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THE ADA DILEMMA: THE CHALLENGES OF INCREASING CLAIMS ON PROPERTY OWNERS

CONSTRUCTION

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In July of 1990 the U.S. Congress enacted the Americans with Disabilities Act (ADA) which was subsequently signed into Law by President George H.W. Bush. Title III of the Act, which seeks to eliminate discrimination from public accommodations, also created the *Americans with Disability Act Accessibility Guidelines* (ADAAG). These guidelines were designed to remove physical barriers and prohibit discrimination of those with disabilities in order to assure their full and equal enjoyment of goods, services, facilities, and privileges in provision of access to facilities of public accommodation. Places of public accommodation most customarily include facilities such as restaurants, hotels, theaters, retail establishments, offices, transportation facilities, and multi-family housing.

In the 25 years since the Act was passed into law, the interpretation of it has evolved, creating a level of ambiguity and confusion as to the applicability, enforcement, and necessary means by which property owners can assure compliance and the handicapped individual can achieve safer and convenient access. In the last five to ten years, there has been a dramatic increase in the number of lawsuits filed against property owners who unknowingly have physical barriers at their existing facilities; barriers that were, in most cases, created prior to the Act's adoption. This increase in lawsuits is mainly due to the fact that the only mechanism available to an aggrieved handicapped individual is a discrimination suit. While the validity of these suits can be debated, it is clear that many of these suits are beginning to provide property owners a clearer view of what to expect in terms of meeting the requirements of the law, and the ramifications of noncompliance. As more of these suits get adjudicated, both sides of the debate are starting to get more realistic with their expectation. The handicapped are starting to realize that not all barriers are removable but some improvement to their access is better than nothing; and facility owners realize that removing barriers, that can be removed easily, is the right thing to do.

ADA CLAIMS & HOW IT CAN AFFECT OWNERS AND DESIGNERS

Most recently, building owners and the legal community have referred to such accessibility lawsuits as "*drive-by*" or "*serial*" litigation as many ADA accessibility suits are filed by the same recurrent lawyer, on behalf of the same repeated discriminated plaintiff. What makes the ADA law somewhat different is that any individual who feels as though he or she may have been discriminated against, has the right to file a lawsuit. This is known as "*private right of action*". A private right of action is simply the right of an individual to enforce a federal regulation as opposed to the government enforcing its own regulation. In many instances the suits are served without any prior warning from plaintiff or counsel either through oral communication or a demand letter. Moreover, many times the suit is so vague as to leave the property owner with really no understanding of the alleged accessibility violation, leaving little opportunity for them to deploy a good faith fix. As the law allows, the legal fees incurred by the plaintiffs' counsel, as well as the cost for experts, are often demanded of the defendant as a prerequisite to begin detailed discussion about a repair protocol which, in most instances, leads to settlement and dismissal of the action, albeit with legal, expert, and repair costs typically being borne solely by the unsuspecting defendant property owner.

As a testament to the magnitude of this trend, various sources place the total number of suits being filed on a national basis between 3,800 and 4,100 just in 2014 alone; an approximate 25 percent increase from the prior year. This upward trend is likely to continue with a majority of the suits filed in three states; New York, California, and Florida. As an example, in one locale there were 45 suits filed by just a few plaintiffs with more than 30 of the cases handled by the same attorney. Another example shows the results of an assessment conducted in a small town on the west coast revealing just one plaintiff / counsel who filed more than 60 lawsuits. A common thread in most suits include alleged deficiencies such as vehicular parking inadequacies, improper accessible route slope, entry door and toilet room access and floor space challenges, grab bar and toilet accessory noncompliance such as soap dispenser and counter-height issues, and wheel chair accessible ramp access.

Another fact about the ADA that many property owners might not be aware of is that even though the law was enacted in 1990, it applies to **all** public structures regardless of when they were originally built. There is not a so-called "*grand-fathering*", or exempting of older structures. In fact, the ADAAG addresses existing facilities in that "*failure to remove*" an architectural barrier is "*discrimination*" however, the Act goes on to address the requisite removing of barriers as those that are "readily achievable", creating a balancing test between the cost to comply and the financial capability of the enterprise to bear the cost. Moreover, certain physical impediments in a structure, beyond mere financial impediments, may also impact the removal of barriers, wherein one may apply the expectation of the Law which states to the "*maximum extent feasible*". However, it is this very ambiguity in the terms that leaves the interpretation of the law to courts.

WHAT TO FOLLOW – CODE OR GUIDELINE?

The ADAAG is a guideline established by the U.S. Department of Justice (DOJ) and is not a code. Therefore, ADAAG is simply a guideline which individual states can adopt or modify. Some states choose to follow other standards that mimic ADAAG such as ANSI 117.1. What adds to the complication of this guideline is that simply following it does not necessarily ensure compliance with local or state codes. Since ADAAG is not a code, design professionals who design new buildings or the renovation of existing facilities, must execute diligence and be certain that their designs meet both the state code and ADAAG, which are not always aligned. When conflicts between ADAAG and the state code surface, the design professional has the onus of determining which non-aligned section is more stringent and their design must comply with the more stringent section. The determination of the more stringent section is not always obvious, and when interpreted incorrectly often becomes the subject of an error and omission lawsuit.

With new or newly renovated facilities, providing for the handicapped is a code requirement and handicapped individuals have the right to expect that these facilities are designed and constructed properly. Unfortunately, this is not always the case. Suits that arise from improper design, or implementation of the design in new facilities, are often much more costly and difficult to rectify. Negotiating some middle ground, which is often done for existing facilities, is usually not an option for newer buildings. Design errors in new facilities are more prevalent than one might expect.

In certain instances relating to residential portions of buildings, there is yet a third component to consider, which addresses accessibility: the Federal Fair Housing Act (FHA). Some states, like New Jersey, have compared both ADAAG and FHA and then compiled and adopted a code that meets or exceeds both guidelines thereby eliminating much of the ambiguity.

Design professionals are trained to interpret codes but trouble begins when the interpretation takes on ambiguity and thus relies on subjective interpretation of the individual. As architects with specific training of the ADA and the various codes and guidelines associated with the law, we often find violations even in new buildings that have gone through rigorous permitting and inspection scrutiny. These violations might be subtle but can be costly to correct, especially when revision to clear floor space is involved, which often necessitates partition and wall reconstruction. Remediating these violations incurs additional expense when they are discovered by a plaintiff and deemed discriminatory because not only must the physical repair be made, but the expert and legal fees are also compensatory.

IN CONCLUSION

The ADA is a noble law that has truly helped to provide reasonable accommodations for those in our society that are living with any form of disability. Results of the ADA have become part of our everyday life and can be as obvious as the handicapped parking stalls at the local grocery store or the handicapped stall in the public restroom; or the not so obvious, like the tone one hears when the elevator arrives at its floor. While the ADA has many good attributes, it also tends to cause uncertainty for building owners or tenants who must choose between upgrading their facility proactively, or being forced to upgrade by an ADA lawsuit.

As we are now mid-way through the third decade of ADA, the onslaught of litigation by so-called “serial” plaintiffs and counsel has begun to place building owners in potential peril. With the upward trend in the number of filed ADA suits, and the knowledge that there is no cost to the plaintiff for filing such suits, facility owners must realize that the likelihood of being the subject of such suits has and will continue to increase significantly. The pragmatic lessons learned from the recent history of the ADA suits and their outcome should be a warning to facility owners to proactively assess how their facilities can mitigate potential ADA claims in advance of litigation. Facility owners have an obligation to provide reasonable accommodation for handicapped tenants or patrons and the handicapped community have a right to expect that these accommodations will remove the impediment to their enjoyment of the facility. Unfortunately, the only means to the removal of these barriers is by filing an ADA lawsuit. Hence, the dilemma.

ABOUT THE AUTHORS

Richard Vivenzio is a Director in Navigant's Global Construction Practice. He is an architect with more than 31 years' experience in both design and the construction industry. He has extensive capabilities in the resolution of complex technical construction disputes involving property owners, design professionals, constructors and their insurers. Rich has served as a testifying expert in matters involving architectural standard of care, construction means and methods, water intrusion and exterior building envelope issues. Rich possesses a thorough working knowledge of Codes including legacy codes such as BOCA. Rich has been deemed an expert in matters involving the ADA and has assisted building owners in the resolution of ADA disputes and performed advisory services to owners who proactively choose to provide ADA upgrades.

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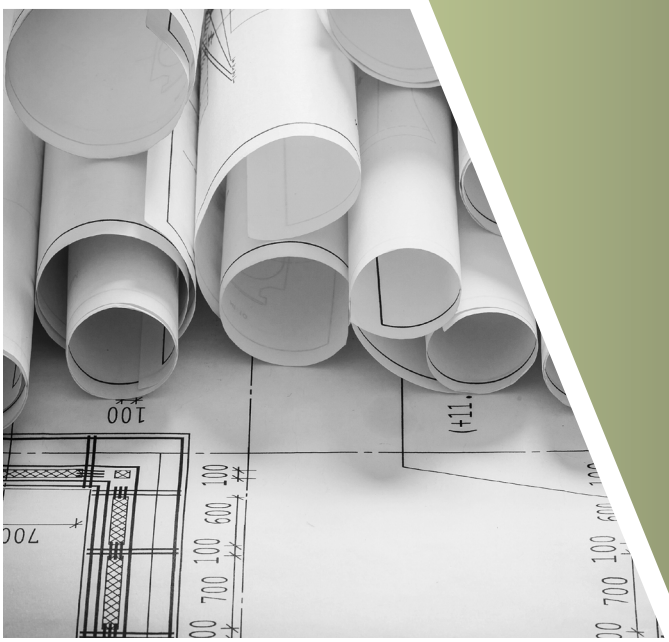

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