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LEGAL ALERT

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Virginia Continues to Take a Tough Stance on Non-Compete Agreements

While non-compete agreements are fairly common in today's business world, Virginia courts disfavor them and will not enforce them unless they are narrowly tailored to protect legitimate business interests. Virginia courts will not modify or "blue pencil" overly restrictive non-compete agreements to make them reasonable and enforceable. The Virginia Supreme Court recently made its tough stance on non-compete agreements crystal clear in *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282 Va. 412, 718 S.E.2d 762 (2011), when it ruled a non-compete provision in an exterminator's employment contract was unenforceable because the terms were too restrictive. Click here for the opinion. On the heels of the *Shaffer* decision, the Virginia General Assembly then killed a bill introduced in its 2012 session (House Bill 1187) proposing to ban most restrictions on a former employee's ability to engage in a lawful profession, trade or business. Analyzing the *Shaffer* decision provides insight not only for the rationale underlying Virginia's tough stance on non-competes, but also guidance that may help draft non-compete provisions that can be enforced if violated.

The *Shaffer* Case

In *Shaffer*, an exterminator company sued its former employee for breach of its non-compete provision. The Virginia Supreme Court ruled that the non-compete agreement in the employment contract was unenforceable because its terms were overly restrictive and prevented the employee from engaging in work activities that the employee never performed for his former employer. The court found the functional scope of the non-compete was broader than necessary to protect the employer's legitimate business interest. The *Shaffer* decision represented an about-face by the Virginia Supreme Court, which held in a 1989 case that the very same employer's non-compete provision was enforceable. The *Shaffer* court justified its reversal of position on incremental changes in Virginia non-compete law in cases decided between 1989 and 2011.[1]

Specifically, under Virginia law, a non-compete agreement is enforceable if the employer establishes that the restriction: (a) is narrowly drafted to protect the employer's legitimate business interest; (b) is not unduly burdensome on the employee's ability to earn a living; and (c) does not violate policy. In the context of examining these elements, Virginia courts, like others, determine whether non-compete agreements are appropriately limited in time, geography and scope. Before determining if the employee breached the non-compete agreement, however, the *Shaffer* court followed Virginia's practice of analyzing whether the agreement is enforceable on its face rather than as applied. Some refer to this approach by Virginia courts as the "janitor" test. If a non-compete agreement would preclude an employee, who was not a janitor, from working as a janitor at a competitor, then the agreement is overly broad and unenforceable unless the employer can prove that it has a legitimate business interest in prohibiting the employee from working as a janitor for a competitor.

The *Shaffer* non-compete provision prohibited the employee exterminator, for a period of two years, from engaging directly or indirectly "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,

[1] In dissent, Justice Elizabeth McClanahan maintained that the decision improperly disregarded the doctrine of *stare decisis* and the employer had a right to rely on the court's prior determination in *Paramount Termite Control Co. v. Rector*, 238 Va 171, 380 S.E.2d 922 (1989) that this non-compete provision was reasonable and enforceable.

representative or employee. . .” This restriction was limited to cities and counties where the employee worked. The *Shaffer* court did not take issue with the agreement’s temporal and geographic restrictions (and, in fact, these restrictions were not challenged as unreasonable or overly broad by the employee). Instead, the *Shaffer* court focused on whether the non-compete was drafted narrowly in scope by assessing whether “the prohibited activity is of the same type as that actually engaged in by the former employee.”

The *Shaffer* court held that the employer failed to prove that the provision was narrowly drafted to protect the employer’s legitimate business interest. The Virginia Supreme Court held that the non-compete was overly broad because, on its face, it prohibited the employee from working for a competitor in any capacity or from having even a passive ownership interest in a corporation with a pest control subsidiary, and the employer failed to prove it had a legitimate business interest in those prohibitions. The employer in *Shaffer* argued that it was improper for the court to adopt an approach that reviewed the agreement facially, focusing on hypothetical job duties that might violate the agreement, rather than the work the former employee was actually performing for the competitor. The court rejected this argument, noting that the employer invited this inquiry by failing to limit the restriction to specific activities in which the employee had been engaged.

Guidance from *Shaffer*

The *Shaffer* case provides some guidance for employers and their counsel in drafting non-compete provisions that are more likely to withstand scrutiny if challenged. First, in light of *Shaffer,* Virginia employers may want to resist the urge to create non-compete restrictions with broad, catch-all language. Second, following *Shaffer*, Virginia employers should consider self-applying the “janitor” test to analyze whether the scope of the restrictions under the non-compete provision can be defended if challenged. Finally, despite *Shaffer’s* holding, employers can still use a combination of carefully drafted non-compete, non-solicitation and confidentiality agreements to protect themselves from harm caused by unfair competition. These steps may help employers strengthen their non-compete agreements.

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