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## ACCESS TO PUBLIC ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT: HOW VULNERABLE IS YOUR BUSINESS?

The Americans with Disabilities Act was passed nearly 14 years ago to recognize and protect the civil rights of disabled individuals. Title III of the ADA prohibits discrimination against individuals on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation" by any person who owns, leases (or leases to), or operates a place of public accommodation.

**Title III Requirements.** Title III requires public accommodations that are newly constructed or renovated after January 1992 to be accessible to persons with disabilities, and mandates older facilities to remove architectural barriers that are "readily achievable." The vast majority of business owners and operators believe they are in compliance with Title III, but have a rude awakening when a suit is filed. This is primarily due to the complexity of the law, which makes compliance difficult. It contains hundreds of requirements ranging from the location and signage for disabled parking, the allowable height of countertops, the pressure of swinging entrance doors and where grab bars must be placed in restrooms. In addition, the law imposes an "ongoing obligation" to remove such barriers that is murky fact specific to the circumstances of the individual business. The law provides insufficient guidance to determine where "too expensive" ends and "readily achievable" begins.

**Barrage of Litigation.** Businesses throughout the country and in Florida have witnessed a massive upsurge in lawsuits filed by disabilities rights advocacy groups and disabled individuals for alleged violations of Title III. It is estimated that thousands of such lawsuits have been filed in Florida in the past few years against restaurants, retail establishments, shopping malls and the hospitality industry and there seems to be no end in sight. Frequently these lawsuits are filed against businesses that have never received a customer complaint or by plaintiffs who are not acting in good faith. For example, a lessor of a small property was recently sued by a disabled individual who was angry because the commercial retail tenant would not extend the time period for a product discount.

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**Attorneys Fees.** Title III is unfortunately structured to encourage lawsuits. The distasteful cottage industry of "drive-by" lawsuits filed by the group of attorneys who specialize in Title III plaintiff's work continues to grow. Adding insult to injury, many of these attorneys are well known for filing up to hundreds of lawsuits for the same plaintiff.

The ADA grants attorneys fees to the prevailing plaintiff, and the courts have applied a liberal standard to the meaning of "prevailing." A 2001 U.S. Supreme Court case, *Buckhannon Board and Care Home v. West Virginia Dept. of Health*, offered a glimmer of hope when the Court ruled that no attorneys fees should be rewarded where the defendant voluntarily makes the changes demanded, i.e., the case has not ended in a final judgment on the merits, consent decree, or some other "judicially sanctioned change in the legal relationship of the parties." *Buckhannon* was initially interpreted to mean that a private settlement bars attorneys fees, but the predominant trend in the federal circuit courts is more generous.

For example, in the 2002 case of *American Disability Association v. Chmielarz*, the Eleventh Circuit held that a court-approved settlement, coupled with retention of jurisdiction to enforce its terms, was sufficient to render the association a "prevailing party" and allow for attorneys fees.

Predictably, plaintiff's attorneys now generally refuse to agree to any settlement without such court approval and retention of jurisdiction. Thus, a plaintiff's attorney who files a boilerplate complaint and settles with a business owner who promises merely to restripe a parking lot, restructure a restroom, and decrease the pressure on entrance doors, can collect \$5,000 in attorneys fees. The business owner is also often required to pay several thousand to an "expert" (sometimes affiliated with the plaintiff) who has made a perfunctory survey of the property and issued a report.

**A Legislative Solution?** U.S. Rep. Mark Foley of Palm Beach is outspoken about his efforts to eliminate abusive Title III ADA litigation. He has sponsored legislation known as the "ADA Notification Act" in Congress (reintroduced in 2003 as H.R. 728). This bill would amend Title III to require individuals to first notify the business and provide an opportunity to correct the alleged violation prior to filing any lawsuit, with a 90 day waiting period. The bill currently has nearly 60 co-sponsors but faces strident opposition from disability advocacy groups.

**Preventative Steps.** Business owners, particularly those who own or operate older properties, are well-advised arrange for an ADA survey to be conducted by a professional with significant ADA experience, taking into consideration the fact

that increased revenues and profits are a factor in deciding if an alteration is "readily achievable." Small business owners should be aware of the Disabled Access Tax Credit available in the amount of 50 percent of certain expenditures between \$250 and \$10,250 per tax year and that this tax credit is a factor in the court's "readily achievable" equation. A business that has an ADA compliance implementation plan completed or underway when it is sued has strong defenses available—being in compliance with barrier removal and that an injunction should not be issued where affirmative steps are already underway.

Most cases involve access to stores (doors, sidewalks), parking lots, garages, restrooms and lack of proper signage, all of which are generally considered "readily achievable" by the courts and fairly inexpensive. Lessors should examine their leases, as the law requires both landlords and tenants to comply with Title III, and valuable time and resources are often wasted after a lawsuit is filed quibbling over who bears the financial responsibility for completing the alteration and splitting attorneys fees.

**When a Suit is Filed.** Your attorney can help you evaluate the case and the type of plaintiff involved. Individual plaintiffs may not have standing to sue for certain alleged violations: if the plaintiff is not visually impaired, for example, an argument can be made that they cannot make allegations regarding the lack of audible alarms. Retaining a Title III defense expert is well worth the cost. These experts are familiar with the ADA's technical requirements, can readily provide an estimate of the cost to fully comply with the plaintiff's demands and, more importantly, know how to analyze what alterations would be considered "readily achievable" by a court and assist with structuring an efficient settlement, if settlement is considered the best option.

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