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BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC
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Body "Art" and "Piercing" Jewelry – Problematic for Employers in the Hospitality Industry?

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Body art or tattoos and body piercings of a wide variety are becoming the "norm," especially among younger adults. However, a recent article in *USA Today* clearly demonstrates that the public does not expect to see tattoos and piercings on the people who greet them when they check into a hotel. The overwhelming majority of readers

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Arbitration: The Trial with No Appeal?

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Including an arbitration provision in your contract *can* be a big cost saver in certain situations where going to court and proceeding through an all-out trial would be more expensive. Arbitration is private and the case pleadings are not part of a public record, as litigation records are. Whether you win, lose or draw in arbitration, the decision of the arbitrator is final and there is no meaningful basis for appeal. Or is there a possibility that the losing party could attempt to have a court vacate the decision of the arbitrator?

Part of the reason arbitration provisions seem so attractive is the ability to avoid having to go to court in front of a judge whom you will likely have no input in selecting. In arbitration, each party will typically have some input and choice about the arbitrators or arbitra-

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Overlapping Territories Don't Violate Territorial Exclusivity

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A recent decision by the United States District Court in Kansas clarifies the interpretation of "protected territory" clauses in franchise agreements. The case of *Black Angus Holdings, LLC v. Backyard Burgers, Inc.* originated in the bankruptcy court in Kansas.[1] In its complaint in the adversary proceeding, the plaintiff/franchisee asserted that Backyard Burgers, Inc. (BYB) breached its franchise agreement by granting an additional franchise to another operator in violation of the "protected territory" provision in the franchise agreement.

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Greetings from *Hospitalitas*

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

In this issue:

Body "Art" and "Piercing" Jewelry – Problematic for Employers in the Hospitality Industry?, *continued*

who commented on the article said it did not matter what type of hotel it was, they did not want to see tattoos and body piercings, besides regular earrings, on hotel workers or other people who deal with the public. One reader added, "Do you want piercings or a career?" While another echoed the same sentiment: "If the pierced, inked lifestyle is the one they chose, they should also accept the lack of opportunities it may represent."

Despite the potential impact on career options, tattoos and body piercings have exploded in use by the younger generation. A Pew Research Center poll reported that 36% of 18- to 25-year-olds and 40% of 26- to 40-year-olds have at least one tattoo. In those same age groups, 30% and 2%, respectively, have a piercing somewhere other than their ears. The same survey found that even in the 40- to 60-year-old age group, over 10% had tattoos or piercings other than their ears, with these numbers expected to grow as the demand for tattoos and piercings continues to increase.

Obviously, there are some employees in the hospitality industry whose tattoos or body piercings might be acceptable, even when dealing with the public. Trendy clubs or coffee houses come to mind. But for the vast majority of the hospitality industry, the public generally does not want to be greeted by a customer service person or server with a nose ring, a pin in their ear or a tattoo that covers their arm. So what should the employers do? They should dust off their dress codes and add some guidance and limitations applicable to piercings and tattoos.

According to the Equal Employment Opportunity Commission (EEOC), employers are allowed to impose dress codes and appearance policies as long as they do not discriminate or hinder a person's race, religion, color, age, national origin or gender. There is a strong legal basis for limiting tattoos and piercings in the workplace, especially if employers have reason to believe that tattooed or pierced employees will hurt their image with customers. It is reasonable to limit piercings and to distinguish between men and women. For example, it is reasonable to require men to have short, neatly groomed hair and be clean shaven or have neatly trimmed beards. When a religious practice affects the appearance of a beard, the issues get more complex and require more analysis. Likewise, it is reasonable for an employer to require men not to have any visible piercings, while allowing women to have a limited number of piercings in their ears, but otherwise, no visible piercings. In addition, if an employee has a tongue piercing, an employer can require them to remove it while they are at work, especially if the employee deals with the public. With the advent of gauges or large holes in ears, an employer might consider adding that earrings should be tasteful and appropriate for all business and professional attire.

With respect to tattoos or body art, an employer might consider requiring that no employee can have visible tattoos while at work. If an employee wants to express

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Baker Donelson's Gaming Law Practice Ranked First in the Nation, Franchise Law Practice Ranked Second in the Nation by *Best Lawyers in America®*

With 188 of its attorneys selected for inclusion in the 2011 edition of *The Best Lawyers in America®*, Baker Donelson is the fourth highest ranked law firm in the country, based on the number of attorneys named to the list.

Baker Donelson's Gaming Law Practice ranked first in the nation in the 2011 edition of *The Best Lawyers in America*. Our gaming attorneys are located in our Louisiana, Mississippi, Alabama and Tennessee offices, and routinely leverage the Firm's wide-ranging knowledge and multi-state presence to provide experienced representation in both gaming and non-gaming matters across multiple jurisdictions. Members of the team include past and current presidents of the International Association of Gaming Advisors. We routinely appear before the Mississippi Gaming Commission, the Louisiana Gaming Control Board and other state and local agencies and governmental bodies on behalf of a wide range of companies and individuals. Our clients are headquartered throughout North America, Europe, Australia and Asia, and include casino developers and operators, horse racetrack projects, bingo operators, gaming equipment manufacturers and gaming device distributors as well as their equity holders, officers, directors, key employees, gaming employees, lenders and landlords. Baker Donelson gaming attorneys recognized by *Best Lawyers* include Edward H. "Hank" Arnold III,

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Body "Art" and "Piercing" Jewelry – Problematic for Employers in the Hospitality Industry?, *continued*

themselves with body art, they should do so on parts of the body that can be covered with appropriate attire for the workplace. Some employers may allow visible tattoos provided they are not offensive, but the majority of guests in the hospitality industry have expressed sufficient concern to make an employer think twice before doing so.

If the employer is going to make changes to the dress code to address these issues, it is important that they obtain some input from employees before making across-the-board changes. This allows the employees to understand the reasons for addressing tattoos and body piercings in the dress code, but also, hopefully, allows the employees to have some input into the process or "buy into it."

One final consideration: if an employee has a visible piercing or tattoo that they assert is an expression of religious beliefs or practices, the employer needs to evaluate whether it can make a reasonable accommodation for the employee without creating an undue hardship. The most important point is to address these issues in the employer's dress code, and then act consistently in enforcing it.

Ms. Thompson is an attorney in our Knoxville office.

Don't Miss Our Gaming Law Panel at The Lodging Conference 2010

The Lodging Conference 2010 will take place September 21st-24th at the Arizona Biltmore in Phoenix, Arizona. Please join us on Wednesday, September 22, from 10:30 a.m. - 12:00 p.m. for the Gaming Panel (W-7). The panel will focus on recent developments in licensing and development of casino hotels. Danny McDaniel, Baker Donelson's Gaming Industry Service Team Chair, will moderate the panel, which will include Michael A. Leven, President & Chief Operating Officer, Las Vegas Sands Corp.; Paul M. O'Gara, Gaming Practice Chair, Sterns & Weinroth; and Frank Schreck, Gaming Law Group Chair, Brownstein Hyatt Farber Schreck, LLP. Baker Donelson is a proud sponsor of The Lodging Conference 2010.

Baker Donelson's Gaming Law Practice Ranked First in the Nation, Franchise Law Practice Ranked Second in the Nation by *Best Lawyers in America*, *continued*

Heather J. Camp, Dan M. McDaniel and Paul S. West.

Baker Donelson's Franchise Law Practice ranked second in the nation in the 2011 edition of *The Best Lawyers in America*. With our broad range of experience, Baker Donelson can help your franchising and distribution business grow and prosper. Let us guide you as you manage your franchise system and franchise recruitment efforts, formulate and execute your strategic plan, acquire, sell and lease brands, chains, stores and locations, deal with regulatory issues, manage your supply chain and harmonize your franchise relationships. Our attorneys are experienced in all aspects of franchise and distribution law, as well as related issues in patent, trademark and copyright, antitrust and general trade regulation, franchise enforcement, commercial disputes, and vicarious liability defense litigation, employment law, securities and corporate governance, banking and lending, commercial real estate development and leasing, and technology, privacy and information security. Baker Donelson franchise attorneys recognized by *Best Lawyers* include Gary M. Brown, Joel R. Buckberg, Grady M. Garrison, Matthew J. Sweeney III and Kelli L. Thompson.

Arbitration: The Trial with No Appeal?, *continued*

tion panel to be selected. This ensures that those individuals are familiar with the type of law or the business that the dispute involves. A randomly selected judge will not likely have the same expertise. The ability to have a hand in selecting the person or people who will hear the dispute, however, does not absolutely protect against the possibility that the arbitrator may rule without regard to your ideas about the law and the facts of the case.

Is there anything you can do to ensure that, if there is a ruling that you are unhappy with, you can guarantee a court will have the opportunity to review? Some arbitration provisions have attempted to include these types of "mandatory review" provisions in their contracts with mixed results. The seminal case from the U.S. Supreme Court held that the Federal Arbitration Act (FAA) provides the exclusive grounds on which an arbitration award can be vacated.[1] Several Federal circuit courts of appeals have cited this Supreme Court decision in eliminating many other common law grounds which were available in those Circuits when attempting to vacate an arbitration award. The most significant ground for vacating an award that many courts have said did not survive Hall is "manifest disregard of the law." The Fifth Circuit,[2] which controls in Mississippi and Louisiana, has eliminated manifest disregard of the law as a basis by which a party can seek to vacate an arbitration award. The Eleventh Circuit,[3] which controls in Alabama and Georgia, has taken the same approach.

The Second and Ninth Circuits have taken a different tack;[4] They have both held that manifest disregard for the law is still a valid ground on which to vacate an arbitration award. The courts reason that this standard is simply shorthand for other FAA permissive statutory grounds for vacating the award. The Sixth Circuit permits judicial supplements to the statutory grounds for vacating arbitration awards included in the FAA, but does not permit parties to contract around them.[5]

The state courts reaching this question have each interpreted the impact of the *Hall* decision in their own way. Alabama very recently held that the FAA is not the exclusive way to have an arbitration award vacated.[6] Instead, Alabama common law can be used to supplement the grounds set forth in the FAA. This decision had a major impact because the court also found that Alabama common law requires strict adherence to a contract. In Alabama, parties can contract around the FAA grounds for vacatur and provide for court review of an arbitration award in circumstances other than those explicitly set out in the FAA. Interestingly, however, absent a contractual provision to the contrary, manifest disregard for the law is still insufficient in Alabama to vacate an arbitration award.[7]

Both Georgia and Tennessee prohibit contractual provisions which might add additional mechanisms for court review of an arbitration award.[8] Under Georgia's arbitration law, however, manifest disregard of the law is included as an explicit ground for vacatur.

The bottom line is that the *Hall* decision has further protected arbitration awards from being reviewed and vacated by courts generally. It has certainly reduced the justifications which can be utilized in seeking a review. This situation provides a sense of comfort in knowing that obtaining a favorable award is something that is less likely to be overturned as well as a sense of hesitation in knowing that a bad award is likely to stick. The current state of the law only further highlights the need to spend sufficient time researching and looking into the backgrounds of each potential arbitrator. A well-informed selection of the arbitrator may not always guarantee predictability or success on the merits, but it can help to give some increased stability to the process. Arbitration may not provide for an appeal in most situations, but it can still be a useful tool in many cases that should not be eliminated as part of an overall dispute resolution strategy.

Ms. Turner is an attorney in our Birmingham office.

1. *Hall Street Assocs., L.L.C. v. Mattel, Inc.* 552 U.S. 576 (2008).
2. *Citigroup Global Markets, Inc. v. Bacon,* 562 F.3d 349 (5th Cir. 2009).
3. *Frazier v. Citifinancial Corporation, LLC*, 604 F.3d 1313 (11th Cir. 2010).
4. *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277 (9th Cir.); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008).
5. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415 (6th Cir. 2008).
6. *Raymond James Financial Services v. Honea,* 2010 WL 2471019 (Ala. June 18, 2010).
7. *Volvo Trucks North America, Inc. v. Dolphin Ling, Inc.*, 2010 WL 1641017 (Ala. April 23, 2010).
8. Brookfield Country Club, Inc. v. St. James Brookfield, L.L.C, 2010 WL 2557443 (Ga. June 28, 2010); Pugh's Lawn Landscape Company, Inc. v. Jaycon Development Corporation, 2009 WL 1099270 (Tenn. Ct. App. April 23, 2009).

Overlapping Territories Don't Violate Territorial Exclusivity, *continued*

The franchise agreement in question contained the following territorial provision:

> "Territory." Franchisor [BYB] agrees that, during the term of this Agreement, it will not sell or establish any other franchises or company-owned Restaurant or any other restaurant which sells hamburgers and/or chicken sandwiches in the following territory: a site located at 124 North Clairborne, Olathe, Kansas, 66062 [location of plaintiff's restaurant] with a one mile exclusive radius. ("the Territory"), except in or in conjunction with any military installation, zoo, amusement park, or stadium/arena/coliseum.

The plaintiff alleged that the franchise agreement was amended to extend the radius to two miles. The plaintiff further alleged that BYB breached this agreement by granting a franchise to another operator for a location 2.17 miles from the plaintiff/franchisee's location. BYB moved to dismiss the complaint arguing that a restaurant 2.17 miles from plaintiff's location did not breach the protected territory provision even as amended.

In opposing this motion, the franchisee asserted that the offending location was granted a one-mile area of protection under its franchise agreement. Consequently, the plaintiff argued, the "areas of protection" for the plaintiff's location and the offending location overlapped. The plaintiff focused on the term "exclusive radius" in the franchise agreement. The plaintiff asserted that if any other restaurants' radius touched plaintiff's radius, then it was not "exclusive" and the franchise agreement had been breached.

The bankruptcy court observed that BYB's interpretation of the provision was the most obvious one; however, the "exclusive radius" language was sufficiently ambiguous to warrant denial of the motion to dismiss.

BYB sought leave to appeal this decision to the United States District Court for the District of Kansas, and the appeal was accepted. In an order dated September

2, 2010, the district court reversed the ruling of the bankruptcy court and dismissed the adversary proceeding.

The district court noted that the franchise agreement provided that it was to be interpreted under Tennessee law. Tennessee courts have long held, consistent with the majority of jurisdictions, that if the language of a written contract is clear and unambiguous, a contract is interpreted according to its plain terms as written, and the language used is taken in the plain, ordinary and popular sense.[2] Employing those principles, the district court noted that the territorial provision in question provided that BYB could not sell or establish a restaurant "in the following territory: a site located at [plaintiff's address] with a [two] mile exclusive radius (the Territory)." Thus, under the ordinary meaning of this prohibition of a restaurant "in" the territory defined by a two-mile radius around plaintiff's restaurant, a restaurant could not physically be situated or located two miles or less from plaintiff's restaurant. By that interpretation, a new restaurant more than two miles from plaintiff's restaurant was not prohibited, regardless of any other circumstance (for instance, the operation of a territorial provision benefiting the new restaurant).

The district court rejected the plaintiff's argument regarding "exclusive radius." The court held that the use of the word "exclusive" meant that other restaurants were physically excluded from the defined territory.

Finally, the court notes that the franchisee's proposed interpretation simply did not pass the common sense test. When the franchisee executed the franchise agreement, it could not have known what kind of protected radius that a future restaurant might have. For instance, under the plaintiff's interpretation, a new restaurant with a five-mile protected radius could not be located within seven miles of the plaintiff's restaurant, while a new restaurant with no protected territory could be as close as two miles away. Consequently, the plaintiff would not have known how close other restaurants could be to its own, and therefore, would not have known the extent of the benefit for which it had bargained.

The court held that the protected territory provision was not ambiguous and, interpreting that provision according to its plain and ordinary terms, a restaurant located 2.17 miles from the plaintiff's restaurant did not constitute a breach. The adversary proceeding was dismissed.

Mr. Podesta is an attorney in our Memphis office.

1. Bankr. Case No. 09-21349-11
2. *Maggart v. Almany Realtors Inc.*, 259 S.W.2d 700, 703 (Tenn. 2008).

Oh Canada! Developing Patchwork of Canadian Franchise Regulations Not Uniform

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On July 10, 2010, New Brunswick became the fourth Canadian province to enact franchising regulations, following Alberta, Ontario and Prince Edward Island (PEI). The New Brunswick regulations provide franchise dispute resolution procedures, and set forth specific franchise disclosure requirements. While there is some apparent consistency among the provinces, significant variations do exist. These variations may create a trap for unwary foreign franchise concepts. As more provinces enact franchise legislation, the differences in disclosure requirements argue for careful study by franchisors before market entry.

For instance, for all regulated provinces but Ontario, a confidentiality agreement between a franchisor and franchisee does not constitute a "franchise agreement" and will not violate the 14-day waiting period after delivery of disclosure documents. Also, unlike all other regulated provinces, the Ontario model does not apply the duty of good faith and fair dealing specifically to the exercise of a right under the franchise agreement, but instead requires parties to act in good faith in accordance with commercially reasonable standards. Furthermore, New Brunswick is the only province that expressly allows for delivery of disclosure documents by electronic means.

Perhaps the most significant variation among the provinces is the Ontario model's silence on whether a "wrap-around" franchise disclosure document is legally permissible. Alberta, PEI and New Brunswick allow foreign franchisors to use their own disclosure documents, provided the document is supplemented with additional disclosures required by the particular province. Ontario's regulations do not address the use of any foreign disclosure documents, but require that disclosures be "clear and concise." These inconsistent, and sometimes amorphous, disclosure requirements cause franchisors to create an Ontario disclosure document that is wrapped by disclosures for the other provinces. Foreign franchisors are discouraged from the use of existing home country disclosure documents out of fear of running afoul of the specific requirements of each province. The body of experience incorporated into the home country disclosure document is then unavailable to prospective Canadian franchisees.

While U.S. franchisors accustomed to U.S. franchise disclosure regulation may find Canadian franchise legislation to be a curious patchwork of modest regulatory hurdles, the small populations and markets in some provinces with regulations may prove to be insufficient incentive for costly compliance efforts. The compliance cost per potential unit may become so cost-prohibitive for smaller unit concepts attempting to enter Canadian markets, they are less likely to enter new, smaller markets in regulated provinces. Some enhanced uniformity might go a long way to opening these markets.

Ms. Taylor is an attorney in our Atlanta office.

Having It the ADA Way at Burger King — Getting and Staying Compliant After a Class Action Lawsuit

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A recent class action settlement approved by a federal court in California purports to be one of the largest of its kind.[1] The settlement involved 10 Burger King restaurants in California leased by Burger King to franchisees. In the lawsuit, wheelchair and mobility scooter users alleged that architectural barriers and policies at certain California Burger King restaurants denied equal access to them in violation of the Americans with Disability Act (ADA) and California disability access laws. Architectural barriers are physical features that limit or prevent people with disabilities from obtaining the goods or services that are offered.

Examples of the claimed access barriers at the Burger King restaurants included:

- Inaccessible parking areas, dining areas and restrooms
- Doors that were too narrow or difficult to open
- Inaccessible condiments, napkins and other items
- Sidewalks and ramps that were too narrow and/or steep

The plaintiffs (the wheelchair and mobility scooter users) wanted Burger King to adopt policies that would ensure access for customers who used wheelchairs and mobility scooters. The plaintiffs also wanted Burger King to modify the leased restaurants so that they were in compliance with the engineering and architectural mandates of the ADA. In early motion practice, the court found that Burger King had affirmative policies requiring compliance by franchisees with the ADA. The court further found that these Burger King policies were not the reason that the individual restaurants retained access barriers that were potentially in violation of the ADA.

The ADA was enacted in 1990 and the effective date of the ADA's design and construction mandates went into effect on January 26, 1993. The specific architectural standards that restaurants and buildings must meet are set forth in the ADA Accessibility Guidelines (ADAAG). ADA covers any business that serves the public, and applies to the parties that own, operate, or lease the business as lessor or lessee. Facilities built before 1993 were required to complete "barrier removal" as defined by the ADA, with substantial attention paid to the path of travel, the route by which the disabled patron must proceed to gain access to the business. Existing facilities that are substantially altered are not usually exempted by "grandfather provisions" that are often used in other circumstances to exempt older structures from later-adopted building code changes. Under the law, restaurants are required to make changes that are "readily achievable" to provide or attempt to provide "equivalent facilitation" for disabled customers. Under the doctrine of "equivalent facilitation," departures from the ADAAG provisions are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility. In addtion, the ADA requires the business party to spend an additional amount equal to twenty percent of the remodel cost upgrading the path of travel for disabled customers throughout the restaurant.

In this case, all 10 of the Burger King restaurants were constructed in the 1970s and 1980s, long before the ADA was enacted. In the lawsuit, Burger King asserted as a defense that the restaurants complied with the ADA because they were all built long before the ADA was enacted and any necessary upgrades had been made as part of any subsequent remodels. The wheelchair and mobility scooter users claimed that based on the substantial renovations that had occurred at the stores since the enactment of the ADA, Burger King had not done enough to comply with the remodeling requirements of the ADA and ADAAG .

The plaintiffs in the lawsuit claimed that a separate violation occurred each time a patron visited a Burger King store and encountered an architectural barrier there. The wheelchair and scooter mobility user sought the statutory minimum damages for each violation, which includes a $4,000 fine per violation. Plaintiffs estimated that their damages were as high as $20 million in this case. Before trial, a settlement was reached between the plaintiffs and Burger King. On July 12, 2010, a federal judge approved the settlement, awarding almost $2.5 million in attorney's fees and $5 million in damages to the plaintiffs and class members.

Given the potential exposure to liability, businesses should continue to be mindful of their legal obligations to provide access to all potential customers and make sure that the physical structures are compliant with all federal, state and local laws addressing accessibility. Companies with facilities built in conformity with corporate plans and designs prior to 1993 and subsequently substantially altered after 1993 should pay particular attention to accessibility issues. This is especially true when the parent's relationship with the facility is as a landlord only and the tenant is responsible for remodeling the facility. The remodeling triggers the joint obligation of landlord and tenant under the law. Accessibility issues will continue to garner national attention and more intense scrutiny as our population ages, more people take advantage of mobility scooters, and the disabled population's advocacy groups intensify efforts for effective implementation of this now well-understood ADA regulatory regime.

Ms. Hayes is an attorney in our Johnson City office.

1. *See Castaneda v. Burger King Corporation*, U.S. District Court for the Northern District of California, Civil Action No. C 08-04262 WHA.

Tough Locations Produce Complex Litigation

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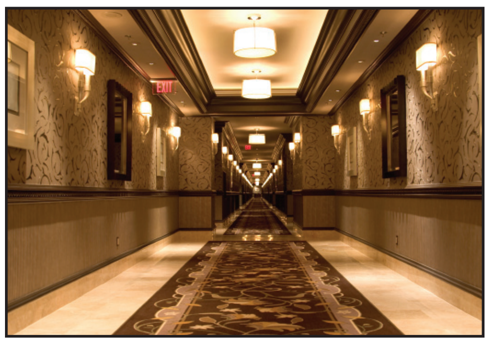
A pair of recent buyer's remorse court decisions illustrate that great brands can't overcome questionable location selections. Efforts at blame-shifting were unsuccessful, but at least one group of claimants will get another pass at making its claims stick. While these cases were decided under different theories, the location issue underlies all of the claims.

Not Exactly Paradise

The Hard Rock Hotel San Diego (HRHSD)[1] was developed as a 420-room hotel condominium project in the city's Gaslamp district with ownership unit prices ranging from $350,000 to $2 million. Each owner signed a purchase and escrow contract, a rental management agreement and a maintenance and operating agreement. Tarsadia Hotels, an experienced hotel owner/operator, developed and operated the franchised hotel through affiliates. Owners were limited to 28 days of use, and their occupancy of their own units was controlled by the hotel manager. None had a key to the unit represented by their ownership interest. While they were not obligated to sign a rental management agreement, the real estate value of each unit was a function of the number of days it was rented. The owners argued that there was little practical choice but to rent through the rental management agreement. The documents included substantial disclaimers about the nature of the investment, described as a real estate transaction and not as a common enterprise where the owners' capital was at risk in a pool of risk capital.

The San Diego market was overbuilt and the notional returns for the HRHSD owners apparently were not achieved. The hotel condo owners filed an action in federal court in December 2009, alleging that the ownership interests were investment contracts, not real estate transactions, and thus were securities. Since the interests were not registered and had been sold without regard to any available exemption from registration, the owners alleged violation of federal and California securities laws. In this case, the owners argued that the disclaimers were irrelevant to the economic reality, and that the only realistic chance of realizing any value was through the hotel rental arrangement. But the owners failed to make certain factual allegations critical to this theory, so the U.S. District Court in San Diego dismissed the complaint without prejudice at the request of the hotel developer parties. The owners will be allowed at least one more attempt to advance their economic reality theory. A 1989 case involving a hotel in Hawaii where condominium interests were sold to persons outside Hawaii went to trial in the Ninth Circuit using a similar theory. If the owners are successful in defeating a motion to dismiss by the developer when their amended complaint is filed, securities laws will offer a new avenue for disgruntled hotel condo owners to seek recompense for their unsatisfying purchase decision.



Brand Leverage at the Edge[2]

Ritz Carlton has established a brand synonymous with luxury, wealth and prestige. A real estate developer entered into a series of agreements with The Ritz-Carlton Hotel Company in 2004 for the development of luxury golf course communities. Ritz would not develop the property or sell the homes or lots, but would instead provide technical services for golf course development, and then manage the golf club and recreational amenities of the community. The first project was to be located in Loudon County, Virginia, in the outer reaches of the Washington, D.C. suburbs. The core transaction agreement prohibited the sale of the real estate under the Ritz-Carlton brand, although Ritz was to receive a royalty of 5.5% of the gross sales of lots in the development. The developer never advertised the Ritz brand as a seller of the land. It produced a few marketing pieces that mentioned the Ritz-managed golf course. The covenants of the development were named "Master Declaration of Conditions, Easements, and Restrictions for The Ritz-Carlton Golf Club and The Estates of Creighton Farms," and stated that "it is anticipated that the Master Association (the homeowners association or "HOA") will enter into a management contract with Ritz-Carlton Hotel Company, LLC."

A sophisticated investor couple purchased a lot in June 2007, before the development had any residents. The golf course was not scheduled to open before April 2008. Despite the absence of any agreement, as of June 2007, Ritz was providing some services which would have been performed under a management agreement with the HOA, including landscaping along the roads of the development and providing security for the gates. The couple was given access to a reciprocal Hotel Reservation Service by Ritz-Carlton providing them with discounted rates, upgrades and other benefits at participating Ritz-Carlton

Tough Locations Produce Complex Litigation, *continued*

hotels. Although no definitive management agreement between Ritz and the HOA was ever executed, advertising approved by Ritz stated that the development was to be a "Ritz-Carlton Managed Community." A sales representative employed by the developer repeated this language and even displayed the Ritz trademark. Marketing brochures displayed the Ritz trademark, but contained this disclaimer:

Creighton Farms is not owned, developed or sold by The Ritz-Carlton Hotel Company, LLC. Juno Loudoun, L.L.C. uses the Ritz-Carlton marks under license from The Ritz-Carlton Hotel Company, L.L.C. Juno Loudoun, LLC is the owner and developer of the project. Developer will enter into an agreement with The Ritz-Carlton Hotel Company (R-CHC) or an affiliate for the management of the golf club and master association.

The purchasers never included any provision in their land purchase contract that made the contract conditional on the formalities of the Ritz affiliation. They closed, with a highly negotiated contract, upon advice of counsel. Out of 100 lots, only 32 were sold, and only 14 sold to builders for construction. Ritz terminated its relationship in 2009. The purchasers never received any of the required disclosures under the Interstate Land Sales Act (ILSA). They sought redress for their situation by seeking to hold Ritz liable as a "developer" or "agent" under ILSA, which would then provide a right of revocation for the aggrieved land buyer against Ritz. They also sought relief under Virginia consumer protection laws.

The evidence showed that the developer did not always obtain the consent of Ritz for marketing materials using the Ritz logo. Violations were met with notices to discontinue unauthorized use. Despite the murkiness of the marketing affiliation, Ritz was not a party to any contract to purchase real estate in the development, was not in the chain of title and was never proven to have had any knowledge of particular lot sales transactions. The court found that Ritz was not a developer under the ILSA and was not liable for revocation of the sale contract.

Leveraging the famous brand in third party real estate development is thought to offer revenue with low capital risk. This case demonstrates that the risk of adverse consequences is not zero, and such licenses demand vigilance over the licensee to avoid entrapment by consumer protection statutes with broad reach as the licensee's efforts become more desperate and dependent on the power of the licensed brand.

Mr. Buckberg is an attorney in our Nashville office.

1. *Tamer Salameh, et al., Plaintiffs, vs. Tarsadia Hotels, et al., Defendants. No. 09CV2739 DMS (CAB), 2010 U.S. Dist. LEXIS 87225 (S.D. CA 2010).*

2. *Keith Nahigian, et al., Plaintiffs, v. Juno-Loudon, LLC., et al., Defendants. 2010 U.S. DIST. LEXIS 86401 (E.D. Va/. 2010).*