by KEITH ROZANSKI

MEASURING COMPLIANCE

A DISABILITY ACCESS CERTIFICATE MAY DISSUADE POTENTIAL PLAINTIFFS FROM FILING ADA SUITS

MORE THAN 40 PERCENT of all construction-related disability access suits filed nationwide are submitted in California courts.[1] In contrast to the federal Americans with Disabilities Act (ADA), which only affords injunctive relief,[2] California law allows plaintiffs to recover statutory damages and attorney's fees and costs each time they are denied full and equal access to places of public accommodation (e.g., hotels, restaurants, schools, and stores) because of a construction-related disability access violation related to a plaintiff's disability.[3]

A California business or property owner can minimize the risk of being sued by understanding what ADA compliance actually entails, clearly defining in leases or contracts who bears responsibility for meeting applicable legal requirements, and ensuring that appropriate compliance actions are taken. Even if a business or owner is sued, diligent efforts to comply with the ADA can reduce statutory awards and attorney's fees and costs.

The ADA "prohibits discrimination and ensures equal opportunity for persons with disabilities in…public accommodations, commercial facilities, and transportation."[4] Places of public accommodation built or altered after January 26, 1993, must be readily accessible and comply with the ADA's construction-related design standards.[5] Owners and operators of existing facilities are required to remove architectural barriers that impede access of disabled patrons when removal is "readily achievable."[6] If barriers cannot be removed, the property owner or business operator must provide access through alternative methods (also known as reasonable accommodations) if they are readily achievable.[7]

The ADA does not specifically define what constitutes "readily achievable" or provide guidelines as to the amount of time, expense, and effort that must be put forth to remove barriers before alternative methods may be employed. A few examples of alternative methods that have been successfully applied under the proper circumstances include providing home delivery or having

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someone retrieve merchandise from inaccessible racks or shelves.

At first glance, avoiding a construction-related disability access lawsuit appears deceptively simple; that is, the owner or operator merely has to construct or modify its store, restaurant, office complex, or shopping center in compliance with the construction-related standards of the ADA and California law. The number of disability access lawsuits filed in this state each year, however, demonstrates that compliance is not easy and raises the question of why so many business and property owners have failed to comply with the ADA in the 20 years since the construction-related provisions went into effect.[8] Plaintiffs and their attorneys may argue that it is because business and property owners do not want to incur the expense of compliance. Business and property owners, in turn, may claim that they 1) did not know that any ADA violations existed, or 2) believed they were in compliance because their local building department authorized construction, or 3) thought someone else was responsible for satisfying the ADA requirements.

ADA compliance is not automatically achieved by obtaining permits or other construction approvals from local building departments. Many building departments issue permits or approve construction work based solely on whether the construction project complies with the California Building Code (CBC) and local ordinances. However, these often differ from the ADA's construction-related design standards.[9] In 2012, the California Division of the State Architect published an online comparison of the 2010 ADA Standards for Accessible Design and the 2010 CBC Accessibility Standards that covers 2,000 different accessibility topics in more than 450 pages.[10] Differences include the size and spacing of Braille lettering required on signage, the location of flush controls on toilets, and how metric measurements are rounded.[11] The comparison also reveals that numerous ADA requirements are not addressed in the CBC.[12] Even if a building department official permits construction or grants an occupancy permit because the official believes the project satisfies ADA requirements, it does not insulate a defendant from suit if ADA violations are subsequently found.

Another worry for potential defendants is that construction standards differ. Unless a business or property owner can demonstrate compliance is not readily achievable in buildings constructed before January 26, 1993, only actual compliance with ADA construction-related design standards is acceptable. Current ADA design standards were published on September 15, 2010, and apply to all new construction and alterations begun on or after March 15, 2012.[13] Construction begun between September 15, 2010, and March 2012 may comply with either of the standards promulgated in 1991 or 2010. Construction undertaken prior to September 15, 2010, must comply with the 1991 standards.[14]

No matter how much diligence is exercised in trying to achieve ADA compliance, the probability exists that at least one or more technical violations of the ADA's design and construction standards may be found in a place of public accommodation. ADA standards regulate, at least in part, the construction of almost every facet of a place of public accommodation—the width of aisles, the height of counters, the parking lots, and the operation of door handles, for example.[15]

Plaintiffs and their attorneys often seek out basic violations to meet their burden of proof. Under California law, a "violation personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation."[16] Faced with the prospect of statutorily mandated attorney's fees,[17] defendants often settle quickly because they feel that the plaintiff's burden to prove "difficulty, discomfort, or embarrassment" is easy to meet. In addition, settling quickly also reduces the amount that plaintiffs are likely to demand in settlement because they will have expended less in attorney's fees.

While it is incumbent upon property owners, landlords, business owners, or any other responsible party to ensure that an entire property, including its structures and amenities (for example, fuel pumps) comply with disability access standards, special attention should be paid to areas frequently targeted by "professional" or "drive-by" plaintiffs. These areas should also be inspected regularly and every time that construction, repairs, or modifications take place.

Some of the most common areas for which violations are alleged are parking lots, public restrooms, and narrow aisles and walkways that prevent wheelchair access. Violations in a parking lot are especially attractive because they do not require plaintiffs to enter a building or even leave their vehicle. Common parking lot allegations include improper (or lack of) striping designating handicap parking spaces and walkways, improper signage, and grading (or slopes) that are too steep. One frequent allegation is the failure to post parking signs that indicate that a location is van accessible, preventing a disabled plaintiff from determining whether there are any parking spaces that will accommodate a van. Current standards require that one in every six accessible parking spaces be van accessible (i.e., 132 inches wide rather than 96) and contain signage indicating the space is van accessible.[18]

Claims of parking lot violations are often coupled with claims regarding bathrooms in order to elicit settlements from multiple sources (e.g., the property owner, landlord, store operator, and common area manager). Typical restroom-related allegations include mirrors and soap and towel dispensers that are mounted too high, grab bars surrounding toilets that are too far from the toilet to accommodate transfer from a wheelchair, noncompliant door handles and latches on restroom stalls, and sinks that lack insulation or wrapping on pipes to prevent persons in wheelchairs from scalding their legs on hot-water pipes when they approach to use the sink. Public restrooms are frequently vandalized and require constant maintenance and repair. As a result, repairs may be noncompliant. A mirror that was properly hung during initial construction may be inadvertently rehung too high. Even if the height is off by an inch or less, plaintiffs may still allege that because of this technical violation, they suffered difficulty or discomfort in trying to view themselves in the mirror. These allegations do not always mean that a plaintiff will prevail at trial. Defendants have successfully demonstrated that plaintiffs were not denied full and equal access from checking their appearance in a mirror by presenting evidence of other reflective surfaces at the premises that the plaintiff could have used.[19]

Under federal law, property owners, landlords, tenants and operators of places of public accommodation each bear responsibility for ADA compliance.[20] While these parties may reallocate responsibility for ADA compliance among themselves by contract, a plaintiff will still generally have a claim against each of them.[21] Commercial leases and other real estate contracts must be drafted to clearly delineate who will assume the duty to ensure compliance with ADA requirements. An ambiguous or poorly worded lease or contract often leads to strained relationships between landlords and tenants when disability access suits are brought, along with costly claims for indemnity and contribution as each party attempts to assign responsibility to the other. In the meantime, the plaintiff and his or her counsel may be incurring recoverable attorney's fees and costs on the underlying claim.

Common commercial lease provisions that create issues are those requiring the tenant to "comply with all applicable laws" and repair or maintain the property at the tenant's expense. Pursuant to these provisions, landlords expect that tenants will improve the property and bring it into compliance with current legal standards, thus allowing the

property owner to receive the property back at the end of the lease term in an improved condition.

Landlords, however, may not use these provisions to escape liability for ADA violations. In *Botosan v. Fitzhugh*, a federal district judge cited several grounds for refusing to relieve a landlord of responsibility for ADA violations when its commercial lease contained these provisions.[22] First, the landlord retained "substantial control" over the property; for example, the tenant could not make structural alterations to the premises without the landlord's consent. Second, "Under the ADA, liability attaches to landlord and tenant alike." Third, while the landlord argued that under the Code of Federal Regulations,[23] the parties could allocate responsibility for compliance among themselves, the court said this allocation did not mean that a party could insulate itself from liability to a third party. Finally, the court cited with approval an interpretation of this regulation made by the U.S. Department of Justice that if a tenant failed to remove a barrier, the tenant and the landlord would both be liable for that failure.

The DOJ noted that a landlord could seek indemnification from a tenant for any ADA violations. However, indemnification may not be available from a tenant or their own insurance company if ADA violations exist because of the landlord's own negligence or decision to refrain from making ADA modifications and repairs.[24]

CASp Certification

Since July 1, 2013, commercial landlords in California have been obliged to disclose in any new leases if the property has been inspected by a Certified Access Specialist (CASp) and if the building was determined to meet ADA and California state law design standards.[25] CASp is a state program enacted in 2003 to train and certify individuals who can "render opinions as to the compliance of buildings and sites" under the ADA and state codes and regulations for accessibility.[26]

Although the law does not impose an affirmative duty on a landlord to have the property inspected, this statutory lease provision should serve as a starting point for negotiations for allocating responsibility for compliance with disability access laws between the parties. Tenants may request CASp certification at the time they take possession of the property. Owners may negotiate to have tenants obtain CASp certification for improvements made by the tenant. Recognizing they will have to make disclosures regarding CASp certification if they lease the premises, prospective purchasers may ask current owners to make warranties regarding CASp certifications in a purchase contract or require that ADA compliance measures be taken before the close of escrow.

California affords some protection against suits filed in state court if a property has been inspected and certified by a CASp. A list of persons and firms qualified to provide CASp certification is available on the California Department of General Services Web site.[27]

Beginning this year, the Construction-Related Accessibility Standards Compliance Act requires local public agencies to "employ or retain a sufficient number of building inspectors who are certified access specialists to conduct permitting and plan check services to review for compliance with state construction-related accessibility standards by a place of public accommodation with respect to new construction, including, but not limited to, projects relating to tenant improvements that may impact access."[28] To further the goal of minimizing the inadvertent approval of projects that do not comply with federal and state access requirements, the act requires that building officials and architects meet continuing education requirements on the subject of disability access.[29] When a CASp finds that a property complies with applicable accessibility standards, property owners, landlords, tenants, and business owners may receive a Disability Access Certificate that can be displayed prominently. While receipt of a certificate does not preclude a disability access lawsuit from being filed, its display may dissuade professional plaintiffs and their attorneys from entering the property or filing suit. If the owner or tenant has taken the initiative to comply with disability access laws, plaintiffs may decline to file suit because they are satisfied that the property is ADA compliant, because they fear that any property owner or tenant who went through the expense of CASp certification is more likely to vigorously defend an ADA action than negotiate a quick settlement, or because they know it may result in a reduction in the statutory damages available under state law.

CASp certification does not provide a completely safe harbor, even if a local building department granted certification. If a plaintiff can prove that he or she encountered a disability access violation, a right to recovery still exists.[30] Certification may, however, entitle a defendant to a temporary stay and an early evaluation (settlement) conference if the complaint is filed in state court.

Beginning September 2012, the amount of statutory damages available to a plaintiff was reduced from $4,000 to $1,000 per encounter if a defendant demonstrates the alleged disability access violations were remedied within 60 days after the complaint was served and one of the following applies: 1) the property has been CASp certified, and no modifications or alterations affecting compliance with disability access standards took place after certification, 2) a CASp inspection is in process and the defendant has implemented reasonable measures to correct the alleged violation or was in the process of doing so when the plaintiff alleged they were denied full and equal access, 3) new construction or improvements were inspected and approved by a local building department official who is a CASp specialist and no significant alterations took place following certification, or 4) new construction or improvements were inspected and approved by a local building department on or after January 1, 2008, without any subsequent modifica-

tions.[31] Small businesses (defined as having 25 or fewer employees and gross receipts of less than $3.5 million) without CASp certification who have corrected or will correct all alleged violations within 30 days of receiving the complaint can also obtain a similar reduction in statutory damages from $4,000 to $2,000.[32]

Defendants who qualify for reduced damages may also be entitled to a temporary stay and an early evaluation (settlement) conference if the plaintiff files in state court.[33] In addition, CASp certification may be used as evidence that an alleged violation did not exist on the date alleged in the plaintiff's complaint.[34] Significantly, CASp certification may not allow a defendant to stay a federal case or force an early settlement conference. Several federal district courts in California have already refused the applications of defendants for stays and early settlement conferences because the procedural aspects of state law conflict with the corresponding provisions of federal law.[35] This is not to say that a defendant in federal court is bereft of potential procedural advantages. If defendants remedy an alleged ADA violation before final adjudication, they may move to have the court dismiss the plaintiff's federal claim for injunctive relief as moot. The court may then decline to exercise supplemental jurisdiction on the remaining state law claims for damages and dismiss the entire complaint.[36]

If served with a state court complaint, defendants and their counsel should immediately determine if they qualify for a potential stay and early evaluation conference. Regardless of whether the complaint is filed in federal or state court, defendants would be well advised to review the terms of all leases or contracts for the property to determine who bears responsibility for compliance with disability access laws and be prepared to tender the action if contractual responsibility or indemnification belongs to another party. Consideration should also be made as to who else may be responsible for alleged violations including, but not limited to, contractors who constructed the property or made repairs, common area managers retained to maintain the parking lot and other common areas surrounding the property, and any architect who designed the property or any renovations.

Equally important, a CASp should be retained to confirm or deny the existence of the violations alleged in the complaint as well as all other potential violations that may exist at the property. If violations are found, they should be remedied immediately. Finally, defense counsel may also benefit from attempting to contact the plaintiff's counsel immediately upon receipt of a suit. Many attorneys who represent plaintiffs in these actions are often willing to produce photographs of the alleged violations. This will help defense counsel in quickly identifying the alleged construction-related violations and assist in evaluating whether to defend or settle a matter.

Property owners or operators of a place of public accommodation cannot completely insulate themselves from a plaintiff and attorney who are determined to file a disability access lawsuit. In addition, it does not appear that the proliferation of disability access litigation suits will subside anytime soon. While a few courts have been willing to rule that some attorneys and plaintiffs are vexatious and have precluded them from filing further suits, most courts are unwilling to take this step.[37] However, knowing what does and does not constitute ADA compliance, identifying who the potentially responsible parties are under a lease or contract, and seeing that compliance measures are actually undertaken can minimize the risk that a suit will even be filed or limit recoverable damages, fees, and costs if one is filed. ■

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[1] *See* http://www.adacrisis.com/californiascrisis/ca42ofusadasuits.html; Tom Nichol, *Targeting ADA Violators,* CALIFORNIA LAWYER, Apr. 30, 2013; Michael Glueck, *A Common Sense Solution to Frivolous ADA lawsuits,* ORANGE COUNTY REGISTER, Aug. 21, 2013; George Coles, *Out-of-Control Lawsuits Need Reforms,* SAN DIEGO UNION TRIBUNE, June 16, 2011; John Selk, *Eliminate Predatory ADA Lawsuits,* SAN BERNARDINO SUN, Aug. 17, 2011.

[2] 42 U.S.C. §12188(a), (b).

[3] *See* Unruh Civil Rights Act, codified at CIV. CODE §§51 *et seq*. The act incorporates the ADA and authorizes recovery of up to $4,000 in statutory damages plus attorney's fees and costs for prevailing plaintiffs for each encounter with disability access violations. CIV. CODE §52(a).

[4] United States Department of Justice, Civil Right Division, Information and Technical Assistance on the Americans with Disabilities Act, *available at* http://www.ada.gov/2010_regs.htm.

[5] 42 U.S.C. §12183(a); 28 C.F.R. §36 (1991); *see also* 2010 ADA Standards for Accessible Design, *available at* http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf (Sept. 15, 2010).

[6] 42 U.S.C. §12182(b)(2)(A)(iv).

[7] 42 U.S.C. §12182(b)(2)(A)(v).

[8] Public accommodations and commercial facilities designed or constructed after January 26, 1993, or altered after January 26, 1992, are required to comply with the ADA Architectural Guidelines for Buildings and Facilities. The architectural guidelines have been updated several times since they were first adopted, most recently on September 15, 2010, and published as the 2010 ADA Standards of Accessible Design. *See* http://www.ada.gov/2010ADAstandards_index.htm.

[9] *See* Comparative Analysis of the 2010 Americans with Disabilities Act Standards and the 2010 California Building Code Chapter 11B Accessibility Standards, Dec. 1, 2012, *available at* http://www.documents.dgs.ca.gov/dsa/access/2010ADA_CBC_Comparison.pdf.

[10] *See id.*

[11] *See, e.g., id.* at 366.

[12] *See* Comparative Analysis of the 2010 Americans with Disabilities Act Standards and the 2010 California Building Code Chapter 11B Accessibility Standards,

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[13] *See* 2010 Standards for Public Accommodations and Commercial Facilities, *available at* http://www.ada.gov/ada_title_III.htm.

[14] *See* Guidance on the 2010 ADA Standards for Accessible Design, *available at* http://www.ada.gov/regs2010/2010ADAStandards/Guidance2010ADAstandards.htm (Sept. 15, 2010).

[15] *See id.*

[16] Plaintiffs may also demonstrate denial of full and equal access if they demonstrate that they were "deterred from accessing a place of public accommodation on a particular occasion." CIV. CODE §55.56(b). "A plaintiff demonstrates that he or she was deterred from accessing a place of public accommodation on a particular occasion only if both of the following apply: 1) The plaintiff had actual knowledge of a violation or violations that prevented or reasonably dissuaded the plaintiff from accessing a place of public accommodation that the plaintiff intended to use on a particular occasion, and 2) the violation or violations would have actually denied the plaintiff full and equal access if the plaintiff had accessed the place of public accommodation on that particular occasion." CIV. CODE §55.56(d).

[17] CIV. CODE §52(a).

[18] Section 208.4 of the 2010 Standards requires one in every six accessible parking spaces to be van accessible. Section 502.6 requires signage to be displayed designating each van-accessible parking space. *See* http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm#pgfId-1006250.

[19] *See* Mundy v. Pro-Thro Enters., 192 Cal. App. 4th Supp. 1 (2011).

[20] 42 U.S.C. §12182(a).

[21] *See* CIV. CODE §3513.

[22] Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1054 (S.D. Cal. 1988).

[23] 28 C.F.R. §36.201(b).

[24] Modern Dev. Co. v. Navigators Ins. Co., 111 Cal. App. 4th 932 (2003) (The plaintiff's ADA claims were not covered by the insurer's commercial general liability policy when the alleged injuries were caused not by an accident but by the architectural configuration of business location and the insured's alleged failure to remove architectural barriers.).

[25] CIV. CODE §1938.

[26] *See* the California Department of General Services Voluntary Certified Access Specialist Program, *at* http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx. S*ee also* S.B. 262 (2003).

[27] *See* https://www.apps.dgs.ca.gov/casp/casp_certified_list.aspx.

[28] CIV. CODE §55.53(d).

[29] BUS. & PROF. CODE §5600(d).

[30] CIV. CODE §55.56 (prescribing the statutory damages available to plaintiffs in construction-related accessibility claims).

[31] CIV. CODE §55.56(f)(1); *see also* S.B. 1186 (2013).

[32] CIV. CODE §55.56(f)(2).

[33] CIV. CODE §55.54(a).

[34] CIV. CODE §55.53(d)(3).

[35] Lofton v. Wasserman, 2013 U.S. Dist. LEXIS 55931; O'Campo v. Chico Mall, LP, 758 F. Supp. 2d 976 (E.D. Cal. 2010); Lamark v. Nuredin Noorallah Laiwalla, CIV. NO. 12-03034 WBS AC (E.D. Cal. Oct. 15, 2013).

[36] *See, e.g.,* Wilson v. Costco Wholesale Corp., 426 F. Supp. 2d 1115, 1124 (S.D. Cal. 2006); *see also* Oliver v. KFC Corp., 2008 WL 2756605 (S.D. Cal. Jul. 14, 2008).

[37] Wayne C. Arnold & Lisa D. Herzog, *How Many Lawsuits Does It Take to Declare an ADA Plaintiff Vexatious? Apparently More Than Judge Rafeedie Thought*, 48 ORANGE COUNTY LAWYER 50 (2006).