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Recent Virginia Supreme Court Decision Marks a Steady Shift in the Law Governing Noncompete Agreements

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On November 4, 2011, the Virginia Supreme Court issued a decision in *Home Paramount Pest Control Cos. v. Shaffer*, in which the Court found a covenant not to compete in an employment agreement to be overbroad and unenforceable. In so doing, the Court overruled its own 1989 decision in *Paramount Pest Control Co. v. Rector*, which upheld a virtually identical agreement. Coincidentally, Home Paramount (the losing party in this new case) is the successor in interest to Paramount Pest Control, the prevailing party in the 1989 case.

Justin Shaffer worked for Home Paramount as an exterminator before quitting in July 2009 and joining a competitor shortly thereafter. Six months prior to quitting, Shaffer had signed an employment agreement containing a noncompete provision. The provision prohibited Shaffer from "engag[ing] indirectly or concern[ing] himself in any manner whatsoever" in the pest control industry "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." The specified limitations applied only to the cities or counties in which Shaffer performed services for Home Paramount and were set to expire two years following the termination of his employment.

The Court found that the functional element of the noncompete provision was simply too broad to be enforceable. The Court noted that, under a plain reading of the language, the provision theoretically would bar Shaffer from working as a janitor, bookkeeper, or mechanic for a pest control company, or even passively owning stock in

a publicly traded conglomerate with a pest control subsidiary. Ultimately, the Court stated that, if an employer is not going to confine the functional element to those activities in which it actually engages, it must bear the burden of providing a legitimate business interest in prohibiting the former employee from engaging in any conceivable activity while employed by a competitor. The implication of this reasoning, however, is that the functional element may still be broad as long as it is limited to only the employer's actual activities. In fact, by completely forbidding Shaffer from working for another pest control company, it would seem that this is the exact type of permissible limitation imposed by Home Paramount. But, as seen by the contrary ruling, it seems clear that the consequence of this decision is that a noncompete in Virginia may prohibit competing activities only if they are limited to those that the *employee actually performed* for the employer.

Home Paramount argued that the relatively narrow geographic scope and commonly accepted durational scope of two years compensated for the expansive functional element. While the Court acknowledged that the three should be "considered together rather than as three separate distinct issues," it nevertheless rejected this argument because of the clear overbreadth of the functional element in this case.

This decision clearly confirms a shift in the law governing Virginia noncompetes towards requiring a narrowly-tailored functional element. In reviewing its decisions evaluating noncompete agreements from the past 20 years, the Court noted that, in practice, it was "consistently assess[ing] the function element of provisions that restrict competition by determining whether the prohibited activity is of the same type as that actually engaged in by the former employer." As a result, Virginia employers (and those companies performing work in Virginia) should ensure that their noncompete provisions are narrowly tailored to prohibit their employees *only* from performing the services that they actually performed for their former employers.