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How to Avoid and Defend ADA Access Claims in Utah

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If your business is open to the public, you are likely a target of an increasing number of “architectural barrier” claims under the Americans with Disabilities Act. In 2016, plaintiffs filed 129 ADA access claims in federal court in Utah. That figure was consistent with a 34% filing increase nationwide that saw about 2,500 cases filed in California, almost 1,700 in Florida, and just under 570 in New York. And the trend is likely to keep rising. In 2017, plaintiffs in Utah are on track to double the number cases filed in 2016, with 125 ADA claims filed as of May 31. The cases have targeted all types of businesses, including restaurants, hotels, grocery stores, malls, credit unions, banks, and office buildings. Virtually every one of these businesses was surprised to find itself defending these claims because the ADA does not require plaintiffs to give defendants an opportunity to cure seemingly minor violations before filing a case. Businesses that own, lease, lease out, or operate “public commotions” are all potential targets.

1. Are Attorneys' Fees Driving the Spike in ADA Access Lawsuits?

The increase in filing has attracted attention to an ongoing debate about the ADA's enforcement mechanism. On one hand, some point out that private litigants and their attorneys play a key role in enforcing the ADA. While the statute does not entitle private litigants to monetary damages, it does entitle them to attorneys' fees if they succeed on a claim for injunctive relief. Plaintiff firms argue that the availability of attorneys' fees is key in forcing businesses to modify behavior or remove architectural barriers that the ADA prohibits.

On the other hand, courts have concluded that an abuse of this enforcement mechanism is partly driving the recent spike in ADA access lawsuits. “The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through conciliatory and voluntary compliance, a lawsuit is filed, requesting damages awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most business quickly settle the matter.”[1] While data on the amount of the settlements is hard to obtain, anecdotal evidence suggests the going rate in Utah is between $1,000 and $6,000 per case.

2. Why are ADA Access Claims so Easy to Assert?

To sustain an ADA claim for discriminatory architectural barrier, the plaintiff

must show (1) that the plaintiff is “disabled” within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant denied the plaintiff public accommodation because of the plaintiff's disability; (4) the existing facility at the defendant's place of business or property presents an architectural barrier prohibited under the ADA; and (5) the removal of the barrier is “readily achievable.”[2] ADA claims are prone to abuse because these elements are relatively easy to plead.

The statute defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9). The ADA includes multiple factors a court may consider in determining whether a plaintiff has produced sufficient evidence that the removal of the architectural barrier is “readily achievable,” including the overall financial resources of the facility involved in the action, and the number of people employed at the facility. But cost alone is usually insufficient to excuse non-compliance. Instead, many courts look to the Department of Justice's ADA Accessibility Guidelines (“ADAAG”) for remedies that the DOJ considers to be “readily achievable.” Because the ADAAGs are very technical, many businesses commit minor violations of the ADA. “Serial filers” have become experts at identifying these minor offenses including, for example, the failure to post in a parking lot a wheel-chair access sign at 60 inches or higher.

3. How Can Businesses Avoid Becoming Targets of ADA Access Claims?

The ADA does not require that the defendant “intend” to discriminate on the basis of a disability. Even well-meaning business owners may run afoul the statute if an architectural barrier does not conform with the ADA. Businesses should take precautions to avoid becoming targets of these claims. Some proactive steps include:

- *Visiting the Department of Justice Website*: Businesses that have not undergone an ADA audit within one to two years, should visit the DOJ's Information and Technical Assistance on the ADA webpage at www.ada.gov. This website includes information about the ADAAGs and multiple checklists that help businesses comply with the ADA.

-*Addressing Common and Easy to Spot Violations:* Many of the complaints are filed by the same plaintiff or the same firm. For example, one individual filed over 100 of the approximately 120 access cased filed in Utah in 2016. Many of the complaints allege similar violations, including some that are relatively easy to spot and fix. Common infractions include the alleged failure to place at the appropriate height ADA access signs in parking lots and paper towel dispensers in restrooms. Addressing these simpler infractions could prevent a lawsuit in the first place, especially if the putative plaintiff is not a frequent customer of the target business. The checklists available at www.ada.gov can help businesses identify and address most of these minor infractions.

- *Saving the Receipts from Remodels:* The 2010 Design Standards require that public accommodation allocate at least twenty percent (20%) of

remodeling costs towards ADA compliance when altering a facility's “path of travel” to an area that hosts a “primary function” of a building. Many complaints allege that the defendant has altered the building, but failed to dedicate the requisite amount towards ADA compliance. Consequently, when remodeling a space, businesses should require their architects or contractors to clearly budget for ADA compliance and businesses should retain those records.

4. What Should You Do If You Are Sued?

First, Avoid a Default: As with all federal lawsuits, the deadline for responding to a complaint for an alleged ADA violation is relatively short: 21 days from the date the complaint was served on the defendant. To avoid entry of default, businesses should, at a minimum, calculate their response deadline as soon as they are served. Consulting counsel is always preferable, particularly since businesses cannot appear without an attorney in court. But if retaining counsel before the response deadline is not possible, defendants should at a minimum reach out to plaintiff's counsel and seek an extension for responding to the complaint. Many plaintiffs' attorneys are willing to grant such an extension, particularly if the parties need the time to evaluate a settlement.

Second, Verify the Allegations in the Complaint: To evaluate the amount of settlement and the remedies that a business is willing or able to make, it is imperative that the business verifies the alleged ADA access violations. Some of the most common allegations are relatively easy to verify. But businesses might have to contract a third-party consultant to ascertain, for example, whether the slopes of a parking lot exceed the permissible maximum under the ADAAGs. In such instances, it is usually advisable for businesses not to retain the consultant directly and to have their attorneys retain the consultant instead. Verifying the allegations is also necessary because if the plaintiff misunderstood or misrepresented the facts, the complaint may be subject to dismissal.

Third, Consider a Settlement: Most ADA access cases settle, principally because the costs of defending the lawsuit usually outweigh the settlement amount. Businesses should negotiate forward-looking provisions, including a stipulation that the plaintiff notify the defendant prior to filing another complaint alleging a violation of the ADA, or a moratorium against similar lawsuits against the same defendant at other locations.

Fourth, Consider a Litigation Strategy: If a settlement is not feasible, defendants should consider a few litigation strategies early in the case, including: moving to dismiss under Federal Rule of Civil Procedure 12(b); moving for summary judgment after mooting the claims; and seeking a “vexatious litigant” order. Defendants also should be prepared to object to plaintiff's request to inspect the subject property under Rule 34. Courts in Utah and the Tenth Circuit have addressed these issues in ways that may help businesses defend ADA claims.

5. What are the Long Term Solutions to “Drive-By Lawsuits”?

Ultimately, the volume of ADA access cases is likely to continue rising in

the absence of legislative action. In 2016, Arizona Senator Jeff Flake and Texas Representative Ted Poe introduced legislation in the Senate and House, respectively, seeking to amend the ADA to require that plaintiffs notify target defendants of alleged violations and give them a chance to cure them before filing claims. Both bills stalled, but have attracted recent attention due to publicity highlighting alleged abuses of the ADA.

Separately, state lawmakers are also trying to address the issue. For example, Utah State Rep. Norman Thurston (R, Provo) is reportedly working on legislation addressing abuses at the state level. Our office has also discussed the matter with other legislators who are interested in addressing abuses. However, state-level solutions are likely to have limited impact because ADA claims arise under federal law.

In the absence of legislative actions, courts have more strict about requiring plaintiffs to allege with particularity the purported violations of the ADA. Even then, the costs of defending the action usually forces businesses to accept a settlement, which will not stave off the growing number of cases.

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[1]Molski v. Mandarin Touch Restaurant, 347 F.Supp.2d 860, 863 (C.D. Cal. 2004) (enjoining "vexatious litigant" from filing future ADA claims without leave of court).

[2]See Vogel v. Rite Aid Corp., 992 F.Supp.2d 988, 1007-8 (C.D. Cal. 2014).
