

By: Uresti

S.B. No. 1759

A BILL TO BE ENTITLED

AN ACT

relating to the enforceability of covenants not to compete and to certain procedures and remedies in actions to enforce those covenants.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter E, Chapter 15, Business & Commerce Code, is amended to read as follows:

SUBCHAPTER E. COVENANTS NOT TO COMPETE

Sec. 15.50. SHORT TITLE. This subchapter may be cited as the Texas Covenant Not to Compete Act.

Sec. 15.51. POLICY AND PURPOSE. It is the public policy of this state and the purpose of this subchapter to:

(1) provide a stable, competitive business environment for the citizens of this state;

(2) provide certainty and uniformity regarding the enforceability of covenants not to compete; and

(3) encourage employers to share confidential, proprietary information and other protectible business interests with employees in furtherance of their common purpose, but to prevent employers from taking unfair advantage of an employee and impairing an employee's personal freedoms and economic mobility.

Sec. 15.52. DEFINITIONS. In this subchapter:

(1) "Covenant not to compete" or "covenant" means any agreement, regardless of form, that restricts competition. The

1 term does not mean an agreement:

2 (A) not to disclose or use trade secrets or  
3 confidential information of the promisee;

4 (B) not to solicit employees of the promisee;

5 (C) to resign or cease using staff or medical  
6 privileges acquired with the assistance of the promisee; or

7 (D) not to cause a reduction of staff of the  
8 promisee.

9 (2) "Physician" means a person licensed as a physician  
10 by the Texas State Board of Medical Examiners.

11 Sec. 15.53. CRITERIA FOR ENFORCEABILITY OF COVENANTS NOT TO  
12 COMPETE. (a) Notwithstanding Section 15.05 [~~of this code~~], and  
13 subject to any applicable provision of Subsection (b) or (c), a  
14 covenant not to compete is enforceable if it is [~~ancillary to or~~]  
15 part of or supported by an otherwise enforceable agreement, but  
16 only [~~at the time the agreement is made~~] to the extent that it  
17 contains limitations as to time, geographical area, and scope of  
18 activity to be restrained that are reasonable and do not impose a  
19 greater restraint than is necessary to protect the goodwill or  
20 other business interest of the promisee.

21 (b) In addition to the requirements of Subsection (a), a [A]  
22 covenant not to compete or otherwise enforceable agreement is  
23 enforceable against a person licensed as a physician by the Texas  
24 State Board of Medical Examiners if such covenant or agreement  
25 complies with the following requirements:

26 (1) the covenant not to compete or otherwise  
27 enforceable agreement must provide the physician, upon request,

1 access to a list of patients whom the physician had seen or treated  
2 within the last year of employment with the promisee [~~must:~~

3 [~~(A) not deny the physician access to a list of~~  
4 ~~his patients whom he had seen or treated within one year of~~  
5 ~~termination of the contract or employment]~~;

6 (2) the covenant or agreement must [~~(B)~~] provide, upon  
7 written authorization of the patient, access to medical records of  
8 the physician's patients [~~upon authorization of the patient~~] and  
9 any copies of medical records for a reasonable fee as established by  
10 the Texas State Board of Medical Examiners under Section 159.008,  
11 Occupations Code; and

12 [~~(C) provide that any access to a list of~~  
13 ~~patients or to patients' medical records after termination of the~~  
14 ~~contract or employment shall not require such list or records to be~~  
15 ~~provided in a format different than that by which such records are~~  
16 ~~maintained except by mutual consent of the parties to the contract,~~

17 [~~(2) the covenant must provide for a buy out of the~~  
18 ~~covenant by the physician at a reasonable price or, at the option of~~  
19 ~~either party, as determined by a mutually agreed upon arbitrator~~  
20 ~~or, in the case of an inability to agree, an arbitrator of the court~~  
21 ~~whose decision shall be binding on the parties, and]~~

22 (3) the covenant or agreement must provide that the  
23 physician will not be prohibited from providing continuing care and  
24 treatment to a specific patient or patients during the course of an  
25 acute illness even after the contract or employment has been  
26 terminated.

27 (c) A covenant not to compete with a physician must provide

1 for a buyout of the covenant by the physician at a reasonable price  
 2 in light of the goodwill or other business interests of the promisee  
 3 that are sought to be protected by the covenant. The buyout price  
 4 must be provided for in the covenant by stating either an amount, a  
 5 formula by which the amount may be determined, or a stipulation that  
 6 the determination of the amount will be submitted to an arbitrator  
 7 whose decision shall be conclusive and binding on the parties and  
 8 the court and not subject to reformation as provided by Section  
 9 15.54 (c).

10 (d) Unless the covenant not to compete or the otherwise  
 11 enforceable agreement with a physician specifically designates the  
 12 format in which a patient list or patients' medical records will be  
 13 provided, the physician's access to a list of patients or to  
 14 patients' medical records after termination of the contract or  
 15 employment shall be provided in the format in which the records are  
 16 maintained.

17 Sec. 15.54 [~~15.51~~]. PROCEDURES AND REMEDIES IN ACTIONS TO  
 18 ENFORCE COVENANTS NOT TO COMPETE. (a) Except as provided in  
 19 Subsections [~~Subsection~~] (c) and (d) [~~of this section~~], a court may  
 20 award the promisee under a covenant not to compete damages,  
 21 injunctive relief, or both damages and injunctive relief for a  
 22 breach by the promisor of the covenant.

23 (b) If the primary purpose of the otherwise enforceable  
 24 agreement that supports the covenant, or of [~~to~~] which the covenant  
 25 is a part, [~~ancillary~~] is to obligate the promisor to render  
 26 personal services, for a term or at will, the promisee has the  
 27 burden of establishing that the covenant meets the criteria

1 specified by Section 15.53 [~~15.50 of this code~~]. If the agreement  
2 has a different primary purpose, the promisor has the burden of  
3 establishing that the covenant does not meet those criteria. For  
4 the purposes of this subsection, the "burden of establishing" a  
5 fact means the burden of persuading the triers of fact that the  
6 existence of the fact is more probable than its nonexistence.

7 (c) If the covenant is found to be enforceable under Section  
8 15.53 but, as written, contains limitations as to time,  
9 geographical area, or scope of activity that are not reasonable or  
10 imposes a greater restraint than is necessary in order to protect  
11 the goodwill or other business interests of the promisee, the  
12 promisee of the covenant may, in writing, unilaterally expressly  
13 modify or amend the limitations as to time, geographical area, or  
14 scope of activity to make them reasonable and not impose a greater  
15 restraint than is necessary to protect the goodwill or other  
16 business interest of the promisee and may seek to have the covenant  
17 enforced as modified or amended. An election to modify or amend  
18 shall automatically reduce the scope of the covenant to the  
19 limitations sought to be enforced by the promisee and must be made  
20 at or before the time any claim is made in a suit to enforce the  
21 covenant. If a court enforces the covenant as modified or amended  
22 and to the extent sought to be enforced by the promisee as to time,  
23 geographical area, or scope of activity, the court may award the  
24 promisee damages and injunctive relief. If the covenant is found to  
25 be enforceable under Section 15.53 but the promisee of the covenant  
26 seeks to enforce limitations as to time, geographical area, or  
27 scope of activity that are not reasonable and impose a greater

1 restraint than is necessary to protect the goodwill or other  
2 business interest of the promisee, the court shall reform the  
3 covenant to the extent necessary to cause the limitations contained  
4 in the covenant as to time, geographical area, and scope of activity  
5 to be restrained so as to be reasonable and to impose a restraint  
6 that is not greater than necessary to protect the goodwill or other  
7 business interest of the promisee and shall enforce the covenant as  
8 reformed. If the court reforms the covenant, the court may award  
9 the promisee injunctive relief and damages for breach of the  
10 covenant after it was reformed by the court or arbitrator but may  
11 not award damages for a breach of the covenant before its  
12 reformation.

13 (d) The final trial in any case involving the enforceability  
14 of a covenant not to compete shall be held expeditiously and shall  
15 take precedence over other matters, except criminal and family law  
16 matters. A promisee of a covenant not to compete that is  
17 enforceable under Section 15.53 shall be entitled to temporary  
18 injunctive relief without the necessity of showing irreparable harm  
19 or an inadequate remedy at law. A promisee of a covenant not to  
20 compete shall be entitled to temporary injunctive relief during the  
21 pendency of any suit if the final hearing is set more than six  
22 months after the date of the original filing of the suit.

23 (e) A promisee of a covenant not to compete that is  
24 enforceable under Section 15.53 shall be entitled to have the  
25 period of the restrictions extended by the court for a period  
26 equivalent to the period any breach of the covenant by the promisor.

27 (f) The party that prevails in a suit under this chapter

1 shall be awarded court costs and reasonable and necessary  
2 attorney's fees, except that a promisee shall not be entitled to  
3 court costs and attorney's fees if the covenant is reformed by a  
4 court under Subsection (c) [ancillary to or part of an otherwise  
5 enforceable agreement but contains limitations as to time,  
6 geographical area, or scope of activity to be restrained that are  
7 not reasonable and impose a greater restraint than is necessary to  
8 protect the goodwill or other business interest of the promisee,  
9 the court shall reform the covenant to the extent necessary to cause  
10 the limitations contained in the covenant as to time, geographical  
11 area, and scope of activity to be restrained to be reasonable and to  
12 impose a restraint that is not greater than necessary to protect the  
13 goodwill or other business interest of the promisee and enforce the  
14 covenant as reformed, except that the court may not award the  
15 promisee damages for a breach of the covenant before its  
16 reformation and the relief granted to the promisee shall be limited  
17 to injunctive relief. If the primary purpose of the agreement to  
18 which the covenant is ancillary is to obligate the promisor to  
19 render personal services, the promisor establishes that the  
20 promisee knew at the time of the execution of the agreement that the  
21 covenant did not contain limitations as to time, geographical area,  
22 and scope of activity to be restrained that were reasonable and the  
23 limitations imposed a greater restraint than necessary to protect  
24 the goodwill or other business interest of the promisee, and the  
25 promisee sought to enforce the covenant to a greater extent than was  
26 necessary to protect the goodwill or other business interest of the  
27 promisee, the court may award the promisor the costs, including

~~reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant].~~

Sec. 15.55 [~~15.52~~]. PREEMPTION OF OTHER LAW. (a) The criteria for enforceability of a covenant not to compete provided by Section 15.53 [~~15.50 of this code~~] and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.54 [~~15.51 of this code~~] are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action, regardless of form, to determine the enforceability or to enforce a covenant not to compete under common law or otherwise.

(b) If the primary purpose of the otherwise enforceable agreement that supports the covenant or of which the covenant is a part is to obligate the promisor to render personal services, for a term or at will, and the covenant seeks to restrict the promisee from competing in this state, any agreement that purports to select or elect the laws of another jurisdiction to apply or govern in any action to determine the enforceability of or to enforce a covenant not to compete is void.

SECTION 2. The change in law made by this Act to Subchapter E, Chapter 15, Business & Commerce Code, applies only to an action to enforce a covenant not to compete filed on or after the effective date of this Act. An action filed before the effective date of this Act, including an action filed in which a party is joined or designated after that date, is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.



1           SECTION 3.   This Act takes effect September 1, 2007.