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One Minute Memo®

Time To Check Your Virginia Non-Compete

On November 4, 2011, a divided Virginia Supreme Court decided *Home Paramount Pest Control Companies, Inc. v. Shaffer.* In light of the decision, Virginia employers should closely review their non-competition and non-solicitation agreements. What was once enforceable in the Commonwealth may no longer be so. Indeed, some twenty years ago, the Virginia Supreme Court found the exact same non-competition agreement enforceable.

Facts. Justin Shaffer worked for Home Paramount for seven months in 2009. When he started with the Company he signed an employment agreement that prohibited him from engaging directly or indirectly or concerning himself "in any manner whatsoever," in the business of exterminating in any city or county where he worked while employed by Home Paramount. After Shaffer quit, he went to work for a Home Paramount competitor and Home Paramount sued to enforce its employment agreement.

Background. Restrictive covenants in the Commonwealth are analyzed using a three part test: (1) Is the covenant narrowly drawn to protect the employer's legitimate business interest; (2) is it unduly burdensome on the employee's ability to earn a living; and (3) is it against public policy? *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005). These three factors are interrelated and will be considered together. *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E. 2d 666 (2001). In 1989, the Virginia Supreme Court found Home Paramount's restrictive covenant enforceable. *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E. 2d 922 (1989) (*Home Paramount I*). Since *Home Paramount I*, however, the Court has slowly narrowed the enforceability of non-competition agreements, culminating in *Omniplex World Services, Corp. v. U.S. Investigations Servs., Inc*., 270 Va. 246, 249, 618 S.E. 2d 340 (2005). In *Omniplex*, the Virginia Supreme Court held that non-competition agreements are enforceable only if they prohibit direct competition with the former employer. *Id*. (invalidating non-compete that prevented former employee from being employed by competitor *in any capacity*).

Decision. In *Home Paramount II*, the Virginia Supreme Court determined that the restrictive covenant in the employment agreement was now unenforceable because it potentially prohibited Shaffer from performing different, non-competitive functions, for his new employer than he did for Home Paramount. The "in any manner whatsoever" language held enforceable in 1989, proved fatal today. The Court read the agreement as restricting Shaffer from even owning stock in an exterminating company and rejected Home Paramount's argument that the Court was contemplating hypothetical job duties for Shaffer. The Court stated that Home Paramount invited contemplation of hypothetical situations "when it drafted a provision that prohibits former employees from working for competitors in *any* capacity." The Court found that Home Paramount should have confined the function element of the restrictive covenant to those activities it actually engaged in.

The Court also rejected the idea—as highlighted by the dissent—that it was bound by its previous decision finding the

agreement enforceable. It noted that *stare decisis* is "not an inexorable command" and did not prevent the "evolution of the law."

The Court further said that other similar non-competition agreements had been upheld because they contained language that made clear that the employee could work for competitors or in the same industry, in positions that did not actually compete with the former employer.

Finally, it is worth noting that *Home Paramount II*, narrows even *Omniplex*, indicating that restricting work to a direct competitor alone will not make an agreement enforceable. To be enforceable, an agreement must focus on the actual work or function being performed for the new employer, such that it actually, as opposed to potentially, prohibits only direct competition.

Check Your Agreements. Many employers have restrictive covenants using form language that purport to restrict employees from "directly or indirectly, owning, managing, being employed by any business that competes with or is similar to the business conducted by the employer." This type of language, even if enforceable before *Home Paramount II*, is no longer enforceable. In order to be enforceable, the language of the agreement must limit post employment activities solely to those functions that were performed for the previous employer and which compete directly with the former employer, or the agreement must include a "savings provision" that makes clear that employees can work in businesses or capacities that do not compete with the former employer. Put another way, an enforceable agreement must not allow invocation of the so-called "janitor defense," *i.e.* does it prevent the former employee from working for a competitor in any capacity, including as a janitor. If it does, or it can be read as such, it is unenforceable.

Less is now decidedly more with respect to restrictive covenants. An agreement that seeks to prohibit broad competition and activities will not likely be enforceable. This means that form agreements will rarely work now. To be enforceable, a restrictive covenant must be tailored to your business, your industry and the work actually being performed by your employees. The agreements should be drafted to stop egregious situations, not to prevent employees from merely changing companies.

Conclusion. It is good practice for employers to periodically review their policies. *Home Paramount II* makes clear why. What worked in 1989 does not work now. To be enforceable, your restrictive covenant should prohibit employees from working only for direct competitors, doing the same functions that they did for you. And it should define those competitors and functions and make clear that you do not seek to prevent your former employees from working in any capacity for those competitors.

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