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## ADA LAWSUITS – ACCESS OR EXTORTION?

*By Keith M. White*

The Americans with Disabilities Act (“ADA”) was passed in 1990 and is a comprehensive law intended to prohibit discrimination against people with disabilities in employment, public accommodations, public services, and telecommunications. Among other things, its goal is to make public places, including businesses open to the general public, accessible to all people by requiring that barriers to access be removed or eliminated. Moreover, it and the Unruh Act, a sister California law, gives private individuals the right to enforce the law by lawsuit rather than have the federal, state or local governments enforce the law at public expense.

In California, a person bringing an ADA claim need not give notice of the claim or even suffer actual damages in order to sue a business or a property owner. It is enough that they encountered a barrier and were discouraged by its presence.

Many parts of California, including the Central Valley have become a hotbed for lawsuits based on the ADA and California’s own accessibility laws. By these lawsuits, a disabled plaintiff can demand the removal of barriers to access, \$4,000 in statutory damages per visit, and

attorney’s fees and costs incurred in bringing the lawsuit. There is no requirement that the property owner receive notice of a potential violation before suit is filed so the first indication an owner is subject to one of these claims is the service of a lawsuit.

For years these lawsuits have been the subject of newspaper articles, television news reports, and are frequently the fodder of local radio talk-shows which usually decry the suits as legal extortion and shakedowns by a handful of unscrupulous attorneys and their clients. Despite the media attention, new ADA actions are filed almost every day. In fact, since 2009, one law firm has filed more than 600 lawsuits against Central Valley businesses, with more than a third of those having been filed on behalf of one person.

The question thus arises, are these lawsuits about access or extortion? As you might expect, the answer depends on who you ask. If you are a non-compliant property or business owner, you likely believe the suits constitute legalized extortion by selfish individuals and their opportunistic lawyers. If you are a disabled person, you may see the suits as the only tool available to force otherwise seemingly

unsympathetic businesses to comply with the noble purpose of the ADA to provide access to everyone. If you are not among those two classes, you probably sympathize with the disabled while being stunned by the sheer number of lawsuits and the amount of income generated by a handful of disabled persons and their attorneys.

No matter which side you take, almost everyone agrees that businesses should be welcoming and accessible to everyone. The question remains, how to achieve access? In addition to the ADA which allows for injunctive relief ordering the removal of access barriers and plaintiff's attorney fees, the Unruh Act, California's 1974 disabilities rights law, puts a bounty of \$4,000 on such claims, incentivizing plaintiffs to make such claims. This in effect, allows private citizens to enforce the law, becoming de-facto private attorney generals.

However, as is frequently the case, a well-intended law has unintended consequences. Instead of disabled persons using the threat of a lawsuit to obtain access compliance, a small group of disabled persons and their attorneys have established a cottage industry where collecting the lucrative statutory damages and fees encourages "professional filers" to visit as many establishments as they can and to bring suits on what many would characterize as trivial violations.

Is there an easy fix to end abusive lawsuits? Of course. Solutions are available both in the private and public sector.

First, and probably the easiest, the private side. The most simple way to avoid an ADA lawsuit is to comply with the law. While accessibility laws are difficult to understand, a Certified Access Specialists ("CASp") can inspect a business, identify barriers to access, and instruct as to the removal of barriers. After the initial inspection and repairs, an occasional "tune up" inspection may be necessary to address changes in accessibility standards or to identify an inadvertent and newly established barrier. After all, nearly all businesses are looking for more customers or clients and who would want barriers at their business that keep anyone away or from feeling welcome? Moreover, obtaining a CASp report and getting

repairs underway may entitle a defendant to additional benefits (e.g., a stay of litigation and reduced statutory damages) if they are sued after the inspection.

On the public side, the options are more limited. Although a change in the law appears to be warranted, lobbying efforts have yielded little change. Our state senators and assemblymen appear to be more concerned with the public perception of limiting the law that "protects" the disabled rather than the havoc the current law brings to small businesses and the burden ADA cases add to an already overworked court system.

Despite the legislature's resistance, there are several modifications to the existing law that would eliminate the lawsuit abuse while maintaining the purpose of the ADA and Unruh Acts.

First, a simple limit on the number of lawsuits an individual could bring on an annual basis, similar to the limit imposed on small claims actions, would greatly reduce the abuse while maintaining the disabled person's mechanism to make their favorite establishments accessible.

Second, a pre-litigation notice period could also be created which would allow an opportunity for the property/business owner to avoid the lawsuit by removing the barriers within a certain period after receiving notice of their existence. This structure has been successfully employed in some consumer protection laws to prevent abuse and could be required for all access related lawsuits or as a pre-requisite to the imposition of statutory damages and attorney fees. That way, a disabled person could still bring a suit for actual damages (rather than mandatory statutory damages allowed for almost no injury at all) and injunctive relief when they were actually physically harmed or prevented access, instead of merely being embarrassed or discouraged during their visit by a technical deficiency.

If you are named in an access-based lawsuit, you should speak to an attorney familiar with the law and the process. The attorney will likely counsel you to research the claims made and the conditions of the property to promptly settle the case before either side incurs additional

fees and costs in prosecuting and defending the action.

Plaintiffs tend to file their cases in Federal Court, where the court takes an active role in pushing the cases along which forces the action to advance and the parties to incur fees and costs early in the case. Thus, in order to limit exposure to plaintiff's fees and your own, the case needs to be evaluated promptly. Your attorney may suggest another course of action that either challenges the claims made in the lawsuit, moots them, or otherwise pushes a case toward a prompt resolution. More likely than not, a prompt resolution is in the best interest of any ADA defendant.

Business and property owners cannot ignore the ADA and should be aware of what the law requires of them. Armed with such knowledge, they should be able to avoid an access-based lawsuit. Moreover, landlords must disclose in their leases whether the property has been inspected by a CASp and the results of the inspection. This knowledge allows the both the property owner and the tenant to understand their obligations and have reasonable expectations of their rights if an access-based lawsuit is filed against them.



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