

"Drive-By" Lawsuits on the Rise in Georgia

What You Need to Know to Protect Yourself April 28, 2004

Due to a concerning number of "drive-by" lawsuits in Georgia, our hospitality partners and legal counsel at Shea Stokes and Carter have written the following alert.

"Drive-By Lawsuit Alert

By John R. Hunt and Maile Goldstein

During the past year, the federal courts in Georgia have witnessed an increase in the number of "public access" lawsuits filed against hotels and restaurants under the Americans with Disabilities Act. Most of the Plaintiffs generally allege that a hotel or restaurant has failed to make various physical changes necessary in order to comply with the ADA. As a result, the plaintiff, who may be an individual or organization, will demand that the court order the business to make specific architectural or structural changes. Naturally, defending such a case can result in lost management time as well as litigation expenses.

Since 1992, the Americans with Disabilities Act has imposed significant obligations on places of public accommodation such as hotels and restaurants. The laudable goal of the ADA's "public access" requirements is to assure that disabled persons may enjoy the same use of these facilities as other members of the public. In consequence, the ADA requires that restaurants and hotels make readily achievable modifications to assure public access. For most businesses, the ADA Accessibility Guidelines (ADAAG) describe the highly detailed specifications for access by the disabled.

Although many hotels and restaurants made changes in an effort to comply with the ADA at the time it became effective, the number of cases filed under the ADA's public access requirements has been substantial. Indeed, this kind of litigation has been rampant in areas where the hospitality industry is concentrated. For example, in a recent trial against a cruise ship line, witnesses testified that during the past six years, one organization had filed over two hundred ADA public access lawsuits in just one federal court. Other organizations have been equally prolific. One Florida attorney helped form a trio of non-profit companies just to bring ADA lawsuits against businesses in Broward, Miami-Dade and Palm Beach counties. *These organizations have filed ADA public access lawsuits at*

the rate of one per day during the past two years.

Faced with this flood of cases, the federal courts in Florida have begun to exhibit less patience with ADA access actions. Recently, a federal judge in Tampa required the attorney representing one organization to explain the work underlying his legal fees in open court. The judge took this unusual step despite the fact that the organization and the defendant, a Tampa office park owner, already had reached an out-of-court settlement.

The Risks of Public Access Cases

Unlike other federal discrimination laws, the public access provisions of the ADA do not provide for an award of damages to the plaintiff or for a jury trial. Despite the absence of a potential for a large damage award, the ADA does provide for an award of attorneys' fees to a successful plaintiff. In view of the complicated nature of the ADA's requirements, this creates the possibility of a plaintiff being awarded attorneys' fees where he or she proves only a handful of technical ADA violations at trial.

As noted by various commentators, this has encouraged high volume litigation that proceeds in "cookie cutter fashion." The modus operandi of some organizations is to have a disabled person visit a restaurant, "spot" a number of ADA problems, file a complaint and then have its expert witness inspect the restaurant during pretrial discovery. While on the premises, the expert "trolls" for more technical violations of the accessibility guidelines listed in the ADAAG. The expert then completes a report containing a plethora of supposed violations and a settlement demand ensues.

In view of the costs of defense and the uncertainties of trial, most defendants will reach an early settlement that provides for some modifications to the business plus the payment of a "portion" of the plaintiff's attorneys' fees. As plaintiffs' attorneys are able to generate a large number of quick settlements while performing little work, this practice has become fairly lucrative. The website for one organization even boasts that it has never had to take a case to trial.

Indeed, the number of these cases in the federal courts in Florida has become so great, that Representative Mark Foley has introduced a bill in Congress to amend the ADA. This bill, H.R. 728, The ADA Notification Act, would require at least ninety days notice of all general violations before an ADA case can be filed. The bill would provide businesses with a time period in which to cure any defects. The bill currently has sixty one co-sponsors and has been referred to the Subcommittee

on the Constitution. However, until H.R. 728 is passed and becomes effective, employers must be proactive in safeguarding against these "drive-by" lawsuits.

[Congressional House Resolution 728....](#)

What Should You Do?

The best strategy for defending such a case is to never become embroiled in one at all. When a hotel or restaurant has a program to assure public access, that program should be regularly reviewed and checked against the actual physical operations. Where a restaurant or hotel lacks such a plan, it should consider conducting its own ADA audit review. This kind of audit can spot some of the more common and technical violations and the business can develop a realistic time- line for their correction.

When you are faced with an ADA case, an early decision should be made as to whether to settle or proceed to trial. Although a modest settlement probably can be obtained at an early date, the obvious danger is that the plaintiffs simply will pocket the money and move on to the next restaurant operated by your company. In addition, a settlement will not prevent other organizations from filing additional actions.

Accordingly, you should determine whether there is any substance to the plaintiffs' allegations, even if this only results from a coincidence. The business should prepare a comparison of the allegations in the complaint to the actual physical condition of the restaurant and the requirements of the ADA's regulations.

Once you have identified any features which may not be in compliance, you should determine whether compliance is "readily achievable." Your goal should be to make any needed renovations to the property prior to an inspection by the plaintiffs' expert witness.

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