

Preventing Abuse Of Tort Litigation Means Fixing Laws

By Michael A.S. Newman

In the middle ages, before standing armies became common, European sovereigns often hired mercenary armies to fight their internecine wars. Between wars, these mercenaries, habituated to pillage and rapine, would turn to terrorizing the towns that had hired them or else would force the payment of tribute in exchange for leaving the inhabitants and their property in peace. Kings and nobles sometimes found themselves inventing and financing far-off military expeditions and minor crusades simply to rid themselves of dangerous mercenaries.

Our civil justice system has a similar problem. Having fostered a system that encourages the filing of private lawsuits in order to achieve social equity, we have created a predatory class of plaintiffs and lawyers. The victims are businesses, large and small, their employees and shareholders, consumers and individuals.

The federal Americans with Disabilities Act, California's related Unruh Civil Rights Act and California Disabled Persons Act are examples of a justice system that increasingly is falling prey to mercenary litigation.

The ADA was passed in 1990 to prohibit discrimination against people with disabilities in the areas of employment, public services and "public accommodations." It permits aggrieved individuals to sue alleged violators for injunctive relief and attorney fees. A violation of the ADA generally also constitutes a violation of the Unruh Act and Disabled Persons Act. These two California statutes provide even more potent enforcement weapons than the ADA in that they allow for the awarding of money damages. Thus, a common strategy is for plaintiffs to sue in federal court for injunctive relief and attorney fees under the ADA and tack on state-law claims for money damages under the two state laws. Therefore, a California defendant in an ADA action is subject to significant exposure.

Who can be a defendant? Almost any business. Nearly all employers are subject to potential liability for discriminating against employees. Likewise, "public accommodation" is an incredibly expansive term and includes hotels, restaurants, gymnasiums, parks, recreational facilities, laundromats and transportation. "Discrimination," in the context of a public accommodation, includes the failure to remove "structural barriers" where such removal is "readily achievable." Where the removal of a barrier is not readily achievable, the facility must provide access through alternative methods if such methods are readily achievable. Anyone violating this vague standard is vulnerable to lawsuit and can be subject to damages and attorney fees.

In theory, a law that compels facilities to become accessible to those with disabilities seems necessary and laudable. No right-thinking person believes that those with disabilities should be excluded from partaking in publicly available facilities that people without disabili-



ties take for granted.

The issue with such laws is not in the ideas that gave rise to them; the promulgators no doubt had the best of intentions. The problem, rather, is that their means of enforcement are potentially so lucrative to plaintiffs and their attorneys that they give rise to abusive litigation.

As Judge Gary L. Taylor recently noted in *Doran v. Del Taco*, 373 F. Supp. 2d 1028 (C.D. Cal. 2005), "the ADA has attracted sharp criticism from judges, lawyers, and legal scholars as having been distorted by certain lawyers into a cynical money-making scheme."

The scheme, as Taylor explained, "is simple: An unscrupulous law firm sends a disabled individual to as many businesses as possible in order to have him or her aggressively seek out all violations of the ADA."

"Then," Taylor wrote, "rather than simply informing a business of the violations and attempting to remedy the matter, ... a lawsuit is filed, requesting damage awards that could put many of the targeted establishments out of business. Faced with costly litigation and a potentially drastic judgment against them, most businesses quickly settle."

As Taylor put it, "[t]he ability to profit from ADA litigation has given rise to 'a cottage industry.'"

And what a profitable cottage industry it can be. A good example is provided in *Molski v. Mandarin Touch Restaurant*, 347 F. Supp. 2d 860 (C.D. Cal. 2004), where the plaintiff had initiated 400 ADA lawsuits in six years, frequently using complaints that provided virtually identical facts and injuries. As Judge Edward Rafeedie noted, by way of example, three separate federal lawsuits against three different defendants were based on injuries the plaintiff said he suffered all on the same day. That day was part of a five-day period during which, the

plaintiff said, he suffered injuries giving rise to 13 separate lawsuits. The court concluded that such suits were filed maliciously, in order to extort a cash settlement.

The blame for such abuses no doubt lies primarily with the propagators of such lawsuits. But also at fault is the Legislature for promulgating laws that are vulnerable to such abuse. Taylor's comment that cynical lawyers have "distorted" the ADA is too generous to the statute's authors. Laws that create incentives for such flagrantly vexatious litigation practices are themselves fundamentally flawed.

Moreover, the ADA is just one example of the kinds of abuses that are occurring in our civil justice system at every level. Tort litigation is draining enormous sums from the American economy and doing untold damage to businesses, employees and consumers. According to a U.S. Chamber of Commerce Survey, tort litigation costs each U.S. citizen \$809 per year, resulting in a 1.3 percent to 3.4 percent price increase on all products, and further results in a 2.1 percent to 5.7 percent decrease in employee wages. The survey estimates that, in the next 10 years, this "tort tax" will cost Americans \$3.6 trillion.

That's a lucrative business for plaintiffs and lawyers, but it's bad for everyone else. No doubt, mayhem was a lucrative business for Europe's medieval mercenaries, too. But legislative enactment should be preventing, not encouraging, the use of abusive litigation as a form of business.

Our system of litigation is broken, requiring serious legislative reform. We should start by curbing laws that allow people to exploit the litigation process as a form of "cottage industry."

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