A Wave of ADA Public Accommodation Lawsuits Moves from Florida and California to the Rest of the United States

*by Gregory P. McGuire**

There recently has been a surge of private plaintiff lawsuits filed under the public accommodation provisions of the Americans with Disabilities Act of 1990 ("ADA").[1] Public accommodation lawsuits have been common for several years in states such as Florida and California, but in the past two years have been filed with increasing frequency in several states including North Carolina, Virginia, and Alabama.

Several lawyers and law firms have made a "cottage industry" out of suing places of public accommodation, in part because the law may permit the recovery of attorneys' fees.[2] These lawyers will use the same disabled person, often someone who is wheelchair-bound, as the plaintiff in multiple lawsuits. The individual plaintiff may be joined by, or at least supported by, a disabled "advocacy" group. The lawsuits are being filed primarily against restaurants, hotels, retail stores, and shopping centers. The complaint filed with the court will allege that the plaintiff visited the facility but encountered physical "barriers" to his or her full enjoyment of the available goods and services. For example, the plaintiff may allege that there was inadequate handicapped parking; that access into and out of the building was difficult or impossible because of steep inclines, lack of curb cuts, or narrow doorways; that goods or services inside the facility were difficult to reach because of counter or shelf heights; or that it was difficult or impossible to use the public restroom because of inadequate maneuvering space or inaccessible toilet stalls. The lawsuit typically will seek a court order (injunction) requiring the public accommodation to remove or alter the alleged physical barriers, and ask the court to award other damages and attorneys' fees for the plaintiff's lawyer who brought the lawsuit. One Florida-based plaintiff has filed 42 separate ADA public accommodation lawsuits in North Carolina's three federal district courts since July 2008, and he has been represented by the same attorney in 39 of those lawsuits. Another Pennsylvania-based lawyer, using the same plaintiff, filed 8 ADA public accommodation lawsuits in North Carolina's Federal District Courts for the Middle and Western Districts between September 22 and October 8, 2009.[3]

This article is intended to provide a general overview of the requirements placed upon places of public accommodation (and "commercial facilities") by Title III of the ADA to make facilities physically accessible by the disabled, the most commonly raised violations of the accessibility standards, and some practical pointers for avoiding and defending public accommodation lawsuits.

The ADA was signed into law on July 26, 1990[4] and is divided into three sections, or "Titles": Title I covers discrimination in employment; Title II prohibits discrimination by state and local "public" entities in providing access to programs, services and activities; and Title III prohibits discrimination by privately owned places of "public accommodation" and prohibits certain types of discrimination by "commercial facilities."

Title III of the ADA provides that "no individual shall be discriminated against on the basis of disability[5] in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[6] The discrimination prohibited by Title III clearly includes overt discrimination against a disabled individual by a public accommodation, such as refusing entry to the facility or service to that individual. However, Title III also specifically defines "discrimination" to include (1) the failure to "design and construct" new facilities so that they are "readily accessible to and usable by individuals with disabilities,"[7] (2) where alterations are made to a facility, the failure "to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs,"[8] and (3) in "existing facilities" the failure to remove architectural (physical) barriers to access for the disabled, and the failure to provide appropriate alternative services to the disabled when physical barriers cannot be removed.[9] As explained below, which of the accessibility standards a public accommodation is required to meet will depend upon the date that the facility was constructed and first occupied, or when and what types of alterations are made to a facility.

Under the ADA, a place of "public accommodation" is a facility or establishment owned or operated by a private entity that is open to the public.[10] Public accommodations include, but are by no means limited to:

- hotels, restaurants, retail stores and shopping centers;
- service establishments like banks, doctor's offices, and the portions of other business offices open to the public;
- recreational facilities, including health clubs and spas;
- theaters, auditoriums, and stadiums;
- private places of education and day care centers; and
- many other establishments and facilities open to the public.

A "commercial facility" is different from a public accommodation. Title III of the ADA defines a "commercial facility" as a facility "intended for nonresidential use" and "whose operations will affect commerce," but which is not open to the general public.[11] Commercial facilities include certain office buildings, factories, warehouses and distribution centers, and other buildings in which employment might occur, as well as wholesale establishments that sell exclusively to other businesses and private airports.

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It also should be noted that the ADA's public accommodation provisions cover more than just the physical attributes of the facility such as parking lots, doorways, access routes, and restrooms. It also requires the removal of "barriers" to the use and enjoyment of the facility and the services offered by the facility. For example, a restaurant may be required to provide Braille menus for blind customers, and a bank must provide reasonable means for a deaf individual to transact business.[12]

Whether a facility is considered accessible is determined by reference to the "ADA Accessibility Guidelines for Buildings and Facilities" adopted by the United States Department of Justice ("the ADAAG").[13] The ADAAG provides detailed requirements and architectural standards for virtually all aspects of a public accommodation, including parking lots, access and entrances to the facility, paths of travel within the facility, restrooms, drinking fountains, access to goods and services in the facility, and safety features. A reputable architect or engineer should be familiar with the requirements for compliance with the accessibility ADA. In addition, there are architectural and engineering firms that have special expertise in ADA accessibility issues, and provide design, consulting, and inspection services.

As noted above, the non-discrimination requirements of Title III apply to all places of "public accommodation." However, the requirement that a public accommodation "design and construct" accessible facilities or remove "architectural barriers to accessibility," will depend on when a facility was built, and whether the facility has been renovated since the ADA became effective.

I. New Construction

As used in the ADA, "new construction" refers to buildings which were constructed for first occupancy on or after January 26, 1993.[14] Such "new" buildings must be constructed so that they are "readily accessible to and usable by individuals with disabilities."[15] The only exception to this requirement is where the public accommodation can demonstrate that it is "structurally impractical" to meet the ADAAG requirements because "the unique characteristics of the terrain prevent the incorporation of the accessibility features."[16] In other words, a public accommodation first occupied after January 23, 1993 usually is required to come into compliance with the ADAAGs. The new construction requirements of the ADA apply both to public accommodations and to commercial facilities.

An interesting issue that remains unclear at this time is whether an entity that buys a facility that was first occupied after January 23, 1993, but which was not built in compliance with the ADA "new construction" standards, is required to bring the facility into compliance. There are at least some court decisions that suggest that a purchaser who had no involvement in the "design and construct[ion]" of the facility would not be required to come into compliance, but would be subject to the "existing facility" standards described below.[17]

II. Alterations (Renovations) to Facilities

If an existing building is "altered" or renovated after January 26, 1992, the owner or operator must "to the maximum extent feasible" remove architectural barriers and make the altered portion of the facility accessible to disabled individuals in compliance with the ADAAGs.[18] The alterations requirements of the ADA apply both to public accommodations and to commercial facilities.

An "alteration" to a facility "is a change to public accommodation or commercial facility that affects or could affect the usability of the building or facility or any part thereof."[19] The regulations further provide that when such alterations affect the usability or access to an area of the public accommodation containing its "primary function," the alterations

> shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.[20]

The "primary function" is the major activity for which the facility is used, such as the lobby and customer service areas of a bank, the dining and bar areas in a restaurant, and the common areas and guest rooms in a hotel.[21] The ADA regulations provide the following examples of alterations that would affect the "primary function" of a public accommodation or commercial facility: "(i) Remodeling merchandise display areas or employee work areas in a department store; (ii) Replacing an inaccessible floor surface in the customer service or employee work areas of a bank; (iii) Redesigning the assembly line area of a factory; or (iv) Installing a computer center in an accounting firm."[22]

There are detailed regulations regarding the extent of the duty to remove "path of travel" barriers and make the facility accessible depending on the nature of the alterations, the areas of the facility being altered, and the cost of making the changes.

III. "Existing" Facilities

For public accommodations that existed as of January 26, 1990, and were first occupied before January 26, 1993, the ADA provides that the failure to remove "architectural barriers" where the removal is "readily achievable" is a violation of the ADA. The failure to remove existing barriers from existing facilities applies only to "public accommodations" and not to "commercial facilities." In other words, the owners of an office building used primarily for private employment, or of a manufacturing facility, have no obligation to remove existing barriers from the non-public areas of the building.

The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense."[23]

The ADA provides that

> [i]n determining whether an action is readily achievable, factors to be considered include:
>
> (A) the nature and cost of the action needed under this chapter;
>
> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or

the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[24]

Neither the courts nor the Department of Justice have attempted to state any mathematical formula for determining whether the cost of removal of a barrier is "readily achievable." Instead, it is well established that such decisions must be made on a case-by-case basis. Obviously, what might be cost prohibitive for a single location retail store might not be for a location of a national retail chain.

In addition, the United States Supreme Court has held that whether barrier removal is readily achievable "extends to considerations beyond cost."[25] In fact, courts have held that the fact that the public accommodation can afford to remove the barrier does not necessarily mean that the removal is readily achievable.[26] One commentator has stated that:

> In determining whether the cost of barrier removal is "readily achievable," a public accommodation can consider the effect of the barrier removal on the operation of its business in addition to the initial cost of simply removing the barrier. In certain circumstances, the actual cost of removing a physical barrier may not be very large; however, the process of removing the barrier may cause additional costs by disrupting the operation of the public accommodation.[27]

IV. The Recent Public Accommodation Lawsuits

Although Title III of the ADA covers, and the ADAAGs provide access standards for, a multitude of physical facilities and services provided by public accommodations, the recent slew of lawsuits tend to focus on the same physical, or "architectural," barriers: parking lots and spaces, entrances to the facility, and restrooms.

A. Parking Spaces and Access From Parking Lot

Almost all of the recent public accommodation lawsuits filed against retailers, restaurants, and shopping centers allege that the disabled parking spaces are inadequate. The ADAAG requires that a place of public accommodation provide a certain minimum number of handicapped parking spaces and dictates the size, position of, and access from such parking spaces. For example, a public accommodation that has 51-75 parking spaces must have at least 3 handicapped accessible parking spaces, and a parking lot with 76-100 spaces must have 4 accessible parking spaces.[28] The handicapped accessible parking spaces must be at least 96 inches wide and must have a "parking access aisle" next to the space of at least 60 inches width (although 2 accessible spaces can share the same access aisle).[29] The parking spaces and access aisles must be "level, with surface slopes not exceeding 1:50 (2%)."[30] The accessible spaces must be located "on the shortest possible route of travel from adjacent parking to an accessible entrance."[31]

The ADAAG also provides that "one of every eight accessible spaces, but not less than one" shall be "van accessible." A "van accessible" parking spot must have next to it an "access aisle" at least 96 inches wide.[32]

The accessible parking spaces must have an accessible route to the entrance of the building at least 36 inches wide.[33]

Parking space problems tend to be the easiest and least expensive to fix, particularly when the problems relate solely to the number and size of the spaces, which often can be remedied merely by restriping the parking lot. However, when the problems involve the slope of the parking spaces or access lane, or a lack of curb cuts, the remedies can become much more expensive.

B. Entrances and Doors

The ADAAG requires that a public accommodation provide at least one accessible entrance doorway that is a minimum of 32 inches in width.[34] The doorway also must provide certain minimum clear space around the door to permit maneuvering of a wheelchair, and the "floor or ground area within the required clearances shall be level and clear."[35] The exact size and space requirements vary depending on the type of doors involved. The door on this entranceway must have a handle that is "easy to grasp with one hand and does not require tight grasping, tight pinching, or twisting of the wrist to operate."[36]

C. Restrooms

Most of the current wave of public accommodation lawsuits also allege significant deficiencies with accessibility to restrooms and toilet facilities. Renovation of restroom facilities can be expensive, disruptive, and structurally challenging.

The ADAAG provides that a public accommodation must have at least one handicapped accessible stall. A "standard" accessible stall must be at least 56 inches in length, and 60 inches wide.[37] However, when it is "infeasible" to provide a stall width of 60 inches, the ADAAG permits alternative configurations with a 36-inch width or a 48-inch width.[38] There are specific requirements for the placement of handrails depending on the configuration of the stall.[39]

Door handles on stall doors should have a "shape that is easy to grasp with one hand and does not require tight grasping, tight pinching, or twisting of the wrist to operate." The Guidelines recommend the use of "lever-operated mechanisms."[40]

Urinals must be positioned so that the front rim is no higher than 17 inches off the ground, and must have a minimum clear floor space in front of the urinal of at least 30 inches by 48 inches.[41]There must also be minimum amounts of floor "maneuvering" space provided inside the rest room, and the ADAAG also provides specific requirements for the placement of the sinks and mirrors in the restrooms.[42] A handicapped accessible restroom must have a handicapped accessible sign on the door.

V. Enforcement of Title III

The authority to enforce the nondiscrimination and accessibility requirements of the ADA are placed in the hands of both the United States Department of Justice and private individuals.[43] The United States Attorney General is authorized to "investigate alleged violations of [Title III], and shall undertake periodic reviews of compliance of covered entities." The Attorney General also may bring a lawsuit where there is a "pattern or practice of discrimination," or when discrimination "raises issues of general public importance."[44] The Attorney General may seek injunctive relief, damages for impacted persons who are discriminated against, and civil monetary penalties for non-compliance of $50,000 for a first violation, and $100,000 for subsequent violations.[45] The Attorney General cannot seek an award of punitive damages.[46]

A private individual who has been the victim of discrimination may also bring a civil lawsuit under Title III of the ADA.[47] Generally, the individual must show that he or she was discriminated against by being denied access to or enjoyment of the public accommodation, and that he or she has a desire to return and use the facility in the future. A private plaintiff may seek an injunction requiring that barriers to access be removed and an award of attorneys' fees if they win the lawsuit.[48] A private plaintiff cannot be awarded compensatory or punitive damages under Title III of the ADA.

VI. Avoiding and Defending Public Accommodation Lawsuits

The best means of avoiding a public accommodation lawsuit is to make certain that a facility is in compliance with the ADAAG standards to the maximum extent feasible. Obviously, the best time to do this is during the construction, or renovation, of a facility, when the plans are being drawn and the construction is taking place. Although most good architects are very familiar with the ADA's accessibility standards, there are a surprising number of lawsuits that arise out of the failure to construct or renovate facilities in compliance with the ADAAG, including lawsuits involving buildings constructed and opened in the last 5 to 10 years. A company or individual engaged in designing and building a facility to be used as a public accommodation or a commercial facility may want to hire an ADA accessibility expert to independently review architectural plans and confirm compliance with the ADA requirements. There are a number of engineering firms and other qualified experts who are in the business of conducting ADA compliance reviews and are expert in the accessibility requirements. Another potential means of protection for new construction or renovations is to negotiate an indemnity provision that specifically makes the architects and/or construction contractor liable to indemnify the facility's owner if the building is not constructed in compliance with the ADA requirements.

For owners and operators of public accommodations in "existing facilities," an ADA accessibility study or audit by the aforementioned accessibility expert is the best means of discovering and remedying accessibility problems before being hit with a lawsuit. Renovations of parking lots, restrooms, entranceways, and other parts of a facility are much less costly and easier to manage when they are done on the owner or operator's own schedule than when they are done on the forced schedule that comes with a court-ordered injunction. It may also be wise to have the audit or inspection conducted with the assistance, and under the direction of, an attorney so that the report may be protected from discovery in a lawsuit. This is particularly important where the owner or operator decides that it will fix some, but not all, of the accessibility problems discovered by an inspection. If the inspection report is not prepared at the direction of counsel, it may have to be provided to a plaintiff who brings a later public accommodation lawsuit.

If an owner or operator of a public accommodation is sued under Title III of the ADA, it should immediately report the lawsuit to its insurance carriers for potential coverage. The owner or operator, or its insurance carrier, will also want to quickly retain competent legal counsel to represent it in the lawsuit. Among the first things that must be determined are: was the facility constructed for first occupancy after January 26, 1993?; have there been substantial renovations made to the facility since January 26, 1992?; are there any indemnity provisions regarding ADA compliance contained in contracts surrounding construction or renovation of the facility?; and are the allegations in the lawsuit accurate—is the facility out of compliance with the ADA accessibility requirements? In addition, for an "existing facility," it will be important to determine how much it will cost to make any needed renovations to the facility so that it can be determined if such renovations are "readily achievable."

The wave of ADA public accommodations lawsuits does not show signs of breaking anytime soon. Preparation before they hit is the best protection.

Endnotes

1 42 U.S.C. §12182 et seq. Statistics compiled by United States federal court system showed a 56% increase in the number of non-employment lawsuits filed under the ADA from 2005 to 2008, and a 24% increase from 2007 to 2008.

2 The United States Department of Justice also is authorized to enforce the public accommodation requirements of the ADA and to bring a civil lawsuit where it believes there is a "pattern or practice" of violations, and it may seek damages and civil monetary penalties for non-compliance.

3 Information compiled from search of federal district court's electronic PACER dockets.

4 42 U.S.C. §12101 et seq.

5 Title III uses the same definition of "disability" as is used in Title I prohibiting employment discrimination. 42 U.S.C. §12102 (2).

6 42 U.S.C. §12182(a).

7 42 U.S.C. §12183(a)(1).

8 42 U.S.C. §12183(a)(2).

9 42 U.S.C. §12182(b)(2)(A)(iv) and (v).

10 42 U.S.C. §12181(7). Title II of the ADA places the same or similar requirements on state and local publicly owned and operated facilities open to and utilized by the public. 42 U.S.C. §12181 et seq. Federal government facilities are not covered by the ADA, but are covered by the Rehabilitation Act of 1973.

11 42 U.S.C. §12181(2).

12 42 U.S.C. §12182(b)(2)(ii); 28 C.F.R. Part 36, §36.303.

13 Appendix A to the ADA regulations at 28 C.F.R. Part 36. A revised version of the ADAAG, first introduced in 2004, was submitted to the Office of Management Budget in late 2008 by the Bush Administration as part of a proposed revision of the Title III regulations, but was not acted upon before the change of administration.

14 42 U.S.C. §12183(1).

15 *Id.*

16 *Id.*

17 *See, e.g.,* Rodriguez v. Inestco, L.L.C., 305 F. Supp.2d 1278 (M.D. Fla. 2004).

18 42 U.S.C. §12183(a)(2); 28 C.F.R. Part 36, §36.402.

19 28 C.F.R. Part 36, §36.402(b).

20 28 C.F.R. Part 36, §36.403.

21 *Id.*

22 *Id.* §36.403(c).

23 42 U.S.C. §12181(9).

24 *Id.*

25 Spector v. Norwegian Cruise Lines, Ltd., 545 U.S. 119 (2005).

26 Brother v. CPL Investments, Inc., 317 F.Supp.2d 1358, 1371 – 72 (S.D. Fla. 2004).

27 Mook, Americans with Disabilities Act: Public Accommodation and Commercial Facilities, Ch. 3, § 3.02(4)(a) (Matthew Bender).

28 ADAAG 4.1.2(5).

29 *Id.* 4.1.2.

30 ADAAG 4.6.3.

31 *Id.* 4.6.2.

32 ADAAG 4.1.2(5)(6).

33 ADAAG 4.3.3.

34 ADAAG 4.13.5.

35 *Id.* 4.13.6.

36 ADAAG 4.13.9.

37 ADAAG 4.17.3.

38 *Id.*

39 ADAAG 4.26.

40 ADAAG 4.13.9.

41 *Id.* 4.18.2 and 3.

42 ADAAG 4.19.

43 42 U.S.C. §12188.

44 42 U.S.C. §12188(b).

45 42 U.S.C. §12188(b)(2).

46 *Id.*

47 42 U.S.C. §12188(a)(1).

48 *Id.*; 42 U.S.C. §2000a-3(a); 42 U.S.C. §12205.