Established 1872

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LAW of the LAND

Serial ADA Plaintiffs Harass Retail Businesses

Internet Retailers Not Immune

BY CHRISTOPHER R. VACCARO
SPECIAL TO BANKER & TRADESMAN

Retail shops face daunting challenges, such as securing locations and financing, employee retention, inventory management and competition from online vendors who have shed brick and mortar cocoons. The Americans with Disabilities Act (ADA) has spawned additional challenges, which include vexatious litigants and their lawyers.

CHRISTOPHER VACCARO

Congress enacted the ADA in 1990 with noble intentions and bipartisan support. Title III of the ADA requires places of public accommodation, including stores, theatres and restaurants, to remove barriers that hamper disabled customers. The Department of Justice adopted myriad regulations and standards under the ADA, imposing requirements for everything from parking spaces, to handrails, to countertops.

Even the most conscientious architects and shopkeepers often inadvertently violate ADA requirements. Disabled individuals who find violations can file lawsuits and obtain court orders requiring businesses to remove or remediate barriers to access. Although the ADA does not allow private individuals to seek monetary damages against businesses that fail to accommodate disabled customers, it does let them recover their attorneys' fees. Also, some states such as New York, California and Florida (but not Massachusetts) have enacted civil rights statutes allowing disabled individuals to recover monetary damages from retailers that violate the ADA. It is unsurprising that those states are epicenters of vexatious ADA litigation.

Internet retailers who think they are excused from ADA compliance because they operate outside of physical buildings, should think again. In 2011, the National Association for the Deaf filed an ADA lawsuit against Netflix in a Massachusetts federal court, because Netflix's video streaming service did not accommodate hearing impaired individuals. Netflix moved to dismiss the suit, arguing that its video service was wired into private homes from its website, which is not a place of public accommodation. The federal judge disagreed, ruling that Congress intended the ADA to adapt to changes in technology. Netflix wisely added close captioning to its video streaming.

Many ADA lawsuits are less virtuous than the Netflix litigation. According to TRAC Reports, a database at Syracuse University, ADA lawsuits are on the rise, and now comprise nearly 25 percent of all civil rights litigation in federal courts. Much of this litigation is fueled by serial plaintiffs and unscrupulous lawyers who file hundreds of lawsuits using boilerplate complaint forms. Some ADA plaintiffs' lawyers are known to dispatch disabled individuals to dozens of businesses to seek ADA violations, then hastily file suit against businesses without first notifying them or letting them remediate problems. Defendants reluctantly settle the lawsuits with cash payments to avoid ruinous litigation costs.

All About The Benjamins

A disgusted federal judge on Long Island confronted this mischief in *Costello v. Flatman LLC* in 2013. Mike Costello claimed to be a wheelchair-bound individual unable to access several restaurants and shops in Brooklyn, New York. A pair of lawyers, one from Florida and another from New York, both with histories of bringing questionable ADA suits, simultaneously sued eight separate businesses on Costello's behalf under the ADA and under state and local civil rights laws. Flatman LLC was a Subway restaurant operator, who failed to answer the lawsuit. The court entered a default judgment against it for a paltry $14.31.

Costello's lawyers pushed their luck when they asked the court to award them $15,000 in attorneys' fees. The presiding judge, Sterling Johnson Jr., praised the ADA as "a testament to this country's effort to protect some of its most vulnerable

citizens," but complained that many ADA cases are "less about ensuring access … and more about lining counsel's pockets." Johnson quietly visited the eight establishments that Costello had sued without disclosing his visits to Costello's lawyers. He found little, if any, remediation of alleged access problems. He concluded that Costello's lawsuits were more about attorneys' fees than access. He also discovered that since 2009, Costello's lawyers had filed over 200 ADA cases in New York alone. Johnson denied the motion for attorneys' fees, comparing the lawyers' conduct to that of "a parasite disguised as a social engineer." He threatened to report them to state bar authorities.

After this thrashing, Costello's lawyers appealed to the U.S. Court of Appeals. The appeals court did not dispute most of Johnson's assessment of the lawyers' motives, but it took issue with his site visits without giving the lawyers an opportunity to contest conclusions drawn from the visits. The appeals court vacated Johnson's ruling, and remanded the matter to a different judge. Thus vindicated, Costello's lawyers promptly withdrew their request for attorneys' fees, perhaps to escape similar reproach from a new judge.

Many people share Johnson's frustration with pettifogger lawyers who exploit virtuous laws for their own financial gain. Given this frustration, could the ADA's goals be better served if businesses were given notices and opportunities to cure violations, without being ambushed with costly litigation? ■

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