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# Fox Faces Unusually Steep Odds As Defamation Trial Looms

By **Jeff Montgomery**

Law360 (April 13, 2023, 9:22 PM EDT) -- Fox News is set to defend blockbuster defamation claims in an unusually vulnerable position Monday, with Dominion Voting Systems believed to have a fighting chance for victory in an area of law notoriously difficult for plaintiffs, in what experts called one of the most consequential trials of its kind.

## How the Case Came Together

See how Dominion's epic defamation dispute with Fox News has unfolded since the 2020 presidential election with Law360's **timeline chronicling the events**.

Up for trial in Delaware state court are Dominion's claims that it suffered \$1.6 billion or more in damages when Fox and its news subsidiaries trumpeted baseless allegations that Dominion voting machines were used in a 2020 presidential election plot to steal votes from then-President Donald Trump and give them to Joe Biden.

Defamation suits of all kinds have long been viewed as difficult to litigate and harder to win. A Poynter Institute report last year on a surge in libel claims pointed to a 1986 University of Iowa study finding that, 90% of the time, litigants lost. Winners, meanwhile, came away with relatively small amounts. While defamation claims have increased in recent years, wins remain a rarity.

The Dominion case, however, "has the potential to become one of the most consequential defamation suits of all time, with ramifications that resonate not just legally, but socially and politically," RonNell Andersen Jones, an attorney, former reporter, first amendment scholar and Lee E. Teitelbaum Professor of Law at the University of Utah, College Of Law, told Law360.

Fox Corp. and Fox News executive chairman K. Rupert Murdoch is scheduled to be among the first to testify, with many of Fox's top hosts and key brass expected to follow, including Tucker Carlson, Lou Dobbs, Sean Hannity, Maria Bartiromo and others.

Delaware Superior Court Judge Eric M. Davis dealt Fox a series of pretrial blows recently, including in a summary judgment decision that found, in part, "The evidence developed in this civil proceeding demonstrates that it is CRYSTAL clear" that none of the statements relating to Dominion about the 2020 election are true.

The judge sent the two sides to trial having already decided that: Fox committed defamation per se; that Fox cannot shield itself behind privileges for opinion or fair or neutral reporting and that Dominion is entitled to seek punitive damages.

In a statement on the case late Thursday, Fox said described Dominion's lawsuit as "a political crusade in search of a financial windfall" and said "the real cost would be cherished First Amendment rights. While Dominion has pushed irrelevant and misleading information to generate headlines, Fox News remains steadfast in protecting the rights of a free press, given a verdict for Dominion and its private equity owners would have grave consequences for the entire journalism profession."

A key question left for the jury is Fox's liability for actual malice, a potential damage multiplier.

"Having jurors be told that falsity is already established — that these statements were such total lies that there was no need to even debate it at trial — may set a tone that makes it easier to convince those jurors that there was knowing falsity or at least reckless disregard for the truth," Jones said. She added that it still appeared unlikely that Fox would settle despite the "staggering amount of potentially damning internal evidence" about what Fox knew and when.

Peter S. Lubin of Chicago-based Lubin Austermuehle said, "The fair reporting privilege is an absolute defense to libel in some jurisdictions, but not in New York state according to the judge," referring to the fact that some of the claims are being judged under New York state law.

"That defense is one Fox was counting on," Lubin said. "The privilege is real in some jurisdictions and can be the great defense for a media defendant in those jurisdictions."

The court found the fair reporting privilege "is not a defense, so Fox in trying the case will do its best to preserve that issue for appeal by trying the case to do that," Lubin said.

Lubin said Judge Davis' rejection of a fair reporting privilege for Fox made its case daunting, but added, "I don't know that the handwriting is on the wall yet as the issue of knowing or reckless disregard of the truth is still an issue for the jury to decide." Fox's ratings, Lubin said, appear to be holding up despite the negative public focus on its news organization.

Evidence of Fox's growing concern include an "Offer of Proof" that Fox filed with the court on Wednesday, seeking a ruling that it can present without interruption, during its opening statement, evidence regarding the absence of "actual malice" in its months of reports.

The request was made, according to the filing, "in light of the court's summary judgment ruling" finding defamation per se by Fox, as well as rejection of "fair reporting" defense shields and a finding that Dominion is entitled to seek punitive damages.

Lili Levi, professor of Law at the University of Miami's school of law, said it would have been unprecedented for the court to grant summary judgment on such a major case just on the basis of discovery documents. But Levi also said that fair report, opinion and neutral reporting privilege exclusions "are very consequential for Fox."

"I'm not privy to the parties' thinking, though I do think that a settlement is more likely after the summary judgment decision," Levi said. "For Fox, the distinct possibility of a loss at trial, the fact that it has already been harmed by the public circulation of information in its internal documents and the likely impression that the trial judge is not on Fox News' side might counsel serious settlement efforts."

Dominion might likewise be drawn to negotiations by the risks and cost of litigation and reversal as well as record of pro-defense rulings in political defamation cases, among other pressures, Levi said.

"The problem for both parties with respect to settlement is that each side has taken public positions that cast them as social heroes" — Dominion as "intrepid combatant against democracy-harming disinformation weaponized by the conservative press for partisan political reasons," Levi said, and Fox as "First Amendment mascot giving conservative voices a hearing they are denied in the liberal mainstream media."

As a result, the opportunity to portray terms of the settlement as a victory could be a factor for both in assessing a settlement.

This week, the judge also said he was pondering sanctioning of Fox for critical discovery failures in the months leading up to the trial and described some Fox responses to inquiries from Dominion or the court as "evasive." On Wednesday, he pressed Fox's Delaware counsel on continuing ambiguity, despite years of litigation, regarding corporate officer and manager overlaps between Fox Corp. and Fox News Network LLC.

"Dominion also starts with the advantage that some of the newsgathering-based defenses that Fox had wanted to argue were also rejected pre-trial," Jones said. "Fox comes before the jury unable to argue neutral reportage or fair report privilege, which were devices it had hoped to use to build its narrative that the statements about Dominion were simply a part of appropriate, healthy newsgathering."

The case focuses on Dominion claims that Delaware-chartered Fox and its news affiliates knowingly provided a mass media platform in late 2020 and early 2021 for groundless allegations that Dominion's voting machines were central to a vast conspiracy to steal the presidency from Donald Trump.

Dominion alleged in its complaint that "Fox endorsed, repeated and broadcast a series of verifiably false yet devastating lies about Dominion," including "outlandish, defamatory and far-fetched fictions" that Dominion rigged the 2020 election, manipulated vote counts and paid kickbacks to officials that used its machines, which were part of a company founded in Venezuela to rig dictator Hugo Chavez's election.

The suit narrowed the claims to 20 broadcasts and tweets, and their republication, between Nov. 8, 2020, and Jan. 26, 2021. Its initial damage claims requested an award of \$1 billion in lost enterprise value, \$600 million in lost profits, as well as \$600,000 in security expenses and \$700,000 for the costs of combating the disinformation campaign — numbers that could multiply with a jury finding of malice.

Off the air, according to emails, depositions and other evidence, Fox figures like Tucker Carlson derided conspiracy theorist claims as "insane," while fretting that competitor Newsmax could make gains on Fox's hesitation at continuing to push the fiction to viewers.

Francis X.F. Pileggi, managing partner in the Delaware office of Lewis Brisbois Bisgaard & Smith LLP, said defamation cases are hard to win and damages difficult to prove.

"Unless one only seeks a pyrrhic victory, there must be a proximate causation established between the defamation and loss of money, or a quantifiable loss, which is not easy to establish or calculate," Pileggi said.

Jones said Dominion "has to show a link between the people who had this knowledge and the actual decision to create and broadcast the specific statements. And it isn't enough to show that people at Fox had general knowledge that the election wasn't stolen."

The case, Jones said, "is not about whether Fox advanced election denialism generally. It's about whether it told a knowing lie about Dominion. I expect we will see Fox's lawyers leaning into this heavily at trial."

Testimony in the more-than-two-year-old suit is scheduled to begin at 9:30 a.m. on the seventh floor of a 12-floor courthouse in Wilmington, lately the focus of intense national attention and speculation over Fox's fate.

Dominion is represented by Justin A. Nelson, Stephen Shackelford Jr., Davida Brook, Jonathan J. Ross, Katie Sammons, Laranda Walker, Elizabeth Hadaway, Florence Chen, Kate Farley, Mark Hatch-Miller, Zach Savage and Christina M. Dieckmann of Susman Godfrey LLP, Brian E. Farnan and Michael J. Farnan of Farnan LLP, Thomas A. Clare, Megan L. Meier, Dustin A. Pusch and Daniel P. Watkins of Clare Locke LLP, and Rodney A. Smolla of Vermont Law and Graduate School.

Fox News and Fox Corp. are represented by Dan K. Webb and Matthew R. Carter of Winston & Strawn LLP, Paul D. Clement and Erin E. Murphy of Clement & Murphy PLLC, Scott A. Keller of Lehotsky Keller LLP, and Blake Rohrbacher, Katharine L. Mowery and Angela Lam of Richards Layton & Finger PA.

Fox Corp. is additionally represented by Eric M. George, Katherine A. Petti and Noah S. Helpern of Ellis George Cipollone O'Brien Annaguey LLP.

The cases are US Dominion Inc. et al. v. Fox News Network LLC, case number N21C-03-257, and US Dominion Inc. et al. v. Fox Corp. et al., case number N21C-11-082, in the Superior Court of the State

of Delaware.

--Additional reporting by Leslie Pappas, Hailey Konnath and Ryan Boysen. Editing by Dave Trumbore.

*Update: This story has been updated with a comment from Fox Corp. and its affiliates.*

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