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NEW TREND IN ACCESSIBILITY LAWSUITS: THE CLASS ACTION COMPLAINT

Publication
Jul 2, 2018

Most retailers have by now faced a Title III lawsuit under the Americans with Disabilities Act (ADA) contending that a store is not accessible to disabled individuals. There remains a plethora of attorneys who make a living finding non-compliant facilities and bringing suit to have the facility brought into compliance—while, of course, seeking recovery of their attorneys' fees. The vast majority of these cases involve matters that can easily be and are fixed, which means the stakes and settlements are relatively small. However, when grouped together, the numbers can add up.

CLASS ACTION COMPLAINTS: OFTEN ILLOGICAL, ALWAYS EXPENSIVE

Recently, some enterprising plaintiffs' attorneys have come up with a theory that allows them to seek to bring these claims as a class action directed at all of a company's locations. The theory that is that a company's ADA overall compliance policies should be scrutinized if they are insufficient to identify, correct, and prevent barriers to accessibility, justifying class litigation. They claim the policy itself must be ineffective if individual Title III violations exist at several locations.

These plaintiffs' attorneys will argue that the ADA requires a business to maintain an active program of inspecting facilities and correcting problems as they arise. For example, a parking lot can be built to be in compliance with the ADA, but over time, natural causes can change the slope of the lot to cause it to be no longer compliant. Attorneys will contend that the company's failure to identify these changes and proactively correct them is an ADA violation. In fact, as a

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result of such allegations, a national restaurant and retail chain was recently forced to defend a case where the court certified an expansive class of potential litigants. The court approved a group of class plaintiffs to include all persons "with qualified mobility disabilities who were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations" of any store location in the United States on the basis of disability because such persons encountered accessibility barriers due to that chain's "failure to comply with the ADA's accessible parking and path of travel requirements."

On its face, permitting this lawsuit to proceed seems to contravene some of the basic principles established in individual lawsuits. For example, an individual must typically visit the location at issue to have standing to bring a lawsuit. These class actions, however, are based on investigators hired by the attorneys or the attorneys themselves visiting many stores and not on any of the plaintiffs actually visiting all the stores at issue.

Likewise, since the ADA provides only for injunctive relief and not for damages, it is hard to understand why a class of plaintiffs would even be necessary. While an injunction requiring a business to come into Title III compliance would certainly benefit all class members, they do not need to be a party to a lawsuit to enjoy that reward. But courts have nevertheless been ignoring these practical concerns and certifying national class actions.

This automatically brings with it the need for businesses to do significant additional legal and administrative work, which drives up the fees that the attorneys can claim at the end of the day. It also allows for the potential cost of compliance with the lawsuit to go from what is often a few hundred or thousand dollars to millions.

The settlement agreement filed in the above action shows just how costly and burdensome these types of actions can be. To resolve the case, the national restaurant and retail chain agreed to create a parking lot ADA compliance assessment form, approved by the plaintiffs' counsel. This form will be used to train facility managers in ADA parking lot compliance assessments and conduct assessments of parking lots for ADA compliance on a periodic basis of all its stores nationwide. It will also be used by plaintiffs' counsel to monitor these compliance efforts, and to remediate any

parking lots found to be out of compliance. In addition, it agreed to pay class counsel fees of $830,000.

CONCLUSION

The contention that the ADA requires a company to adopt a policy to identify, correct, and prevent accessibility barriers is controversial. But the expense of defending class actions based on the theory has prevented many of the suits from getting to the point where the issue would be decided by a court. So it makes good sense to assess your facility maintenance program to be ready to defend against a claim.

In the case discussed above, the restaurant and retail chain had no formal program to monitor ADA compliance of its facilities, and its facilities inspectors had little in the way of formal training in ADA compliance. Considering that the judge writing the opinion led off his analysis with this information suggests that the complete absence of such a policy was a significant factor in the class certification stage.

To avoid the same fate, retailers should first adopt a policy that states the company intends to comply with Title III of the ADA. The policy should then be put into action by incorporating ADA compliance checklists into the regular work of the individuals responsible for facility maintenance. Carrying out these efforts will not only help defend against a class claim based on the lack of an effective policy, but hopefully also correct issues in a way that leads to fewer individual claims.

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