U.S. House Committee on the Judiciary

Subcommittee on the Constitution

June 27, 2012

Hearing on H.R. 3356, the "ACCESS (ADA Compliance for Customer Entry to Stores and Services) Act of 2011"

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I've been consulted in over 900 ADA/accessibility lawsuits throughout the United States, and defended over 400 such claims as lead counsel. I urge your support of HR 3356 because it will stop some widespread, troubling practices in these cases, reduce the number of businesses which close as a direct result and accelerate improvements for disabled access which are currently not being made in a very large number of these cases.

HR 3356 would require an almost immediate agreement to make changes with the knowledge that, if changes were not quickly made, the pre-litigation notice letter it requires would most likely be "Exhibit A" to a costly lawsuit where the business could be forced to make those same changes and pay the plaintiff's attorney. In these very difficult financial times, we need to give individuals confidence to step forward and create jobs. But hundreds of my clients received inaccurate information from their local building departments, city leaders and even legislators that they were "grandfathered" and only needed to make improvements if they made significant structural changes at their business. While that's certainly not true, the answer is that businesses need information—not to be "blindsided" by lawsuits for changes most would gladly make if they only knew of the requirements. A lawsuit should not be the first notice they get.

In 2005, I personally witnessed at least seven (7) small businesses close very quickly in the small mountain community of Julian, California after an attorney demanded a $200,000 (Exhibit "A") as an unlawful "investigation fee" (Exhibit "B" page 7 paragraph 2) from about 67 businesses in the name of an organization he created and represented, which demands increased every day his terms were not accepted (Exhibit "C"). Since then, we've seen dozens of other businesses close as a direct result of these lawsuits, in many cases after making all appropriate changes, just because they never wanted to deal with the nightmare of another ADA lawsuit.

But more troubling is the fact that many hundreds, if not thousands of these cases, are concluded without any changes ever being made, which undermines the important public policy objectives of the ADA. Exhibit "D" is just one example of the standard terms offered by one law firm known to have filed over 2,000 ADA/accessibility lawsuits. Basically, if you pay the right price, you can obtain a settlement agreement

wrapped in a strong confidentiality clause which is, for practical purposes, all but unenforceable. Note that the agreement only requires the defendant to do what its consultant recommends, but does not require that the consultant be qualified or even that the items mentioned in the complaint be fixed.

Many attorneys deliberately leave information about conditions which may need to be changed out of their lawsuits for fear defendants will make all the changes and moot the case; but since so many of these cases are settled informally, many defendants never learn about all the changes they need to make. The Ninth Circuit Court of Appeals recently commented that a filer of thousands of these lawsuits admitted that he rarely mentioned all conditions which could limit accessibility for his clients in the complaints he filed because " . . . otherwise a defendant could remove all the barriers prior to trial and moot the entire case" (see footnote 7 on page 10888 of Exhibit "E"— Oliver v. Ralphs). So if one of the purposes of the ADA was that these lawsuits would operate to prompt changes for others, practices like these directly undermine that objective.

But not all lawyers conceal claims— a discrete selling of noncompliance is far more common— I've been told that if my client pays the right amount, the plaintiff's attorney will agree with my access plan whether it is appropriate or not, and if that amount is not paid, they will find a way to object to it no matter how meritorious it is. At one struggling charity thrift store which was only months from being taken by eminent domain, I was told that if my client didn't pay $50,000, the plaintiff's attorney would contend that a power door should be installed to prolong the case and increase defense expense.

In the same way noncompliance is often overlooked in these cases, conditions which are completely compliant still provide no protection. In the case of Kohler v. Flava we had to litigate for 17 months to prove that each of the claims made by plaintiff's counsel were meritless (Exhibit "F"). This required over $100,000 in legal expense for which we could not bill this very small client and for which the Court declined to award us fees, as shown in Exhibits "G1" and "G2". As you are probably aware, there is a one-way fees statute in these cases by which prevailing plaintiffs almost always recover their legal fees while prevailing defendants are lucky to ever recover a fraction, if any, of them. These have been described as "the cases you can't afford to win" and creates a situation where inappropriate positions can easily be taken without accountability.

The Flava case was unusual because we had photographic proof that two of the three sole claims in the complaint (Exhibit "H") were false— the property had previously been sued by the same attorney, and the changes had been photographed, text messaged and emailed in 2009, so there could be no question that they did not exist in 2010 when the plaintiff testified he'd first visited. As to the third claim, the attorney had sued 105 defendants and failed in every known adjudication (Exhibits "M", "N" and "F"), but kept demanding and receiving nuisance settlements from defendants who found it would cost them less to settle than to prove their innocence. The real reason my client

was sued is shown in Exhibits "I" and "J"— because we reported to the court that this attorney falsified several signatures of a deceased client on documents which were first prepared weeks after her death. This attorney then filed a handful of new lawsuits against each of the defendants who'd reported the signature falsification to the court. Even though the falsity of many of the claims was documented in considerable detail, the judges were never willing to consider the evidence about the various cases together because it could create the impression that they were not limiting their focus to the case in question.[1]

But the ADA does not need to be a game where only the attorneys win and people with disabilities too often are the losers. As you may know, vast numbers of these cases are concluded without appropriate changes ever being made. One of the reasons for this is that it can take two years or more to litigate a case, and during that time attorneys must often advise their clients not to make changes for fear they will be accused of destroying evidence, as one of my clients was when making the very changes the plaintiff sought (Exhibit "K" at 2:7). In that case as well, two of the three sole claims were adjudicated in the defendant's favor (Exhibit "L"), and as to the third, the plaintiff failed in every known adjudication (Exhibits "M", "N" and "F")— basically, the plaintiff contended that a dressing room bench longer than 48 inches in length somehow limited accessibility for people with disabilities. While every judge we know of has disagreed, if this attorney received similar amounts in each of the cases in which he made these claims, he would have received $500,000 or more for advancing claims which consistently failed.

In Pinnock v. Michlin even though the plaintiff's attorney could find no problems whatsoever at a site meeting with a number of witnesses (Exhibit "O"), they still converted the claim to a class action (Exhibit "P") and litigated for over 8 months against this small picture frame shop shown in Exhibit "Q". In the end, the sole picture they produced by court order of the condition on which their claim was based showed a compliant counter which had existed unchanged for decades (Exhibit "R").

In Pinnock v. Coles, that same law firm filed a complaint which represented that their client had visited a carpet store on two specific dates (Exhibit "S"); but when confronted with video footage from the 10 high definition cameras which covered every area of the store and that the plaintiff did not appear in it for a week before and after each date, they filed *another* lawsuit (Exhibit "T") in the name of one "Robin Member." When reminded that pseudonyms were inappropriate for adult plaintiffs (and few kids buy carpet), they indicated that the Plaintiff's true name was Robin Lavender but that they could no longer contact her. We decided to help but one of the best private investigators in the area could find no record of anyone named Robin Lavender ever having lived anywhere in the county (and most people who buy carpet tend to have property ownership or leasing information in credit records). Unable to produce plaintiff number two, the lawfirm filed a *third* lawsuit— this time a statewide class action lawsuit (Exhibit "U") for a failure to provide Braille and wheelchair access. But when the

[1] Each of the foregoing decisions has already been appealed or is shortly expected to be thus requiring even more work for which we can't bill out clients.

plaintiff in that case finally arrived in court, a courtroom full of witnesses and two Federal judges saw that she needed neither Braille nor wheelchair access, because she walked in without assistance and was seen reading an ordinary book (Exhibits “V” and “W”).

But the dozens of false claims this lawfirm filed in the name of Plaintiff Lissa Hayes were just the beginning. As you can see on the news video I am showing, the KABC news copter caught their client Jim Cohan hiking up a hill with his dogs, even though they had filed countless claims in his name alleging a lack of Braille and wheelchair access (Exhibit “X” is just one example). Their former client Noni Gotti recently testified to the California State Senate on video (available on request) that she Googled her name and was shocked to see that they filed as many as 243 lawsuits about a lack of Braille, wheelchair accessibility and numerous other conditions which had never been a problem for her, against many places she’s never visited (Exhibits “Y1” through “Y4”). While it is true that one of the attorneys who worked on her cases fled the country and tried to resign; the State Bar opposed his resignation and pressed charges— the problem is that the charges had almost nothing to do with the false claims discussed above, and to date, there has been almost no accountability for any of the small businesses sued in these cases, many of which closed immediately.

But HR 3356 can put a stop to all that, and can restore the ADA to its original intent and the dignity and respect it was intended to have. What defendant would not immediately change out a round door knob or remove an unsecured floormat— even if the plaintiff did not need really those things? Almost any small business would make the change immediately with its “first dollars” instead of putting them toward litigation, where too often they are never made once a settlement is paid.

I personally visited, photographed and documented 100 properties in 4 cities which had been sued in ADA/accessibility lawsuits at least 5 years earlier, so the time for appeals and reconsideration would have passed long before. 98 of those properties had significant conditions which would immediately support a new ADA/lawsuit, and at many, no changes whatsoever had been made. HR 3356 would have had changes made at every one of those properties within weeks. After 20 years of lawsuits and only a fraction of the progress we owe our citizens with disabilities, it’s time to adopt a system which would guarantee immediate changes and stop the inappropriate use of these noble laws for improper purposes. I respectfully urge your strong support and swift passage of HR 3356.