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Case Study: Home Paramount V. Shaffer

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Imagine the following scenario ...

Twenty years ago, your company was the employer at issue in a key Supreme Court of Virginia noncompete agreement case. Your company prevailed, with the Supreme Court holding that the company's standard noncompete agreement is enforceable under Virginia law.

Relying on that victory, your company continues using identical noncompete language and believes that it is on firm footing in doing so; after all, the Supreme Court of Virginia — the final arbiter of the meaning of Virginia law — has ruled that your noncompete agreement is enforceable.

Your company thus believes that it is certain to prevail when, in 2009, it seeks to enforce the agreement against a former employee who now works for a competitor. But the trial court refuses to follow the Supreme Court's prior decision and denies enforcement.

Your company is not worried, because it has a right to appeal to the Supreme Court, and your company knows that the Supreme Court staunchly applies stare decisis, a judicial concept requiring courts to follow prior decisions. Thus, your company has little doubt that the Supreme Court will reverse the trial court and, as it did 20 years previously, hold that the noncompete agreement is enforceable.

The Supreme Court issues its opinion, and, by a 6-1 margin, the court holds that, since it issued its prior decision in your company's favor, the court has "incrementally clarified the law" and that, in light of these incremental clarifications, your company's noncompete agreement is unenforceable. The prior decision has been "overruled."

This is not just another lawyer's hypothetical. These are the facts underlying the Supreme Court of Virginia's Nov. 4, 2011, decision in Home Paramount Pest Control Cos. v. Shaffer.

There, despite the Supreme Court's 1989 decision in Paramount Termite Control v. Rector approving the identical noncompete at issue in the subsequent Home Paramount decision, the court held that Home Paramount's noncompete agreement was overbroad and unenforceable.

The noncompete at issue provided that Shaffer would not "engage directly or indirectly ... in any manner whatsoever in ... pest control ... 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 geographic scope of the noncompete was limited to the cities and counties in which Shaffer worked for Home Paramount, and the temporal scope was two years post-employment.

In fairness, notwithstanding the court's 1989 Paramount Termite decision, the noncompete before the court was clearly overbroad in light of the Supreme Court's more recent decisions.

Specifically, the functional element of the noncompete agreement, which prevented Shaffer from working for a competitor in any capacity, was overbroad because it prevented him from working for competitors in positions unrelated to the work he performed for Home Paramount.

The prohibition against working in "any capacity" is often referred to as the "janitor rule," and is well-established in Virginia — if the noncompete is broad enough to prevent the employee from working for a competitor as a janitor, it is overbroad.

Home Paramount tried to salvage the overbroad functional element by arguing that the agreement's geographic and temporal scopes were narrow and thus significantly lessened the impact the functional prohibition had on Shaffer's ability to find other employment.

Though the court agreed that the functional element of a noncompete must be weighed together with the geographic and temporal elements, the court held that "the clear overbreadth of the function here cannot be saved by narrow tailoring of geographic scope and duration."

The court was correct to note that its precedent regarding noncompete agreements has evolved since 1989 and that it could no longer be reconciled with more recent case law.

In fact, most decisions out of the Supreme Court in the last 15 years have been in favor of the departing employee and have made clear that noncompete agreements that prohibit departing employees from working for competitors "in any capacity" will almost always be overbroad.

The lessons from the Home Paramount case are twofold.

First, the case reinforces the fact that Virginia's case law with respect to noncompete agreements is still evolving or, to use the Supreme Court's language, the court continues to "incrementally clarif[y] the law." An agreement that may have passed muster just a year or two earlier may no longer be enforceable today.

It is imperative that employers periodically review their noncompete agreements to ensure that agreements entered into years ago remain enforceable under the current state of the law. Without a periodic review and revision process, employers may find themselves defending a noncompete agreement that, though valid when drafted, is no longer valid as a result of the ever-evolving noncompete law.

Second, like many other previous decisions, this decision sends a clear signal that employers who use a form noncompete agreement are taking serious risks because "boilerplate" noncompete language cannot possibly be sufficiently tailored to the specific employment circumstances of every employee covered by the agreement.

Form agreements will invariably be overbroad with respect to the functional element. Employers should put into place a process that includes an in-depth analysis of each new employee's duties and responsibilities, drafting of unique noncompete provisions narrowly tailored to those specific duties and responsibilities, and periodically reviewing the terms of the agreement.

Though this process may seem cumbersome, the small amount of time it takes to get it right will be more than worth it when it comes time to enforce the agreement at the conclusion of the employment relationship.

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