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NON-COMPETITION AGREEMENTS IN VIRGINIA IN THE AFTERMATH OF *HOME PARAMOUNT PEST CONTROL V. SHAFFER*

Kevin E. Martingayle *

I. INTRODUCTION

On November 4, 2011, the Supreme Court of Virginia released its opinion in *Home Paramount Pest Control Cos. v. Shaffer*.¹ The issue before the court was whether a “non-compete” provision in an employment agreement was overbroad and unenforceable.² Although the court acknowledged that twenty-two years ago it reviewed and approved virtually identical restrictive language in *Paramount Termite Control Co. v. Rector*, the six-member majority of the seven-member court observed that it has “incrementally clarified the law since that case was decided” and reasoned that intervening decisions required a finding that the circuit court ruled correctly in determining the provisions to be overbroad and unenforceable.³

While the 2011 *Home Paramount* decision has been regarded by some as marking a seismic shift in Virginia jurisprudence on restrictive covenants,⁴ it is far more accurate to assess the opinion

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1. 282 Va. 412, 718 S.E.2d 762 (2011).

2. *Id.* at 414, 718 S.E.2d at 763.

3. *Id.* at 414, 420, 718 S.E.2d at 763, 766 (citing *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989)).

4. Jeffrey L. Berger, *The Times They Are A'Changin': Alarming New Decision Requires Employer Review of Non-Competes*, ACG NAT'L CAP. (Jan. 24, 2012), <http://acgcapi.talblog.com/tag/home-paramount-pest-control-v.-shaffer/>; Heath H. Galloway & Reba M. Mendoza, *Virginia Supreme Court Exterminates Another Non-Compete*, RICH. BAR (Nov. 30, 2011), http://www.richmondbar.org/business_law_tip_November_2011.pdf; Timothy M. McConville, *Virginia Supreme Court Ruling Signals Shift in Non-Compete Law*, LABOR & EMP'T L. COCKTAIL (Nov. 10, 2011), http://laborandemploymentlawcocktail.com/a_mix_of_labor_and_employ/2011/11/virginia-supreme-court-ruling-signals-shift-in-non-compete-law-by-timothy-m-mcconville-esq.html.

as simply confirming the message that the supreme court has delivered in an unbroken line of cases since 2001, starting with *Simmons v. Miller*.⁵ Specifically, the court has vigorously analyzed restrictions on post-employment competitive activities, and the use of broadly restrictive language almost certainly will cause the covenant to fail.⁶

II. THE THREE-PRONG TEST APPLICABLE TO COVENANTS NOT TO COMPETE

The test applicable to non-compete agreements is well-established and was not changed by the 2011 *Home Paramount* decision. It consists of these elements:

- (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
- (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
- (3) Is the restraint reasonable from the standpoint of a sound public policy?⁷

III. *SIMMONS V. MILLER* AND THE TREND AGAINST ENFORCEMENT OF NON-COMPETES

In the 1990s, the Supreme Court of Virginia issued several opinions in favor of employers seeking to enforce restrictive covenant language.⁸

However, starting with *Simmons v. Miller* in 2001, the trend reversed,⁹ and the supreme court signaled a deepening skepticism of the propriety of enforcing post-employment competitive restrictions. In *Simmons*, the court analyzed this language:

5. 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001).

6. *E.g.*, *id.* at 581–82, 544 S.E.2d at 678–79.

7. *Richardson v. Paxton Co.*, 203 Va. 790, 794, 127 S.E.2d 113, 117 (1962) (internal citations omitted); *see also Home Paramount Pest Control Cos.*, 282 Va. at 415, 718 S.E.2d at 763–64 (internal citations omitted) (paraphrasing the elements and test set forth in *Richardson*).

8. *See, e.g.*, *Advanced Marine Enters. v. PRC, Inc.*, 256 Va. 106, 119, 501 S.E.2d 148, 156 (1998); *New River Media Grp., Inc. v. Knighton*, 245 Va. 367, 370, 429 S.E.2d 25, 26–27 (1993); *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 239 Va. 369, 374, 389 S.E.2d 467, 470 (1990).

9. 261 Va. at 581, 544 S.E.2d at 678.

For a period of three (3) years after this termination or expiration of the Agreement, Employee shall not directly or indirectly, own, manage, control, be employed by, participate in, or be connected in any manner with ownership, management, operation, or control of any business similar to the type of business conducted by Employer at the time this Agreement terminates.¹⁰

This restrictive language, the court noted, involved an employer that imported merely “one particular brand of cigars grown and manufactured in the Canary Islands,” and yet purported to restrict “any business similar to the type of business conducted by Employer.”¹¹ The court also observed that the non-competition clause was “without geographical limitation,” whereas the employer “had exclusive rights to import and distribute” its product in a limited area.¹² Finally, the court determined that a three-year restriction was a “lengthy duration.”¹³

The *Simmons* court explained that “in determining the reasonableness and enforceability of restrictive covenants, trial courts must not consider function, geographical scope and duration as three separate and distinct issues. Rather, these limitations must be considered together.”¹⁴

Based upon the facts in the record and the language in the agreement, the court determined that “the restrictive covenant was greater than necessary to protect the legitimate business interests of [the employer], and unduly harsh and oppressive in curtailing [the employee’s] legitimate efforts to pursue her livelihood.”¹⁵ Describing this as an “unnecessary and unreasonable restraint of trade,” the court determined that the restrictions were “offensive to the public policy of the Commonwealth” and “not enforceable.”¹⁶

Later in 2001, the court decided *Motion Control Systems, Inc. v. East* and confirmed a trial court ruling that the subject covenant not to compete “imposed restraints that exceeded those necessary to protect the legitimate business interests of [the company] and,

10. *Id.* at 580, 544 S.E.2d at 678.

11. *Id.* at 581, 544 S.E.2d at 678.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 582, 544 S.E.2d at 678–79.

therefore, was unenforceable.”¹⁷ In this case, the language at issue provided:

Therefore, the Employee agrees that for a period of two years after termination of their employment with the Company in any manner whether with or without cause, the Employee will not within a one hundred (100) mile radius of the Company’s principal office in Dublin, Virginia, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be associated in any manner with the ownership, management, operation or control of any business similar to the type of business conducted by the Company at the time of the termination of this Agreement. The term “business similar to the type of business conducted by the Company” includes, but is not limited to any business that designs, manufactures, sells or distributes motors, motor drives or motor controls.¹⁸

Concluding that the trial court was correct in declaring such restraints to be excessive, the court stated:

By defining a “similar business” as “any business that designs, manufactures, sells or distributes motors, motor drives or motor controls,” MCS’s covenant also prohibits employment in any business, for example, that sells motors, regardless of whether the motors are the specialized types of brushless motors sold by MCS. As the trial court concluded, under this provision, the restricted activities “could include a wide range of enterprises unrelated to” the business of MCS.¹⁹

The next year, the court announced its opinion in *Modern Environments, Inc. v. Stinnett*, and once again determined that an employer failed to demonstrate the reasonableness of restrictions it sought to impose.²⁰ The primary problem spotted by the court in *Modern Environments* was a blanket prohibition against the former employee working in “any capacity” for a competing company in the restricted geographic area during a restricted time period.²¹ The court noted that the company offered “neither argument nor evidence of any legitimate business interest that is served” by such a broad restriction.²²

The employer in *Modern Environments* argued, unsuccessfully, that the supreme court had “previously enforced identical or simi-

17. 262 Va. 33, 38, 546 S.E.2d 424, 426 (2001).

18. *Id.* at 36, 546 S.E.2d at 425.

19. *Id.* at 37–38, 546 S.E.2d at 426.

20. 263 Va. 491, 495–96, 561 S.E.2d 694, 696 (2002).

21. *Id.*

22. *Id.* at 495, S.E.2d at 696.

lar language in other employment agreements and [had] not held such language to be over-broad.”²³ Among the decisions cited by the employer was *Paramount Termite Control Co. v. Rector*,²⁴ the case that would later be reversed in the 2011 *Home Paramount Pest Control Cos. v. Shaffer* decision.²⁵ However, the *Modern Environments* court made an effort to distinguish its prior opinions, rather than reversing any of them, reasoning:

In the cases relied upon by Modern, however, this Court did not limit its review to considering whether the restrictive covenants were facially reasonable. The Court examined the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee, whether the actions of the employee actually violated the terms of the non-compete agreements, and the nature of the restraint in light of all the circumstances of the case. The language of the non-compete agreement was considered in the context of the facts of the specific case. In no case did the Court hold that the language contained in the restrictive covenant at issue was valid and enforceable as a matter of law under all circumstances.²⁶

In 2005, the court decided *Omniplex World Services Corp. v. US Investigations Services, Inc.*,²⁷ and after a string of unanimous opinions dealing with restrictive covenants, the seven-member court split four to three. At issue was the covenant’s language:

Employee hereby covenants and agrees that, immediately following any termination of employment from OMNIPLEX that occurs before the expiration of the Term, . . . Employee shall not for the remainder of the Term (i) accept employment, become employed by, or perform any services for OMNIPLEX’s Customer for whom Employee provided services or for any other employer in a position supporting OMNIPLEX’s Customer, if the employment or engagement requires Employee to possess the same level of security clearance Employee relied on during his employment with OMNIPLEX.²⁸

In a very concise opinion, the majority determined that the restrictions would bar the former employee from working in any capacity for any business “that provides support of any kind” to a

23. *Id.* at 494, 561 S.E.2d at 695.

24. *Id.* (citing *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 172, 380 S.E.2d 922, 924 (1989)).

25. 282 Va. 412, 420, 718 S.E.2d 762, 766 (2011), *overruling Paramount Termite Control Co.*, 238 Va. 171, 380 S.E.2d 922 (1989).

26. 263 Va. at 494–95, 561 S.E.2d at 696.

27. 270 Va. 246, 618 S.E.2d 340 (2005).

28. *Id.* at 248, 618 S.E.2d at 341 (alterations in original).

particular government customer.²⁹ Because “the prohibition in this non-competition provision [was] not limited to employment that would be in competition with Omniplex,” the court determined it to be “overbroad and unenforceable.”³⁰

In a dissent more than twice as long as the majority opinion, three members of the court expressed the view that the restrictions were justified based on the evidence in the case:

The restrictive covenant at issue in this case, when viewed in the context of the facts of this record, meets the three-part test for the validity of such covenants particularly for purposes of sufficiency on a motion to strike the evidence. The contractual restraint has been amply demonstrated to be reasonable, even essential, to protect Omniplex’ contractual interests with the SGC. The restraint is no greater than necessary to protect that interest, particularly when drawn for such a short period of time and without restriction on Schaffer’s freedom to seek employment providing services to any employer in the world except one working at the SGC and requiring her level of security clearance.

For these same reasons, it cannot be said the restrictive covenant is unduly harsh in limiting Schaffer’s ability to earn a livelihood. Finally, the restraint is reasonable from a public policy standpoint. When drawn as narrowly as in this case, the restrictive covenant safeguards the ability in unique economic circumstances for an employer to maintain the contracts that enable it to be a viable entity, particularly in the areas of national security and defense.³¹

In 2007, the court returned to unanimity with its decision in *Parikh v. Family Care Center, Inc.*, in which it reversed trial court enforcement of a non-compete imposed on a physician.³² Although the court recited the elements of the three-prong test used to evaluate non-compete agreements,³³ it did not reach the issue of the enforceability of the restrictive language because the court determined that the parties seeking to enforce the restrictions did not have legal standing.³⁴

For the next four years, the court did not issue any published opinions dealing with post-employment competitive restrictions. And then the court released its *Home Paramount* opinion.

29. *Id.* at 250, 618 S.E.2d at 342–43.

30. *Id.*, 618 S.E.2d at 343.

31. *Id.* at 258, 618 S.E.2d at 347.

32. 273 Va. 284, 291, 641 S.E.2d 98, 101 (2007).

33. *See id.* at 288, 641 S.E.2d at 100 (citations omitted).

34. *See id.* at 291, 641 S.E.2d at 101.

IV. *HOME PARAMOUNT PEST CONTROL COS. V. SHAFFER*:
SEISMIC SHIFT OR ACKNOWLEDGMENT OF A DECADE-LONG TREND?

With its 2007 opinion in *Parikh v. Family Care Center, Inc.*, decided on an issue of standing, the last substantive analysis from the supreme court on a non-compete case was the 2005 *Omniplex* decision that revealed a four-to-three split in the court. By the time that the 2011 *Home Paramount* case was under consideration, only two members of the *Omniplex* court remained members of the supreme court. Current Chief Justice Cynthia D. Kinser was a dissenting justice in *Omniplex*, and Justice Donald W. Lemons was in the *Omniplex* majority.³⁵ With significant turnover on the court, there was no accurate way to predict what the court would do in the new *Home Paramount* decision. On the one hand, every non-compete opinion in the past decade had been decided in favor of the employee and against enforcement of restrictions. On the other hand, the language before the court was identical to the language the court upheld in 1989 in *Paramount Termite Control Co. v. Rector*,³⁶ which had never been overruled.

The language under review in the 2011 *Home Paramount* case was as follows:

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

35. Justice Elizabeth B. Lacy authored the *Omniplex* majority opinion, 270 Va. at 247, 618 S.E.2d at 341, and subsequently retired. Michael Hardy, *Virginia High Court Justice Says She'll Retire; Selection of Lacy by Baliles in 1988 Was First of Woman*, RICH. TIMES-DISPATCH, June 12, 2007, at B1. She was joined in that opinion by Justice Lemons, Justice Lawrence L. Koontz, Jr. (retired, Mike Gangloff, *Judge Puts Gavel Down After Career of 43 Years*, ROANOKE TIMES, Dec. 5, 2010, at B1), and Senior Justice Roscoe B. Stephenson, Jr. (deceased, Jordan Fifer, *Alleghany Co. Was Home to Justice*, ROANOKE TIMES, June 1, 2011, at A15). See *Omniplex*, 270 Va. at 246, 247, 251, 618 S.E.2d at 340-41, 343. Justice G. Steven Agee (now on the United States Court of Appeals for the Fourth Circuit, see Jessica Marcy, *Judge from Salem Gets Nod for Federal Post*, ROANOKE TIMES, Mar. 14, 2008, at B3) authored the dissenting opinion and was joined by Justice Barbara M. Keenan (also now on the Fourth Circuit, see Alan Cooper, *Justice Mims, Former AG, Legislator, Joins Va. Supreme Court*, VA. LAW. WKLY., Apr. 19, 2010, at 2, 18) and Justice Kinser (now Chief Justice, see Michael Sluss, *Female Justice Picked to Lead*, ROANOKE TIMES, Sept. 1, 2010, at A11). See *Omniplex*, 270 Va. at 251, 618 S.E.2d at 343.

36. Compare *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 414-15, 718 S.E.2d 762, 763 (2011), with *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 172-73, 380 S.E.2d 922, 924 (1989).

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].³⁷

Applying a *de novo* standard of review and reciting the established three-prong test,³⁸ the court determined that the restrictions were “akin to those we found unenforceable in *Simmons* and *Motion Control*.”³⁹ Continuing, the court stated:

On its face, [the contract] prohibits Shaffer from working for Connor’s or any other business in the pest control industry in any capacity. It bars him from engaging even indirectly, or concerning himself in any manner whatsoever, in the pest control business, even as a passive stockholder of a publicly traded international conglomerate with a pest control subsidiary. The circuit court therefore did not err in requiring Home Paramount to prove it had a legitimate business interest in such a sweeping prohibition.⁴⁰

In reaching the decision to affirm the circuit court’s judgment that the restrictions were overbroad and unenforceable, the court acknowledged that in 1989 it approved of the same language dealing with the same company.⁴¹ Confronted directly with the doctrine of *stare decisis*, the court opined that it is “not an inexorable command”⁴² and found a duty “to acknowledge when . . . later decisions have presented an irreconcilable conflict with [the earlier] precedent.”⁴³ Accordingly, the court found it appropriate to overrule its prior *Paramount* decision.⁴⁴

Although Chief Justice Kinser joined the dissent in *Omniplex* and argued for restrictive covenant enforcement in that case,⁴⁵ she joined the majority in the 2011 *Home Paramount* opinion. The decision drew only one dissent, and it came from one of the two newest members of the court, Justice Elizabeth McClana-

37. 282 Va. at 414–15, 718 S.E.2d at 763 (alteration in original).

38. *Id.* at 415, 718 S.E.2d at 763–64.

39. *Id.* at 418, 718 S.E.2d at 765.

40. *Id.*

41. *Id.* at 420, 718 S.E.2d at 766.

42. *Id.* at 419, 718 S.E.2d at 766 (internal citation omitted).

43. *Id.* at 419–20, 718 S.E.2d at 766 (quoting *Newman v. Erie Ins. Exch.*, 256 Va. 501, 509, 507 S.E.2d 348, 352–53 (1998)) (alteration in original).

44. *Id.* at 420, 718 S.E.2d at 766.

45. See *Omniplex World Servs. v. US Investigations Servs., Inc.*, 270 Va. 246, 251, 618 S.E.2d 340, 343 (2005) (Agee, J., dissenting).

han.⁴⁶ Noting, quite correctly, that the “test for determining the validity of a non-compete agreement was the same” when the court decided the 1989 *Paramount* case, and observing that the dispute involved the same language and the same company seeking enforcement, Justice McClanahan opined that *stare decisis* should require a ruling that the language is enforceable.⁴⁷

There are several important lessons to be learned from the 2011 *Home Paramount* decision and the prior decade of decisions striking down non-compete agreements.

First, unless an employer truly has legitimate business interests that justify post-employment protection, no employer should seek to impose such restrictions. If put to the test, an employer will have to prove the business necessity for each restriction and all of the language utilized in an agreement.

Second, if a covenant not to compete is going to be implemented, the language must be crafted with great care. There is a tremendous temptation in agreements to use sweeping terminology, such as “including, but not limited to” and “directly or indirectly.” Imprecise “catch-all” language makes it easy for an employee to demonstrate the absurd lengths to which such restrictions might extend. For example, when the functional limitations “include” but “are not limited to” a list of activities, how can the court or parties know what else is contemplated by the limitations? Similarly, when an activity is prohibited both “directly” and “indirectly,” what does “indirectly” actually prohibit?

Third, parties seeking the protection of restrictive covenants should limit the functional limitations to vital and clearly provable business interests. Employers are not entitled to complete insulation from competition by former employees, but they can often justify protecting core business interests. Employers ought to be able to determine what constitutes their vital business concerns, and they must resist the temptation to protect anything more than that.

46. Justice McClanahan and Justice Cleo E. Powell were elected by the Virginia General Assembly on July 29, 2011, in the 2011 Special Session I with their terms commencing August 1, 2011. Mike DeBonis, *Assembly Fills Spots on Va.'s High Court*, WASH. POST, July 30, 2011, at B01.

47. *Home Paramount Pest Control Cos.*, 282 Va. at 420–21, 718 S.E.2d at 766–67 (McClanahan, J., dissenting).

Fourth, employers and attorneys have to recognize that there is no such thing in Virginia as a “standard” restrictive covenant. The functional limitations depend on what type of work the employer does and what the employee did while working for the employer. Geographic limitations should coincide with core market areas. The length of duration should be justifiable based on actual company data or other competent analyses. It is never sufficient for an employer to argue that the restrictions are “typical” or “normal.” The burden is on the employer to prove the need for and narrow tailoring of each restriction.

V. UNRESOLVED ISSUES IN VIRGINIA NON-COMPETE LAW

While the opinions from the Supreme Court of Virginia in the past decade have made it clear that the court has adopted a skeptical view of non-compete agreements, there are a number of unanswered questions.

A. *What Does the “Public Policy” Part of the Three-Prong Test Actually Mean?*

The third prong of the traditional test asks this question: “Is the restraint reasonable from the standpoint of a sound public policy?”⁴⁸ However, there are no cases from the supreme court answering the question of what this means. In *Simmons v. Miller*, the court found that an “unnecessary and unreasonable restraint of trade” was “offensive to the public policy of the Commonwealth and is not enforceable,”⁴⁹ but that statement does little to provide any depth or definitional meaning to this part of the test. In this author’s opinion, the most likely application of the public policy prong to invalidate a covenant will come in the medical or other “necessary” professional context. For example, if a post-employment non-competition agreement would have the impact of removing a much-needed doctor from a certain geographic area that will then suffer a hardship, that is the type of circumstance

48. *Richardson v. Paxton Co.*, 203 Va. 790, 794, 127 S.E.2d 113, 417 (1962) (internal quotation marks omitted).

49. 261 Va. 561, 582, 544 S.E.2d 666, 678–79 (2001).

that would justify a finding that public policy outweighs the private considerations underlying the competitive restrictions.⁵⁰

B. *Is Ambiguity in Restrictions Fatal to Enforcement?*

In an often-cited statement from a 1983 United States district court opinion, Judge Robert Merhige invalidated a restrictive covenant and held that the difficulty of determining the “exact reach of the covenant . . . renders the covenant overbroad.”⁵¹

Twelve years later, Chief Judge Jackson Kiser, of the Western District of Virginia, cited Judge Merhige’s opinion in stating that the “mere act of subjecting the employee to the uncertainty of an ambiguous provision offends public policy.”⁵² Although numerous circuit court opinions have cited these statements from Judge Merhige and Chief Judge Kiser,⁵³ the supreme court has neither cited their opinions nor expressly stated agreement with the idea that ambiguity in the restrictions will necessarily cause them to fail. As a practical matter, however, ambiguities probably do nothing more than demonstrate overbreadth, and the supreme court has made it clear that overbreadth is fatal to enforcement.⁵⁴

C. *Are Non-Solicitation Clauses Subject to the Same Test Applicable to Non-Competition Provisions?*

The supreme court has never expressly held that non-solicitation provisions are to be analyzed pursuant to the same three-prong test applicable to non-compete agreements. However,

50. In *Etheridge v. Medical Center Hospitals*, the court upheld the cap on medical malpractice damages based, primarily, on deference to the General Assembly’s judgment that there is a strong public policy interest in making sure that medical services remain widely available to the general public. 237 Va. 87, 93–94, 107, 376 S.E.2d 525, 527–28, 536 (1989). That determination provides significant ammunition for an argument that efforts to prevent doctors from working in certain areas should be invalidated or, at most, tolerated only when it is clear that there are an abundance of providers of the particular type of medical care at issue.

51. *Power Distrib., Inc. v. Emergency Power Eng’g, Inc.*, 569 F. Supp. 54, 58 (E.D. Va. 1983).

52. *Roto-Die Co. v. Lesser*, 899 F. Supp. 1515, 1521 (W.D. Va. 1995) (citing *Power Distrib. Inc.*, 569 F. Supp. at 58 (footnote omitted)).

53. See, e.g., *Innovative Sys. & Solutions, Inc. v. Hannah*, 75 Va. Cir. 363, 370–71 (2008) (Norfolk City).

54. *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 419, 718 S.E.2d 762, 765 (2011).

in *Therapy Services, Inc. v. Crystal City Nursing Center, Inc.*,⁵⁵ the court determined that an employee non-solicitation agreement between businesses is “a contract in restraint of trade and will be held void as against public policy if it is unreasonable as between the parties or is injurious to the public.”⁵⁶ This supreme court opinion (along with other authority) recently was cited by a circuit court as support for the premise that non-solicitation “covenants are generally analyzed in the same manner as covenants not to compete.”⁵⁷

D. *Is Blue-Penciling Allowable and Enforceable? Can Inclusion of a Blue Pencil Clause Be Fatal?*

Many non-competition agreements contain language designed to save the agreement from total loss in the event that any portion of the language is deemed to be invalid and unenforceable. Often, this takes the form of a severability provision where the parties agree to sever out any provisions found to be defective, while letting the remainder of the agreement stand. Other agreements attempt to authorize the court to rewrite the restrictions through blue-pencil power in the event that any defects are determined.⁵⁸ Some agreements, rather confusingly, attempt to use both kinds of provisions. There is no indication, however, that the supreme court is inclined to rule that judges in Virginia have blue-pencil power, even if the parties agree.

The only mention of blue-penciling (or any version of this terminology) in supreme court case law is found in *National Title Insurance Corp. Agency v. First Union Bank*.⁵⁹ In that case, the court noted that one of the litigants claimed that the circuit

55. 239 Va. 385, 389 S.E.2d 710 (1990).

56. *Id.* at 388, 389 S.E.2d at 711.

57. Patient First Richmond Med. Grp., LLC v. Blanco, No. CL10-6211, 2011 Va. Cir. LEXIS 107, at *9 (Cir. Ct. Feb. 15, 2011) (Virginia Beach City) (citing Strategic Res., Inc. v. Nevin, No. 1:05cv992, 2005 U.S. Dist. LEXIS 30985, at *10-11 (E.D. Va. Nov. 23, 2005); Strategic Enter. Solutions, Inc. v. Ikuma, 77 Va. Cir. 179 (2008) (Fairfax County); Int'l Paper Co. v. Brooks, 63 Va. Cir. 494, 495-96 (2003) (Roanoke City); *Therapy Servs., Inc.*, 239 Va. at 385, 389 S.E.2d at 710), *cert. denied*, (Aug. 1, 2011), *pet. for reh'rg denied*, (Sept. 23, 2011).

58. See *Roto-Die Co.*, 899 F. Supp. at 1522-23 (discussing in detail severing, blue-penciling, and their differences).

59. 263 Va. 355, 364 n.5, 559 S.E.2d 668, 673 n.5 (2002).

court improperly engaged in blue-penciling, but without addressing whether such is ever allowable, the court simply determined that the circuit court did not do it.⁶⁰

Although the supreme court has not expressly rejected the concept of blue-penciling, other courts in Virginia have, and the overwhelming weight of authority is against the concept.⁶¹ In fact, at least one circuit court has determined that merely including a blue-pencil provision will “render the agreement unenforceable.”⁶²

E. *Does Virginia Code Section 59.1-9.5 Render All Restrictive Covenants Invalid?*

Virginia Code section 59.1-9.5, which is a part of the Virginia Antitrust Act,⁶³ provides that “every contract . . . in restraint of trade or commerce of this Commonwealth is unlawful.”⁶⁴ The courts have consistently held that post-employment restrictive agreements are “restraint[s] of trade,”⁶⁵ and statutory construction requires giving the “words used” their plain meaning, “unless a literal construction would involve a manifest absurdity.”⁶⁶ While the supreme court has not analyzed Virginia Code section 59.1-9.5 in the context of non-competition agreements, a recent case from a circuit court in Virginia has. Despite the mandate to construe and interpret statutes in accordance with the plain language used by the General Assembly, the circuit court determined that antitrust provisions are “rule[s] of reason” and ruled that the statute does not constitute an absolute bar to restrictive covenant enforcement.⁶⁷

60. *Id.*

61. *See, e.g.,* Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006) (citations omitted) (rejecting blue-penciling and discussing authority); Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 965–66 (W.D. Va. 2000) (citations omitted) (similarly rejecting blue-penciling and discussing authority).

62. Pace v. Ret. Plan Admin. Serv., 74 Va. Cir. 201, 205 (2007) (Richmond City) (citations omitted).

63. VA. CODE ANN. § 59.1-9.1 to -9.18 (Repl. Vol. 2006).

64. *Id.* § 59.1-9.5 (Repl. Vol. 2006).

65. *See, e.g.,* Modern Env'ts, Inc. v. Stinnett, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002).

66. Davis v. Tazewell Place Assocs., 254 Va. 257, 260–61, 492 S.E.2d 162, 164 (1997) (internal quotation marks omitted).

67. Integrity Auto Specialists, Inc. v. Meyer, No. CL-10114 (Va. Cir. Ct. June 28, 2011) (Chesapeake City) (internal quotation marks omitted).

VI. CONCLUSION

Despite the fanfare with which some employment lawyers greeted the supreme court's 2011 *Home Paramount* decision, it did not mark a sea change or seismic shift in restrictive covenant jurisprudence. As the court stated, it has "gradually refined" its analysis and "incrementally clarified the law since [the prior *Paramount*] case was decided in 1989."⁶⁸ Although it is certainly true that the court has cleaned up some of the obvious conflict present in its prior decisions, many questions remain unresolved, and without a doubt, they will provide fertile ground for future litigation and appeals.

68. *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 420, 718 S.E.2d 762, 766 (2011).