How many judges does it take to rule that shopping center tenants are not liable for ADA violations in common areas? by Marty Orlick

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ADA Hospitality Defense and Compliance Lawyer: Hotel mixed-use projects have proliferated over the past decade or two — projects that combine a hotel with retail, residential, entertainment, office and other uses. In recent years, many of these projects combine hotel and shopping center elements. We are big fans of hotel mixed-use.

Over the years, we have written about the numerous advantages that accrue to both hotels and shopping centers, when hotels are added to the right shopping or retail center. One study showed that the right hotel can boost gross sales at shopping centers 20% – 40% — and hotels can get 30% – 40% RevPAR advantage over hotels in their competitive set.

But those of you with these hotel in mixed-use projects with shopping centers or other retail elements know that mixed-use projects inject numerous additional legal and business issues that hoteliers usually don’t deal with in stand-alone hotel projects. One such critical issue is that of “common areas.”

In the article below, my partner, Marty Orlick, writes about one aspect of common area liability that you may have overlooked in defense to ADA violations. Of course, the ultimate analysis will depend on the precise facts of the situation at hand and the structure of the hotel’s participation in the mixed-use project — particularly whether or not the hotel is owned in fee or is a tenant in the project.

How many judges does it take to rule that shopping center tenants are not liable for ADA violations in common areas?

by

Marty Orlick

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Congress passed the Americans with Disabilities Act of 1990 (“ADA”) “to provide clear, strong consistent, enforceable standards addressing discrimination against individuals with disabilities” in employment, public accommodations, transportation and federal, state and local government services. 42 U.S.C.§12101(b)(2). Title III of the ADA applies to public accommodations including shopping centers, theaters, arenas, restaurants, health clubs, hotels, banks, public space in office buildings, and nearly every manner of retail premises. Virtually every leased location which serves the general public and is engaged in commerce is subject to the accessibility requirements of the ADA.

The Americans with Disabilities Act Accessibility Guidelines (“ADAAG”) were developed in the early 1990s by the Access Board and implemented by the Department of Justice (“DOJ”), the federal agency responsible for enforcing the ADA. The ADAAG Standards were amended effective March 15, 2012.

The DOJ has been actively investigating national retailers for ADA compliance. In addition to voluntary compliance and
federal enforcement, the ADA contemplates that private litigants will enforce ADA compliance. To that end, federal court filings demonstrate that since 2000, more than 20,000 ADA private lawsuits have been filed in the federal courts. Over 8,000 ADA lawsuits have been filed in California’s federal district courts during this time period. From September 2012 through December 2013, 627 federal cases, 2,078 state cases and 342 demand letters were submitted to the California Commission on Disability Access. See 2013 Annual Report to the California State Legislative in Compliance with Government Code Sections 8299.07(a) and 8299.08(d). The overwhelming majority of these ADA lawsuits and compliance demands involved owners and tenants of leased properties.

Section 28 C.F.R. 36.201 provides that both the landlord who owns the building that houses a place of public accommodation and the tenant who operates the business in the building are jointly and severally liable to the disabled plaintiff. That section further provides that the landlord and tenant may allocate in their lease “responsibility” for complying with the ADA. In Botosan v. Paul McNally Real Estate, 216 F.3d 827 (9th Cir. 2000), the Court of Appeals held that the “ADA imposes concurrent obligations on landlords and tenants, and that a landlord, as an owner of the property, should be liable for ADA compliance even on property leased to, and controlled by, a tenant.” See id. at 832–34. ADA lawsuits typically name both the property owner and the tenant, making clear and careful drafting of Compliance with Laws, Alterations and Indemnification lease clauses all the more important.

Case in point: Kohler v. Bed Bath & Beyond of Cal., LLC, 780 F.3d 1260 (9th Cir. 2015).

In an opinion published March 2015, the Ninth Circuit Court of Appeals decided a case of far-reaching importance to landlords and retail tenants. The Court affirmed a lower court decision that the nation’s leading housewares retailer was not liable for alleged violations of the ADA within its store or in a portion of the common area parking lot in front of its store. Plaintiff sued a regional shopping center owner and a principal tenant for alleged ADA violations within the store and the shopping center’s common areas generally serving the store. We successfully moved for summary judgment on the grounds that the tenant’s lease conveyed to the tenant a non-exclusive right to use the shopping center’s common parking facilities. The lease gave the landlord complete control over the common areas, and required the landlord to maintain same in a first class condition. The plaintiff argued that the tenant controlled the common area parking, evidenced by the fact that the tenant paid into a common maintenance fund. In granting Defendant’s summary judgment motion, the trial court rejected the plaintiff’s arguments and dismissed the case. Plaintiff appealed to the 9th Circuit Court of Appeals which, 3 years later, held that the ADA does not impose “upon tenants liability for ADA violations that occur in those areas exclusively under the control of the landlord.”

What this means for landlords and tenants is that there should be fewer lawsuits against shopping center tenants for violations of the ADA that occur in common areas. Nor can landlords expect to pass liability for ADA violations in common areas to their tenants. After Kohler, it is unlikely that cases alleging ADA violations in shopping center common areas will be filed against retailers. However, careful lease drafting is essential to clearly identify who is responsible for ADA Compliance.

THE ANSWER: It took 4 judges to reach the correct result; 1 to grant summary judgment, and 3 appellate justices to affirm the lower court.

If you would like to discuss any ADA issues, please contact us:
Martin H. Orlick is one of the top ADA defense lawyers in the country. He has helped hotel, restaurant, retail and other commercial property owners defend more than 600 ADA cases. In addition to defending lawsuits and governmental investigations, Marty’s team of ADA specialists focuses on enterprise-wide ADA compliance and litigation prevention, including facilities, website and operational compliance. He is also is a senior member of the law firm’s Global Hospitality Group®, a partner in the real estate department, and a member of the American College of Real Estate Lawyers (ACREL). For more information about ADA compliance and defense, contact Marty Orlick at 415.984.9667 or morlick@jmbm.com.

Jim Butler is a founding partner of JMBM, and the founder and chairman of JMBM’s Global Hospitality Group® and Chinese Investment Group™. He is recognized as one of the top hotel lawyers in the world and has authored or co-authored The HMA & Franchise Agreement Handbook, How to Buy a Hotel Handbook, The ADA Compliance and Defense Guide, and The Lenders Handbook. Jim has led the Global Hospitality Group® in more than $71 billion of hotel transactional experience, involving more than 3,800 hotel properties located around the globe. Jim's team has also closed more than $1 billion of EB-5 financings for developer clients over the past two years. 310.201-3526 or jbutler@jmbm.com

Other ADA defense and compliance resources

You can access the full library of ADA materials on Hotel Law Blog by going to the home page, selecting the tab at the top that says “HOTEL LAW TOPICS”, and then clicking on “ADA Defense & Compliance” in the drop down menu . . . or by clicking here.

Below is a partial listing of articles by JMBM’s ADA Defense Lawyer team:

- The ADA Compliance and Defense Guide — Free Download
- ADA Defense Lawyer: New ADA standards for website accessibility
- FAQs on “service animal” requirements of the ADA. What every hotelier needs to know. Why Uber was sued over service animals.
Starwood Hotels and The Phoenician get an expensive (and unnecessary) lesson in ADA compliance.

DOJ sues 3 of NYC’s top Zagat-rated restaurants for ADA violations

Charles Schwab settles claim over website accessibility

A blast against frivolous, serial ADA lawsuits in striking the right balance

New ADA compliance standards for golf courses. What do they mean to you?

How to handle an ADA lawsuit . . . and How not to do it

How a recent ADA case affects all hotels but particularly conference centers and meeting hotels

ADA Defense Lawyer Alert: Hilton’s ADA Settlement with the Department of Justice: Precedent-setting agreement delivers more than removing architectural barriers

When disabled hotel guests’ needs go beyond the norm for typical guests, what do hotel owners and managers have to do?

ADA Sweeps by U.S. Department of Justice — Coming to a the