TEXAS COURT OF APPEALS APPLIES THE COVENANTS NOT TO COMPETE ACT TO A FORFEITURE PROVISION IN AN EMPLOYMENT AGREEMENT

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I. INTRODUCTION

Covenants not to compete typically involve a promise by an employee not to work for a competitor for a period of time after termination of employment in exchange for receiving trade secrets or other valuable information from his or her employer. Because these agreements act as restraints of trade, courts will not enforce them if they are overly broad or not necessary to protect the employer's business interest. Non-solicitation agreements which prohibit former employees from contacting their former customers or co-workers are more likely to be upheld because they are less restrictive on the employee's ability to earn a living. Forfeiture clauses do not prohibit an employee from working for a competing employer, but often act as a restraint of trade if they have the effect of deterring employees from quitting their jobs. In *Rieves v. Buc-ee's Ltd.*, the Texas Court of Appeals applied the Covenants Not to Compete Act and refused to enforce an employment agreement which included a provision that the employee return a portion of salary previously received (called a claw-back provision).[1] This paper will summarize the extant law regarding non-compete agreements and then discuss the court's decision in *Rieves* and its implication for future enforcement of forfeiture provisions.

II. COVENANTS NOT TO COMPETE

The history of the validity of covenants not to compete in Texas has been described by one author as "circuitous at best."[2] Early cases took a pragmatic approach to determining enforceability.[3] In *Weatherford Oil Tool Co. v. Campbell*, the Texas Supreme Court stated that a covenant not to compete is a restraint of trade and its terms are enforceable only if they are reasonable.[4] The test, stated the court, is "whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer."[5] Thereafter,

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1. Rieves v. Buc-ee's Ltd., 532 S.W.3d 845, 850–52 (Tex. App. 14th 2017).

2. Patrick J. Maher, *Noncompetes and Trade Secrets: A Continuing Evolution*, 35 CORP. COUNS. REV. 73, 75 (2016). Other reviews tracing the Texas history of the enforceability of covenants not to compete include Michael D. Paul, Marsh USA Inc. v. Cook: *One Final Step away from Light*, 43 ST. MARY'S L.J. 791 (2012) and Alix Valenti, *Covenants Not to Compete: Texas Supreme Court Expands Employers' Ability to Enforce Executory Contracts*, 17 SO. L.J. 99 (2007).

3. *See* Michael Sean Quinn & Andrea Levin, *Post Employment Agreements Not to Compete: A Texas Odyssey*, 33 TEX. J. BUS. L. 7, 15–17 (1996).

4. Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 951 (Tex. 1960).

5. *Id.*

for nearly two decades, the court determined reasonableness by examining the time, geography, and scope of the activities sought to be limited.[6]

During the 1980's, non-compete agreements began to be viewed with disfavor. Courts were likely to find that they imposed an undue hardship on the employee and the interest of the employee often outweighed the interest of the former employer.[7] In *Hill v. Mobile Auto Trim, Inc.*,[8] the court held that a covenant was overly oppressive to the employee because it prevented him from using his previously acquired skills and talent to support him and his family where he lived.[9] Absent clear and convincing proof to the contrary, there must be a presumption that an employee did not intend to agree to a provision that would prohibit him from engaging in a common calling.[10]

Shortly after the *Hill* decision, the court considered whether hair stylists were engaged in a common calling and decided that they were.[11] Thus, non-compete agreements with their former employer were unenforceable because there was no demonstration that specialized knowledge or information was disclosed.[12] The following year, the court held that sales was a common calling occupation and declined to enforce the agreement even though the former employee held the title of vice president.[13]

Dissatisfied with the trend of the court's decisions, in 1989 the Texas legislature passed the Covenants Not to Compete Act.[14] The main feature of the Act as originally worded was that it incorporated the reasonableness standard with respect to time, geographic area, and scope of activity.[15] It also imposed a requirement that the restraint against competition not be greater

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6. *E.g.*, Frankiewicz v. Nat'l Comp Assocs., 633 S.W.2d 505, 507 (Tex. 1982); Justin Belt Co. v. Yost, 502. S.W.2d 681, 685 (Tex. 1973).

7. *See* M. R. Yogi McKelvey, *Post Employment Noncompetitive Restrictive Covenants in Texas*, 30 S. TEX. L. REV. 1, 51–55 (1988).

8. 725 S.W.2d 168 (Tex. 1987).

9. *Id.* at 172.

10. *Id.*

11. Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987).

12. *Id.*

13. Martin v. Credit Prot. Ass'n, No. C-7339, 1988 WL 71554 (Tex. July 13, 1988), *withdrawn,* 793 S.W.2d 667 (Tex. 1990). The 1988 ruling was withdrawn after the Covenants Not to Compete Act was passed, *see infra* notes 14–17 and accompanying text. Under the new statutory standard, the court nevertheless held that the agreement was not enforceable because it was not ancillary to an otherwise enforceable agreement or supported by independent valuable consideration. *Martin*, 793 S.W.2d at 670.

14. Act of Aug. 28, 1989, ch. 1193, 1989 Tex. Sess. Law Serv. 1193 (West, Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Legis.) (codified at TEX. BUS. & COM. CODE ANN. §§ 15.50 et seq.).

15. *Id.*

than that necessary to protect the goodwill or other business interests of the employer.[16] Further, the legislature intended to eliminate the common calling analysis that had been applied by the Texas Supreme Court.[17]

Within two years after the passage of the law, the Texas Supreme Court decided three cases in which it declined to enforce covenants not to compete.[18] In *DeSantis v. Wackenhut Corp.*, the court observed that it was unnecessary to decide the issue whether the new law would apply to contracts entered into before its effective date because the employer failed to establish that the covenant was integral to a protectable business interest.[19] Specifically, the employer was unable to show that its customer list was in fact confidential, that its pricing policies were uniquely developed, or that pricing information could not have been obtained from its customers themselves.[20] The court in *Martin v. Credit Protection Ass'n* held that a covenant not to compete, if executed on a date other than the date on which the underlying agreement was executed, is not enforceable if it is not supported by independent valuable consideration.[21] Special training, said the court, might be considered supportable consideration, but customer information is not.[22] In *Juliette Fowler Homes v. Welch Associates*, the court held that a covenant that contained no limitations concerning geographical area or scope of activity was an unreasonable restraint of trade and therefore unenforceable.[23]

In response to these rulings, the Act was amended in 1993, removing some of the subjectivity that required courts to consider the interests of the employee or the general public.[24] As currently in effect, section 15.50 of the Texas Business & Commerce Code provides in relevant part:

> Notwithstanding Section 15.05 of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement

16. Quinn & Levin, *supra* note 3, at 39.

17. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 683 (Tex. 1990).

18. *See* Paul, *supra* note 2, at 799; *see also* Valenti, *supra* note 2, at 112.

19. *DeSantis*, 793 S.W.2d at 685.

20. *Id.* at 684.

21. Martin v. Credit Prot. Ass'n, 793 S.W.2d 667, 670 (Tex. 1990).

22. *Id.*

23. 793 S.W.2d 660, 663 (Tex. 1990).

24. Added by Acts 1993, 73rd Leg., ch. 965, § 3, eff. Sept. 1, 1993 (West, Westlaw through the 2017 Reg. Legis. Sess.). The amendments also clarified that the provisions of the Act are "exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise." *Id.* § 15.52.

> 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.[25]

The first case before the Texas Supreme Court after the 1993 amendments was *Light v. Centel Cellular Co. of Texas*.[26] The court noted that two additional conditions must exist to enforce a covenant not to compete: (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to protect 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.[27] According to the court, while Centel's consideration (the promise to train) might involve confidential or proprietary information, the covenant not to compete was not designed to enforce any of the employee's return promises in the otherwise enforceable agreement.[28]

Accordingly, the covenant did not meet the second requirement and was not enforceable.[29] In addition, in a footnote, the court noted that although the initial agreement would not have been enforceable when made, when the employer later accepted the employee's offer by disclosing trade secrets, a unilateral contract was created in which the employee became bound by his promise.[30] However, the *Light* court suggested that such an agreement still *would not* support a non-compete covenant because it would not be "an 'otherwise enforceable agreement *at the time the agreement is made*' as required by § 15.50."[31]

Subsequent to *Light* several conflicting court of appeals cases were decided, some recognizing the validity of non-compete agreements and others holding they were unenforceable. For example, the Dallas Court of Appeals held that a covenant was not enforceable when it was based on a promise to disclose confidential information or provide specialized training in the future.[32]

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25. TEX. BUS. & COM. CODE ANN. § 15.50(a) (West, Westlaw through the 2017 Reg. Legis. Sess.).

26. 883 S.W.2d 642 (Tex. 1994).

27. *Id.* at 647.

28. *Id.*

29. *Id.* at 647–48.

30. *Id.* at 645 n.6.

31. *Id.* (emphasis added) (quoting TEX. BUS. & COM. CODE ANN. § 15.50(a) (West, Westlaw through the 2017 Reg. Legis. Sess.)).

32. Strickland v. Medtronic, Inc., 97 S.W.3d 835, 839 (Tex. App. 5th 2003) (The relevant inquiry under section 15.50 is whether, *at the time the agreement is made,* there exists a binding promise to train.).

Conversely, the Houston Fourteenth Court of Appeals held that the promise to provide confidential information and trade secrets was sufficient to form an enforceable contract.[33]

The issue whether there must be a contemporaneous exchange of consideration at the time the "otherwise enforceable agreement" is executed was resolved by the Texas Supreme Court in *Alex Sheshunoff Management Services v. Johnson*.[34] In *Sheshunoff*, the court was presented with the situation it had previously discussed in *Light*.[35] Because the employer had explicitly promised to provide the employee with confidential information, the employee had explicitly promised not to disclose the confidential information, and the employer actually had provided the employee with the confidential information, the non-compete covenant was ancillary to an "otherwise enforceable agreement."[36] However, the court departed from *Light's* dictum "that a unilateral contract can never meet the requirements of the Act because such a contract is not immediately enforceable when made."[37] Instead, the court held that the "covenant need only be 'ancillary to or part of' the agreement at the time the agreement is made. Accordingly, a unilateral contract was formed when the employer performed a promise that was illusory when made, and thus can satisfy the requirements of the Act."[38]

Under this holding, the first part of the statute must be read as consisting of two questions: (1) whether there is an "otherwise enforceable agreement," and (2) whether the covenant not to compete is "ancillary to or part of" that agreement at the time it was made.[39] Further, when an employer makes an illusory promise of consideration and, later, performs in accord with the promise, the consideration is no longer illusory and can support the first element of the statute.[40] Concerning the second inquiry, for a covenant not to compete to be "ancillary to or part of" an otherwise enforceable agreement, the employer must establish both that (a) the consideration given by the employer in the agreement is reasonably related to an interest worthy of protection

33. Curtis v. Ziff Energy Grp., Ltd., 12 S.W.3d 114, 118 (Tex. App. 14th 1999) (Where an employer promised to provide confidential information and trade secrets and in return the employee promised not to disclose or use the trade secrets until after his employment, an enforceable agreement was formed.).

34. 209 S.W.3d 644, 646 (Tex. 2006).

35. *Id.*

36. *Id.* at 647.

37. *Id.* at 651.

38. *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 15.50(a) (West, Westlaw through the 2017 Reg. Legis. Sess.)).

39. *Id.*

40. *Id.* at 651.

and (b) the covenant not to compete was designed to enforce the employee's consideration or return promise in the agreement.[41] In other words, "[t]he covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer."[42]

The consideration from the employer "must give rise to the employer's interest in restraining the employee from competing."[43] Examples of interests that may be worthy of protection by a covenant not to compete include business goodwill, confidential or proprietary information, trade secrets, customer information, and specialized training. An example of specialized training would be internal and external courses which prepared the employee to take and pass board certification exams, which resulted in the employee's obtaining two additional certifications.[44] However, a one-time training session would not be sufficient good and valuable consideration to support the non-compete agreement.[45]

Three years after *Sheshunoff*, the Texas Supreme Court again addressed the enforceability of non-compete covenants. In *Mann Frankfort Stein & Lipp v. Fielding*,[46] as in *Sheshunoff*, the employee expressly promised not to disclose any confidential information; however, there was no express agreement on the part of the employer to provide the employee with confidential information.[47] Nevertheless, the court held that the lack of an express promise by the employer was not determinative; rather, it held that "[w]hen the nature of the work the employee is hired to perform requires confidential information to be provided . . . the employer impliedly promises confidential information will be provided."[48] Applying this rule to the facts of the case, the court held that because the employee promised not to disclose confidential information and his work as a certified public accountant "necessarily involved the provision of confidential information by [his employer]," the non-compete covenant was enforceable.[49]

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41. *Id.* at 648–49.

42. *Id.* at 651.

43. *Id.* at 648–49.

44. *See* Neurodiagnostic Tex, L.L.C. v. Pierce, 506 S.W.3d 153, 161, 166 (Tex. App. 12th 2016).

45. Midstate Envtl. Servs., LP v. Atkinson, No. 13-17-00190-CV, 2017 WL 6379796, at *2 (Tex. App. 13th Dec. 14, 2017).

46. Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844 (Tex. 2009).

47. *Id.* at 850.

48. *Id.*

49. *Id.* at 851–52.

The Supreme Court of Texas in *Marsh USA Inc. v. Cook*[50] addressed the requirement that the covenant not to compete must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.[51] In *Marsh*, the employee had to sign a covenant not to compete in order to be able to exercise company-provided stock options.[52] Both the trial court and the court of appeals held that the non-compete agreement was unenforceable because "the transfer of stock did not give rise to Marsh's interest in restraining Cook from competing."[53]

The Texas Supreme Court reversed.[54] In its decision, the court noted that "[t]he hallmark of enforcement is whether or not the [provision] is reasonable."[55] Further, when determining the enforceability of a provision, a court should not focus on "overly technical disputes" over whether a provision is ancillary to an agreement, but should instead inquire "whether the [provision] '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.'"[56] The court also noted that the statute does not specifically require "that the consideration for the noncompete must give rise to the interest in restraining competition with the employer."[57] Accordingly, the court held that as long as the relationship between an otherwise enforceable agreement and a legitimate interest being protected is reasonable, the covenant will be upheld.[58]

After the *Sheshunoff*, *Fielding*, and *Marsh* cases, lower courts seemed to be more likely to find in the employer's favor.[59] However, some courts have declined to follow the Texas Supreme Court where the facts were different. A case decided by the Fifth

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50. Marsh USA Inc. v. Cook, 354 S.W.3d 764 (Tex. 2011).

51. *Id.* at 766.

52. *Id.* at 767.

53. *Id.* at 768.

54. *Id.* at 766.

55. *Id.* at 777.

56. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 15.50(a) (West, Westlaw through the 2017 Reg. Legis. Sess.)).

57. *Id.* at 775.

58. *Id.* at 778.

59. *See, e.g.*, McKissock, LLC v. Martin, 267 F. Supp. 3d 841, 856 (W.D. Tex. 2016); Gallagher Healthcare Ins. Servs. v. Vogelsang, 312 S.W.3d 640, 653 (Tex. App. 1st 2009). In *McKissock*, the court found that the employer had a protectable interest at stake, namely its goodwill and confidential, proprietary information, which the employee acquired during her employment. However, the agreement as written was overly broad and had to be reformed by limiting the scope of the restricted activity to providing services to competitors that were similar to the services that the employee had previously provided to her employer. *McKissock*, 267 F. Supp. 3d at 855–56.

Circuit Court of Appeals[60] narrowly construed the *Fielding* decision where neither employer nor employee made an express promise regarding confidential information; specifically, neither the employer expressly promised to provide confidential information, nor did the employee expressly promise not to disclose confidential information.[61] According to the district court, "[t]his very important distinction cannot be missed."[62] The ruling in *Fielding* was based on facts where one party or the other made express promises regarding confidential information, thereby implying a contract on behalf of the other party, said the court.[63] When the employment agreement is devoid of any reference to the topic of confidential information, *Fielding*'s holding—that when an employee expressly promised not to disclose confidential information, an employer impliedly promises to provide that confidential information—does not apply.[64] If the employee never expressly promises not to disclose confidential information and there is no corresponding implied promise to provide confidential information, there is no agreement regarding confidential information. The *Hunn* court said, "[i]n the absence of such an agreement, the non-compete covenant fails because there was no 'otherwise enforceable agreement' to which it was connected."[65]

The court rejected the employer's argument that a promise not to disclose confidential information would have been redundant and unnecessary because, as a matter of state law, the employee had an obligation *without* a written contract or express promise.[66] The court stated:

> [t]he question is not whether [the employee] had a duty, enforceable in tort, not to disclose confidential information. The question is whether the parties entered into an enforceable *contract* to which the non-compete covenant was ancillary. Absent such a *contract*, the non-compete agreement was not ancillary to any "otherwise enforceable agreement" and is thus invalid.[67]

In addition, when the employer promises in the non-compete agreement to provide confidential information, such information must be provided after the agreement is signed in order to satisfy

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60. Hunn v. Dan Wilson Homes, Inc., 789 F.3d 573 (5th Cir. 2015).
61. *See id.* at 585–86.
62. *Id.* at 586.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

the Texas Covenants Not to Compete Act.[68] If the employee already had such information at the time of the agreement, the covenant will not be enforceable.[69]

In *Lazar Spot, Inc. v. Hiring Partners, Inc.*,[70] the Texarkana Court of Appeals declined to extend the decision in *Marsh* when the employer could not establish that the covenants were necessary to protect its goodwill.[71] The court noted that *Marsh* involved a managing director who was successful in achieving and attracting business for the company and establishing long-term relationships that were vitally important in the insurance brokerage industry.[72] Thus, the consideration for the protection of business goodwill was reasonably related to that protection. In contrast, the employees in *Lazar Spot* were blue-collar workers who signed noncompetition agreements in the absence of consideration.[73] The court stated that "[b]ecause the restrictive covenants here were not supported by consideration independent of the simple act of hiring under an at-will agreement, they are not 'ancillary to or part of' an otherwise enforceable agreement as required under Section 15.50."[74] One author has suggested that the distinction between blue-collar workers and managers is an application of the "common calling" standard announced by the court in *Hill v. Mobile Auto Trim, Inc.*[75] Under this view, an employee in a position of common calling, specifically any non-management or blue-collar employee, will not be in a position to receive confidential information sufficient to trigger an otherwise enforceable agreement.[76]

The Texas Supreme Court distinguished *Marsh* in a case involving forfeiture of restricted stock. In *ExxonMobil Corp. v. Drennen*,[77] an employee received stock awards that would be paid out over a period of three to seven years. Under the terms of the award, any outstanding award would be terminated if the employee engaged in a detrimental activity, which included working for a competitor.[78] The employee was later forced to resign

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68. Digital Generation, Inc. v. Boring, 869 F. Supp. 2d 761, 775 (N.D. Tex. 2012).
69. *See id.* at 776.
70. Lazer Spot, Inc. v. Hiring Partners, Inc., 387 S.W.3d 40, 48 (Tex. App. 6th 2012).
71. *Id.*
72. *Id.* at 48–49.
73. *Id.* at 49.
74. *Id.*
75. *See supra* notes 8–9.
76. Charles M.R. Vethan, *The Development of the Texas Non-Compete: A Tortured History*, 45 TEX. J. BUS. L. 169, 184–85 (2013).
77. 452 S.W.3d 319, 322 (Tex. 2014).
78. *Id.*

and subsequently accepted a position with Hess Corporation, another large energy company.[79] As a result, the employee's 57,200 outstanding restricted shares of ExxonMobil stock were forfeited and cancelled by the plan administrator.[80]

The employee sued, and a jury rendered a verdict for ExxonMobil.[81] The court of appeals reversed, finding that the forfeiture conditions were unreasonable covenants not to compete.[82] On appeal, the Texas Supreme Court ultimately applied New York law pursuant to terms of the stock plan by addressing whether the "detrimental activity" forfeiture language was considered a covenant not to compete under Texas law.[83] The court concluded it was not, stating:

> [t]here is a distinction between a covenant not to compete and a forfeiture provision in a non-contributory profit-sharing plan because such plans do not restrict the employee's right to future employment; rather, these plans force the employee to choose between competing with the former employer without restraint from the former employer and accepting benefits of the retirement plan to which the employee contributed nothing.[84]

The court distinguished the agreement from that in *Marsh* in that the forfeiture provision in the ExxonMobil plan was designed to instill loyalty while the non-compete agreement signed in *Marsh* was to protect the company's goodwill.[85]

III. THE DECISION IN *RIEVES V. BUC-EE'S, LTD.*

Against this backdrop, we review the facts of *Rieves v. Buc-ee's, Ltd.*[86] In *Rieves*, the employee was hired as an assistant manager at one of Buc-ee's convenience stores.[87] During her employment she signed two agreements, both of which provided that she would be paid a base wage and a bonus—labelled "additional compensation" in the first agreement and "retention

79. *Id.* at 322–23.

80. *Id.* at 323.

81. *Id.*

82. *Id.*

83. *Id.* at 329–331.

84. *Id.* at 329.

85. *Id.* at 328–29. Because the court determined that the agreement was not a covenant not to compete, it analyzed and upheld the enforcement of the forfeiture provision applying New York law. *Id.* at 329. "Whether such provisions in non-contributory employee incentive programs are unreasonable restraints of trade under Texas law, such that they are unenforceable, is a separate question and one which we reserve for another day." *Id.*

86. 532 S.W.3d 845 (Tex. App. 14th 2017).

87. *Id.* at 847.

pay" in the second agreement.[88] Both agreements provided that if the employee did not work for a minimum amount of time and did not provide at least six months' notice of separation, regardless of the reason, the retention pay and any additional compensation had to be repaid with interest equal to 10% per year.[89] About three years after her employment began she resigned.[90] One year later, Buc-ee's sent her a demand for payment of $66,720.29 plus interest.[91] The employee filed a lawsuit seeking a declaratory judgment that the repayment provisions of the agreements were unenforceable as unreasonable restraints of trade.[92] Ultimately, the trial court ruled in favor of Buc-ee's, and the employee appealed.[93]

The court of appeals reversed.[94] Citing *Marsh*, the court noted that any agreement that limits an employee's professional mobility is an unlawful restraint of trade unless it falls within the exception created by the Covenants Not to Compete Act.[95] The court noted that to be an enforceable agreement, a covenant not to compete must not impose restraints that are greater than those necessary "to protect the goodwill or other business interest" of the employer.[96] In this case, the court held that the agreements go far beyond protecting any legitimate competitive interest of Buc-ee's, impose significant hardship on Rieves by clawing back substantial compensation already paid to her and on which she had paid taxes, and injure the public by limiting choice and mobility.[97] The court also noted that the claw-back provisions would apply even if Rieves were terminated through no fault of her own.[98]

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88. *Id.*
89. *Id.*
90. *Id.* at 848.
91. *Id.*
92. *Id.*
93. *Id.* at 849.
94. *Id.* at 853.
95. *Id.* at 850 (citing Marsh USA Inc. v. Cook, 354 S.W.3d 764, 768, 770 (Tex. 2011)). The court noted that the facts in this case were similar to those in *Peat Marwick Main & Co. v. Haass*. *Id.* at 851. In *Haass*, a provision of a partnership and merger agreement required a former partner to pay damages for soliciting or furnishing accounting or related services to the partnership's clients for a period of twenty-four months after his termination. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 383 (Tex. 1991). The court concluded that the provision is sufficiently similar to a covenant not to compete and should be subject to the same standards of reasonableness as covenants not to compete. *Id.* at 385. *See supra* notes 79–85 and accompanying text.
96. *Rieves*, 532 S.W. 3d at 850–51.
97. *Id.* at 851–52.
98. *Id.* at 851.

The court rejected Buc-ee's argument that *ExxonMobil Corp. v. Drennen*[99] should support the agreement. The court distinguished from *Drennen* on three points: (1) that the *Drennen* dispute involved the future payment of stock that had not yet been paid to the employee; (2) that the dispute did not involve the repayment of salary already earned; and (3) that the forfeiture provision in the ExxonMobil plan did not restrict the employee's future employment opportunities.[100]

IV. POSSIBLE APPLICATION OF CONTRACT LAW

In *Rieves v. Buc-ee's, Ltd.*, the court resolved the issue by relying on the Covenants Not to Compete Act.[101] While that Act traditionally applied to agreements that expressly limit the employee's professional mobility, the court noted that standards of reasonableness apply to any agreement that contains "damage provisions that impose a severe economic penalty on a departing employee."[102] Because the additional compensation and retention pay agreements did not impose limitations on the employee's repayment obligations dependent on whether her new employment involved certain competitive activities or was located in a certain geographic area, the court concluded that they were not reasonable as to time, geographic area, or scope of activity as required by the statute and, consequently, were unenforceable.[103]

Arguably, *Rieves* could have been decided without reference to the Covenants Not to Compete Act, relying instead on more traditional theories of contract law.[104] In this case, the agreements were so one-sided and onerous that a court could have easily found them unconscionable and therefore unenforceable. Specifically, the agreements required the employee to remain employed for a minimum of five years and give a six-month written notice of separation regardless of the reason. Failure to comply required the employee to give back what appeared to be a substantial portion of her pay. Further, if such amount was not paid within thirty days of departure, the amount due would accrue interest at 10% per year, compounded annually. While the decision did not state what percentage of her income would have to be repaid, one can assume that the demand for $66,720.29 plus interest was more than a

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99. *See supra* notes 79–85 and accompanying text.

100. *Rieves*, 532 S.W.3d at 852–53.

101. *Id.* at 851.

102. *Id.* (citing Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 388 (Tex. 1991)).

103. *Id.* at 851–52.

104. *See* Daniel P. O'Gorman, *Contract Theory and Some Realism about Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 189, 199–200 (2012).

small percentage of an assistant manager's income. Note that the court could have also followed the reasoning of *Lazar Spot, Inc. v. Hiring Partners, Inc.*[105] and held that as a matter of law, an assistant manager would not be in a position to receive confidential information or specialized training and, accordingly, could not be bound by a non-compete agreement.

An alternative argument against enforcement based on contract law is that the claw-back provision was not supported by any independent consideration. Before the 1993 amendments to the Covenants Not to Compete Act, the Texas Supreme Court considered the requirement of consideration in connection with a covenant not to compete.[106] The court noted that because at-will employment can be terminated at any time by either party, it cannot serve as consideration for a covenant not to compete; there must be some other "independent consideration."[107] The 1993 amendments eliminated the "independent consideration" requirement of the Act's original language and substituted the "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" requirement as an attempt to clarify what will support the promise not to compete which, as one author noted, merely added to the confusion.[108] In any event, the facts in *Rieves* do not indicate that she was given, or even promised to receive, any trade secrets or other confidential or proprietary information that could support her promise to return part of her salary if she did not abide by the terms of the agreement.[109]

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105. *See supra* note 70.

106. *See* Martin v. Credit Prot. Ass'n, Inc., 793 S.W.2d 667, 669 (Tex. 1990); *see also* Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 832 (Tex. 1991). The court in *Travel Masters* stated that "[b]ecause employment-at-will is not binding upon either the employee or the employer and is not an otherwise enforceable agreement, . . . a covenant not to compete executed either at the inception of or during an employment-at-will relationship cannot be ancillary to an otherwise enforceable agreement and is unenforceable as a matter of law." *Id.* at 833.

107. *Martin*, 793 S.W.2d at 670. The court concluded that customer information was "neither special training nor knowledge which may constitute independent valuable consideration." *Id.*

108. Vethan, *supra* note 78, at 178.

109. The agreements in *Rieves* provided that the appellant would receive "additional compensation" to which the appellant and employer had previously agreed as a split between hourly pay and a "fixed monthly bonus." Rieves v. Buc-ee's, 532 S.W.3d 845, 847 (Tex. App. 14th 2017). It is generally accepted that cash alone would not be the type of consideration that would "give rise" to the need for a covenant not to compete. Charles M. Hosch, Lauren T. Becker & Kimberly E. Hodgman, *Business Torts*, 65 SMU L. REV. 315, 317 (2012). *But see*, Arevalo v. Velvet Door, Inc., 508 S.W.2d 184, 186 (Tex. App. 8th 1974) (where continuing employment with payment of salary is consideration for a noncompetitive covenant). Some speculated that the court's decision in *Marsh* would greatly expand the consideration that would meet this standard. *E.g.*, Marsh USA Inc. v. Cook, 354 S.W.3d 764, 790 (Tex. 2011) (Any financial incentive that can encourage an employee to create more goodwill can satisfy the consideration prong of the Act.) (Green, J.,

A third basis for finding for the employee is that the claw-back provision in the agreement should be treated as a liquidated damages clause. A liquidated damage provision in a contract "must be a reasonable forecast of just compensation for the harm that is caused by the breach."[110] Stipulated damages that bear no relationship to the actual damages suffered will be treated as a penalty and will not be enforceable.[111] Nowhere in the case did Buc-ee's claim that Rieves' departure or failure to give the required notice caused any economic harm.

V. WHEN IS A FORFEITURE CLAUSE A COVENANT NOT TO COMPETE?

The decision in *Rieves* was based in large part on the Texas Supreme Court decision in *Peat Marwick Main & Co. v. Haass*.[112] That case involved a merger of a small accounting firm in San Antonio with a much larger national firm.[113] Defendant Haass was a junior partner in the San Antonio firm and at first, objected to the merger partly because he was not privy to the merger negotiations.[114] Eventually, he agreed to the merger.[115] As part of the merger agreement, Haass was guaranteed a certain income for twenty months, and he agreed that if he withdrew from the new partnership and took clients with him that he would compensate the firm as provided for in the partnership agreement.[116] After one year Haass and several other employees terminated the partnership, and it sued Haass for breach of the partnership agreement and for violation of his fiduciary duty.[117] The trial court

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dissenting). However, the legislative history of the 1993 amendments to the Covenants Not to Compete Act clarifies that the provisions of the Act are intended to protect employers "when the employer has invested a significant amount of expense and effort in training the employee, in educating the employee, the employee works for the employer and learns all about the employer's business and learns all about the employer's customers, and trade secrets, and confidential business information." Jeffery W. Tayon, *Covenants No to Compete in Texas: Shifting Sands from* Hill *to* Light, 3 TEX. INTELL. PROP. L.J. 143, 222 (1995). Thus, merely providing compensation to an at-will employee will not be sufficient to meet the otherwise enforceable agreement standard; the employer must have provided more. *E.g.*, French v. Cmty Broad. of Coastal Bend, Inc., 766 S.W.2d 330, 334 (Tex. App. 13th 1989) (Appellant received sufficient consideration in the form of salary, directorship, stock bonuses, and other benefits as well as the special knowledge of learning how to operate a television station.).

110. Henshaw v. Kroenecke, 656 S.W.2d 416, 419 (Tex. 1983).

111. Stewart v. Basey, 245 S.W.2d 484, 485–86 (Tex. 1952).

112. 818 S.W.2d 381 (Tex. 1991).

113. *Id.* at 382.

114. *Id.* The senior partners had been considering retirement and sought the merger in part to guarantee their retirement benefits. *Id.*

115. *Id.* at 383.

116. *Id.*

117. *Id.* at 384.

found in favor of Haass and the partnership appealed. The court of appeals reversed in part, and affirmed in part and both parties filed for writ of error.[118]

The accounting firm argued that the damages provision in the agreement should not be treated as a covenant not to compete.[119] The Texas Supreme Court rejected this argument.[120] It noted that the provisions of the merger agreement did not expressly prohibit Haass from providing accounting services to clients of the firm. However, if he did, the agreement required Haass to pay as a form of liquidated damages "all direct costs (out-of-pocket expenses), paid or to be paid" by the firm in acquiring such clients.[121] Relying on decisions outside of Texas, the court held that the provisions in the agreement act as restraints on trade and are thus "sufficiently similar to covenants not to compete to be governed by the same general reasonableness principles in order to be enforceable."[122] According to the court, the practical economic impact of the agreement is that it inhibited competition the same as a covenant not to compete.[123]

The court also noted that its previous decision in *Frankiewicz* supported its conclusion.[124] In that case, an insurance agent's employment contract provided that he would forfeit any renewal premiums if, for two years after termination of employment, he sold insurance policies for any other insurance company or agency.[125] After the agent quit, the employer ceased paying renewal premiums, and the employee sued to recover the premiums.[126] Citing *Weatherford Oil Tool Co. v. Campbell*, the court held that the provision contained no territorial limitation, nor was it limited to competing lines of insurance.[127] Thus, the court concluded that the agreement could not provide the basis upon which premiums could be suspended any more than it could support a claim for damages on the part of the employer.[128]

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118. *Id.*
119. *Id.*
120. *Id.* at 388.
121. *Id.* at 385.
122. *Id.*
123. *Id.* at 385–86.
124. *Id.* (citing Frankiewicz v. Nat'l Comp Assocs., 633 S.W.2d 505 (Tex. 1982)).
125. *Frankiewicz*, 633 S.W.2d at 506.
126. *Id.* at 507.
127. *Id.* (citing 340 S.W.2d 950 (Tex. 1960)).
128. *Id.* at 507–08. A similar result was reached in *Peat, Marwick & Mitchell & Co. v. Sharp*, 585 S.W.2d 905, 908 (Tex. App. 7th. 1979), where the court of appeals ruled that an agreement that did not specify or stipulate a reasonable geographical area was an unenforceable restraint of trade and, therefore, did not preclude former partners from recovering accrued benefits under partnership agreements.

The *Haass* court then examined whether the provisions of the merger and partnership agreements were reasonable and concluded they were not.[129] Because the agreement would inhibit Haass from providing accounting services to clients who were acquired by the firm after he left or with whom he had no contact, the prohibition was overbroad and not enforceable.[130]

Alternatively, the accounting firm argued that if the contractual provisions were overbroad, the court should modify the agreement and enforce the damages provision as reformed, citing the Covenants Not to Compete Act.[131] While the court questioned whether the Act provided for the "sweeping retroactive effect" sought by the firm, reformation under the Act was intended only for purposes of issuing an injunction and not in cases where damages were sought.[132]

In a dissenting opinion, Justice Cornyn, with whom Justice Gonzalez joined, disagreed with the majority's treatment of the agreement as a covenant not to compete.[133] Rather, the dissent sided with the accounting firm's position that the damages provision should be governed by the court's opinion in *Henshaw v. Kroenecke*.[134] The majority had considered the *Henshaw* decision and concluded that the damages provision, in that case, was a reasonable liquidated damages provision.[135] However, in Haass' case, the damages provision was "far more expansive" and thus should be analyzed under the standards for covenants not to compete.[136]

Twenty-three years after the *Haass* decision, the Texas Supreme Court was faced with another forfeiture provision in *ExxonMobil Corp. v. Drennen*.[137] In deciding a choice-of-law issue between New York and Texas, the court had to determine whether such provision would violate a fundamental policy of the state as

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129. *Peat Marwick Main & Co.*, 818 S.W.2d at 386–88.

130. *Id.* at 388.

131. *Id.*

132. *Id.*

133. *Id.* at 389.

134. *Id.* (citing Henshaw v. Kroenecke, 656 S.W.2d 416 (Tex. 1983)).

135. *Id.* at 386–87.

136. *Id.* at 386. Justice Cornyn in his dissent also disagreed that the agreement was overbroad and stated that "there is no valid reason why parties to the sale of a professional practice should not be able to adopt formula designed to protect the purchase from the loss of its bargain . . . ." *Id.* at 389 (Cornyn, J., dissenting). Interestingly, the damages provision was part of a negotiated merger of two accounting firms. As one comment noted, Texas courts are generally more apt to uphold covenants not to compete executed in the context of a sale of a business, which is akin to a merger which took place in this case. Quinn & Levin, *supra* note 3, at 58.

137. 452 S.W.3d 319 (Tex. 2014). The court noted that the provisions of the forfeiture agreement were similar to those in *Haass*. *Id.* at 328.

it had previously decided in *DeSantis v. Wackenhut Corp.*,[138] which has been interpreted to favor application of Texas law when determining the reasonableness of a covenant not to compete when the employee works in Texas.[139] In reaching its decision, the court found that a nonqualified plan that provided for the forfeiture of unvested compensation was not a covenant not to compete and enforced the parties' choice of New York law, finding no violation of a fundamental Texas forum policy.[140] The *Drennen* court expressly noted that "[w]hether [forfeiture] provisions in non-contributory employee incentive programs are unreasonable restraints of trade under Texas law, such that they are unenforceable, is a separate question and one which we reserve for another day."[141]

The court's decision turned on a distinction between the purpose of a non-compete agreement and the purpose of the forfeiture provision under the ExxonMobil plan. Employers insist that employees sign covenants not to compete in order to prevent confidential information such as trade secrets and customer lists from being used by competitors.[142] The employer can sue a former employee and his or her new employer to enforce the agreement including seeking an injunction.[143] On the other hand, forfeiture provisions do not restrict an employee from working for another employer; rather, they are motivated by a desire for loyalty and reward employees for remaining with the employer.[144] The choice to work for a competitor is entirely up to the employee, and he or she simply risks losing the benefits of the retirement plan to which the employee contributed nothing.[145]

In 2016, the Southern District Court of Texas reviewed a similar provision in a plan sponsored by Wells Fargo.[146] Executives at Wells Fargo were eligible to participate in a Performance Award Plan which was specifically designed to provide "a special

138. 793 S.W.2d 670, 677 (Tex. 1990).

139. *E.g.*, McKissock, LLC v. Martin, 267 F. Supp. 3d 841, 850 (W.D. Tex. 2016); ADP LLC v. Capote, No. A-15-CA-714-SS, 2016 WL 3742319, at *5 (W.D. Tex. July 7, 2016).

140. *Drennen*, 452 S.W.3d at 329–31.

141. *Id.* at 329.

142. *Id.* at 327–28.

143. *Id.* at 328.

144. *Id.* at 328. These types of forfeiture provisions fall within a larger category of employment agreements often termed "golden handcuffs." They have been defined as "an exchange of compensation from the employer for an employee's agreement to remain employed for a specified time period." Nick Nissley & Rosemary Hartigan, *When Golden Handcuffs Become More Than a Retention Strategy*, 3 ADVANCES IN DEVELOPING HUM. RESOURCES 96, 97 (2001).

145. *Drennen*, 452 S.W.3d at 328–29.

146. Connell v. Wells Fargo & Co., No. H-15-2841, 2016 WL 4733448 (S.D. Tex. Sept. 12, 2016), *aff'd*, 699 F. App'x 446 (5th Cir. 2017).

retention incentive to motivate Eligible Employees to remain with the Company."[147] The plan contained a forfeiture provision that was triggered if the employee quit or if he retired and went to work for a competitor within three years of retirement.[148] When the plaintiffs left Wells Fargo and began working for other financial services firms, their unvested award accounts were forfeited.[149] As in *Drennen*, the court was faced with a choice-of-law issue, whether to apply North Carolina law as provided in the plan.[150] Relying on *Drennen*, the court found that the contested forfeiture provision did not violate a fundamental policy of Texas; thus, the law of North Carolina, which permitted such provisions, applied.[151]

VI. IMPLICATIONS FOR THE FUTURE

The decisions in *Drennen* and *Wells Fargo* suggest that forfeiture provisions will not be treated as covenants not to compete when the issue before the court is whether to apply the parties' choice-of-law provisions, thus eroding somewhat the court's prior directive in *DeSantis v. Wackenhut Corp.*, at least in the case of multinational corporations.[152] However, the decisions in *Haass* and later in *Rieves* confirm that when considering the reasonableness of forfeiture provisions under Texas law, the Covenants Not to Compete Act framework will apply. The court in *Drennen* cited *Haass* as support for its conclusion that the purpose of the ExxonMobil forfeiture clause was not to protect trade secrets, which the Act is intended to safeguard.[153] However, the *Drennen* court erroneously stated that it had not needed to apply the Act in its *Haass* decision.[154] In fact, the *Haass* court expressly held that the principles underlying the reasonable test for non-compete agreements were applicable.[155] The court stated: "The treatment of damages provisions similar to the one at issue has been addressed by the courts in a number of jurisdictions.[156] Most courts have analyzed such provisions as restraints on trade sufficiently similar to covenants not to compete to be governed by the same general reasonableness principles in order to be

147. *Id.* at *1.
148. *Id.* at *2.
149. *Id.*
150. *Id.*
151. *Id.* at *5.
152. Maher, *supra* note 2, at 86.
153. ExxonMobil Corp. v. Drennen, 452 S.W.3d 319, 328–29 (Tex. 2014).
154. *Id.* at 329.
155. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 385 (Tex. 1991).
156. *Id.*

enforceable."[157] In the very next paragraph the court again iterates: "There are two further reasons that damages provisions such as the one at issue should be judged by the reasonableness standards for covenants not to compete."[158] Thus, the *Drennen* court's statement that the forfeiture provision was not a covenant not to compete[159] begs the question whether it intended to overrule its decision in *Haass*.

The court of appeals in *Rieves* clearly held that it did not and that *Haass* continues to govern the determination of reasonableness of forfeiture clauses.[160] Moreover, the statement by the court in *Drennen* that its determination was not intended to address the issue whether provisions in non-contributory employee incentive programs are unreasonable restraints of trade under Texas law[161] seems to confirm this conclusion.

Going forward, several distinctions can be made that may inform future decisions. First, in both *Haass* and *Rieves* the forfeiture provisions would force the former employees to make an out-of-pocket payment, presumably of income on which they had already paid taxes.[162] Similarly, in *Frankiewicz*, the former employee was forced to give up commissions on policies already sold.[163] The former employees in *Drennen* and *Wells Fargo* forfeited future payments of unvested benefits payable under a non-contributory executive plan.[164] The plans in *Drennen* and *Wells Fargo* were plans provided exclusively to high level employees of the companies[165] subject to forfeiture as required under section 83 of the Internal Revenue Code.[166] While Mr. Haass

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157. *Id.*

158. *Id.* The two additional points made by the court were (1) when the damages to be imposed are sufficiently severe, the economic penalty's deterrent effect functions as a covenant not to compete, and (2) analyzing the damage provisions as affecting the right to render personal services as covenants not to compete in restraint of trade was consistent with prior cases. *Id.* at 385–86.

159. *Drennen*, 452 S.W.3d 319 at 329.

160. Rieves v. Buc-ee's, 532 S.W.3d 845, 851 (Tex. App. 14th 2017).

161. *Drennen*, 452 S.W.3d at 329.

162. *See supra* notes 89, 121.

163. Frankiewicz v. Nat'l Comp Assocs., 633 S.W.2d 505 (Tex.1982). *See supra* notes 125–26.

164. Connell v. Wells Fargo & Co., No. H-15-2841, 2016 WL 4733448, at *1–2 (S.D. Tex. Sept. 12, 2016), *aff'd*, 699 F. App'x 446 (5th Cir. 2017); *Drennen*, 452 S.W.3d at 322.

165. Mr. Drennen held the title of Exploration Vice President of the Americas. *Drennen*, 452 S.W.3d at 322. The plan in *Wells Fargo* was intended to provide to "a select group of individuals in the employ of one or more participating employers with an opportunity to earn additional incentive-based compensation contingent upon their attainment of pre-established performance objectives and their completion of designated service periods." *Wells Fargo*, 2016 WL 4733448, at *1.

166. 26 U.S.C. § 83 (2012). Section 83 provides for deferred taxation where property is transferred in connection with the performance of services if such property is subject to a

was an accountant, he was the youngest partner in a small firm, with the smallest percentage interest (11.5%).1.[167] Ms. Rieves was an assistant manager of a convenience store.[168] Any competitive threat to a large, national accounting firm or to a well-known convenience store chain by the former employees in *Haass* and *Rieves* was minimal at best. In addition, the forfeiture clause in the Buc-ee's employment contract was triggered regardless of why the employee terminated employment or whether she went to work for a competitor.[169] Finally, the *Drennen* court made the distinction that the ExxonMobil forfeiture provision was intended to induce loyalty on the part of its executives and should not apply to provisions that operate to "claw-back" previously earned salary by employees no longer employed by the company.[170] In the two accounting firm cases, it was clear that the damages provisions were intended to deter the employees from competing with their previous employers.

Perhaps the two cases most difficult to reconcile are *Henshaw v. Kroenecke* and *Peat Marwick Main & Co. v. Haass*. Both cases involved agreements between accountants and their accounting firm employers. In both cases the former employees had agreed to pay liquidated damages if they left the firm and took clients with them.1.[171] The *Haass* court distinguished its facts with those in *Henshaw* solely on the basis of the broad scope of the restriction.[172] It disapproved the damage provision because it made Haass liable for clients with whom he had not worked, or who came to his former firm after he left and thereafter came to his firm.[173] Conversely, the agreement in *Henshaw* was between two equal partners and the lawsuit was for damages based on clients that

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substantial risk of forfeiture, thus providing a popular executive benefit. *Id.* Subsection 83(c)(1) defines substantial risk of forfeiture as follows: "if such person's rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual." *Id.* The plan sponsored by ExxonMobil was a restricted stock award. *Drennen*, 452 S.W.3d at 319. Under these arrangements, an executive is awarded a number of shares subject to restrictions which lapse over time. BRUCE R. ELLIG, THE COMPLETE GUIDE TO EXECUTIVE COMPENSATION 412–26 (2002). In the ExxonMobil plan, the vesting period was from three to seven years after the award. *Drennen*, 452 S.W.3d at 322. The Wells Fargo plan was also an incentive plan where the award was paid out in cash rather than stock. *Wells Fargo*, 2016 WL 4733448, at *1. Similar to the ExxonMobil plan, payments under the plan were made in installments as they accrued over time. *Id.* Neither restricted stock nor unvested performance awards are considered to have any monetary value until vested and no income tax is paid until that time. *Id.*

167. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 382 (Tex. 1991).

168. Rieves v. Buc-ee's, 532 S.W.3d 845, 847 (Tex. App. 14th 2017).

169. *Id.*

170. *Drennen*, 452 S.W.3d at 328.

171. Henshaw v. Kroenecke, 656 S.W.2d 416, 417 (Tex. 1983). *See supra* note 115.

172. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 388 (Tex. 1991).

173. *See* Quinn & Levin, *supra* note 3, at 57.

Kroenecke actually took with him.[174] The court noted that the claimant in *Henshaw* had his own accounting practice before entering into the partnership with Kroenecke and, consequently, had a legitimate business interest to protect.[175] Further, the calculation of the damages was reasonable and not a penalty.[176]

VII. CONCLUSION

The decisions discussed in this paper reflect the difficulties in deciding whether a restriction in an employment contract should be treated as a covenant not to compete in the absence of a specific prohibition against working for a competitor employer. Several reasons would support the court's decision in *Rieves* that it correctly decided the employment agreements were not enforceable. They were neither reasonable nor necessary to protect legitimate business interests of the employer. Conversely, forfeiture of unvested benefits under an executive incentive plan when an employee quits before the benefits become payable is a standard feature in most long-term incentive plans, and the forfeiture is often triggered regardless of whether the employee works for a competitor.[177] Thus, it is reasonable that such agreements not be analyzed as covenants not to compete. Agreements that are intended to protect employers' competitive interests fall somewhere in between and need to be analyzed on a factual basis. However, application of the "reasonable" test announced almost seventy years ago would seem to be an appropriate standard to arrive at a just result.

174. *Henshaw*, 656 S.W.2d at 417–18.

175. *Id.* at 418.

176. *Id.* at 419.

177. Some executive compensation specialists advocate career-long vesting as a means of improving the pay-for-performance relationship. Brian G. Main, Rolf Thiess & Vicky Wright, *Vesting of Long Term Incentives and CEO Careers: Holding Their Feet to the Fire* (Aug. 2010) (unpublished) (on file with the University of Edinburgh Business School), https://www.researchgate.net/profile/Brian_Main3/publication/228646149_Vesting_of_Long_Term_Incentives_and_CEO_Careers_Holding_their_feet_to_the_fire/links/00b49529f4a0f66cd7000000.pdf (last visited Nov. 29, 2018).