

Nuisance-value Lawsuits: To know them is to loathe them

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February 2024



Agenda

- **What is a nuisance-value case?**
- **Current trends in nuisance-value cases**
- **Best practices for distinguishing between annoyance and risk**

What is a nuisance-value case?

- **Nuisance-value cases arise whenever a plaintiff initiates a meritless (or very weak) claim and offers to settle the case for less than it would cost the defendant to litigate**

What is a nuisance-value case?

- In practice, “nuisance-value” means something different to everyone
 - Some folks view it as the amount of money it would take in defense fees/costs to get from inception to a Motion to Dismiss
 - Some folks apply a fixed figure (e.g., \$20K)
 - Some folks view it as % of risk exposure
 - Some folks tie it to the amount of insurance coverage

Are they on the rise?

- **There is some anecdotal evidence to suggest that the volume of nuisance-value cases has increased since the advent of mandatory mediation in state and federal courts**

ADR in federal court

- The federal district courts in the following states have early, mandatory, ADR in all but a very limited category of cases (e.g., pro se prisoner cases)
 - CA, DE, D.C., S.D. FL, HI, S.D. IL, KS, MN, MO, MS, NV, NM, S.D. NY, W.D. NY, NC, OK, W.D. PA, RI, SC, TN, VT, WI
 - In a whole host of other states, early mediation is voluntary, but “strongly encouraged” and/or can be ordered *sua sponte*

Impact of early ADR

- **Early ADR has, arguably, changed the ethos of plaintiff's counsel – if a Complaint need only make it past an MTD prior to mediation and the plaintiff is willing to settle for, let's say, 5 figures, it doesn't matter if the case has actual merit, odds are it will settle**

Further evidence

- **When the F.R.Civ.Pro. were first promulgated in 1938, 20% of all civil cases resolved via jury trial**
 - 1962 = 12%
 - 2000 = 2%
 - 2013 = 0.8%
- **Certainly, not all of the cases settled are nuisance-value cases, but it does suggest parties are much more prone to take steps to avoid jury trials than ever before**

More than annoying

- **Nuisance-value cases are arguably more than a mere annoyance**
- **They clog up the judicial system, waste resources, drive up insurance costs, and can have significant (even disastrous) impacts on defendants (e.g., small businesses)**

Categories of frivolity

- **My worldview, as a life-long defense attorney, is admittedly jaded**
- **Prof. Robert Yablon (U of WI Law) defines 4 categories of nuisance litigants**
 - **Tricksters (people who know they are filing a bad lawsuit to get a settlement);**
 - **Don Quixotes (true believers motivated by ideology more than facts);**
 - **Slackers (lazy folks who don't do their due diligence up front)**
 - **Gamblers (people who know the case is a long-shot, but are willing to take the gamble)**

Nuisance v. Risk

- **One of the most important steps in the preliminary analysis of any case as a defendant is considering whether you are looking at a nuisance or something that poses a real risk of liability (or, at least, of significant expense)**

Nuisance v. Risk

- **Low-hanging fruit that is often missed:**
 - **Statute of limitations**
 - **Administrative remedies**
 - **Jurisdiction**
 - **Standing**
- **Deeper dive items to consider:**
 - **Irrefutable, favorable evidence (video surveillance, written admissions by the plaintiff)**

Do your homework

- **One of the difficulties in valuing cases is that settlements are almost always confidential**
- **However, available damages, verdicts, and verdict trends are not**
- **A little bit of homework can go a long way in making the nuisance v. risk assessment**

An individualized approach

- **Since the actual dollar amount of what constitutes “nuisance-value” is subjective, you must also consider the human cost of litigation (e.g., your tolerance for risk, disruption, uncertainty, and the additional work required in defending litigation)**

Motivation matters

- **Because not all plaintiff's attorneys who bring what are perceived to be nuisance cases do so with mal-intent, it is always a good idea to directly approach plaintiff's counsel if you believe the case is nuisance-value, even before proceeding in litigation and/or with ADR**

Dragonetti

- In PA, you have a rarely-used (but pretty effective) option: The Dragonetti Act
- It allows a prevailing defendant to sue the plaintiff for damages associated with, essentially, a frivolous lawsuit

Dragonetti

42 Pa.C.S. §8351 Wrongful Use of Civil Proceedings

(a) A person who takes part in the procurement, initiation, or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

- (1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim in which the proceedings are based; and**
- (2) the proceedings have terminated in favor of the person against whom they are brought.**

Current trends

- **ADA website accessibility**
- **BIPA**
- **Slip and fall**

ADA Website Accessibility

- **Certainly, there is nothing frivolous about the ADA's requirements regarding website (and mobile application) accessibility for the vision impaired**
- **However, the uptick in litigation associated with these requirements suggests a nuisance trend at work**

ADA Website Accessibility

- In 2016, there were 262 ADA Website Accessibility cases filed, nationwide
- By 2019, there were 2,235
- By 2023, there were 4,600

Why the increase

- **There is a dearth of actual law in this area and an easy tool (essentially, a compliance-checking website) where plaintiff's counsel can search for errors on website associated with brick-and-mortar businesses**
- **Where a website hits with an error, and plaintiff's counsel can find a willing plaintiff, a website accessibility lawsuit results**

What can you do?

- **We advise clients to first check state law and if no guidelines are mandated there, to use the Web Accessibility Content Guidelines (“WCAG”) as a benchmark**
- **A proactive review of your company’s website and mobile applications for WCAG compliance (and fixing any non-compliant issues) is the best way to avoid this litigation**

What can you do?

- **When website accessibility litigation arises, develop a plan for review/compliance as quickly as possible**
 - **There are a number of companies (searchable online) that conduct this review and can advise on fixes**
- **In the absence of state statutes, the only recoverable damages are attorneys' fees/costs and injunctive relief (requiring you to review/fix the non-compliance)**
- **Early settlement minimizes these damages by cutting off fees/costs**

BIPA litigation

- **Illinois Biometric Information Privacy Act (“BIPA”), passed in 2008, is the most expansive biometric privacy law in the country, imposing strict requirements on businesses that collect, store, or use biometric data**
- **Applies to companies that operate in IL *and/or that collect biometric data from IL residents***

BIPA in the states

- **WA and TX have also enacted biometric privacy legislation**
- **MA has active legislation being considered**
- **NV, AZ, MN, MO, MS, TN, KY, NY, ME, VT, and MD had proposed legislation that did not pass in 2023 and is not presently active**

Sneaky data collection

- **Before you answer “no” to the “does this apply to us question,” consider that biometric data is often collected from employees in**
 - **Time management systems**
 - **Security access**
 - **Health plans**
 - **Hiring process**

What is biometric data?

- **As a preliminary matter, identify whether you are collecting biometric information in (or from anyone in) Illinois**
- **Biometric data =**
 - **Retina or iris scan**
 - **Fingerprint**
 - **Voiceprint**
 - **Scan of hand geometry**
 - **Scan of face geometry**

BIPA Rules

- 1. Requires informed consent prior to collection**
- 2. Permits a limited right to disclosure**
- 3. Mandates protection obligations and retention guidelines**
- 4. Prohibits profiting from biometric data**
- 5. Creates a private right of action for individuals harmed by BIPA violations (damages = up to \$1K per negligent violation; up to \$5K for intentional/reckless violation)**

What can you do?

- 1. Check applicable insurance policies to ensure coverage for BIPA claims**
- 2. Review contracts for any vendor providing related equipment to ensure they include indemnification**

What can you do?

- 3. Carefully evaluate your policies regarding collection and storage of biometric information**
 - ✓ **Do you have and follow a policy regarding biometric data collection**
 - ✓ **Do you have a publicly available written policy establishing a retention schedule**
 - ✓ **Do you have and follow a policy regarding disclosure of biometric data outside of your company**

Tale as old as time: Slip and falls

- **Slip and fall cases – and all personal injury cases – have been steadily on the rise for the last decade**
- **Certainly, some slip and falls are extremely serious (and are the fault of a property owner and/or occupier)**

What can you do?

- **Check the statute of limitations**
 - **Many are fairly short; in PA, it is 2 years**
- **Make sure you have appropriate insurance coverage**
- **Make sure your contracts with vendors and lessees contain indemnification**
- **Utilize surveillance cameras in high-risk areas (e.g., sidewalks, parking garages, wet areas)**

What can you do?

- **If litigation (or the threat of litigation) arises, consider having a third-party conduct an investigation**
- **Get aggressive in discovery**
 - **Consider including requests for the plaintiff's social media accounts, medical documents, financial records, etc.**

Key Takeaways

- **An unfortunate fact of doing business is that you will be exposed to nuisance litigation**
- **Even traditionally nuisance-style cases can have merit and present real risk, so careful evaluation every time is required**
- **Early action for genuine nuisance cases can save time and money – develop a plan in advance**

Key Takeaways

- **Consider your risk, expense, and inconvenience tolerance before litigation arises so that your analysis is not impacted by emotion**
- **Stick with the plan and avoid appearing like an “easy target”**

Thank you!

