Virginia Supreme Court Exterminates Another Non-Compete

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For over twenty years, employers have relied on the 1989 decision in *Paramount Termite Control Co. v. Rector* as a blueprint for the a non-compete agreement that is enforceable under Virginia law. On November 4, 2011, however, the Supreme Court of Virginia issued its opinion in *Home Paramount Pest Control Cos., Inc. v. Shaffer*, and, apparently, changed its mind. Oh, how the times have changed.

In connection with his employment by Paramount, the defendant in the Court's recent case, Justin Shaffer, entered into a non-compete agreement that contained the following restriction:

> The Employee will not engage directly or indirectly or concern himself/herself in any manner whatsoever in the carrying on or conducting the business of exterminating, pest control, termite control and/or fumigation services as an owner, agent, servant, representative, or employee, and/or as a member of a partnership and/or as an officer, director or stockholder of any corporation, or in any manner whatsoever, in any city, cities, county, or counties in the state(s) in which the Employee works and/or in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he/she shall cease for any reason whatsoever to be an employee of [Home Paramount].

Since the Court had upheld this *exact language* to Paramount's benefit in 1989, the company was well justified in continuing to use this restriction to protect its business from departing employees. Unfortunately for Paramount, the power of precedent only goes so far.

Unlike *Rector*, the *Shaffer* Court found that the minimal time and geographic restraints in Home Paramount's agreement could not mitigate the broad functional restraints on Shaffer's activities that, in the Court's view, far exceeded Home Paramount's traditional business activities. Indeed, the Court asserted that the language effectively prevented Shaffer from engaging in *any* activities related to the pest control industry, even activities that did not actually compete with Home Paramount. The Court noted that, "on its face, [the agreement] bars [Shaffer] from engaging even indirectly, or concerning himself in any manner whatsoever, in the pest control business, even as a passive stockholder of a publicly traded international conglomerate with a pest control subsidiary." While acknowledging the decision in *Rector* – which involved the same plaintiff and the same contractual language – the Court noted that it was not bound to follow its own prior precedent. Rather, the Court opined that Virginia's law on restrictive covenants had developed significantly since the *Rector* decision and that the language

could not stand under the Court's more recent decisions. Specifically, the Court noted that it had invalidated substantially similar restrictive covenants in the 2001 decisions in *Simmons v. Miller* and *Motion Control Systems, Inc. v. East*.

While it is true that restrictive covenants have long been disfavored under Virginia law as restraints on trade, the decision in *Shaffer* reflects a growing hostility by the Court toward such contracts. Indeed, the Court has invalidated restrictive covenants in the last five cases that have come before it. It is also clear from *Shaffer* that the Court is scrutinizing the functional scope of restrictive covenants, in addition to geographic breadth and duration, to strike down provisions that reach beyond the protection of employers' legitimate business interests. In the end, employers and practitioners must carefully draft restrictive covenants to ensure that they are reasonable not just in terms of their duration and the territory to which they apply, but also with respect to the activities that they purport to limit. In light of the Court's recent about-face with respect to Paramount's contract, employers should revisit their own agreements, even if they were drafted fairly recently.