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GUEST COLUMN

The Ninth Circuit recently undercut defenses against ADA "serial plaintiffs"

By Bob Blum

Until late January this year it looked like the Ninth Circuit and the California District Courts were on a clear path to substantially curb "serial plaintiffs" who have brought thousands of lawsuits in federal court under the Americans for Disabilities Act (ADA). Then this changed. A late January decision by the Court has raised substantial questions about the value of newly successful defenses in these suits.

The ADA, the Unruh Act and Serial Plaintiffs

Under the ADA, disabled persons who are not provided the same benefit in a public place as all other customers can sue in federal court to require correction by the business or facility owner and often get attorneys fees and costs. This applies to facilities such as retail space, hotels, restaurants, etc. Violation of the ADA is also a violation of California's Unruh Act, which adds damages of $4,000 minimum per violation.

ADA "testers" - another term for serial plaintiffs – clearly are allowed to litigate under the ADA. A few disabled litigants have brought thousands of ADA lawsuits, many against small businesses. One plaintiff is reported as filing more than 1,000 suits in 2021 alone. Another is reported as having filed over 1,700 suits.

To provide some protection, California added hurdles (not prohibitions) for "high frequency litigants" ("HFLs") to bring suit in state court, including higher filing fees, more details in pleadings, disclosures that they are HFLs and other rules. This made litigation by HFLs in state courts more difficult so many serial plaintiffs switched to the federal courts, using supplemental jurisdiction to litigate both ADA and Unruh Act claims and avoiding the California hurdles.

ADA Cases Flood the Federal District Courts

That switch was a success for plaintiffs, and California federal courts were inundated with ADA suits. As much as 20% of the District Court dockets were ADA cases.

It can be difficult for a defendant to litigate these cases. Often there is a clear violation because many ADA requirements are based on exact metrics like parking lot slopes, signage, type of door handle, height of counter and width of aisles. The more the fight, the higher the plaintiff's attorney's fees – payable by the defendant. As a result, many cases settle quickly. Regardless, courts are overwhelmed.

Some defendants decided to fight and challenge serial plaintiffs. In 2021 and 2022, defendants had some important success. That changed in late January when the Ninth Circuit decided *Langer v. Kiser* (No. 21-55183, 1/23/2023).

The Ninth Circuit Before Langer

Defendants have challenged serial plaintiffs in three ways: the amount of legal fees payable by defendants; plaintiff's ability to obtain supplemental jurisdiction, and standing to sue. In 2021 and 2022, defendants were successful in a number of cases – making it more difficult for serial plaintiffs to litigate in federal court.

Challenges to plaintiff's fees became more successful as the Ninth Circuit affirmed significant reductions of fees. In one serial plaintiff case, a reduction of lodestar fees by 65% was affirmed; the case was not complex, there were no difficult factual issues; defendant admitted fault and unnecessary actions were taken by plaintiff's counsel. In another, the court affirmed an award requiring *plaintiff to pay defendant's fees* because plaintiff was on notice from prior litigation that his legal arguments would not succeed.

Challenges to supplemental jurisdiction also became more likely to succeed. The Ninth Circuit ruled that a district court can exercise discretion to decline Unruh Act supplemental jurisdiction in order to avoid sidestepping of California's high frequency litigant rules. This must be done early in the case. Otherwise, it would be a waste of time and resources to require that the claim be refiled in state court.

Challenges to standing were indirectly approved – even encouraged – by the Ninth Circuit. To have standing in an ADA case, the plaintiff must establish a sufficient future injury by alleging that they either are currently deterred from visiting the place of business because of a barrier or that they were previously deterred, and they intend to return if the facility is made accessible. The focus is on the future – the intent to return.

Standing – the intent to return – was not addressed directly in the fee or supplemental jurisdiction cases. However, in the leading supplemental jurisdiction case the Court made a point of saying that the defendants "could have explored" in discovery facts that would bear on a serial plaintiff's intent to return. Also, in some fee cases, it appeared that the Court was skeptical about the intent to return of the serial plaintiff. Skepticism should not be a surprise. It can be difficult to return to hundreds of businesses in a reasonable period of time. However, in late January in Langer, the Court changed the discussion.

Standing and Langer

In *Langer*, the District Court found that a serial plaintiff 's intent to return was not credible. As described in the appellate court's dissent, in a bench trial the District Court made this decision because it found that plaintiff's demeanor and testimony was "rote" and counsel "visibly" coached him, there were multiple contradictions in his testimony, the product sold by defendant was readily available for

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delivery from another business and he had recently bought a "big lot" there. Also, he had already brought nearly 2,000 ADA lawsuits. The District Court concluded that it was doubtful that he really intended to patronize this enormous number of businesses.

The Ninth reversed. The key was reliance by the trial court on the number of lawsuits brought.

The Court held that a serial litigant's intent to return may not be rejected "simply because" he is a serial litigant who brings numerous ADA cases. After all, even a serial litigant can have a legitimate desire to patronize a particular business that has barriers to the disabled. Using the fact that plaintiff was a serial litigant to evaluate his credibility to return to the defendant's business was "impermissible legal reasoning."

It does appear that there were facts to support both sides and in the usual situation, the Circuit court would have deferred to the finding of the trial court. However, the Ninth was adamant. Apparently it was enough – as a matter of law – to discard all of the trial court's other reasons for finding that plaintiff was not credible when that court included the fact that plaintiff had brought many ADA lawsuits. "This fact has no place in our standing analysis."

Now What?

Before *Langer*, the earlier decisions in the Ninth had significantly reduced the number of ADA suits filed in the Northern District. We can expect that slowdown to continue until plaintiffs figure out how best to deal with all of these decisions.

Of course, *Langer* may lead to new appeals. A number of judges have challenged serial plaintiffs' claims that they had a genuine intent to return to the defendant's business and in some fashion focused on their litigation history. Results on appeal will depend on particular facts.

Whatever the result in future appellate cases, we can expect plaintiffs, defendants and judges to modify their actions in these cases.

Plaintiffs may choose ADA challenges more carefully and file fewer cases with stronger facts to support a credible intent to return to the defendant's business. They also now have an incentive to comply with the California high frequency litigant rules.

Trial courts will continue to scrutinize the credibility of plaintiffs' intent to return and will shy away from focusing on or even mentioning prior litigation status. They will also continue to carefully review attorney fees and supplemental jurisdiction.

Larger business defendants may have more incentive to challenge serial plaintiffs. However, if serial plaintiffs get their act together, challenges may be more difficult – increasing the risk that defendants will have to pay plaintiff's fees, and because challenges increase the plaintiffs' legal work, pay higher fees. These defendants may still lean towards settlement, but settlements may take a different contour.

Small businesses will continue to find it difficult to challenge these cases because they cannot take the risk of having to pay higher plaintiff's fees and costs. Quick settlement will often occur, as unhappy as it is for these defendants.

Overall, the disabled must be protected, and business owners also must be protected against untoward use of the law. How to balance both needs is the issue. In the case of serial litigators, the balance is uncertain but it is clear from recent cases that the courts have put them under more scrutiny.