The Other ADA:

Defending Title III Public Accommodation Litigation

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No 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 of 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. §12182(a).

I. What Does Title III Cover?

A. Places of public accommodation must "ensure full and equal enjoyment of goods, services, facilities, privileges, advantage, or accommodations" by the disabled. (42 U.S.C. §12182)

1. Broad definition of place of public accommodation
    a. A facility operated by a private entity whose operations affect commerce and fall within at least one of 12 categories (42 U.S.C. §12181(7)(A)(-L); 28 C.F.R. §36.104)
    b. 12 categories—hotels, restaurants, theaters, professional offices (42 U.S.C. §12181(7))
2. What is not a place of public accommodation?
    a. Condominium owners association in which condominiums are individually owned, even if held out for rental to public. *Dunn v. Phoenix West II, LLC, Phoenix West II Owners Association, Inc.*, 2016 WL 740294 (S.D.Ala. 2016).
    b. Private clubs and religious organizations (42 U.S.C. §12187)

B. Obligations are different than Title I (Employment) and Title II (State and Local Government)

1. More than reasonable accommodation-- affirmative obligations for accessibility when readily achievable even before a disabled person shows up
2. Age of the facility and when it was last altered matters
    a. If built or altered before 3/15/2012-- 1991 Standards for Accessible Design applies (safe harbor) but must meet 2010 Standard if "readily achievable".
    b. If built or altered on or after 3/15/2012--2010 ADA Standards for Accessible Design apply (28 CFR part 36, subpart D, and the 2004 ADAAG at 36 CFR part 1191, appendices B and D)

C. DOJ is the watchdog—can initiate an investigation or intervene

II. Is a Website a Place of Public Accommodation?

(Appendix A Article)

A. Increased consumer use of websites (particularly in hotel and retail industries), means a lot of commerce is done over the web and not at a brick and mortar location. Website challenges are the flavor of the month for plaintiffs' access lawyers

1. Question of accessibility to blind, visually impaired and deaf users who may need
    a. Screen reader technology
    b. Voice synthesizers and text-to-speech conversion software
    c. Text magnification/enlargement tools

d. "Alt-tags"—embedded, written descriptions for photographic, video, or audio content

2. A tester doesn't have to leave his or her house—just surf the net

B. Circuit split on whether websites are covered—must the website have nexus with a physical place of public accommodation?

1. Website not covered—Third and Sixth Circuits. Title III only applies to physical structures—and a website is clearly not a physical structure.

a. *Peoples v. Discovery Financial Services, Inc.*, 387 Fed.Appx. 179 (3d Cir. 2010). Blind plaintiff's ADA suit sought to recover prostitute's excessive charges to his Discover card. **HELD:** Credit card company was not a "place" of public accommodation and alleged discrimination did not relate to physical property the company owned.

b. *Ford v. Schering-Plough Corp*., 145 F.3d 601, 612 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place. . . .")

c. *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (holding that "a public accommodation is a physical place")

2. Websites likely covered—First, Second and Seventh Circuits—no need for a no nexus to a physical facility.

a. *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England*, 37 F.3d 12 (1st Cir. 1994)—by including "travel service" on the list of examples, Congress presumed to include service establishments beyond brick and mortar sites that conduct business remotely.

b. *Morgan v. Joint Administration Board, Retirement Plan of the Pillsbury Co. and American Federation of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001)—"An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store."

c. *Pallozzi v. Allstate Life Ins. Co*., 198 F.3d 28, 32-33 (2d Cir. 1999). Title III was "meant to guarantee [the disabled] more than mere physical access."

3. It depends—Ninth and Eleventh Circuits—Title III covers both tangible and intangible barriers assuming a sufficient nexus to a physical place

a. *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1115 (9th Cir. 2000) (holding that an insurance company administering an employer-provided disability plan is not a place of public accommodation)

b. *Rendon v. Valleycrest Productions, Ltd*. 294 F.3d 1279, 1283 (11th Cir. 2002)(holding that no ADA provision limits claims for discrimination based on screening or eligibility requirements to brick and mortar locations)

4. Illustration: *Kidwell v. Florida Commission on Human Rights and SeaWorld Entertainment, Inc.*, No. 16-cv-00403 (M.D. Fla. Jan. 17, 2017). Disabled plaintiff alleged that SeaWorld did not provide him with an electric wheelchair or allow his two service dogs entry. The court held that the plaintiff did not have standing to bring these claims because there was no threat of imminent harm. *The plaintiff also alleged that SeaWorld's website was not accessible to individuals with disabilities. Court held that SeaWorld's website is not a physical or*

public place under the ADA. Plaintiff failed to demonstrate how SeaWorld's website precluded access to a specific, physical, concrete space.

C. Governing Standards for Website Accessibility under Title III?
   1. Not yet
   2. DOJ Advance Notice of Potential Rulemaking in 2010
      a. Later said no proposed regulations expected before 2018
      b. Predictions: (1) Web-based content must be accessible so long as the proprietor markets goods and services that fall within the categories of public accommodations contained in the statute; (2) "accessible alternatives"—*e.g.*, a staffed telephone line to access the information, goods, and services available on the website—will satisfy Title III.
      c. The Trump Administration and de-regulation
   3. DOT has rules under Air Carrier Access Act
      a. Covered airlines are required to make websites that contain core travel information and services accessible to persons with disabilities.
      b. The standard for accessibility is measured by compliance with the Website Content Accessibility Guidelines 2.0.
      4. DOJ and counsel in civil litigation have signed off on settlements where a company agrees to make its website compliant with the Level AA success criteria of the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0.

III. What Is a Place of Public Accommodation's Obligations Under Title III?

A. Nondiscrimination against the disabled. Discrimination includes (42 U.S.C. §12182(b)(2)(A)(iv) and (v)):
   1. A "failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . ., where such removal is readily achievable; and
   2. If you can demonstrate that barrier removal is not readily achievable, "a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable."

B. What does "readily achievable" mean? (Appendix B Regulations)
   1. 42 U.S.C. §12181(9)-- readily achievable means ". . . easily accomplishable and able to be carried out without much difficulty or expense." Factors to be considered include—
      a. Cost—"the nature and cost of the action needed";
      b. Facility's resources—the overall financial resources of the facility or facilities involved; the number of employees at the facility; or the impact otherwise on operations
      c. Covered entity's resources—the overall financial resources of the covered entity; size of the business/number of employees; the number, type, and location of facilities
      d. Type of operations—"the composition, structure, and functions of the workforce"; geographic separateness, administrative or fiscal relationship of the facility or facilities to the covered entity

C. Case law

1. Plaintiff showing noncompliance with ADAAG standard does not equal ADA violation—still must show removal of the barrier is readily achievable. *Access now, Inc. v. Southern Florida Stadium Corp*., 161 F.Supp.2d 1357 (S.D.Fla. 2001).
2. Readily achievable is not just about cost—*Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005)—can't result in legal obligations that would have substantial impact on operations, and cannot pose direct threat to the health or safety of others.
3. Don't have to destroy historic buildings—*Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269 (11th Cir. 2006)—barrier removal is not "readily achievable" if it would threaten or destroy the historic significance of the building

D. Value of an audit

1. Checklist for Readily Achievable Barrier Removal—http://www.adachecklist.org/checklist.html.
2. Hire outside consultant and document reasons for not making changes and efforts to come into compliance (*i.e.*, businesses have an ongoing obligation to attempt to come into compliance).

IV. What to Do When You Get a Lawsuit

(Appendix C Article)

A. Check out the plaintiff

1. Any history at the store (sales, visits, etc.)
2. Litigation history—almost always a serial plaintiff
3. Needs an injury—barrier actually impacted this plaintiff

B. Check out the facility

1. Check for dates of construction and alteration to determine what standard applies.
2. Don't assume the facts as stated in the complaint, no matter how official they look.
3. Don't just look at the allegations in the complaint—look everywhere because the original complaint may not limit discovery. *Doran v. 7-Eleven Inc.*, 524 F.3d 1034 (9th Cir. 2008) (once plaintiff has established standing about one barrier to access, entitled to discovery to identify other barriers).
4. Make easy fixes. Signage, accessible routes, etc.
5. Look at client's other locations for compliance as well.

C. Check for insurance coverage (unlikely) or indemnity provisions in construction contracts

1. Address ADA compliance in design and construction contracts
2. Make sure workers understand compliance

D. Plaintiff's damages problem

1. No civil penalties but individuals have private right of action and can bring enforcement actions and seek injunctive relief. 42 U.S.C. §12188.
2. No fees unless plaintiff secures a judgment on the merits or a court-ordered consent decree, even if the plaintiff "achieved the desired result because the lawsuit brought about

a voluntary change in the defendant's conduct." *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598 (2001).

E. The avalanche of letters scaring people and the importance of not overreacting or assuming you are in trouble
    1. Steps to take when you get the threatening letter.
        a. Determine coverage and standing
        b. Figure out how much client wants to spend to defend it
        c. Hire an expert
        d. Fix it (but make sure you do it right)
    2. Settlement agreement will not bar a subsequent accessibility lawsuit by a different plaintiff
    3. State AGs fighting back
F. Expansion of brick-and-mortar claims? *See Gomez v. Target Corp.*, No. 17-cv-20488-CMA (S.D. Fla. Feb. 7, 2017) (alleging that Target violated the ADA because the in-store "Price Reader kiosks … were not equipped with auxiliary aids for the visually impaired.").

Appendix A

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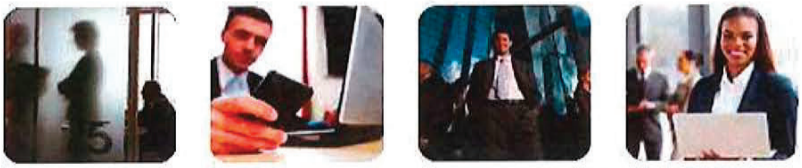

Customer Connection

The Newsletter of the Retail and Hospitality Committee

Is a Website a "Place" of Public Accommodation? A Primer on Internet Accessibility

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Places of public accommodation are required by law to ensure "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" by the disabled. 42 U.S.C. § 12182. Nowhere is this more evident than in the hospitality sector and likely something Congress had in mind specifically when it passed Title III of the Americans with Disabilities Act of 1990. Having considered all the primary points of access to your location, however, is it possible you missed the biggest one: your website?

The internet has evolved to become a—if not *the*—primary method by which consumers access goods and services available to the public. Hotels in particular have experienced explosive growth in the number of rooms booked via their websites; according to data from hotel cloud technology provider TravelClick, reservations made via hotel websites increased 6.8 percent in the fourth quarter of 2014 alone. Not surprisingly, with increased consumer use of websites, cyberspace has become one of the hottest new frontiers in public accommodation law.

But debate rages as to whether the term "place," as used in Title III of the ADA, includes electronic spaces as well. In practice, the extent to which the law requires use of specialized technology to make websites for places of public accommodation accessible to persons with disabilities may very well depend, at least for the time being, on where you live.

How Does the Technology Work?

In the not-so-distant past, websites and applications consisted exclusively of visual interfaces and lacked non-visual means of operation. Technological advances, however, have revolutionized the manner in which disabled individuals access Internet content.

Individuals with vision-based disabilities can access the Internet through use of a screen reader, which translates web content into text that is either read aloud by a voice synthesizer or translated by a Braille device. Individuals with impaired vision use screen readers to read text aloud and navigate websites with keystrokes. Additional changes to the format or layout of the webpage can assist those with a multitude of other vision-based impairments—for example, individuals with color blindness will typically benefit from higher contrast, individuals with low vision can be accommodated with a magnifier to enlarge the text beyond simple font enlargement, etc. For the hearing-impaired, audio content can be replaced by text-based transcripts and video content can include closed captioning, and text-to-speech conversion software can also be used by certain individuals with cognitive, language, and learning disabilities.

Because the process used by screen readers is necessarily linear as opposed to holistic, webpages designed and coded with screen readers in mind are more easily read and understood by the software. Screen reading programs, for example, cannot recognize text embedded in images, decipher online forms, or in many cases track non-linear webpage designs that were created without the disabled in mind. Likewise, the effectiveness of other forms of assistive technology may depend on whether the webpage has been designed and coded to accommodate

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the needs of those with disabilities. Consequently, this technology may require a re-design of your company website. Furthermore, it is entirely unclear whether third-party content on websites must meet the same standards. In terms of guidance, Web Content Accessibility Guidelines developed by the World Wide Web Consortium contain a wide-range of recommendations for making Web content more accessible to people with a wide variety of disabling conditions, including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity, and/or combinations of these. It is important to note, however, that at present there is no legally-binding technical standard governing Internet accessibility.

Title III of the ADA

Title III requires places of public accommodation to:

> 1. make "reasonable modifications" to policies and procedures wherever necessary to render services accessible to individuals with disabilities, so long as the modifications would not fundamentally alter the nature of such services;
>
> 2. ensure that individuals with disabilities are not "excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," unless taking such action would fundamentally alter the nature of the public accommodation or constitute an undue burden; and
>
> 3. remove structural barriers to the use of the facility, whether architectural or communicational. Where an entity can demonstrate that the removal of a structural barrier is not readily achievable, it must provide access by way of alternative methods to the extent such methods are readily achievable.

See §12182(b)(2)(A)(ii)–(v).

State of the Case Law

Courts have struggled to fit the square peg of Title III's statutory language into the round hole of Internet content. At present, the Circuits are split on whether the term "public accommodation," as used in Title III, is limited to physical structures or whether it has a broader meaning that could potentially apply to cyberspace as well.

While Web-based services did not exist when the ADA was passed, all of the examples of public accommodations listed in the statute—with the possible exception of the term "travel service" in § 12181(7)(f)—are physical places. Accordingly, U.S. Courts of Appeal for the Third and Sixth Circuits have concluded that Title III applies only to physical structures. See, e.g., *Peoples v. Discover Fin. Services, Inc.* (3d Cir. 2010) and *Parker v. Metropolitan Life Ins. Co.* (6th Cir. 1997) (*en banc*). A website clearly is not a physical place. Accordingly, while the holdings are limited to the facts presented, courts in these jurisdictions are not likely to entertain legal challenges to the accessibility of Web-based content brought by disabled individuals.

By contrast, the First, Second, and Seventh Circuits have all refused to limit the scope of Title III to physical structures. In *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, for example, the First Circuit reasoned that by including "travel service" on the list of examples, Congress presumed to include service establishments that do not require a brick and mortar site and may conduct business remotely. Likewise, the Seventh Circuit observed that "[a]n insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store." *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am. Fed'n of Grain Millers, AFL-CIO-CLC* (7th Cir. 2001). The Second Circuit in *Pallozzi v. Allstate Life Ins. Co.* (2d Cir. 1999) noted that Title III was "meant to guarantee [the disabled] more than mere physical access." Consequently, the accessibility of Web-based content in these jurisdictions would likely be judged by the same standard as a physical structure.

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The Ninth and Eleventh Circuits have fashioned an intermediate approach, holding that Title III covers both tangible barriers and intangible barriers assuming a sufficient nexus to a physical place. *Rendon v. Valleycrest Productions, Ltd.* (11th Cir. 2002); *Weyer v. Twentieth Century Fox Film Corp.* (9th Cir. 2000). Courts in these jurisdictions would likely apply Title III's accessibility standards to the Internet wherever it could be shown that the challenged services are heavily integrated with brick-and-mortar places of public accommodation and operate as a gateway to those places of public accommodation.

Given the above, the issues of forum selection and specific personal jurisdiction are uniquely consequential. For example, what if a hotel chain is incorporated and headquartered in Delaware (the Third Circuit) but the disabled individual attempts unsuccessfully to access the website in New York (the Second Circuit)? Does it matter if the hotel also maintains brick and mortar locations in various jurisdictions? While courts have generally declined to assert jurisdiction over an out-of-state defendant on the basis of Web advertising alone, active contacts such as Internet sales to residents in that forum, or even the volume of website traffic from citizens of the forum state, could suffice as minimum contacts sufficient to validate litigation proceedings in that forum.

Impending Regulation?

To date, Congress has not sought to legislate Internet accessibility standards, and the ability of state legislatures to intervene is uncertain given the lack of clarity as to whether states are empowered to regulate the Internet under the Commerce Clause. However, the U.S. Department of Justice (DOJ), as the agency responsible for enforcing Title III, has taken the position that the ADA applies to Web-based content so long as the proprietor of the website markets goods and services that fall within the categories of public accommodations contained in the statute. Additionally, the DOJ is currently in the process of formulating regulations that would codify requirements for website accessibility, although it announced recently that no proposed regulations should be expected prior to fiscal year 2018 (website regulations applicable to state and local governments, however, may be issued sooner). Consequently, the near future may offer little in terms of regulatory clarity.

Internet accessibility rules for airlines, promulgated by the U.S. Department of Transportation (DOT) under the authority of the Air Carrier Access Act, may provide a glimpse of where the DOJ intends to go. Under the DOT's new websites-and-kiosks rule, covered airlines — *i.e.*, domestic and foreign airlines with websites marketing air transportation to U.S. consumers for travel within, to, or from the United States — were required within two years of the effective date to make websites that contain core travel information and services accessible to persons with disabilities, and to make all webpages accessible within three years. Significantly, the standard for "accessibility" is measured by compliance with the Website Content Accessibility Guidelines referenced above.

Conclusion

Courts continue to grapple with the scope of Title III, and many questions remain unanswered. While it is unlikely that the DOJ will publish Internet accessibility regulations applicable to private businesses in the near future, places of public accommodation subject to Title III would be well-advised to be proactive and should consider retaining a consultant to review their websites for compliance with the Level AA success criteria of the Web Content Accessibility Guidelines 2.0.

Appendix B

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Disability Law Index - Public Accommodations: Readily Achievable Barrier Removal

- Statutes
- Regulations
- Case Law

Statute:

42 U.S.C. § 12182(b)(2)(A) - Prohibition of discrimination by public accommodations

For purposes of subsection (a) of this section, discrimination includes -

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and (v) where an entity can demonstrate that the removal of a barrier under clause

(iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

42 U.S.C. § 12181(9) - Definition - Readily achievable. *See also* 28 C.F.R. § 36.104.

The term readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. In 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.

Regulation:

28 C.F.R. § 36.304 - Removal of barriers

(a) General - A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) Examples - Examples of steps to remove barriers include, but are not limited to, the following actions--

(1) Installing ramps;
(2) Making curb cuts in sidewalks and entrances;
(3) Repositioning shelves;
(4) Rearranging tables, chairs, vending machines, display racks, and other furniture;
(5) Repositioning telephones;
(6) Adding raised markings on elevator control buttons;
(7) Installing flashing alarm lights;
(8) Widening doors;
(9) Installing offset hinges to widen doorways;
(10) Eliminating a turnstile or providing an alternative accessible path;
(11) Installing accessible door hardware;
(12) Installing grab bars in toilet stalls;
(13) Rearranging toilet partitions to increase maneuvering space;
(14) Insulating lavatory pipes under sinks to prevent burns;
(15) Installing a raised toilet seat;
(16) Installing a full-length bathroom mirror;
(17) Repositioning the paper towel

dispenser in a bathroom;
(18) Creating designated accessible parking spaces;
(19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
(20) Removing high pile, low density carpeting; or
(21) Installing vehicle hand controls.

(c) Priorities - A public accommodation is urged to take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.

(1) First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

(2) Second, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, providing Brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.

(3) Third, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation

of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.

(4) Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(d) Relationship to alterations requirements of subpart D of this part

(1) Except as provided in paragraph (d) (2) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404-36.406 of this part for the element being altered. The path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(2)

(i) *Safe harbor*. Elements that have not been altered in existing facilities on or after March 15, 2012,and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii)

(A) Before March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with either the 1991 Standards or the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406 (a)(5).

(B) On or after March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406 (a)(5).

(iii) The safe harbor provided in § 36.304(d)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (i.e., elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows –

> (A) *Residential facilities and dwelling units*, sections 233 and 809.
>
> (B) *Amusement rides*, sections 234 and 1002; 206.2.9; 216.12.
>
> (C) *Recreational boating facilities*, sections 235 and 1003; 206.2.10.
>
> (D) *Exercise machines and equipment*, sections 236 and 1004; 206.2.13.
>
> (E) *Fishing piers and platforms*, sections 237 and 1005; 206.2.14.
>
> (F) *Golf facilities*, sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities*, sections 239 and 1007; 206.2.16.

(H) *Play areas*, sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms*, sections 241 and 612.

(J) *Swimming pools, wading pools, and spas*, sections 242 and 1009.

(K) *Shooting facilities with firing positions*, sections 243 and 1010.

(L) *Miscellaneous*.

(1) Team or player seating, section 221.2.1.4.

(2) Accessible route to bowling lanes, section 206.2.11.

(3) Accessible route in court sports facilities, section 206.2.12.

Appendix to § 36.304(d)

Compliance Dates and Applicable Standards for Barrier Removal and Safe Harbor

Date	Requirement	

		Applicable Standards
Before March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards must be modified to the extent readily achievable. Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	1991 Standards or 2010 Standards
On or after March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards or that do not comply with the supplemental requirements	2010 Standards

	(i.e., elements for which there are neither technical nor scoping specifications in the 1991 Standards) must be modified to the extent readily achievable. Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
Elements not altered afterMarch 15, 2012	Elements that comply with the requirements for those elements in the 1991 Standards do not need to be modified.	Safe Harbor

(3) If, as a result of compliance with the alterations requirements specified in paragraph (d)(1) and (d)(2) of this section, the measures required to remove a barrier would not be readily achievable, a public accommodation may take other

readily achievable measures to remove the barrier that do not fully comply with the specified requirements. Such measures include, for example, providing a ramp with a steeper slope or widening a doorway to a narrower width than that mandated by the alterations requirements. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) *Portable ramps*. Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) *Selling or serving space*. The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

(g) *Limitation on barrier removal obligations*.

(1) The requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for alterations in subpart D of this part.

(2) To the extent that relevant standards for alterations are not provided in subpart D of this part, then the requirements of § 36.304 shall not be interpreted to exceed

the standards for new construction in subpart D of this part.

(3) This section does not apply to rolling stock and other conveyances to the extent that § 36.310 applies to rolling stock and other conveyances.

(4) This requirement does not apply to guest rooms in existing facilities that are places of lodging where the guest rooms are not owned by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners.

Case Law:

***Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).**

- "Title III does not define "difficulty" ... but use of th disjunctive-"easily accomplishable and able to be carried out without much difficulty or expense"-indicates that it extends to considerations in addition to cost."
- A barrier removal that would bring a vessel into noncompliance any international legal obligation, would create serious difficulties for the vessel and would have a substantial impact on its operation, and thus would not be "readily achievable."
- A structural modification is not readily achievable i it would pose a direct threat to the health or safety of others.

***Doran v. 7-Eleven Inc.*, 524 F.3d 1034 (9th Cir. 2008).**

- Once a Title III plaintiff has established that he ha standing to sue with respect to one barrier, he or

she may conduct discovery to determine what, if any, other barriers affecting his or her disability existed at the time he or she brought the claim.

***Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043 (9th Cir. 2008).**

- Wheelchair user sued winery because it had refused to remove barriers in a historic building.
- Winery had duty to remove barriers inside the building even though the outside barrier removal, an external ramp leading into the building, may not be readily achievable.
- "The inaccessibility of entry to one group of individuals does not justify retaining barriers to access inside the building for all others who may safely gain entry. Where readily achievable, the interior of the building must be made accessible for all who may enter."

***Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269 (11th Cir 2006).**

- In the context of an historic building, "barrier removal would not be considered 'readily achievable' if it would threaten or destroy the historic significance of the building.

***Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership*, 264 F.3d 999 (10th Cir. 2001).**

- Plaintiff must initially present evidence tending to show that the suggested method of barrier removal is readily achievable under the particular circumstances.
- If Plaintiff does so, Defendant then bears the ultimate burden of persuasion that barrier removal is not readily achievable.

***Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000).**

- The term, readily achievable, is not unconstitutionally vague. Taken together with administrative regulations and interpretations, the term is sufficiently specific to put the owner of a public accommodation on notice of what is required by Title III.

***First Bank Nat. Ass'n v. F.D.I.C.*, 79 F.3d 362 (3rd Cir 1996).**

- In considering what is "readily achievable" with respect to removal of architectural barriers, the "readily achievable" standard necessarily includes a temporal element.
- What is easy to accomplish in one year may not be easily accomplishable in one day so a determination of what is "readily achievable" depends upon the passage of time.

***Hubbard v. 7-Eleven, Inc.*, 433 F.Supp.2d 1134 (S.D. Cal. 2006).**

- Although the ADAAG guidelines do not apply to facilities existing before the ADA's effective date, they "provide valuable guidance for determining whether an existing facility contains architectural barriers".

***Grove v. De La Cruz*, 407 F.Supp.2d 1126 (C.D. Cal. 2005).**

- Proposed barrier removal was readily achievable even if lease agreement between tenants and lessors prohibited tenants from making physical alterations to the property.
- A landlord and tenant are permitted to allocate responsibility for compliance with the ADA by lease, but such allocation is effective only "[a]s

between the parties. Provisions of lease had no affect on tenants' obligations to patron and other members of the disabled community.

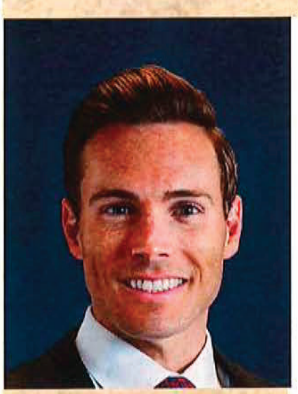
***Access Now, Inc. v. South Florida Stadium Corp.*, 161 F.Supp.2d 1357 (S.D.Fla. 2001).**

- The ADA does not require ADAAG compliance of existing facilities; accordingly, the court could not determine the defendants' liability from finding that elements of the stadium deviated from those standards.
- The ADAAG nevertheless provide "valuable guidance" for determining whether an existing facility contains architectural barriers. A finding of noncompliance is not tantamount to finding an ADA violation; plaintiff carries the additional burden of showing that removal of the barriers is readily achievable.

Appendix C

Strategies for Defending ADA Accessibility "Tester" Lawsuits

By Matt Anderson



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Matt is an attorney and partner in the Phoenix law firm of Jaburg Wilk where he concentrates his practice on the defense of retailers, restaurants, property owners and hospitality entities. He has expertise with cases involving high-exposure liability. For questions about this article or the recent increase in these types of cases, Matt can be reached at 602.248.1000 or mta@jaburgwilk.com

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In the last 15 months, nearly 1000 complaints alleging ADA accessibility violations have been filed by three individual plaintiffs against Arizona commercial property owners, retailers, restaurants, and hospitality entities. These "tester" cases assert nearly identical allegations related to insufficient handicap parking, improper construction of restroom facilities and check-out counters, and, in the case of hotels, failure to provide a pool lift. Two of the plaintiffs claim to reside in Arizona and one resides out of state, but all three seek the same remedies: injunctive relief to retrofit the property and attorneys' fees and costs.

Although businesses are on notice of these lurking claims, little has been written on whether and how to defend them. Now, however, we have the benefit of 15 months of procedural history in these tester cases to teach us what works, what doesn't work, and why.

Legal Framework

The initial reaction of most business owners is: "this customer never even visited my business, or only visited once, how have they been harmed under the ADA?" Arizona district court judges have routinely ruled, coupled with other considerations, that a minimum threshold is necessary to survive a motion to dismiss. Indeed, there have been over 10 motions to dismiss filed in the current wave of ADA tester cases, all alleging lack of standing, yet none have been successful (one motion was granted, but afforded the plaintiff leave to correct her complaint).

To maintain an ADA claim, a disabled plaintiff must suffer an injury that is "concrete and particularized" and "actual or imminent." Concrete and particularized is established when the plaintiff personally encounters the barrier complained of or is deterred from visiting the public accommodation as a result of the barrier. Actual or imminent is established when the plaintiff is either currently deterred from patronizing a public accommodation due to the defendant's noncompliance or threatened with harm in the future because of existing or imminently threatened noncompliance. However, **without an actual intent to return, a plaintiff has suffered neither an actual nor imminent injury, and thus has no standing.** "Intent to return" is generally the element most susceptible to attack because a plaintiff's filing of multiple ADA lawsuits can undercut the credibility of his or her expressed intent to return. In analyzing the "intent to return" element, courts also consider the purpose for which the plaintiff initially visited the business; if there was only one visit, was it to enjoy the business's services, or was it for the purpose of filing a lawsuit?

Defense Strategies and Considerations

First, ensure that the plaintiff's allegations of ADA deficiencies are legitimate. To do this, have an ADA-savvy contractor or architect survey the premises. This is also the way to prevent future suits—a business's voluntary correction of an alleged barrier renders a prospective plaintiff's ADA claim moot. Also, remember that under the ADA, a business must only bring its premises into compliance when "readily achievable" to do so. The ADA defines readily achievable as easily accomplishable and able to be carried out without much difficulty or expense (relative to the size of the business). According to the ADA, "this is a flexible, case-by-case analysis, with the goal of ensuring that ADA requirements are not unduly burdensome, including to small businesses."

Second, consider serving written discovery and taking the plaintiff's deposition to assess the plaintiff's claimed intention to return to the business if retrofitted. Just because the complaint says the plaintiff intends to return doesn't mean this allegation shouldn't be explored. This is especially true when the plaintiff resides out of state, has filed numerous similar lawsuits, or has only visited the business on one occasion, if at all. Remember, the plaintiff's ADA lawsuits against other businesses increases the likelihood that the court will find that the plaintiff lacks standing.

Strategies for Defending ADA Accessibility "Tester" Lawsuits

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Third, if the plaintiff's settlement demand is unreasonable, file an early offer of judgment under Rule 68, FRCP. If the plaintiff doesn't beat the offer at trial, he or she must pay costs (but not attorneys' fees) incurred after the offer was made. By forcing the plaintiff to have skin in the game, he or she may reconsider whether your case is the one worth fighting.

Fourth, be mindful of a potential investigation by the Arizona Attorney General. If there are verifiable ADA barriers, and it would be readily achievable to remove those barriers, do so. By statute in Arizona, the AG "shall investigate" alleged ADA violations, and if the investigation leads to the AG filing suit, the court "may" award monetary damages to aggrieved persons and fine the business $5,000 for a first violation and $10,000 for any subsequent violation.

Lastly, if scorched earth is your preference, consider filing a counterclaim against the plaintiff. This has been done in other jurisdictions based on theories of abuse of process (alleging the plaintiff's ulterior purpose for filing suit) and conspiracy to commit tortious acts. Unfortunately, it does not appear that any such counterclaims have been successful.

The takeaway message is that although these tester cases are bothersome and feel like extortion, businesses are wise to take these cases seriously because there is no end in sight. New cases continue to be filed weekly, sometimes daily. Formulate a plan with your attorney and take affirmative steps to ensure your interests are protected.

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