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UPDATE ON THE REQUIREMENTS TO PURSUE A CLAIM UNDER THE AMERICAN'S WITH DISABILITIES ACT

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On January 7, 2011, the Ninth Circuit Court of Appeals, issued a decision entitled *Byron Chapman v Pier 1 Imports* (2011 DJDAR 414), which establishes a lower threshold for plaintiffs to establish "standing" to pursue a lawsuit under the American's with Disabilities Act (ADA). The opinion, however, makes clear that plaintiffs must include specific factual allegations in the complaint, in order to establish the "injury-in-fact" requirement established by Article III of the U.S. Constitution.

The case was filed by a well-known ADA plaintiff attorney in Northern California, on behalf of a plaintiff that requires the use of a motorized wheelchair. In July of 2004, the Plaintiff visited a Pier One store in Vacaville, California, and while in the store, encountered a number of "barriers". After his attorney retained an expert to visit the store, a number of additional "violations" and barriers were found, many of which Plaintiff did not personally encounter.

Plaintiff filed suit in the U.S. District Court in Sacramento (Eastern District), alleging a number of different violations of the ADA, and particularly the ADA Accessibility Guidelines, most of which Plaintiff did not personally encounter. Based thereon, Pier One moved for summary judgment as to the alleged violations that Plaintiff did not personally encounter. The trial court granted the motion as to 7 of the alleged violations, on the ground that Plaintiff did not encounter them, and hence, was not "injured in fact".

An appeal was filed, and in a 2-to-1 vote, the 9th Circuit Court of Appeal, issued a decision which invokes standing on certain plaintiffs, even though they did not personally encounter the alleged violation. The court held:

> "when a disabled person encounters an accessibility barrier violating its provisions, it is not necessary for standing purposes that the barrier completely preclude the plaintiff from entering or from using a facility in any way (citation omitted). Rather, the barrier need only interfere with the plaintiff's full and equal enjoyment of the facility".

The Court further held that a plaintiff satisfies this requirement, as to barriers or violations *to which he/she has not personally encountered*, if one of two things are alleged in the complaint: 1) he/she intends to return to the business, and the plaintiff will likely suffer repeated injury; or 2)he/she is deterred from visiting a noncompliant public accommodation because he/she has encountered barriers related to the disability at the business.

Despite the recognition that a disabled plaintiff may pursue a claim for barriers/violations that were not actually encountered, the Court did state that an ADA plaintiff must show at each stage of the proceedings either that she/she intends to return to the facility and is therefore likely to suffer repeated injury, or that he/she is actually deterred from returning based upon that particular disability.

In the case, since the Plaintiff did not specifically include that type of language in his Complaint, the Court ruled, as a procedural matter, that Plaintiff failed to sufficiently allege the essential elements of Article III standing. Although Plaintiff's Complaint included allegations that he was "physically disabled", and that he "visited the store and had encountered architectural barriers that denied him full and equal access", he never alleged how those barriers would either deter his future visits to the store, or that he would encounter them in the future. Accordingly, the Court ruled that the District Court below should have dismissed the Complaint for lack of standing/lack of federal court jurisdiction.

The decision is in accord with the 8th Circuit's decision in *Steger v Franco, Inc*. 228 F.3d 894 (8th Cir. 2000), but inconsistent with the 1st Circuit's opinion in *McInnisMisenor v Maine Med. Ctr*., 319 F.3d 63 (1st Cir. 2003).

Accordingly, a disabled plaintiff, that seeks to invoke the jurisdiction of the federal courts in the Ninth (California, Nevada, Arizona, Idaho, Oregon, Montana, Alaska, Hawaii, and Washington) or Eight (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota) Circuits, the "standing" requirement is much lower, and such plaintiff can seek redress for "all" violations, whether or not they were actually encountered.

Although the existing case law eliminates the previously familiar "drive-by" claim, retail businesses and restaurants now face the risk that a plaintiff expert will find a plethora of "technical violations" which the disabled patron did not encounter; and, the business will be required to fix the same. There still remains the specific pleading requirements, but an artful plaintiff attorney will include those allegations in the standardized "form" complaints that are filed.

We should note, in closing, that the new decision only involves federal claims under the ADA, and not state law claims, such as those filed under state civil rights or disability statutes.