Enforceability of Covenants Not to Compete in At-Will Employment Relationships in Texas

Eric G. Behrens

Available at: https://works.bepress.com/eric_behrens/1/
The enforceability of covenants not to compete in at-will employment relationships in Texas

Eric Behrens

Businesses that work with trade secrets or other confidential information frequently rely on covenants not to compete ("non-compete clauses") as one of their safeguards against disclosure. A typical non-compete clause restricts an employee from soliciting or performing work for the employer's clients, being employed in the same line of work as the employer, and/or working for certain competitors, for a specified period of time, geographic region, and scope of activity. The enforceability of such clauses in at-will employment relationships, however, is a subject of continual litigation in Texas courts.

Texas statute provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful." Although a non-compete clause by its nature is a restraint on trade, Section 15.50(a) of the Texas Business & Commerce Code provides that such covenants are enforceable if they satisfy the narrow criteria dictated in the statute. Since Section 15.50(a)'s enactment in 1989, employers across Texas have relied on those criteria as a guide for drafting covenants not to compete.

A 1994 decision by the Texas Supreme Court in Light v. Centel Cellular Company of Texas was initially perceived as having "blueprinted" contractual language that would satisfy

---

1 TEX. BUS. & COMM. CODE § 15.05(a) (Vernon 2002).
2 Harrison v. Williams Dental Group, P.C., 140 S.W.3d 912, 917 (Tex. App.–Dallas 2004, no pet.) ("At the most fundamental level an agreement not to compete is an agreement in restraint of trade."); Trilogy Software, Inc. v. Callidus Software, Inc., 143 S.W.3d 452, 459 (Tex. App.–Austin 2004, pet. denied) (as a restraint, a covenant is "unenforceable unless it meets certain statutory requirements.").
3 Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642 (Tex. 1994) (hereinafter "Light").
Section 15.50(a)'s requirements for at-will employees.\textsuperscript{4} Even after \textit{Light} was decided, however, the proper interpretation of Section 15.50(a)'s criteria continued to elude employers, as multiple courts denied requests to enforce covenants not to compete against former at-will employees.\textsuperscript{5} This was particularly troubling to employers who had provided their at-will employees with confidential information in reliance on such covenants, and yet were unable to enforce them when their employees took job positions with competitors.

The Texas Supreme Court's 2006 and 2009 decisions in \textit{Alex Sheshunoff Management Services, L.P. v. Johnson}\textsuperscript{6} and \textit{Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding}\textsuperscript{7} have now abrogated several of those decisions, clarifying Section 15.50(a)'s criteria in a manner that would cause earlier rulings to be decided differently today. This article discusses the enforcement of covenants not to compete in the context of at-will employment relationships in the wake of the Court's most recent decisions, and the Court's modifications and elaboration of \textit{Light} over time.

Consistent with the Legislature's original intention that Section 15.50 expand the enforceability of covenants not to compete,\textsuperscript{8} the Court's reinterpretation of Section 15.50(a) in

\textsuperscript{4} See \textit{Ireland v. Franklin}, 950 S.W.2d 155, 158 (Tex. App.–San Antonio 1997, no pet.) ("This is the situation blueprinted by the Texas Supreme Court," describing footnote 14 of the \textit{Light} decision); \textit{Wright v. Sport Supply Group, Inc.}, 137 S.W.3d 289, 297 & n.7 (Tex. App.–Beaumont 2004, no pet.) (same).


\textsuperscript{6} \textit{Alex Sheshunoff Mgt. Svcs., L.P. v. Johnson}, supra, 209 S.W.3d 644 (Tex. 2006).

\textsuperscript{7} \textit{Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding}, 289 S.W.3d 844 (Tex. 2009) (hereinafter "\textit{Mann Frankfort}").

\textsuperscript{8} \textit{Sheshunoff}, 209 S.W.3d at 654 (legislative history indicates that the Legislature "wanted to expand the enforceability of covenants not to compete beyond that which the courts had allowed").
Sheshunoff and Mann Frankfort should guide employers who wish to craft covenants for at-will employees, and provide confidence that such covenants will be given force.

I. Section 15.50 of the Texas Business & Commerce Code sets forth the exclusive criteria for enforcement of covenants not to compete.

Prior to 1989, common law alone governed the enforceability of covenants not to compete.\(^9\) In reaction to Supreme Court decisions that restricted the enforceability of covenants, however, the Legislature in 1989 enacted "The Covenants Not to Compete Act," which set forth new criteria for enforcement of non-compete clauses.\(^10\) In 1993, the Legislature modified the criteria, and added a section which provides the Act preempts all common law criteria relating to enforcement of non-compete covenants. Section 15.52 clarified that the "criteria for enforceability of a covenant not to compete" under Section 15.50, as well as procedures and remedies in an action to enforce such covenants under Section 15.51, "are exclusive and preempt any other criteria for enforceability of a covenant not to compete under common law or otherwise."\(^11\) Despite such language, at least some courts have found the Act does not preempt every aspect of enforcement.\(^12\)

---


\(^10\) Donahue, 949 S.W.2d at 755 & n.3; Sheshunoff, 209 S.W.3d at 652-53, 654 ("The Act was passed to expand the enforceability of covenants not to compete," discussing legislative intent to overturn Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex. 1987), and DeSantis v. Wackenhut Corp., 31 Tex. Sup. Ct. J. 616 (July 13, 1988) (substituted on rehearing by 793 S.W.2d 670 (Tex. 1990), following passage of the Act)); Light, 883 S.W.2d at 643 & n. 2 (noting the same intent behind the Texas Business Law Foundation's sponsorship of the legislation). The Act originally consisted of only §§ 15.50 and 15.51.

\(^11\) TEX. BUS. & COMM. CODE § 15.52 (emphasis added); Mann Frankfort, 289 S.W.3d at 854 (Hecht, J., concurring) ("The statute preempts the enforceability requirements, procedures, and remedies afforded by any other law with respect to covenants not to compete."). The Sheshunoff Court noted that the 1993 amendments were almost certainly intended to overrule Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830 (Tex. 1991), which had held that covenants not to compete as part of an at-will employment relationship were unenforceable as a matter of law. Sheshunoff, 209 S.W.3d at 653 n. 5.

\(^12\) See, e.g., EMS USA, Inc. v. Shary, _ S.W.3d _, 2010 WL 724179 at *2 (Tex. App.-Hous. [14 Dist.] 2010, no subs. h.) (stating its prior decisions hold the Act expresses an intention to preempt only "final remedies," and consequently finding common law rules continue to govern temporary injunctions).
The 1993 amendments additionally provided that the Act has retroactive effect, applying to covenants not to compete "entered into before, on, or after" the effective date of September 1, 1993, unless the enforceability of a particular covenant had already been adjudicated prior to that date.\(^{13}\) Legislative history indicates that the 1993 amendments were further designed to clarify that non-compete covenants are "applicable to at-will employment situations."\(^ {14}\)

The referenced "exclusive" criteria for enforceability of a covenant not to compete are set out in Section 15.50(a), and currently read:

"Notwithstanding Section 15.05 of this code [prohibiting restraints of trade], and subject to any applicable provision of Subsection (b) [relating to physicians], 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."\(^{15}\)

The Court has stated that Section 15.50(a)'s "core inquiry" should be whether the covenant contains reasonable "limitations as to time, geographical area, and scope of activity to be restrained."\(^{16}\) Following the Light decision, however, many courts became focused on interpreting the first two requirements in Section 15.50(a).

II. Section 15.50(a)'s two initial inquiries: is there an "otherwise enforceable agreement," and was the covenant "ancillary to or part of" that otherwise

---

\(^{13}\) Section 5 of the 1993 amendatory act.

\(^{14}\) *Sheshunoff*, 209 S.W.3d at 653 & nn. 5, 6; *id.* at 655. *Sheshunoff* observed there are detailed references to "at will" employment contracts in the legislative history to the 1993 amendments, as well as a specific reference to "at will" in Section 15.51(b) itself.

\(^{15}\) TEX. BUS. & COMM. CODE § 15.50(a) (Vernon Supp. 2009) (bracketed references and emphasis added). Subsection 15.50(b) sets out additional criteria applicable to covenants not to compete against licensed physicians. Courts have held that non-solicitation agreements are subject to the same criteria and analysis as covenants not to compete. See, e.g., *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 599-600 (Tex. App.–Amarillo 1995, no writ) ("other than the moniker assigned it," nothing actually differentiates a non-solicitation agreement from a covenant not to compete, and noting that its purpose parallels that of covenants not to compete); *Shoreline Gas, Inc. v. McEachery*, 2008 WL 1747624 at *10 (Tex. App.–Corpus Christi 2008, no pet.) (not design. for publ.) (same).

\(^{16}\) *Sheshunoff*, 209 S.W.3d at 655.
enforceable agreement at the time the agreement was made.

Section 15.50 requires two initial inquiries as to formation of the covenant not to compete: i) is there an otherwise enforceable agreement, ii) to which the covenant was ancillary or a part at the time the otherwise enforceable agreement was made.\textsuperscript{17}

A covenant not to compete, like any other contract, must be supported by an exchange of valuable consideration.\textsuperscript{18} In most situations this entails a bargained-for exchange of promises which consist of either a benefit to the promisor or a detriment to the promisee.\textsuperscript{19} Those simple principles of contract law, however, caused much confusion within courts that applied the statutory requirements to non-compete clauses prior to \textit{Sheshunoff} and \textit{Mann Frankfort}.

A. Requirements for an "otherwise enforceable agreement."

1. Non-binding or illusory promises are not valid consideration.

In the context of at-will employment, long-standing Texas law holds that an employee may quit or be fired at any time, with or without cause.\textsuperscript{20} Therefore, as \textit{Light} and subsequent decisions of the Court explain, any bargained-for promises that depend on the at-will employee

\textsuperscript{17} Mann Frankfort, 289 S.W.3d at 849 (citing Light, 883 S.W.2d at 644).

\textsuperscript{18} Sheshunoff, 209 S.W.3d at 651 ("[A]n agreement not to compete, like any other contract, must be supported by consideration," quoting DeSantis, 793 S.W.2d at 681 n. 6).

\textsuperscript{19} Texas Custom Pools, Inc. v. Clayton, 293 S.W.3d 299, 309 (Tex. App.–El Paso 2009, mand. denied) (citing Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 496 (Tex. 1991)); compare Sheshunoff, 209 S.W.3d at 659 (Jefferson, C.J., concurring) ("Consideration for a promise may be either a performance or a return promise bargained for in a present exchange.").

\textsuperscript{20} Light, 883 S.W.2d at 645 (citing East Line & Red River R. Co. v. Scott, 10 S.W. 99, 102 (Tex. 1888)). As explained in County of Dallas v. Wiland, 216 S.W.3d 344, 347 (Tex. 2007), "For well over a century, the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all" (quoting Montgomery Co. Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998)). See also Massey v. Houston Baptist Univ., 902 S.W.2d 81, 83 (Tex. App.–Hous. [1 Dist.] 1995, writ denied) ("Absent a specific contract term to the contrary, this doctrine allows an employee to quit or be fired without liability on the part of the employer or employee, with or without cause."). Therefore, as \textit{Light} explained, a promise to give an at-will employee a raise is illusory, because the employer is not bound: it could simply terminate the employee prior to having to perform on the illusory promise. \textit{Light}, 883 S.W.2d at 645 n. 6.
having an additional period of employment would fail to bind the promisor and are illusory: either party could escape having to perform its so-called "promise" by terminating the employment relationship prior to when performance is due.\textsuperscript{21}

\textit{Light} cited a "promise of a raise to an at-will employee" as an example of such a non-binding promise. The promise would be illusory because "[u]pon promising a raise in wages, the employer could fire the employee and be under no obligation to perform the promise."\textsuperscript{22}

If such illusory promises are all that support a purported bilateral contract, then there is no contract.\textsuperscript{23} Absent being salvaged as a unilateral contract, it fails for want of consideration.\textsuperscript{24}

2. \textbf{At-will employment does not foreclose the parties from creating an enforceable agreement, so long as the consideration is not dependent on there being a continuing period of employment.}

The fact that the employment is at will, however, does not preclude an at-will employee from forming other contracts with his employer, so long as their exchange of promises is not premised on the employee having a continuing period of employment.\textsuperscript{25} For example, if the parties exchange promises that would bind each of them even if employment were summarily terminated, that would supply the exchange of valuable consideration needed to support the

\begin{itemize}
\item \textsuperscript{21} \textit{Light}, 883 S.W.2d at 644-45 ("Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance," footnote omitted); \textit{id.} at 644 n. 5 ("Any promise made by either employer or employee that depends on an additional period of employment is illusory because it is conditioned upon something that is exclusively within the control of the promisor."). As Justice Hecht noted in his \textit{Mann Frankfort} concurrence, an illusory promise is "in reality no promise at all." 289 S.W.3d at 857.
\item \textsuperscript{22} \textit{Light}, 883 S.W.2d at 644 n. 5. \textit{See also Air America Jet Charter Inc. v. Lawhon}, 93 S.W.3d 441, 444 n. 2 (Tex. App.–Hous. [14 Dist.] 2002, pet. denied) (Brister, C.J.) (same).
\item \textsuperscript{23} \textit{Light}, 883 S.W.2d at 645; \textit{Trilogy Software}, 143 S.W.3d at 460-61 (a promise to provide confidential information and training, in contrast to giving such information and training, would still be illusory and hence unenforceable).
\item \textsuperscript{24} \textit{id.}
\item \textsuperscript{25} \textit{Light}, 883 S.W.2d at 644.
\end{itemize}
In *Light*, United Telespectrum, Inc., required Debbie Light to execute an agreement as a condition to keeping her job. At the time, Light had been employed with United for two years. The parties' written agreement included a covenant not to compete, and expressly stated that Light's employment was terminable "at the will" of either Light or the company.

Any "promises" that presupposed Light would continue in her employment — such as provisions in the agreement which promised Light "a salary and commission for sales" and "a package of employee benefits" — were illusory because United could fire Light before United's performance was due. The Court noted, however, that United's promise to train Light in exchange for her reciprocal promises to give 14 days' notice to terminate employment and to provide an inventory upon termination satisfied the "otherwise enforceable agreement" requirement of Section 15.50(a). Those three mutual promises would not be extinguished simply by the promisor terminating the employment. In short, Debbie Light and United made mutual non-illusory promises which formed an "otherwise enforceable agreement," thereby satisfying Section 15.50(a)'s first requirement.

3. **A unilateral contract involving a non-illusory promise and another party's performance can satisfy the "otherwise enforceable agreement" requirement.**

Dicta in footnote six of *Light* described an additional method of creating an "otherwise enforceable agreement."
enforceable agreement," which later would become a focus of Sheshunoff and Mann Frankfort, and would receive further discussion from the Court in Vanegas v. American Energy Services.\(^{31}\)

The Light Court noted that a promise by one party, and the other party's performance of the condition for that promise, can form a binding unilateral contract.

*Light's* footnote six stated that if "only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance."\(^{32}\) Formation of the unilateral contract is complete by the performance which was called for by the promisor, instead of by making a reciprocal binding promise as in a bilateral contract.\(^{33}\)

The unilateral contract becomes enforceable as to either party *only* when the promisee actually does perform, thereby supplying the reciprocal consideration necessary to form a binding agreement.\(^{34}\) Until such performance occurs, the promisor is still free to revoke the offer.\(^{35}\) Once the offer is "accepted" through return performance, however, the exchange of

\(^{31}\) *Vanegas v. American Energy Svcs.*, 302 S.W.3d 299, 301-03 (Tex. 2009) (hereinafter "*Vanegas*"). As discussed *infra*, however, *Vanegas*' holding did not center on Section 15.50.


\(^{33}\) *Vanegas*, 302 S.W.3d at 302. Acceptance can be by performance or forbearance. *Id.* (citing RICHARD A. LORD, WILLISTON ON CONTRACTS § 1.17 (4th ed. 2007)).

\(^{34}\) *Plano Surgery Center v. New You Weight Management Center*, 265 S.W.3d 496, 503-04 (Tex. App.–Dallas 2008, no pet.); *Johnston*, 261 S.W.3d at 899; BLACK'S LAW DICTIONARY 325 (6th ed. 1990) ("Essence of a 'unilateral contract' is that neither party is bound until the promisee accepts the offer by performing the proposed act.").

\(^{35}\) *Sunshine v. Manos*, 496 S.W.2d 195, 198 (Tex. Civ. App.–Tyler 1973, writ ref'd n.r.e.) ("Prior to that time, it [the unilateral contract] is nudum pactum and may be revoked by the offeror at any time.").
valuable consideration results in a fully formed contract, and the promisor becomes bound.\textsuperscript{36}

Light provided an example of such a unilateral contract which would be central to the Court's subsequent two opinions. The Light Court described a situation in which "an employee promises not to disclose an employer's trade secrets and other proprietary information, if the employer gives the employee such specialized training and information during the employee's employment."\textsuperscript{37} The employer's mere promise to provide the specialized training and information would be illusory, since the employer could terminate the employment prior to performing either promised act. The employee's non-illusory promise not to disclose trade secrets and proprietary information in return for receiving that training and information, however, is treated as an offer; if the employer accepts that offer by providing the training, the employer's performance provides the reciprocal consideration needed to create a unilateral contract. A contract having been formed, the employee would then be bound by its promise not to disclose the employer's proprietary information.\textsuperscript{38}

4. Summary of the "otherwise enforceable agreement" requirement.

In summary, an otherwise enforceable agreement "can emanate from at-will employment so long as the consideration for any promise is not illusory."\textsuperscript{39} Such consideration can take a couple of forms. First, the parties can exchange promises, each being both a promisor and a promisee (a bilateral contract).\textsuperscript{40} Those promises cannot depend on whether the at-will

\textsuperscript{36} Dodson, 776 S.W.2d at 805; Rolls-Royce Indus. Power, Inc. v. Zurn Indus., Inc., 2001 WL 315666 at *2 (Tex. App.–Dallas 2001, no pet.) (not design. for publ.) ("In the context of a unilateral contract, the promisor becomes bound to deliver the promised benefit when the promisee performs the act requested.").

\textsuperscript{37} Light, 883 S.W.2d at 645 n. 6 (emphasis added); Sheshunoff, 209 S.W.3d at 649-50.

\textsuperscript{38} Id.

\textsuperscript{39} Sheshunoff, 209 S.W.3d at 648 (quoting Light, 883 S.W.2d at 645); Mann Frankfort, 289 S.W.3d at 849 (same).

\textsuperscript{40} Vanegas, 302 S.W.3d at 302.
employee's employment continues, since either party would have to option to terminate employment and thereby avoid having to perform its promise.\textsuperscript{41} Or second, one party's promise can serve as an offer, which the other party is deemed to have accepted through its subsequent performance of a condition posed by the offer (a unilateral contract).\textsuperscript{42} The deemed "acceptance," however, must be by performance and not by a mere promise to perform.\textsuperscript{43} The employer's consideration in the "otherwise enforceable agreement" can supply the consideration needed for the promises given by the employee in both the agreement and the covenant.\textsuperscript{44}

**B. Requirements for the covenant to be "ancillary to or part of" an otherwise enforceable agreement at the time the agreement was made.**

Section 15.50(a) dictates, next, that the covenant not to compete be "ancillary to or part of" that otherwise enforceable agreement at the time the agreement was made. To fulfill this requirement, the Court lists two conditions:

i) 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

ii) The covenant not to compete "must be designed to enforce the employee's consideration or return promise" in the otherwise enforceable agreement.\textsuperscript{45}

\textsuperscript{41} *Light*, 883 S.W.2d at 644-45.

\textsuperscript{42} *Light*, 883 S.W.2d at 645 n. 6 ("The fact that the employer was not bound to perform because he could have fired the employee is irrelevant; if he has performed, he has accepted the employee's offer and created a binding unilateral contract." citing E. ALLAN FARNSWORTH, CONTRACTS 76 (1982) (describing the non-illusory promise as a "disguised offer."); *Sheshunoff*, 209 S.W.3d at 659 (Jefferson, C.J., concurring) ("It follows that 'past consideration' is not consideration.").

\textsuperscript{43} *Light*, 883 S.W.2d at 645 n. 6.

\textsuperscript{44} *Sheshunoff*, 209 S.W.3d at 660 n. 4 (Jefferson, C.J., concurring).

\textsuperscript{45} *Sheshunoff*, 209 S.W.3d at 648-49 (emphasis added, quoting *Light*, 883 S.W.2d at 647); \textit{id.} at 659 n. 1 (Jefferson, C.J., concurring); *Mann Frankfort*, 289 S.W.3d at 849; *DeSantis*, 793 S.W.2d at 682 ("Such a restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection."). Justice Wainwright, in his concurrence in *Sheshunoff*, disapproved of these two "court-made requirements" erected by *Light*. \textit{Id.} at 664 (Wainwright, J. concurring) (citing payment of money as adequate consideration).
Unless both conditions are satisfied, the covenant will not be ancillary to an otherwise enforceable agreement, and thus fail as being a "naked restraint of trade." 46

1. The agreement must give rise to an interest worthy of protection by the covenant not to compete.

As to the first condition, the *Light* Court stated the agreement "must give rise to an 'interest worthy of protection'" by a covenant not to compete, 47 and cited business goodwill and confidential or proprietary information as examples of such worthy interests. 48 By comparison, Chief Justice Jefferson notes that an agreement between two strangers in which the non-compete covenant is supported merely by a payment of money would be unenforceable. 49 The Court found that the agreement at issue in *Light* passed muster under this first condition: United made a non-illusory promise to provide training to Light, which the Court noted "might involve confidential or proprietary information" worthy of protection. 50

The covenant in *Light* failed, however, under the second condition. Debbie Light did not reciprocally promise that she would not disclose confidential information shown to her, and

---

46 Mann Frankfort, 289 S.W.3d at 849; *Light*, 883 S.W.2d at 647; *Houston Solvents and Chemicals Co., Inc.* v. *Montealegre*, 1999 WL 219366 at *3 n. 5 (Tex. App.–Hous. (14 Dist.) 1999, no pet.) (not design.for publ.) (citing *Light*).

47 *Light*, 883 S.W.2d at 647 (quoting *DeSantis*, 793 S.W.2d at 682); *Sheshunoff*, 209 S.W.3d at 649 (quoting same); *Mann Frankfort*, 289 S.W.2d at 854 n. 10.

48 *Light*, 883 S.W.2d at 647 (citing *DeSantis*); *Mann Frankfort*, 289 S.W.2d at 854 n. 10 ("Examples of legitimate, protectable interests include business goodwill, trade secrets, and other confidential or proprietary information."); *Marsh USA Inc.* v. *Cook*, 287 S.W.3d 378, 381 (Tex. App.–Dallas 2009, pet. filed) ("The most common types of consideration given in return for a covenant not to compete are a company's trade secrets or other confidential information."). *DeSantis* relied on the Restatement (Second) of Contracts § 188 comments b, g (1981), which provide multiple illustrations of these examples.

49 *Sheshunoff*, 209 S.W.3d at 658 (Jefferson, C.J., concurring) (citing the Restatement (Second) of Contracts § 187 cmt. b). Justice Wainwright, in his concurrence, wrote that payment of money should constitute adequate consideration for a confidentiality agreement, and would dispense with *Light*'s "court-made requirements" for a covenant to be ancillary or part of a confidentiality agreement. *Id.* at 664 (Wainwright, J., concurring).

50 *Light*, 883 S.W.2d at 647.
therefore the covenant was not designed to enforce any such promise.\textsuperscript{51} Moreover, the covenant was not designed to enforce either of the two non-illusory promises that Light did make under her contract — to provide 14 days' notice of termination, and to provide an inventory upon termination.\textsuperscript{52} Lacking such a nexus, the covenant was not "ancillary to or a part of" the otherwise enforceable agreement between the parties, and was therefore unenforceable.\textsuperscript{53}

C. Time, geographic, and scope of activity limitations.

Section 15.50(a) of the Texas Business & Commerce Code further dictates that a non-compete clause which satisfies the statute's first two areas of inquiry is enforceable only "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." While it is common for non-compete clauses to include an acknowledgment by the employee that the limitations imposed are reasonable, the \textit{Sheshunoff} Court stated that such language is not in itself outcome determinative.\textsuperscript{54}

As Justice Hecht pointed out in his concurrence in \textit{Mann Frankfort}, "Texas law has long been that unreasonable restrictions do not void a covenant not to compete but limit its enforcement."\textsuperscript{55} If the limitations imposed by the covenant are overbroad in one of the three respects, Section 15.51(c) provides that "the court shall reform the covenant to the extent necessary to make the constraints reasonable and no greater than needed to protect the promisee's

\textsuperscript{51} \textit{Light}, 883 S.W.2d at 647-48 & nn. 14, 15.
\textsuperscript{52} \textit{Light}, 883 S.W.2d at 647-48 & n. 15.
\textsuperscript{53} \textit{Light}, 883 S.W.2d at 648.
\textsuperscript{54} \textit{Sheshunoff}, 209 S.W.3d at 657.
\textsuperscript{55} \textit{Mann Frankfort}, 289 S.W.3d at 856 & n.15.
goodwill or other business interest.\textsuperscript{56} (Prior to the 1993 amendments, reformation on overly broad restrictions was available at the "request by the promisee," which some courts read to mean reformation was otherwise waived.)\textsuperscript{57} The statute adds that if the clause is reformed, the promisee's remedy is limited to injunctive relief to enforce the clause as reformed, and it may not be awarded "damages for a breach of the covenant before its reformation."\textsuperscript{58}

Because of the virtually limitless combinations of work situations and industries, it is difficult to set out rules regarding what a court will determine to be reasonable in a particular fact situation. Two to five years has "repeatedly" been held as a reasonable duration for the post-employment period of noncompetition.\textsuperscript{59} Even then, however, Section 15.50(a) requires the chosen time limitation to be no greater than necessary to protect the employer's interest in protecting its goodwill or other business interest. Therefore, in an industry in which the shelf-life for trade secrets or other confidential data is short, a five-year time limitation might be reformed to a shorter duration.

A few guidelines have formed as to the geographic and scope-of-activity restraints as well. In general, a non-compete clause must not restrain the employee's activities "into a territory into which his former work has not taken him or given him the opportunity to enjoy undue advantages in later competition with his employer."\textsuperscript{60} A geographic limitation stands a better chance of being upheld if the employee actually worked in that territory during the term of

\textsuperscript{56} \textsc{Tex. Bus. & Comm. Code} § 15.51(c) (Vernon 2002).

\textsuperscript{57} \textit{See}, \textit{e.g.}, \textit{Gomez v. Zamora}, 814 S.W.2d 114, 119 (Tex. App.-Corpus Christi 1991, no writ) (dissolving injunction, and holding that although the trial court reformed overly broad geographic restriction, the promisee's failure to explicitly request reformation constituted a waiver).

\textsuperscript{58} \textsc{Tex. Bus. & Comm. Code} § 15.51(c) (Vernon 2002).


\textsuperscript{60} \textit{Peat Marwick Main & Co. v. Haass}, 818 S.W.2d 381, 387 (Tex. 1991) (quoting \textit{Wisconsin Ice & Coal Co. v. Lueth}, 213 Wis. 42, 250 N.W. 819, 820 (1933)).
his employment.\textsuperscript{61} Flipped around, if an employee is restrained from working anywhere in Texas (even though he worked only in one particular region within the State), the limitation will be found overly broad and therefore require reformation.\textsuperscript{62} However, a broad geographic limitation – including in one decision all of the United States or Canada – might survive if the employee's work territory covered that entire region, and the broad geographic limitation is tempered by narrowly-tailored limitations in other respects.\textsuperscript{63}

Likewise, the covenant's scope-of-activity limitation must bear some relation to the work activities the employee personally was engaged in with his prior employer, and be no more broadly framed than necessary to protect the employer's goodwill or other business interests. Again, it ties back into the Supreme Court's guideline whether, without the scope-of-activity limitation, the employee would be given undue advantages in later competition with his former employer.\textsuperscript{64} The Texas Supreme Court has held that industry-wide exclusions are unreasonable.\textsuperscript{65} In connection with Section 15.50(a)'s reference to protecting the "goodwill" of the employer, it notes that the "fundamental legitimate business interest that may be protected by

\textsuperscript{61} Justin Belt Co., Inc. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973) (covenant must not impose geographic limitations greater than territory within which the employee worked during his employment); Stone v. Griffin Comm'n & Sec. Svcs., Inc., 53 S.W.3d 687, 695 (Tex. App.-Tyler 2001, no pet.) ("Texas courts have generally held that a geographical limitation imposed on the employee which consists of the territory within which the employee worked during his employment is a reasonable geographical restriction.").

\textsuperscript{62} Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 793-94 (Tex. App.-Hous. [1st Dist.] 2001, no pet.) ("A covenant not to compete with a broad geographical scope is unenforceable, particularly when no evidence establishes the employee actually worked in all areas covered by the covenant."); Justin Belt Co., Inc. v. Yost, 502 S.W.2d at 685.

\textsuperscript{63} See, e.g., Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114, 118-19 (Tex. App.-Hous. [14 Dist.] 1999, no pet.) (although employee was restrained from working in the United States or Canada, the restriction pertained only to his work for 20 competing oil-and-gas consulting firms for a six-month period, and did not include oil and gas companies).

\textsuperscript{64} Peat Marwick, 818 S.W.2d at 387.

\textsuperscript{65} Peat Marwick, 818 S.W.2d at 386-88; John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 86 (Tex. App.-Hous. [14 Dist.] 1996, writ denied).
such covenants is in preventing employees or departing partners from using the business contacts and rapport established during the relationship of representing the firm to take the firm's customers with him" (but again only as to clients with which the employee actually worked).\textsuperscript{66}

III. \textit{Sheshunoff}'s divergence from \textit{Light}: a unilateral contract can satisfy Section 15.50(a), despite having been unenforceable "at the time the agreement was made."

A. \textit{Light}'s misplaced modifier in its reading of Section 15.50(a).

Prior to \textit{Sheshunoff}, one riddle for both courts and employers was determining which of two phrases in Section 15.50(a) the Legislature intended to be modified by the clause "at the time the agreement is made." The statute could be parsed in either of two ways:\textsuperscript{67}

<table>
<thead>
<tr>
<th>The statute requires that the agreement must be enforceable at the same time the parties enter into it:</th>
<th>Or</th>
<th>The statute requires only that the covenant be ancillary to the agreement at the same time the parties enter into it:</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;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&quot;</td>
<td>&quot;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&quot;</td>
<td></td>
</tr>
</tbody>
</table>

The \textit{Light} Court chose the interpretation in the left-hand box, meaning that Section 15.50(a) would require a contract to be immediately enforceable at the same time the parties entered into it. Under that interpretation, \textit{Light} observed in dicta that a unilateral contract could not satisfy Section 15.50(a), because a unilateral contract by definition does not come into existence until the promisee "accepts" through subsequent performance:

"But such unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an 'otherwise

\textsuperscript{66} Peat Marwick, 818 S.W.2d at 387.

\textsuperscript{67} Sheshunoff, 209 S.W.3d at 651 ("Simply reading the text [of Section 15.50(a)], the clause 'at the time the agreement is made' can modify either 'otherwise enforceable agreement' or 'ancillary to or part of.' No amount of pure textual analysis can tell us unequivocally which preceding clause is modified.").
enforceable agreement at the time the agreement is made' as required by § 15.50.°

Multiple lower courts followed Light's dicta, and declined to enforce non-compete covenants even when the employer performed the conditions of its at-will employee's offer, sharing confidential information in return for the employee's promise to maintain confidentiality.°

B. The Sheshunoff decision corrected Light's misreading of the statute.

The Court modified Light in its seminal Sheshunoff decision. The Sheshunoff Court agreed with Light's recitation of "basic contract law" regarding formation of a unilateral contract, but in an important divergence from Light, held that such a contract can satisfy Section 15.50(a)'s requirements despite the fact that the contract was not enforceable at the same time the agreement was made.°

In Sheshunoff, Alex Sheshunoff Management Services, L.P. (ASM) promoted an existing employee, Kenneth Johnson, to be the director of ASM's client and prospective client relationships. A few months after the promotion, ASM presented Johnson with an at-will

° Light, 883 S.W.2d at 645 n. 6 (emphasis added). The Court held that Light and United had such a unilateral contract. It cited United's illusory promise to pay Light for her work. 883 S.W.2d at 645 n. 6. The promise was illusory because either party could have terminated employment before any work was performed and any payment was due. However, since United did pay Light for her services, Light's offer and United's performance formed a unilateral contract.

° See, e.g., Trilogy Software, 143 S.W.3d at 461 ("It is undisputed that Trilogy provided the information and training not 'at the time the agreement was made,' but only at a later time."); Tom James, 109 S.W.3d at 886 ("Under section 15.50, the point in time relevant to this determination 'is the moment the agreement is made ....'" emphasis original, quoting CRC-Evans Pipeline Int'l, Inc. v. Myers, 927 S.W.2d 259, 263 (Tex. App.–Hous. [1st Dist.] 1996, no writ)); Anderson Chemical, 66 S.W.3d at 438 ("A promise not to disclose an employee's proprietary information which is later accepted by the employer's performance in providing that information to the employee is a unilateral contract that cannot support a covenant not to compete because it is not otherwise enforceable at the time it is made."); Houston Solvents, 1999 WL 219366 at *4 ("Whether any training was actually provided after the agreements were entered is not material to this determination because a binding obligation to provide it was not part of the otherwise enforceable agreement at the time the agreement was made.").

° Sheshunoff, 209 S.W.3d at 650-51 ("Upon further review of the Act and its history, however, we disagree with footnote six [of Light] insofar as it precludes a unilateral contract made enforceable by performance from ever complying with the Act because it was not enforceable at the time it was made."); Mann Frankfort, 289 at 849-50 (reconfirming same).
employment agreement which contained a non-compete covenant, which Johnson signed. The agreement contained a promise by Johnson to maintain the confidentiality of any confidential or other proprietary information ASM provided to him (the deemed "offer"), and illusory promises by ASM to provide Johnson special training regarding the company's business methods and access to certain of ASM's confidential and proprietary information (the performance of which would constitute acceptance). There was no dispute that Johnson received confidential information and special training after the agreement was signed.

In short, the underlying facts tracked Light's footnote six example of a unilateral contract to which the non-compete covenant would be ancillary or a part. Under the terms of footnote six of Light, the non-compete covenant would be unenforceable even if ASM performed.

This time, however, the Court found that the interpretation depicted in the right-hand box was the correct reading of the statute: the non-compete covenant need only be ancillary to or a part of the parties' agreement when the agreement was made, even if that agreement did not become enforceable until a later time through performance of the illusory promise. Sheshunoff held:

"Light stated that the agreement must be enforceable at the time the agreement is made, and therefore concluded that 'at the time the agreement is made' must modify 'otherwise enforceable agreement.' We now conclude, contrary to Light, that the covenant need only be 'ancillary to or part of' the agreement at the time the agreement is made. Accordingly, a unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the Act."
The Court differentiated a unilateral contract (in which both parties offer "new" consideration) from a contract that is supported only by past performance or past consideration (which does not suffice). As in other contractual contexts, prior access to confidential information and prior maintenance of confidentiality would not be competent consideration for purposes of Section 15.50(a). Therefore, an employer cannot impose a stand-alone covenant not to compete on an existing employee, even if the employer had previously provided confidential information to that employee; instead, there must be a new exchange of mutual consideration forming a new contract, to which the non-compete covenant is affixed or a part. Moreover, there must be actual performance in response to the employee's offer; an employer's mere promise to provide confidential information would still be illusory and not suffice until performed.

C. The Sheshunoff Court's reasons for modifying Light.

The Sheshunoff Court outlined several reasons for its partial turnaround of Light. First, it

---

unilateral contract can never meet the requirements of the Act because such a contract is not immediately enforceable when made."). Three concurring justices, however, disagreed with the portion of the Court's discussion which analyzes which phrase is modified by "at the time the agreement is made," writing that the Act's grammatical structure does not support the Court's reading. Those three justices concluded the phrase either modifies "otherwise enforceable agreement" or it modifies both clauses, "but in no event" does it modify the "ancillary to or part of" clause alone.  

---

75 Light, 883 S.W.2d at 645 n. 6 (cannot be "rendered past consideration," citing Farnsworth, supra, at 50-59); Roark, 813 S.W.2d at 496 (must be present, not past); Trilogy Software, 143 S.W.3d at 463 (under classical law of contracts, past consideration is not good consideration); Tim W. Koerner & Ass., Inc. v. Aspen Labs, Inc., 492 F.Supp. 294, 303 (S.D. Tex. 1980), aff'd, 683 F.2d 416 (5th Cir. 1982) (already incurred detriment is not consideration because it neither induced nor was bargained for in exchange for a promise).

76 Sheshunoff, 209 S.W.3d at 651 (citing Martin v. Credit Prot. Ass'n, Inc., 793 S.W.2d 667, 669 (Tex. 1990)); id. at 659 (Jefferson, C.J., concurring) ("past consideration" is not consideration).

77 The employer's mere promise to perform would still be illusory, and would not be a valid acceptance of the employee's offer: the employer could still terminate the at-will employment, and avoid performing at all. That changes when the employer actually does perform, completing the exchange of valuable consideration.  

---
conducted a detailed analysis of the legislative history underlying Section 15.50(a)'s current language, including in particular the 1993 amendments which added "at the time the agreement is made" to the statute. Because the statute's wording does not lend itself to precise textual analysis, the Sheshunoff Court traced the several iterations of the statute from the original bill through the passage of the 1993 amendments to glean the legislative intent. 78

1. The 1993 statutory amendments were intended to expand enforceability of clauses.

The sequence of changes show that the 1993 amendments' inclusion of "at the time the agreement was made" was intended simply to "maintain the rule … that a covenant could be signed after the date that employment began so long as the new agreement was supported by independent consideration," and did not require the agreement be enforceable the instant it is made. 79 Moreover, a contrary interpretation would narrow enforcement of covenants. The legislative history, however, shows the Legislature intended the 1993 amendments to expand the enforceability of non-compete covenants, partly in reaction to Supreme Court decisions that had restricted enforcement. 80

78 Sheshunoff, 209 S.W.3d at 651-52. Citing the "indefiniteness of the phrase 'at the time the agreement is made,'" and that it "suggests two conflicting interpretations on the central issue," the Court gleaned the legislative history to determine the phrase's fair and ordinary meaning. Id.

79 Sheshunoff, 209 S.W.3d at 655. Prior to the 1993 amendments, Section 15.50 provided in part that a non-compete covenant is enforceable to the extent that it "(1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; …." The 1993 amendments originally changed the text of that subpart to read: "is ancillary to an otherwise valid transaction or relationship but, if the covenant not to compete is executed on a date other than the date on which the transaction occurs or the relationship begins, such covenant must be supported by independent valuable consideration." That portion of the statute finally was simplified to the current wording "is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made." The introduction of the new phrase "at the time the agreement is made" retains the same notion that the agreement can be signed on a date other than when the employment relationship began – a concept that perhaps was made clearer in the earlier variations of the 1993 amendment – provided it is supported by new consideration in an enforceable agreement. Id. at 654-55.

80 See supra, footnotes 8-10.
2. Pragmatic reasons also shaped the Sheshunoff Court's decision.

The Sheshunoff Court also noted more pragmatic reasons. In a typical at-will employment arrangement, the employer's promise to provide confidential information or training is generally always prospective, and would evaporate if employment were terminated.\(^8\) The Court noted that if Light's interpretation of Section 15.50(a) in footnote six were correct, then most non-compete covenants would be unenforceable, despite the Legislature's efforts to expand enforceability in its 1993 amendments.\(^2\) (As one justice incredulously noted at oral argument, neither past consideration nor future consideration would suffice under footnote six's reasoning.)

Some lower courts had tried to finesse the problem, and stated that confidential information "provided close to the time that the agreement was made" could be sufficiently contemporaneous with the contract to make it non-illusory.\(^3\) However, even those decisions would be hard to reconcile with footnote six of Light: even if an employer quickly performed its promise to provide confidential information to an at-will employee, the promise itself would still have been illusory at the time it was made: the employer could just as quickly have terminated the at-will employee, and avoided performance. Sheshunoff cut through such concerns, concluding that there is "no sound reason why a unilateral contract made enforceable by

---

\(^8\) Sheshunoff, 209 S.W.3d at 655.

\(^2\) Sheshunoff, 209 S.W.3d at 655 ("most covenants not to compete executed by [at-will] employees" would be unenforceable). Only a peculiar agreement where the employer promises to provide confidential information or training even if the employee is terminated, would be covered by the Act under the Court's earlier ruling. As stated above, Light presented such an unusual contract: United was required to provide "initial ... specialized training" regardless whether Light "had resigned or been fired after this agreement was executed." Light, 883 S.W.2d at 646.

\(^3\) See, e.g., Wright, 137 S.W.3d at 297 (employer made confidential information available both before and after the agreement, satisfying Section 15.50(a)); TMC Worldwide, 178 S.W.3d at 38 (pre-Sheshunoff, discussing whether confidential information was provided "close to the time" the agreement was made, and finding that an exchange one year after the contract was not sufficiently contemporaneous); Guy Carpenter & Co. Inc. v. Provenzale, 334 F.3d 459, 466 (5th Cir. 2003) (Light does not "pin the enforceability of non-solicitation agreements on whether an employer discloses confidential information at the time the employee signs an employment contract").
performance should fail under the Act."  

D. To ensure enforcement of the non-compete covenant, an employer's performance should occur within a reasonable time after the agreement is made.

In a concurrence by Chief Justice Jefferson, three justices agreed that the statute does not require an instantaneous exchange of valuable consideration, but stated they would hold that "the employer's exchange of consideration must occur within a reasonable time after the agreement is made" — similar to the interpretation some courts of appeals had previously applied.  

Although the facts of Sheshunoff itself did not present the issue, Chief Justice Jefferson voiced the concern that the Court's ruling would permit an employer to enforce a non-compete covenant "months or even years after the employee signed it" so long as it eventually fulfilled its side of the bargain. He noted that absent a fixed time for performance, the law necessarily implies that parties will perform within a reasonable time. If the employer fails to perform (e.g., provide confidential information) within a reasonable time, the Chief Justice argued that such performance ceases to be part of the same "transaction" which created the unilateral contract, is no longer the performance for which the employee had bargained when it made its offer, and no longer can be considered a valid inducement for the employee to have entered into the agreement.

However, despite the fact that the majority in Sheshunoff did not explicitly require performance of the unilateral contract within a "reasonable" time, its responses to the Chief

---

84 Sheshunoff, 209 S.W.3d at 651.
85 Sheshunoff, 209 S.W.3d at 657-58, 661 (Jefferson, C.J., concurring).
86 Sheshunoff, 209 S.W.3d at 657 (Jefferson, C.J., concurring).
87 Id. at 661-62. He noted the Court's open-ended language would encompass an employer who never intended to provide confidential information, but then quickly performs that illusory promise upon learning the employee intends to work for a competitor in order to block that employment. Id. at 662.
Justice's comments suggest that it would decline to enforce a covenant if an employer were to unduly delay providing confidential information to its at-will employee. The majority found it unlikely that a "rational company would rush to disclose valuable trade secrets as a departing employee walks out the door," but if such were to occur, it stated a court could: i) determine that the employer's belated performance was "'unreasonable' and unnecessary to protect the employer's business interests" under section 15.50(a), thereby defeating Light's requirements for a covenant to be "ancillary to or a part of" an otherwise enforceable agreement, and/or ii) conclude that the employer's "unclean hands in such circumstances renders it ineligible for injunctive relief" under Section 15.51, the primary exclusive remedy permitted by the Act.\footnote{Id. at 655-56 n. 8. The Chief Justice responded that the court's equitable power would apply to Section 15.50(a)'s requirement that the covenant be reasonable with respect to time, geographical, and scope of activity limitations — not to the issue of a delay in performance, which relates to contract formation itself. Id. at 663.}

In short, although the majority in Sheshunoff did not adopt an explicit requirement that performance occur within a reasonable time, as the Chief Justice would require, the remedies the majority outlined under the Act suggest that an employer faces a de facto deadline under either scenario. Although a unilateral contract can salvage the "otherwise enforceable agreement" requirement, the employer likely needs to perform within a reasonable time to ensure that its non-compete covenant satisfies the ancillary requirement as well.

IV. Further clarification under Mann Frankfort: an employer's implied promise to disclose confidential information to its at-will employee supplied consideration necessary to enforce the non-compete covenant.

A. Mann Frankfort's ruling.

The Supreme Court expanded on its Sheshunoff decision in Mann Frankfort. In Sheshunoff, the employment agreement contained an express promise by the employer to provide training and access to confidential information (which the employer subsequently provided), and
a reciprocal express promise by the at-will employee to maintain the confidentiality of that information.89

In contrast, the employer in Mann Frankfort did not expressly promise to provide its at-will employee with access to confidential information.90 The Court held, however, that the "nature of the work" for which the employee was hired would reasonably require Mann Frankfort to provide the employee with confidential information to accomplish his contemplated job duties.91 Under those circumstances, the Court determined that Mann Frankfort impliedly promised to provide confidential information to the employee, and stated:

"We hold 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."92

Mann Frankfort's performed its implied promise to supply confidential information to the employee, thereby binding the employee to perform his express promise to such information confidential. Since the other requirements of Section 15.50(a) were satisfied, the Court rendered judgment that the parties' non-compete covenant was enforceable.

Mann Frankfort was an accounting and consulting firm. The employee, Brendan Fielding, was a certified public accountant employed as the senior manager in Mann Frankfort's

89 The Sheshunoff parties tracked Light's description of the types of interests "worthy of protection" by an ancillary covenant not to compete -- an employer's confidential or other proprietary information -- as well as its footnote example of a unilateral contract. Light, 883 S.W.2d at 645 n. 6 & 647.

90 Mann Frankfort, 289 S.W.3d at 850.

91 Mann Frankfort, 289 S.W.3d at 850. The Court abbreviated Mann Frankfort Stein & Lipp Advisors, Inc. and two related employers' names to "Mann Frankfort."

92 Mann Frankfort, 289 S.W.3d at 845-46; see also id. at 850 ("When the nature of the work the employee is hired to perform requires confidential information to be provided for the work to be performed by the employee, the employer impliedly promises confidential information will be provided.").
Tax Department. To complete his job responsibilities of completing tax returns and other accounting duties for clients, Fielding would necessarily obtain the identity and confidential tax and financial information of Mann Frankfort's clients. The Court could reasonably infer that Mann Frankfort promised to provide confidential information to Fielding despite the absence of an express recitation to that effect.

Similarly, the Court stated that Fielding could not have acted on his own express promise not to disclose the firm's confidential information unless he first obtained access to such information: Fielding's promise "meant nothing without a correlative commitment by Mann Frankfort" to provide Fielding that material. As in similar situations in which courts have found the existence of implied contractual terms, the Court stated that if a party "makes an express promise that cannot reasonably be performed absent some type of performance by the other party, courts may imply a return promise so the dealings of the parties can be construed to mean something rather than nothing at all."

B. Willingness to find an implied promise: Light vs. Mann Frankfort.

In contrast to the Mann Frankfort Court's willingness to find an implied promise by the employer to supply confidential information, the Light Court implicitly was unwilling to find an implied promise by an employee to maintain confidentiality of the proprietary information she

---

93 *Mann Frankfort*, 289 S.W.3d at 846, 851.

94 *Mann Frankfort*, 289 S.W.3d at 851. Fielding obtained access to such confidential information by the second day of his employment. Moreover, he had a prior period of employment with the same company, and therefore, upon being rehired, knew he would be given confidential information. *Id.*

95 *Mann Frankfort*, 289 S.W.3d at 850-51.

96 *Mann Frankfort*, 289 S.W.3d at 851.

97 *Mann Frankfort*, 289 S.W.3d at 850; *id.* at 851 ("In other words, when it is clear that performance expressly promised by one party is such that it cannot be accomplished until a second party has first performed, the law will deem the second party to have impliedly promised to perform the necessary action.").
had been promised, and in any event did not address the topic. Instead, the Light Court cited the absence of that express promise by Light as a basis for finding United's non-compete covenant unenforceable.98

1. The Light Court's apparent unwillingness to find an implied promise.

The Light Court reached that conclusion despite finding that United made an enforceable express promise to provide Light initial specialized training that could involve confidential or proprietary information.99 Light's contract also recited that Light would acquire confidential customer-related information "that could damage [United] if it were to come into the possession of [United's] competition in the service area" — strongly suggesting a mutual intent that Light not disclose the confidential information to others. The common law duty of nondisclosure also would arguably bind Light to maintain confidentiality of protected information she received.100

The Sheshunoff Court, however, stated that it did not disturb Light's holding that the covenant between United and Light was unenforceable, again citing the fact that Light made no promise not to disclose confidential information.101 The Mann Frankfort gave no indication it changed that conclusion.

98 Light, 883 S.W.2d at 647-48 & n. 15.

99 Id. at 646, 647; see also id. at 645 n. 8 (in addition to the express promise, the contract stated the parties agreed that Light "will acquire confidential customer-related information that could damage [United] if it were to come into the possession of [United's] competition in the service area"). The Court nevertheless cited the absence of a reciprocal promise by Light not to disclose such confidential information as a basis for determining that the non-compete covenant was not ancillary or a part of the otherwise enforceable agreement.

100 See, e.g., T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc., 965 S.W.2d 18, 21-22 (Tex. App.-Hous. [1 Dist.] 1998, pet. dismissed) ("Certain duties, apart from any written contract, arise upon the formation of an employment relationship. One of those duties forbids an employee from using confidential or proprietary information acquired during the relationship in a manner adverse to the employer. This obligation survives termination of employment," citation omitted.); Tom James, 109 S.W.2d at 888 (recognizing duty, even if covenant not to compete is unenforceable); Fox v. Tropical Warehouses, Inc., 121 S.W.3d 853, 858 (Tex. App. – Fort Worth 2003, no pet.) (duty exists even in the absence of a nondisclosure agreement).

101 Sheshunoff, 209 S.W.3d at 649.
2. Inquiry on whether the nature of the employment would require access to confidential information.

A distinction between the Court's willingness to imply a promise in one situation (the employer in Mann Frankfort) but not the other (the employee in Light) centers on the certainty that confidential information would be required for the respective jobs. The Mann Frankfort Court noted that contractual terms are implied "'not because they are just or reasonable, but rather for the reason that the parties must have intended them and have only failed to express them … or because they are necessary to give business efficacy to the contract as written.'" 102

In Light, it was unclear to what extent Light's day-to-day job functions, either before or after her employment agreement was executed, required use of confidential information, if at all. Despite the parties' recitations that Light would receive confidential information, the only enforceable promise United made was to train her; the Light Court stated that such training "might" involve confidential or proprietary information, but its equivocal language points just as easily to an opposite conclusion. 103

In contrast, it was indisputable in Mann Frankfort that the function of a certified public accountant necessitates access to and use of confidential information, and the employee had had a prior period of employment with the same firm in which he obtained and used such confidential information to perform the duties for which he was hired. 104 In short, Mann Frankfort presented a bright-line situation of a certified public accountant whose job duties would "reasonably require" access to his employer's confidential client information, reaching the threshold of an implied promise. Light did not.

102 Mann Frankfort, 289 S.W.3d at 850 (quoting 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.27 (rev. ed. 1995).

103 Light, 883 S.W.2d at 647.

104 Mann Frankfort, 289 S.W.3d at 851.
Mann Frankfort also found that the firm's implied promise and its actual provision of the confidential information together satisfied the first subpart of Section 15.50(a)'s test for the covenant be "ancillary to or a part of" the otherwise enforceable agreement. Fielding's reciprocal express promise not to disclose such information (which was missing in Light) satisfied the second requirement.105

3. The Court's discussion of implied terms in contracts.

The Mann Frankfort decision leaves open that courts may find the existence of other types of implied promises that can satisfy the requirements of Section 15.50(a), so long as mutual assent can reasonably be inferred from the particular facts of the case. Mann Frankfort's section on "Implied Promise" recited long-standing principles which define when a court can appropriately find that parties intended an implied contractual term.106

Based on those principles, it was not a difficult reach for the Court in the "Application" section of its opinion to find that the firm impliedly promised to give Fielding access to the tax and other financial information of the firm's clients, and that he understood such access to be necessary to perform his work as Senior Manager of the firm's Tax Department.107 There appears to be no reason why the line of authority underlying Mann Frankfort cannot be extended to other implied promises, if the facts support that the parties must have intended those terms.

4. The Vanegas Court's further clarification that an illusory promise can serve as the initiating offer in the formation of a unilateral contract.

The Court's decision in Vanegas, though it did not involve a covenant not to compete nor analyze Section 15.50(a) in any detail, discussed both Light and Sheshunoff at length. It relied

---

105 Mann Frankfort, 289 S.W.3d at 852.
106 Mann Frankfort, 289 S.W.3d at 850-51.
107 Mann Frankfort, 289 S.W.3d at 851-52.
on unilateral contract principles in reaching its result, and clarified Light's footnote six reference to a "non-illusory promise" in a unilateral contract.

In Vanegas, the petitioners were seven at-will employees of American Energy Services (AES). The employees alleged that they voiced concerns to AES's vice president about the continued viability of the company at a meeting in 1997, and that in an effort to convince the employees to stay, the officer orally promised that any employees remaining with AES at the time of any sale or merger of the company would receive 5% of the value of the sale or merger. AES was acquired in 2001, and the seven remaining employees demanded their proceeds. In a twist, the employer alleged that the agreement was illusory under Light's analysis and therefore unenforceable. The trial court agreed and granted summary judgment for AES.

The court of appeals affirmed, and held under Light that the alleged unilateral contract at issue in Vanegas failed because it was not supported by at least one non-illusory promise. Focusing on footnote six of Light, the lower court stated, "[a] unilateral contract may be formed when one of the parties makes only an illusory promise but the other party makes a non-illusory promise. The non-illusory promise can serve as the offer for a unilateral contract, which the promisor who made the illusory promise can accept by performance." The Supreme Court reversed. While the Vanegas Court agreed with the quoted statement from the court of appeals, it disagreed with how it had been applied. Vanegas clarified:

"Both Sheshunoff and Light concerned bilateral contracts in which employers made promises in exchange for employees' promises not to compete with their companies after termination. … 'The court of appeals' explanation of these cases — describing an exchange of promises where one party makes an illusory promise and the other a

\[108\] Vanegas, 302 S.W.3d at 300.
\[109\] Vanegas, 302 S.W.3d at 301.
non-illusory promise — describes the attempted formation of a bilateral contract, not a unilateral contract. Our discussion in footnote six of Light was confined to situations where a non-illusory promise could salvage an otherwise ineffective bilateral contract by transforming it into a unilateral contract, enforceable upon performance. This was not a blanket pronouncement about unilateral contracts in general.\textsuperscript{111}

Light's statement that a "non-illusory promise" can serve as an offer in a unilateral contract suggested to the Eastland Court of Appeals that an illusory promise would not. The Vanegas Court clarified that it is irrelevant whether the promise was illusory at the time it was made; "[a]lmost all unilateral contracts begin as illusory promises," and what matters is whether "the promise became enforceable by the time of the breach" through the other party's performance.\textsuperscript{112} In Vanegas, AES or any of the at-will employees could have terminated the employment prior to the time of AES' acquisition. Since the seven employees accepted AES' offer by remaining employed for the requested period, however, their performance constituted acceptance of AES' offer and consideration. AES' illusory promise to pay them 5% of the value of the acquisition then became binding.\textsuperscript{113}

As the Court noted in Sheshunoff, "the typical arrangement" in at-will employment relationships would be similar to the non-compete covenant between Sheshunoff and Johnson, in which "the employer's promise is prospective and becomes enforceable only after the employer provides such confidential information or training and a unilateral contract results."\textsuperscript{114} Under Vanegas' explanation, that typical arrangement begins as an

\textsuperscript{111} Vanegas, 302 S.W.3d at 302-03 (emphasis in original, and citation and footnote omitted).
\textsuperscript{112} Vanegas, 302 S.W.3d at 303. The Court cited a classic textbook example "I will pay you $50 if you paint my house." The illusory promise/offer can be withdrawn at any point prior to performance, but if performed prior to any withdrawal, that "acceptance" of the offer makes the promise to pay $50 binding. \textit{Id}.
\textsuperscript{113} Vanegas, 302 S.W.3d at 304.
\textsuperscript{114} Sheshunoff, 209 S.W.3d at 655.
"attempted" but "ineffective" bilateral contract. The non-illusory promise or disguised offer can "salvage" the ineffective bilateral contract once the other party accepts the offer through its performance, transforming the ineffective bilateral agreement into a binding unilateral contract.\footnote{Vanegas, 302 S.W.3d at 302-03.}

V. Conclusion.

As noted by the American Law Institute, the trend in Texas following Sheshunoff and Mann Frankfort is toward enforceability.\footnote{Restatement (Third) of Employment Law § 8.06 at Reporters' Note e (Tent. Draft No. 4, 2009). As set out in the tentative draft, the ALI states: "Continuing employment of an at-will employee is sufficient consideration to support the enforcement of an otherwise valid restrictive covenant. Thus, parties may agree to enforceable restrictive covenants after the beginning of an employment relationship, so long as the employee has reasonable notice of the new covenant." Under the illustration, the ALI provides an example of a reasonable non-compete covenant signed two years into the at-will employee's employment, after which the employer shares competitively sensitive confidential information; it notes that the agreement would be enforceable. \textit{Id.} at § 8.06 & illustration 11.} Light's description of the requirements for Section 15.50(a)'s two initial inquiries — i) whether there is an "otherwise enforceable agreement," ii) to which the covenant was ancillary or a part at the time the otherwise enforceable agreement was made\footnote{Mann Frankfort, 289 S.W.3d at 849 (citing Light, 883 S.W.2d at 644).} — continue to govern, but with the Sheshunoff's and Mann Frankfort's clarifications. Sheshunoff, departing from footnote six of Light, clarifies that the non-compete covenant need only be ancillary to or a part of the agreement at the time it was made, even if the agreement does not become enforceable until a subsequent time as a unilateral contract.

Mann Frankfort states that if the nature of the work for which the employee is hired will reasonably require the employer to provide the confidential information to the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information even in the absence of an express recitation to that
effect; provided the other requirements of the Act are satisfied, the non-compete covenant would then be enforceable. The decision rested on long-standing authority which outlines when contract terms may be found by implication; therefore, the opinion leaves open that other types of implied promises might be found in satisfaction of Section 15.50(a) requirements, depending on the specific facts of a case.

The trio of *Light, Sheshunoff*, and *Mann Frankfort*, read together, show a trend toward enforceability of non-compete clauses which is true to the legislative intent behind the Covenants Not to Compete Act.