SANDS ANDERSON

Virginia Workplace Law

Drafting Non-Competes Is Risky Business

By: Mike DeCamps. ***Monday, November 28th, 2011***

For those of you who draft, work with and seek to enforce **restrictive covenants**, pay particular attention to the recent November 2011 Virginia Supreme Court decision in **Home Paramount Pest Control Companies, Inc. v. Shaffer**.

At first blush, the case appears to be nothing more than another decision in a long line of recent decisions in which the Court rules in favor of the employee against the employer by finding the **non-compete** provision in an employment agreement over broad and therefore unenforceable. However, this decision commands attention because in it the Court considered the very same provision for the very same company that it considered in another non-compete case in 1989. In 1989, the Court held that provision enforceable. In last week's decision, the court found the same provision unenforceable.

So what was different? Well, obviously the particular employee was, and this made a difference with the Court's assessment of the duties and functions this particular employee had with the employer. The Court consistently applies the same basic test of enforceability for non-competes: Is it "narrowly drawn to protect the employer's legitimate business interests, not unduly burdensome on the employee's ability to earn a living, and not against public policy?" The court evaluates these limitations based on geographic scope, time duration and function.

In the most recent Home Paramount case, the Court traces its **judicial precedent** in looking at these agreements from a functionality viewpoint.

By reviewing this history, the Court makes it clear that it will demand that the functional limitation of these agreements be specifically tailored to the business situation at hand. They must not exceed what is necessary to protect the employer's legitimate business interests. Businesses that desire employees to sign restrictive covenants must give serious consideration to the breadth of the language used and whether such language is narrowly drawn. Drafters of such provisions who use the broadest language possible and cut and paste such language from other agreements do so at their peril.

Phrases such as "directly or indirectly," or "manage, operate, control, be employed by, participate in, or connected in any manner with…" are frequently seen in describing the functional limitations imposed on the employee. The Court's recent decision signals a risk in using these words. It also makes it clear that limitations of duration, geographic scope, and function must be considered together and not separately in assessing whether to enforce the restrictive covenant.

The **Virginia employment attorneys** at Sands Anderson are available to counsel and assist with the drafting of these restrictive agreements and to render advice concerning their enforcement.