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THE "PUBLIC ACCESS" PROVISIONS OF TITLE III OF THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR COMMERCIAL LANDLORDS AND TENANTS

"[P]eople with disabilities have been saying for years that their major obstacles are not inherent in their disabilities, but arise from barriers that have been imposed externally and unnecessarily."1

I. INTRODUCTION

Title III of the Americans with Disabilities Act2 (ADA) and its related regulations are designed to remove "physical, organizational, and attitudinal barriers to the disabled from places of public accommodation and commercial facilities."3 This comment primarily addresses physical and architectural


barriers in commercial buildings prohibited by the "public access" provisions of Title III.\(^4\)

Privately owned businesses subject to the ADA's Title III "public access" provisions\(^5\) must comply with statutory requirements for accessible design and construction. The provisions require new facilities to be accessible to the disabled and to contain "auxiliary aids and services" for individuals with disabilities.\(^6\) In addition, existing buildings must be redesigned for disabled persons' access\(^7\) where the removal of architectural barriers or addition of "auxiliary aids and services" is "readily achievable."\(^8\)

Title III will dramatically affect commercial landlord-tenant relationships. The provisions of the ADA apply both to the landlords who own the buildings housing "public accommodations" and the tenants who operate the "public accommodations."\(^9\) The confusion created by the Act in this area is evident in several hypothetical situations:

1) A high-profile tenant with over thirty employees rents commercial space from a landlord. The high-profile tenant cannot accommodate a disabled customer because the tenant's office is located on the third floor and there is not an elevator. A disabled individual may sue under the Americans with Disabilities Act (ADA).\(^10\) Is the landlord liable? Is the tenant liable? Are both liable?

2) There is a sale or leaseback\(^11\) arrangement in which the landlord is a "financial institution with no control or

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11. A "leaseback" is a "[t]ransaction whereby transferor sells property and later leases it back. In a sale-leaseback situation, for example, R would sell property to S and subsequently lease such property from S. Thus, R becomes the lessee and S the lessor." BLACK'S LAW DICTIONARY 890 (6th ed. 1990).
responsibility for the building..."

3) A small traveling group of performing artists, planning to give a series of performances open to the public, rents space from a large theater company. Who is responsible for making the space accessible to the disabled under the terms of the ADA?

4) A post office or other government entity providing a service to the public leases space from a private entity. Will the government lessee or the private lessor be responsible for rendering the space accessible to the disabled?

These hypothetical situations represent a few of the "broad spectrum of owners of businesses and such diverse enterprises as hotels, restaurants, theaters, stadiums, shopping centers and malls, hospitals, amusement parks, health clubs, private schools, and day-care centers" impacted by Title III of the ADA. Before the Act's passage, many of these business owners never considered accommodating individuals with disabilities. As is clear from the hypotheticals, such facilities are often leased spaces.

Of paramount interest is the uncertainty created in landlord-tenant relationships as both landlord and tenant are potentially liable for ADA violations. The landlord and tenant can contract the responsibility for compliance with the "public access" provisions in the lease. However, any allocation, subrogation, or indemnification is limited by the parties' in-

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14. A "public entity" includes "any State or local government, ... department, agency, special purpose district, or other instrumentality of a State or States or local government ..." 42 U.S.C. § 12131(1) (1990).


17. See Perritt, supra note 3, at 132.


19. See id.
Furthermore, under the ADA, the obligated party's failure to comply does not insulate the other party's noncompliance. Allocation is only effective between parties. Both the landlord and tenant remain fully liable for compliance with all applicable provisions of the ADA. Thus, both may be considered "public accommodations" responsible for compliance with Title III requirements applicable to places of public accommodation.

Consider one example offered in the ADA's Technical Assistance Manual. ABC Company (Landlord) leases space in a shopping center to XYZ Boutique (Tenant). In the lease, the parties allocate to XYZ Boutique the responsibility for compliance with the barrier-removal requirements of Title III within the store. If XYZ Boutique fails to remove barriers, both ABC Company (Landlord) and XYZ Boutique (Tenant) are potentially liable for violating the ADA. Of course, in the lease, ABC (Landlord) may require XYZ (Tenant) to indemnify it against all losses caused by failures to comply with XYZ's lease obligations. However, the indemnification does not affect liability under the ADA. Thus, even if the lease places the obligation for compliance on the tenant, the landlord is still responsible for failure to make accommodations for the disabled. Furthermore, in a depressed market, a landlord may accept liability stemming from the ADA in order to keep a disgruntled tenant, thereby lessening the impact of such a contractual agreement.

To understand how the ADA applies to the landlord-tenant relationship, one must be familiar with federal legislation

22. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
related to the ADA.\textsuperscript{30} This is important for several reasons. First, the ADA has incorporated remedies and standards from several related federal acts.\textsuperscript{31} Second, the coverage of the related acts differs slightly from coverage provided under the ADA. Thus, a plaintiff will want to choose supporting laws carefully. Further, an explanation of some of the terminology used in the ADA is provided by this comment.\textsuperscript{32} The comment also discusses problems posed by the ADA to the commercial landlord-tenant community.\textsuperscript{33} In this area, it is particularly interesting to note changes in the proposed and final rules promulgated by the Department of Justice. Such changes were made in response to comments submitted on behalf of building owners and managers.\textsuperscript{34} In addition, knowledge of the relationship between Title II\textsuperscript{35} and Title III of the ADA is also important for anyone leasing to or from a public entity. Third, because Title III of the ADA was not effective until January 26, 1992, there is currently little or no direct case law. However, cases brought under the Civil Rights Act of 1964,\textsuperscript{36} the Rehabilitation Act of 1973,\textsuperscript{37} the Architectural Barriers Act,\textsuperscript{38} and the Fair Housing Act of 1988\textsuperscript{39} are useful to resolve ambiguities in the ADA. Finally, this comment suggests possible lease solutions to problems inherent in allocating liability under Title III of the ADA.\textsuperscript{40}

\textsuperscript{30} See infra text accompanying notes 41-80.
\textsuperscript{31} Id.
\textsuperscript{32} See infra text accompanying notes 81-149.
\textsuperscript{33} See infra text accompanying notes 177-228.
\textsuperscript{40} See infra text accompanying notes 229-36.
II. Background

A. Similar Legislation

1. Civil Rights Act of 1964

The Civil Rights Act of 1964\(^{41}\) "authorize[s] aggrieved individuals to file suit in federal court to seek injunctive relief against discriminatory practices."\(^{42}\) Such discriminatory practices include hiring decisions and refusals to rent apartments on the basis of race.\(^{43}\) In addition to private rights of action, the Attorney General is authorized to intervene in civil suits or to initiate a lawsuit independently where a "pattern or practice of discrimination" exists under the Civil Rights Act.\(^{44}\)

Titles II\(^{45}\) and VII\(^{46}\) of the Civil Rights Act of 1964 are the origin of the ADA's coverage and enforcement provisions.\(^{47}\) Title II of the Civil Rights Act of 1964 provides for injunctive relief against discrimination on the basis of race, color, religion, or national origin in places of public accommodation.\(^{48}\) Although the Civil Rights Act of 1964 makes no specific reference to discrimination against the disabled, the ADA later adopted the enforcement provisions provided in the Civil Rights Act.\(^{49}\) These provisions are discussed in more detail below.\(^{50}\)

2. Architectural Barriers Act

Congress passed the Architectural Barriers Act in 1968\(^{51}\) to ensure that all public buildings constructed for the federal

\(^{43}\) Id.
\(^{44}\) Id. at 239-40.
\(^{47}\) PERRTTT, supra note 3, at 6.
\(^{48}\) WHALEN, supra note 42, at 239-40. Defined as places of public accommodation are "motels, inns, hotels, rooming houses (except owner-occupied residences of five units or less), restaurants, cafeterias, lunch counters, soda fountains, motion picture houses, theaters, concert halls, sports arenas, stadiums, and gasoline stations." Id. "Specifically exempted [are] private clubs, and omitted from coverage [are] retail stores and personal services, such as physicians, barber shops, and small places of amusement, except when operating in covered public accommodations." Id.
\(^{49}\) PERRTTT, supra note 3, at 6.
\(^{50}\) See infra text accompanying notes 150-59.
government, or with loans or grants from the federal government, would be designed and built for access and use by the disabled.\textsuperscript{52} Private entities were not covered under the Architectural Barriers Act because the Act applied only to buildings constructed by or on behalf of the federal government.\textsuperscript{53}

In 1975, a General Accounting Office report submitted to Congress found that leased buildings were more inaccessible to the handicapped than federally owned buildings.\textsuperscript{54} The report proposed that the Architectural Barriers Act apply to both government-leased buildings and facilities intended for public use or in which the disabled might be employed, and all privately owned buildings leased to the government for public housing.\textsuperscript{55} As a result of the report, the Architectural Barriers Act was amended in 1976 to cover any commercial building used by a public entity, whether owned by the government or owned by a private party.\textsuperscript{56}

3. Rehabilitation Act of 1973

Because Title III of the Americans with Disabilities Act\textsuperscript{57} originated from section 504 of the Rehabilitation Act of 1973,\textsuperscript{58} building owners and managers must familiarize themselves with this older law. The Rehabilitation Act prohibits federal contractors, federal grant recipients, and federal program participants from discriminating against the disabled.\textsuperscript{59} Section 504 covers "any program or activity receiving federal financial assistance."\textsuperscript{60} However, section 504

\begin{itemize}
\item \textsuperscript{52} Rose v. United States Postal Serv., 774 F.2d 1355, 1358 (9th Cir., 1984) (holding that the Postal Service has a duty to provide access to the disabled to leased buildings under the Architectural Barriers Act).
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id. at 1359.
\item \textsuperscript{57} 29 U.S.C. §§ 701-796(i) (1988).
\item \textsuperscript{58} PERRITT, supra note 3, at 105.
\item \textsuperscript{59} Id. "[A] private right of action is implicit under § 504 of the Rehabilitation Act." Id. at 111. For example, one disabled plaintiff recently sued under the Rehabilitation Act to gain access to several federal and state courthouses. Dobard v. San Francisco Bay Area Rapid Transit Dist. No. C-92-3563-DLJ, 1993 U.S. Dist. LEXIS 13677 (N.D. Cal. Sept. 7, 1993). The complaint was dismissed without prejudice. Id. Perhaps the plaintiff should have sued under Title II of the ADA instead.
\item \textsuperscript{60} PERRITT, supra note 3, at 106. See also Minimum Guidelines and Requirements for Accessible Design, 36 C.F.R. § 1190.1 (1991). The Code of Federal Regulations implements the minimum accessibility guidelines for build-
applies only to the federal government, to its agencies, and to programs and activities receiving federal funds. Thus, the Rehabilitation Act, unlike the Architectural Barriers Act, does not apply where a government entity leases from a private entity. If a private entity does not receive federal financial assistance, it is not subject to the Act's requirements.

Unlike the Rehabilitation Act, the ADA covers private entities that do not receive federal financial assistance. However, the ADA does not undermine any of the provisions of that Act. Instead, the ADA enlarges the terms of the Rehabilitation Act by covering private entities in Title III as well as public entities in Title II.

In addition to enlarging the scope of the Rehabilitation of Act of 1973, the ADA derives much of its language from that Act. For example, the ADA states that "the terms and concepts of section 504 of the Rehabilitation Act of 1973 are used to define discrimination." Thus, the ADA is the first federal act to cover discrimination against the disabled by private entities.

4. Fair Housing Act of 1988

Like the ADA, the Fair Housing Act of 1988 (FHA) was passed to prevent discrimination in the use of real property. Unlike the ADA, however, the Fair Housing Act deals only with residential property. The Fair Housing Act prohibits actions that "discriminate in the sale or rental, or [that]
otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."70

Although the Fair Housing Act only covers residential buildings, places of public accommodation71 may be covered by both the ADA and the Fair Housing Act.72 The Federal Register73 explains that where a large hotel contains both residential apartment wings and non-residential wings, the residential wing is covered by the FHA and the nonresidential wing is covered by Title III of the ADA.74 Another example of dual coverage is when a homeless shelter and social services office operate in the same building.75 The homeless shelter qualifies as a residence, and is therefore subject to the FHA provisions.76 The social services portion of the operation qualifies as a "public accommodation," and is subject to the requirements of the ADA's Title III.77

In summary, these federal laws help to interpret the ADA. The enforcement provisions of the Civil Rights Act of 1964 are used in the ADA.78 The ADA moves beyond the terms of the Architectural Barriers Act and the Rehabilitation Act by adding coverage to buildings constructed with private funds as well as to buildings constructed with federal money.79 Unlike the Fair Housing Act of 1988, Congress in-

70. Id. § 3604.
71. See infra text accompanying notes 97-99 for definition of "public accommodation."
73. The Federal Register, published daily, is the medium for making available to the public Federal agency regulations and other legal documents of the executive branch . . . . [I]t includes proposed changes (rules, regulations, standards, etc.) of governmental agencies. Each proposed change published carries an invitation for any citizen or group to participate in the consideration of the proposed regulation through the submission of written data, views, or arguments, and sometimes oral presentations. Such regulations and rules as finally approved appear thereafter in the Code of Federal Regulations.
75. Id.
76. Id.
77. Id.
78. PERRITT, supra note 3, at 6.
tended the ADA to apply to commercial settings instead of personal residences. 80

B. Terminology

Because of the complexities of the landlord-tenant relationship under the ADA, it is helpful to understand the different terminology used in the Act. For instance, “public accommodation” must be distinguished from “commercial facilities.” Other ambiguous terms are “readily achievable” 81 and “alteration.” 82 An understanding of these phrases and words is vital to an analysis of problems posed by the ADA.

1. “New Construction” or “Alteration” of an Existing Building?

There is little ambiguity in the ADA requirements for “new construction.” Parties constructing new facilities must comply with the ADA regulations. 83 Therefore, before construction begins, it is imperative to consult an architect knowledgeable about Department of Justice requirements.

However, the duties and privileges imposed on “existing facilities” are more ambiguous than those for new construction. Owners and managers of existing facilities must take the initiative on access compliance under the ADA. 84 Building owners and managers must examine both Title III of the ADA 85 and regulations published by the Department of Justice. 86

Owners or managers of existing buildings must concern themselves with modifying discriminatory policies or practices. 87 Accordingly, two sections of the ADA are of primary concern to building owners and managers. The first makes it

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86. Nondiscrimination on the Basis of Disability by Public Accommodations or in Commercial Facilities, 56 Fed. Reg. 35,543 (1991) (to be codified at 28 C.F.R. § 36). Title III of the ADA defines the duties imposed on owners, managers, and lessees of existing buildings. Id. The Department of Justice regulations elaborate on those requirements. Id.
an "act of prohibited discrimination against the disabled for a person in control of (owns, leases, or operates) a facility of public accommodation to fail to modify policies and practices to accommodate persons with disabilities."88 Another section states that it is a "prohibited act of discrimination to fail to remove architectural barriers when removal is 'readily achievable.'"89 In the realm of architectural barriers, entrances and exits receive highest priority.90 The Federal Register requires the offering of "auxiliary aids and services," including modification of equipment.91 An example of an appropriate modification is lowering elevator control panels to heights reachable by wheelchair-bound customers.92

2. Distinction Between "Public Accommodations" and "Commercial Facilities"

Of primary importance is the distinction between "public accommodations" and "commercial facilities." Only existing buildings that are "public accommodations," as opposed to "commercial facilities," are subject to the "public access" provisions of the ADA.93 However, "new construction" and "alterations" must meet the requirements of the ADA, whether the building is a "public accommodation" or a "commercial facility."94 The reason for the distinction between "new construction" and "alterations" is that it is easier to plan and build accessible buildings from the beginning.95 However, "new construction" and "alterations" are exempt from meet-

90. See Perritt, supra note 3, at 10.
92. Id.
93. 42 U.S.C. § 12182(a)(1990). See also Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, No. C-92-592L, 1993 U.S. Dist. LEXIS 9895, at *6-7 (D. N.H. July 19, 1993) (holding the ADA inapposite where "public accommodation" defined "as limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein").
ing the requirements of the ADA where such requirements are "structurally impracticable." 96

a. "Public Accommodations"

If a building is found to be a "public accommodation," "readily achievable" steps must be taken to eliminate physical barriers impeding the disabled.97 "Public accommodations" are places where the public conducts business that affects commerce.98 Twelve categories are covered:

1) places of lodging, 2) establishments serving food or drink, 3) places of exhibition or entertainment, 4) places of public gathering, 5) establishments [selling or renting items], 6) establishments [providing services], 7) stations used for public transportation, 8) places of public display or collection, 9) places of recreation, 10) places of education, 11) establishments [providing public services], and 12) places of exercise or recreation.99

96. 42 U.S.C. § 12183(a)(1)(1990). Where structural conditions in an existing building or facility make it virtually impossible to meet the accessibility requirements for alterations, the accessibility requirements are deemed "structurally impracticable." Id. See also Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,577 (1991) (to be codified at 28 C.F.R. § 36). For example, the removal or altering of a load-bearing column to provide accessibility in an office or lobby is technically infeasible and thus "structurally impracticable." Id.

97. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,552 (1991) (to be codified at C.F.R. § 36). Public accommodations that receive federal financial assistance are subject to the requirements of section 504 of the Rehabilitation Act as well as the requirements of the ADA. Id. An important exception to this requirement is the "elevator exemption." Facilities that have fewer than three stories or have less than 3,000 square feet per floor are exempt from the ADA requirement of installing an elevator, unless the building is a shopping center, shopping mall, or the professional office of a health care provider. See 42 U.S.C. § 12183(b)(1990).


99. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,551 (1991) (to be codified at C.F.R. § 36). "Public accommodations" also include private entities such as: 1) inns, hotels, and other places of lodging, except for establishments located within buildings containing five or fewer rooms for rent or hire and being actually occupied by the proprietor as the proprietor's residence, 2) restaurants, bars, and other establishments serving food or drink, 3) motion picture houses, theaters, concert halls, stadiums, and other places of exhibition or entertainment, 4) auditoriums, convention centers, lecture halls, and other places of public gathering, 5) bakeries, grocery stores, clothing stores, hardware stores, shopping centers, and other sales or rental establishments, 6) laundromats, dry cleaners, banks, barber shops, beauty shops, travel services, shoe repair serv-
b. "Commercial Facilities"

A "commercial facility" is a nonresidential facility where the public does not normally conduct business, but whose operation affects commerce. "Commercial facilities" include factories, warehouses, and office buildings that do not contain entities defined as "public accommodations." "Commercial facilities" are in compliance with the ADA if no "alterations" were begun after January 26, 1993. Thus, unlike owners or managers of "public accommodations," owners or managers of "commercial facilities" need not modify existing buildings to remove existing "architectural barriers" unless other construction or alterations are planned.

3. "Auxiliary Aids and Services"

The ADA requires both the removal of architectural barriers to the disabled and the provision of "auxiliary aids and services." A "public accommodation" must "ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." The term encompasses a wide range of services and

ices, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals, and other service establishments, 7) terminals, depots, and other stations used for specified public transportation, 8) museums, libraries, galleries, and other places of public display or collection, 9) parks, zoos, amusement parks, and other places of recreation, 10) nurseries, elementary, secondary, undergraduate, or postgraduate private schools; and other places of education, 22) day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, and other social service center establishments, 12) gymnasiums, health spas, bowling alleys, golf courses, and other places of exercise or recreation.


103. Id.


106. Id.
devices designed to provide effective communication between customers and businesses.\textsuperscript{107} Examples include Braille restaurant menus for the visually impaired and sign language interpreters for the hearing impaired.\textsuperscript{108}

The auxiliary aid requirement is flexible.\textsuperscript{109} Because effective communication is the ultimate goal of this section of the ADA,\textsuperscript{110} any alternative chosen by a "public accommodation" resulting in effective communication is viable.\textsuperscript{111} For example;

a restaurant would not be required to provide menus in Braille for patrons who are blind, if the waiters...[were] available to read the menu. Similarly, a clothing boutique would not be required to have Brailled price tags if sales personnel provide[d] price information orally upon request; and a bookstore would not be required to make available a sign language interpreter, because effective communication [could] be conducted by notepad.\textsuperscript{112}

In addition, public accommodations are exempt from providing "auxiliary aids and services" where "taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden."\textsuperscript{113} Undue burden is defined as a "significant difficulty or expense."\textsuperscript{114} The Federal Register does not provide an example of an undue burden. Presumably, requiring a "mom-and-pop" store to provide delivery service for disabled customers would pose such an "undue burden."\textsuperscript{115}

However, the "auxiliary aids and services" requirement would not typically affect a commercial landlord because it

\textsuperscript{107} Id.


\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 35,567. See also, e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979) (holding that statutory limitations on liability for "fundamental alteration" and "undue burden" arguments under the Rehabilitation Act of 1973 are to be applied on a case-by-case basis).


\textsuperscript{115} Id. at 35,567-68.
concerns only the manner in which the tenant runs his business, not the physical set-up of the leased space. Where the requested "auxiliary aid or service" is located in a common area, however, the landlord is likely required to become involved.\footnote{116}

4. "Readily Achievable"

As defined by the ADA, a project is "readily achievable"\footnote{117} when "easily accomplishable and able to be carried out without much difficulty or expense."\footnote{118} Relevant factors are: (1) the nature and cost of the action, (2) the overall financial resources of the facility involved in the action, (3) the overall resources of the covered entity, and (4) the operation of the covered entity.\footnote{119}

Examples of "readily achievable" actions given by the Department of Justice are:

\footnote{116}{Under most commercial leases, the landlord is responsible for maintenance of common areas. Interview with John D. Whelan, Property Manager, John Whelan Co., in Palo Alto, Cal. (Dec. 28, 1992). \textit{See also} \textit{Continuing Education of the Bar, Commercial Property Leases: Negotiating and Drafting in an Overbuilt Real Property Market} 261 (1991).}

\footnote{117}{The term "readily achievable" in Title III is similar to the term "undue burden" used in Title I of the ADA. Although the factors considered in meeting both standards are the same, the "undue burden" standard is higher, requiring more effort on the part of the public accommodation. \textit{See} \textit{Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35, 569 (1991) (to be codified at 28 C.F.R. § 36).}

\footnote{118}{42 U.S.C. § 12181(9) (1990). \textit{See also} \textit{Nondiscrimination on the Basis of Disability by Public Accommodations or in Commercial Facilities, 56 Fed. Reg. 35,568 (1991) (to be codified at C.F.R. § 36). A project was not required to be "readily achievable" by either the Civil Rights Act of 1964 or the Rehabilitation Act of 1973.}


Tax consequences can make an act of ADA compliance "readily achievable." As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural . . . barriers. The 1990 amendment also permits small eligible businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures between $250 and $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing barriers, providing auxiliary aids, and acquiring or modifying equipment or devices. \textit{Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,545 (1991) (to be codified at C.F.R. § 36).}
Installing ramps, replacing door hardware, making curb cuts in sidewalks and entrances, modifying rest rooms, re-arranging tables, chairs, vending machines and other furniture, repositioning telephones, adding raised markings on elevator control buttons, providing designated parking spaces accessible to the disabled, and removing high-pile, low-density carpeting.  

Each of these improvements ease maneuverability for disabled persons.

Expense relative to the profitability of the enterprise is a primary concern when deciding if the "readily achievable" standard is met. As a prime example of what is "readily achievable," the Department of Justice considers the designation of disabled parking spaces to be "easily accomplished without much difficulty or expense." However, property managers and owners may contend that the designation of handicapped parking spaces reduces the number of available, rentable spaces, thereby rendering them cost-prohibitive. When parking spaces are unoccupied, the landlord loses revenue. Nevertheless, the Department of Justice states that both installing signs and painting areas to designate parking spaces for the disabled are "readily achievable," because the cost incurred is minimal.

Bank automatic teller machines (ATMs) provide another illustration of the ADA's "readily achievable" standard. Architectural barriers to ATMs must be removed where removal

120. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,568 (1991) (to be codified at 28 C.F.R. § 36). The Department of Justice deems such changes "readily achievable" even though their implementation is fairly expensive. For example, it can cost $1,500 to $10,000 to install a concrete ramp, $500-$700 to make a cut in the curb, and $13-$20 per yard to replace carpeting. Interviews with Patrick E. Brandin, Assistant Construction Manager, Bramalea Properties, in Palo Alto, Cal. (Dec. 31, 1992); John D. Whelan, Property Manager, John Whelan Co., in Palo Alto, Cal. (Aug. 29, 1993).


122. When parking spaces are rented, the fee can range from $30-$150 monthly. Interviews with Patrick E. Brandin, Assistant Construction Manager, Bramalea Pacific, in Palo Alto, Cal. (Dec. 31, 1992); John D. Whelan, Property Manager, John Whelan Co., in Palo Alto, Cal. (Aug. 29, 1993).


124. Id.
is "readily achievable" or "easily accomplished without much difficulty or expense." For a small business, building a small ramp to eliminate several steps is "readily achievable," but raising or lowering an ATM may be too difficult or costly.

If an action is not "readily achievable," the entity involved must use alternative methods to accommodate disabled persons. There is no case law interpreting what is "readily achievable," yet the definition may be predicted by reference to *Selph v. City of Los Angeles.*

In *Selph,* a disabled person, and several organizations representing the disabled, brought a class action suit under the Civil Rights Act of 1964 to enjoin the city from locating polling places in structures containing "architectural barriers" to the disabled. The court's analysis of what actions by the city were "readily achievable" and what alternative methods of accessibility were acceptable is instructive. The plaintiffs argued that "architectural barriers" discouraged the disabled from voting in municipal elections. The district court held that the right to vote by absentee ballot constituted a reasonable alternative for a handicapped person facing an inaccessible polling place. The court also held that the United States Constitution did not require city officials to modify all polling places within Los Angeles to eliminate architectural barriers, as the cost was excessive in relation to the number of people benefited.

A major factor in the court's reasoning was the impracticality of requiring all polling places to be modified. "The cost of undertaking such a project would be an unfair expenditure of huge amounts of money in order to benefit a small segment of the total population . . . ." Thus, for an action under the

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127. *Id.* at 35,570.
129. *Id.*
130. *Id.* at 59.
131. *Id.* at 61.
132. *Selph v. City of Los Angeles,* 390 F. Supp. 58, 62 (C.D. Cal. 1975). The court found that the use of absentee ballots by those unable to access the voting booth did not deny the equal protection of the laws to the disabled. *Id.*
133. *Id.* at 61.
ADA, if the cost of the action is disproportionate to the future benefit, the action may not be deemed "readily achievable."

5. "Alteration"

For "new construction" and "alterations" to existing buildings, services offered to disabled persons must equal services offered to others.134 An "alteration" to either a "public accommodation" or a "commercial facility" after January 26, 1993 must comply with the ADA's technical requirements.135 Thus, the building owner or manager must understand what constitutes an "alteration." According to the Department of Justice, an alteration is a change affecting "the use of a building or facility, such as remodeling, renovation, rehabilitation, historic restoration, changes or rearrangements in structural parts or elements, or extraordinary repairs."136 Examples of alterations include such common repairs as "relocating a door, replacing a door, relocating an electrical outlet, installing or replacing faucet controls, and replacing door handles or hinges."137

Construction work is considered an alteration when it affects the use of a building or facility.138 On the other hand, "[n]ormal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems"139 are not considered alterations, because such maintenance does not affect the use of the building.140 The distinction is ambiguous, but it appears that design changes constitute "alterations," while mere maintenance does not.

There are no cases interpreting the meaning of the term "alteration" as used in the ADA. However, in Rose v. United States Postal Service,141 a case interpreting the Architectural Barriers Act,142 the court discussed the meaning of "alteration." Rose involved a post office building leased by the gov-

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135. Id.
137. Id. (the Final Rule states that alterations are not limited to the given examples).
138. Id.
139. Id.
140. Id.
141. 774 F.2d 1355 (9th Cir. 1984).
The court asserted no conclusion regarding the meaning of "alteration," but it rejected a narrow reading offered by the Postal Service. The Postal Service "argued that the Service was required to make accessible only that portion of a building which was being altered, not the entire building." For example, the Postal Service contended that "if a door were to be replaced, the new door would have to be accessible to handicapped persons, but the steps leading up to that door [need not] be accessible." The court found no support for this position in the language of the Architectural Barriers Act or in the legislative history of the statute. Instead, the court read the literal language of the Architectural Barriers Act to require that the entire building be made accessible to the disabled if any alteration, however slight, were made. Thus, under this reasoning, the replacement of a door could be considered an "alteration" for ADA purposes.

C. Enforcement

The remedies available to successful plaintiffs under the ADA are clear-cut. The ADA's public access provisions are enforced by civil suits brought in federal court by either victims of discrimination or by the Attorney General. If brought by an individual as a civil suit, Title III's remedies are primarily injunctive. Civil penalties and monetary damages, excluding punitive damages, are awarded only in limited circumstances. The aggrieved person may seek an

143. Rose, 774 F.2d at 1356-57.
144. Id. at 1357.
145. Id. at 1357 n.5.
146. Rose v. United States Postal Service, 774 F.2d 1355, 1357 n.5 (9th Cir. 1984).
147. Id. at 1357-60.
148. Id.
149. However, the ADA specifies that only the altered portions of an existing building be accessible to the disabled. Thus, if a door were replaced, the area around the door would need to conform to the "public access" provisions, but the entire building would not. 42 U.S.C. § 12147(a) (1990).
151. Perritt, supra note 3, at 149.
152. For example, monetary damages would be warranted if the defendant consistently engaged in a discriminatory pattern of failing to provide access to the disabled. See 42 U.S.C. § 12188 (1990). See also Nondiscrimination on the
injunction to require: (1) the removal of architectural barriers in existing facilities, (2) that new construction and alterations be designed and built to render the facility accessible, (3) the provision of an auxiliary aid or service, or the modification of an existing policy, or (4) the provision of alternative methods, to the extent required by Title III.\textsuperscript{153} The prevailing party would also be awarded attorney's fees.\textsuperscript{154}

Alternatively, the Department of Justice may bring suit in federal court against any person or group it reasonably believes is engaged in a "pattern or practice" of resisting compliance with Title III, or where it believes that any denial of rights under Title III raises an issue of general public importance.\textsuperscript{155} If the Justice Department brings a civil action, the ADA section authorizes a court to award monetary damages, but not punitive damages, to aggrieved persons where specifically requested by the Attorney General.\textsuperscript{156} Under the same section, civil penalties of $50,000 for the first violation, and $100,000 for each subsequent violation, are authorized\textsuperscript{157} "to vindicate the public interest."\textsuperscript{158} The ADA encourages, but does not require, the use of negotiation, arbitration, mediation, and other alternatives to litigation.\textsuperscript{159} It is not clear which method for enforcing compliance will be most popular.

D. **Who Can Be Held Liable?**

1. **Lease Agreements**

The Federal Register states that the ADA does not affect existing lease agreements between landlords and tenants.\textsuperscript{160} For example, the Department of Justice's proposed rule\textsuperscript{161}

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\textsuperscript{154} Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,589-90 (1991) (to be codified at 28 C.F.R. § 36); PERRITT, supra note 3 at 149 (explaining the enforcement provisions of Title III of the ADA).


\textsuperscript{160} \textit{Id.} at 35,555.

\textsuperscript{161} "Basic rulemaking procedure on the federal level is a . . . notice and comment process. An agency announces a proposed rule, receives and reviews
suggests that the tenant’s responsibilities generally consist of “readily achievable” changes in his own office suite and ensuring that any “alterations” made to the space are accessible to the disabled.\textsuperscript{162} Similarly, under the proposed rule, unless the lease agreement provides otherwise, the landlord’s responsibilities consist of making “readily achievable” changes to common areas and ensuring that alterations made in common areas comply with the ADA.\textsuperscript{163} The ADA states that the prohibition against discrimination applies to “any person who owns, leases (or leases to), or operates a place of public accommodation.”\textsuperscript{164} Thus, the coverage of the ADA sweeps widely, including “sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the lease or operation is only for a short time.”\textsuperscript{165}

Parties concerned about the allocation of liability under the ADA between commercial tenants and landlords should become familiar with \textit{Rose v. United States Postal Service}.\textsuperscript{166} In \textit{Rose}, a similar problem regarding allocation of liability between commercial landlord and tenant existed.\textsuperscript{167} Although suit was brought under the Architectural Barriers Act, the court’s reasoning is helpful to determine allocation of liability under the ADA.\textsuperscript{168}

Plaintiffs sued to (1) enjoin the United States Postal Service from leasing buildings inaccessible to the disabled, and (2) require the Postal Service to make currently inaccessible leased facilities accessible.\textsuperscript{169} The Postal Service argued that the Act required leased buildings to comply only when altered for reasons other than handicapped access.\textsuperscript{170} Plaintiffs argued that the government must require compliance as a con-

\textsuperscript{163} Id.
\textsuperscript{164} Id. at 35,555.
\textsuperscript{165} Id.
\textsuperscript{166} 774 F.2d 1355 (9th Cir. 1984).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 1356.
\textsuperscript{170} Id. at 1357.
dition of the lease. The dispute centered upon whether leasing or alteration triggered the government's duty to make the building accessible to the disabled under the Act. Finding that "Congress intended to close the loophole through which inaccessible buildings were leased without alteration," the court held that the lease, and not the act of alteration, triggered the duty of compliance. The Rose Architectural Barriers Act analysis demonstrates that leasing triggers the lessee's responsibility for compliance with the Architectural Barriers Act if the lessee is a public entity. However, under the ADA, the responsibility could fall on the lessor as a private entity as well.

III. Analysis

A. Background to Landlord/Tenant Considerations

The prohibition against discriminating in providing access to "public accommodations" applies to owners, lessors, lessees, and operators of places of public accommodation. Thus, both the building owner and the tenant operating a place of public accommodation within the building are subject to the requirements of Title III of the ADA.

Although both landlord and tenant ultimately bear responsibility for meeting the ADA's public access requirements, the lease or other contractual arrangements may determine who will undertake needed changes. Standard leases must be reviewed to ensure that they reflect Title III requirements. For example, many leases contain "compliance" clauses, which allocate liability for compliance with all federal, state, and local laws, municipal ordinances, and reg-

171. Rose v. United States Postal Serv., 774 F.2d 1355, 1356 (9th Cir. 1984).
172. Id. at 1356-57.
173. Id. at 1360.
174. Id. at 1361.
175. See supra notes 51-56 and accompanying text.
179. Id. at 35,556.
180. Id.
Such compliance clauses may inadvertently incorporate the requirements of the ADA.\textsuperscript{182} Commercial landlords can protect themselves from accidentally accepting sole liability for compliance with the ADA by ensuring that the provisions of the lease do not give responsibility to the landlord for policies belonging to the tenant. For example, a restaurant tenant may be unable to modify a landlord’s “no pets rule” to allow guide dogs in the restaurant.\textsuperscript{183} If that were the case, both the landlord and the tenant would face potential liability for an ADA violation if a blind patron with a guide dog were refused entrance to the restaurant.\textsuperscript{184} Thus, commercial leases must take into account such individual circumstances.

B. \textit{Specific Problems}

It is instructive to analyze some of the ambiguities of the ADA for commercial landlord-tenant liability. For purposes of the hypothetical examples, assume that a “public accommodation” planning “new construction or an alteration” is involved, and that additional alterations requested on behalf of a disabled individual are “readily achievable” and not “structurally impracticable.”

1. \textit{Hypothetical Situation No. 1}

Consider the first hypothetical posed in the Introduction. Where a high-profile tenant leases commercial space from a landlord,\textsuperscript{185} if the lessee denies access to a disabled customer because of an architectural barrier, who is liable?

Under the proposed rule,\textsuperscript{186} landlords are responsible for making common areas conform to ADA specifications, and tenants are responsible for their own space.\textsuperscript{187} Due to com-

\textsuperscript{181} Id. at 35,555.
\textsuperscript{182} Id.
\textsuperscript{184} Id.
\textsuperscript{185} See supra text accompanying note 10.
\textsuperscript{186} Again, a “proposed rule” is circulated by an administrative agency for commentary, and comments from the public are reflected in the agency’s Final Rule, or interpretation of federal legislation. Fox, supra note 161, at 112.
menters' objections to this proposed allocation, the Final Rule differs. Under the Final Rule, the parties are free to negotiate a lease agreement allocating liability.

However, in the absence of any allocation of liability between the parties the landlord's general responsibilities are: "1) making readily achievable changes and providing auxiliary aids and services in common areas; and 2) modifying policies, practices, or procedures applicable to all tenants." Likewise, with no contractual allocation of responsibility, the tenant is responsible for making "readily achievable" changes, providing "auxiliary aids," assuring accessibility of displays, and making any policy modifications within his own space. Thus, without an agreement to the contrary, the landlord is responsible for conforming common areas to ADA standards and the tenant is responsible for his own space.

Where the landlord is unaware that he or she leases to a "public accommodation," and the tenant represents that he or she is operating a "commercial facility," the landlord should not be required to consider whether the ADA's accessibility requirements pose a problem of future liability. Alternatively, if the tenant identifies his business as either a "public accommodation" or a "commercial facility" in the lease agreement, the landlord should be deemed aware of his Title III responsibilities. Thus, it is important that the tenant describe his operation properly in the lease.

2. Hypothetical Situation No. 2

Consider a sale or leaseback arrangement where the landlord is a financial institution with no control over, or responsibility for, the building. Is the financial institution or lessee liable for claims under the ADA?

188. Id. Commenters are professionals representing a wide variety of interests, including advocates for the disabled and commercial property managers, who were asked to comment on the proposed rule. Their suggestions were incorporated into the final product or Final Rule. See id. at 35,544-45.
189. Id. at 35,556.
190. Id.
191. Id.
192. Id.
193. Id. at 35,555. See supra text accompanying note 10.
This inquiry is an important question when deciding if alteration to a commercial building is “readily achievable.”\textsuperscript{194} A larger financial institution is likely to have greater resources than either the tenant or property manager. Thus, a court is more likely to find a requested alteration to the building “readily achievable” where such deep pockets are present.\textsuperscript{195}

The ADA does not provide examples of the “legal ramifications ... of even generic relationships (e.g., banks involved in foreclosures or insurance companies operating as trustees or in other similar fiduciary relationships) ...”\textsuperscript{196} because analysis depends “completely on the detailed fact situations and the exact nature of the legal relationships involved.”\textsuperscript{197} Thus, it is difficult to predict outcomes of lawsuits brought under the ADA against a “public accommodation.”

When considering what is “readily achievable,” the Justice Department examines the resources of the parent corporation or entity in light of “the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity.”\textsuperscript{198} For example, if the financial institution is involved in leasing the property to business operators, the institution is more likely to be liable for failure to comply with “public access” provisions of the ADA. Similarly, when a larger company operates a number of franchises, such a relationship involves financial support and business advice and thus could be sufficiently close to create liability under the ADA.

It is difficult to know what constitutes sufficient geographic and fiscal closeness to render a parent corporation liable for a smaller entity’s lack of accommodations to the disabled. Thus, larger entities should expressly describe the extent of their responsibility in the lease.

\textsuperscript{194} An alteration must be “readily achievable” before the ADA mandates that a public accommodation make a change. \textit{See supra} text accompanying notes 117-33.

\textsuperscript{195} \textit{See} 42 U.S.C. § 12181(9) (1990). “Readily achievable” means “easily accomplishable without much difficulty or expense.” One factor to be considered is the “overall financial resources of the covered entity.” \textit{Id}.


\textsuperscript{197} \textit{Id}.

\textsuperscript{198} \textit{Id}.
3. Hypothetical Situation No. 3

A small traveling group of performing artists rents space from a larger theater company.\(^{199}\) Who is responsible for making the space accessible to the disabled under the terms of the ADA?

The group of performing artists is a “public accommodation” when consideration is given for the leased space in order to accommodate the public.\(^{200}\) As a “public accommodation,” the group must comply with the “public access” provisions of Title III of the ADA.\(^{201}\)

The proposed rule propagated by the Department of Justice allocates responsibility for providing auxiliary aids and services to the tenant.\(^{202}\) This exclusive allocation seems inappropriate when larger public accommodations operate their businesses by renting space to smaller public accommodations.\(^{203}\) Commenters objected to this portion of the proposed rule, fearing that larger public accommodations might avoid their responsibilities by renting to smaller public accommodations unable to afford any structural changes designed to create greater accessibility for the disabled.\(^{204}\) It is unlikely that providing architectural adjustments such as widened doorways or the installation of low-pile carpeting to accommodate wheelchairs would be “readily achievable” for a small, less profitable entity. Thus, it is possible that neither the small traveling group of performing artists nor the larger theater company would be liable for compliance with the terms of the ADA.

As a result of this problem, the final rule no longer allocates liability to specific parties, but leaves allocation of responsibilities to the lease negotiations.\(^{205}\) Parties are therefore free to allocate their responsibility for Title III

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199. Id. at 35,556. See also supra text accompanying note 13.


201. See supra text accompanying notes 93-99.


203. Id.

204. Id.

205. Id.
compliance as they choose. Appropriate lease provisions must be fully understood by both parties.

4. **Hypothetical Situation No. 4**

A government entity, such as a post office or welfare office, leases space from a private entity. The government entity is not covered by the “public access” provisions of Title III of the ADA. Is the public lessee or the private lessor liable for inaccessibility to the disabled under the ADA?

Currently, many government entities are inaccessible to the disabled, thereby increasing the likelihood of litigation. It is likely that many of these spaces are leased from private entities. The Department of Justice does not require that public entities lease accessible space. The Justice Department reasons that imposition of such a requirement would heavily burden state and local governments seeking leased space and significantly restrict their leasing options.

Unlike state or local governments, there are leasing guidelines for the federal government. The federal government must lease buildings containing: “1) One accessible route from an accessible entrance to those areas in which the principal activities for which the building is leased are conducted, 2) accessible toilet facilities, and 3) accessible parking facilities, if a parking area is included within the lease.”

While these guidelines apply solely to the federal government, other public entities are encouraged to look for accessible space to lease or, alternatively, space meeting at least these minimum requirements. However, merely encourag-

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206. See supra text accompanying notes 14-15.


208. Dion Nissenbaum, Cities Fall Behind on Disability Law, S.F. CHRON., November 23, 1992, at A11, A12. See also Kroll v. St. Charles County, Mo., 766 F. Supp. 744 (1991) (holding that a courthouse, government building, and administration building inaccessible to the disabled would violate the ADA when the Act became effective and that a property tax increase was warranted).


210. Id.


ing public entities to look for the most accessible space is probably not sufficient to eliminate the problem of government buildings being inaccessible to the disabled.

Were a public entity to lease space from a private entity, a plaintiff could sue the private landlord under Title III of the ADA but would be unable to reach the government entity. "Facilities operated by government agencies or other public entities . . . do not qualify as places of public accommodation," and thus are not covered by Title III. Instead, public entities and facilities operated by the government are governed by Title II of the ADA. However, the term "public entity" is interpreted very narrowly. The sole fact that a private entity receives financial assistance from the federal government is not enough to render it a public entity, and thus preclude it "from being considered . . . a place of public accommodation."

To sue a government entity under the ADA, a plaintiff must invoke Title II and not Title III. Title II extends the coverage of section 504 of the Rehabilitation Act. The Rehabilitation Act only covers public entities receiving federal financial assistance. Title II of the ADA covers state and local governments that receive no such assistance. As under Title III, ambiguities arise only when the public entity leases already existing space. New construction must be fully accessible to the disabled.

Specifically, a plaintiff suing a government entity for violation of the ADA may refer to Title II, the equivalent of Title III for "public accommodations." Title II, also based on section 504 of the Rehabilitation Act, explains the accessibility requirements for "existing facilities and for new construction

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213. Id.
214. Id. at 35,551.
215. Id.
216. Id.
217. Id.
218. See supra text accompanying notes 57-66.
220. Id. at 35,695.
221. See supra text accompanying note 83.
and alterations." Title II covers two major categories of programs or activities, "those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants." Any type of communication with the public falls into the first category, including telephone contacts, office walk-ins, and interviews. The public's use of an entity's facilities, such as a library, also falls into this first category. Programs providing state or local government services or benefits, such as welfare or mental health counseling, falls into the second category.

Because both Title II of the ADA and section 504 of the Rehabilitation Act cover public entities inaccessible to the disabled, plaintiffs may sue under either act. Nothing in Title II is inconsistent with the Rehabilitation Act, because "Title II . . . incorporates [only] those provisions of Titles I and III of the ADA that are not inconsistent with the regulations implementing section 504." Thus, a plaintiff may choose whichever law provides the greatest coverage.

Thus, plaintiffs, in this hypothetical situation, may sue both the public entity under Title II and the private entity under Title III of the ADA. In the event that a lawsuit is successful under the ADA provisions, the allocation of responsibility in the lease determines which party is responsible for meeting the "public access" and "auxiliary aids and services" requirements of the ADA. Therefore, it is vital that the parties understand and reach an agreement regarding the allocation of liability under the ADA in the lease.

IV. Proposal

Following are proposed lease clauses solving the problems posed in the above hypothetical situations. A lease

224. Id. at 35,696.
225. Id.
226. Id.
227. Id.
228. However, a public entity is not covered by § 504 of the Rehabilitation Act where it does not receive federal financial assistance. See supra text accompanying notes 57-66. In that case, an aggrieved party may sue under Title II of the ADA. Under Title II, the public entity's coverage is consistent with the private entity's coverage under Title III. 42 U.S.C. § 12133 (1990).
should specify whether the lessee is a "commercial facility" or a "public accommodation." Although most commercial leases are specific regarding the identity of the tenant, it may remain unclear whether the operation is one affecting commerce, and therefore a "public accommodation." If the tenant is a "public accommodation," the landlord may choose whether or not to accept liability for noncompliance with the terms of the ADA, make plans for architectural adjustments to the building, and adjust the rent accordingly. Such a lease clause should read:

The tenant certifies that he or she operates a public accommodation/commercial facility.

If the tenant specifies that he or she operates a place of "public accommodation," then responsibility for compliance with the "public access" provisions of the ADA should be allocated between landlord and tenant. Such a lease clause, designed to relieve the landlord from financial responsibility for removal of architectural barriers, should read:

The purpose of this Agreement is to allocate responsibility for eliminating architectural barriers and providing auxiliary aids and services pursuant to the ADA. In the event that Landlord performs any work for Tenant in connection with the ADA, Landlord shall be paid an amount equal to the actual costs reasonably incurred by Landlord in performing such work.

However, if the lease is for a short period of time, it is unreasonable to expect that the tenant will pay for structural changes. Here, the lease should provide that due to the short duration of the lease, the landlord assumes responsibility for compliance with the terms of the ADA. For example, the clause should read:

Because the lease is for less than two years, Landlord agrees to pay for all structural changes (to both common

230. See supra text accompanying notes 19-22.
232. A short lease is anything less than five years, depending on the type of improvements made for the tenant at the beginning of the lease. Interview with John D. Whelan, Property Manager, John Whelan Co., in Palo Alto, Cal. (Dec. 28, 1992).
areas and Tenant’s space) necessary to meet the requirements of the ADA for the removal of architectural barriers to the disabled and the provision of auxiliary aids and services.

Even in a market glutted with commercial space, a landlord may be reluctant to agree to pay for all structural changes mandated by the ADA. An alternative to such an agreement is for the landlord to agree to pay only for structural changes to the common areas, and to amortize the cost of any changes to the tenant’s space.

To protect the landlord from needless liability, the lease should also specify that the tenant will not conduct his business to cause unnecessary liability under the ADA to the landlord. If the tenant is a private entity, the tenant should be asked to the following clause:

Tenant agrees not to violate Title III of the ADA in the way it serves customers if another alternative is available.

Such an agreement requires a restaurant tenant to allow seeing-eye dogs onto its premises and gives blind customers equal access to the “public accommodation.” Likewise, a store must arrange its merchandise so that a customer in a wheelchair could pass through the aisles. Similarly, if a

233. In most leases, the “common areas” are:

[All areas and facilities outside the premises and within the exterior boundaries of the shopping center, [office building, etc.] that are not leased to other tenants and that are provided and designated by the Landlord in its sole discretion from time to time for the general use and convenience of Tenant and its authorized representatives and invitees, and of the general public. Common areas are areas within and outside of buildings . . . such as . . . pedestrian walkways, patios, landscaped areas, sidewalks, service corridors, elevators, restrooms, stairways, decorative walls, plazas, malls, throughways, loading areas, parking areas and roads.


234. For example, if alterations are made to a tenant’s space, the lease is for five years, the life of the structural change is five years, and the cost of the improvement is $10,000, the tenant would pay $2,000 of the cost plus interest per year. Interview with John D. Whelan, Property Manager, John Whelan Co., in Palo Alto, Cal. (Dec. 28, 1992).


236. Id.
public entity, the tenant must agree not to violate Title II of the ADA if another alternative is available.

V. CONCLUSION

To understand how the ADA applies to a particular situation, one must be familiar with past related legislation, such as the Civil Rights Act, the Architectural Barriers Act, the Rehabilitation Act, and the Fair Housing Act. The ADA, however, is unique because allocation of responsibility for compliance is left undefined between commercial landlord and tenant.

The flexibility afforded by the ADA in not allocating responsibility for compliance as between commercial landlord and tenant by statute is desirable. However, the responsibility to the tenant, building owner, and manager of a "public accommodation" mandated by the Act is potentially quite costly. Commercial landlords and tenants must ensure they have a contractual agreement stating which party will bear responsibility for eliminating architectural barriers to the disabled. Naturally, insurance companies and market conditions for commercial rental properties will inevitably play a role in determining who accepts liability. If, however, the lease spells out the allocation clearly, both landlords and tenants are in a position to make better business decisions.

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