# A Change in Fundamental Texas Public Policy

BY ROBERT M. THORNTON

In its recent decision in *Exxon Mobil Corporation v. Drennen*, 452 S.W.3d 319 (Tex. 2014), the Texas Supreme Court announced a significant change in what is considered to be fundamental public policy regarding agreements in restraint of trade.

Prior to *Drennen*, it appeared to be fundamental public policy in Texas that any agreements constituting unreasonable restraints of trade, including unreasonable covenants not to compete, were unenforceable. Section 15.05(a) of the Texas Business and Commerce Code provides that "[e]very contract, combination, or conspiracy in restraint of trade is unlawful." Section 15.50(a) provides a narrow exception for a reasonable covenant not to compete ". . . to the extent that it contains limitations as to time, geographic 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."

As recently as 2011, the Supreme Court held in *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 769-70 (Tex. 2011), that "[a] person's right to use his own labor in any lawful employment is . . . one of the first and highest of civil rights," and that, "[i]n section 15.05(a) of the Business and Commerce Code, the Legislature included a policy limitation on the freedom between employers and employees to contract."

In *Drennen*, the Court enforced a New York choice of law provision to uphold the forfeiture of 57,200 shares of XOM stock previously awarded to a former Texas employee over his 31-year career for having engaged in competition with his former employer after the termination of his employment. Significantly, the Court found that Exxon Mobil had no noncompetition agreement with Drennen, but held that the application of New York law to uphold the forfeiture did not violate any Texas public policy that was fundamental. In reaching its decision, the Supreme Court announced the following change in the public policy of this state:

> With Texas now hosting many of the world's largest corporations, our public policy has shifted from a patriarchal one in which we valued uniform treatment of Texas employees from one employer to the next above all else, to one in which we also value the ability of a company to maintain uniformity in its employment contracts across all employees, residing in Texas or New York.

Under the Court's decision in *Drennen*, it remains an open question as to whether such a forfeiture provision would be enforceable under Texas law. "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." Without specifically addressing whether the statutory prohibition in Section 1505(a) constitutes a limitation on the parties' right to contract, the Court held that "the prime objectives of contract law . . . may be best obtained by letting the parties choose the law to govern the validity of the contract."

The broad language used in *Drennen* allows large national or international companies to avoid Texas laws against unreasonable restraints of trade through choice of law provisions in contracts with its own employees, even with respect to restrictive covenants:

> "(Under New York law), [i]n cases where an employer conditions receipt of a benefit post employment upon compliance with a restrictive covenant, the employee is given the choice to either preserve his rights under the contract by refraining from competition or forfeit such rights by exercising the right to compete. . . . [S]uch a provision is not an unreasonable restraint upon an employee's liberty to earn a living. . . . When this (informed choice) doctrine applies, 'a restrictive covenant will be enforceable without regard to reasonableness' so long as the employee voluntarily left his or her employment. . . ."

It is unclear whether the Court's announced change in public policy is predicated on, or limited by, the enactment of Chapter 271 of the Business and Commerce Code, which allows contracting parties to choose foreign law to govern certain transactions, since that statute is not mentioned in the opinion. The scope and future application of this change in public policy also remains uncertain in light of the fact that Chapter 271 is expressly limited to "qualified transactions" with an aggregate value of at least $1 Million, and Drennen's claim would presumably involve a qualified transaction. **HN**

Robert M. Thornton is a member of Kilgore & Kilgore, PLLC. He can be reached at rmt@kilgorelaw.com.

NOTE:
THIS ARTICLE WAS EXCERPTED FROM PAGE 17 OF THE SEPTEMBER 2015 EDITION OF *HEAD NOTES*, A PUBLICATION OF THE DALLAS BAR ASSOCIATION.