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DEFENDING ADA TITLE III CLAIMS.

Title III of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12181, et seq., 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." 42 U.S.C. § 12182(a). Discrimination includes a failure to make reasonable modifications … unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such … facilities… or accommodations. 42 U.S.C. § 12181 (b)(2)(A)(ii). Discrimination also includes a failure to remove architectural barriers in existing facilities where such removal is readily achievable, or where removal of a barrier is not readily achievable, a failure to make such facilities… or accommodations available through alternative methods, if such methods are readily achievable. 42 U.S.C. § 12181 (b)(2)(A)(iv) and 42 U.S.C. § 12181 (b)(2)(A)(v). With respect to a facility or part of a facility that has been altered by an establishment in a manner that affects or could affect the usability of the facility, discrimination includes, "a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. § 12183(a)(2).

A "place of public accommodation" is a facility operated by a private entity, whose operations affect commerce, that falls into one of twelve categories: (1) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (2) a restaurant, bar, or other establishment serving food or drink; (3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (4) an auditorium, convention center, lecture hall, or other place of public gathering; (5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) a terminal, depot, or other station used for specified public transportation; (8) a museum, library, gallery, or other place of public display or collection; (9) a park, zoo, amusement park, or other place of recreation; (10) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (12) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation. 42 U.S.C. 12181(7); 28 CFR 36.104.

One defense, frequently raised in cases arising under Title III of the ADA is that a plaintiff does not have standing. To establish standing, a plaintiff must demonstrate that his injury is actual or imminent. For example, where a plaintiff has never patronized a particular bank branch, he is unlikely to have standing. Courts have found that plaintiffs do not have standing to seek injunctive relief under the ADA when they fail to show a plausible intent or desire to return to the place where they previously encountered an ADA violation, or fail to show that there is a likelihood of discrimination should they return to that place. Where an association is a co-plaintiff, there may also be a defense that the association lacks standing. In order for an association to have standing it must show that (1) at least one of its members would have standing to sue as an individual, (2) the interests at stake in the litigation are germane to the organization's purpose and (3) neither the claim made nor the relief requested requires the participation of individual members in the lawsuit.

When defending Title III cases it is also important to keep in mind that different standards apply depending on whether the case involves an existing facility, new construction or an alteration under the ADA.

I. EXISTING FACILITY (First Occupied before January 26, 1993)

The less stringent readily achievable standard applies to existing facilities (first occupied before January 26, 1993). The term “readily achievable” means “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. §12181(9). Barrier removal is not "readily achievable” if it would fundamentally alter the nature of the public accommodation.

Burden of Proof Existing Facility:

The plaintiff bears the initial burden of production to present evidence that a suggested method of barrier removal is readily achievable, i.e., can be accomplished easily and without much difficulty or expense. In order to make a prima facie showing that removal is readily achievable, a plaintiff must "articulate a plausible proposal for barrier removal, 'the costs of which, facially, do not clearly exceed its benefits.'" The proposal and estimate are not required to be exact or detailed, however a plaintiff must provide at least some estimate of costs.

Once the plaintiff meets his or her burden, the burden then shifts to the defendant to show that barrier removal is readily not achievable, i.e., that the costs of plaintiff's proposal would in fact exceed the benefits.

Affirmative Defenses:

In the case of an existing facility, in addition to standing, several affirmative defenses may be available, including:

1) Removal of the alleged barriers is not readily achievable;

2) The requested modifications would impose an undue burden on the defendant;

3) Removal of the alleged barriers would fundamentally alter the nature of defendant's public accommodation 42 U.S.C. § 12182(b)(2)(ii).
The ADA requires public accommodations to modify their policies and practices where necessary for access, subject to the fundamental alteration defense. 42 U.S.C. § 12182(b)(2)(ii). 42 U.S.C. § 12182(b)(2)(ii) provides, "Discrimination includes— a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

4) The defendant adequately provided access through readily achievable "alternative methods" such as customer service.

II. ALTERATIONS AND NEW CONSTRUCTION

More stringent maximum standards apply to alterations and new construction. Alterations and new construction must meet the minimum requirements of the ADA Standards for Accessible Design. Alterations must be accessible to the "maximum extent feasible." 28 CFR § 36.402. Newly constructed facilities must be readily accessible to and usable by individuals with disabilities, except where a defendant can demonstrate that it is "structurally impracticable." 28 CFR § 36.401.

A. What Is an Alteration?

In determining whether a modification is an alteration, the concept of usability is key. The ADA's implementing regulations define an alteration as "a change to a place of public accommodation ... that affects or could affect the usability of the building or facility or any part thereof." 28 C.F.R. § 36.402(b). Minor and superficial changes do not constitute alterations and do not trigger the sweeping obligations that accompany "alterations."

"If a plaintiff 'identif[ies] a modification to a facility and . . . mak[es] a facially plausible demonstration that the modification is an alteration under the ADA,' the burden shifts to the defendant 'to establish that the modification is in fact not an alteration.' If the Court concludes that there has been an alteration, the plaintiff must only 'identify some manner in which the alteration could be, or could have been, made 'readily accessible.' The burden then shifts to the defendant to 'persuad[e] the factfinder that the plaintiff's proposal would be "virtually impossible" in light of the "nature of the facility."'' Kreisler v. Second Avenue Diner Corp., 2012 U.S. Dist. LEXIS 129298 (S.D.N.Y. 2012), quoting, Roberts v. Royal Atl. Corp., 542 F.3d 363, 371-372 (2d Cir. 2008).

However, alterations to the "path of travel" need only be undertaken where they are "not disproportionate to the overall alterations in terms of cost and scope." 42 U.S.C. § 12183(a)(2). As provided by 28 C.F.R. § 36.403(f)(1), "alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area."

Moreover, where the claim is based on renovations that occurred outside the statute of limitations period, the claim may be time barred. See, Speciner v. NationsBank, N.A., 215 F. Supp. 2d 622 (Dist. Md. 2002) (applying three year state statute of limitations to alterations claims).

There is also a defense where the alteration would be technically infeasible-----ADAAG

§4.1.6(1)(j).—which applies only to alterations-not new construction.

Affirmative Defenses:

Thus, in the case where the plaintiff alleges that Plaintiff has made renovations that constitute alterations, and which did not comply with the ADA, in addition to standing, several other affirmative defenses may be available including:

1) The renovations did not constitute alterations;

2) Defendant satisfied the maximum extent feasible standard;

3) Plaintiff's claim is barred by the statute of limitations;

4) In the case of a path of travel-the alterations sought would be disproportionate to the cost of the overall alteration where the cost exceeds 20% of the cost of the overall alteration;

5) The alteration sought is technically infeasible.
Technically Infeasible, "[m]eans, with respect to an alteration of a building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility." ADAAG §4.1.6(1)(j).

B. What Is New Construction?

The new construction requirements of the ADA apply to any place of public accommodation or commercial facility first occupied after January 26, 1993, for which the last application for a building permit or permit extension was completed after January 26, 1992. 28 CFR §36.401.

In the case of new construction, a commercial facility or public accommodation must be "readily accessible" to individuals with disabilities to the extent that is not "structurally impracticable." 42 USCS § 12183 (a); 28 C.F.R. §36.401(c)(2).

If the Court concludes that there is new construction, the plaintiff must only identify some manner in which the new construction fails to comply with the ADA's standards, then the burden shifts to the defendant to show that meeting the requirements of the ADA would be "structurally impracticable." 42 USCS § 12183 (a); 28 CFR §36.401.

Affirmative Defenses:

Thus, in the case, of new construction, in addition to standing, affirmative defenses that are available include:

1) Compliance would be structurally impracticable;

2) Plaintiff's claim is barred by the statute of limitations.