



## Texas Supreme Court Makes Non-compete Easier to Enforce

By Patrick S. Richter & Patrick J. Maher

Important information related to labor & employment law provided by the law firm of Shannon Gracey

In *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, No. 07-0490 (Tex. April 17, 2009), the Texas Supreme Court made non-compete agreements easier to enforce. Just three years ago, in *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006), the Court expanded the enforceability of non-competes by holding that an employer's express promise to provide confidential information could create an otherwise enforceable agreement sufficient to support a non-compete covenant, even when the information was not provided at the time the agreement was executed.

Continuing its trend toward finding non-compete agreements enforceable (and reversing years of hostility toward such agreements), the Court in *Mann Frankfort* held that an implied promise to provide confidential information to an at-will employee can create an "otherwise enforceable agreement" sufficient to support a covenant not to compete.

Fielding had successfully argued in the courts below that the non-compete he signed was unenforceable because it was not ancillary to an otherwise enforceable agreement. Specifically, Fielding argued that he even though he promised not to disclose confidential information, there was no otherwise enforceable agreement because Mann Frankfort had not promised to provide him with any such information.

The Texas Supreme Court disagreed, holding that Mann Frankfort made an implied promise to provide Fielding with confidential information that was sufficient to support a non-compete. The Court found an implied promise because: (1) Fielding's job duties required the company to provide, and required Fielding to use, confidential information; and, (2) the Court reasoned that there had to be an implied promise to provide confidential information because otherwise Fielding's express promise not to disclose the information made no sense.

### Offices

#### Arlington

(817) 795-4866

#### Austin

(512) 610-2700

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(713) 255-4700

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Two key quotes:

“[I]f 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.”

\* \* \*

“[I]f one 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.”

Thus, an “otherwise enforceable agreement,” to which an enforceable non-compete could be ancillary, was formed as soon as Mann Frankfort fulfilled its implicit promise to Fielding by providing him with confidential information.

***“With Mann Frankfort the Texas Supreme Court has made it easier than ever for employers to prove the formation of a valid covenant not to compete.”***

With *Mann Frankfort* the Texas Supreme Court has made it easier than ever for employers to prove the formation of a valid covenant not to compete. However, this does not mean that non-competes are free from attack -- an employer will still have to prove that the covenant is reasonable with respect to the time, geographic area, and scope of activity to be restrained. In other words, litigation over non-competes will no longer center on whether a non-compete was formed. It will instead be focused on whether, in view of the totality of the circumstances, the restrictions the covenant purports to impose are reasonable.

## For More Information

Employers should still proceed carefully with the drafting and execution of non-compete agreements.

If you have questions about these or other legal issues relating to your employees, please contact **Pat Richter** at (512) 610-2714 or **Pat Maher** at (817) 877-8167.

**Mr. Richter and Mr. Maher** are partners at Shannon Gracey, Ratliff & Miller, LLP where they practice Labor and Employment Law.

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