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Virginia Supreme Court Recognizes the Evolving Nature of Non-Compete Law

On November 4, 2011, the Virginia Supreme Court issued its opinion in one of the two non-compete cases it agreed to hear this term. The Court in *Home Paramount Pest Control Cos., Inc. v. Shaffer*, reaffirmed that a non-compete cannot contain a blanket restriction on working for a competitor. Rather, a non-compete can only restrict post-employment activities that are competitive to the former employer; and a narrow reading of the provision will not save it.

When reviewing a non-compete, Virginia courts look to the provision's restrictions on "function, geographic scope, and duration." Although considered together, where there is clear overbreadth of one factor, the non-compete will not be enforced.

In this case, the employee was prohibited from engaging "directly or indirectly or concern[ing] himself/herself in ***any manner whatsoever*** in the carrying on or conducting" of a competing business. Thus, as the lower court acknowledged, the employee could not hold any position at a competing business (e.g. janitor, bookkeeper, etc.), even positions that bear no relation to the position the employee held at the former employer. Not surprisingly, the Court found the non-compete unenforceable because it was so broad as to not promote a legitimate business interest.

Although Home Paramount argued that enforcement of the provision was justified under the circumstances because the employee had solicited its customers and was working in a similar capacity at the competitor, the Court was not persuaded. Instead, the Court reiterated that the first step in the analysis is to determine whether the non-compete is enforceable as a matter of law; only then does the court look to the specific facts of the situation.

Interestingly, in 1989, the exact same provision was found to be enforceable by the Virginia Supreme Court for an entity related to Home Paramount. Finding that the Court was not bound by its prior decision, it acknowledged that the law in this area has been "incrementally clarified" since 1989 and that the application of the traditional three factor test has been "refined." However, Justice McClanahan dissented from the opinion stating that the test for enforceability of a non-compete has not changed since 1989 and, thus, Home Paramount was "uniquely justified" in relying on the Court's prior opinion.

In the coming weeks, the Court will further clarify Virginia's position on non-competes when it is expected to issue an opinion in *BB&T Insurance Services v. Thomas Rutherfoord, Inc.* The *BB&T* case is expected to directly address the applicability of "blue penciling" in Virginia, as well as the less rigorous "sale of business standard" where the non-compete is ancillary to an acquisition. Expect another update when this decision is issued.

For additional information or for any questions regarding the *Home Paramount* decision, you are invited to contact the authors or their colleagues in Venable's **Labor and Employment Practice Group**.
