Don't Mess With Noncompetes In Texas

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Taking another step toward easier enforceability of non-compete agreements and away from its own decisions interpreting the Texas Covenants Not to Compete Act, the Texas Supreme Court ruled in *Marsh USA Inc. v. Cook* that a non-compete covenant contained in a stock option purchase plan was enforceable.

Prior to Marsh, Texas courts, relying upon the Supreme Court's *Light v. Centel Cellular Co.* of Texas decision in the mid-1990s, required that noncompete agreements be ancillary to another agreement supported by consideration that "gives rise" to the same interest protected by the restrictive covenant. In practice, this has meant that agreements limiting a departing employee's right to compete or solicit customers could not be supported by cash consideration.

Rather, most enforceable restrictive covenants have been attached to agreements to provide an employee with confidential information or trade secrets in exchange for the employee's return promise to keep the information secret. Employers seeking more flexibility in establishing valid noncompete agreements in Texas will see their options expand after Marsh.

The Supreme Court's inexorable march towards greater enforceability of noncompetes in Texas sends a clear message to lower courts: Avoid legal technicalities in interpreting restrictive covenants while ensuring that the purpose of the Covenants Not to Compete Act is honored. But, as often happens when the court charts a new path, the likeliest result in the short term will be more litigation over just how far employers can go to tie up their key employees with restrictive covenants.

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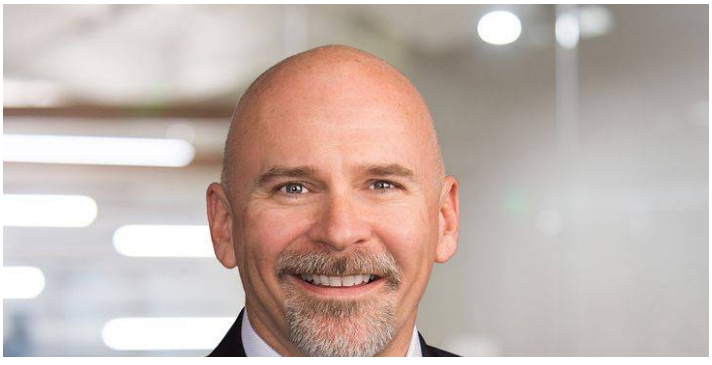

Stephen J. Roppolo
Partner
713.292.5601
Email