iStockphoto

ADA Title III Legal Developments Affecting Public Accommodations Owners and Operators

By Minh N. Vu

During the past few years, a number of legal developments have occurred relating to Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., that affect owners and operators of public accommodations facilities. Title III of the ADA prohibits discrimination against individuals with disabilities by owners, operators, lessors, and lessees of public accommodations facilities and requires public accommodations facilities to be accessible to such individuals. This article provides some highlights of those legal developments.

Minh N. Vu is a partner in the Washington, D.C., office of Seyfarth Shaw LLP.

Some Courts Prevent Owners from Suing Architects and Consultants for Designing Noncompliant Facilities

Owners of commercial facilities and developers of multi-family housing should take note of an alarming trend: some courts are not allowing owners and developers to sue their architects and consultants for designing facilities that do not comply with the ADA and the Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601 et seq., accessibility requirements.

The most recent case on this subject is *Rolf Jensen & Associates v. District Court*, 282 P.3d 743 (Nev. 2012). A casino owner sued its ADA consultant under its contract and state law after the Department of Justice (DOJ) required the owner to make more than $20 million in retrofits to comply with ADA requirements. The Nevada Supreme Court dismissed the owner's claims, finding that allowing these claims to move forward would frustrate the objectives of the ADA. The court said that allowing an owner to "completely insulate itself" from liability for an ADA or FHA violation by contract or through state common law principles would diminish an owner's incentive to ensure compliance. *Rolf Jensen*, 282 P.3d at 748. The court emphasized that owners have a nondelegable duty to comply with these statutes that cannot be shifted to third parties. Although the court did acknowledge that the ADA

explicitly allows landlords and tenants to allocate responsibility for violations among themselves, it viewed this explicit exemption as further proof that there was no congressional intent to allow such allocation between owners and architects or designers. The court also noted that the consultant was not immunized from liability but its liability ran to disabled individuals and not to the casino owner.

The U.S. Court of Appeals for the Fourth Circuit reached the same conclusion in *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010). In that case, a multi-family housing developer sued the architect of 15 apartment communities that needed more than $2.5 million in retrofits to comply with ADA and FHA requirements. The Fourth Circuit dismissed all of the owner's claims against the architects under the same theory that the Nevada Supreme Court adopted. Federal district courts in Maryland, Mississippi, and Tennessee have also dismissed claims by owners against their architects and applied the same rationale. See *United States v. The Bryan Co.*, No. 3:11-CV-302-CWR-LRA, 2012 WL 2051861, at *5 (S.D. Miss. June 6, 2012); *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 824 (D. Md. 2009); *United States v. Murphy Dev., LLC*, No. 3:08-0960, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009).

Although courts in many jurisdictions have yet to address this issue, property owners may want to rethink how they draft their architectural or ADA consulting contracts in light of the *Rolf Jensen/Equal Rights Center* cases. The primary rationale for rejecting the owners' claims in those cases was the fact that enforcing the owners' contractual rights would shift all responsibility for noncompliance to architects or consultants. Thus, alternative provisions that would require design professionals to share in the responsibility of a noncompliant design, rather than assume all of it under a full indemnification provision, might give owners more options for recourse.

These disturbing court decisions also make clear that property owners cannot passively rely on their design professionals to get it right. After all, if

all architects knew how to design to the federal accessibility standards, there would be no successful ADA Title III lawsuits concerning noncompliant public accommodations facilities built after 1993. In reality, the level of understanding of federal accessibility requirements among design professionals varies greatly. Thus, it is important for owners to be proactive about accessibility issues. Designating a point person to oversee accessibility compliance for an entire project, asking the right questions to make sure accessibility is being considered, having plans reviewed by an independent and reputable accessibility specialist, and conducting as-built accessibility inspections as soon as the project is completed are some of the ways to achieve this result. Doing nothing on the front end may prove to be quite—unexpectedly—costly on the back end.

Do Web Sites and Mobile Applications Need to Be Accessible to Persons with Disabilities?

Businesses have increased their reliance on technology to deliver their goods and services to customers, resulting in a corresponding increase in complaints by individuals with disabilities that much of the technology is not accessible to them. For example, many blind individuals use screen reader software to access web sites, but the web sites must be designed and coded in a manner that works with this software. Likewise, the operating systems for Apple and Android mobile devices have built-in screen reader software, but mobile applications must be designed to be compatible.

Litigants seeking to make web sites and mobile applications accessible usually rely on the ADA's requirement that public accommodations must provide "auxiliary aids and services" that "may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals." 28 C.F.R. § 303(a). The revised ADA Title III regulations issued on September 15, 2010, expanded the definition of the term "auxiliary aids and services" to include "accessible electronic and information technology." Web sites and other technologies such as mobile applications would fall under this general category. Id. § 303(b)(1) & (2).

In 2010, the DOJ stated its position that web sites of public accommodations are covered by Title III of the ADA and that they must be either (1) accessible or (2) the goods and services available on the web site must be provided in an alternative manner that affords "an equal degree of access." Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, at 43,466 (July 26, 2010). DOJ made this pronouncement even though it had not issued regulations setting forth the technical standards defining an "accessible" web site. Proposed regulations are expected to be issued this year. In the meantime, DOJ filed its first enforcement suit over an inaccessible web site at the end of 2013 against a leading tax return preparation company. See *National Fed'n of the Blind v. HRB Digital LLC*, No. 1:13-cv-10799-GAO (D. Mass). The parties entered into a consent decree in March 2014 that includes a requirement for accessible web sites and mobile applictions in addition to civil penalties and damages.

Court decisions on the issue of whether web sites of public accommodations are covered by Title III of the ADA generally fall into two categories. Courts deciding cases involving web sites of public accommodations that have a physical place of business for customers have held that Title III of the ADA covers the web sites. The circuits do not agree, however, on how web sites of businesses with no physical presence should be treated.

In the Ninth Circuit, a web site must have a nexus to a physical location for

it to be covered under Title III of the ADA. In *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006), the district court held that Target's retail web site is a covered "place of public accommodation" because there was a "nexus" between the web site and Target's brick and mortar stores. Target settled the case shortly after this decision. In recent years, eBay and Netflix were both able to dismiss cases brought in California federal court challenging the accessibility of their web sites on the theory that the sites had no nexus to a physical location. See *Earll v. eBay Inc.*, No. 5:11-CV-00262-EJD, 2012 WL 3255605 (N.D. Cal. Aug. 8, 2012); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

Unlike the Ninth Circuit, the First Circuit does not require that a web site have a nexus to a physical location to be a covered public accommodation. Thus, in 2012, a Massachusetts district court held in *National Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 202 (D. Mass. 2012), that Netflix's web-only video streaming business, "Watch Instantly," is a "place of public accommodation" covered under Title III of the ADA, even though this web site has no nexus to any physical place of business. The case settled shortly after the ruling.

To date, no court has issued a decision on the question of whether a public accommodation's mobile application is covered by Title III of the ADA.

Perhaps recognizing that litigating the accessibility of a web site or mobile application can be expensive and complicated, many high-profile companies have entered into agreements with federal and state agencies and advocacy organizations in which they have committed to make their web sites and mobile applications accessible. The access standard usually referenced in these agreements is the Website Content Accessibility Guidelines (WCAG) 2.0 Level AA. The WCAG 2.0 Level AA is a set of criteria developed by the Worldwide Web Consortium (WC3), a private group of accessibility experts who are considered the thought leaders in this space. At the end of 2013, the Department of Transportation adopted the WCAG 2.0 Level AA as the access standard for airline web sites; and it is likely that the DOJ will also adopt the WCAG 2.0 Level AA as the access standard for public accommodations web sites.

New ADA Title III Regulations on Service Animals Provide Relief to Owners and Operators

Before March 15, 2011, any type of animal could be a protected service animal under the ADA as long as the animal was trained to perform work or tasks for a person with a disability. DOJ regulations that became effective on March 15, 2011, provide that only dogs can be service animals, although miniature horses also have to be given the same special treatment assuming their size does not preclude their use in a particular facility. 28 C.F.R. §§ 36.104, 36.302(c)(9). The dogs or miniature horses must be trained to perform work or tasks for a person with a disability and they must be house-trained. They are not required to wear any special garments. Service animals can accompany their owners anywhere that other members of the public are allowed to go, including restaurants and grocery stores. Businesses may not impose on service animal users any charges that would normally apply to pets or other animals.

Although businesses may not inquire into the nature of a person's disability, the new ADA Title III regulations allow businesses to ask two questions if the animal's status as a service animal is not clear: Is this dog (or miniature horse) required because of a disability? What work or task has this dog (or miniature horse) been trained to perform? Businesses may not require medical documentation, a special identification card, or training documentation for the service animal.

Businesses cannot exclude service animals because they are an aggressive breed or because they cause fear or allergic reactions. That said, a business can ask a person with a disability to remove his service animal from the premises if the animal is either out of control and the handler does not take effective action to control it, or is not housebroken. When there is a legitimate reason to ask that a service animal be removed, however, a business must offer the person with the disability the opportunity to obtain goods or services without the animal.

These new federal ADA service animal rules are a mixed blessing. On the one hand, they simplify matters by limiting the types of animals that must be accommodated to dogs and miniature horses. On the other hand, businesses that want to adopt this narrower rule must also determine whether the definition of service animal under their state and local laws are broader and tailor their policies to comply with all laws. For companies that do business in many states, it may be simpler to stick with the old rule that all animals can be service animals.

New Regulations Require Businesses to Allow Segways™ and Other Power Mobility Devices into Premises

Many individuals with disabilities are choosing other power-driven mobility devices (OPMDs), such as Segways™, over traditional wheelchairs and scooters to provide them with enhanced mobility. In response, DOJ amended its regulations in 2010 to require businesses to allow the use of OPMDs in their facilities unless the business can establish that the particular OPMD cannot be operated safely within any particular facility. 28 C.F.R. § 36.311. Three years later, businesses still have very little practical guidance from the courts and DOJ about when and how they may limit the use of these devices.

The regulations specify that businesses must analyze five factors to determine whether they must allow a particular OPMD to be used in a specific facility, including (1) the type, size, weight, dimensions, and speed of the device; (2) the facility's pedestrian traffic; (3) the facility's design and operational characteristics; (4) whether legitimate safety requirements can be established to permit the safe operation of another OPMD in that facility; and (5) whether the use of that OPMD creates a substantial environmental harm or conflicts with federal land management laws. Id. § 36.311(2).

The DOJ's position is that "in the vast majority of circumstances," public accommodations would have to admit Segways™ and other OPMDs. In its technical guidance documents, the DOJ encourages businesses to develop written policies based on the foregoing factors, specifying when OPMDs will be permitted on their premises and to communicate those policies to the public. It does not give concrete examples, however, of scenarios in which OPMDs can be excluded, other than that gas-powered OPMDs can be limited to outdoor use.

Before the new regulations, much of the Segway™ access litigation involved shopping malls. See, e.g., *McElroy v. Simon Property Group, Inc.*, No. 08-4041-RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining a mall from prohibiting the use of a Segway™ when an individual agreed to all of the mall's policies for use of the device, except indemnification). Since the DOJ adopted the new regulations, only two courts have actually applied the regulatory factors to specific facts, and both cases involve a large amusement park. The first case, decided in a California trial court and affirmed on appeal, upheld the amusement park's no-Segway™ policy, reasoning that the park had submitted undisputed evidence that Segways™ could not be safely used in the crowded park because of the way they operate. See *Baughman v. Walt Disney World Co.*, 159 Cal. Rptr. 3d 825, 831–32 (Ct. App. 2013). In the second case, a federal district court approved a class settlement in which the plaintiffs had agreed to abandon their challenge to the park's no-Segway™ policy in exchange for a commitment by the park to provide four-wheeled stand-up OPMDs. See *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1217-18 (11th Cir. 2012). The court based its approval on the fact that the amusement park owner had submitted sufficient expert testimony regarding the dangers of Segways™. This evidence caused the court to conclude that the plaintiffs were unlikely to prevail had the issue been litigated.

The reality is that few businesses have Segway™ experts on staff who can conduct analyses to justify any restrictions on OPMD use and even fewer have the resources or desire to defend their OPMD policies in court. Unfortunately, the regulations' use of a multi-factor test results in uncertainty and litigation. Until more courts issue decisions involving scenarios that would justify restrictions, businesses should adopt policies with the fewest possible restrictions on OPMDs after conducting a thoughtful analysis of the regulatory factors as applied to each unique facility. Businesses also need to keep in mind that conditions can change depending on the time of the day or year and that a policy should take these differences into account. These steps will help minimize the threat of litigation regarding OPMDs but will not eliminate it.

Conclusion

New regulations and court decisions have further delineated the responsibilities of owners and operators of public accommodations to provide ADA-compliant facilities and services. These developments address both new technologies—such as the use of Segways™ and the accessibility of web sites—as well as the increased use of service animals for persons with disabilities. Developers and property owners should also be aware of a new trend in court decisions that would limit their ability to pass on ADA compliance liability to architects and designers. ■

Technology Property

Technology—Property provides information on current technology and microcomputer software of interest in the real property area. The editors of *Probate & Property* welcome information and suggestions from readers.

Making Money and Sleeping at Night—How Systematizing and Automating Can Benefit Your Practice

A provider of continuing legal education in my state occasionally offers a seminar entitled "How to Make Money and Stay Out of Trouble." The course focuses on the ethical rules, best practices for law office management, billing and collections, and finance and accounting. When it comes to avoiding trouble (mainly in the form of disciplinary actions and malpractice claims), however, would it not be better to know that trouble is highly unlikely? Why not aspire to creating an environment that lets you sleep at night knowing that you have taken steps to minimize the kinds of problems that expose lawyers to the most feared hazards?

One of the best ways to get a good night's sleep and make money is to systematize your practice. This means putting in place defined processes to make sure that what should happen actually does and that you don't neglect something that could result in embarrassment or worse. Systems also can help make your practice profitable by making you and your staff more efficient and responsive. Note that while "system" can apply specifically to technology, it is being used here in a broader sense to refer to a regular planned procedure that is designed for reuse.

Even if you are a solo practitioner without any support staff, having systems in place is important. If you have staff, they take on a whole new importance, providing you with a way to make sure that your staff does what needs to be done and providing you with a way to easily check on the status of delegated tasks.

You do not need technology to create systems for your practice. Just having clearly defined procedures (hopefully recorded in writing) can give you a leg up. Technology, however, can take things to a much higher level. Lots of practitioners, for example, use closing agendas to ensure that all of the necessary documents are provided, executed, or both. You can improve on this by using software to generate a transaction-specific closing agenda on the fly, making it far more useful. Attorneys for one affordable housing finance agency, for example, use document assembly software to generate such a document for its closings, when there are dozens of different sources of financing and each has a unique set of documentation requirements. The closing agenda lists the documents for each financing source and only those for the relevant ones.

Technology can assist with a broad range of systems. Software can be invaluable in keeping track of deadlines, helping lawyers and their staffs navigate complex processes, and ensuring a more efficient and rigorous information gathering process. Technology can also help prevent errors in the documents the firm produces. It can be very useful in keeping track of delegated work assignments—making sure that the person assigned a task knows what is expected of him or her and allowing easy tracking of what tasks have been completed and which are outstanding. If you use a computer to track work assignments, you can also generate reports to see, at a glance, what a particular person's workload looks like, allowing you to distribute work more evenly and avoid bottlenecks.

Automated systems also can help reduce dependence on highly skilled employees and avoid the disruption that occurs when they go on vacation, get sick, or retire. You can capture the knowledge of such employees in a software-driven system so that less knowledgeable folks can do the same job. Rather than residing in the head of one or two key employees, know-how lives on every computer in your office.

Technology can help you standardize the documents your firm generates. Standardization is an

Technology—Property Editor: Gerald J. Hoenig, Smart Diligence, LLC, 8495 Caney Creek Landing, Alpharetta, GA 30005, gerald.hoenig@smartdil.com.
Guest Editor: Bart Earle (bart@capstonepracticesystems.com) is vice-president of Capstone Practice Systems, Inc., of Harvard, Massachusetts.