

Why All of Your Construction Clients Need to Worry About The Americans with Disabilities Act

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Construction industry clients need to be familiar with the terms of the Americans with Disabilities Act (the “ADA”). The ADA is a piece of sweeping civil rights legislation that may change the obligations of all of the parties to the construction process. Many aspects of the ADA are unclear or susceptible to multiple interpretations in light of the manner in which courts are construing the terms of the ADA and accompanying enabling regulations. As such, clients need to take a broad view to evaluate and minimize the liability risks posed by the ADA.

There are several critical features of the ADA that need to be emphasized. First, it is currently unsettled as to exactly who may be liable pursuant to the ADA. Second, the ADA is essentially a “civil rights” statute rather than a building code. The ADA is thus different in application than the traditional measures of minimal construction and design performance. Third, the ADA creates exposure for not only repair costs and injunctive relief, but also civil penalties and recovery of legal fees and expenses. Finally, judicial interpretations of the ADA have been extremely inconsistent even on simple questions. These facets of the ADA warrant both a need for a healthy respect for the ADA on the part of clients and the usefulness of an outline of some of the major points of the ADA, accompanying regulations, and interpretive caselaw.

What is the Purpose of the ADA?

The broad, sweeping purpose of the ADA can be seen from its general mandate. The ADA was enacted, “To provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” See, 42 U.S.C. § 12101(b)(1). The broad nature of the statute is further intended, “[t]o invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities” See, 42 U.S.C. § 12101(b)(4).

The express “sweeping” nature of the ADA has important ramifications. Courts interpreting such legislation tend to resolve questions by resorting to this express purpose of Congress. The premise that owners, contractors, and design professionals need to understand is that the ADA is not a building code. Rather, the ADA is a sweeping piece of civil rights legislation. Courts thus tend to construe the statute in a broad fashion.

What Types of Structures are Governed by the ADA?

Title III of the ADA provides that the ADA applies to all “public accommodations”. “Public accommodations” are defined within the ADA to include a broad range of types of structures and businesses. See, 42 U.S.C. § 12181(A)-(L). Given the sweeping intent of the ADA, and the extremely broad definitions of “public accommodations” found within the ADA, counsel should probably view any structure that invites the public to enter as a “public accommodation” subject to ADA.

What are Prohibited Activities Pursuant to the ADA?

The ADA provides that no individual shall be discriminated against on the basis of disabilities from the full and complete enjoyment of the goods, services, facilities, advantages, or accommodations of any public accommodation. See, 42 U.S.C. § 12182(a). Discriminatory activity includes affording differential benefits due to disabilities. See, 42 U.S.C. § 12182(b)(1)(A)(ii). Goods, services, advantages, and accommodations must be afforded to individuals in the “most integrated setting appropri-

ate to the individual”. See, 42 U.S.C. § 12182(b)(1)(B).

For public accommodations, discrimination pursuant to the ADA includes the failure to remove architectural barriers in existing facilities where such removal is “readily achievable”. See 42 U.S.C. § 12182(b)(2)(A)(iv). Where removal of such barriers is not readily achievable, it is discrimination if the party does not pursue alternative methods of providing access, goods, or services to the disabled if those alternative methods are readily achievable. See, 42 U.S.C. § 12182 (b)(2)(A)(v). The term “readily achievable” is defined as, “easily accomplished and able to be carried out without much difficulty or expense.” See, 42 U.S.C. § 12181(9). Factors to consider include the cost of the specific action, the overall financial resources of the entity involved, and the type of operations engaged in by the covered entity. *Id.*

What are the Provisions Relating to New Construction?

Discrimination pursuant to the ADA includes the failure to “design and construct” new facilities that are “readily accessible to and usable by individuals with disabilities”. See, 42 U.S.C. § 12183(a)(1). The issue of who can be liable for failures to “design and construct” accessible facilities has resulted in extensive, and often inconsistent, litigation. Determining who may be liable under the ADA is currently unclear.

The ADA contains an exception from compliance where it is “structurally impracticable” to meet requirements. *Id.* The question of structural impracticability is factual in nature. In addition to new facility construction, the renovated portions of renovated facilities are also subject to compliance with the “new construction” requirements of the ADA. See, 42 U.S.C. § 12183(a)(2). The ADA also provides that improvements be made to the path of travel to the renovated portion of the facilities to make the renovated portion accessible. *Id.*

What are the Available Remedies Pursuant to the ADA?

Injunctive relief is available under the ADA, including the issuance of court orders to alter facilities to make facilities readily accessible. See, 42 U.S.C. § 12188(2). With regards to enforcement actions, the United States Attorney General may commence civil action against a discriminating party upon reasonable cause to believe a person is engaging in a “pattern and practice” of discrimination. See, 42 U.S.C. § 12188(b)(1)(B)(i). The Attorney General may also file suit if particular discrimination, “raises an issue of general public importance.” See, 42 U.S.C. § 12188(b)(1)(B)(ii).

In cases brought by the Attorney General, the court may order equitable relief, including making facility readily accessible and usable to individuals with disabilities. See, 42 U.S.C. § 12188(b)(2)(A). Further, the court may award other relief, including monetary damages to aggrieved parties, in cases filed by the Attorney General. See, 42 U.S.C. § 12188(b)(2)(B). The court may assess civil penalties up to \$50,000 for a first violation of the ADA and may issue civil penalties of up to \$100,000 for subsequent violations. See, 42 U.S.C. § 12188(b)(2)(C).

The ADA expressly provides that civil remedies pursuant to 42 U.S.C. §§ 2000a-3(A) are also available, including injunctive relief. See, 42 U.S.C. § 12188(a)(1). Thus, private litigants may seek direct redress in court for alleged violations of the ADA. The ADA permits a private litigant to seek redress in situations of not only being subjected to discrimination, but also having “reasonable grounds for believing that such person is about to be subjected to discrimination” *Id.* Finally, the court or agency may award, in its discretion, a reasonable attorney’s fee to the prevailing party. See, 42 U.S.C. § 12205. This provision applies to actions before administrative bodies and court cases. *Id.*

Miscellaneous Provisions of Interest

The Attorney General may review and certify local and state buildings codes for compliance with ADA upon request. See, 42 U.S.C. § 12188(b)(1)(A)(ii). According to the DOJ website dealing with the ADA, DOJ has certified accessibility guidelines and building codes in Florida, Maine, Texas, and Washington states as meeting or exceeding the ADA as of August 24, 1999. In addition, similar statutes and regulations for California, Indiana, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, the county of Hawaii, and several model building codes are currently under review.

In addition, the Attorney General and other agencies are authorized to provide technical assistance. See, 42 U.S.C. § 12206. The ADA does not excuse parties from compliance for failure to receive accurate technical assistance, including failure of agencies to develop technical assistance manuals required by the Act. See, 42 U.S.C. § 12206(e). As such, this technical assistance may be of limited utility.

Who Drafts the Applicable Regulations?

The ADA directs the Architectural and Transportation Barriers Compliance Board (the “Board”) to develop minimum guidelines to provide for accessibility of various structures. See, 42 U.S.C. § 12204(a). The ADA also expressly provided for the Attorney General of the United States to promulgate regulations that implement the act. See, 42 U.S.C. § 12186(b). The ADA requires that regulations issued by DOJ be “consistent with” the minimum guidelines and requirements issued by the Board. See, 42 U.S.C. § 12186(c).

According to this statutory mandate, the Board created a set of guidelines for design and construction guidance to facilitate accessibility. DOJ in turn adopted these guidelines and re-issued its own set of regulations to effectuate Congress’ intent with respect to the ADA (the “DOJ Regulations”). See, 28 C.F.R. §§ 36.101 *et seq.* These regulations provide specific guidance as to when removing existing barriers in “public accommodations is “readily achievable.” See, 28 C.F.R. § 36.304. The removal of barriers includes: installing ramps; making curb cuts; repositioning shelves, tables, and other items; widening doors; installing grab bars; installing accessible door hardware; creating designated accessible parking spaces; and removing high pile carpets. See, 28 C.F.R. § 36.304.

Regarding new construction and renovations to existing facilities, the DOJ Regulations included an express adoption of compliance with the standards for accessible design developed by the Board. See, 28 C.F.R. § 36.406. Most of the construction standards developed by the Board and incorporated by DOJ into the DOJ Regulations parallel ANSI A 117.1, the hallmark initial standards for accessible design and construction. There are some alterations, and counsel is well advised to seek assistance on interpretation from experts, in accessible design and building codes on this point.

The DOJ Regulations provide similar guidance regarding required improvements to the path of travel on renovation or improvement projects. See *e.g.*, 28 C.F.R. § 36.403. Finally, the DOJ Regulations define “structural impracticability” as instances where an entity, “[C]an demonstrate that it is structurally impracticable to meet the requirements “[these situations] will be considered only in those *rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.*” See, 28 C.F.R. § 36.401(c) (emphasis added).

Appendix A to the DOJ Regulations offers some specific construction details that govern various individual situations presented by construction design. The Regulations are very detailed and include dimensions and details for providing various elements of accessible design and construction. All designers and contractors should be familiar with these requirements to minimize potential exposure

to claims.¹

Who Can Be Liable?

The Ellerbe Becket Cases

The question of precisely who is exposed to liability pursuant to the ADA has been addressed in multiple cases throughout the country. Courts have reached widely varying results on the question of who can be liable for a failure to “design and construct” accessible facilities. For example, the architectural firm of Ellerbe Becket was sued by an advocacy group with regards to the design and construction of the MCI Arena in Washington, D.C. The United States District Court for the District of Columbia granting Ellerbe Becket’s Motion to Dismiss holding that the architect only designed the facility and thus could not “design and construct” the MCI Arena. *Paralyzed Veterans of America v. Ellerbe Becket, et al.*, 945 F. Supp. 1 (D.C. 1996).

In contrast, the United States District Court for the District of Minnesota held differently *with respect to the same architectural firm as defendant*. The Department of Justice filed suit against Ellerbe Becket in Minnesota alleging that the architectural firm engaged in a pattern and practice of discrimination by designing inaccessible facilities. The Minnesota court overruled Ellerbe Becket’s Motion to Dismiss and expressly disagreed with the *Paralyzed Veteran’s* case. *United States v. Ellerbe Becket*, 976 F. Supp. 1262 (D.C. Minn. 1997). The *Ellerbe Becket* court held that the ADA could apply to architect’s on these facts. *Id.*

The court’s rejection of the defendant’s argument rested on a distinction between public accommodations, where only owners could be liable, and “commercial facilities” which required a party to “design and construct” the facility to create liability. According to the trial court, the distinctions between the “commercial facilities” section and the “public accommodations” section could leave no one liable on commercial facilities in the event the court adopted the architect’s interpretation. *Id.* at 1267. The trial court held that, at the motion to dismiss phase, it was inappropriate to find as a matter of law that the architect could not have participated in the “design and construction” given the potential for construction monitoring by the architect. *Id.*

Ellerbe Becket eventually entered into a Consent Order dated April 22, 1998 in this case. While not conceding liability, Ellerbe agreed to design facilities in accordance with DOJ requirements for enhanced lines of sight for disabled patrons.²

The Broward Arena is yet another Ellerbe Becket designed arena project. Broward Arena is the home of the Florida Panthers. *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1176 (S.D. Fl. 1997). Ellerbe Becket again filed a motion to dismiss plaintiffs’ ADA claims arguing that a “failure to design and construct” under the ADA must include both *design* and *construction*. *Johanson*, 963 F. Supp. at 1177. Like the Minnesota case, the Broward Arena court rejected the argument, holding that for purposes of motion to dismiss, plaintiffs could maintain their action against Ellerbe Becket. *Id.* at 1178. Thus, different courts have reached different results based on the same facts. Indeed, these three cases involving Ellerbe Becket shared the common issue of who can be liable, involved the exact same party (Ellerbe Becket) and were basically the same type of project (design and construction of a large scale arena).

The Day’s Inn Cases

DOJ filed three separate cases against various Day’s Inn hotel franchisees and the franchisor alleging that the design and construction of various Day’s Inn facilities failed to meet ADA requirements. The Day’s Inn franchisor developed manuals regarding construction, design and operation of Day’s

Inn facilities to ensure uniform appearance of the various members of the chain. The question of whether Day's Inn could be liable, as franchisor, for a facility that it did not own, operate, or contract for construction and/or design was construed in three separate cases with varying results.

In Illinois, the Attorney General sued the national organization that licenses Day's Inns amongst other parties. *United States v. Day's Inn of America, Inc.*, et al., 997 F. Supp. 1080 (C.D. Ill. 1998). The trial court analyzed the role of the franchisor in developing plans, manuals, and reviewing construction documents used for construction of the facility in question. The court found that Day's Inn involvement was sufficient to classify them as designing and constructing the facility to fall within the parameters of the ADA. *Id.* at 1083. The court expressly disagreed with narrow construction of the statutory "design and construct" language found in the MCI arena case as to the architect, Ellerbe Becket. *Id.*

In South Dakota, the Attorney General again brought an enforcement action against the Day's Inn franchisor. In this case, the District Court granted summary judgment to the franchisor holding that the franchisor did not "design and construct" facilities in question. See, *United States v. Day's Inn of America, Inc.*, et al., 151 F.3d 822 (8th Cir., 1998). The Court of Appeals reversed, finding that a finder of fact could determine that they designed and constructed the facility. *Id.* at 824.

The court cited various examples of such facts. For example, a Day's Inn franchise representative recommended the architect and builder who were eventually hired by the franchisee. *Id.* The franchise agreement included a requirement for submittal and approval of plans by Day's Inn. The court did find that "design and construct" was conjunctive and thus meant a party who both designs and constructs the facility. *Id.* at n. 2. Thus, this holding agrees with the logic of MCI Arena while finding that summary judgment was inappropriate on these facts. The court stated that to bear responsibility under the ADA, a party must possess a "significant degree of control over the final design and construction". *Id.* at 826. While Day's Inn did not exercise that control under the facts of the case, it did have the contractual right to control construction and design and thus summary judgment was inappropriate. *Id.* at 826-27.

Finally, the Attorney General brought yet another enforcement action against Day's Inn in Kentucky. The same scenario was presented as the South Dakota and Illinois cases with respect to the franchise agreements, manuals, and the like. *United States v. Day's Inn, Inc. et al.*, 22 F Supp. 2d 612 (E.D. Ky. 1998). The contractor, builder, and owner of facility agreed to remedy allegations of non-compliance with the ADA and were thus dismissed by the Attorney General. The trial court found that only owners, operators, and lessors were liable under Section 303 of the ADA. *Id.* The court found that the manuals placed responsibility for ADA compliance on the franchisee. The court further held that Day's Inn was not an "operator" of the facility because it was not really controlling the facility. As such, ADA liability was inappropriate. *Id.*

The Ellerbe Becket and Day's Inn cases demonstrate a critical point about the ADA. Such simple language applied to the myriad of facts presented by a construction project creates uncertainty. When coupled with the viewpoints of different judges with respect to statutory interpretation and enforcement, it is difficult to determine who may be liable under the ADA.

The best course is to assume that any party that either "designs" or "constructs" portions of a project may be exposed to direct ADA liability. This translates a need for not only design professionals, but also contractors, subcontractors, and owners to concern themselves with ADA compliance.

A Case Study: Enhanced Lines of Sight

The spate of cases throughout the country dealing with “enhanced lines of sight” offers perhaps the most in-depth example of ADA interpretation and enforcement. The biggest question presented in most of these cases is precisely what type of seat is acceptable for a disabled patron in a public facility. At its most basic level, the ultimate question is whether a disabled patron is entitled to a seat which permits viewing an event over a patron who stands up. The cases also discuss the need for dispersion and integration of seating for the disabled within the facility.

A review and analysis of the promulgation of regulations on this point is critical to understanding these cases.³ Initial ANSI A 117.1 standards for accessibility required handicapped seating to have “comparable lines of sight” to those seats for non-disabled patrons. This language was interpreted to mean that seating for the disabled could not have obstructed views. In the interpretation of ANSI, there was no requirement for “enhanced lines of sight” that permitted a wheelchair bound patron to be able to see over the heads of non-disabled patrons who stood up during an event.

When the Board issued ADAAG, it simply incorporated the prior ANSI A 117.1 requirements for “comparable lines of sight”. During the development of ADAAG, there was considerable discussion put forth as to whether specific language for enhanced lines of sight should be included. The final version deleted such language that was present in earlier drafts. The Department of Justice simply adopted ADAAG without any review of or comment on the question of what “comparable lines of sight” meant.

In 1994, the Department of Justice issued its supplement to its Technical Assistance Manual (“TAM”). The supplement required enhanced lines of sight to meet the requirement of “comparable lines of sight” under the ADAAG regulations adopted pursuant to 28 CFR §§ 101 et seq. The supplement was issued without a “notice and comment” period typically required pursuant to administrative procedures when an administrative agency engages in a substantive rule change. This chain of events set the stage for significant litigation throughout the country of major, high-profile public stadium projects.

The MCI Arena Case

On the Washington, D.C. MCI Arena project, the owners and designers did not require enhanced lines of sight for all of the seating for the disabled. The owners, developers, and designers were sued by the Paralyzed Veteran’s of America for failure to “design and construct” a facility that met the requirements for new construction pursuant to the ADA. When faced with the question of facility’s compliance with the ADA, the trial court expressly noted that the remaining defendants had acted in good faith. *Paralyzed Veterans of America v. Ellerbe Becket, et al.*, 950 F. Supp. 389, 392 (D.C. 1996)(denying defendants’ Motions for Summary Judgment); *see also, Paralyzed Veterans of America v. Ellerbe Becket, et al.*, 950 F. Supp. 393, 394 (D.C. 1996)(granting Plaintiff’s request for injunctive relief). The facility even contained a greater number of seats for the disabled than required pursuant to the ADA. *Paralyzed Veterans*, 950 F. Supp. at 401.

Nevertheless, the court ruled, that the original design failed to comply with the ADA. *Id.* 950 F. Supp. at 405. The court held the original design failed to meet DOJ’s requirements for enhanced lines of sight. In addition, the original design failed to provide for adequate dispersion of the seating for the disabled to comply with the ADA and DOJ’s interpretive regulations. *Id.*

The design of the MCI Arena was selected in January 1995. *Id.* 950 F. Supp. at 396. The Department of Justice issued a supplement to its Technical Assistance Manual in December, 1994 which indicated DOJ would require enhanced lines of sight. *Id.* 950 F. Supp. at 391. The TAM was issued without a review and comment period that is typically associated with administrative rules changes. *Id.* 950

F. Supp. at 399. Despite these issues, the court found that DOJ's interpretations were entitled to agency interpretive deference and enhanced lines of sight were required for compliance.

After the initial ruling, later changes to the design resulted in a higher percentage of seats with enhanced sightlines. The trial court then ruled that "substantial compliance", as demonstrated in the final design, was sufficient to comply with the ADA. Both sides appealed. *Paralyzed Veterans*, 117 F.3d 579, 580 (D.C. Cir. 1997). The owners of the facility claimed on appeal that enhanced sightlines were not required due to the lack of notice and comment for administrative rule change. The plaintiff claimed that "substantial compliance" was insufficient; rather, the ADA should require full and complete compliance with 100% of accessible seating having enhanced lines of sight. The Court of Appeals for the District of Columbia upheld the lower court's opinion in toto. *Id.* at 589. The owners eventually appealed to the United States Supreme Court where a writ of certiorari sought by the owners was denied. *Id.*, 118 S. Ct. 1184.

The Rose Center Litigation

The Rose Center is the home of the Portland Trail Blazers. As with the litigation in the MCI Arena case, a significant portion of the litigation was devoted to what requirements were for lines of sight for seating for the disabled. *Independent Living Resources v. Oregon Arena Corporation*, 982 F. Supp. 698 (D.C. Ore. 1997). Further, the case devotes a great deal of analysis to the question of companion seating locations, dispersion of seating, and integration of seating for the disabled within the overall seating plans. The court found that placement of accessible seating "made a mockery" of dispersal requirements in the ADA. *Id.* at 712. The court found violation of both vertical and horizontal dispersion requirements. *Id.* at 716-717.

In contrast to the MCI Arena case, the *Oregon Arena* court found that DOJ was bound by its actions to the commentary of the Board when it adopted the ADAAG as part of the DOJ Regulations. *Oregon Arena*, 982 F. Supp. at 741-42. The issue of whether enhanced lines of sight were required was expressly deferred by the Board when it developed the ADAAG. *Id.* Thus, any attempt to alter the earlier rule would be an interpretive rule change requiring a notice and comment period. *Oregon Arena*, 982 F. Supp. at 743.⁴

Caruso v. Blockbuster

The *Caruso* case again analyzed the requirement for enhanced lines of sight. The Caruso trial court granted defendants' motions for summary judgment, holding that the "enhanced lines of sight" requirements set forth in the 1994 Supplement to the TAM were effectively a rule change without notice and comment. *Caruso v. Blockbuster-Sony Music Entertainment Center, et al.*, 968 F. Supp. 210, 214-15 (S.D. N.J. 1997).

The case turned on the court's review and analysis of the regulations. The Caruso court found that the original ANSI A 117.1 requirements were never interpreted as requiring "enhanced lines of sight". *Id.* at 217. When ADAAG was developed, the question of enhanced lines of sight was expressly deferred. *Id.* at 216. DOJ simply adopted the ADAAG as its regulations.

On appeal, the Third Circuit Court of Appeals upheld this portion of the lower court's ruling. *Caruso v. Blockbuster*, 174 F.3d 166 (3rd. Cir. 1999). Another ruling granting defendants' motion for summary judgment and dismissing plaintiffs' claims related to lack of accessibility lawn seating at the facility was reversed. *Id.*

Conclusion

As demonstrated above, such apparently simple issues as "who can be liable" pursuant to the ADA

are unresolved. This lack of clarity on even basic points makes liability pursuant to the ADA a threat to every party to the construction process.

Non-compliance with accessibility requirements is not just a design issue. When a contractor places a plumbing stack in the wrong location and thus shifts all the toilets in a building too close to a wall, the ADA may be violated. The contractor may find themselves responsible for not only repair costs, but also legal fees and even penalties under the right circumstances. As such, the stakes in this type of litigation are quite high.

All of these factors make accessibility difficult to access. As such, clients need to aggressively manage risks associated with these claims by taking the broadest possible interpretation as to who can be liable. Further, construction clients need to take a proactive attitude and go beyond the apparent requirements of the law to avoid potential entanglement with ADA liability. □

Endnotes

- ¹ The design details include dimensions and design criteria for such items as acceptable curb cuts, accessible elevators, and compliant handrails, not to mention obstructions to path of travel and the like.
- ² For more information, you may refer to the Department of Justice Web site on accessibility issues, <http://www.usdoj.gov/crt/ada/ada-home.html>.
- ³ The cases cited below provide detailed treatments of the regulatory and statutory history of the ADA, ANSI A 117.1, ADAAG, and the DOJ regulations regarding accessibility. For a detailed history, see *Paralyzed Veterans of America v. Ellerbe Becket, et al.*, 950 F. Supp. 389, 392 (D.C. 1996)(denying defendants' Motions for Summary Judgment); see also, *Paralyzed Veterans of America v. Ellerbe Becket, et al.*, 950 F. Supp. 393, 394 (D.C. 1996)(granting Plaintiff's request for injunctive relief); see also, *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997).
- ⁴ The Rose Center litigation was not resolved by merely this reported decision. Other related reported decisions on this project are reported at 1 F. Supp 2d. 1124 and 1 F. Supp. 2d 1159. Given just the number of pages of these decisions, these cases are a testament to the level of detail, legal fees, and efforts that can accompany an ADA based lawsuit.

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