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ADA UPDATE: COURTS DEAL BLOW TO PLAINTIFFS' LAWYERS

by Martin H. Orlick

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Abusive lawsuits filed under the Americans With Disabilities Act by professional plaintiffs and driven by the promise of attorneys' fees have long been a frustrating reality of doing business in California. Some California courts are finally acknowledging what the business community has known for years: That serial ADA litigation is "a cynical money making scheme" (*Jerry Doran vs. Del Taco, Inc. et. al.*) and that professional ADA plaintiffs engage in "systematic extortion designed to harass and intimidate business owners into agreeing to cash settlements" (*Jarek Molski v. Mandarin Touch Restaurant*).

The hospitality industry has been one of the consistent targets of abusive ADA litigation and thousands of restaurants and hotels have been the victims of an "ADA shakedown," even when technical ADA violations in their establishments have been quickly corrected. This is because the ADA does not include a period to "cure" or correct violations.

Repeated efforts by Congress have failed to amend the ADA to require pre-litigation notice and a period to cure. Recently, the California Supreme Court imposed a new requirement that for a plaintiff to recover attorneys' fees in cases like these (called "private attorney general cases") a plaintiff must have made a reasonable attempt to settle the dispute before litigation (*Graham v. DaimlerChrysler Corp.*). Cited by the court in the Doran case, this too brings hope that the wave will finally crash on the 15-year-long joy ride taken by ADA plaintiffs' organizations and their lawyers.

WHAT WENT WRONG WITH THE ADA?

Passed in 1990, the Americans With Disabilities Act, or ADA, is federal legislation requiring the removal of barriers that prevent persons with disabilities from full and equal access to public accommodations. This legitimate and important piece of civil rights law has been turned on its head by professional disabled

plaintiffs who are fronted by "disability rights" organizations, (generally comprised of a handful of people), and work hand in glove with their unprincipled lawyers to pull off serial sting operations.

Because federal law provides for injunctive relief to stop ADA violations, as well as the payment of plaintiffs' and attorneys' fees—and remember there is no period to cure violations before filing a lawsuit—ADA plaintiffs' groups have become a cottage industry, and for many of them the spigot of cash settlements and attorneys' fees has been locked in the "on" position. And in California, Colorado and Florida law, plaintiffs can also recover actual, punitive and statutory damages, making the litigation even more lucrative in these states.

Here's how it is done. The plaintiffs' organization targets a specific industry or geographic area, and systematically visits all targeted businesses, looking for ADA violations, however minor. The plaintiffs' groups don't discriminate between the deep pockets of Fortune 500 companies and the shallow pockets of mom-and-pop operations. All are fair game, and the shakedown is perfectly legal.

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After the drive-by visits, the plaintiff files a cookie-cutter complaint against a number of establishments, claiming damages for physical and emotional harm against each establishment, and requesting attorneys' fees in each instance. We have defended hospitality clients against an individual plaintiff who has filed hundreds of these kinds of lawsuits, all through the same lawyer. Unfortunately, there are many more professional plaintiffs just like him.

FIFTEEN YEARS OF "SUE AND SETTLE"

In many cases, a single ADA lawsuit will claim hundreds of thousands of dollars in damages. In most instances the cases never go to trial, but are settled outside of court for $20,000-$35,000 or more, per establishment. Why don't most defendants ask for their day in court? For one thing, the ADA itself includes vague language that makes a quick, vigorous defense unfeasible (language that could perhaps be defined by the courts, if enough ADA cases were tried).

Secondly, at the outset of defending our clients in an ADA action, we must inform them that—on top of the legal fees they pay us to defend them—they will have to pay the plaintiffs' attorneys fees too, if they lose the case. Of course, the longer the case takes—and it takes time to defend them because of the existing ambiguities and absence of case law—the higher all fees will be. Often our clients are already shouldering the burdensome construction costs associated with correcting ADA infractions, so it is not hard to understand why most of them avoid a trial and opt to bring their checkbooks to the earliest settlement conference possible.

TURNING THE TIDE?

After the immigrant owners of a Chinese restaurant in Solvang, California were sued for more than $300,000 under the ADA and state statues, they learned that the plaintiff had filed more than 300 similar lawsuits in California since 1998. Outraged, they decided to take on the expense and stress of fighting back instead of paying up. The outcome of their day in court in December 2004 provides a beacon of hope to other restaurant and hotel owners.

In this case, (Molski), U.S. District Judge Rafeedie's order stipulates that neither the plaintiff, Jarek Molski, nor his lawyer, Thomas Frankovich, can file an ADA suit unless Rafeedie's court is first notified. The judge emphasized that his ruling "does not limit the right of a legitimately aggrieved disabled individual to seek relief under the ADA; it only prevents abuse of the law by professional plaintiffs, like Molski and their lawyers ... whose priority is their own financial gain, and not 'the elimination of discrimination against individuals with disabilities.'" In a second opinion in April 2004, Rafeedie wrote that the court believes it must "... protect the judicial system and the public from [the Frankovich law firm's] abusive and predatory litigation."

In a similar ADA case (Doran) decided in June 2005, U.S. District Court Judge Gary Taylor held that "it is a proper exercise of discretion and common sense in an ADA case or a parallel state case to require, as a prerequisite to recovering attorneys' fees, a pre-litigation unambiguous warning notice to the defendant and a reasonable opportunity to cure the violation." The court cited the Graham case and wrote, "Such a notice will permit legitimate ADA advocates to warn the defendant and get the problem fixed without having to file a needless, frequently extortionate, lawsuit."

PROTECTING THE RIGHTS OF ALL

Virtually all our clients agree with the spirit and intent of the ADA and willingly correct problems that prevent their disabled customers from full access to their premises. But the unsavory tactics of "disability rights" plaintiffs organizations leave many of them soured, and we have been troubled by the backlash of sentiment against the disabled population due to this unnecessary and abusive litigation.

Although it's too early for the hospitality industry to celebrate the end of abusive ADA lawsuits—we have had to help clients respond to a number of ADA lawsuits filed since Doran and Molski—these recent California cases have given us powerful ammunition in the fight to end these abusive lawsuits.

The courts' decisions also give us hope that the civil rights of the disabled will continue to be protected, while our clients will also be protected from the extortion and legal sham perpetrated by professional ADA plaintiffs and their lawyers. This would provide a win-win situation for both business owners and their disabled customers.

There would be losers too, of course. But who will cry for the professional plaintiffs and their unethical lawyers if they are forced to make an honest living?

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