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LETTER
NONCOMPETE NEWS

Noncompete News: Virginia Supreme Court Overturns Long-Standing Precedent on the Enforceability of Noncompetition Covenants in Employment Agreements

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Executive Summary: The Virginia Supreme Court recently struck down a noncompetition covenant contained in an employment agreement, overruling a 22-year-old precedent. Despite reasonable geographical and durational restrictions, the Court held that the noncompetition covenant was unenforceable because the scope of the former employee's restricted activities was overbroad. In *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 718 S.E.2d 762 (Va. 2011), a pest control company included a noncompetition covenant within the employment agreement that prohibited the company's former employee from "engag[ing] indirectly or concern[ing] himself …in any manner whatsoever [in pest control]…as an owner, agent, servant, representative, or employee, and/or as an officer, director, or stockholder of any corporation, or in any manner whatsoever." This language was *identical* to the language contained in a noncompetition covenant *upheld* by the Virginia Supreme Court twenty-two years before in *Paramount Termite Control Co., Inc. v. Rector*, 380 S.E.2d 922 (Va. 1989). In overruling *Paramount Termite*, the Court reviewed its noncompetition decisions over the intervening twenty-two years and concluded that Virginia had gradually refined its views on the reasonableness of such covenants. Applying its current standards, the Court found that the shear overbreadth of the scope of the future restricted activities (the "functional element") – prohibiting the former employee from being even a passive stockholder in a competitor company – was unreasonable, and thus not necessary to protect the company's legitimate business interests. The upshot of *Home Paramount* is that an overbroad "functional element" - standing alone - is sufficient to void an otherwise reasonable noncompetition covenant. To provide some context to *Home Paramount*, in Virginia, noncompetition covenants in employment agreements are upheld if the employer can establish that the covenant was: (a) narrowly drawn to protect the employer's legitimate business interests, (b) not unduly burdensome on the employee's ability to earn a living, and (c) not against the state's public policy. In assessing these three factors, Virginia courts considered the function, geography and duration of the restriction. The "functional element" compares the former employee's future restricted activities to his/her prior employment activities. The "geographical element" refers to the geographic area where the former employee is prohibited from competing (usually expressed in miles from the former employer's place of business, or the name of a city, county or state). The "durational element" refers to the restriction's length of time (usually expressed in years). Virginia does not permit (a) re-writing of unreasonable covenants (to make them reasonable) or (b) "blue penciling" (excising of unreasonable portions and enforcing the remaining provisions). **The Bottom Line:** The Court's

decision in *Home Paramount* means Virginia's lower courts will likely refuse to enforce noncompetition agreements with overly broad restrictions on the former employee's future activities. If you have questions regarding this decision, please contact the author of this article Todd R. Seelman, tseelman@fordharrison.com, who is a partner in our Denver office, Jeff Mokotoff, the editor of the *Noncompete News,* who is a partner in our Atlanta office, or the Ford & Harrison attorney with whom you usually work.