reaching circulation, the court found it was reasonable to restrict the seller from issuing a competing newspaper within Texas for the five-year period.[127]

### *B. Covenant Reformation*

Moreover, Texas courts are empowered to reform overly broad covenants to the extent necessary to bring them into compliance with the CNCA.[128] In addition to modifying covenants in the sale-of-business context, Texas courts have been flexible in modifying a covenant not to compete that is ancillary to the sale of stock in a business.[129]

For example, in *Stocks*, the Texarkana Court of Appeals held that the failure to include a territorial limitation did not render a covenant not to

[121] *Id.*

[122] *Id.*

[123] 46 S.W.2d 384, 385 (Tex. Civ. App.—Galveston 1932, no writ).

[124] *Id.*

[125] *See id.* at 385, 386–87. The goodwill of a professional man is an asset that can be sold, and his agreement, in connection with a sale of his business, not to engage in his profession in a specified area is valid if the restriction is not unreasonable as to time or place. *Id.* at 387.

[126] *Id.* at 386–87.

[127] *Id.* at 387.

[128] *See, e.g.*, Seline v. Baker, 536 S.W.2d 631, 634 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) ("A non-competitive agreement so extensive as to constitute an invalid restraint of trade may be modified in such a manner as to render the agreement reasonable.") (citing Thames v. Rotary Eng'g Co., 315 S.W.2d 589 (Tex. Civ. App.—El Paso 1958, writ ref'd n.r.e.)).

[129] *See, e.g.*, Stocks v. Banner Am. Corp., 599 S.W.2d 655, 668 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

compete void.[130] Citing other courts of appeals, the Texarkana Court held that the use of a customer list was an acceptable alternative to setting a specific geographical limit and was a reasonable means of enforcing a covenant not to compete.[131] However, that customer list was overly broad and thus subject to reformation itself.[132] For example, the restricted customer list included Apple Computers, which had never done business with the corporation.[133] Thus, the court limited the customer list to those customers existing as of the date of the sale.[134]

Overall, the time limitation rarely renders a covenant unreasonable as a matter of law.[135] In fact, courts are often willing to reform that criterion to render the covenant reasonable.[136] For example, the covenant in *Chandler v. Mastercraft Dental Corp. of Texas, Inc.* stated the seller agreed not to compete for a period of "not less than five (5) years."[137] On its face, that phrase indicated the covenant would last for at least five years, but no provisions otherwise restricted the duration.[138] The court reformed this seemingly unlimited time period to state the covenant was enforceable for only five years.[139] Thus, courts have considerable discretion in determining the reasonableness of a covenant's duration.[140]

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[130] *Id.* at 667.

[131] *Id.* at 667–68 (citing Toch v. Eric Schuster Corp., 490 S.W.2d 618, 622 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (former employee enjoined from contacting any former customer listed on an attached exhibit and from competing with his former employer in any manner in two counties in Texas where the employee had been his employer's exclusive sales representative); Arrow Chem. Corp. v. Anderson, 386 S.W.2d 309 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) (court enforced a covenant not to compete as modified by the attachment of a list of names and addresses of certain accounts which the former employee would be prohibited from contacting)).

[132] *Id.* at 668.

[133] *Id.*

[134] *Id.*

[135] *See, e.g.*, Oliver v. Rogers, 976 S.W.2d 792, 801 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding lack of time limitation did not render noncompete unreasonable as a matter of law).

[136] *See, e.g.*, Chandler v. Mastercraft Dental Corp. of Tex., Inc., 739 S.W.2d 460, 464 (Tex. App.—Fort Worth 1987, writ denied).

[137] *Id.* at 462.

[138] *See id.* at 464.

[139] *Id.*

[140] *Id.* (citing Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982, no writ).

## IV. PUTTING THE WHEELS BACK ON THE *BANDERA* WAGON

Most recently, the Eastland Court of Appeals threw a monkey wrench into the current law governing covenants not to compete in the sale-of-business context when the court refused to imply that goodwill had been sold.[141] In *Bandera*, Sledge Drilling ("Sledge") agreed to purchase almost all of Bandera Drilling's ("Bandera") equipment in return for a promise not to compete within a restricted geographic area.[142] The Eastland Court held the noncompete was not enforceable because the sale did not expressly include the sale of Bandera's goodwill to the buyer, despite the presence of a noncompete provision in the sale contract.[143] However, this does not explain the $50,000 payment to the seller, individually, that was explicitly set forth as consideration for the covenant not to compete.[144] Nor does it explain Bandera's post-execution transfer of goodwill to Sledge.[145] In the end, the court's refusal to imply that goodwill was sold, as well as its deference to a merger clause in the agreement,[146] does not coincide with existing precedent and contravenes common sense.[147]

### *A. Misplaced Reliance on the Court of Appeals' Decision in* Marsh USA, Inc. v. Cook

The Dallas Court of Appeals decided *Marsh USA, Inc. v. Cook*[148] a mere three months before the Eastland Court decided *Bandera*.[149] In a letter brief, Bandera relied on the Dallas Court's decision and stated *Marsh* supported the seller's position because it emphasized a covenant not to compete was not enforceable as the underlying agreement did not create an interest

[141] Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867, 873 n.4 (Tex. App.—Eastland 2009, no pet.).

[142] *Id.* at 869.

[143] *Id.* at 873 n.4.

[144] *Id.* at 872.

[145] *Id.*

[146] *Id.* at 873 n.3. The merger clause stated, "This Agreement may not be amended, altered, modified, or changed in any way except in a writing signed by all the Parties specifically referencing this Agreement. Without limitation, course of performance specifically does not modify or waive any provision herein." *Id.*

[147] *See, e.g.*, Marsh USA, Inc. v. Cook, 354 S.W.3d 764, 776 (Tex. 2011) (stock options were sufficiently related to the company's goodwill to support an employee's covenant not to compete).

[148] 287 S.W.3d at 378.

[149] 293 S.W.3d at 867 (decided August 6, 2009).

worthy of protection.[150] Further, the Dallas Court proclaimed a "mere financial benefit" was not enough to create such an interest.[151]

In like manner, the noncompete agreement in *Bandera* did not expressly state goodwill was sold.[152] However, the purchase agreement did state that Bandera conveyed "all of the rights, title and interest, tangible and intangible" that it had in the equipment sold.[153] Sledge argued the only reasonable "intangible" assets related to the equipment were the current and prospective relationships with the rig employees, the current and prospective relationships with the rig customers, and the intellectual property in the form of the employee files.[154] Ultimately, the Eastland court found this argument unpersuasive because the intangible rights described were not conveyed by the assignment since they were "not intrinsic to the rigs or equipment."[155] Instead, they were associated with a going concern.[156] This analysis reflects a strong reliance on the Dallas Court of Appeals' decision in *Marsh*, since that court's analysis also hinged on whether goodwill was implicated.[157] This result contrasts with other cases that imply goodwill is implicated even when not mentioned explicitly.[158]

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[150] *See* Letter Brief for Appellant at 1, Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867 (Tex. App.—Eastland 2009, no pet.) (No. 11-08-00284-CV).

[151] *See id.*

[152] 293 S.W.3d at 873–74.

[153] *Id.* at 869; Brief of Appellee at 37–38, Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867 (Tex. App.—Eastland 2009, no pet.) (No. 11-08-00284-CV).

[154] Brief of Appellee at 38, Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867 (Tex. App.—Eastland 2009, no pet.) (No. 11-08-00284-CV).

[155] *Bandera*, 293 S.W.3d at 875.

[156] *Id.* Also, it is important to note that the Eastland Court of Appeals addressed this issue at the summary judgment phase, so it considered the evidence in the light most favorable to Bandera, who contended it transferred some employee files to help those employees find work while Bandera got its new drilling rigs working. *Id.* at 872. Had Sledge successfully argued the transfer of employees was integral to the transaction, then such transfer might have implicated goodwill. *See id.*

[157] *See* 287 S.W.3d 378, 381 (Tex. App.—Dallas 2009) (recognizing that a company's goodwill is dependent on keeping trade secrets and other information confidential, while private financial benefits do not give rise to an interest worthy of protection) (citing Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 650 (Tex. 2006), *rev'd*, 354 S.W.3d 764 (Tex. 2011)).

[158] *See, e.g.*, Marsh USA, Inc. v. Cook, 354 S.W.3d 764, 777 (Tex. 2011); Chandler v. Mastercraft Dental Corp. of Tex., Inc., 739 S.W.2d 460, 465 (Tex. App.—Fort Worth 1987, writ denied).

In a curious turn of events, the Texas Supreme Court reversed the *Marsh USA* decision in 2011, and practitioners are still analyzing that result.[159] In *Marsh USA*, an insurance and consulting services provider offered stock options to its key employees to incentivize their contribution to the company's long-term success.[160] When Cook exercised his option, he also signed a covenant not to compete effective for three years.[161] Before that term expired, Cook was hired by a direct competitor.[162] To determine whether the noncompetition agreement was enforceable, the court focused on whether the agreement had a beneficial effect on Marsh USA's goodwill.[163] The covenant did not expressly mention "goodwill" as an interest it was intended to protect.[164] However, the court reasoned that awarding stock options provided the required statutory nexus between the company's interest in protecting its goodwill and the noncompete agreement.[165] Specifically, the court stated, "consideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus."[166]

Under the Texas Supreme Court's analysis in *Marsh USA*, *Bandera* would probably be decided differently. The court shifted the focus from the technical requirements of the contract to the reasonableness of the restraints, which indicates a preference for enforceability.[167] Moreover, the court stated the hallmark of enforcement is whether the covenant is reasonable.[168] Again, the court seemed to imply goodwill was protected by the covenant, since the restriction protected the company's customer relationships.[169] The same is true in *Bandera*, where the covenant was

[159] *See Marsh USA*, 354 S.W.3d at 764; *see, e.g.*, Paul, *supra* note 68, at 821–23; Matt Sheridan, Note, *Who Dimmed the* Light*?: How* Marsh USA, Inc. v. Cook *Impacts Covenants Not to Compete in Texas*, 65 BAYLOR L. REV. 378, 392–401 (2013).

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

[161] *Id.* at 767.

[162] *Id.*

[163] *Id.* at 777.

[164] *See id.*; *see also* Rex Cook's Response to Petition for Review at 8–9 Marsh USA v. Cook, 354 S.W.3d 764 (Tex. 2011) (No. 09-0558).

[165] *Marsh USA*, 354 S.W.3d at 777.

[166] *Id.* at 775.

[167] *See id.*

[168] *Id.* at 777 (citing Alex Sheshunoff Mgmt. Servs., L.P., v. Johnson, 209 S.W.3d 644, 655 (Tex. 2006)).

[169] *Id.*

designed to protect the goodwill of the business interest sold to Sledge, even though goodwill was not expressly conveyed.[170] This is particularly obvious given the $50,000 earmarked as consideration for Bandera's covenant not to compete, as well as Bandera's post-execution actions that effectively transferred its goodwill to Sledge.[171]

### *B. Improperly Rejecting Texas Case Law for the Sake of a Merger Clause*

In *Bandera*, the extrinsic evidence clearly showed Sledge intended to acquire Bandera as a going concern.[172] However, the court extolled the virtues of a merger clause by saying the contract's execution presumed that all prior negotiations and agreements relating to the transaction had been merged into the contract, and it would be enforced as written and could not be added to, varied, or contradicted by parol evidence.[173] Because the contract at issue included a merger clause, the court emphasized terms would only be implied if they were "necessarily involved in the contractual relationship and are such that the parties must have intended them and failed to express them only because of sheer inadvertence or because they were too obvious to need expression."[174] That said, the court determined the contract's written terms would have been equally satisfied if the purchase agreement was merely a sale of rigs and equipment.[175] Essentially, Sledge made the fatal mistake of not expressly stating "goodwill" was transferred in the agreement.[176]

Further, Texas courts have exercised broad powers to reform a noncompete provision and many seem to imply goodwill is sold when the assets of a company are sold.[177] In fact, at least one Texas case has

[170] *See* Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867, 869 (Tex. App.—Eastland 2009, no pet.).

[171] *See id.* at 872.

[172] *Id.* at 874.

[173] *Id.* at 872 (citing ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., 234 S.W.3d 711, 719–20 (Tex. App.—Eastland 2007, pet. denied)).

[174] *Id.* at 875 (citing Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 850 (Tex. 2009)).

[175] *Id.* at 874.

[176] *See id.* at 873–74.

[177] *See, e.g.*, Stocks v. Banner Am. Corp., 599 S.W.2d 665, 666–68 (Tex. Civ. App.—Texarkana 1980, no writ) (enforcing a covenant not to compete where seller sold 3,000 shares in company to the other shareholders); Seline v. Baker, 536 S.W.2d 631, 633 (Tex. Civ. App.—

specifically implied goodwill is sold when the seller transfers his business's assets and agrees to a covenant not to compete.[178] In *Riddlesperger v. Malakoff Gin Co.*, the sellers transferred a cotton gin plant in Malakoff to the purchasers for $4,000.[179] The contract purported to convey the gin house and machinery, as well as the building in which the machinery was installed.[180] In addition, the contract included a stipulation that the sellers would not "directly or indirectly engage in or be interested in any other gin or mill" in Malakoff as long as the purchasers operated the gin sold.[181] Notably, the contract did not expressly mention goodwill.[182] Yet, the court held that goodwill was transferred by implication, due to the nature of the sales agreement.[183] Also, the writ history for *Riddlesperger* indicates the Texas Supreme Court refused the writ of error.[184] "Writ refused" recognizes the Court of Civil Appeals is correct, and the case has equal precedential value with the Texas Supreme Court's own opinions.[185] Thus, courts may consider whether the facts of a particular case imply goodwill is transferred, even though the agreement does not expressly state it is.[186]

On the other hand, the court recognized that Bandera's post-execution actions indicated the parties contemplated Bandera would transfer goodwill to Sledge.[187] Importantly, the parol evidence rule is a substantive rule of contract law, not a rule of evidence.[188] Moreover, it does not prevent the

Houston [1st Dist.] 1976, no writ) (enforcing covenant not to compete where owner sold fifty percent of stock in the corporation to Plaintiffs); Chandler v. Mastercraft Dental Corp. of Tex., Inc., 739 S.W.2d 460, 464–65 (Tex. App.—Fort Worth 1987, writ denied).

[178] Riddlesperger v. Malakoff Gin Co., 229 S.W. 636, 638 (Tex. Civ. App.—Texarkana 1921, writ ref'd).

[179] *Id.* at 636.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 638.

[183] *Id.*

[184] *See* 42 TEX. JUR. 3D *Good Will* § 7, n.2 (2005).

[185] THE GREENBOOK: TEXAS RULES OF FORM Appendix E (Texas Law Review Ass'n ed., 12th ed. 2010). In that vein, there is nothing in current case law or within the statutory text of the CNCA that precludes a court from implying goodwill is sold. *See* TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011).

[186] *See Riddlesperger*, 229 S.W. at 638.

[187] *See* Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867, 872 (Tex. App.—Eastland 2009, no pet.).

[188] *See, e.g.*, Quitta v. Fossati, 808 S.W.2d 636, 642 (Tex. App.—Corpus Christi 1991, writ denied); Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1958).

agreement from later being modified by the parties by oral agreement.[189] Likewise, the purchase agreement in *Bandera* did not intimate that goodwill was sold and was ostensibly a sale of Bandera's equipment.[190] Bandera then introduced Sledge to its customers as the "new owners" and transferred its personnel files, so Sledge would have employees to operate the rigs.[191] The court admitted that drilling is a personal services business, and relationships and trust are vital to success.[192] Such introductions were an endorsement of Sledge, which seriously hindered Bandera's competitiveness in the area by encouraging customers to transition to another drilling company.[193] The court conceded Bandera transferred goodwill to Sledge but obstinately maintained that Bandera was not contractually obligated to do so.[194] Again, Bandera's post-execution actions clearly indicated the parties intended Bandera to transfer goodwill to Sledge.[195] Because the parol evidence rule does not apply to post-execution negotiations or modifications, the merger clause is not preclusive.[196]

Moreover, the *Chandler* court made no such distinction between the sale of assets and the transfer of goodwill when it treated the conveyance of goodwill as part and parcel of the purchase of a corporation's assets.[197] There, the buyer purchased a dental equipment manufacturing concern from Chandler, the original owner.[198] When the seller contested the covenant not to compete, the Fort Worth Court of Appeals first declared that goodwill

[189] *See, e.g.*, *Quitta*, 808 S.W.2d at 642; Robbins v. Warren, 782 S.W.2d 509, 512 (Tex. App.—Houston [1st Dist] 1989, no writ); Mar-Lan Indus., Inc. v. Nelson, 635 S.W.2d 853, 855 (Tex. App.—El Paso 1982, no writ); Lakeway Co. v. Leon Howard, Inc., 585 S.W.2d 660, 662 (Tex. 1979).

[190] *Bandera*, 293 S.W.3d at 869, 874.

[191] *Id.* at 872.

[192] *Id.*

[193] *Id.* at 872–73.

[194] *Id.* at 873–74.

[195] *Id.*

[196] *See, e.g.*, Quitta v. Fossati, 808 S.W.2d 636, 642 (Tex. App.—Corpus Christi 1991, writ denied); Robbins v. Warren, 782 S.W.2d 509, 512 (Tex. App.—Houston [1st Dist.] 1989, no writ); Mar-Lan Indus., Inc. v. Nelson, 635 S.W.2d 853, 855 (Tex. App.—El Paso 1982, no writ); Lakeway Co. v. Leon Howard, Inc., 585 S.W.2d 660, 662 (Tex. 1979).

[197] *See* Chandler v. Mastercraft Dental Corp. of Tex. Inc., 739 S.W.2d 460, 462, 465 (Tex. App.—Fort Worth 1987, writ denied).

[198] *Id.* at 462.

and trade secrets are protectable business interests.[199] Then it described the seller's twenty-five-year career and his significant number of friends and associates among orthodontists, a small and exclusive professional group.[200] Given the limited clientele, highly specialized product line, and importance of personal contacts, the court concluded the covenant was necessary to protect the business's goodwill.[201] However, there was no mention of "goodwill" in the purchase agreement.[202] In fact, the court states the buyer "purchased the assets of the [company]"[203] only to later expand the scope of assets purchased to include trademarks and customer lists.[204] With that in mind, the court seems to imply that goodwill was sold when the purchaser acquired the equipment manufacturing company as a going concern.[205]

In like manner, courts have upheld covenants when a buyer acquires the seller's stock in a corporation.[206] For instance, the *Seline* court of appeals upheld a covenant not to compete when a woman sold fifty percent of an event planning corporation's stock to two other women.[207] Again, the court did not analyze whether goodwill was expressly transferred in the sale agreement.[208] Instead, it simply stated, "good will inheres in the business, including the corporate name."[209] It was enough that Seline sold her stock in the corporation and the buyers assumed the corporation's name.[210] Similarly, the *Stocks* court enforced a covenant not to compete when one shareholder sold his interest in the corporation to the corporation's other shareholders.[211]

Additionally, some courts have even fabricated a noncompete provision where one did not exist simply because the agreement stated the parties

[199] *Id.* at 464–65 (citing La Rocca v. Howard-Reed Oil Co., 277 S.W.2d 769, 772 (Tex. Civ. App.—Beaumont 1955, no writ)).

[200] *Id.* at 465.

[201] *Id.*

[202] *See id.*

[203] *Id.* at 462.

[204] *Id.* at 465.

[205] *See id.*

[206] Seline v. Baker, 536 S.W.2d 631, 634 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

[207] *Id.*

[208] *See id.*

[209] *Id.*

[210] *See id.*

[211] Stocks v. Banner Am. Corp., 599 S.W.2d 665, 668 (Tex. Civ. App.—Texarkana 1980, no writ).

intended to make such an agreement at the time of sale, irrespective of whether that covenant was ever created.[212] For example, in *Farmer v. Holley*, the purchaser of a dance studio was allowed to enforce a covenant not to compete against the seller, even though the covenant was never delivered.[213] There, the sales agreement contained a provision that stated the seller would sign and deliver a covenant not to compete, and it included both geographic and time restrictions.[214] The court found the provision, by itself, was an enforceable covenant not to compete with nothing more.[215]

Following the analysis of *Farmer*, the *Bandera* court would have found ample opportunity to circumvent the merger clause in the parties' agreement. That agreement clearly specified that Bandera would not compete with Sledge, set aside $50,000 as consideration for that promise, and provided reasonable restraints with regard to time, scope of activity, and geographic area.[216] If the *Farmer* court can fabricate a noncompete provision from a simple reference to a covenant, then the *Bandera* court could surely find "goodwill" was conveyed based on the fact that Bandera sold substantially all of its assets to Sledge.[217]

Nonetheless, the *Bandera* court protested that it could not rely on the parties' post-execution actions because the contract's language was ultimately controlling.[218] On the other hand, the *Oliver* court showed no such hesitation when it cited the buyer's yearly assessments as grounds for enforcing the seller's covenant not to compete.[219] In the end, courts have not determined whether covenants not to compete in the sale of a business are enforceable merely based on whether the agreement contained a merger clause. Instead, the analysis focuses on the reasonableness of the restraint

[212] Farmer v. Holley, 237 S.W.3d 758, 760 (Tex. App.—Waco 2007, pet. denied).

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *See* Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867, 869 (Tex. App.—Eastland 2009, no pet.).

[217] *See, e.g.*, Riddlesperger v. Malakoff Gin Co., 229 S.W. 636, 638 (Tex. Civ. App.—Texarkana 1921, writ ref'd) (goodwill transferred by implication).

[218] *See Bandera*, 293 S.W.2d at 873.

[219] Oliver v. Rogers, 976 S.W.2d 792, 801 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (seller failed to show why "in the face of continuing contractual obligations to pay advertising assessments in the thousands of dollars, the covenant imposes a greater restraint than is necessary").

and sometimes impliedly assumes goodwill is included in the transaction.[220] Particularly given that all contractual agreements are presumed to embody the parties' final agreement, regardless of whether a merger clause exists,[221] the *Bandera* court's decision is at odds with the analysis of prior cases.[222]

### *C. Avoiding the Bandera Trap*

Unless and until the Texas Supreme Court overrules the *Bandera* decision, it may cause practitioners some headaches, particularly in the Eastland area. That said, practitioners can either avoid this pitfall from the outset or ensure a covenant not to compete has the best chance of being enforced after the agreement is contested. To accomplish the former, express contract provisions are paramount. For the latter, an emphasis on existing case law is vital.

Essentially, careful drafting of the sale agreement is key. The specific contractual terms should expressly state the business's goodwill is transferred to the buyer.[223] Goodwill can take the form of customer lists, trademarks, employee files, and other property related to the business's goodwill, including the business's name.[224] As a result, proving that goodwill is transferred is easier when the entire business entity is transferred and the purchaser takes it over as a going concern.[225] In that vein, the express transfer of goodwill will prevent the buyer from having to

[220] *See, e.g.*, *Riddlesperger*, 229 S.W. at 638.

[221] *See, e.g.*, Transcon. Realty Investors, Inc. v. John T. Lupton Trust, 286 S.W.3d 635, 641–42 (Tex. App.—Dallas 2009, no pet.); Barker v. Roelke, 105 S.W.3d 75, 83 (Tex. App.—Eastland 2003, pet. denied); Smith v. Smith, 794 S.W.2d 823, 827 (Tex. App.—Dallas 1990, no writ). If the parties reduce their agreement to writing, then it is presumed that all prior negotiations and agreements related to the transaction have been merged into the writing, regardless of whether a merger clause is present. *See Transcon. Realty Investors*, 286 S.W.3d at 641–42.

[222] *See, e.g.*, *Riddlesperger*, 229 S.W. at 638.

[223] *See Bandera*, 293 S.W.3d at 873–74.

[224] *See* Seline v. Baker, 536 S.W.2d 631, 634 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (goodwill inheres in the business, including the company's name); *see also* Airflow Houston, Inc. v. Theriot, 849 S.W.2d 928, 933 (Tex. App.—Houston [1st Dist.] 1993, no writ) (goodwill includes the advantages accruing to a business on account of its name, location, reputation, and success); Chandler v. Mastercraft Dental Corp. of Tex. Inc., 739 S.W.2d 460, 465 (Tex. App.—Fort Worth 1987, writ denied) (dental equipment manufacturing business's customer lists and professional contacts were directly tied to the business's goodwill).

[225] *See, e.g.*, *Seline*, 536 S.W.2d at 634; *see also Chandler*, 739 S.W.2d at 465.

convince a court that the parties contemplated a transfer of goodwill, as Sledge was forced to do in *Bandera*.[226]

On the other hand, practitioners who find themselves litigating an agreement that does not expressly include goodwill should argue that *Riddlesperger* is still binding. While the case was decided before the CNCA was passed, the CNCA neither supersedes *Riddlesperger* nor conditions the enforceability of a covenant not to compete on whether goodwill is unambiguously mentioned in sale of business agreement.[227] Further, cases that purportedly contradict the *Riddlesperger* rule either do not address sale agreements that include covenants not to compete[228] or do not command similar precedential deference.[229] In the end, it may be better to avoid the

[226] *See Bandera*, 293 S.W.3d at 872–73. This is particularly important because even if the seller does transfer goodwill to the buyer, the buyer will most likely not be able to successfully argue that such post-execution actions constitute illusory promises that became binding obligations once performed. *See id.* at 874. Such arguments have been successful in the employment context, where the employer's illusory promise to provide confidential information to an employee in a noncompete agreement becomes binding once the employee actually receives such information in the course of his employment. *See id.* (citing Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651 (Tex. 2006)). By the nature of a sale-of-business transaction, the seller already possesses the confidential information, so any of the seller's post-execution actions cannot provide mutuality. *Id.*

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

[228] *See, e.g.*, Alamo Lumber Co. v. Farenthold, 58 S.W.2d 1085, 1087 (Tex. Civ. App.—Beaumont 1933, writ ref'd). There, nothing in the written contract indicated the business's goodwill or the seller's right to re-enter the lumber business was included. *Id.* Because there was nothing to indicate this was not the parties' final, merged agreement, the court could not imply either of those terms was included. *See id.* In contrast, the sales agreement in both *Bandera* and *Riddlesperger* included the sellers' promises not to compete with the buyer. *See Bandera*, 293 S.W.3d at 869; Riddlesperger v. Malakoff Gin Co., 229 S.W. 636, 636 (Tex. Civ. App.—Texarkana 1921, writ ref'd). Because such covenants are designed to protect the business's goodwill, the presence of such a covenant is a strong indication that the parties intended to include goodwill. *See* 51 TEX. JUR. 3D *Monopolies & Restraints of Trade* § 61 (2008) (citing La Rocca v. Howard-Reed Oil Co., 277 S.W.3d 769, 772 (Tex. Civ. App.—Beaumont 1955, no writ)) (covenants not to compete in the sale of business context are intended to protect the business's goodwill).

[229] *See* Edelstein v. Edelstein, 6 S.W.2d 400, 402 (Tex. Civ. App.—San Antonio 1928, writ dism'd w.o.j.) (goodwill does not pass by general terms used for sale of goods). Not only was the writ of error dismissed, and therefore not entitled to the precedential value of a refused writ, *Edelstein* dealt with a situation where Edelstein sold his interest in a partnership to his partner, who was a relative, then established a similar furniture business. *Id.* The former partner wanted to prevent Edelstein from using his own surname in connection with that business. *Id.* Notably, there was no covenant not to compete included in the sale agreement. *See id.* Further, precluding someone from using his own name in business has significantly far-reaching consequences that a

*Bandera* trap completely, but it is certainly possible to establish that *Riddlesperger* and similar cases render the *Bandera* trap toothless even when a party is ostensibly caught in its steel jaws.

## V. GOODWILL HUNTING

Requiring the sale agreement to specifically indicate that goodwill is transferred not only leads to under-inclusive and patently inequitable decisions, as evidenced by *Bandera*,[230] but it also disregards prior case law.[231] As discussed in Part II.B, courts should lean toward enforcing covenants not to compete in the sale-of-business context for various reasons.[232] Most importantly, not enforcing a covenant based on a mere technicality, such as not explicitly stating goodwill is transferred, allows the seller to have his cake and eat it, too. The seller is then able to compete against the buyer, thereby regaining the goodwill he has voluntarily sold, without having to disgorge the monetary consideration that supported his covenant not to compete in the first place. Other states will imply goodwill is sold, if the circumstances of the sale indicate goodwill is contemplated in the transaction.

For example, in Alabama, it is not necessary that the contract of sale specifically state that the transaction includes the sale of goodwill in order to enforce a covenant not to compete executed in connection with the sale of a business.[233] It is sufficient if the contract indicates that the buyer is taking over a going concern.[234] However, the contract of sale must contain a provision prohibiting competition, because covenants not to compete will never be implied.[235]

court is unlikely to imply goodwill in the form of the seller's surname was sold in connection with the person's interest in a partnership. *See id.*

[230] *Bandera*, 293 S.W.3d at 874.

[231] *See, e.g.*, *Riddlesperger*, 229 S.W. at 638.

[232] *See supra* Part II.**Error! Reference source not found.**.

[233] Michael Edwards et al., *The Enforceability of Covenants Not to Compete in Alabama*, 65 ALA. LAW. 41, 46 (2004).

[234] *Id.* (citing Russell v. Mullis, 479 So. 2d 727, 729 (Ala. 1985); Files v. Schaible, 445 So. 2d 257, 260 (Ala. 1984)).

[235] *Id.* (citing Joseph v. Hopkins, 158 So. 2d 660, 665 (Ala. 1963)). Oddly enough, at least one Texas court has crafted a covenant from the mere reference to such a promise in a sales agreement. *See* Farmer v. Holly, 237 S.W.3d 758, 760 (Tex. App.—Waco 2007, pet. denied).

Likewise, Massachusetts will imply good will is sold in appropriate circumstances.[236] As the Supreme Judicial Court of Massachusetts pointed out, when the entire assets of the business are sold, it is ordinarily presumed that goodwill passes with the other assets.[237] This is true, even when the sales agreement does not expressly mention goodwill is transferred.[238]

Also, California courts will imply goodwill is sold if there is a clear indication that the parties valued or considered goodwill as a component of the sales price.[239] In *Hill Medical Corp. v. Wycoff*, the California court determined that if the buyer paid fair market value for the seller's shares of stock, the sales price was a strong indication that goodwill was part of the transaction and that the price included a value for goodwill.[240] The court also required that a sale of stock must also involve a substantial interest in the corporation, such that the owner can be said to transfer the corporation's goodwill by transferring all of his shares.[241] Essentially, the structure of the transaction, including the sale price, suggested whether goodwill was transferred.[242]

Just as those courts readily imply goodwill is sold, so should Texas courts. For instance, Sledge purchased almost all of Bandera's assets and absorbed Bandera's employees.[243] In addition, Bandera's owners signed shareholder consents for the sale, which are required by law whenever a corporation sells all or substantially all of its assets.[244] Moreover, the Texas Comptroller determined the Occasional Sales Rule applied to the sale of the business, so no sales tax was due.[245] All of these circumstances strongly suggest that the parties intended to convey the business as a going concern, goodwill included. Under cases from Alabama, California, Massachusetts,

[236] Tobin v. Cody, 180 N.E.2d 652, 655 (Mass. 1962).

[237] *Id.*

[238] *Id.* at 656.

[239] Hill Med. Corp. v. Wycoff, 103 Cal. Rptr. 2d 779, 786 (Cal. Ct. App. 2001) (citing Monogram Indus., Inc. v. SAR Indus., Inc., 134 Cal. Rptr. 714, 720 (Cal. Ct. App.1976)).

[240] *Id.* at 904.

[241] *Id.*

[242] *Id.*

[243] Bandera Drilling Co., Inc. v. Sledge Drilling Corp., 293 S.W.3d 867, 873 (Tex. App.—Eastland 2009, no pet.).

[244] *Id.* at 873 (citing TEX. BUS. ORGS. CODE ANN. § 21.455 (West 2012)).

[245] *Id*. The Occasional Sales Rule exempts the sale of a business or an identifiable segment of a business from sales tax. *Id.* (citing 34 TEX. ADMIN. CODE § 3.316(d) (West 2012)). By extension, Bandera's owners took advantage of the tax exemption without having to suffer the consequences of selling their company as a going concern. *See id.*

and even some from Texas, Sledge would have been entitled to enforce its bargain and hold Bandera to its promise.[246]

In the end, a rule implying goodwill would inherently benefit the buyers of businesses in Texas. Instead of allowing the seller to breach his covenant on a mere technicality, implying goodwill would hold the seller to the agreement he voluntarily made and was well-compensated for while sufficiently protecting the buyer's investment without unreasonably restraining the seller. Anytime a business is sold as a going concern, goodwill can easily be implied, since buyers would rarely purchase a business as a going concern or for its fair market value without that understanding.

## VI. CONCLUSION

The Rule of Reasonableness permits Texas courts significant flexibility in the area of covenants not to compete. Given the strong policy reasons for upholding such covenants, it is no wonder some courts have engaged in legal gymnastics to uphold some agreements.[247] While there are few, if any, bright line rules, this holistic approach is appropriate as these transactions usually defy classification and generally raise novel concerns.

In reexamining the Instagram anecdote, Facebook should be able to enforce a reasonable covenant not to compete against the photo-sharing application's founders.[248] For one thing, Facebook paid double the fledgling company's estimated worth to acquire it.[249] If the founders are allowed to take $1 billion and then promptly breach the covenant on a technicality, Facebook has just paid an exorbitant amount of money for a nearly worthless company. More importantly, the sellers have been unjustly enriched through their malfeasance, yet Facebook has no legal recourse.

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[246] *See* Edwards, *supra* note 233234; *Hill Med. Corp.*, 103 Cal. Rptr. 2d at 904; Tobin v. Cody, 180 N.E.2d 652, 655 (Mass. 1962).

[247] *See, e.g.*, Farmer v. Holly, 237 S.W.3d 758, 760 (Tex. App.—Waco 2007, pet. denied) (a provision referring to a covenant not to compete that was never delivered served as an enforceable covenant by itself).

[248] Given that Instagram and Facebook are both social media services accessed throughout the United States, not to mention the world, it is not likely that a covenant restricting Instagram's founders from competing against Facebook within one particular state would do much to protect Facebook overall. But how to protect such companies from those ills is a question for another article.

[249] *See* Upbin, *supra* note 4. Facebook purchased Instagram for $1 billion, despite Instagram's valuation at only $500 million the week before. *Id.*

With these considerations in mind, Texas courts should follow the *Riddlesperger* court's example and imply goodwill is sold in situations where the circumstances unmistakably indicate the parties intended to transfer the business as a going concern and considered goodwill as a component of the sales price.[250] To do so would avoid cases like *Bandera*, preserve the parties' reasonable expectations, and greatly contribute to more uniform judicial decisions that are unfettered by overwrought technicalities. Given Texas courts' willingness and broad powers to reform unreasonable covenants in the sale of business context, the ability to imply goodwill is no stretch. As the *Riddlesperger* court so eloquently stated:

> When untrammeled by legislation there is no reason why courts of justice should voluntarily manacle themselves with artificial rules which tend to defeat the very purpose for which they are created. In each controversy of this character that course should be adopted which may, without overturning some other established principle, *best meet the ends of justice*. That rule for ascertaining and awarding damages should be followed which best enables the court to allow the injured party all the damages he has sustained, *without penalizing the offender* by awarding more.[251]

[250] *See* Riddlesperger v. Malakoff Gin Co., 229 S.W. 636, 638 (Tex. Civ. App.—Texarkana 1921, writ ref'd). As in *Riddlesperger*, the presence of a covenant not to compete coupled with the sale of a substantial part of the business's assets signifies goodwill is sold by implication. *See id.*

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