Spring 2006

TRENDS™ IN LITIGATION

Seeing Justice Done: From Saddam Hussein in Iraq to White-Collar Crime in Charlotte, N.C.

An Interview with Anne Tompkins by Thomas G. Walker

Investigation Reports: To Write Or Not To Write

By Scott P. Hilsen

The NAD: An Efficient and Cost-Effective Alternative to Traditional False Advertising Litigation

By Jennifer Brown Moore

Title III of the Americans With Disabilities Act: The Latest Trend in Disability Litigation and its Effect on One of Our Nation's Most Treasured and Historic Landmarks

By R. Steve Ensor and Ashley D. Brightwell

ALSTON +BIRD LLP

This edition features a unique perspective on Iraq from our new partner, Anne Tompkins, who was a critical member of the team prosecuting the case against Saddam Hussein and others in his government. Ms. Tompkins had previously served in the United States Attorney's office in Charlotte and is interviewed by Thomas Walker, another alum from that office and current Alston & Bird partner. Anne describes working amidst rocket and mortar fire and dealing with mass grave exhumations. You will find the interview fascinating.

Somewhat less dramatic – but nonetheless important – are the other articles in this edition. Scott Hilsen deals with a very hot topic in internal investigations – whether to write a report summarizing the investigation results. Jennifer Brown Moore addresses a new alternative for litigating false advertising claims, and Steve Ensor and Ashley Brightwell discuss a new and important trend in disability litigation.

We are also pleased to announce two recent and exciting additions to Alston & Bird's litigation team – the Honorable Gino Brogdon and the Honorable Betty Weinberg Ellerin. Judge Brogdon re-joins our firm after serving on the State and Superior Courts in Fulton County, Georgia. Even before entering the judiciary, Gino was a highly regarded and talented trial lawyer, and we are honored that he chose to return to our Firm. Justice Ellerin served more than 20 years as an Appellate Division jurist and followed that by being the first woman appointed as Deputy Chief Administrative Judge of the State of New York for the New York City Courts. We are delighted to have her join the Firm.

Peter Kontio
Todd R. David

Peter Kontio
Co-Chair
Litigation Groups
pkontio@alston.com

Todd R. David
Co-Chair
Litigation Groups
tdavid@alston.com

Thomas G. Walker, Partner
Litigation and Trial Practice
thomas.walker@alston.com

Seeing Justice Done: From Saddam Hussein in Iraq to White-Collar Crime in Charlotte, N.C.

An Interview with Anne Tompkins by Thomas G. Walker

Introduction:

In April 2005, Anne Tompkins returned home after two four-month tours in Iraq where she worked with a team of American and Iraqi lawyers, judges and investigators. Her job was to help build a case against Saddam Hussein for crimes against humanity. Now a partner with Alston & Bird, Anne recently talked with fellow litigator Thomas Walker about her experience.

Thomas:

Anne, tell us about your legal experience before you came to Alston & Bird.

Anne:

I spent the first eight years of my career as a state prosecutor in the District Attorney's office here in Charlotte. I was lucky to be able to begin trying cases early and to be able to watch talented lawyers, like you, try cases. It was a great training ground and a true labor of love.

Thomas:

What kinds of cases did you try?

Anne:

I tried every type of case from trespass to capital murder.

Thomas:

Then you and I worked together again at the U.S. Attorney's office.

Anne:

Yes, I spent five years as a federal prosecutor trying violent crimes, drug trafficking and white collar cases.



Thomas:

Now, you recently spent some time in Iraq. When did you first hear about the opportunity to go to Iraq?

Anne:

In early 2004, Judge Robert Conrad, who was the U.S. Attorney at the time, learned that the Deputy Attorney General was putting together a team of prosecutors to go to Baghdad and assist the Iraqis in putting together the cases against Saddam Hussein and other members of the former regime. I thought it sounded like a great opportunity to be part of history and told Mr. Conrad that I was interested in vying for the job. It took some effort, but I was finally able to convince the DAG that my background in major case preparation and trial was relevant to the effort in spite of the fact that I had no experience in international humanitarian law.

Thomas:

How did you make up for your lack of subject matter experience?

Anne:

Now Thomas, you know trial lawyers never let a lack of knowledge slow them down! Actually, Greg Kehoe, who led our group in Iraq, had spent five years in The Hague trying cases in the Yugoslavian Tribunal. I learned a lot from Greg. I read a lot of the cases from the International Tribunals from Yugoslavia, Rwanda and Sierra Leone. I also read a lot of other books about crimes against humanity and genocide. Compelling but not happy stuff.

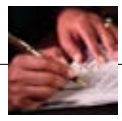
Thomas:

How much time did you have between the time that you accepted the job and the time you had to leave?

Anne:

I spent two months in Washington working with agents at the FBI, learning how to shoot a gun, and making contacts with the intelligence community to assist in the effort. Then I packed my bag and headed to Baghdad.

Anne Tompkins, Partner
Litigation and Trial Practice
anne.tompkins@alston.com


There was no escaping the fact that we lived and worked in a war zone.

Thomas:

Did you actually carry a gun?

Anne:

Yes, I did, but I left the real security to the professionals!

Thomas:

What was everyday life like in Baghdad?

Anne:

There was no typical day. Our group consisted of four lawyers and about 20 federal agents. We worked seven days a week on lots of different projects. Law firm associates will be happy to know that a big part of this case was spent in document production.

Thomas:

You mean there is no way to escape document production?

Anne:

Apparently not! After the fall of the regime, there were millions of documents recovered. We had to develop search terms and use translators to help search for any documents that may be helpful in prosecuting the crimes we were investigating.

Thomas:

What else did you do?

Anne:

We also were involved in two mass grave exhumations and the follow-up investigation and witness interviews that stemmed from information we learned from evidence gathered in the mass graves. We worked with the Iraqi investigative judges to interview witnesses; we participated in training in international humanitarian law for the Iraqi prosecutors, investigative judges, trial judges and appellate judges; and we built the courthouse for the trials. It was a massive effort.

Thomas:

What was the most interesting thing you did while in Iraq?



Anne:

It's hard to say, because it was such an extreme experience, but the exhumation of the mass grave in Hatra and the follow-up investigation in Kurdistan were amazing.

Thomas:

Were you constantly aware of the danger surrounding you?

Anne:

Yes. There was no escaping the fact that we lived and worked in a war zone. Explosions and gun fire were everyday sounds. We took incoming mortar and rocket rounds in the Green Zone regularly. And, of course, the military was always around us.

Thomas:

Did you have any close calls?

Anne:

There were times I was extremely scared when we were taking rounds, but "close" to me and "close" to a soldier are in completely different ballparks!

Thomas:

Do you miss anything about that experience?

Anne:

Yes. I miss the espirit de corps of the group of people that I worked with. I think in extreme conditions, like living in a war zone, or even in a big case prep, you develop a bond with the people you share the experience with. We had a singularity of focus that I really enjoyed.

Thomas:

How is the Iraqi criminal justice system different than our legal system?

Anne:

Good question! What people don't know is that even under Saddam Hussein, Iraq had the same civil law system that exists in Europe.



That system is up and running today and forms the backbone of both the Iraqi Special Tribunal and the Iraqi civil and criminal justice systems. But, what we also know about Saddam's regime is that there were secret courts in which show trials were held; there was a 100 percent conviction rate; and the unfortunate souls who appeared in those courts were never seen again.

Thomas:

So do the judges and lawyers making up the tribunal have any experience?

One of the things I am hopeful for is that we'll see women in Iraq take leadership roles.

Anne:

They do. Just like anywhere, they vary in experience, temperament and skill set, but there are a lot of experienced judges and lawyers in Iraq, including women. That's another thing people don't know about Iraq – there are many highly educated women in that country. One of the things I am hopeful for is that we'll see women in Iraq take leadership roles – they are there – I just hope they get the chance to lead.

Thomas:

How did the experience affect your life?

Anne:

Well, that's a difficult question. I met a lot of great people, and I was lucky to be part of such a historical event. But, I guess it made me appreciate the simple things in life and the people in my life.

Thomas:

Did you ever see Saddam?

Anne:

Yes, I did. I actually had a little staring contest with him. I won, of course.

Thomas:

How has your transition to Alston & Bird been after that experience?



Anne:

Well, I'm back home in many ways. I've worked with you and Mark Calloway before, so it feels very comfortable here, and I am enjoying it very much.

Thomas:

What kind of cases have you been working on since you arrived?

Anne:

I am working on a health care fraud case that is staffed mainly out of Atlanta. Working on that case has helped me get to know a lot of my colleagues in the Litigation and Trial Practice Group in Atlanta. I have also spent a considerable amount of time working on a compliance review of a major corporation here in Charlotte.

Thomas:

Where do you see your practice going this year?

Anne:

I hope to do a lot more corporate compliance work. Our experience as former federal prosecutors is very valuable for these corporate audits. I'm also seeing a lot of possibilities in criminal securities litigation, tax and health care. Those seem to be hot areas for federal prosecutors these days. I'm looking forward to having a busy year.

Thomas:

Thanks, Anne.

Anne:

Anytime.



Scott P. Hilsen, Partner
Securities Litigation Group
shilsen@alston.com

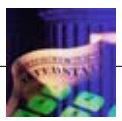
Investigation Reports: To Write Or Not To Write

One of the critical issues when conducting an internal investigation is whether the factual findings and results of the investigation will be provided to the client orally or in a written report. The inclination may be to write a report if the investigation found that no wrongdoing occurred, and to avoid any written report if wrongful conduct did occur. The problem with this defense-oriented approach is that it only considers the outcome of the investigation, not the purpose of the investigation. An attorney needs to think proactively about whether a written report will best serve the client's needs.

The most practical reason to prepare a written report is to memorialize and preserve the facts that are developed during the course of the investigation. A written investigation report also may give the company a powerful tool to cooperate with the government. In a renown 2003 memorandum by then-Deputy Attorney General Larry Thompson to all United States Attorneys, prosecutors were advised that one of the factors that should be considered when deciding whether to prosecute a company is the company's timely and voluntary disclosure of wrongdoing and its willingness to cooperate.[1] Another advantage to providing a written report to the government is to offensively establish mitigating factors, such as how and when the company learned of the alleged misconduct, its thoroughness in investigating the facts, remedial actions taken, and its cooperation with authorities.

If a shareholder derivative action is filed, the company may need to submit a written investigation report to support a motion to dismiss if the action is not in the best interests of the company.[2] Courts have relied upon written reports when granting such motions to dismiss. In *Millsap v. American Family Corporation*,[3] for instance, the Georgia Court of Appeals affirmed the dismissal of a derivative lawsuit based on the recommendation of a special litigation committee because the committee's conclusions were based on a "detailed, documented investigation."[4] Similarly, in *Kaplan v. Wyatt*,[5] the Delaware Supreme Court affirmed the dismissal of a shareholder derivative claim where the committee submitted a detailed report supporting its conclusions.





If the purpose of the investigation is to determine how wrongdoing occurred and to take corrective action, directors and officers may need a written report to justify resulting business decisions, such as terminating an employee, changing management, or restating financial results. Instead of relying on oral reports from counsel, directors are insisting with greater frequency on having a written report justifying their decisions.

The overwhelming disadvantage of a written report is that it might fall into the hands of plaintiffs in civil litigation. In *McKesson Corporation v. Green*,[6] and in related cases across the country,[7] the production of the results of an internal investigation to the government was found to have constituted a waiver of the work product protection because the production to the government was a production to an "adversary."[8] This waiver allowed civil plaintiffs in over 80 shareholder lawsuits against McKesson to gain access to the investigation report, which provided an invaluable road map to assert claims against the company.

The overwhelming disadvantage of a written report is that it might fall into the hands of plaintiffs in civil litigation.

Even if the report does not find wrongful conduct, there is a tremendous amount of adverse information about a company that can be gleaned from an investigation report. Discord among management, concerns over accounting practices, weaknesses in internal controls, and undue pressure to achieve financial results are a few examples. This information could be used in a securities class action to help overcome the heightened pleading standards of the Private Securities Litigation Reform Act,[9] which would swing open the doors to invasive and costly discovery.

Additionally, the Federal Rules of Civil Procedure and most state rules of civil procedure allow for the discovery of work product upon a showing that the party seeking the discovery has a substantial need for the materials and is unable without undue hardship to obtain the substantial equivalent by other means.[10] In *In re Woolworth Corp. Securities Class Action Litigation*,[11] plaintiffs unsuccessfully sought production of notes and memoranda supporting an investigation report by arguing that they had a substantial need for interview notes because several employees could not remember what they had told counsel during the investigation.[12]

Litigants also might seek the production of a written investigation report by arguing that the report is not privileged because it was



not prepared in anticipation of litigation. This argument recently prevailed in *Electronic Data Systems v. Steingrager*,[13] in which EDS sued its former employee for misappropriation after conducting an internal investigation. Because a lawsuit was not pending when the company began its investigation, the court held that the primary purpose was to determine whether the employee stole money and, ultimately, to make a business decision whether to terminate the employee.[14] The court noted that "[i]n the realities of today, investigations of corporate wrongdoing are routine, expected and necessary for many reasons, including protecting shareholders, assessing losses, and the prevention of future corporate wrongdoing."[15]

Investigation reports can have a tremendous impact on the reputation and future careers of employees who are implicated.

Similarly, in *Spectrum Systems International Corp. v. Chemical Bank*,[16] a plaintiff argued that an investigation report was not protected by the attorney-client privilege because the report conveyed business advice, not legal advice. The court found that an investigation report is not privileged "when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer."[17]

An attorney should also consider the possibility that statements made in a written report might expose him, his law firm, and the company to an action for defamation or libel. Investigation reports can have a tremendous impact on the reputations and future careers of employees who are implicated. In *Pearce v. E. F. Hutton Group*,[18] an employee named in an investigation report written by former United States Attorney General Griffin Bell sued him and E. F. Hutton for defamation, libel, and similar claims, arguing that the report falsely stated that the employee should have known his actions were illegal.[19] The court denied summary judgment for Bell finding that, among other things, the report was not entitled to an absolute or qualified privilege. Given the possibility of similar claims, counsel should consider including indemnification language in its engagement letter for an action asserted as a result of the report.

The decision of whether or not to write a report depends upon the purpose of the investigation, and counsel needs to carefully weigh the advantages and disadvantages.

Endnotes

[1] Federal Prosecutions of Business Organizations, Memorandum from Deputy Attorney General Larry Thompson to the U.S. Attorneys' offices (Jan. 20, 2003), www.us-doj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm.



[2] *See* O.C.G.A. § 14-2-744(a) ("The corporation shall have the burden of proving the independence and good faith of the group making the decision and the reasonableness of the investigation.").

[3] 208 Ga. App. 230, 430 S.E.2d 385 (1993).

[4] *Id.* at 233.

[5] 499 A. 2d 1184, 1191 (Del. 1985).

[6] 597 S.E.2d 447 (Ga. Ct. App. 2004).

[7] *See State ex rel. Oregon Public Employees Retirement Bd. v. McKesson HBOC, Inc.*, 2003 WL 23315698 (Cal. Superior Jun 16, 2003) (NO. 307619, 320819, 311269, 405792, 311747), *petition denied by McKesson HBOC, Inc. v. San Francisco Super. Ct.*, 115 Cal.App.4th 1229 9 Cal. Rptr. 3d 812 (Cal. App. 1 Dist. Feb 20, 2004).

[8] *Id.* at 452-53; *see also* 9 Cal. Rptr. 3d at 818, 821.

[9] 15 U.S.C. § 78u-4 *et seq.*

[10] Fed. R. Civ. P. 26(b)(3); *see also* O.C.G.A. § 9-11-26(b)(3).

[11] 1996 WL 306576, 94 Civ. 2217 (RO) (S.D.N.Y. June 7, 1996).

[12] *Id.* at *3.

[13] 2003 WL 21653414, No. 4:02 CV 225 (E.D. Tex. July 9, 2003).

[14] *Id.*

[15] *Id.*

[16] 78 N.Y.2d 371, 581 N.E.2d 1055 (1991).

[17] *Id.* at 1061.

[18] 664 F. Supp. 1490 (D.D.C. 1987) *rev'd on other grounds* 828 F.2d 826 (D.C. Cir. 1987).

[19] *Id.*

OUR EXPERTISE

Alston & Bird's Securities Litigation Group has a broad range of experience in representing and counseling clients in internal investigations, derivative and class actions, SEC and other regulatory proceedings, D&O, E&O, and other complex commercial and transaction-based litigation.



Jennifer Brown Moore, Partner
Intellectual Property - Litigation
jennifer.brown.moore@alston.com

The NAD: An Efficient and Cost-Effective Alternative to Traditional False Advertising Litigation

False advertising claims continue to plague prescription and herbal drug manufacturers, the food and cosmetic industry, and companies interested in advertising over the Internet. In some cases, the claims are well-founded. In others, they are not. In either situation, however, it is likely that the advertiser has invested hundreds of thousands of dollars in research, product development and marketing campaigns. The last thing an advertiser wants is to spend years in court defending a possible "bet the company" lawsuit over its performance or quality claims.

Is there any alternative? The answer, quite simply, is yes. Many companies are now turning to the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) for assistance in resolving false advertising claims. While this organization, based in New York City, has been in existence since 1971, the use of the NAD's dispute resolution process has been on the rise in recent years. Why? Because the NAD offers a reasonably quick, cost-effective way to resolve disputes through a voluntary self-regulation process.

For clients and lawyers who are not familiar with the NAD and its self-regulation process, here are answers to some commonly-asked questions about its dispute resolution process that may be useful in deciding whether the NAD can help the next time your company is accused of making false or misleading advertising claims.

What types of claims can be resolved through the NAD? The NAD is equipped to handle just about any kind of false advertising claim, including product performance claims, comparative superiority claims, and scientific/technical claims. The NAD does not limit its review solely to television, radio or print advertisements. It will also consider Internet advertising and product packaging and labels. It will even review promotional materials and oral sales presentations. As experts in the advertising field, NAD officials are well-versed in



the law governing literally false claims, claims that are literally true but convey a false and misleading message, and claims that are false by necessary implication.

What are some of the hot topics that the NAD has reviewed in 2005? Hot topics include weight loss and body improvement claims, "low carb" and other health and nutrition claims, and claims related to children's advertisements. The NAD has also reviewed product placements in films, advertisements and children's literature.

Who are some of the companies involved in these disputes? The companies that have used the NAD in the past year are some of the best known in the country, including The Home Depot, Rayovac Corporation, Kraft Foods, The Procter & Gamble Company, Frito-Lay, Inc., The Gillette Company, Playtex Products and Estée Lauder.

Are all of the advertising claims that the NAD reviews challenged by private companies? No. The NAD and the Children's Advertising Review Unit (CARU) of the CBBB also monitor national advertisements for truthfulness, accuracy, and with respect to children's advertisements, for consistency with CARU's Self-Regulatory Guidelines for Children's Advertising. The NAD and CARU may initiate their own investigations and may also act upon complaints made by individual consumers or local Better Business Bureaus.

Are there any jurisdictional limitations? Yes. The NAD only reviews advertisements that are national in scope or cover a broad geographic region. It does not review advertisements that appear only in areas served by local businesses or local branches of national chains. In addition, the NAD will not review cases that are already the subject of a private lawsuit or Federal Trade Commission (FTC) investigation, nor will it review matters where the advertiser has already withdrawn the advertisement before the complaint is filed and the advertiser has assured the NAD, in writing, that it will not include the claims at issue in future advertisements.

Are there other limitations? Yes. The NAD only considers one set of advertisements at a time. If a party has issues with advertising involving multiple products or if the claims are contained in multiple advertisements, the NAD may require that separate complaints be filed. In addition, there is no process for asserting counterclaims in a NAD proceeding. If an advertiser has issues with any advertising

The NAD only reviews advertisements that are national in scope or cover a broad geographic region.



used by the challenger, a separate NAD proceeding must be filed to address those claims.

Who decides the outcome of my complaint? The NAD has a staff of seven attorneys who have experience with claims substantiation, advertising and trade regulation, and litigation/arbitration. Staff officials are assigned to review individual cases based on their knowledge and experience in a particular field.

How does the process work? In some ways, NAD proceedings are like mediations and non-binding arbitrations. The parties submit written position papers, along with supporting documentation, to the NAD for its review. Each side is given the opportunity to submit two sets of papers that are generally limited in length. In some instances, the NAD official assigned to the matter may also request conferences with one side, the other, or both. Unlike mediations, however, the parties generally do not have a face-to-face meeting where they air their differences and attempt to reach a compromise. And unlike arbitrations, the parties do not have a hearing where they call witnesses or submit evidence. Rather, the NAD official assigned to the case generally gathers and reviews whatever information is submitted by the parties and then issues a written recommendation.

A substantial benefit of NAD proceedings is that challenges are often resolved early on in an advertising campaign.

Does it take a long time to get a decision? No. Cases are generally resolved within 60-90 business days. A substantial benefit of NAD proceedings is that challenges are often resolved early on in an advertising campaign before substantial damage has been done and before substantial fees are incurred.

Are there mechanisms for an expedited review? Yes. The parties may waive written replies and have their dispute resolved based on only the first set of written submissions. This reduces the review time substantially.

Do I have to participate? As an organization that promotes self-regulation, the NAD does not have the power to compel parties to participate in the review process. If an advertiser elects not to participate, however, the NAD does have the power to forward its review of the challenged advertisement to the appropriate federal or state law enforcement agency and to release information regarding the referral to the public and the media.



Is the process expensive? Compared to traditional litigation, it's a bargain. Because the NAD is a non-profit organization, it charges a flat fee of $2,500 for CBBB members and $6,000 for non-members. Participants must, of course, pay for the time of their lawyers involved in drafting and/or defending claims, but there are no additional hourly or flat fees charged by the NAD. Participants in NAD proceedings have reported that they save hundreds of thousands of dollars by using the NAD.

What are the differences in the relief provided by the NAD versus a court? Unlike a court, the NAD does not have the power to issue an injunction or award damages. Rather, it generally only has the power to make a recommendation that the advertisement be withdrawn or modified. Nevertheless, if an advertiser refuses to participate in the NAD process or refuses to comply with the NAD's recommendation, the NAD does have the power to refer the matter to the FTC. According to an FTC official who spoke at the NAD Annual Conference in September 2005, the FTC has great respect for the NAD and its decisions and generally places NAD referrals at "the top of the stack." As a result, most advertisers comply with NAD recommendations, even if they publicly denounce the NAD's decision.

The FTC has great respect for the NAD and its decisions and generally places NAD referrals at "the top of the stack."

Is discovery permitted? No. In an NAD proceeding, all matters are generally resolved on the parties' written submissions. There are no procedures for exchanging documents, and depositions are not allowed. Parties are, however, encouraged to provide as much evidence as possible to support their claims as part of their written submissions.

Do I have any options if I don't like the recommendation of the NAD? Yes. A respondent that receives an adverse recommendation has the absolute right to appeal the NAD's decision to the National Advertising Review Board (NARB). The NARB consists of 70 professionals from three areas: national advertisers, advertising agencies and members of the public. Each review panel consists of one public member, one advertising agency member and three advertiser members. The concurring vote of three members is required to decide any issue submitted for review. The NARB also has the discretion to decide whether it wishes to hear appeals from the challenger.

Are the results published? Yes. The parties' positions, the NAD's decision, and the statement, if any, of the advertiser in response to



the NAD's decision are made public. NAD decisions are published on the NAD's website, www.nadreview.org. To have access to the full text of NAD, CARU and NARB decisions, you must be a member of the CBBB. The NAD also issues hard copy NAD/CARU Case Reports ten times a year to CBBB members. In some instances, opinions are also sent to trade publications and government agencies. It is up to the NAD to decide when and to what entities it will circulate its opinions.

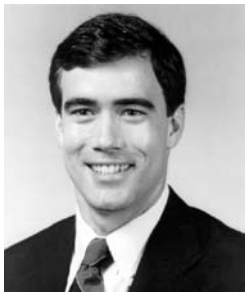
How successful is the process? Since its creation in 1971, the NAD has resolved more than 4,000 claims. In 2005 alone, over 100 claims were filed, and the NAD was successful in resolving over 95 percent of the claims brought to it.

OUR EXPERTISE

Alston & Bird's marketing and advertising lawyers have represented clients before the FTC, other federal agencies, state attorneys general, and the advertising self-regulatory industry bodies NAD and NARB of the CBBB with respect to advertising controversies involving false advertising, unfair competition, misappropriation, trademark and copyright infringement, and breach of privacy and publicity rights. We have also addressed these disputes through litigation in both state and federal courts around the country. In addition, our lawyers have managed complex issues related to performers' union agreements, including disputes handled through arbitration, with talent unions, such as the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA). Such disputes often require labor law expertise in addition to advertising law expertise; we work closely with the firm's labor law experts on these matters.



Title III of the Americans With Disabilities Act: The Latest Trend in Disability Litigation and its Effect on One of Our Nation's Most Treasured and Historic Landmarks



R. Steve Ensor, Partner
Labor & Employment Group
sensor@alston.com

Ashley D. Brightwell, Associate
Labor & Employment Group
abrightwell@alston.com

In December of 1995, two women – both confined to wheelchairs due to post-polio syndrome – contacted The Fox Theatre in Atlanta to complain about their seating accommodations during a recent performance. Those complaints marked the beginning of what would become a ten-year battle over how much a historic facility, built well before the passage of the Americans With Disabilities Act (ADA), must do to accommodate disabled individuals. From the retention of disability consultants and experts to confronting a complaint filed with the United States Department of Justice; from mediation of the complaints at issue to battling discovery disputes in district court – The Fox is just one of thousands of businesses facing the daunting task of defending the efforts it has made to accommodate the disabled community. As The Fox enters what should be the final chapter of this long battle, it awaits a decision from the Eleventh Circuit that will likely shape the future of disability litigation in this circuit.

Title III of the ADA

Title III is the provision of the ADA that regulates accessibility to places of public accommodation and commercial facilities. Pursuant to Title III, facilities constructed after the enactment of the ADA must conform to precise and exacting standards for accessible design, any deviation from which constitutes a barrier to access and evidences intentional discrimination against disabled persons.[1] Although not held to strict compliance with the standards applicable to new construction, even facilities like The Fox that were built prior to the passage of the ADA must identify barriers to access and remove those barriers where to do so would be considered "readily achievable" under the statute.[2]

Although the ADA has been in existence since 1990, litigation under Title III has skyrocketed in recent years. States such as Florida,



California and Illinois in particular have seen tremendous growth in this type of litigation. These lawsuits are brought by individuals or, increasingly, advocacy groups purportedly seeking to protect their constituents from disability discrimination by alleging, for instance, that a particular business has an insufficient number of parking spaces in its parking lot, doors that are not wide enough to accommodate wheelchairs, or paper towel dispensers that are too high from the floor. While some such lawsuits come in the form of a suit filed by a single plaintiff against one particular facility, others come in the form of a class action lawsuit filed against numerous properties under the control of a single owner or lessor. Moreover, contrary to popular belief, virtually all businesses – regardless of size – are covered by Title III. Thus, businesses of all types are quickly recognizing that this type of litigation is just one more cost of doing business today.

The Fox Theatre in Atlanta was originally planned as the site for a Shriners' temple. When financial troubles were encountered before the building was completed, a leasing deal was struck and The Fox opened in 1929 as a movie theater.

The Case Against The Fox

A number of factors set the current Title III litigation against The Fox apart from the run-of-the-mill Title III case – most significantly, The Fox's status as a national historic landmark. Designed in the late 1920s, the historical import of The Fox was officially recognized for the first time in 1974 when it was listed in the National Register of Historic Places – the National Park Service's listing of the nation's most historic places. In 1976, the U.S. Department of the Interior designated The Fox a National Historic Landmark, the highest historical designation for private properties in the United States. Also, in 1991, due to its architectural and historical significance, The Fox became one of only nine buildings in Georgia to be designated a Landmark Museum Building by the State Historic Preservation Division of the Georgia Department of Natural Resources. Thus, unlike a typical theater that can fairly easily remove seats and level portions of the theater floor to create additional wheelchair sections or widen bathroom stalls to make them wheelchair accessible, doing so at The Fox would likely impact a number of features that contribute to its status as a protected historic landmark.

Despite the limitations placed upon The Fox due to its historic status, The Fox has undertaken numerous efforts over the years to accommodate its disabled patrons. A wheelchair-bound patron visiting The Fox today has a wide variety of accessible seating locations from which to choose, has an accessible box office from



which to purchase tickets, can visit wheelchair-accessible concession areas and restrooms, and can place calls on wheelchair-accessible telephones. In addition, The Fox has ensured that disabled patrons have a wide range of pricing options, including the option of paying the lowest ticket price for every show, and will likely encounter an "ambassador" – an usher specifically trained in how best to accommodate and assist The Fox's disabled patrons.

The plaintiffs in the referenced litigation are dissatisfied with the modifications that The Fox has made and, regardless of its historic status, think that The Fox should be as accessible to patrons in wheelchairs as a theater constructed in 2006. Thus, The Fox has fought this litigation tooth and nail – defending the many modifications that it has made over the years while recognizing the compelling need to preserve the historic features that make the theater such a unique and valuable Atlanta treasure. Those efforts paid off and, in June 2005, the district court granted summary judgment in The Fox's favor. Specifically, the district court held that, aside from the number and location of certain wheelchair locations, the plaintiffs failed to satisfy their burden of establishing that barriers to access actually exist at the theater. Moreover, the court opined that the plaintiffs failed to produce sufficient evidence to show that any alleged barriers should be removed pursuant to the standard applicable to facilities constructed prior to the enactment of the ADA.

The Fox is a mosque-like structure complete with minarets, onion domes, and an interior décor of an Arabian courtyard with a sky full of flickering stars and drifting clouds.

A Matter of First Impression

An appeal to the Eleventh Circuit Court of Appeals followed. At issue on appeal is a matter of first impression in this circuit – namely, the amount and type of evidence a plaintiff must proffer to satisfy its burden of production in a Title III case. The plaintiffs/appellants in this matter urge that the burden placed upon them by the district court – to produce evidence of a specific design to remove the barriers alleged as well as the cost and effect such removal would have on the finances and operation of the facility – has the effect of rendering it "nearly impossible for disabled individuals to survive summary judgment." The Fox takes the contrary position that lowering the burden as the plaintiffs suggest would completely do away with a plaintiff's obligation to provide any meaningful evidence about the proposed method of barrier removal whatsoever. Rather, a plaintiff could meet her "burden" with nothing more than unsupported and



The theatre's enormous Bedouin canopy overhang is really a work of plaster and steel rods, and serves both as ornamentation and as an acoustical funnel to project sound to the rear of the house.

conclusory assertions – regardless of the ultimate feasibility or cost of the measures proposed. Then, armed solely with conceptual ideas and summary assertions of affordability, a defendant would be left in the precarious position of producing "detailed evidence" relating to the feasibility of the proposal, the difficulties associated with its implementation, the associated costs, the effect that the proposal would have on the historic features of the facility, the economic effect that the proposal would have on the operation of the facility, and the like. The Fox, in fact, urges that a plaintiff's burden of production, as advocated by the plaintiffs, is no burden at all.

A decision on this issue will be significant. As it currently stands, the law in this area is largely undeveloped and those on the receiving end of a Title III lawsuit are forced to navigate incredibly muddy and murky waters. Thus, at a minimum, a definitive ruling on the appropriate burden to be placed on a plaintiff to prove that barriers to access exist and should be removed will provide valuable guidance to those litigating under this statute. Moreover, as the issue involves the ease with which a plaintiff can prove its case, the decision will likely have a resounding effect on the number of such suits brought in this circuit.

Endnotes

[1] *See Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1362 (S.D.Fla. 2001); 28 C.F.R. §§ 36.401, 36.402, 36.406(a), Part 36, Appendix A.

[2] *See South Florida Stadium Corp.*, 161 F. Supp. 2d at 1368.

OUR EXPERTISE

Alston & Bird's Labor & Employment Group has expertise in all areas of employment litigation, and regularly defends corporate clients against claims of discrimination, retaliation, wage and hour violations, family and medical leave violations, and various state tort and contract claims. Our lawyers also regularly advise corporate clients on employment policies and practices, represent management in negotiations and disputes with labor unions, and assist employers with safety and health investigations, affirmative action planning and audits.



Atlanta
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404-881-7000

Charlotte
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
704-444-1000

New York
90 Park Avenue
New York, NY 10016-1387
212-210-9400

Research Triangle
3201 Beechleaf Court, Suite 600
Raleigh, NC 27604-1062
919-862-2200

Washington, D.C.
601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, D.C. 20004-2601
202-756-3300

www.alston.com