UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

DAYS INNS OF AMERICA, INC., and HFS INCORPORATED, Plaintiffs, v. JANET M. RENO, as the Attorney General of the United States Defendants.	Civil Action No.: P 96 CA 05 (Bunton) Oral Argument Requested

UNITED STATES' MOTION
TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT
AND MEMORANDUM IN SUPPORT OF THE MOTION

Defendant Janet M. Reno, United States Attorney General, hereby moves to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or in the alternative, pursuant to the Court's "very broad discretion" vested by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. Points and authorities in support of the Attorney General's Motion To Dismiss are provided below.

I. INTRODUCTION

Inappropriately invoking the Declaratory Judgment Act, Days Inns of America, Inc., and its parent company, HFS Incorporated, have filed this action seeking a declaration that they have no liability for numerous violations of title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189. DIA and HFS further ask this Court to enjoin the Attorney General from carrying out her statutorily prescribed duty to enforce the ADA, and order her not to bring any actions, in any court, against DIA

or HFS for violations of the ADA at any newly constructed Days Inn. This Court should exercise its broad discretion pursuant the Declaratory Judgment Act to dismiss the action brought by DIA and HFS. In addition, there is no justiciable controversy in this district, and this Court should dismiss this action under 12(b)(1) for lack of subject matter jurisdiction.

II. BACKGROUND

A. Factual Background

After receiving numerous complaints against Days Inn hotels, in the summer of 1994 the Attorney General initiated investigations of 28 newly constructed Days Inns in 17 states. Representatives of the Department of Justice visited each site; those visits revealed that all 28 hotels failed to comply with the ADA's Standards for Accessible Design in numerous and significant respects. Accordingly, the Department wrote a series of letters to DIA, HFS, and the owners, architects, contractors of all 28 hotels (a total of more than 80 parties). The first letter, sent in March 1995, informed each party that the Department had identified numerous failures to comply with ADA Standards for which each party was jointly and severally liable and included a list of the elements at each hotel that failed to comply with Standards. See Exhibit A, Letter of March 17, 1995 to counsel for DIA. In July 1995, the Department wrote to counsel for DIA and HFS, with copies to every other party, inviting all of the legally responsible parties to discuss settlement, and informing them that the Department was prepared,

if necessary, to file one or more actions to enforce the ADA. See Exhibit B, Letter of July 6, 1995 to counsel for DIA.

In late December 1995, the Department wrote again to HFS, DIA, and the other parties responsible for eleven hotels for which the Department had not received settlement proposals. These letters said that if a resolution of the architectural issues at the hotels in question were not reached by January 31, 1996, the Department would file an enforcement action in the appropriate federal district court. See Exhibit C, Letter of December 18, 1995 to counsel for DIA. The Fort Stockton Days Inn was not included in the group of eleven hotels that the Attorney General warned would be the subject of enforcement actions. To the contrary, the owner and architect for that hotel were among the first parties to provide the Department with a settlement proposal (in response to its earlier letters), and have since remedied many of failures of that hotel to comply with the ADA.

The Department began discussing resolution of this matter with DIA and HFS in early 1995. Those discussions continued through the end of January 1996 (until DIA and HFS filed this action), including numerous telephone calls, meetings, and the exchange of draft settlement proposals. On January 30th, counsel for DIA and HFS tendered their last, best offer at a meeting with representatives of the Department in Washington, D.C. When representatives of the Department telephoned counsel for DIA and HFS on February 5th to reject that offer, counsel for DIA and HFS

informed the Department that DIA and HFS had, while the Department was considering their last offer, filed this action.

On February 8, 1996, the Department of Justice filed actions against DIA, HFS, and the owners, architects, and contractors for five Days Inn hotels. See Exhibits D-H. These actions are currently pending in the United States District Courts for the Eastern District of Kentucky, the Southern District of Indiana, the Central District of Illinois, the District of South Dakota, and the Eastern District of California. In each case, the Attorney General alleges that DIA and HFS had a significant role in, and extensive control over, the design and construction of hotels that do not comply with the ADA.[1]

---

[1] The primary mechanism for DIA's and HFS's involvement in and control over the design and construction is the license agreement it has entered into with the owner of each hotel. The complaints filed by the Attorney General allege that among other things, DIA, HFS, or both of them, in many or all of the cases:

-- developed a Planning and Design Standards Manual ("PDSM") for new Days Inn hotels, which includes detailed sketches of various elements of the hotel, and hundreds of design specifications, all of which licensees are required to comply with by the license agreements;

-- specified various aspects or features of the hotel, including the number of guest rooms, the number of parking spaces, whether facility would have a swimming pool, and so on;

-- reviewed and approved architectural plans for the hotels prior to construction; and

-- inspected the hotel at or shortly after completion of construction, and on numerous occasions since.

See Attachments D through H.

B. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., is Congress' most comprehensive civil rights legislation since the Civil Rights Act of 1964. Its purpose is "to invoke the sweep of congressional authority . . . to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. § 12101(b)(4), and to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The Attorney General is directed to investigate violations of the Act, and to bring civil actions where she believes a violation has been committed. 42 U.S.C. § 12188(b).

Title III of the ADA prohibits a variety of forms of discrimination against individuals with disabilities by public accommodations and commercial facilities. The basic non-discrimination provision is found in section 302(a) of the Act, which prohibits discrimination on the basis of disability in existing places of public accommodation. 42 U.S.C. § 12182(a). Section 303 of the Act extends the scope of prohibited activity to include newly constructed places of public accommodation, and newly constructed commercial facilities (facilities which are not covered by section 302(a)). Section 303 provides that,

> as applied to public accommodations and commercial facilities, discrimination for the purposes of section 12182(a) of this title includes a failure to design and construct facilities for first occupancy [after January 26, 1993] that are readily accessible to and usable by individuals with disabilities . . . .

42 U.S.C. § 12183(a)(1). The scope of section 303's coverage has not yet been addressed by any court, but the language clearly indicates that parties who are involved in the design and construction of a new facility -- whether a public accommodation or a commercial facility -- have an obligation under the ADA to insure that the facility is readily accessible to and usable by individuals with disabilities.

III. ARGUMENT

A. THE COURT SHOULD EXERCISE BROAD DISCRETION GRANTED BY THE DECLARATORY JUDGMENT ACT TO DISMISS THE COMPLAINT

It is well settled that under the Declaratory Judgment Act this Court has "unique and substantial" discretion to decline to adjudicate any complaint for declaratory relief, even if the case is otherwise justiciable. 28 U.S.C. 2201-2201. See, e.g., Wilton v. Seven Falls Co., ___ U.S. ___; 115 S.Ct. 2137, 2140 (1995); Psarianos v. Standard Marine, Ltd, Inc., 12 F.3d 461, 463 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 2164 (1994). The Fifth Circuit has identified several factors which justify declining to entertain an action for declaratory relief, including (1) forum-shopping, Rowan Companies, Inc. v. Griffin, 876 F.2d 26, 28-29 (5th Cir. 1989); (2) because declaratory judgment actions are not an appropriate vehicle for resolving questions of the scope of a public law, especially on the basis of a sparse or inadequate record, Fair v. Dekle, 367 F.2d 377 (5th Cir. 1966), cert. denied, 386 U.S. 996 (1967); and (3) because of another proceeding in which the matters in controversy between the parties may be litigated, or because of inconvenience

to the parties and witnesses. Rowan, 876 F.2d at 28-29.[2] The first-filed suit does not control the Court's exercise of discretion; the Supreme Court has declared that "the federal declaratory judgment action is not a prize to the winner of the race to the court house." Perez v. Ledesma, 401 U.S. 82, 119 (1972). See also Torch v. LeBlanc, 947 F.2d 193, 195-196 (5th Cir. 1991).

1. DIA and HFS filed this action in anticipation of other actions, and are forum shopping.

Given that DIA and HFS well knew that the Department of Justice intended to file one or more actions to enforce the ADA if these matters could not be settled -- actions which would name them as defendants -- their filing here can only be viewed as a rank attempt at forum shopping. As Judge Politz wrote in the Rowan case, a request for declaratory relief may be dismissed "because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping." 876 F.2d at 29.

Indeed, the Fifth Circuit has repeatedly cautioned against allowing the Declaratory Judgment Act to be as used an instrument of forum-shopping. See, e.g., Pacific Employers Ins. Co. v. M/V CAPT. W.D. CARGILL, 751 F.2d 801 (5th Cir. 1985), cert. denied,

[2]It is not necessary that these particular factors be present; any of them, or other factors identified by the Fifth Circuit, may justify dismissal of a declaratory judgment action. See Granite State Ins. Co. v. Tandy, 986 F.2d 94, 96 (5th Cir. 1992), cert. dismissed 507 U.S. 1026 (1993) ("The Rowan list [of factors] is neither exhaustive, nor is it exclusive or mandatory.").

474 U.S. 909 (1985) ("proper factor to consider in dismissing a declaratory judgment suit is whether the suit was filed in anticipation of another [suit] and therefore was being used for the purpose of forum-shopping"). In Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599 (5th Cir. 1983), the Fifth Circuit held that the district court "acted within its discretion in considering the anticipatory nature of [the declaratory judgment action]." Id. at 602. The Court noted that "[a]nticipatory suits are disfavored because they are an aspect of forum shopping," adding that "[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." Id. at 602 n.3 (citation omitted). The Court found "indications that forum-shopping was an element in this case" in the fact that the law in the two courts differed, making one forum more favorable to one party than the other. Id.

There are strong indications that DIA and HFS brought this action in anticipation of actions against them by the Attorney General, and that they are forum shopping. First, through the series of letters and settlement discussions detailed above, the Department made clear to DIA and HFS that if these matters could not be settled, the Department was prepared to file actions to enforce the law, and gave DIA and HFS more than 30 days notice of the date on which the Department intended to file. See Granite State, 986 F.2d at 96 (that adverse parties had "engaged in lengthy negotiations" over their dispute prior to filing of a

declaratory judgment action by one of them was indication that declaratory judgment action was anticipatory in nature, and could properly be dismissed).

Second, there are clear indications that DIA and HFS believe that the law is more favorable to them in the Fifth Circuit, so that they have come racing to a courthouse in Texas. Judging from various allegations in their complaint, DIA and HFS may argue that an opinion by the Fifth Circuit in a case arising under another provision of the ADA -- dealing with removal of architectural barriers in existing buildings (as opposed to the accessible design and construction of new buildings) -- will be of use to them in their effort to insulate themselves from liability based on their involvement in the design and construction of new hotels which do not comply with the ADA.

That case is Neff v. American Dairy Queen, 58 F.3d 1063 (5th Cir.), cert. denied, ____ U.S. ____, 116 S.Ct. 704 (1995), in which Judge Emilio Garza held, on limited and undisputed facts, that American Dairy Queen ("ADQ"), the franchisor of the Dairy Queen chain of restaurants, was not required by section 302 of the ADA to remove architectural barriers to access in restaurants built before the ADA became law. Among other things, section 302 of the ADA requires parties who own, operate, or lease pre-existing public accommodations to remove architectural barriers to access at their facilities. 42 U.S.C. § 12182(b)(2)(a)(iv). Judge Garza reasoned that ADQ had insufficient control over the restaurant to be "operating" it within the meaning section 302,

and there was no suggestion that ADQ owned or leased the restaurant. As a result, the Court held, ADQ did not fall within the scope of section 302, and had no responsibility to remove barriers to access. 58 F.3d at 1068-69.

Neff is not controlling here because it addresses a different provision of the ADA -- the requirement in section 302 that architectural barriers be removed in existing facilities. The Department's cases against DIA and HFS do not concern pre-existing buildings; rather, they concern new hotels built after the ADA became law, and arise under section 303, which does not limit its coverage to those who own, operate, or lease the facilities in question. Section 303 imposes liability on parties involved in the "design and construction" of the facility in question. 42 U.S.C. § 12183(a)(1). See infra, pp. 11-13.

Further influencing DIA's and HFS's choice of this forum is the fact that while their role in the design and construction of the Days Inn in Fort Stockton, Texas, was substantial, it was nonetheless somewhat less extensive than it was at many other Days Inn hotels. DIA and HFS thus seek declaratory relief as to all newly constructed Days Inn hotels based solely on the facts relating to their role in the design and construction at the single Days Inn hotel in Fort Stockton.[3] Moreover, they have come to one of the few districts in which the owners and

[3]To the extent that DIA and HFS now seek, or modify their claims to seek, a declaration only that they are not liable for ADA violations at the Fort Stockton Days Inn, such a claim is not justiciable. See Part III.B., infra, at pp. 16-20.

architect of the facility have remedied a substantial number of the ADA violations at the Days Inn in question. There can be no explanation other than forum-shopping to explain their filing here.

2. The Court should not decide important questions of the scope of public law by declaratory judgment, especially on a sparse and inadequate record.

The Supreme Court and the Fifth Circuit have both held that declaratory judgment actions are not an appropriate vehicle for resolving questions of the scope of a public law, especially on the basis of a sparse or inadequate record.[4] DIA and HFS, however, ask this Court to do precisely that -- to decide, on the basis of little or no factual inquiry -- whether they fall within the scope of coverage of the ADA's new construction provisions. The Americans with Disabilities Act is a new public law, and the scope of coverage under the new construction provision has not been reached in any court.

The issue raised by DIA and HFS concerns the correct interpretation of the scope of coverage of section 303 of the Act. That section defines illegal discrimination "as applied to

[4]In Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111 (1962), the Supreme Court "cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations." Id. at 112. "Adjudication of [matters of serious public concern], certainly by way of resort to a discretionary declaratory judgment, should rest on an adequate and full-bodied record." Id. at 113. The Fifth Circuit echoed this caution in Fair v. Dekle, noting that a district court "should exercise sound discretion in entertaining declaratory judgment actions, by requiring a full-bodied record developed through adequate adversary proceedings, with all proper parties before the court." 367 F.2d at 378.

public accommodations and commercial facilities" to include a failure to design and construct new facilities to be readily accessible to and usable by individuals with disabilities. See 42 U.S.C. § 12183(a)(1). Because section 303 covers commercial facilities[5] as well as places of public accommodation, it is the Department of Justice's view that section 303's coverage is not limited to (and cannot sensibly be limited to) those entities that own, lease, or operate places of public accommodation. DIA and HFS argue, however, that the scope of section 303 is limited to those parties who own, lease (or lease to), or operate places of public accommodation. See Complaint ¶ 20. Plaintiffs' argument would nullify the portion of the statute that applies to new construction of commercial facilities. See Moskal v. United States, 498 U.S. 103, 109-110 (1991) (courts should interpret statutes in a manner that gives effect to every clause and word of the statute).

The issue raised by DIA and HFS is precisely the type of issue of the scope or reach of a public law that is not appropriate for decision in a declaratory judgment action, in the absence of a concrete case and a fully developed record.

---

[5]Title III defines commercial facility to include non-residential facilities whose operations affect commerce. 42 U.S.C. § 12181(2). This is a broad category of facilities, including many types of buildings not included within the definition of places of public accommodation, see 42 U.S.C. § 12181(7). For instance, most office buildings, warehouses, and factories are commercial facilities, but are not places of public accommodation.

Under either the Attorney General's or plaintiffs' legal theory, the inquiry into DIA's and HFS's liability remains thoroughly fact-bound. Under the Attorney General's view, the question with respect to each hotel is whether DIA and HFS had sufficient involvement in or control over the design and construction of the hotel to render them liable for ADA violations -- a thoroughly factual question. Even plaintiffs' theory, which does violence to the statutory scheme and plain language of section 303, requires the Court to decide two fact questions fundamental to a determination of the liability of DIA and HFS: 1) do DIA and HFS have sufficient control over the operations of hotel to be "operating" the hotel within the meaning of section 302 of the ADA, and 2) if so, did DIA and HFS have sufficient involvement in or control over the design and construction of the hotel to be liable for ADA violations? Under either approach, the cases make clear that DIA and HFS can receive the declaratory relief they seek only upon the development of a full factual record. There is simply no basis, in equity or common sense, to choose the course suggested by DIA and HFS.

3. The availability of alternate fora and the convenience of other parties and witnesses requires dismissal of this action.

The Fifth Circuit and the Supreme Court have held that the availability of an alternate forum where the dispute between the parties may be fully litigated counsels against declaratory

relief. Wilton, 115 S.Ct. at 2140; Rowan, 876 F.2d at 29.[6] Likewise, the Court should consider whether it is convenient to bring parties and witnesses to this action. Both of these factors counsel in favor of dismissing this action; there are five other actions currently pending where plaintiffs can bring their claims for declaratory relief, each of which is far more convenient for the other parties to those actions, and the witnesses that may be called.

The other pending actions will fully resolve all of the issues raised by DIA and HFS, even if plaintiffs do not affirmatively seek declaratory relief in those other actions. In each case the Department of Justice has alleged that DIA and HFS have participated in the design and construction of the hotels in question, and that they are liable for the ADA violations at those hotels. There is simply no need to have a sixth federal district court take up these issues. See Mission Ins. Co., 706 F.2d at 603 (Fifth Circuit affirms district court's discretionary dismissal of a declaratory judgment action, relying in part on the fact that another action in California would settle the disputed issues).

---

[6]Although Rowan addressed itself explicitly to existence of an alternative forum in a state court, the same rationale applies to the situation in which the alternative fora are in other federal courts. While the pendency of actions raising the same issues in other federal courts does not raise the issues of federalism and abstention raised when those other actions are pending in state courts, it is still true that the same issues need not and should not occupy two courts.

The convenience of parties and witnesses also takes on particular significance here. If this Court entertains this action, it must either join as parties, or compel attendance as witness, several individuals and entities -- and perhaps dozens or hundreds -- throughout the United States. As discussed above, whatever view one takes of the applicable law, the liability of DIA and HFS for ADA violations is fact-bound in every case. To decide liability for a particular facility will require at least the introduction of testimony from the owner and architect of that facility, and may require joining the owner and others as parties, so that complete relief can be afforded. Thus, if DIA and HFS sought declaratory relief with respect only to the five actions brought by the Department, it would be necessary to join, or bring in as witnesses, at least fourteen other parties who reside in California, South Dakota, North Dakota, Illinois, Indiana, Georgia, Kentucky, and Ohio.

Plaintiffs, however, do not seek declaratory relief only as to the five actions filed by the Department. They seek a declaration reaching at least all twenty-eight new Days Inns that have been visited and inspected by the Department, if not all new Days Inns in the United States, expanding exponentially the number of parties or witnesses necessary to resolution of their action. "The convenience of parties and witnesses has traditionally been considered in determining whether to hear a declaratory judgment action"; important considerations include "the cost of obtaining attendance of willing witnesses," the

"possibility of view of premises, if view would be appropriate to the action," and "all other practical problems that make trial of a case easy, expeditious and inexpensive." Mission Ins. Co., 706 F.2d at 602-03, quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

Each of these "important considerations" calls for dismissal of this action. Even if the Court could exercise jurisdiction over all the necessary witnesses, it will be inordinately difficult and expensive to bring them to this Court from homes across the country. If viewing the hotels in question would be appropriate for the trier of fact, that can certainly be more easily accomplished in the districts where the hotels are located. In sum, there can be little question that attempting to hear in this Court the action brought by plaintiffs will not be in any sense "easy, expeditious, or inexpensive." Given the existence of adequate alternative fora, there is no reason to make those parties come here to duplicate litigation pending elsewhere.

B. THIS ACTION MUST BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE

Two distinct, though related, doctrines of constitutional law mandate that this action be dismissed for lack of subject matter jurisdiction. Insofar as plaintiffs seek a declaratory judgment based upon the claim that the Attorney General has misinterpreted the ADA by holding plaintiffs liable for ADA violations "growing out of DIA's status as the franchisor...," (Complaint, ¶ 1), they have not alleged a controversy over which

the Court has subject matter jurisdiction. Second, plaintiffs' claims against the Attorney General are not ripe. Accordingly, pursuant to Rule 12(b)(1), Fed. R. Civ. P., the Court lacks subject matter jurisdiction, and this action should be dismissed.

1. Plaintiffs fail to present a justiciable controversy.

It is well-settled that the party seeking a declaratory judgment must demonstrate that its cause of action falls within the contours of Article III of the Constitution. Cardinal Chemical Co. v. Morton, Int'l, Inc., 508 U.S. 83; 113 S.Ct. 1967, 1974 (1993); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937); State of Texas v. West Pub. Co., 882 F.2d 171, 175 (5th Cir. 1989), cert. denied, 493 U.S. 1058 (1990). "The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Rowan, 876 F.2d at 28. In other words, where a plaintiff seeks "forward-looking relief," the injury must be both "particularized" and "imminent." Adarand Constructors, Inc. v. Pena, ___U.S.___, 115 S.Ct. 2097, 2104 (1995).

The Complaint alleges harms in the nature of "protracted disputes" with the Department in pending litigation, "potential exposure such actions pose," and "unnecessary expenditure of resources." See Complaint, ¶¶ 63, 64, 69, 76, 77, 80. Plaintiffs have not suffered any cognizable injury. They only allege that potential future "losses may be sustained" if the

five enforcement actions go forward based upon the Attorney General's enforcement of the ADA against them on the basis of their "status" as franchisors. Such injuries do not satisfy fundamental standing requirements of a concrete injury that is not speculative in nature. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Notwithstanding allegations in the Complaint that plaintiffs are being subjected to ADA enforcement actions by virtue of their franchisor status, the Attorney General is enforcing the statutory prohibition against discrimination by those who "design and construct" new buildings.[7] DIA and HFS have themselves alleged facts that show that they did participate in the "design and construction" of hotels that the Department has since determined do not comply with the ADA. Complaint, ¶¶ 30-49. Their status as franchisors did not make plaintiffs liable for ADA violations and is not the basis for the Attorney General's actions against them. See Exhibits D-H, Complaints.

---

[7] An order preventing the Attorney General from suing DIA and HFS for the participation in the design and construction of new hotels may not provide plaintiffs the redress from "protracted litigation," and other harms, that they seek. Lujan, 504 U.S. at 560 (causation and redressability essential elements of standing.) Preventing the Attorney General from suing DIA and HFS based exclusively upon their status as franchisors may not estop the Attorney General from suing them for their actions in other districts, and it certainly does not estop the litigation over the design and construction of these hotels. Owners, architects, and contractors are also defendants, and those parties also have an interest sufficient to join DIA and HFS as parties despite an injunction against the Attorney General. See Rule 19, Fed. R. Civ. P. Thus, the hypothetical injury of risk and cost of litigation is not remedied solely by enjoining the Attorney General because DIA and HFS may be forced to defend regardless of a judgment from this Court.

2. Plaintiffs' claims are not ripe.

The separate, though related, doctrine of ripeness shares a common requirement with standing: a plaintiff must show that "he has sustained or is immediately in danger of sustaining a direct injury' as a result of the allegedly unlawful conduct." Laird v. Tatum, 408 U.S. 1, 13 (1972) (emphasis added). "Ripeness is a function of an issue's fitness for judicial resolution as well as the hardship imposed on the parties by delaying court consideration." Jobs, Training & Services v. East Tex. Council, 50 F.3d 1318, 1325 (5th Cir. 1995), citing Merchants Fast Motor Lines, Inc. v. I.C.C., 5 F.3d 911, 919-20 (5th Cir. 1993). The mere fact that a plaintiff seeks a declaratory judgment does not affect the requirement that a "ripe" injury be alleged. A declaratory judgment is procedural only; it provides merely a remedy, and such remedy may operate only when there is a controversy that is ripe in the constitutional sense. Dixie Electric Cooperative v. Citizens of Alabama, 789 F.2d 852, 858 n.18 (11th Cir. 1986).

There is no such real or concrete dispute with respect to the Fort Stockton Days Inn; there is no "actual controversy" in this district. The Fort Stockton Days Inn is not within the group of eleven hotels over which the Department threatened to sue if the matter was not resolved by January 31, 1996. To the contrary, the owner and architect for that hotel were among the first parties to provide the Department with a settlement proposal, the Department has had extensive settlement discussions

with those parties, and the owner and architect of the Fort Stockton facility have remedied many of the problems identified by the Department's investigation. No enforcement action regarding the Fort Stockton Days Inn is imminent, and it is premature for plaintiffs to seek a declaration that they have no liability for the problems at that hotel.

IV. CONCLUSION

This Court lacks jurisdiction over plaintiffs' claims against the Attorney General, and this action must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Alternatively, the Court should exercise its very broad discretion to dismiss pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

Dated: April 8, 1996

Respectfully submitted,

DEVAL L. PATRICK
Assistant Attorney General

JAMES WILLIAM BLAGG
United States Attorney

RAYMOND A. NOWAK
Texas State Bar No. 15121490
Assistant United States Attorney

JOHN L. WODATCH
Chief, Disability Rights Section

_____
RENEE M. WOHLENHAUS
Special Litigation Counsel
THOMAS M. CONTOIS
ALYSE S. BASS
Attorneys, Civil Rights Division
U.S. Department of Justice
Post Office Box 66738
Washington, D.C. 20035-6738
(202) 514-5527