ADA Title III: It's All About the Fees
February 13, 2015

If your business or your insured's business has ever been hit with a suit claiming a violation of Title III of the Americans with Disabilities Act ("ADA"), then you have been down this bumpy road. A quick internet search yields colorful results about these so-called "drive-by" and "extortion" lawsuits. Although there has been talk about amending the ADA to add a notice-and-cure provision or to make it less attorneys-fee driven, so far business owners and insurers have enjoyed no such luxury. In fact, recent changes to the law's regulations heighten the standards for compliance, and lawsuits enforcing its provisions show no sign of slowing down. More than 1 in 5 of all ADA lawsuits filed against businesses in 2013 were filed in the Southern District Court of Florida (the federal court that covers from Ft. Pierce to Key West).1 According to the Wall Street Journal, there were 55% more ADA lawsuits filed nationwide between January 1, 2014 and June 30, 2014 than over the same period in 2013.2

Many times the lawsuits in a geographic area are filed by one Plaintiff who visits a number of restaurants, retail establishments or shopping centers in a particular neighborhood over a short period of time. For example, in 2014, one individual Plaintiff filed 38 ADA lawsuits in the Middle District Court of Florida (covering roughly Jacksonville to Ft. Myers), and another Plaintiff filed 23 in the Southern District Court of Florida. Although it may seem daunting, business owners can stay ahead of the game - getting compliant and staying compliant is the key. This article will identify the risk factors specific to the retail and hospitality industry, and ways to minimize your and your insured's exposure.

A 25 Year-Old Law.

The Americans with Disabilities Act of 1990, as amended, is a federal statute which prohibits discrimination against individuals with disabilities by various entities. Although the ADA is comprised of five "titles," most private business owners are familiar with Titles I and III, since, unfortunately, those are the provisions most often enforced against them. Title I covers employers with 15 or more employees and prohibits discrimination in the employment context. Title III, which is the subject of this article, covers places of public accommodation.3 The statute provides an exhaustive list of 12 categories of public accommodations, which includes places of lodging, places serving food and drink, service establishments, sales and rental establishments and places of exercise and recreation, among others. 42 U.S.C. sec. 12181(7).

New vs. Old Construction and the 2010 Standards.

The provisions of Title III apply to all covered businesses as of January 26, 1993. There is no "grandfathering" in for older construction, which means that all covered entities are required to remove architectural barriers which prevent access unless such removal is not "readily achievable." Whether a modification or removal of a barrier is deemed readily achievable is defined in the regulations as "easily accomplishable" and that which does not require "much difficulty or expense." 28 C.F.R. sec. 36.304(a). Practically speaking, this requires a balancing test against the business’ resources, and may entitle a Plaintiff to discover a business’ net worth and income, if raised as a defense. Facilities or buildings that were constructed or altered prior to March 15, 2012, generally must comply with the 1991 ADA Standards for Accessible Design. Any new construction or alternations which take place on or after Mach 15, 2012, generally must comply with the more rigorous 2010 Standards. Full compliance with the 2010 Standards is not required only if the entity can establish that it is structurally impracticable to meet the requirements, which is defined as "those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. sec. 36.401(c)(1).
The "Motherload."

So what is it that makes ADA such a legal minefield? Fees, fees and more fees! A Plaintiff may recover injunctive relief (an order from the court requiring the business to comply with the law), and his or her attorney’s fees and costs, including expert fees. Oftentimes, the Plaintiff's fees can quickly eclipse the cost of actually making the compliant modifications, which is why early resolution is often urged in ADA cases. Although the statute provides that either prevailing party may recover its attorney's fees, a Defendant generally may only recover fees if "the court finds that the Plaintiff's action was frivolous, unreasonable, or without foundation . . . ." Technical Assistance Manual, sec. III-8.5000. This is a very difficult burden to overcome.

Risk Factors for the Retail and Hospitality Industry.

Some of the most common areas targeted by Plaintiffs at retail establishments, restaurants and other hospitality industry entities include:

- Parking Lots: number, size and location of accessible parking spaces and paths of travel;
- Valet Parking: existence of an accessible passenger loading zone;
- Entrances: maneuvering clearance, door hardware and opening force;
- Restrooms: turning space, accessible water closets (stalls), lavatories (sinks), and mirrors;
- Sales, Service and Check-out Counters: walking surface, counter height/depth and knee/toe space;
- Dining Tables (bars, tables, lunch counters and booths): number, size and location of tables, structural strength, and knee/toe space; and
- Pools: accessible means of entry (e.g., lift, slope, transfer wall).

Additionally, all business owners should be aware of the ADA’s provisions with respect to service animals. Only dogs, and in some circumstances miniature horses, are recognized as service animals under the ADA. Generally, a service animal is permitted to accompany a person with a disability in all areas where members of the public are permitted. Only limited inquiries are allowed regarding service animals, and staff may never ask about the person’s disability, require medical documentation or documentation about the animal. Every business should have a written policy regarding service animals, and train its employees on this policy, so as to avoid violations of the ADA in this area.

But I'm Just the Landlord
But I'm Just the Tenant!

The ADA permits landlords and tenants to allocate responsibility for compliance with the ADA within a lease agreement. However, such an agreement is effective only among the parties - both the landlord and tenant both remain fully liable for compliance with all provisions of the ADA - meaning the Plaintiff can sue either or both the landlord or tenant, and the existence of the agreement is not a defense to the lawsuit.

The Silver Lining.

Certainly, getting in and staying in compliance by way of regular ADA inspections and modification (where necessary) is the best way to avoid a lawsuit. But if your or your insured's business, like thousands of others in Florida, becomes the target of an ADA lawsuit, all hope is not lost. Generally, an ADA complaint will look like a boilerplate document, and will contain a laundry list of alleged violations, sometimes citing items not even available at your location (e.g., a buffet counter at a sit-down restaurant). Notwithstanding, any business faced with an ADA suit should immediately retain an experienced and qualified ADA expert to inspect the property and identify potential violations, and to make recommendations for remediating any violations. The business should then undertake measures to get in compliance with the ADA as quickly as possible.
Under certain circumstances, if a Defendant can remedy all violations, and show there is no reasonable expectation it will re-establish the discriminatory barriers, the Plaintiff’s claim may be rendered moot and dismissed by the court, and Plaintiff may not be entitled to attorney’s fees. Petinsky v. Gator 13800 NW 7th Ave. LLC, No. 13-21955-CV-KING, 2014 WL 1406439 (S.D. Fla. Apr. 10, 2014) (holding that because Defendant made structural changes and brought the property into compliance with ADA after Plaintiff filed lawsuit, Plaintiff’s claim was moot, Plaintiff was not the prevailing party and was therefore not entitled to recover attorney’s fees). While the Petinsky case is the best case scenario (and is rather uncommon), it is also an example of a best practice: identify any possible violations right away, and make the modifications as quickly as possible. Even though a court may not be as swift to deny your Plaintiff all of his or her fees, you can stop the clock ticking on those fees by remedying any violations, and set up an early (and hopefully cost effective) resolution.


3Title III of the ADA states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations or any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. sec. 12182(a).