

## SUPREME COURT OF TEXAS

# Marsh USA Inc. and Marsh & McLennan Companies, Inc. v. Rex Cook

354 S.W.3d 764 (Tex. 2011) · No. No. 09-0558 · Decided December 16, 2011

### SUMMARY

The Supreme Court of Texas considers whether a covenant not to compete supported by stock options is unenforceable because the stock options did not give rise to an interest in restraining competition. The court holds that the covenant is ancillary to an otherwise enforceable agreement under the Texas Covenants Not to Compete Act because the stock options are reasonably related to protecting the company's goodwill. The court reverses the court of appeals and remands for further proceedings.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                 |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Texas                                                                                                                                                                                                                          |
| WRITING FOR THE COURT | Justice Wainwright; Chief Justice Jefferson; Justice Hecht; Justice Medina; Justice Johnson; Justice Green; Justice Willett; Justice Guzman; Justice Lehrmann                                                                                   |
| JURISDICTION          | Texas                                                                                                                                                                                                                                           |
| DECIDED               | December 16, 2011                                                                                                                                                                                                                               |
| DOCKET                | No. 09-0558                                                                                                                                                                                                                                     |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                           |
| PROCEDURAL POSTURE    | Marsh appealed the trial court's partial summary judgment declaring its non-solicitation and noncompetition agreement with Cook unenforceable as a matter of law. The court of appeals affirmed, and the Supreme Court of Texas granted review. |
| STANDARD OF REVIEW    | De novo review of issues of statutory construction and the application of law to undisputed facts in summary judgments.                                                                                                                         |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                  |
| PARTIES               | Marsh USA Inc., Marsh & McLennan Companies, Inc. v. Rex Cook                                                                                                                                                                                    |

### TOPICS

noncompete agreements

restrictive covenants

employment contracts

statutory interpretation

## PRACTICE AREAS

employment law

contracts

commercial litigation

statutory interpretation

## QUESTIONS PRESENTED

1. Whether a covenant not to compete or solicit supported by stock options is unenforceable as a matter of law because the stock options did not give rise to the employer's interest in restraining competition.
2. What relationship between an otherwise enforceable agreement, the consideration supporting it, and the employer's protectable business interest is required under Texas Business and Commerce Code section 15.50(a).
3. Whether Texas law imposes a timing requirement that the employee receive consideration for the covenant before the employer's protectable interest arises.
4. Whether the covenant's limitations as to time, geographic area, and scope were reasonable and no greater than necessary.

## HOLDINGS

1. A covenant not to compete is not unenforceable merely because the consideration supporting the agreement did not itself give rise to the employer's interest in restraining competition. Section 15.50(a) requires a nexus between the covenant, an otherwise enforceable agreement, and a legitimate business interest; the covenant must be ancillary to or part of that agreement in the ordinary sense of being supplementary to it or one of its components.
2. Goodwill is a protectable business interest under section 15.50(a), and stock options designed to align a key employee's interests with the company's long-term performance and customer relationships may be reasonably related to protecting that goodwill.
3. The Supreme Court did not decide whether the covenant was reasonable as to time, geographic area, or scope of activity. Those issues remained for the trial court, which could reform and enforce an overbroad covenant under section 15.51(c).
4. Texas law does not require the employee to receive consideration for a noncompete before the employer's interest in protecting its goodwill arises.

## KEY QUOTATIONS

*"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; and there is no textual basis for excluding the protection of much of goodwill from the business interests that a noncompete may protect."* (775)

*"We hold that if the relationship between the otherwise enforceable agreement and the legitimate interest being protected is reasonable, the covenant is not void on that ground."* (778)

*"In this case, the covenant not to compete is 'ancillary to or part of' an otherwise enforceable agreement because the business interest being protected (goodwill) is reasonably related to the consideration given (stock options)."* (780)

## FACTUAL BACKGROUND

Rex Cook, a longtime Marsh managing director, received stock options from Marsh's parent company, Marsh & McLennan Companies, Inc., under an incentive plan intended to provide valued employees with an ownership interest and encourage long-term contributions to the company's growth and goodwill. To exercise the options, Cook signed an agreement restricting solicitation and performance of services for certain Marsh clients and solicitation of certain Marsh employees, and requiring nondisclosure of confidential information and trade secrets. Cook later resigned and joined direct competitor Lockton, after which Marsh alleged that he had violated the agreement by soliciting clients and employees.

## PROCEDURAL HISTORY

Marsh sued Cook and Lockton for breach of contract and breach of fiduciary duty after Cook left Marsh for a direct competitor. Cook moved for partial summary judgment, arguing that the covenant was not ancillary to or part of an otherwise enforceable agreement under *Light v. Centel Cellular Co. of Texas*. The trial court granted the motion on the breach-of-contract claim; Marsh nonsuited its other claims and appealed. The court of appeals affirmed, holding that the stock transfer did not give rise to Marsh's interest in restraining Cook from competing. The Supreme Court reversed and remanded.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

The trial court must conduct further proceedings consistent with the opinion, including determining whether the covenant's limitations as to time, geographic area, and scope of activity are reasonable and no greater than necessary. If necessary, the trial court may reform and enforce the covenant under Texas Business and Commerce Code section 15.51(c).

## CASES CITED

- *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644, 647 (Tex. 1994)
- *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 648-49, 651, 655-56 (Tex. 2006)
- *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848-50, 858-59 (Tex. 2009)
- *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-84 (Tex. 1990)
- *Marsh USA Inc. v. Cook*, 287 S.W.3d 378, 381-82 (Tex. App.—Dallas 2009, pet. granted)
- *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)
- *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)
- *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 176-77 (Tex. 1987)
- *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 386, 388 (Tex. 1991)
- *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663-65 (Tex. 2008)
- *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 128-29 (Tex. 2004)

- Potomac Fire Ins. Co. v. State, 18 S.W.2d 929, 934 (Tex. Civ. App.—Austin 1929, writ ref'd)
- United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899)
- Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 738 (1988) (Stevens, J., dissenting)
- International Printing Pressmen & Assistants' Union of N. Am. v. Smith, 145 Tex. 399, 198 S.W.2d 729, 740 (1946)
- Alamo Lumber Co. v. Fahrenthold, 58 S.W.2d 1085, 1088 (Tex. Civ. App.—Beaumont 1933, writ ref'd)
- Taormina v. Culicchia, 355 S.W.2d 569, 573 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.)
- Southwestern Bell Telephone Co. v. Mitchell, 276 S.W.3d 443, 447 (Tex. 2008)
- Arizona v. Gant, 556 U.S. 332, 348 (2009)

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