PRACTICAL RESPONSES TO ACCESSIBILITY LITIGATION

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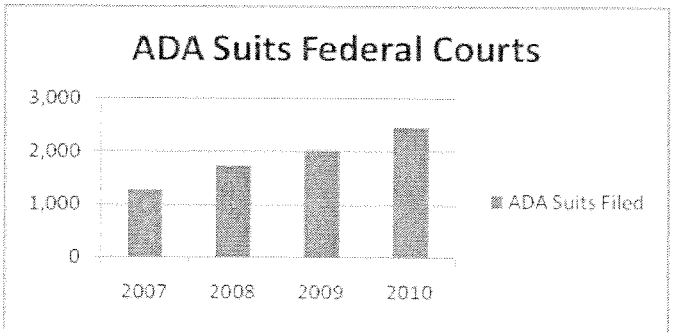
I. The Threat

Sooner or later, almost every business owner or owner of commercial or multi-family residential properties will receive a demand letter or be served with a lawsuit claiming violations of ADA accessibility standards. Although most properties are mostly compliant, very few are fully compliant[2] and full compliance is what the statute requires. Thus, most properties are targets for accessibility litigation. In addition, as tort reform has limited the opportunities for the plaintiff's bar in other areas, many are turning to accessibility litigation as a reasonably profitable venture because attorneys' fees are provided by statute. Although the ADA is now more than 20 years old, the number of suits based on violations of the accessibility guidelines continues to increase[3], as shown below:



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[2] Steven Winter Ass., Inc. "Multifamily Building Conformance with Fair Housing Accessibility Guidelines" (HUD 2003). The "HUD Study"

[3] Based on data from the Statistical Tables for the Federal Judiciary, http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary.aspx

Texas is fully participating in this trend. Since March of this year more than 50 new ADA lawsuits have been filed in Texas, a number far in excess of prior years. In addition, the trend is likely to accelerate as our population ages and more individuals become wheelchair bound or otherwise disabled. This paper discusses how to deal with lawsuits or demands in a way that both minimizes the future risk of litigation and minimizes the expense of existing litigation.

II. The statutory framework for accessibility litigation.

A. Federal Statutes

At the federal level three statutes, the Fair Housing Act, ("FHA")[4] the Architectural Barriers Act,[5] and the Americans with Disabilities Act, ("ADA")[6] impose accessibility requirements on residential and commercial properties. The FHA covers single and multi-family residential properties. The Architectural Barriers Act covers buildings built, improved or leased with federal funds[7]. The ADA covers "public accommodations," which for private developers generally means commercial properties and hotels. Under all three statutes compliance is measured by the ADA Accessibility Guidelines ("Guidelines") or, since March of this year, by the new ADA Accessibility Standards and related regulations. The Guidelines and Standards are objective criteria that elaborate on the more general definition of discrimination against the disabled by

[4] 42 U.S.C. §§3601 et seq.
[5] 42 U.S.C. §§4151 et seq.
[6] 42 U.S.C. §§12101 et seq.
[7] The Architectural Barriers Act does not include any private right of action for violations, and is therefore beyond the scope of this paper. See, *Burkett v. Booker*, 2006 WL 2583371 (E.D.Ky. 2006).

specifying things like door widths or mirror heights[8].

The ADA prohibits discrimination "on the basis of disability" in a "place of public accommodation" by any person who "owns, leases (or leases to) or operates a place of public accommodation."[9] There are broadly two kinds of "discrimination" with respect to accessibility in commercial buildings. The first is design/build discrimination, which is the failure to design and build a new structure in compliance with the ADA.[10] The second is the "failure to remove architectural barriers. . . in existing facilities . . . where such removal is readily achievable."[11] The remedies for discrimination include injunctive relief to require removal of the architectural barriers[12] and an award of attorneys' fees to the prevailing plaintiff.[13]

The FHA is similar to the ADA in its requirements, but includes additional remedies. Design/build discrimination is forbidden with respect to multi-family residential properties.[14] The landlord is not required to remove accessibility barriers in existing properties, but is required to permit a tenant to make reasonable modifications at the tenant's expense.[15] Unlike the ADA, the FHA provides for actual and punitive damages in addition to attorney's fees.[16]

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[8] The ADAAG were revised in 2010 with effective dates beginning in 2012. These revisions will generally apply only to new construction or significant renovations after March 15, 2012.
[9] 42 U.S.C. §12182(a).
[10] 42 U.S.C. §12183(a)(1).
[11] 42 U.S.C. §12182(b)(2)(A)(iv). The equivalent FHA provision requires the owner to permit a handicapped person to make reasonable modifications at the expense of the handicapped person. 42 U.S.C. §3604(f)(3).
[12] 42 U.S.C. §12188(a)(2)
[13] 42 U.S.C. §12205.
[14] 42 U.S.C. §3604(f)(3)(C)
[15] 42 U.S.C. §3604(f)(3)(A)
[16] 42 U.S.C. §3613(c)(1).

There is a critical difference between the remedies available for design/build as opposed to existing property discrimination. The requirement of accessibility compliance for design/build discrimination is absolute; that is, the original owner or builder of a non-compliant project can be required to bring it into full compliance with the requirements of the ADA regardless of the cost or feasibility of the required remediation.[17] Removal of barriers in existing structures, on the other hand, is required only if it is "readily achievable.[18]" "Existing structures" includes buildings that were subject to the design/build requirements but are no longer in the hands of the original owner.[19] If barrier removal is not readily achievable the owner or operator can use other methods to make the facility accessible.[20]

It should be noted that the statutory distinction between design/build discrimination and existing building discrimination is under attack. A few courts have gone against most of the existing case law to hold that the buyer of a property who knows it is not compliant with the ADA may be subject to liability for complete remediation.[21] Others hold that the current owner may be made a party to a lawsuit against the original owner so that the Court can enforce an order requiring remediation that is paid for by the original owner, but to which the current owner must accede.[22]

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[17] Provided that compliance was feasible before construction.
[18] Or, in the case of multi-family residences, if the modification is reasonable and done at the tenant's expense.
[19] See, *Paulick v. Ritz-Carlton Hotel Co.*, 2011 WL 6141015 (N.D. Cal. 2001) and cases cited therein.
[20] For example, if goods are on shelves to high to be reached from a wheel chair a store might offer assistance in reaching the higher items.
[21] See, *National Fair Housing Alliance, Inc., v. Bodner*, 2012 WL 529941 (S.D. Ind. 2012).
[22] *Baltimore Neighborhoods, Inc. v. Rommell Builders, Inc.*, 40 F.Supp.2d 700, 712 (D. Maryland 1999).

These cases suggest that a buyer of commercial or residential property constructed after 1992 should recognize a risk of design/build liability.

B. State Statutes

Most states, including Texas, have civil rights statutes concerning accessibility that parallel the federal statutes. In Texas, Chapter 121 of the Texas Human Resources Code forbids discrimination (in the form of non-compliance with accessibility standards) in public accommodations and housing[23]. Chapter 301 of the Property Code forbids discrimination in housing[24]. Both statutes refer to accessibility standards promulgated under the Elimination of Architectural Barriers Act found in Chapter 469 of the Texas Government Code.[25] The standards promulgated under Chapter 469 (the Texas Accessibility Guidelines) are intended to parallel those in the ADAAG and 2010 SAD, but there are differences. Under the Human Resources Code a civil plaintiff can recover actual and punitive damages, which are presumed to be at least $100 for each violation. Under the Property Code a plaintiff can recover actual and punitive damages plus injunctive relief and attorney's fees.[26]

Texas law differs significantly from federal law in one important respect. The Texas Elimination of Architectural Barriers Act[27] requires that plans for new construction

[23] Tex. Human Res. Code §121.003.
[24] Tex.Prop. Code §301.025. The Texas statute parallels the Fair Housing Act in that it forbids design/build discrimination for multi-family dwellings and requires that a tenant be allowed to make reasonable modifications at the tenant's expense for any dwelling.
[25] Tex.Gov.Code §469.001 et seq.
[26] Tex.Prop.Code §301.153.
[27] Tex.Gov.Code §469.001 et seq

or renovations with a cost of more than $50,000 be submitted to the Texas Department of Licensing and Regulation for approval[28]. In addition, the owner of a building is required to have it inspected to determine if it is in compliance with the Texas Accessibility Guidelines within a year after construction is complete.[29] The failure to submit such plans can be reported to the licensing authorities for the architect or engineer although no specific penalty is described.[30] More important from the owner's standpoint, the failure to comply with these administrative requirements will make it difficult to persuade any court that failures to comply with the Guidelines or Standards were unintentional.

Finally, Texas law, like that of most states, provides for the licensing of accessibility experts (Registered Accessibility Experts, "RAS") who are qualified to survey a property and determine whether it complies with the relevant accessibility guidelines.[31]

III. Responding to an accessibility demand.

The best strategy for dealing with an accessibility demand is simple. Identify real problems, settle on reasonable solutions, and fight only if necessary. The goal of this strategy is to maximize the resources spent finding a permanent solution to existing violations while minimizing the attorneys' fee expense. Minimizing attorneys' fees is critical because in many cases the likely attorneys' fees exceed the cost of remediation.[32]

[28] Tex.Gov.Code §469.101
[29] Tex.Gov.Code §469.105
[30] Tex.Gov.Code §469.104.
[31] Tex.Gov.Code §469.201 et seq
[32] The author's experience is that in ADA cases that are vigorously defended the defendants' attorneys' fees often exceed the cost of remediation for undisputed violations of the guidelines.

A. Don't wait for a demand or lawsuit.

The old adage that an ounce of prevention is worth a pound of cure applies with special force to accessibility litigation because the relevant statutes do not require that a demand letter be sent before suit is filed.[33] The failure to send a pre-suit demand may, but need not reduce the attorneys' fees recovered by a successful plaintiff.[34] This gives plaintiffs and their lawyers a positive incentive to sue before making a demand since a demand may give the defendant a chance to remediate.[35] Finally, voluntary removal of barriers to access or remediation of non-compliant facilities may not eliminate the plaintiff's right to fees if the remediation work is done after suit is filed.[36] On the other hand, where a comprehensive remediation plan is in effect before suit is filed there is authority for a complete denial of attorney's fees.[37] Owners of properties subject to the ADA should proactively identify barriers to access and plan for their removal within a reasonable time before receiving a demand or being served with a lawsuit.

For construction completed in the twenty years since the effective date of the ADA owners may be tempted to rely on the obligation of their architect to produce compliant plans, or on governmental approval of plans under standards that include ADA compliance. This reliance on other parties may be misplaced. The HUD Study found that

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[33] Ass'n of Disabled Am. v. Neptune Designs, Inc., 469 F.3d 1357, 1360 (11th Cir.2010).

[34] *Id.*

[35] Although courts will consider the lack of a demand when assessing a reasonable fee, not all courts consider this an important factor because, after all, the obligation to comply with the law does not depend on a demand having been sent.

[36] See, *Morrell v. Barter Foundation, Inc.*, 2007 WL 1412960 (WD.Va. 2007).

[37] See, *Access 4 All, Inc. v. Casa Marina Owner, LLC*, 458 F.Supp.2d 1359, 1365 (S.D.Fla.2006).

many failures to follow the Guidelines were not in the plans, but in the construction as built. For retail and restaurant businesses accessibility violations may be created by moving or adding tables and other furnishings, and modifications during repairs or renovations may not be subject to any ADA compliance review. Property owners and operators subject to the ADA should obtain a post-construction evaluation of ADA compliance by a reliable RAS and, if violations are found, create a comprehensive plan to correct those violations and plan for the correction in any formal budget. This approach has a very strong chance of eliminating any award of attorney's fees if suit is filed. Waiting until a demand is received or a suit is filed carries a much larger risk that the cost of remediation will include a substantial award of attorneys' fees.[38]

B. Get ahead of the knowledge curve after a suit is filed.

If an owner or operator of a covered property has not already hired an RAS, this is the first thing to do after hiring a lawyer.[39] This allows the owner or operator and counsel to determine whether there are in fact violations. Accessibility standards are for the most part objective and can be determined with a tape measure and laser level. This means if a demand is made there are probably some real violations, although alleged violations may reflect misunderstanding or an overly aggressive application of the Guidelines.

Once the true scope of violations is known, the owner or operator should obtain or

[38] The fees awarded can be substantial, even when the costs of remediation are not. In *Sapp v. Snuffer's Restaurants, Inc.*, 2010 WL 6194117 (N.D.Tex. 2010) for example, the Court awarded $226,000 in attorneys' fees despite the fact that the corrected violations were not expensive to correct. It appears the Court was impressed by the fact that there had been substantial litigation before the corrections were finally made, and that the violations had been in existence for 17 years before suit was filed.

[39] See contact information in footnote 1 above.

make at least a rough estimate of the cost and method for remediation for each item. For pre-1992 structures and structures not owned by the original developer barriers to access do not have to be removed unless the removal is "readily achievable", defined in the statute as: "easily accomplishable and able to be carried out without much difficulty or expense."[40] The statute lists four factors to be considered in deciding what is readily achievable that include not only cost, but also the size of the facility and financial resources of the owner and owner's parent.[41] A few examples illustrate what the courts consider reasonable: $1,122 to widen a restroom door,[42] up to $3100 for the construction of a five foot long ramp,[43] and $22,000 to renovate a hotel room, including replacement of the tub with a shower.[44] With an accurate list of violations and estimates of cost it is possible to balance the options of immediate remediation, future remediation and refusal to remediate based on excessive cost or other factors.

C. Fight only what needs to be fought.

As noted above, once a lawsuit is filed it is very likely that the plaintiff will be awarded some amount of attorneys' fees because there will almost certainly be an actionable violation. The defendant's strategic goal is to minimize those fees by making continued prosecution of the case unreasonable. This requires that identified violations be remediated as quickly as possible, and when immediate correction is not possible that

[40] 42 U.S.C. §12181(9).
[41] Id.
[42] *Munson v. Del Taco, Inc.*, 2006 WL 4704611 (C.D. Cal. 2006).
[43] *Alford v. City of Cannon Beach*, 2002 WL 31439173 (D.Or. 2002).
[44] *D'Lil v. Stardust Vacation Club*, 2001 WL 1825832 (E.D. Cal. 2001).

there be a plan for future remediation. Only if remediation is completely unreasonable in expense or inconvenience will it be worthwhile to litigate and risk incurring not only defense attorneys fees but also increased plaintiff's fees.

1. Making the matter moot.

Where the violations are few in number and readily eliminated it may be possible to avoid paying any plaintiff's attorneys fees by simply curing the violations and therefore making the entire case moot.[45] The Supreme Court has held that even if filing a lawsuit was required to prompt the correction of a violation, the ADA does not provide for recovery of attorneys' fees in the absence of a settlement or judgment in favor of the plaintiff.[46] A dismissal for mootness is not such a settlement or judgment and thus eliminates the plaintiff's recovery of fees. This strategy is possible, however, only if the violations are either cured or the court agrees that a plan for their cure is a sufficient guarantee of future performance that no injunction is necessary. Not all courts will agree that a plan for future remediation moots the claims of the plaintiff.[47] It may also be necessary to offer statutory damages provided for by state law.[48] The advantage of pursuing a mootness strategy is that the work done would be required in any case and does not therefore represent an additional expense.

2. Making a deal

[45] See, for example, *Grove v. De La Cruz*, 407 F.Supp.2d 1126 (C.D. Cal. 2005).
[46] Buckhannon Board and Care Home, Inc. v. West Virginia Dept. Health & Human Resources, 532 U.S 598, 121 S.Ct. 1835 (2001).
[47] See, e.g. *Morrell v. Barter Foundation, Inc.* 2007 WL 1412960 (W.D.Va. 2007).
[48] See, *Grove*, supra.

The most common and effective way to reduce the overall expense of ADA litigation is to reach an early agreement on remediation. Most plaintiff's attorneys in ADA lawsuits are happy to reach a quick settlement provided that it includes a provision for payment of their fees. The author has been informed by several members of the plaintiffs' bar that they have a strong incentive to settle quickly because litigation delays the payment of their fees. While it may be irksome to pay thousands of dollars in attorneys' fees to settle an ADA claim this may be the strategy that best minimizes the total expense of dealing with the claim.

D. When a fight cannot be avoided.

Not all plaintiff's lawyers are reasonable or ethical. This is hardly a surprise, and it means that sometimes there will be no choice but engage in litigation even after identifying real violations and agreeing to fix them. There may also be legitimate disagreements on what is "readily achievable" that act as a hindrance to settlement. The problem of unreasonable or unwilling plaintiff's counsel can be addressed in two ways, depending on the nature of the problem.

1. Reduce the scope of the dispute.

Even if it is not possible to moot the plaintiff's claims by fixing everything in dispute, it may be possible to reduce the scope of the dispute and so reduce what constitutes a reasonable fee. An owner or operator can, for example, make an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure that calls for an agreed

injunction for future remediation of every violation the owner and its counsel believe cannot reasonably be disputed. By leaving only the genuine issues this kind of offer reduces the fees justified by the remaining issues and leaves the owner with some chance of a victory.

Summary judgment may also be an option for reducing the scope of any dispute. After offering to remediate what can be reasonably remediated, the owner can file a motion for summary judgment arguing that remediation of remaining barriers is not readily achievable. Because retaining an accessibility expert and analyzing the cost of remediation is part of any strategy for dealing with an ADA demand the incremental cost of a motion for summary judgment can be justified where the plaintiff will not negotiate in a reasonable way. The Plaintiff in an accessibility lawsuit has the initial burden to show that removal of barriers is "readily achievable,"[49] so a summary judgment motion requires that the Plaintiff to suggest solutions instead of merely pointing out the problems. Plaintiffs who are unprepared to uninterested in doing this may find themselves without a lawsuit that justifies any substantial attorneys' fees.

2. Attack the plaintiff's standing.

Many law firms promote an aggressive defense to accessibility litigation based on the possible lack of standing for the plaintiff.[50] Attacking the plaintiff is appealing because it is widely recognized that most ADA and FHA lawsuits are brought by

[49] See, Gathright-Dietrich v. Atlanta Landmarks, 452 F.3d 1269 (11th Cir. 2006).
[50] See, e.g. Andrew Nicely, "Seeking Shelter from Abusive ADA Lawsuits," 3 Bloomberg Law Reports – Litigation No. 22 (Bloomberg 2009).

professional plaintiffs in cooperation with lawyers whose primary goal is making money on attorneys' fees.[51] These professional plaintiffs may have difficulty showing that they are the kind of patron who is likely to return in the future, and some likelihood of return is required to have standing to seek injunctive relief.[52] Standing may also limit the relief available based on the plaintiff's disability. There is some case law holding that a person confined to a wheelchair, for example, does not have standing to complain of access barriers to the blind or deaf.[53] Similarly, a few courts will not permit a complaint concerning barriers unknown to the plaintiff, and will even limit discovery on such barriers.[54]

While a defense based on standing may be necessary when the plaintiff is completely unreasonable, it cannot be regarded as the defense of choice. To raise a standing defense usually requires some discovery, and by the time depositions are taken and briefing is complete the cost may well run into the tens of thousands of dollars. Unless the cost of remediation exceeds the cost of defense the victory is pyrrhic because without remediation it is only a matter of time until a legitimate plaintiff files suit. The plaintiffs' bar and disabilities advocacy groups are well organized, so it will probably be sooner rather than later that this occurs. Standing is a defense to be employed when

[51] See, *Rodriquez v. Investco, L.L.C.*, 305 F.Supp. 2d 1278 (M.D. Fla. 2004), "The current ADA lawsuit binge is, therefore, essentially driven by economics – that is, the economics of attorneys fees." Whether this is a good or a bad thing is the subject of academic debate. See, for example, Samuel Bagenstos, "The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation (Bepress 2006), but there are few in the business world that see anything positive in litigation driven by professional plaintiffs and their allies.

[52] See, *Harris v. Stonecrest Care Auto Center, LLC*, 472 F.Supp.2d 1208 at 1215 (S.D. Cal. 2007).

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

[54] See, cases collected in *McConnell v. Canadian Pacific RR*, 2011 WL 5520322 (M.D. Fla. 2011)

reason fails.

3. Duke it out.

When all else fails, of course, it may be necessary to litigate the question of whether removal of a particular barrier is readily achievable or even whether there is a violation at all. The decision to fight must, however, take into account the cost of the battle, including the cost of the plaintiffs' attorneys fees if the battle is lost. It will often be the case that the attorneys' fees incurred litigating a case through trial will exceed the cost of removing the accessibility barrier even if that cost is itself quite high. This kind of litigation will usually be necessary only when the modifications required to remove the barrier will themselves somehow threaten the long term commercial viability of the facility.

CONCLUSION

A claim or lawsuit under the ADA or other accessibility statutes almost always has some foundation in fact. There will almost always be some violations of the statutes that require remediation and for which remediation is readily achievable. A sensible response to such a claim or demand starts with understanding the extent to which the problem is real and gaining an understanding of the costs of remediation. With this knowledge it is possible to devise a strategy that fixes what must be fixed, fights what must be fought, and minimizes the amount of money paid to lawyers for both the defendant and the plaintiff.

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