It's Time to Review Your Noncompete: Virginia's "Janitor Rule" is Here to Stay

On November 4, 2011, the Supreme Court of Virginia issued its decision in *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412 (2011), and rejected enforcing a noncompetition clause in an employment agreement that prohibited a former employee from working for a competitor in any capacity. This decision confirms a shift in recent years whereby Virginia courts have required a narrowly tailored functional element in noncompetition agreements, which has been referred to as the "janitor rule." That is, employers cannot prevent an employee from working at a competitor in any conceivable job (for example, as a janitor when the employee had been employed as CEO), but rather can only restrict an employee from performing similar duties to that which the employee had performed for the former employer. The Court stated that "we have consistently assessed 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."

The text of the noncompete at issue in *Home Paramount* read:

> The Employee will not engage directly or indirectly or concern himself/herself **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, 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, in any city, cities, county or counties in the state(s) in which the Employee works and or in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he/she shall cease for any reason whatsoever to be an employee of [Home Paramount]. (emphasis added)

Interestingly, the identical noncompete provision at issue in *Home Paramount* had previously been ruled enforceable in a 1989 decision, *Paramount Termite Control Co. v. Rector*, 238 Va. 171 (1989). But now, the Virginia Supreme Court determined that the noncompete restriction was overbroad because it prohibited the employee from engaging in "all reasonably conceivable activities while employed by a competitor." The Court noted that the provision as written would theoretically bar the employee, who had been an exterminator, from working as a janitor, mechanic, or bookkeeper of a pest control

Contacts

Matthew D. Keiser
+1 202.942.6398

Sionne C. Rosenfeld
+1 202.942.6104

company or passively owning stock in a publicly traded conglomerate which owned a pest control subsidiary. The Court determined that the noncompetition restriction was too broad, not necessary for the employer's business interest, and unenforceable under Virginia law.

The Court also determined that even a narrow geographic and temporal restraint could not save an overbroad functional restriction so as to make the restrictive covenant enforceable.

How Does This Apply Outside of Virginia?

Courts outside of Virginia are also carefully examining the functional restrictions in noncompete provisions. For example, a New York court recently struck down a restrictive covenant that was not limited to the employee's specific job duties performed for the former employer. *International Business Machines Corp. v. Visentin*, 2011 WL 672025, *22 (S.D.N.Y. Feb. 16, 2011).

Review and Revise Your Company's Noncompete Agreement

The *Home Paramount* decision casts doubt on the enforceability of any restrictive covenant that prohibits an employee from working in any capacity for a new employer, even if the duration and geographic scope are otherwise limited. Now is the time to review your existing noncompete agreements and revise them if needed.

We hope you have found this Advisory useful. If you would like more information or assistance in addressing the issues raised in this Advisory, please feel free to contact:

Matthew D. Keiser
+1 202.942.6398
Matthew.Keiser@aporter.com

Sionne C. Rosenfeld
+1 202.942.6104
Sionne.Rosenfeld@aporter.com