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The Americans With Disabilities Act, A Decade Of Experience - Part I

The Americans With Disabilities Act ("ADA") was federal legislation enacted in 1990 with the express, laudable intention of enhancing the lives of 43 million disabled Americans by allowing easier physical access to public transportation, accommodations and services, as well as enunciating certain employment rights. However, the Act was not codified but rather the United States Department of Justice has stated that its effective codification and/or interpretation would be achieved principally through courts of appropriate jurisdiction deciding civil lawsuits initiated by aggrieved parties seeking relief based upon the intentions of the Act.

Since the Act took effect in 1992, a plethora of litigation has arisen, initiated by disabled persons against project owners, contractor/builders and design professionals. This was, of course, foreseen by the drafters of this legislation, and many helpful improvements in disabled access to public facilities have resulted, but also, and again forseeably, a "cottage industry" has sprung up within the legal system to exploit various individuals' pursuit of recoverable damages. Some plaintiffs' legal counsel have, in fact, established a scheme of introducing disabled persons to affected premises, in some instances using "rotating" plaintiffs, and then filing suit under the Act. One case receiving public attention was that of actor Clint Eastwood who was sued in 1996 on the basis that his Carmel Valley resort was not fully wheelchair accessible, the case ultimately being decided in his favor. Several cases involving sports stadiums have become especially noteworthy.

As to the particular interests of contractor/builders and design and consulting professionals, there have been several court cases on the issue of whether these parties can be directly held for violation of this civil rights law. Specifically, cases have focused on ADA Sections 302 (a) and 303 (a).

Section 302 (a) states:

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of … any place or public accommodation by any person who owns, leases … or operates a place of public accommodation."

Section 303 (a) states:

> "As applied to public accommodations and commercial facilities, discrimination for purposes of Section 302 (a) includes … a failure to design and construct facilities … that are readily accessible and useable

by individuals with disabilities."

It can be seen that Section 302 (a) specifically focuses upon owners, lessees or operators of places of a public accommodation, and therefore the involvement of contractors or design professionals is probably not really contemplated unless such parties would be seen to engage in any of these three activities. Therefore, it is primarily Section 303 (a) that could involve contractors and design professionals, the operative wording being "failure to design and construct facilities." Regrettably, where federal courts have addressed the interpretation of this latter language, there has been a decided split as to its meaning.

Sparing the gentle reader a whole series of case citations, the controversy, in brief, is as to whether or not the failure to design and construct is to be interpreted as being conjunctive, that is requiring both design and construction by a party in order that they might be pursued or whether the interpretation is failure to design and/or construct, that is, stated in the alternative. The courts have come down on both sides of this issue. As might be expected, the United States Department of Justice strongly advocates the broader (alternative) interpretation and the trend in the courts seems to be heading in that direction.

Coming Next Quarter:
Practical Hints for Contractors and Design Professionals - Compliance with the Americans with Disabilities Act

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