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Seeking Shelter from Abusive ADA Lawsuits

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Congress enacted the Americans with Disabilities Act (ADA) to broadly prohibit discrimination against individuals with disabilities, including discrimination caused by architectural design features that make it difficult or impossible for disabled patrons to use public accommodations. Under the statute, newly designed places of public accommodation, such as restaurants, hotels, and movie theaters, must be designed in a manner that allows persons in wheelchairs and other patrons with disabilities to use the amenities. The ADA also requires owners of existing structures to remove any architectural barriers that impede the access of disabled patrons "where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). When a barrier cannot be readily removed, the owner of the building must provide access "through alternative methods if such methods are readily achievable." 42 U.S.C. § 12182(b)(2)(A)(v).

Birth of a Cottage Industry

Despite its salutary purposes, the ADA unfortunately has created a "cottage industry" of lawsuits involving professional plaintiffs and unscrupulous lawyers who file scores of cases to secure quick settlements. *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280-81 (M.D. Fla. 2004). The problem is particularly acute in California, where private plaintiffs can obtain not only injunctive relief – which is the only remedy available to private plaintiffs under the ADA itself – but also damages by asserting parallel claims under the California Unruh Civil Rights Act ("UCRA"), Cal. Civ. Code § 51(f) and the California Disabled Persons Act ("CDPA"), Cal. Civ. Code § 54(c), both of which permit an award of damages to prevailing plaintiffs in discrimination suits. Although the issue remains unsettled, at least one federal court in California has concluded that the UCRA and CDPA permit disabled plaintiffs to recover $4,000 per day for each day that a place of public accommodation remains inaccessible to them. *See Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1051-52 (S.D. Cal. 1998).

Not surprisingly, when threatened with protracted litigation and the prospect of a significant fee award to the plaintiff's attorney, many companies quickly capitulate. *See Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005) ("Faced with costly litigation and a potentially drastic judgment against them, most businesses quickly settle."). Several recent cases analyzing the practices of serial ADA plaintiffs and their lawyers indicate that most cases can be settled for approximately $5,000 in attorney's fees along with an agreement to remediate the ADA violations alleged by the plaintiff. The trouble is, no plaintiff or attorney, and indeed no regulatory agency, has the capacity to conclusively certify that a facility is ADA compliant. As a result, the fact that modifications have been made in response to one ADA lawsuit does not preclude a subsequent plaintiff from filing a new lawsuit challenging another alleged violation. For small businesses operating on thin margins, the cost of responding to threatened and actual ADA lawsuits is a staggering burden. A number of California businesses have decided to fold after being targeted by serial ADA plaintiffs. *See* Carri Becker, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abusive or Commendable?*, 17 Hastings Women's L.J. 93, 112 (2006).

A Glimmer of Hope: Challenges to ADA Plaintiffs' Standing

Standing is a "threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (internal quotations and citation omitted). Defendants can challenge the plaintiff's standing through a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Because a lack of standing divests the court of subject matter jurisdiction, a standing challenge can be raised at any point in the case. *See Worth v. Seldin*, 422 U.S. 490, 498 (1975).

As with all plaintiffs invoking the jurisdiction of the federal courts, those suing under the ADA bear the burden of proving that they have Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To do so, they must show: (1) an injury in fact – "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) traceable to the challenged action of the defendant; and (3) likely to be redressed by a favorable decision. *See id.* (internal citations omitted).

In ADA cases, the standing inquiry generally turns on the first, and to a lesser extent, the third factor. *See*, *e.g.*, *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1252 (M.D. Fla. 2003); Amy F. Robertson, *Standing to Sue Under Title III of the ADA*, 27 Colo. Law. 51, 52 (Mar. 1998). To satisfy the first element, the plaintiff must prove that he encountered a barrier preventing him from accessing a place of public accommodation, and that there is a "'sufficient likelihood that he will again be wronged in a similar way . . . ." That is, he must establish a real and immediate threat of repeated injury.'" *Fortyune v. American MultiCinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), and *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). In practice, this requires a showing that the plaintiff is "likely to return to patronize the accommodation in question." *Harris v. Stonecrest Care Auto Center, LLC*, 472 F. Supp. 2d 1208, 1215-16 (S.D. Cal. 2007) (internal citation omitted).

Standing Attacks Based on Likelihood of Future Injury to Plaintiff

Courts typically follow a two-step process to resolve standing challenges. First, the court reviews the complaint and any testimony or discovery responses of the plaintiff to see if the plaintiff has asserted with reasonable specificity that he intends to visit the defendant's business again. If the plaintiff has done so, the court evaluates whether the plaintiff's representations are credible in light of all the circumstances, such that there is in fact a reasonable likelihood that the plaintiff faces a "real [and] immediate" threat of repeated injury. *City of Los Angeles*, 461 U.S. at 111. District courts have frequently dismissed ADA cases when the plaintiff offered only vague allegations and testimony about a future plan to visit the defendant's property. *See*, *e.g.*, *Shotz v. Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001) (holding that although plaintiffs had stated an ADA claim involving architectural barriers at a state courthouse, they lacked standing because they did not allege that they intended to return to the courthouse, and thus faced no "real and immediate threat of future discrimination").

Most plaintiffs' lawyers – particularly those who are fully engaged in the ADA "cottage industry" – will allege in the complaint that the plaintiff intends to return to the defendant's premises in the near future, and counsel will instruct their clients to hew to that claim during depositions and at trial. The district court must decide whether the plaintiff's professed intentions are credible. Courts examine the following factors when evaluating the likelihood that the plaintiff will return to the defendants' place of business: (1) the proximity of the business to plaintiff's residence; (2) the plaintiff's past patronage of the defendant's business; (3) the definiteness of the plaintiff's plans to return; and (4) plaintiff's frequency of travel to the area surrounding the defendant's business. *See, e.g., Wilson v. Kayo Oil Co.*, 535 F. Supp. 2d 1063, 1067 (S.D. Cal. 2007). The first factor generally receives the most weight, although the relative importance of the factors varies to some degree depending on the type of business operated by the defendant.

Standing Attacks Based on Plaintiff's Credibility and Litigation History

It is widely recognized that the effectiveness of the ADA's remedial scheme is dependent on lawsuits by private parties to enforce the accessibility requirements of the statute. *See generally D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (noting that "most ADA suits are brought by a small number of private plaintiffs who view themselves as champions of the disabled"). Unfortunately, as many district courts have bemoaned, the objectives of the ADA have been subverted by a substantial number of plaintiffs' lawyers who bring scores of ADA suits not to improve access for the disabled but, instead, to extract payments of attorney's fees. *See Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004) (observing that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for [the] disabled)", and that this "type of shotgun litigation undermines both the spirit and purposes of the ADA"). One court described the practice as follows:

> The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through 'conciliation and voluntary compliance,' *Rodriquez*, 305 F. Supp. 2d at 1281, a lawsuit is filed, requesting damage awards [under California statutes] that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.

Molski v. Mandarin Touch Restaurant, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004); *see also Rodriquez*, 305 F. Supp. 2d at 1285 (describing plaintiff as "merely a professional pawn in an ongoing scheme to bilk attorney's fees from the Defendant").

Although abusive ADA lawsuits have been on the rise for several years, courts have responded to the problem differently and a split of authority appears to be ripening between the Ninth Circuit and district courts in the Eleventh Circuit. Precedent in the Eleventh Circuit permits district courts to "weigh the evidence" on a Rule 12(b)(1) motion to "satisfy itself as to the existence of its power to hear the case." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990); *see also Fox v. Morris Jupiter Assocs.*, No. 05-cv-80689, 2007 BL 107774, *3 (S.D. Fla. Sept. 25, 2007). Consistent with this authority, several district judges in Florida have dismissed ADA suits brought by serial plaintiffs on the ground that the plaintiff's allegations – though arguably sufficient to establish standing if believed – were simply not credible in light of the plaintiff's (and counsel's) extensive litigation history. For example, in *Brother v. CPL Investments*, 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004), the court dismissed on standing grounds the ADA suit of a serial plaintiff, commenting that the plaintiff's "claim that he intended to patronize the [defendant's] hotel prior to suit is not credible, nor are his claims that he intends to use the Ramada Limited in the future." Similarly, in *Tiger Partner, LLC*, 331 F. Supp. 2d at 1274-75, another court dismissed an ADA brought by the same plaintiff, observing that "to satisfy Article III's standing requirements, Mr. Brother has professed an intent to return to all fifty-four of the properties he has sued" – a representation that the court found "simply implausible."

Until recently, district courts in California demonstrated a similar willingness to dismiss abusive ADA claims and to impose other sanctions, including orders requiring serial plaintiffs and their counsel to obtain the court's approval before filing new ADA lawsuits. In *Molski*, 385 F. Supp. 2d at 1047-48, for example, the court, observing that the plaintiff "has engaged in a well-established pattern of abusive [ADA] litigation," expressed "serious doubts" about the plaintiff's professed intent to return to the defendants' restaurant, and dismissed the case for lack of standing. *See id.* at 1046. Another court held in *Wilson*, 535 F. Supp. 2d at 1069-70, that ADA plaintiffs "must have *bona fide* purposes for his visits," but that the visits of the plaintiff in that case appeared to have occurred solely for the purpose of "setting up future lawsuits." The court then dismissed the case, finding that the plaintiff lacked standing, and that his "ADA claims are a sham, used as a pretext

to gain access to the federal courts, while he pursues remedies that are available – sometimes exclusively – under California state law." *Id.* at 1070 (internal citation omitted).

Other Standing Attacks

Defendants in ADA cases have argued aggressively, and for the most part successfully, that individual plaintiffs only have standing to sue with respect to those barriers that they personally encountered at a facility, and only with respect to those barriers that adversely affect them in light of their unique disabilities. *See Moyer v. Walt Disney World*, 146 F. Supp. 2d 1249 (M.D. Fla. 2000) (holding that plaintiff had standing to sue as to the particular rides and amenities that he found to be inaccessible during his visit to the amusement park, but did not have standing as to others for which he lacked "actual notice" that a violation existed). A ruling limiting injunctive relief to a subset of the violations at a site, however, is probably of negligible value to businesses. Although it limits the amount of remedial construction work the defendant will have to undertake, it leaves open the possibility that other plaintiffs will file additional lawsuits regarding the remaining violations, therefore exposing the defendant to additional defense costs, awards of attorney's fees, and injunctive relief. Furthermore, a narrower injunction is unlikely to significantly constrain the amount of attorney's fees awarded to a plaintiff who prevails on some but not all alleged ADA violations in the first suit.

Need for Reform

A district court in Florida aptly observed that "the system for adjudicating disputes under the ADA cries out for a legislative solution." *Tiger Partner, LLC*, 331 F. Supp. 2d at 1375. The court opined that "[o]nly Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks," and that "[i]nstead of promoting 'conciliation and voluntary compliance,' the existing law encourages massive litigation." *Id.* (internal citation omitted).

Not long after the decision in *Tiger Partner*, Florida Congressmen Mark Foley and E. Clay Shaw introduced a bill requiring potential ADA plaintiffs to notify businesses of alleged accessibility violations before filing lawsuits. *See* H.R. 3590, 106th Cong. (2000) (the "ADA Notification Act"). Joe Fields Jr., a West Palm Beach lawyer who testified in support of HR 3590, observed that if Congress failed to act, "more and more attorneys are going to find out that this is a great way to make fees."[1] Unfortunately, trial lawyers and disability advocates lobbied successfully against the adoption of the ADA Notification Act and other similar proposals introduced both before and afterwards in the House and the Senate. Thus, this remains an area that cries out for congressional intervention.

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[1] http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0.htm.