The ADA and Extended-Stay Hotels

UNCERTAINTY IN THE LAW

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Extended-stay hotels are a large and growing segment of the lodging industry. In 2007, they accounted for more than 5 percent of the nearly five million U.S. hotel rooms (over 250,000 rooms) and more than seven percent of rooms in the pipeline. They employ a niche marketing strategy that promises to deliver a "home away from home" to business executives, consultants, students, and trainers on long-term assignments, as well as individuals seeking temporary housing who are in transitional situations, such as divorce, relocation, separation from the military, graduation from college, and vacationing families who prefer more roomy accommodations, in-suite kitchenettes, and other comforts and conveniences of home.

Significant progress in the lodging industry in the 19 years since President George H. W. Bush signed into law the Americans with Disabilities Act (ADA), has made travel more possible, more enjoyable, and more responsive to the needs of people with disabilities, including nearly 10 million mobility-impaired Americans. A significant area in which compliance appears to have lagged, however, possibly due to uncertainty regarding the law, is extended-stay hotels.

Extended-stay hotels often combine elements of both transient lodging and residential apartments and, as a result, may present some confusion about whether the ADA or the Fair Housing Act governs the rights of the disabled traveler. Indeed, a business traveler, a consultant, a student, an individual in a transitional situation, or a member of a vacationing family who uses a wheelchair, may be surprised to learn that some extended-stay hotels are largely inaccessible. A home away from home may not always be available to everyone if they happen to be mobility impaired.

One explanation for the lack of clarity in this area is that the law may not have kept up with changes in the way the lodging business is operating. In one instance, an extended-stay hotel may have a minimum stay requirement, often two weeks or more, which allows the operator of this facility to claim that they are subject to the far more lenient access provisions of the Fair Housing Act (FHA), and not the ADA. Another potential loophole in the ADA occurs when a purchaser of a building, constructed or renovated to be a residential building and subject to the more lenient FHA standard, then "flips the sign," changing the business from condos or long-term rental units to shorter-term stays. The ADA language that limits liability to those who "design or construct" an offending building permits an argument that since the new owner did not design or construct the building, it has no obligation to make the units accessible.

After briefly describing the applicable legal framework, this article explains the two ways in which uncertainty in the law in this increasingly important segment of the U.S. hospitality industry clouds both access for millions of people with disabilities and allocation of responsibility in real estate transactions, and offers solutions to clarify the law.

Applicable Standards

There are essentially three standards applicable to lodging facilities that are deemed to be a place of public accommodation depending on the status of the facility and the scope of construction, if any, undertaken after the applicable effective date.

New Construction Standards. Any new construction of a place of public accommodation after January 26, 1993, must generally be designed and constructed to be readily accessible to and usable by individuals with disabilities. Full compliance with this regulation is not required in only two circumstances: (1) when a commercial facility is located in a private residence, only that portion used exclusively in the operation of the commercial facility or that portion used both for the commercial facility and for residential

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purposes is covered by the new construction standard; (2) where an entity can demonstrate that it is structurally impracticable to meet the requirements of the new construction standard. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. It is well-settled law that any deviation from the accessibility standards in new construction constitutes ADA Title III discrimination, such that facilities not constructed to standard are not readily accessible.

Alteration Standards. Any alteration to a place of public accommodation after January 26, 1992, must be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. An alteration is a change to a place of public accommodation that affects or could affect the usability of the building or facility or any part thereof. The phrase "to the maximum extent feasible" applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility that can be made accessible shall be made accessible.

Existing Facility and Barrier Removal Standards. A place of public accommodation must remove architectural barriers in existing facilities where such removal is readily achievable (i.e., easily accomplishable and able to be carried out without much difficulty or expense). Whether barrier removal is readily achievable is determined based on several factors, including the nature and cost of the action needed, the overall financial resources of the site or sites and companies involved, the number of persons employed at the site, and legitimate safety requirements necessary for safe operation. The duty to remove barriers is a continuing obligation. If barrier removal is not currently readily achievable due principally to financial constraints but at some later time due to improved financial condition becomes readily achievable, the barriers must be removed at that time.

Place of Public Accommodation

Whether, and to what extent, an extended-stay hotel is subject to the ADA will depend on whether it is determined to be a place of public accommodation.

A place of public accommodation is defined as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 categories. Category number 1 is most relevant to whether an extended-stay hotel is considered to be a place of public accommodation:

> (1) An inn, hotel, motel, or *other place of lodging*, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor. (Emphasis added.)

42 U.S.C. § 12181(7)(A); 28 C.F.R. § 36.104.

The legislative history of the ADA suggests that these categorical definitions "should be construed liberally" to afford people with disabilities "equal access" to the wide variety of establishments available to the nondisabled.

Appendix B to Part 36 of the Code of Federal Regulations (C.F.R.) contains the text of the preamble to the final regulations issued by the Department of Justice (DOJ) with regard to nondiscrimination on the basis of disability by public accommodations and in commercial facilities. This preamble states that places of lodging would exclude solely residential facilities because the nature of a place of lodging contemplates the use of the facility for short-term stays.

Unfortunately, the regulations provide no further guidance on what would constitute "short-term" stays for purposes of the ADA's applicability to places of lodging and DOJ has taken the position in multiple technical assistance advisory letters that such determinations are to be made on a case-by-case basis. This case-by-case approach, however, may cause uncertainty as to the ADA's applicability where the extended-stay hotel operates in some respects as a residential facility.

DOJ Notice of Proposed Rulemaking

For nearly two years, proposed regulations have been pending to adopt enforceable accessibility standards under the ADA that are consistent with the minimum guidelines and requirements issued by the federal Architectural and Transportation Barriers Compliance Board. The DOJ issued a Notice of Proposed Rulemaking on July 17, 2008, and the comment period has ended; however, the department has not yet issued the final regulation. The DOJ proposed to adopt certain parts of the Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines.

The department also proposed adding a new section (28 C.F.R. § 36.406(c)) to clarify the scope of coverage for places of lodging. The proposed rule, in the definition section, clarifies that a covered "place of lodging" is a facility that provides guest rooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), to which the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and that operates under conditions and with amenities similar to a hotel, motel, or inn, particularly including factors such as (1) an on-site proprietor and reservations desk; (2) rooms available on a walk-up basis; (3) linen service; and (4) a policy of accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. Time-shares and condominiums or corporate hotels that do not meet this definition will not be covered by section 36.406(c) of the proposed regulation, but will likely

be covered by the requirements of the Fair Housing Act.

The department further posed a question in which it offered a definition of "place of lodging" to include facilities that are primarily short-term in nature, i.e., two weeks or less in duration.

Many disability-rights advocates argue that "two weeks or less" is not the appropriate dividing line between transient and residential use. They believe that 30 days is a more appropriate dividing line.

We suggest that a simplistic length-of-stay-based standard, whether it be two weeks or 30 days, would not be as fair as a standard with an additional requirement to examine *how the facility operates*. If the extended-stay facility is operated more like a hotel, for transient guests, than a residence, where the occupant has the traditional possessory rights of ownership, then it should be considered to be a place of lodging. Thus, the Final Rule might include not only a 30-day dividing line, instead of two weeks, but also require an additional functional analysis of relevant attributes of lodging or hotel-type facilities in comparison with residential facilities that offer traditional possessory rights of ownership. Such a rule would provide much needed clarity to people with disabilities and the lodging industry and go a long way toward ensuring reasonable access for people with disabilities to the valuable accommodations and services extended-stay hotels provide.

Liability for a Noncompliant Facility

There is a second area of uncertainty in Title III of the ADA that must be clarified. The law currently allows owners to argue, in defense of claims that their buildings fail to comply with Title III, that because they did not own the building at the time it was constructed or renovated, they cannot be liable to make it compliant with new construction or alteration standards and must comply only with the lesser "readily achievable" standard for existing buildings instead. While the impact of this uncertainty is not limited to extended-stay hotels, perhaps because of the nature of the business it has arisen in this area with some frequency.

In the typical case, a person with a disability tries to reserve an accessible room at an extended-stay hotel. The extended-stay hotel owner denies a legal obligation to provide accessible rooms. A legal battle ensues.

The owner often turns to what some disability rights advocates have called a "loophole" in the ADA. The owner explains that at the time it purchased the property, the building was operated as long-term rental studios and one-bedroom apartments. When the real estate market softened after the purchase, however, the owner changed its business model to seek guests for shorter-term stays. Even if the building is now a place of lodging, the owner argues, and even though it was constructed or renovated after the ADA became effective, because it was not a "commercial facility" when it was purchased the owner cannot be liable for the fact that the building does not comply with Title III's accessibility requirements.

Owners also argue that the statute attaches responsibility only to those who "design[ed] and construct[ed]" the facility. An owner who bought a residential building, even a new or fully renovated one, and then changed its use without renovating neither designed nor constructed. One federal district court decision is cited in support of this theory. In that case *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004), having found that plaintiff's expert agreed that the defendant's planned renovations would cure any ADA-related problems, the court noted that, because defendant purchased the property out of bankruptcy and did not design or construct it or cause the design and construction to be done, it did not violate the relevant section of the ADA.

Owners further argue that they are not liable under traditional successor liability law because they have not agreed to assume such liability; participated in a fraudulent conveyance to escape liability for the debts of their predecessor; merged or consolidated with the predecessor; or become a continuation of the predecessor.

Persons with disabilities in such cases make several arguments. First, they point out that accepting the owner's theory would lead to an absurd result. The ADA was enacted 20 years ago, with a focus on new and newly renovated construction, to ensure that over time all facilities would be accessible to persons with disabilities. Under the owner's theory, even a brand new or newly renovated facility would escape the accessibility requirements of the law. If, as is often the case, the entity that designed and constructed the facility cannot be found, no longer exists, or has no assets, and the current

Part I of the ADAAG contains the following definitions:

Residential Dwelling Unit. A unit intended to be used as a residence that is primarily long-term in nature. Residential dwelling units do not include transient lodging, inpatient medical care, licensed long-term care, and detention or correctional facilities.

Transient Lodging. A building or facility containing one or more guest room(s) for sleeping that provides accommodations that are primarily short-term in nature. Transient lodging does not include residential dwelling units intended to be used as a residence, inpatient medical care facilities, licensed long-term care facilities, detention or correctional facilities, or private buildings or facilities that contain not more than five rooms for rent or hire and that are actually occupied by the proprietor as the residence of such proprietor.

owner and operator of the place of public accommodation is not required to make the facility accessible, then there is a gaping hole in the ADA.

This is not the law, disability rights advocates contend, because the current owner's liability to make the property accessible is consistent with the broad language of the ADA, which states: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Moreover, as persons with disabilities point out, liability of the current owner is supported by the tenet of statutory construction that remedial legislation—and especially civil rights legislation like the ADA—is to be construed broadly to effectuate its purpose. They cite a New York federal court decision that questioned the owner-friendly Florida decision and noted that the Florida court did not hold that purchasers of non-compliant facilities are not liable under the ADA. (*Access 4 All, Inc. v. Trump International Hotel and Tower Condominium*, 458 F. Supp. 2d 160 (S.D.N.Y. 2006).)

In support of a second theory of liability, persons with disabilities investigate and engage in discovery to determine whether the traditional successor liability factors apply to the current owner. For example, in some cases the sale transaction allocated liability for ADA violations and in others there is evidence that the current owner colluded with the former owner in an effort to avoid liability. Plaintiffs bolster these arguments with case law reflecting a liberalization of common law successor liability principles in the context of the ADA and other federal discrimination actions.

While the occasional sharp real estate operator may benefit from this alleged "loophole" in the ADA, the statutory uncertainty not only diminishes accessibility for persons with disabilities, it creates costly uncertainty in real estate transactions. The issue therefore should be clarified by the courts or it will require regulatory or even statutory clarification. In short, Title III of the ADA should be interpreted to provide that the current owner and operator of a place of public accommodation designed and constructed or altered for occupancy after January 26, 1993, is obligated to ensure that the place of public accommodation meets Title III's access requirements.

Conclusion and Look Ahead

U.S. civil rights laws distinguish between long-term housing and short-term lodging, providing more stringent disability access requirements for the latter. The law is currently unclear as to the category in which extended-stay hotels fit. Because it is expensive, at least in the short term, to make facilities accessible, without clarity in the law, operators of extended-stay hotels will seek to be bound by the less stringent long-term housing requirements. By clarifying the law in the two areas discussed, the Department of Justice and the courts can deliver on Congress's promise, in the ADA, of accessibility for vast numbers of Americans who seek to use extended-stay hotels.

First, the DOJ will shortly move forward toward final regulations on Title III of the ADA. It should make clear that a determination of whether an extended-stay hotel is a place of lodging includes both a minimum stay requirement of up to 30 days and an analysis of relevant attributes of lodging or hotel-type facilities. And second, the courts should interpret the ADA to require that current owners and operators of places of public accommodation make those facilities comply with the ADA, whether or not the current owners controlled the design and constructed the alteration.

A home away from home may not always be available to everyone if they happen to be mobility impaired.