The Drive-by Plaintiff in the Hospitality Industry

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July 26, 2015, marked the 25th anniversary of Title III of the ADA ("Title III"). The U.S. Department of Justice ("DOJ"), charged with regulating Title III, is finalizing regulations affecting a variety of industries, including the hospitality industry. As we all know, the Drive-by Plaintiff haunts us all. The form letter received from a law firm where they purport to represent an individual who was not a guest at your property because your facility was not ADA compliant or was inaccessible to them. While the focus of Title III cases may be moving away from accessibility issues into other areas, that should not be interpreted as a statement that more traditional issues regarding the accessible design/construction of brick-and-mortar Places of Public Accommodation are no longer of serious concern. To the contrary, in large part due to a very active plaintiffs' bar partnering with very persistent individual plaintiffs or ambitious advocacy groups, or "Testers", Title III lawsuits alleging a failure to comply with either the 1991 ADA Accessibility Guidelines or the 2010 ADA Standards for Accessible Design, as appropriate, are as commonplace as ever before.

A "Tester" is a disabled person who travels around the country seeking out businesses that are open to the public and which do not comply with the American with Disabilities Act, 42 U.S.C. § 12181 et seq. Their sole goal is to locate non-compliant businesses and sue them. The remedy they seek is an order (or agreement) to retrofit the property, and attorney fees. Some of these "testers" have filed hundreds of such lawsuits, sometimes thousands of miles away from where they reside. The complaints invariable plead one visit and intent to return in the future to enjoy the goods or services offered by the defendant. However, the Act itself and recent case law ruling on motions to dismiss these test cases afford businesses under attack some defenses. So, before you knuckle under to the threat of having to pay not only the cost of a rebuild, but two sets of attorney fees unsuccessfully defending one of these claims, you should analyze the facts specific to its situation, including the cost of construction relative to the value of the business and whether the plaintiff is really likely to return to the business.

In order to have standing to assert any claim in federal court, a plaintiff must have constitutional standing. That means that a plaintiff must: a) have suffered a concrete, particularized injury that is not conjectural or hypothetical; b) that has been caused by the challenged action of the defendant; and c) that is "likely" and not speculative; meaning that a decision in the plaintiff's favor will, in fact, redress the alleged harm. The only remedy available under the ADA is injunctive relief, one of the requirements of which is that a plaintiff shows a "real and immediate" threat of injury. Past exposure to illegal conduct does not present a present case or controversy regarding injunctive relief. Plans "some day" to become exposed to harm has been held not to be the real and immediate threat that establishes standing. The Third Circuit Court of Appeals has held that these principles apply to claims under Title III of the ADA.

A four-part test has been applied by district courts to determine whether a plaintiff can meet the test of standing to bring an ADA claim: 1) proximity to the defendant's property; 2) past patronage; 3) definitiveness of plaintiff's plan to return; and 4) frequency of nearby travel. The Second Circuit recently affirmed the dismissal of a tester complaint under Fed. R. Civ. P. 12(b)(1) with respect to a Hampton Inn for lack of standing under this four-prong test. The Court held that a plaintiff, who lives thousands of miles away from a location, has only visited it once and who has no specific plans to return lacked standing to file an ADA claim. A theme running through many of the decisions dismissing tester cases for lack of standing has been the courts' assumption, or overt finding of fact, that the tester's only motive for returning to a facility was to test for compliance, not use the goods and services offered by the facility. At least one court has held that a simple averment of intent to return, without more, is insufficient to confer standing. However, another Court, in a split panel decision, ruled that the plaintiff's motive behind returning to facility is not relevant to whether or not he has standing. As long as the plaintiff can establish as a fact that there is a reasonable likelihood of returning to a facility then he has standing to pursue a Title III ADA Claim.

These Drive-by lawsuits thrive on volume and achieving a quick resolution with minimal litigation. Therefore, would-be plaintiffs are less apt to target Places of Public Accommodation that—at first glance—do not appear to have obvious accessibility issues. While, of course, the best defense against such suits is to fully comply with the requirements of Title III, at a minimum, Places of Public Accommodation would be advised to eliminate any "low hanging fruit" to encourage the "drive by" plaintiff to bypass its location for an alternative. For example, Places of Public Accommodation should provide:

- an appropriate number of accessible parking locations, properly located and signed;
- an accessible entrance (and, if the main entrance does not appear accessible, provide clear signage that explains where/how to enter the location);
- accessible routes to and around all key public elements in the location;
- accessible service/sales counters;
- to the extent one is open to the public, an accessible restroom (e.g., one containing sufficient clear floor/turning/transfer space, grab bars, lavatory); and
- permanent room and space and way-finding signage.

Places of Public Accommodation are better served by getting ahead of the curve and creating demonstrable evidence that they are aware of, understand, and are taking steps to address relevant accessibility. The consideration of accessibility issues should be incorporated into the ordinary course of day-to-day planning and management. While it is true that there are rarely definitive actions that Places of Public Accommodation can take to safeguard themselves against Title III claims, demonstrating an understanding and acceptance of accessibility obligations and taking some documented actions to address them will leave you better positioned in the event that a plaintiff raises a concern.

For additional information contact any member of the Hospitality Practice Group.