

A BUSINESS OWNER'S GUIDE TO BOUNTY HUNTER LAWSUITS

Bounty hunter lawsuits are legal actions brought by attorneys who prey upon hotels, restaurants, fast food establishments, service stations, and any other businesses that provide goods or services to the public. These attorneys file actions against dozens of businesses, oftentimes in the same lawsuit, for purported violations of various statutes. Three of the bounty hunters' favorite statutory schemes are California's Safe Water & Toxic Enforcement Act, the Federal Americans With Disabilities Act ("ADA"), and California's Unruh Act, which prohibits discrimination on the basis of race and other factors.

As discussed below, these lawsuits can be, and in many cases are, defensible or avoidable. Moreover, the added bonus in vigorously defending and winning these lawsuits is that the bounty hunter attorneys may think twice before commencing another lawsuit against those businesses that chose to fight back.

In an effort to keep you, the business owner and/or operator, abreast of the law in California that could have an impact on your business, I have prepared this article that discusses pertinent cases and statutes. While this article is not a substitute for legal advice from a lawyer of your choosing, it should at least give you some ideas, and possible strategies, for avoiding a lawsuit, and defending a lawsuit if and when your business is sued.

I. Proposition 65: Lawyers Can Be More Toxic Than Chemicals

Proposition 65, also known as the Safe Water & Toxic Enforcement Act ("Prop 65") requires a business that exposes an individual in California to a chemical known to the state to cause cancer or reproductive toxicity to give "a clear and reasonable warning". Failure to give the required warning is punishable by a civil penalty of

\$25,000 per day for each violation. The attorney who brings an action for violation of Prop 65 is entitled to 25% of any civil penalty, together with costs and attorney's fees.

Some attorneys bring actions on behalf of entities that are formed for the purpose of prosecuting Prop 65 lawsuits. After filing these lawsuits, the attorneys frequently make a quick offer to settle, in many cases for less than the cost of defense.

Some businesses view Prop 65 lawsuits as legalized extortion. Others view them as nuisances. But all businesses that are sued for the alleged violation of Prop 65 wish they had not been sued, and want to avoid being sued again.

Because bounty hunter attorneys frequently offer to settle a case for less than the cost of the defense, it is a strong temptation for the defendant to capitulate and settle. However, there are many reasons why settlement may not be prudent even if the settlement demand appears to be low.

A. Possible Defenses to Prop 65 Cases

1. Inadequate Notice

In order to obtain standing to pursue a Prop 65 lawsuit, the plaintiff is required to give a 60-day notice that includes the very precise language set forth in this statute, and the interpreting regulations. Because many courts tend to disfavor Prop 65 lawsuits brought by bounty hunter attorneys, they carefully scrutinize the notices, and look for any possible defect.

The requirements for giving notice required by Prop. 65 are contained in 22 CCR §12903. In what has turned out to be a landmark case regarding the adequacy of such notice, the Court of Appeal in *Yeroushalmi v. Miramar Sheraton, et al.* (2001) 88 Cal.App.4th 738, 748, found the notices to be flawed because they failed to adequately identify the individuals exposed to the alleged toxins, and how the individuals were

allegedly exposed.

In a case handled by this office, the court found the notices to our client hotel to be defective, as a matter of law, because they failed to comply with the exacting requirements set forth in *Yeroushalmi v. Miramar Sheraton*. The decision was appealed by the plaintiff, and affirmed on appeal.

2. Because Prop 65 applies only to exposures created "in the course of doing business", it arguably does not apply to exposure created by customers of a business.

Prop 65 holds businesses responsible for exposing the public to various toxins, but only for exposure that occurs "in the course of doing business." In many cases, the alleged toxic emissions occur when a customer smokes, drives a motorized vehicle, or otherwise emit chemicals covered by Prop 65.

However, an argument can be made that a business is not responsible for toxins emitted by its customers as a result of smoking, driving, using hair spray or other aerosols, or even applying nail polish. Indeed, it seems far fetched to assume Prop 65 was intended to punish business owners for actions of customers it would not even know about in most cases, and would be powerless to control.

B. Settling Quickly, Or For Too Much, Can Make the Settling Business a Target For Future Bounty Hunter Actions.

Some businesses may choose to settle Prop 65 cases quickly and inexpensively to avoid the cost of defending the lawsuit. Unfortunately, however, bounty hunter attorneys may target such businesses, and bring subsequent actions against them.

Moreover, a settlement with one "consumer group" plaintiff does not stop another bounty hunter attorney who represents another consumer group plaintiff from bringing a

lawsuit based on the same violation as the case that was settled. While such an action may be improper, based on the legal principle of res judicata, that does not always dissuade bounty hunter lawyers, who figure if the defendant settled once, after being sued for an alleged Prop 65 violation, it is likely to settle twice.

Even though the prior settlement may ultimately be found to be a bar to such suits, the cost of disposing of the later action can be substantial. Hence, a cheap and quick settlement often turns out to have the opposite result.

C. Avoiding the Prop 65 Lawsuit.

The best way to avoid a Prop 65 lawsuit is by posting the warning signs called for in that statutory scheme. If warning signs are placed before the 60-day notice is sent by the bounty hunter attorneys, this is a defense to such claims. If the bounty hunter attorneys choose to pursue such a claim, in spite of having proper warning signs, an action can be defended on that basis.

D. Turning the Tables on Bounty Hunter Attorneys by Seeking Sanctions Against Them.

When a defendant prevails in a lawsuit, the court typically awards costs of suit that can include court fees, reporter's fees, deposition transcripts, photocopies, and costs for serving process. California Code of Civil Procedure Section 128.7 goes one step further by punishing any attorney or party who brings an action he or she knows to be without merit. This statute provides that where an action is based on claims that are not warranted under existing law, or based on facts that are devoid of evidentiary support, the court can impose sanctions in an amount that will deter such future conduct.

If a bounty hunter attorney were to bring a Prop 65 lawsuit in which the required

Prop 65 notices had been posted by the business, or before the business had been given the requisite 60-day warning prior to commencing the lawsuit, a court could find such actions to be frivolous, and sanction the plaintiff and his attorney. This would not only provide the business with a financial benefit, but might dissuade other bounty hunter attorneys from filing a Prop 65 lawsuit.

II. THE AMERICANS WITH DISABILITIES ACT: TO LITIGATE OR ACCOMMODATE

The Federal Americans With Disabilities Act ("ADA") requires places of public accommodation, and most businesses that serve the public, to make all facilities accessible to individuals with disabilities. Under the ADA, a court may assess civil penalties of up to \$50,000 for a first violation, and up to \$100,000 for subsequent violations.

California's Unruh Act similarly requires that businesses provide equal access to individuals with disabilities. This statute permits treble damages against businesses that knowingly violate the law, in addition to attorney's fees for plaintiffs who prevail in proving a violation.

Under the ADA, all public places constructed after 1990 must be accessible to physically disabled persons. For buildings constructed prior to 1990, or that were remodeled or renovated after that time, barriers to access must be removed whenever "readily achievable." Where removal of a barrier is not "readily achievable", the facilities must be made accessible to the disabled through alternative methods that are "readily achievable." Readily achievable means without undue difficulty or expense.

Deciding whether the removal of a barrier is "readily achievable" can be based on many factors including the cost of removal, the benefit of removal, the financial ability of the owner to pay for the change, and whether the required changes would alter

the nature of the business. The Unruh Act requires only that barriers be eliminated when a property is being improved. However, compliance with the Unruh Act, in this respect, does not make an owner immune from liability for failure to comply with the ADA.

Because the Unruh Act provides for payment of attorney's fees to a successful plaintiff, the courts have been inundated with lawsuits alleging violation of this statute. Many of these actions are "drive-by lawsuits", and are given that name because plaintiffs often file lawsuits based upon visible violations of accessibility statutes.

A. Avoiding The ADA Lawsuit

The best way to avoid an ADA lawsuit is to correct conditions at the property that violate the ADA. Because many ADA and Unruh Act lawsuits are of the drive-by variety, any obvious and visible violation of the ADA should be corrected. This might include, for example, the inclusion of handicapped parking spaces, disabled parking warning signs, all accessible paths of travel.

While visibility is one factor to be considered when deciding whether potential barriers to accessibility should be corrected, so, too, is the cost of making that change. Hence, while a business might want to put up a disabled parking warning sign, which is both inexpensive and easily observed by the drive-by plaintiff, installation of elevators, or a split height front desk, can be both costly, and unlikely to be seen by would-be owners.

Owners will frequently hire outside consultants to conduct ADA accessibility surveys. There are, however, two potential problems in doing that:

First, an ADA accessibility survey, or any writings relating to that survey, may not be privileged, and could have to be disclosed to the plaintiff in an accessibility lawsuit.

If ADA violations, identified on the survey, were not corrected, the plaintiff would be able to argue that the failure to correct was willful, and hence that the business should be required to pay treble damages.

Second, the fact that an ADA violation exists does not mean under the law that it must be corrected. As referred to above, owners of buildings in existence prior to 1990 when the ADA was implemented are not required to remove architectural barriers to the disabled unless it is "readily achievable" to do so. Whether the removal of a barrier is readily achievable is something that must be ultimately determined by a court, and may not be something a typical ADA surveyor is qualified to opine upon.

Such potential pitfalls can possibly be avoided where an owner hires an attorney to advise him on ADA compliance. In that case, the attorney, rather than the business, hires an ADA specialist to perform a compliance survey. Where an ADA survey is done at an attorney's request, it is likely to be privileged, and not subject to disclosure in discovery to a plaintiff. As such, if certain corrective work, recommended in the survey, is not performed, the plaintiff may not know this, and will not be able to use this against the hotel in his lawsuit.

An attorney can also give advice to a business on whether a court is likely to find that the removal of an architectural barrier is readily achievable, and hence constitutes a violation of the ADA. Such an analysis can be made based on the attorney's own experience, as well as published judicial decisions.

The ADA contains no specificity or guideline as to what is required to make a structure accessible. However, such guidance is provided in the ADA Accessibility Guidelines ("ADAAG"), and Title 24 of the State of California. The ADAAG is a set of guidelines published by the United States Department of Justice. While these

guidelines are typically given great weight by the courts in determining ADA compliance, they are not the law, and it was not controlling on a court.

A typical consultant's report will cite to the provisions of the ADAAG, and Title 24, and will include a series of photographs that refer to dimensions and measurements that purport to show violations of the aforesaid guidelines. Having received this report, a business owner is put on notice of an accessibility problem, and having been put on notice, is exposed to civil penalties and treble damages for any condition that is not corrected. However, as mentioned above, when such a report at the request of counsel, it is privileged, and not subject to disclosure.

In short, the best way of avoiding an ADA/Unruh Act lawsuit is to remove any accessibility barriers. This should be done in conjunction with counsel, who can obtain a survey that is privileged, and who can advise the business client on which barriers should be removed.

B. Defending the ADA Lawsuit

If a business is sued in an ADA lawsuit, it can either settle or defend. This is not an easy choice, and requires an analysis of many factors:

1. Cost of Defending the Action

Typically, the cost of defending an ADA action is high. This is true not only because the cases are fact intensive, and require expert testimony, but because plaintiffs' attorneys tend to be aggressive since they know that attorney's fees can be recovered if they prevail in the case. In addition to the risk of paying plaintiff's costs and attorney's fees, a business sued for violation of the ADA also has the burden of paying its own attorneys to defend the action.

The cost of attorneys is one good reason to settle an ADA case. There are, however, good reasons *not* to settle:

First, settlement does not necessarily buy peace. If a condition which violates the ADA is not corrected, another customer can sue for the same violation. On the other hand, if a business prevails in an action, and the trier of fact finds there is no ADA violation, this will be preclusive of any claim a prospective plaintiff would attempt to bring on the same purported violation.

Second, settling an ADA lawsuit without a fight can possibly identify a business as an easy mark. If a prospective plaintiff, or his counsel, knows that a business will aggressively defend an ADA lawsuit, this can be a disincentive to prosecuting such an action. With so many prospective targets to choose from, plaintiff's counsel might choose some other business viewed as a softer touch.

III. The Racial Discrimination Lawsuit

State and federal statutes, including California's Unruh Act, prohibit discrimination on the basis of many factors, including race. Many cases have been brought pursuant to this and other statutes in which customers claim they were discriminated against by businesses on the basis of their race.

Unlike the ADA cases, where the physical condition of the property can be observed, racial discrimination cases are based upon personal interaction, and typically rise or fall on the credibility of the parties. In that respect, it is more difficult to objectively assess a racial discrimination case than it is to assess an ADA case.

Because the credibility of the plaintiff in a racial discrimination case is often tantamount, one factor that can and should be assessed at the outset is whether that

same plaintiff has brought a number of similar actions other defendants. If the plaintiff appears to be a professional litigant, that can impair his or her credibility.

In deciding whether to settle or defend a race discrimination case, many of the same factors, discussed above in relation to ADA lawsuits, should be taken into account. However, one difference between a race discrimination case, and an ADA case, is that the determination of the trier of fact in a race discrimination case is not preclusive in any race discrimination case brought by a different plaintiff.

In order to avoid a race discrimination claim, a business should have a training program in which all employees are educated as to the requirements for providing equal access to persons of all races, creeds, colors, and nationalities. Proof of such training should be reflected in a training manual, and proof that the employee was trained as to the business' policies with regard to non-discrimination should be documented in the employee's file.

Any race discrimination claim should be thoroughly investigated. After the investigation is concluded, a report should be prepared, and a certified letter sent to the complaining party. If the investigation reveals any improper conduct of an employee, the employee should be disciplined in an appropriate manner.

A discrimination "check-up" can and should be conducted by an attorney. In his review, the attorney can advise the business owner whether the employee training program, procedure, and other protocol regarding non-discrimination is legally appropriate. The attorney can also advise on ways of insulating the business from possible discrimination claims, and how to be better prepared to defend such cases if they are instituted.

IV. CONCLUSION.

The goal of any business, like that of an ethical attorney, is to work hard, do good work, and make a decent living. Lawsuits do not help a business make money; they only help lawyers make money. But like any ethical doctor who wants his or her patients to stay healthy, and wants to treat them only if they get sick in spite of following his advise, an ethical attorney wants his or her clients to avoid getting sued, and to represent them only if they get sued in spite of following his advise. A business should do what it can to avoid a lawsuit, but prepare itself to win if it does get sued.

_____ Litigation is never fun, is usually expensive, and should be avoided if at all possible. A conscientious lawyer can help a business avoid litigation by eliminating conditions that can invite lawsuits. If a business is sued, an attorney can guide his client through the litigation process, and help it decide whether to settle or go to trial. If the decision is made to go to trial, the business should retain an attorney who has the experience, guile, intelligence, and tenacity to make sure that justice is ultimately served.

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