STRATEGIES FOR AVOIDING AND DEFENDING DISABILITY ACCESS LITIGATION

DISABLED ACCESSIBILITY WORKSHOP

Anthony J. DeCristoforo, Esq.
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
(916) 447-0700

January 13, 2011 • Truckee
STATUTORY BASIS FOR DISABILITY ACCESS LITIGATION

Federal Law
• Americans With Disabilities Act

State Law
• Unruh Civil Rights Act
• Disabled Persons Act
ADA
Title III prohibits discrimination “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).
Statutory Basis For Disability Access Litigation

**ADA**

Plaintiff’s burden is to prove:
- He/she has a disability
- Defendant’s business is a place of public accommodation
- He/she was denied full and equal treatment because of his/her disability
ADA

If the claim is based on an architectural barrier, plaintiff must also prove:

• The existing facility at defendant’s place of business presents an architectural barrier prohibited under the ADA
• The removal of the barrier is readily achievable
Unruh Civil Rights Act

“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civil Code §51(b).
A violation of the right of any individual under the ADA constitutes a violation of the Unruh Act.
California Disabled Persons Act

“Individual with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, places of accommodation, amusement, or resort, and other places to which the general public is invited...” Cal. Civil Code §54(a)(1).
California Disabled Persons Act

A violation of the ADA also constitutes a violation of the DPA.
Plaintiff does not need to show an intent to discriminate in order to prove a violation of the ADA, Unruh Act, or DPA
Remedies

ADA

- Injunctive relief only
- Damages are not recoverable
- Discretionary attorneys fees
Remedies

Unruh Act

• Damages in the amount of three times the amount of actual damages, but in no case less than $4,000, “for each and every offense”

DPA

• Damages in the amount of three times the amount of actual damages, but in no case less than $1,000, “for each offense”
• Plaintiff may not recover under both the Unruh Act and the DPA
Defenses

• Best defense: Full compliance
• Structures built before 1992 are “existing facilities” under the ADA, and need only remove barriers to access that are “readily achievable”
• Modification would create undue burden or expense
• Prove the plaintiff did not attempt to access the premises and has no real intention of returning
• My building is old, so it is not subject to the ADA
  - All public accommodations are subject to remove barriers that are “readily achievable”
Common Misunderstandings About Defenses (Cont’d)

• ADA compliance is the responsibility of my landlord (or tenant)
  - While that may be true under the terms of the lease, both the landlord and tenant are potentially liable for ADA violations
Common Misunderstandings About Defenses (Cont’d)

• I had a permit that allowed the building to be constructed in this manner
  - Even if the design and construction were approved, it doesn’t provide a defense if the building isn’t in compliance with the ADA
Common Misunderstandings About Defenses (Cont’d)

• I can’t afford to fix the areas that aren’t in compliance
  - Many requirements are relatively inexpensive to fix (signage, door handles, mat anchoring)
Common Misunderstandings
About Defenses (Cont’d)

• My facility (or parts of my facility) aren’t really open to the public
  - If a single member of the public is allowed access to the facility, a plaintiff can argue it’s a public accommodation
What to Expect

- Warning letter
  - Intended to trigger attorneys fees award
  - Specific barriers usually not identified
  - May appear to be a solicitation or advertisement
  - May not be sent to both landlord and tenant
  - Probably the result of a drive-by
What to Expect

• Filing of lawsuit
  - Probably won’t be served right away
  - You may learn about lawsuit when you receive a solicitation letter from a defense lawyer
What to Do

- Consider tendering to insurance carrier
- Determine if allegations have merit
- Decide how to respond
  - Quick settlement?
  - Hire a lawyer?
Settlement Issues

- Typical settlement range
- Confidentiality
- May have to bring facility into compliance as condition of settlement
- Release applies only to the plaintiff who sued you
Avoiding a Lawsuit

- Full compliance is best defense
- Do not ignore warning letter
- Exterior modifications
- Least expensive modifications
- Notify plaintiff of modifications
Thank you for your attention!

Anthony J. DeCristoforo, Esq.  
Stoel Rives LLP  
500 Capitol Mall, Suite 1600  
Sacramento, CA 95814  
(916) 447-0700