



# Drive-by Lawsuits

Avoiding Liability Under Title III of the ADA Amendments Act

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**T**he Americans with Disabilities Act (ADA) was enacted to prohibit discrimination against individuals with disabilities. Title III of the act guarantees disabled individuals full and equal enjoyment of goods and services of any place that is open to the public. Most people, particularly those in the hospitality industry, would consider this a good thing. That said, these laws have become increasingly onerous for restaurant owners and others who operate businesses open to the public, particularly with recent amendments.

The ADA Amendments Act of 2008 (ADAAA), which became effective on January 1, 2009, revised the ADA to broaden the class of individuals who qualify as disabled under the terms of the ADA. As a result, more individuals are now protected under the ADA. With the number of Americans having a disability projected to grow rapidly as our population ages, the practical effect of these changes is that restaurant operators now have to accommodate more people with access to protection under the ADA. Consequently, the ability of operators to obtain early dismissal of ADA claims has decreased proportionately.

This article provides an overview of the public accommodations provisions of the ADAAA, the sources of potential liability, and things you can do to avoid unnecessary and costly litigation under the new law.

## Then and Now

Prior to the ADAAA, whether an individual was considered “disabled” in the eyes of a court was based on any mitigating measures he or she used. For example, a diabetic person using insulin was only “disabled” if he was substantially limited in a major life activity considering his use of insulin. Under the ADAAA, courts may no longer consider the ameliorative effects of mitigating measures, such as medications or prosthetics, except for eyeglasses or contact lenses, in determining whether an individual’s impairment substantially limits a major life activity. Moreover, before the ADAAA went into effect, the list of “major life activities” was limited by regulation and court interpretations. Now, however, the definition of “major life activities” includes items from the regulations as well as several new activities that have been added to the nonexhaustive list, including sleeping, concentrat-

ing, thinking and communicating. The ADAAA also expanded the concept of “major life activities” to include the operation of major bodily functions such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. Finally, the ADAAA allows an impairment that is episodic or in remission to be considered a disability if it substantially limits a major life activity when active. As such, under the ADAAA, an individual with a disease that is in remission but whose major bodily functions have been substantially impaired may be considered disabled.

### Impact of the ADAAA on Access to Public Accommodations

As noted, Title III guarantees disabled individuals full and equal enjoyment of goods and services of any place that is open to the public. (Title I of the ADA addresses discrimination of disabled employees.) Even though Title III does not address employment directly, it does set forth a number of architectural and structural guidelines that apply to facilities of public accommodation. To this end, existing facilities — places of public accommodation constructed before 1993, and new construction facilities, places of public accommodation constructed after 1993 — are treated differently under Title III. As for existing facilities, Title III requires the removal of architectural and structural barriers so that goods and services are available to people with disabilities on an equal basis with the rest of the public.

To the extent the removal of a physical barrier is “readily achievable,” compliance with Title III includes the installation of ramps, curb cuts and grab bars. Whether the removal of a physical barrier is “readily achievable” depends on the nature and cost of the modification, financial resources

of the business in question, and effect of removing the barrier on the operation of the facility. Newly constructed facilities must also be accessible by individuals with disabilities to the extent that it is not structurally impractical. Put another way, Title III does not require modifications or alterations that would be an “undue burden” because the alteration or modification would cause “significant difficulty or expense.” Nevertheless, courts are generally sympathetic toward a disabled plaintiff when balancing access to a facility and the costs that constitute an “undue burden.”

The ADAAA changes will have far-reaching repercussions for Title III compliance, including discrimination caused by architectural design features. By expanding the definition of disabled, the ADAAA covers individuals with certain illnesses who were not previously covered. As a consequence, because the ADAAA has increased the number of individuals with disabilities receiving protection, operators have been forced to consider individuals with conditions that they had not previously considered as coming under the protection of the ADAAA. To illustrate, restaurants have become an increasingly target-rich environment, as record numbers of lawsuits by a small group of disabled individuals and nonprofit organizations alleging hypertechnical violations of Title III have been filed against operators.

### How Title III Encourages ‘Professional Plaintiffs’

Even in this recessionary business environment, abusive Title III suits are on the rise. Indeed, operators have complained for several years that “professional plaintiffs” are targeting them with costly serial claims. Even though many disability rights groups and disabled individuals have a genuine concern about accessibility and compliance, the ADAAA has deepened the

pool of plaintiffs and has intensified this cottage industry. Unfortunately, plaintiffs’ lawyers specializing in these Title III suits are setting up shop in a number of previously uncharted areas and this is fueling the accompanying spike in litigation.

Here’s how it works. The usual scenario provides for specialized plaintiffs’ lawyers to collaborate with a disabled individual who then travels from facility to facility to test compliance. Even if one borderline violation is discovered, these “professional plaintiffs” (also known as “testers” and “drive-by plaintiffs”) become plaintiffs in Title III lawsuits.

When a borderline violation is discovered, the strategy is virtually the same in every case. The attorney representing the “professional plaintiff” will file a complaint in federal court demanding that the operator cure the supposed Title III violations and request a significant monetary amount representing the attorneys’ fees for which the operator could eventually be liable. Not surprisingly, when threatened with aggressive litigation and the prospect of significant fees to the attorney representing the “professional plaintiff,” many operators quickly capitulate and settle. Part of the problem is that no regulatory agency has the capacity to conclusively certify that the modifications made in response to the lawsuit are compliant.

As a result, this does not preclude a subsequent “professional plaintiff” from filing a new suit challenging another alleged violation. Another problem is that the ADAAA makes these hold-up suits lucrative for plaintiffs’ lawyers. No notice is required prior to a “professional plaintiff” filing suit against a targeted facility. Even though many of the alleged violations could be easily remedied, attorneys’ fees are only awarded if there is a pending lawsuit. Thus, there is a rush to the courthouse to file the lawsuit prior to giving

a facility notice of an alleged violation with a potentially inexpensive fix. Unfortunately, even though the number of Title III lawsuits is staggering and the cost of responding to these lawsuits is astounding, the ADAAA has only made this problem worse.

### Strategies and Solutions for Title III Litigation

It is a given that operators naturally want to comply with the law and do the right thing when it comes to disabled access. In view of this position, it is important for operators to gain knowledge of where they stand with public access, including the extent to which they are or are not in compliance with Title III, before falling victim to a lawsuit. Operators should analyze their public profile and the risks of being targeted in Title III actions. To this end, an internal, privileged audit of a facility's compliance should be conducted. Attorneys and architects familiar with the law can assist with discovery and correction of potential problems.

interpretation. Even though an experienced attorney cannot change the facts of an operator's facility, he or she can minimize legal costs and exposure. In addition, experienced counsel will be in the best position to attain the most cost-effective resolution and may be able to negotiate away numerous alleged violations without further investigation by the plaintiff's counsel. In the final analysis, the cost of hiring experienced counsel to quickly defend these hold-up suits is repeatedly lower than resorting to the courts.

### Common Errors That Lead to ADAAA on Title III Litigation

There are several common themes that reoccur in Title III litigation. In particular, accessible parking spaces and access aisles that are not level in all directions. A parking lot with a sloped surface prevents wheelchair users from getting out of their vehicles, and also inhibits van-mounted wheelchair lifts

ing space prevents an individual using a wheelchair from opening certain doors without a clear level area in front of and adjacent to the door. Proper circulation paths are also a common deficiency found in Title III litigation. When objects protrude into paths of travel from walls or posts and clear headroom is not provided, people who are visually impaired can be seriously injured if objects cannot be readily detectable using a sweep of their cane. Several errors and omissions highlight alleged Title III violations that are specific to restaurants. The most common of which is failing to ensure that all public and common use toilet rooms and bathrooms are accessible. Many times, individuals with disabilities are restricted to a limited number of toilet rooms and are forced to travel long distances while others can use any toilet room available. In addition, foodservice queuing areas are often too narrow and do not provide adequate width for wheelchair turns. As a consequence, disabled individuals using wheelchairs either get trapped in queuing areas or cannot get to the counter to purchase or pick up food. Finally, when condiment or utensil items are placed above the reach range or are not on an accessible route, wheelchair users are prevented from physically reaching these items and are unable to obtain them.

Please note: Legal articles are for your general information only. Legal advice must be tailored to the circumstances of each case, and laws often change. Federal laws, the laws of each state, and often each municipality vary and each may have its own procedures and time limitations that must be followed. Confer with a lawyer in your state to assess your legal rights in a particular situation.

Moreover, compliance issues are particularly important when alterations, improvements or additions take place. Because retrofits can be costly, and can include a variety of projects and expenses, new additional obligations that did not exist before may be triggered to make the facility more accessible. Operators should do their homework and engage consultants familiar with disability access prior to embarking on such projects.

When operators find themselves staring at a lawsuit for Title III violations, counsel should be retained immediately. Title III claims are unique in the sense that a facility is either in compliance or it is not; there is virtually no room for

from being fully lowered to the access aisle surface. A common accessibility error encountered in Title III litigation involves routes from the exterior into the facility; specifically, pedestrian routes on a site from public transportation stops, parking lots, passenger loading zones, and public streets and sidewalks. Individuals with disabilities often cannot travel from the site entry point to the accessible entrances and are forced to use vehicular routes, which can be extremely dangerous.

Another widespread omission is the failure to provide adequate maneuvering clearance at doors and toilet stalls. The exclusion of adequate maneuver-

### If Targeted, Lawyer Up

By virtue of the ADAAA, the inquiry regarding disability does not require extensive analysis, and Title III litigation claims are on the rise. Operators have been forced to redirect and redefine the traditional understanding of complying with accessibility. That said, when such actions do occur, operators need to be prepared to take a proactive approach and engage counsel early in the process. An experienced counsel can prevent unnecessary fees and negotiate the most cost-effective settlement agreement should compliance issues in fact exist.

**RS&G**