

LEGAL UPDATE

Alert Re Recent Court Decisions In Disabled Access Lawsuits

To: RJOP Retailer Clients

From: Aaron P. Silberman
Rogers Joseph O'Donnell & Phillips

Date: December 19, 2005

As all too many California retailers know from personal experience, there exists a “drive-by” disabled access lawsuit industry in this state. Disabled persons and their plaintiff’s lawyers visit retail establishments for the sole purpose of finding violations of state and federal access requirements and then sue the owners and operators of those establishments, not only for removal of access barriers but also for money damages and penalties and attorneys’ fees. This practice has been going on for years. While efforts to reign in such lawsuits through legislation have failed thus far, retailers recently have experienced some important victories in court. The long term impacts of these decisions remain to be seen.

Plaintiffs Can Only Pursue Claims Based On Barriers To Access That They Either Experienced Or Knew About But Avoided.

In the past four months, two judges in the federal District Court in Sacramento threw out substantial portions of the plaintiffs’ claims for violations of federal and State disabled access laws (ADA and Unruh Act) because those claims were based on alleged architectural barriers that the plaintiffs neither experienced nor knew about when they filed

LEGAL UPDATE

Alert Re Recent Court Decisions In Disabled Access Lawsuits

their lawsuits. In both *Martinez v. Longs Drug Stores, Inc.* (“*Martinez I*”) and *White v. Divine Investments, Inc.*, the plaintiffs were wheelchair-bound patrons, and the defendants were retail businesses (a drug store and a gas station). Each plaintiff alleged that the defendants discriminated against them by failing to remove barriers that denied plaintiffs equal access to defendants’ goods and services. Some of the alleged barriers were encountered by the plaintiffs before they filed their lawsuits, but others were not discovered until plaintiffs’ experts did site inspections during litigation. As to the latter groups of alleged violations, the courts determined the plaintiffs had no “standing,” *i.e.*, right to sue, because those violations had not caused the plaintiffs any injury.

The courts did distinguish two instances of architectural barriers for which disabled patrons could sue even though they had not actually encountered those barriers: (1) where patrons were aware of barriers and so were deterred from encountering them, and (2) where patrons knew of or encountered one barrier and so had indirect knowledge of others (*e.g.*, if a patron found one hotel room to be inaccessible, he would not have to try to enter all the hotel’s rooms to sue for the same violations in other rooms).

The *Martinez* and *White* decisions are contrary to an appellate decision from another jurisdiction, so the plaintiffs in either or both *Martinez* and *White* may appeal the decisions against them. We believe the decisions were correctly decided and so should withstand appeal.

LEGAL UPDATE

Alert Re Recent Court Decisions In Disabled Access Lawsuits

At Least One Court Has Denied A Plaintiff's Request To Recover His Attorneys' Fees In A Disabled Access Lawsuit Because He Did Not Give The Business Owner Defendant Adequate Notice And An Opportunity To Cure Access Violations Before He Filed His Lawsuit.

Earlier this year in *Doran v. Del Taco*, a judge in the federal District Court in Los Angeles denied a plaintiff's request for attorneys' fees because the plaintiff had not provided the defendant with "unambiguous warning notice" and "a reasonable opportunity to cure" disabled access violations before filing his lawsuit. In that case, there was no dispute that the plaintiff, a paraplegic, was the prevailing party, but the court denied his fees request because the lawsuit could have been avoided had he provided adequate pre-litigation notice.

While the court's decision in *Doran* is very helpful to retailers, there are reasons to question its validity. Two judges in three different federal District Court cases in Sacramento (*Martinez v. Longs Drug Stores, Inc. ("Martinez II")*), *Sanford v. GMRI, Inc.*, and *White v. Save Mart Supermarkets*) have rejected the *Doran* decision. One of those cases relies on a 2000 federal appellate court decision (*Botosan v. Paul McNally Realty*) that says the ADA does not require a plaintiff to provide notice as a prerequisite to filing suit. In *Doran* itself, the plaintiff has appealed the case, which is still under review. Unless and until the appellate court affirms the District Court's decision in *Doran*, retailers should not rely on it.

*

*

*

The effect of the court decisions discussed above may be substantial. The *Martinez*, *White* and *Doran* decisions may not only enable retailers to eliminate potential

LEGAL UPDATE

Alert Re Recent Court Decisions In Disabled Access Lawsuits

violations and attorneys' fees claims from many disabled access lawsuits but also deter potential plaintiffs (and plaintiffs' lawyers) from initiating lawsuits in the first place. If you have any questions about these decisions, or other disabled access issues that might affect your business, please contact us, and we would be happy to discuss them with you.