How to Defend a Title III ADA Accessibility Claim

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Jennifer Heitman is a Partner at Wilson, Elser, Moskowitz, Edelman & Dicker, LLP. Wilson Elser is a full-service law firm with 23 offices across the U.S. and in London, and lawyers admitted to practice in 40 states. The firm provides international scope through its network of affiliate firms in France, Germany and Mexico.

Jennifer's practice is focused on counseling and defending the hospitality industry with regard to compliance with Title III of the Americans with Disabilities Act. She has successfully represented hotels, motels and other places of public accommodation that have been sued or are under investigation by the Department of Justice or New York State Department of Human Rights for alleged violations of ADA, FHA, and similar state and city laws. Jennifer is an experienced state and federal court litigator whose practice extends to matters involving premises liability, security guard liability, construction site accidents and labor law claims. Her clients include contractors, municipalities, property owners, independent businesses and hotels. Jennifer is a skilled advocate, effectively and efficiently representing her clients at every stage of litigation from preliminary investigation of a claim to resolution by mediation or trial. Her practice also includes matters involving insurance coverage, specifically coverage analysis and litigation.

Jennifer is a member of the firm's Hospitality Industry Initiative, General Liability & Casualty Practice Group, Employment Practice Group, Insurance-Reinsurance Coverage Practice Group, Associate Mentor Program and Diversity Committee. Prior to joining Wilson Elser, she was an Assistant District Attorney in Bronx County.

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I. Introduction

In light of the current political climate, new regulations, higher priorities assigned by the Federal government, and private litigants seeking world-wide compliance, Title III claims may increase significantly in the coming years. Hotel and restaurant owners and operators need to know how to defend cases with the least exposure to future claims and at the lowest total cost.

The cost of Title III ADA lawsuits stem from the substantial amount of money businesses spend in the form of renovations to their establishments and attorneys' fees – to both the plaintiffs' attorney and their own. The ADA permits any disabled person who is denied access to a place of public accommodation or commercial facility because of his or her disability to bring a claim against the business for injunctive relief, demanding that the business become compliant. The ADA also permits a plaintiff to recover reasonable attorney's fees, costs and expenses in bringing the claim. Certain states have even implemented a monetary award to successful Title III litigants.

If your property is in compliance with Title III of the ADA, then a resolution strategy is best built around dismissal of the lawsuit based on both the merits and on available procedural grounds. If your property is not in compliance, then the best resolution strategy focuses on minimizing the alterations necessary to resolve the claim or investigation, and minimizing plaintiff's recoverable attorney's fees.

The best defense is a good offense. To minimize the chance of litigation or investigation, bring your facilities into compliance. A comprehensive ADA compliance assessment is essential. Whether the claim arrives at your doorstep in the form of a Department of Justice investigation or private litigation, the best protection will be the documents showing that an ADA compliance assessment has been completed and that an action plan for barrier removal is in place. The compliance assessment should include your facilities, reservation systems, websites and Telecommunication Relay Service capabilities.

II. Title III of the Americans with Disabilities Act

The first President Bush signed into law the Americans with Disabilities Act ("ADA") over 21 years ago. Congress' intent in passing the ADA was to eliminate discrimination against millions of Americans with disabilities by establishing clear, consistent, and enforceable standards. The act was declared to be "the most sweeping piece of civil rights legislation possible in the history of our country, but certainly since the Civil War era." It is indisputable that the positive effects of the ADA are far-reaching throughout the country on both a social and economic level. However, since the enactment of the ADA, places of public accommodations have faced an increase in law enforcement investigations and private litigation.

The Americans with Disabilities Act of 1990 ("ADA") issued by the Department of Justice was first published in the Federal Register at 28 CFR Part 36 (revised July 1, 1994). The ADA Accessibility Guidelines For Buildings and Facilities ("ADDAG") is found in Appendix A of the Title III Regulations.

In July 2010, the Department of Justice revised the regulations. The 2010 Standards provides the scoping and technical requirements for new construction and alterations resulting from the adoption of revised 2010 Standards in the final rules for Title III. The official text was published in the Federal Register on September 15, 2010 and corrections to this text were published in the Federal Register on March 11, 2011. Appendix A includes a section-by-section analysis of the rule and responses to public comments on the proposed rule. Appendix B discusses major changes in the ADA Standards for Accessible Design and responds to public comments received on the proposed rules. The 2010 ADA Standards for Accessible Design and are known as the "2010 Standards", with the original regulation referred to as the "1991 Standards".

On March 15, 2012, compliance with the 2010 Standards will be required for new construction and alterations. In the period between September 15, 2010 and March 15, 2012, covered entities may choose between the 1991 Standards and the 2010 Standards (except for newly covered elements).

A. Public Accommodations & Commercial Facilities

Title III applies to places of public accommodation and commercial facilities. A public accommodation is a private entity that owns, operates, leases, or leases to, a place of public accommodation. Places of public accommodation include a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Public accommodation and commercial facilities are defined in the ADA as follows:

Place of public accommodation is defined as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories:

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;
(2) A restaurant, bar, or other establishment serving food or drink;
(3) A motion picture house, 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, shoe 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) A park, zoo, amusement park, or other place of recreation;
(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Commercial facilities means facilities:

(1) Whose operations will affect commerce;
(2) That are intended for nonresidential use by a private entity; and
(3) That are not

(i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631);
(ii) Aircraft; or
(iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

Commerce means travel, trade, traffic, commerce, transportation, or communication:

(1) Among the several States;
(2) Between any foreign country or any territory or possession and any State; or
(3) Between points in the same State but through another State or foreign country.

B. The Applicable Standard

There are no exceptions to ADA compliance for a place of public accommodation or a commercial facility – existing properties are not "grandfathered". There are only different standards to apply depending on whether your property is considered an existing facility, whether construction or alterations are completed by March 15, 2012, or whether the elements concerned are newly covered by the 2010 Standards.

Compliance with the 2010 Standards is required for all future construction and alterations completed after March 15, 2012.

Compliance with the 2010 Standards by March 15, 2012 is required, without exception and without regard to when the element was constructed or altered, for newly covered elements. Newly covered elements are those elements for which there are neither technical nor scoping specifications in the prior 1991 Standards. These elements include recreation facilities such as swimming pools, team or player seating, accessible routes in court sports facilities, saunas and steam rooms, fishing piers, play areas, exercise machines, golf facilities, miniature golf facilities, amusement rides, shooting facilities with firing positions, and recreational boating facilities. There are new rules related to reservations and ticketing. Because these elements were not included in the 1991 Standards, they are not subject to the safe harbor exemption. Public accommodations must remove architectural barriers to these newly covered elements when it is readily achievable to do so.

For existing properties, the analysis starts with whether the property existed before 1993. If your construction or alteration was completed before 1993 and no alterations were made since January 26, 1992, then readily achievable elements must comply with either the 1991 Standards or 2010 Standards by March 15, 2012. If your construction or alteration was completed before 1993 but an individual element was altered after January 26, 1992 and such alteration complies with the 1991 Standards, then the element falls within the safe harbor provision of the 2010 Standard and does not need to comply with the 2010 Standard. If your construction or alteration was completed before 1993 but an individual element was altered after January 26, 1992 and such alteration does not comply with the 1991 Standards, then the element must comply with the 1991 Standard or the 2010 Standard by March 15, 2012.

For properties that were constructed or altered after 1993, if the individual element complies with 1991 Standards, then the element falls within the safe harbor provision of the 2010 Standard and does not need to comply with the 2010 Standard. If the individual element does not comply with 1991 standards, then the element must comply with the 1991 Standard or the 2010 Standard by March 15, 2012.

Readily achievable means that removal of a barrier must be “accomplishable and able to be carried out without much difficulty or expense.” Whether any modification is “readily achievable” depends on many factors. These criteria include the nature and the cost of the modification; the overall financial resources of the business in question; the number of persons employed at the facility; and the impact of removing the barrier on the operation of the facility. Under this fact-based test, what may be “readily achievable” for a small local business will be far different from what might be required of a larger organization.

III. The Title III Claim: Misconceptions

Title III claims can arrive in the form a Department of Justice investigation or a private lawsuit. Private individuals may bring lawsuits in which they can obtain court orders to stopdiscrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a pattern or practice of discrimination is alleged. For the most part, Title III claims or investigations result in an agreement for removal of accessibility barriers. However, in cases where the Attorney General finds a pattern or practice of discrimination, monetary damages and civil penalties may result. Civil penalties may not exceed $55,000 for a first violation or $110,000 for any subsequent violation.

The hospitality industry is an easy target for a Title III claim. The requirements set forth in the Standards number in the hundreds. Compliance can be overwhelming as nearly every aspect of your facility is affected; from heights of countertops and mirrors, to pressure needed to open swinging doors, to location of grab bars. There are over 90 technical requirements for bathrooms alone, and to make it even more complex – different requirements for elements depending on its location, such as grab bars in single toilet bathrooms and restroom stalls.

There are several common misconceptions about the ADA, which still persist despite the fact that the ADA was first enacted over 21 years ago. To best defend against the Title III ADA claim, do not rely on common misconceptions and be sure you property is in compliance with the ADA.

A. Pre-Litigation Notice Not Required

Title III does not have any requirement to exhaust administrative remedies or provide notice before filing in federal court. Thus, it is possible that your first notice of a Title III related complaint will come in the form of a lawsuit. While there has been some effort by Congress to pass a "Notification Act", bills of this type have not emerged after being referred to the House Committee on the Judiciary. Over the years, accessibility advocates have opposed the implementation of notification requirements because it is believed that such requirements would encourage establishments to wait for "notice" before they address ADA compliance.

B. Compliance with Building Codes Offer No Protection

There is no requirement that local building codes and ordinances comply with the ADA. Therefore, obtaining a building permit does not translate to compliance with the ADA.

However, the ADA allows the Attorney General to certify that a State law, local building code, or similar ordinance that establishes accessibility requirements meets or exceeds the minimum accessibility requirements for public accommodations and commercial facilities. Any State or local government may apply for certification of its code or ordinance. The Attorney

General can certify a code or ordinance only after prior notice and a public hearing at which interested people, including individuals with disabilities, are provided an opportunity to testify against the certification.

Certification can be advantageous if an entity has constructed or altered a facility according to a certified code or ordinance. If someone later brings an enforcement proceeding against the entity, the certification is considered "rebuttable evidence" that the State law or local ordinance meets or exceeds the minimum requirements of the ADA. The entity can argue that the construction or alteration met the requirements of the ADA because it was done in compliance with the State or local code that had been certified.

C. Plaintiff Can Recover Attorney's Fees, Costs & Expenses

The ADA permits courts to award attorneys' fees to the "prevailing party." This has become a primary motivation for attorneys to bring these actions. Often, the recovery of the plaintiff's attorney's fees, costs and expenses is a key reason that a suit is filed in the first place. Therefore, it is unlikely that an attorney will voluntarily give up its right to recover fees, costs and expenses even in light of an early settlement of the claim. If you do not have a successful defense to a Title III claim, you may not only end up paying fees and expenses for your own attorney and expert, but the fees and expenses of the plaintiff's attorney and expert.

Efforts to reduce the plaintiff's recoverable attorney's fees and expenses should not be underestimated. Generally, courts are reluctant to disallow the entire amount on the basis that such a determination would be unfair. However, once it is determined that plaintiff is entitled to recover attorney's fees and expenses, then the plaintiff's attorney and expert invoices should be closely scrutinized for questionable charges. In a settlement, the plaintiff's attorney is more often than not willing to negotiate its fees and expenses, albeit minimally, in order to close out a case. Where it can be shown that a plaintiff and attorney have pursued multiple Title III litigation where the cases involve identical legal issues and similar factual issues, or where cases involved complaints containing the same boilerplate language, a court may be convinced that the duplicitous nature of the litigation and the garden variety action that lacks complexity warranted a reduction in fees.

D. The Vexatious Plaintiff

To prevail under Title III, a non-employee plaintiff must show: (1) he or she is disabled; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of the plaintiff's disability. However, there are some arguments available to battle the vexatious litigant.

The challenge to the "professional" plaintiff begins with a challenge to the plaintiff's standing. To establish standing, a plaintiff must establish three things: (a) that he suffered an

injury in fact - an invasion of a legally protected interest which is concrete and particularized, actual or imminent, not conjectural or hypothetical; (b) that there must be a causal connection between the injury and the conduct complained of; and, (c) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Accordingly, the credibility of plaintiff's complaints of a causal connection and redressability should be attacked. The focus should be on the number of ADA lawsuits filed, the frequency that the plaintiff settled the lawsuit (trading accessibility compliance for a cash settlement), the merits of the claims brought, and whether the plaintiff did actually return to establishment after alleging an intent to do so.

Although there are a few cases where the courts have dismissed the action commenced by a vexatious plaintiff, neither the U.S. Supreme Court nor most of the Circuit Courts have explicitly addressed this issue. Also, the courts are divided on whether the litigation history of a plaintiff is relevant when considering whether a plaintiff has standing. Nevertheless, when seeking dismissal of an action, efforts should be made to convince a court that the plaintiff's real motivation for a Title III action was to extract money from the defendant in a quick settlement. Further, it should be requested that the court require vexatious plaintiff's to seek leave of court before filing additional suits.

IV. Best Practices

Whether your organization owns, manages, or leases a single property or portfolio of properties that fall within the definition of public accommodation or commercial facilities, you should be critically evaluating what your organization is doing to meet the quickly approaching deadline. March 15, 2012 will be here in the blink of an eye. Although time is limited, it is not too late to conduct an assessment and bring your property into compliance with the ADA.

A. Written Compliance Assessment

If you have not yet completed a comprehensive ADA compliance assessment of your property as well as your written policies and procedures, that should be the first thing on your "To Do" list. A written compliance assessment will be the most critical piece of paper in defending against any future investigation or litigation.

With March 15, 2012 right around the corner, your immediate game plan should include the following: Review elements that will be subject to stricter or different specifications under the 2010 Standards. If these elements are not compliant with the 1991 Standards, decide whether to bring them into compliance with the 1991 Standards to take advantage of the safe harbor. Bring into compliance with the 2010 Standards any newly covered elements to the extent doing so is "readily achievable". Revisit plans for upcoming alterations or new construction to confirm compliance with the 2010 Standards. Modify reservations systems to comply with new requirements and contact your ATM provider to add communication features in accordance with

the 2010 Standards. Be sure that you have a written policy for other power-driven mobility devices. Review and update your effective communication policy as well as your service animal policies based on new regulations and state/local requirements. Revise event ticketing policies.

B. Maintaining ADA Compliance

Challenges to ADA compliance come from both inside and outside your organization. Preventing ADA mistakes are less expensive if they are found during the design or early construction stages. You should review all plans for common ADA mistakes before construction starts. Once construction of a new facility is completed, it can be very costly to bring the property into compliance. Nevertheless, ADA mistakes should be fixed as soon as they are discovered.

1. Through the Design & Construction Phase

To reduce the likelihood of ADA mistakes, early and frequent communication with your building contractor and architect is imperative. Both should have copies of the ADA requirements and should participate in the design and construction process along with the franchisor's design and construction staff. Your architect and construction team will prioritize ADA compliance only if you do. Although you might think that the importance of ADA compliance is common knowledge by now, you will only be at a disadvantage if you do not emphasize to the architects, building contractors, and interior designers that compliance with the ADA is a top priority. Architects and building contractors think in terms of building codes and engineering standards rather than civil rights. It is common for contractors to adapt to the materials they are given in the field even though it may result in a deviation from the plan. To reduce your liability, emphasize that ADA compliance is a civil rights issue where specific compliance is required as compared to a building code issue where variances are widely accepted. Whenever possible, insist on contract terms that require strict compliance with the ADA and obligate the architect and contractor to pay the cost of fixing any and all ADA mistakes found during and after construction. Approval of plans by a local building inspector only means that it meets the building code. Building inspectors do not check for ADA compliance. During construction, the architect and ADA consultant should visit the property often to monitor progress and confirm compliance. If your architect does not closely monitor the progress of the building contractors, you are taking a high stakes and unnecessary risk.

2. Surviving Routine Housekeeping & Repair

An ADA compliant property can quickly become non-compliant if the importance of ADA compliance is not impressed upon your employees at every level. Common ADA mistakes should be addressed during housekeeping and engineering training, with a revision of any written procedures and instructions that may effect ADA compliance. Special attention should be given to accessible guest rooms and other accessible areas throughout the property. A designated person or team to monitor ADA issues in each department may be warranted to ensure that routine housekeeping and repairs do not compromise your compliance.

V. Conclusion

The first step to defending a Title III claim is knowing your compliance status. The completion of a comprehensive written ADA assessment will prove critical. If your property is compliant with the applicable Standard, your response to an investigation or private lawsuit will rely on the written assessment, your action plan, and ADA-related budget. However, if your property is not in compliance, then your best defense strategy hinges on a quick cost-effective investigation that will minimize plaintiff's recoverable attorney's fees.

Once you are notified of a Title III lawsuit or investigation, immediately retain an attorney experienced in public accessibility claims. Title III claims are fairly straightforward. Either your facility is compliant with technical requirements or it is not. An experienced lawyer will know that he or she cannot change whether a facility is compliant, but will strive to minimize your legal costs and exposure. An attorney serving your needs for this type of claim should conduct a cost-effective investigation to determine areas of non-compliance, have knowledge of typical settlement values, and work to quickly negotiate away as many alleged violations as possible. If your facility is in compliance, then it is advisable to defend against the lawsuit by arguing that the property complies with the ADA and by asserting all available procedural challenges.

Legal counsel is essential to identifying cost-saving litigation strategies including dismissal of the lawsuit on procedural grounds. Often, the recovery of the plaintiff's attorney's fees, costs and expenses is a key reason that a suit is filed in the first place. Therefore, it is unlikely that an attorney will give up its right to recover fees, costs and expenses even in light of an early settlement of the claim.