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ADA Litigation: Are The Courts Finally Getting It Right?

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Law360, New York (August 4, 2015, 3:10 PM ET) -- The Americans with Disabilities Act was enacted in 1990 to provide civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age and religion. The ADA guarantees equal opportunity and equal access for individuals with disabilities in public accommodations, recreational facilities, employment, transportation, state and local government services and telecommunications.

Although the U.S. Department of Justice has the power to enforce the regulations of the ADA, the number of private lawsuits aimed at enforcing the ADA has skyrocketed across the country over the past few years. That is no doubt due to a provision in the ADA which provides for attorneys' fees to a plaintiffs attorney and the lack of any notice provision.

In 2014 alone, nearly 5,000 ADA lawsuits were filed across the country. These lawsuits have been aimed at property owners and businesses, including owners of multifamily apartments, retail spaces, office buildings and hotels — all of which have been prime targets. Places of public accommodation, such as shopping centers, stores, restaurants and coffee shops, have also been hard hit. Lawsuits can consist of a broad range of allegations including, but not limited to, failure to provide compliant stores, check-out aisles, restrooms, guest rooms, sidewalks, parking spaces, levels within retail spaces and discrimination in service. Defending an ADA lawsuit is an expensive proposition. At a minimum, a facility needs to hire and pay its own counsel, design and pay for the required modifications, pay plaintiffs attorneys' fees, and perhaps also indemnify its landlord and/or defend its tenants.

Until recently, the courts seemed hesitant to put the brakes on plaintiffs' attempts to collect exorbitant legal fees. But toward the end of 2014 and in the beginning of 2015, the Southern and Eastern Districts of New York seem to have begun to recognize the bad faith "hold up" nature of the lawsuits (i.e., they are geared to line the pockets of plaintiffs and plaintiffs attorneys rather than to uphold the meritorious purpose of the law).

As explained more fully below, in at least three recent decisions, the courts of these districts have begun to accept defendants' applications to stay lawsuits to allow the defendants time to modify their properties. Doing so achieves the meritorious purpose of the law — making public accommodations more accessible to disabled individuals — while

concurrently limiting the financial gain to the plaintiffs and their attorneys.

ADA Background

Enacted in 1990, the ADA guarantees equal opportunity and equal access for individuals with disabilities in, among other places, public accommodations (i.e., places open to the general public), recreational facilities and places of employment. Title III of the ADA regulates "public accommodations, privately operated entities offering certain types of courses and examinations privately operated transportation, and commercial facilities."[1]

Public accommodations are facilities operated by private entities whose operations affect commerce. In essence, public accommodations are just about any store, restaurant or other service establishment anyone uses on a daily basis. The public accommodations generally fall into at least one of 12 categories, which are: (1) a place of lodging; (2) a restaurant, bar or other establishment that serves food or drink; (3) a motion picture house, movie theater, concert hall, stadium or other place of exhibition or entertainment; (4) an auditorium, convention center lecture hall or other place of public gathering; (5) a bakery, grocery store, clothing store, hardware store, shopping center or other sales or rental establishment; (6) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, show repair service, funeral parlor, gas station, office of an accountant or lawyer pharmacy, insurance office, professional office of a health care provider, hospital or other service establishment; (7) a terminal, depot or other station used for specified public transportation; (8) a museum, library, gallery or other place of public display or collection; (9) an amusement park, park, zoo or other place of recreation; (10) a nursery, elementary, secondary, undergraduate or postgraduate school or other place of education; (11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service establishment; and (12) a gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation.[2]

The ADA prohibits public accommodations from denying individuals and classes of individuals the opportunity to "participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations or a place of public accommodation."[3] The ADA also prohibits public accommodations from affording individuals or classes of individuals unequal opportunities to participate or benefit in a good, service, facility, privilege, advantage or accommodation.[4]

Public accommodations may not give disabled individuals separate benefits, put them in unintegrated settings or deny them opportunities to participate in programs because of their disabilities. In essence, public accommodations must not discriminate in any sense of the word, be it by possessing physical barriers to access, excluding, segregating or treating unequally disabled individuals. Public accommodations must often put in place reasonable modifications to policies, practices and procedures for accommodating and/or serving disabled customers. These accommodations may include effective communication with people with hearing, vision or speech disabilities and other access requirements.

Existing Facilities and Alterations

Most frequently, places of public accommodation in existing facilities (those built prior to Jan. 26, 1992) must remove physical barriers to access to their properties to the extent it is "readily achievable to do so."[5] "Readily achievable," in turn, means "easily accomplishable and able to be carried out without much difficulty or expense."[6] The "readily achievable" standard takes numerous factors into consideration, including: (1) the nature and relative cost of making the modification(s); (2) the overall resources of the site or sites involved; (3) the geographic separateness and relationship of the site(s) to any parent entity; (4) the overall resources of any parent entity; and (5) the type of operation of any parent entity.[7]

For example, ‘‘readily achievable’’ for a small family-owned boutique may mean one thing while for a large, international hotel chain or sprawling shopping center, it will mean something different; a large hotel chain claiming that modifications to its premises are not ‘‘readily achievable’’ due to “difficulty and expense” is not likely to be a reasonable excuse for noncompliance. Regardless, the DOJ recognizes that compliance with the ADA is an ongoing obligation and public accommodations may need to alter or modify their equipment and accessibility over time as the needs and structure of their property and programs change.

New Construction

New construction, which consists of facilities designed and constructed for first occupancy after Jan. 26, 1993, is subject to an even more stringent standard. Full compliance is required unless an entity can demonstrate that it is “structurally impracticable” to meet the requirements of the law.[8] “Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.”[9] Furthermore, even if performing one modification may be structurally impracticable, compliance with the ADA is required for any portion of the facility that can be made accessible to the extent that it is not structurally impracticable.[10]

Alterations

“Any alteration to a place of public accommodation or a commercial facility, after Jan. 26, 1992, should have been made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities.”[11] Alteration is defined very broadly to include “remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangements in the plan configuration of walls and full-height partitions.”[12] “Normal maintenance, re-roofing, painting or wallpapering, asbestos removal or changes to mechanical and electrical systems are not alternations unless they affect the usability of the building or facility.”[13]

Additionally, ‘‘to the maximum extent feasible’’ means that the provisions of the ADA must be adhered to unless the nature of the existing facility makes it “virtually impossible to comply fully with the applicable accessibility standards through a planned renovation.’’[14] This means that for existing construction, if a facility was modified or altered in almost any way, such alteration should have been performed so as to make the facility compliant with the ADA.

Private Enforcement of the ADA

Although the DOJ has the power to enforce the regulations of the ADA, the number of private lawsuits aimed at enforcing the ADA has skyrocketed across the country over the past few years. That is no doubt due to a provision in the ADA which provides for attorneys’ fees to a plaintiffs attorney.

The Southern District of New York alone has seen a tremendous increase, from 45 cases filed in 2009 to 181 filed in 2011 to 256 in 2014 — an over 550 percent increase. Approximately 181 ADA accessibility lawsuits already have been filed in the Southern District of New York in the first half of this year, putting 2015 on a pace for having close to 400 ADA accessibility lawsuits in the Southern District of New York alone — a nearly 900 percent increase in only six years. No public accommodation is immune.

The lawsuits are costly and time-consuming. Even if the parties are able to reach an early settlement, defendants are routinely required to: (1) pay their own attorneys to defend the lawsuit; (2) pay the plaintiffs attorney in the settlement; (3) pay to perform modifications,

which can be costly; and in some cases, (4) indemnify and/or defend their landlord or property owner. Often the plaintiffs' attorneys will insist on voluminous discovery which is ultimately without legal purpose. So what can a defendant do to comply with the law, minimize its risk of lawsuit and when a lawsuit is filed, defend itself in the most effective way possible?

With no lawsuit pending, a public accommodation should be proactive; engage an attorney to arrange for a comprehensive review, advise on making the property accessible and protecting itself from a lawsuit. Once a lawsuit is filed, there are two options: (1) fix then fight or (2) fight for the time to fix.

Fix then fight is simple: perform whatever modifications are demanded by the plaintiff, as quickly as possible. Performing the modifications prior to answering the complaint is ideal; then a defendant may be able to file a motion to dismiss in lieu of an answer on the ground that the demanded injunctive relief is moot.[15] But it is very unusual for a public accommodation to be able to move that fast. More likely, the required modifications take time to perform; sometimes a public accommodation will need to hire an architect, draw plans, hire contractors and then actually do the work. During this time the plaintiffs' attorneys are serving and insisting on voluminous discovery, depositions, filing motions to compel and doing whatever they can do increase their fees and in turn, their settlement demands. Until recently, there was no way to combat the holdup.

Modification Stay: SDNY and EDNY Judges Are Catching On

Some judges of the Southern District of New York have recently put a stop to the bad faith litigation tactics employed by many plaintiff attorneys by granting defendants' requests to stay the litigation, limiting the amount of attorneys' fees that plaintiff attorneys can collect and acknowledging, directly and indirectly, plaintiffs' bad faith litigation tactics. A stay allows defendants to perform modifications to their property without having to engage in discovery at the same time. One team of judges got it "just right" and their rulings should set a precedent for how ADA litigation should be handled across the country when the claims are meritorious but plaintiff litigation tactics are not.

Once a defendant agrees to bring its property into compliance, the clock on plaintiff attorneys' fees should be stopped. Earlier this year, U.S. District Judge Katherine B. Forrest and Magistrate Judge Lisa Margaret Smith recognized a plaintiff's bad faith litigation tactics and put an immediate stop to both his tactics and his attorneys' fees bill.

The judge's tag teamed: Judge Smith recognized, and publicly pronounced, the plaintiff's bad faith litigation tactics. In a docket entry for the matter she stated, "The court concludes that plaintiff's approach to settlement was in bad faith, and recommends that if plaintiff is the prevailing party in this case, then attorneys' fees which may be sought should not be granted beyond the date of this settlement conference, or should be significantly reduced."[16]

Following Judge Smith's docket entry, we requested a stay of the litigation so that our client would have time to perform modifications to its shopping center property. Judge Forrest granted the stay, ruling that a stay of an ADA matter to enable the defendants to perform modifications "achieves an important public interest without delay," ensures that merits, rather than fees, drive the litigation process and ensures that the parties do not "run up legal and expert fees that are reasonably likely to be utterly without ultimate purpose ..."[17]

The court has just released the transcript of the settlement conference wherein Judge Smith strongly reprimanded the bad faith conduct of plaintiffs' attorney. Other judges of the Southern District of New York have also recognized other plaintiffs' bad faith litigation tactics and consequently ruled similarly.[18] As the Southern District determined in

Gropper, it would be "wasteful" to continue discovery and to litigate these issues now; a stay "would not work a hardship, inequity or injustice to a party, the public or the court."[19] The courts are finally catching on and doing something about it.

Upon the expiration of the stay, a defendant will likely file a motion to dismiss. With all modifications complete, at that point, it should be undisputed that defendants have remedied the alleged access barriers and they will not be reasonably likely to recur. In such a case, hopefully the district court judges will recognize that defendants have complied with the letter and spirit of the ADA and dismiss the case, awarding limited (or no) attorneys' fees to plaintiff attorneys who filed the case for only that purpose.[20]

Although it is refreshing to see that the courts are finally catching on, public accommodations would still be well served by inspecting their properties and policies proactively, before being hit with a costly private ADA lawsuit or DOJ investigation.

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[1] http://www.ada.gov/cguide.htm

[2] 28 CFR Part 36, Subpart B, § 36.104 (definition "place of public accommodation")

[3] § 36.202

[4] §§ 36.202, 36.203

[5] § 36.304(a)

[6] § 36.104 (definition "readily achievable"); see also § 36.304

[7] Id.

[8] 28 CFR Part 36, § 36.401(c)(1).

[9] Id.

[10] Id.

[11] 28 CFR. Part 36, § 36.402(a)(1)

[12] Id. at § 36.402(b)(1)

[13] Id.

[14] Id. at § 36.402(c)

[15] See, e.g. Bacon v. Walgreen Co., No. 14-cv-419 (JFB)(ARL), 2015 U.S. Dist. LEXIS 35184, at * 10 (E.D.N.Y. March 20, 2015) (granting motion to dismiss where defendant remedied access barrier); Brenchley v. Vill. of Phoenix, No. 5:01-cv-0190, 2005 U.S. Dist. LEXIS 48212 (N.D.N.Y Sept. 30, 2005); Nat'l Alliance for Accessibility Inc. v. Walgreen Co., No. 3:10-cv-780-J-32-TEM- 2011 U.S. Dist. LEXIS 136171 (M.D. Fla. Nov. 28, 2011).

[16] Feltenstein v. Wykygyl Associates HJ LLC, 1:14-cv-4797, Docket Entry, March 18, 2015.

[17] Feltenstein v. Wykygyl Associates HJ LLC, Order of Judge Katherine B. Forrest 1:14-cv-4797, Docket Entry 29 (April 3, 2015) (staying ADA matter for six months so defendants could perform modifications).

[18] See, e.g. Range v. 480-486 Broadway LLC et al., Order of Judge Lewis A. Kaplan, 1:14-cv-2447, Docket Entry/Document 26 (Oct. 7, 2014) (staying ADA matter for two years to enable defendants to perform modifications) (appeal pending); Gropper v. Fine Arts Hous., 12 F.Supp. 3d 664, 672-674 (S.D.N.Y. 2014) (staying ADA matter for 16 months so that defendant could perform modifications).

[19] Gropper, 12 F.Supp. 3d 664 at 672-674.

[20] See, e.g. Bacon, 2015 U.S. Dist. LEXIS 3518, at *10 (Judge Joseph F. Bianco, E.D.N.Y. March 20, 2015), citing cases (dismissing ADA matter as moot where defendant modified alleged barrier).