"DRIVE-BY" SUITS UNDER THE AMERICANS WITH DISABILITIES ACT

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Blame Florida!

Some attorneys allege that Florida is the center of Americans with Disabilities Act "drive-by" litigation, counting more such suits than any other state. This may or may not be true, but the phenomenon of the "drive-by" seems to have started in the Sunbelt and certainly has the potential to migrate north and east from there.

"Drive-by" Defined

Americans with Disabilities Act "drive-by" suits supposedly derive their name from the alleged practice of plaintiffs' attorneys in "driving by" business establishments, noting obvious ADA violations, then filing a class-action suit against those businesses. That is one plausible explanation, but why just drive by? There are probably enough potential violations inside the establishment to justify an attorney's leaving the car and inspecting the business premises.

As a Californian, I suspect that the real genesis of the term is instead the "drive-by" shooting, in which gang members aim at each other, but sometimes kill or injure other persons who get in the way. Thought of in this way, a "drive-by" suit is a scattershot legal action that catches many businesses which have only minor, technical violations of the law.

"Drive-by" suits are not limited to the ADA. In recent years, the now-infamous Trevor Law Group in California has filed class-action suits under a state unfair competition statute that gives individuals the right to file private damage actions against businesses cited for violating state regulations. Thus, Trevor has sued restaurants and supermarkets that were cited for minor sanitation violations and auto repair shops cited by the state for violating consumer protection laws. ("Attorney General sues law firm for alleged 'shakedown' Sacramento Business Journal, February 26, 2003)

And in San Diego this summer, a group of seven restaurants and nightclubs settled a suit by male plaintiffs alleging violations of a state civil rights act prohibiting gender discrimination in providing access to business premises and facilities. The clubs were all running "ladies night" promotions, giving female patrons reduced admission or drink prices. This practice has been held a violation of the civil rights statute in the past, but is still commonly done, and the plaintiffs took advantage of these facts to extract a quick $125,000 settlement. ("Kiss ladies night goodbye," San Diego Union-Tribune, August 3, 2003)

Plaintiff vs. defendant

The goal of these ADA class actions, plaintiffs' attorneys claim, is enforcing compliance on the part of businesses which would otherwise flout the law. These businesses ignore letters and complaints, the attorneys argue, so filing suit is the only way to get their attention and force them to accommodate disabled

customers. ("Crusade or Cottage Industry: ADA lawsuits pit disabled vs. businesses," Sacramento Business Journal, October 19, 1998)

To the defendants in these suits, the goal of plaintiffs' attorneys is rather to extract settlement money and run. Most of these defendants are small businesses without ready access to legal counsel. Plaintiffs' attorneys usually ask for amounts marginally less than the defendant would spend in litigation, making settlement an attractive option under the circumstances. Most of these suits are settled, and defendants complain that attorney fees often constitute the major part of the settlement, more than the expense of the repairs or modifications that they agree to undertake as part of the settlement. ("ADA cases catch defendants by surprise," Fort Myers News-Press, September 15, 2003; "Growing Pains: The Americans with Disabilities Act Turns 10," Area Development Online, November 2000)

Defendants sometimes discover that the settlement does not end their problems, since other attorneys may still file similar suits on behalf of other plaintiffs. And, at least in Florida, there seems to be some controversy among disabled rights organizations over the value of these suits and concern about the bad will they may engender among business operators. ("Unlimited Motions," Miami Herald, November 19, 2001)

Defendants charge that many suits are frivolous, with attorneys seizing on minor technical violations; these are the examples most often cited in the business press. In actions that allege more substantial non-compliance, defendants note that ADA requirements for existing structures only compel businesses to make modifications that are "readily achievable." This is a floating standard defined principally by the size and financial resources of the business in question. So small businesses may not be required under the law to make the changes demanded in these suits, yet would have to spend prohibitive amounts of money to establish that principle in court. Many defendants are also confused by conflicting requirements of federal and state disability discrimination laws, by the variable interpretations given to those requirements by different building inspectors, and by the frequent inability of contractors to insure that a building is in compliance. ("Rather than fight, hotels settle disabilities lawsuits," Daytona Beach News-Journal, November 11, 2003)

Fight back!

Defendants are, however, fighting back. A group of 26 California businesses which have been sued for ADA violations by attorney George S. Louie have filed counter-suits asking the federal district court to reject Louie's suits as frivolous. Louie meanwhile complains that the counterclaims "have so absorbed his time that his litigation against businesses has nearly ground to a halt." The suits and counterclaims are still pending ("North Coast, East Bay businesses counter sue Oakland class–action pro," Santa Rosa Press Democrat, November 4, 2003)

Businesses groups are also seeking relief in Congress. Rep. Mark Foley (R-FL) has introduced H. R. 728, the "ADA Notification Act," which would require plaintiffs' attorneys to give business operators a 90-day advance notice before an ADA suit could be filed. The idea behind the bill is that businesses would use that 90 days to correct minor ADA-related defects, thus blunting plaintiffs' legal actions and avoiding both settlement and litigation costs. The National Restaurant Association and the National Council of Chain Restaurants are supporting the bill, but its prospects remain uncertain. Prior years' versions of the bill failed to move out of committee ("NRA, NCCR support ADA lawsuit bill," Nation's Restaurant News, February 24, 2003)

And the backlash triggered by the Trevor Law Group's "consumer protection" suits may also hold promise for future relief in ADA "drive-by" suits as well. The California State Bar has initiated formal disciplinary

proceedings against the firm, and the California Attorney General, characterizing Trevor's practices as "a shakedown operation designed to extract attorney's fees from law-abiding small business owners," has filed suit in state court seeking restitution of all settlement money collected by Trevor, plus additional civil penalties and a permanent injunction prohibiting the firm from filing future suits under the unfair competition statute without court approval. ("Attorney General Lockyer Files '17200' Consumer Protection Lawsuit Against Beverly Hills Law Firm," [Cal.] Office of the Attorney General press release, February 26, 2003)