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# WHAT LANDLORDS AND TENANTS SHOULD DO TO AVOID LIABILITY UNDER THE ADA

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The Americans with Disabilities Act (42 U.S.C. § 12101 *et seq*.) (ADA) was enacted in 1990 to address the problem of over 43 million Americans with disabilities who suffered discrimination as a result of physical barriers to access in public accommodations, such as restaurants, stores and recreational facilities. Title III of the ADA specifically prohibits discrimination on the basis of disability in places of public accommodation, and sets standards for newly constructed or altered places of public accommodation.

Regrettably, the noble intentions of Title III of the ADA have been eclipsed by a tidal wave of spurious litigation spawned by "professional plaintiffs" who are represented by counsel who specialize in bringing ADA strike suits. Last year, there were over 10,000 ADA lawsuits filed in the United States, with New York State being one of the most frequent venues for these lawsuits. It is not uncommon for "serial plaintiffs" or "frequent filers" to be involved in dozens of lawsuits in the Southern and Eastern Districts of New York, suing different businesses located on the same block or in the same neighborhood. While no one can dispute that barriers to access for handicapped people should be eliminated where possible, these lawsuits seem to be brought primarily to generate attorneys' fees for counsel rather than to make places of public accommodation accessible.

In New York State, the typical lawsuit alleges violations of Title III of the ADA, together with violations of the New York State Human Rights Law (N.Y.S. Executive Law § 296) and the New York City Human Rights Law (N.Y.C. Admin. Code 8-107). Under the ADA, a plaintiff may seek injunctive relief to require that the premises be altered to make them readily accessible to, and useable by, individuals with disabilities. Notably, compensatory and punitive damages are not recoverable in private suits under Title III of the ADA.[1] However, compensatory damages are recoverable under the New York State and the New York City Human Rights Laws, but such

[1] See, e.g., Bernas v. Cablevision Sys. Corp., 215 Fed. Appx. 64, 67-68 (2d Cir. 2007); Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 86 (2d Cir. 2004) (noting that a "private individual may only obtain injunctive relief for violations of a right granted under Title III; he cannot recover damages").

awards generally do not exceed $1,000. Punitive damages are not recoverable under New York State law.[2]

Attorneys' fees are recoverable under the ADA and the New York City Human Rights Law,[3] and that seems to be the driving force for many of these lawsuits. In the Southern District of New York, courts have held that a reasonable hourly rate for experienced civil rights attorneys ranges from $250 to $400 per hour.[4] Further fueling the litigation is the fact that in order to be deemed the "prevailing party" in an ADA action and be awarded attorneys' fees, a plaintiff need only demonstrate a single violation. Regrettably, efforts to reform the ADA and reduce litigation, by requiring plaintiffs to give notice and an opportunity for landowners or operators to cure the alleged violations, have stalled.

It is not surprising that nearly all of these cases are settled at the outset of the litigation so that defendants can minimize their liability for attorneys' fees. In a typical settlement, plaintiff will demand a lump sum for damages and attorneys' fees (with the bulk of the settlement allocated to attorneys' fees) and remediation of the premises to remove barriers to access, both interior and exterior. The remediation efforts typically involve installation of either permanent or portable ramps or chairlifts, intercoms/buzzers and proper signage. The cost of the remediation may be significant depending on the extent of the violations.

What can landlords and tenants do to avoid liability under the ADA? Before you sign a contract or a lease to buy or lease property, do your due diligence. Retain ADA professionals to advise you as to whether the property complies with myriad ADA rules and standards. If you currently own or lease a property with potential ADA violations, be proactive and take measures to comply with the ADA. Do not wait to be sued. As a United States District Court Judge recently stated, these lawsuits are "an exercise in shooting ducks in a barrel."[5]

If you are a tenant, before you sign a lease, have an experienced real estate attorney review it for potential exposure under the ADA. The lease should clearly delineate the respective rights, duties and responsibilities of the landlord and tenant with respect to ADA compliance. Usually, commercial leases provide that the tenant is fully responsible for compliance, but some leases

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[2] Barrella v. Vill. of Freeport, 43 F. Supp. 3d 136, 188 (E.D.N.Y. 2014); Silberstein v. Advance Magazine Publishers, Inc., 988 F. Supp. 391, 393 (S.D.N.Y. 1997), citing Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1190-91 (2d Cir. 1992). Punitive damages may, however, be recovered under the New York City Administrative Code. See Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 235 (2d Cir. 2000).

[3] District Courts have discretion under 42 U.S.C. § 12205 to award reasonable attorneys' fees and costs to a prevailing party. See, e.g., Bowman v. Maygina Realty, No. 14-CV-5423, 2016 WL 3676669 (S.D.N.Y., July 6, 2016).

[4] See Munoz v. The Manhattan Club Timeshare Ass'n Inc., No. 11-CV-7037, 2014 WL 4652481 (S.D.N.Y) (Sept. 18, 2014) (reasonable hourly rate for experienced civil rights attorneys in the Southern District ranges from $250 to $600 per hour, and the attorney in that case, who had almost twenty years of experience, was entitled to only $400 per hour); Access 4 All, Inc. v. Mid-Manhattan Hotel Assoc. LLC, No. 13-CV-7995, 2014 WL 3767009 (July 31, 2014) (pursuant to a settlement agreement where parties reserved the issue of attorneys' fees, $375 per hour was a reasonable hourly rate); Harty v. Par Builders, Inc., No. 12-CV-2246, 2016 WL 616397 (S.D.N.Y.) (Feb. 16, 2016) ($375 per hour was a reasonable rate for attorneys).

[5] Taylor v. 312 Grand Street LLC, 2016 WL 1122027 (E.D.N.Y. 2016).

may have a "carve out" for landlords to be liable for pre-existing conditions or common areas. Tenants should be aware of indemnification provisions that shift the liability to them by making tenants agree to indemnify landlords from any and all claims or damages, including attorneys' fees incurred as a result of ADA violations. The indemnification clause is the most efficient and effective way for landlords to shift liability for ADA compliance to tenants.

In addition to retaining counsel knowledgeable in the area of ADA, it is important to employ other professionals, such as architects and contractors, who also are well-versed in ADA standards, regulations and requirements. This is because when alterations are made to existing buildings, "a defendant discriminates if those altered areas are not made readily accessible to disabled individuals to the maximum extent feasible."[6] Both the landlord who approves the alterations and the tenant who made them may be held liable for ADA violations.

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If you have any questions pertaining to liability under the ADA, please contact Slava Hazin, any of the undersigned or your regular Warshaw Burstein attorney.


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[6] Rosa v. 600 Broadway Partner, LLC, 175 F. Supp.3d 191, 206 (S.D.N.Y. 2016).