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An Overview of Public Accommodations Compliance for the Business Community under ADA Title III

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The purpose of the Americans with Disabilities Act (ADA) is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." This legislation marks the culmination of numerous demands for a comprehensive federal statute designed to improve access to jobs, workplaces, and commercial spaces for individuals with disabilities.

This white paper is intended to provide the business community with a general overview of Title III.[1] Section I of the paper provides an overview of the ADA and its statutory development. The paper subsequently discusses four frequently litigated topics: (1) the reasonable modification of policies, practices, and procedures; (2) auxiliary aids and services; (3) removal of architectural barriers; and (4) accommodations in transportation.

I. An Introduction to Title III of the ADA

A. Historical Overview

President George H.W. Bush signed the ADA into law on July 26, 1990. Since the law took effect in 1992, commentators have routinely characterized the ADA as the most "sweeping" nondiscrimination legislation since the Civil Rights Act of 1964. The ADA has significantly contributed to breaking down societal and physical barriers for individuals with disabilities at places of public accommodation.

The Rehabilitation Act of 1973 is perhaps the most important legislative antecedent to the ADA. The purpose of the Rehabilitation Act – as set forth in its preamble – is twofold: (1) "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society"; and (2) "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities."[2] Although many of the requirements in the Rehabilitation Act mirror those in the ADA, the Rehabilitation Act's reach is limited to entities and programs that receive federal financial assistance. Because of the Rehabilitation Act's narrow applicability, Congress recognized the need for broader legislation.[3]

In the 1990s, the ADA answered the call for greater disability rights legislation. Despite initial challenges to its passage, the ADA ultimately passed through both houses of Congress by overwhelming margins.[4]

B. Title II: Public Accommodations

The ADA is divided into four different titles. Title I covers disability-based discrimination in employment. Title II regulates all state and local government activities. Title III covers public accommodations. Finally, Title IV addresses telecommunication services.

[1] The footnotes in this publication are generally intended to assist individuals who are seeking more in-depth analysis. They are not essential to gaining a basic understanding of the statute and its obligations.

[2] Rehabilitation Act of 1973, 29 U.S.C. § 701(b)(1) and (b)(3).

[3] H.R. Rep. No. 101-485, pt. 4, at 24 (1990), *as reprinted* in 1990 U.S.C.C.A.N. 512, 513.

[4] *Id.*

The ADA's public accommodations title, Title III, prohibits discrimination[5] against disabled individuals by public accommodations,[6] commercial facilities, or private entities that offer "examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes."[7] Under Title III, public accommodations are obligated to modify policies and procedures, provide auxiliary aids and services, and remove barriers in their existing facilities. Provided that they do not pursue alterations, however, commercial facilities are not bound by these obligations. Further, Title III largely exempts private clubs, religious entities, multi-family housing, single-family housing, state and local governments, and the federal government from its requirements and prohibitions.

Under Title III, "[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...."[8] To ensure that disabled individuals are provided functionally equivalent access to public accommodations, Title III of the ADA requires these entities to take several affirmative steps. Four of the most highly litigated of Title III's obligations involve the following: (1) reasonable modifications of policy, practice, and procedure; (2) auxiliary aids and services; (3) barrier removal; and (4) accommodations in transportation.

II. Reasonable Modifications of Policies, Practices and Procedures

Title III of the ADA requires places of public accommodation to reasonably modify their policies, practices, and procedures to ensure full and equal enjoyment of services by disabled individuals.[9] The statute does not provide a clear test for determining whether a particular modification is "reasonable." Rather, "an *individualized inquiry* must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person."[10]

Though they have not articulated precise factors for determining reasonableness, some federal courts have provided guidance for evaluating the reasonableness of a given modification. The U.S. Department of Justice's (DOJ) Technical Assistance Manual on Title III (Technical Assistance Manual) provides three illustrations of a "reasonable modification."[11] First, a health clinic that occupies several floors in a multistory building has an evacuation plan for emergencies. During these emergencies, the clinic shuts down its elevators and blocks their use as an exit. In this scenario, the ADA's reasonable modification requirement would necessitate that the clinic provide alternative means for evacuating clients with mobility impairments. In addition, Title III would require that the clinic consider the needs of clients with visual and hearing impairments. Second, in compliance with the ADA's removal of architectural barriers requirement, a hotel has improved the accessibility of several rooms. However, under its present reservation system, the hotel has no way to guarantee that when a disabled individual requests one of these rooms, the room will actually be made available when the guest arrives. The ADA would require that the motel reasonably modify its reservations system to ensure the availability of the accessible room. Third, a retail store follows a policy of only taking out-of-stock merchandise orders from individuals who

[5] Nonetheless, under 42 U.S.C. 12182(b)(3), a public accommodation is permitted to exclude a disabled individual where accommodating such an individual would pose a "direct threat to the health or safety of others." A direct threat is further defined as a substantial risk to the health and safety of others that cannot be lessened by modifying practice, policy, or procedure or by providing certain auxiliary aids and services. To illustrate, in *Montalvo v. Radcliffe*, a 12-year-old boy and his guardians brought suit against a karate association after it excluded the young boy from enrolling in a martial arts school that it operated. The boy, an individual living with AIDS, was denied admission due to the risk of him "transmitting HIV to other students through frequent bloody injuries and physical contact." 167 F.3d 873, 875 (4th Cir. 1999). In determining that the evidence in the record was sufficient to support the district court's conclusion that the plaintiff posed a direct threat, the court reasoned that HIV is transmitted through blood-to-blood contact and AIDS is fatal. The court also emphasized that karate involves the type of physical activity that often results in bloody injury. Even so, the court was careful to stress that a place of public accommodation must base its assessment of risk on individualized and informed assessments rather than stereotypes and generalizations. *See also*, *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that remand was necessary to determine the health risk posed by providing in-office treatment to an HIV patient).

[6] The ADA identifies 12 types of establishments that qualify as public accommodations. These include places of lodging, establishments that serve food or drink, places of exhibition of entertainment, places of public gathering, sales or rental establishments, service establishments, stations used for specified public transportation, places of public display or collection, places of recreation, places of education, social service center establishments, and places of exercise or recreation.

[7] 42 U.S.C. § 12189.

[8] 42 U.S.C. § 12182(a).

[9] Department of Justice regulations include special provisions on specialties, service animals, and check-out aisles. 28 C.F.R. § 36.302. In terms of specialties, the regulations permit a public accommodation to refer a disabled individual to another provider if the individual seeks services beyond the public accommodation's area of expertise and if the referring public accommodation would make a similar referral for a non-disabled individual seeking the same treatment. Public accommodations must modify their policies, practices, and procedures to permit the use of service animals by disabled individuals. Finally, the regulations require stores with check-out aisles to possess an adequate number of accessible check-out aisles.

[10] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (emphasis added).

[11] *See* Title III Technical Assistance manual § III-4.2000, *available at* https://www.ada.gov/taman3.html [hereinafter "Technical Assistance Manual"].

personally sign the order. To comply with the ADA, the store could allow mobility-impaired individuals to place their orders via phone or mail.

Title III defines discrimination, in pertinent part, as "a failure to make reasonable modifications in policies, practices, or procedures, *when such modifications are necessary*…, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations."[12] Accordingly, the ADA permits public accommodations to forego making such modifications where they would be unnecessary or where they would "fundamentally alter" the nature of the accommodation being rendered.[13]

The Supreme Court's decision in *PGA Tour, Inc. v. Martin* provides one of the most significant decisions[14] interpreting "fundamental alteration" under Title III.[15] In *PGA Tour*, Casey Martin, a professional golfer who suffers from a degenerative circulatory disorder, sued the PGA Tour for preventing him from using a golf cart during the third round of a competition. Despite Martin's formal request to use a golf cart and his detailed submission of supporting medical records, the PGA Tour refused to review the records or waive its walking rule for the third stage of the tournament. At trial, the PGA Tour argued that "walking is a substantive rule of competition, and that waiving it as to any reason would fundamentally alter the nature of the competition." The district court entered a permanent injunction requiring the petitioner to permit Martin to use a golf cart during the competition, and the Ninth Circuit affirmed. One day after the Ninth Circuit rendered its decision, the Seventh Circuit came to the opposite conclusion and held that the nature of the game "would be fundamentally altered if the walking rule were eliminated because it would remove stamina…."

In affirming the Ninth Circuit, the Supreme Court ultimately held that requiring a golf course to waive its walking rule for Martin does not fundamentally alter the game of golf. Though a modification of tournament rules could constitute a "fundamental alteration" if the change impacted an essential aspect of golf or if the alteration provided a disabled player with an advantage, the Court found neither of these arguments to be persuasive. First, as a preliminary matter, the Court reasoned that "the use of carts is not itself inconsistent with the fundamental character of the game of golf." Second, the Court noted that the walking rule is not "indispensable" to the game of golf. To illustrate, both the PGA Tour and the Nike Tour permit the use of golf carts during certain qualifying rounds. Third, the Court dismissed the petitioner's argument that the walking rule is "outcome effective" and emphasized the district court's finding that the fatigue from walking during a 4-day tournament is not significant. As the Court ultimately concluded, "[a] modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament."

Apart from federal case law, between January 2000 and September 2006,[16] the DOJ entered into approximately 40 settlement agreements involving the "reasonable modification" requirement under Title III. A majority of these decisions involve a public accommodation's refusal to permit a service animal's entry in a place of public accommodation. These settlements provide two important lessons: First, public accommodations, especially hotels, motels, and restaurants, are advised to implement and maintain clear, nondiscriminatory policies on service animals. Second, public accommodations are advised to educate their employees on these policies to ensure consistent enforcement and compliance. These settlements indicate that neither a "fundamental alteration" nor an "undue burden" defense is likely to justify an accommodation's refusal to modify its policy on service animals.

In addition to entering into formal settlement agreements, the DOJ has entered into two consent decrees addressing the reasonable modification of service animal policies. The U.S. Attorney for the Western District of Tennessee intervened in *Bell v. Captain D's Inc.*, a private lawsuit in which the complainant alleged that Captain D's restaurant evicted her and her family because they were accompanied by a service animal.[17] To resolve this dispute, both Captain D's and its parent company agreed to better train

[12] 42 U.S.C. 12182(b)(2)(A)(ii) (emphasis added).

[13] *Id.*

[14] Many lower federal court decisions have addressed what constitutes a fundamental alteration in the context of athletic and academic programs. *See*, *e.g.*, *Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass. 2005) (discussing whether an athletic club should be required to modify its racquetball competition rules to permit a wheelchair athlete to have two bounces rather than one); *Bowers v. Nat'l Col. Athletic Ass'n*, 974 F. Supp. 459 (D.N.J. 1997) (examining whether the NCAA is obligated to exempt a learning-disabled student athlete from certain requirements); and *White v. Creighton Univ.*, 2006 U.S. Dist. LEXIS 56500 (D. Neb. Aug. 11, 2006) (evaluating whether a medical school must modify its admissions criteria and accept a second-year student who allegedly suffers from depression).

[15] *PGA Tour*, 532 U.S. at 661.

[16] The DOJ produces status reports that cover selected ADA activities of the Department on a triannual basis. The status reports consulted for the purpose of this analysis cover those produced between January 2000 and September 2006. Nonetheless, the DOJ has produced status reports since 1994. Additionally, though these status reports cover DOJ activity in ADA litigation, formal settlement agreements, other settlements, and mediation, this analysis is restricted to litigation and formal settlement agreements. Department of Justice Americans with Disabilities Act: ADA Settlements and Consent Agreements, https://www.ada.gov/statrpt.htm [hereinafter "Status Reports"].

[17] *See Bell v. Captain D's Inc.* Consent Decree (2001), *available at* http://www.ada.gov/octdec01.htm.

employees on ADA requirements, post welcome signs for individuals with service animals, and pay compensatory damages. Similarly, in *U.S. v. Top China Buffet, Inc.*, the DOJ entered into a consent decree to resolve a case alleging that Top China Buffet refused service to a disabled individual who required the assistance of a service animal.[18] Under the consent decree, the restaurant agreed to pay damages and civil penalties.

III. Auxiliary Aids and Services

To ensure the full and equal enjoyment of goods and services provided by public accommodations, the ADA requires public accommodations to provide disabled individuals who are limited in their capacities to communicate with auxiliary aids and services.[19] Public accommodations, however, cannot charge their disabled patrons the cost of providing these aids or services.

Title III broadly defines "auxiliary aids and services" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions." Further, the DOJ's Technical Assistance Manual provides a non-exhaustive list of aids and services for individuals who are hard of hearing or deaf, vision impaired, and/or speech impaired.[20] To illustrate, aids and services for individuals who are hard of hearing include interpreters, note takers, telephones compatible with hearing aids, and open and closed captioning. Aids and services for persons with vision impairments include large print materials, taped texts, and Braille materials. Computer terminals, communication boards, and speech synthesizers are examples of auxiliary aids and services for individuals with speech impediments.

The auxiliary aid requirement is not stringent. First, the scope of what constitutes a permissible auxiliary aid and service continues to evolve with technological advancements. Second, "[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved."[21] Third, public accommodations are not required to provide the most advanced technology. They are free to furnish the auxiliary aid or service of their choosing provided that the selected aid or service enables "effective communication."

In addition to being flexible, Title III's auxiliary aid and service obligation is not absolute. Rather, the statute places two major limitations on this obligation. A public accommodation is not required to provide auxiliary aids and services if either a "fundamental alteration" or an "undue burden" would result.

Under Title III, a "fundamental alteration" is a modification that is so significant that it alters the inherent characteristics of the goods, services, and accommodations offered or provided. The "fundamental alteration" standard in the context of auxiliary aids and services and reasonable modifications is identical.

An "undue burden" is a "significant difficulty or expense." DOJ regulations list five factors for determining what constitutes an undue burden: (1) the cost and nature of the action; (2) the financial status of the site involved, the number of individuals employed at the site, the effect on expenses and resources, and legitimate safety requirements for safe operation; (3) the geographic separateness of the site to its parent corporation; (4) if applicable, the overall financial resources of the parent corporation, the overall size of the parent corporation, and the number and type of its facilities; and (5) if applicable, the type of operation of a parent corporation. What constitutes an "undue burden" is a fact-intensive inquiry.

Recent federal case law discussing auxiliary aids and services as well as the "undue burden" standard has largely focused on motion picture theater captioning. DOJ regulations clearly state that the ADA does not require movie theaters to provide open-captioned movies for their customers.[22] Both the ADA's legislative history and the regulations, however, are unclear about whether closed captioning is required under the statute.[23]

In *Ball v. AMC Entertainment, Inc.*, the U.S. District Court for the District of Columbia held that the installation of rear window captioning (RWC), a closed-captioning device, could be required under the ADA because it would not fundamentally alter the nature

[18] *U.S. v. Top China Buffet, Inc.*, No. 02-1038 (S.D. Ind. 2003), Consent Decree *available at* http://www.usdoj.gov/crt/ada/topchina.htm.

[19] 42 U.S.C. § 12182(b)(2)(A)(iii).

[20] Technical Assistance Manual, *supra* note 12.

[21] *Id.*, III-4.3200

[22] "Open captioning consists of screen-based captions, burned onto the film itself and thus visible to the entire viewing audience." *Todd v. American Multi-Cinema, Inc.,* 2003 U.S. Dist. LEXIS 25317, at *3 (S.D. Tex. 2003).

[23] *Ball v. AMC Ent., Inc.*, 246 F. Supp. 2d 17, 22-23 (D.D.C. 2003).

of the service being provided.[24] Although that court left open the question of whether requiring theaters to install RWC technology would constitute an undue burden,[25] the U.S. District Court for the Southern District of Texas in *Todd v. American Multi-Cinema, Inc*. answered this question in the affirmative.[26] The court ultimately granted the theater operators' motion for summary judgment after they persuasively argued that closed captioning was an "undue burden."[27] Based on the operators' arguments, the court reached the following conclusions: (1) filmmakers caption a limited number of movies and theater operators have to share captioned movies; therefore, the plaintiffs' request that all first-run movies be captioned is unreasonable; (2) the cost of purchasing and installing the equipment would cost $12,500 per screen; and (3) the plaintiffs provided little evidence on how to best accommodate their request.

The federal district court for the District of Oregon in *Cornilles v. Regal Cinemas, Inc*. similarly held that requiring closed-caption technology in each movie theater auditorium imposes an undue burden on theaters.[28] According to the court, "requiring Defendants to expend thousands of dollars per auditorium to install new technology is unduly burdensome when such action will not immediately increase the number of films available to Plaintiffs."

The overwhelming majority of DOJ settlement agreements involve a public accommodation's failure to provide a deaf individual with a qualified sign language interpreter or, more generally, an entity's inability to provide its deaf patrons with "effective communication."[29] These agreements emphasize the importance of providing hearing-impaired clients with sign language interpreters, especially within the health care context.

The DOJ has filed a number of consent decrees that also highlight a public accommodation's obligation to provide auxiliary aids. In *U.S. v. Saimovici*, the DOJ filed, and resolved by consent decree, a lawsuit against an eye surgeon doing business as Advanced Eye Care Associates in New York City.[30] This lawsuit alleged that the eye surgeon had advertised a free consultation for persons contemplating laser vision correction surgery. The complainant, a deaf individual, called to schedule an appointment. However, after becoming aware of the patient's need for an interpreter, the doctor canceled the appointment. In addition to the payment of civil penalties, Advanced Eye Care agreed to pursue a policy of nondiscrimination and provide its customers with appropriate auxiliary aids under the consent decree. In *Gillespie v. Dimensions Health Corporation*, the DOJ entered into a consent decree with Laurel Regional Hospital after the hospital allegedly failed to properly respond to several client requests for qualified sign language interpreters.[31] As part of the consent decree, the hospital agreed to provide qualified interpreters on-site or via video relay system. Finally, in *U.S. v. Parkway Hospital*, Parkway entered into a consent decree requiring it to provide qualified sign language interpreters after allegations emerged that it had failed to provide this service to a deaf patient undergoing extended hospitalization.[32] As with the aforementioned settlement agreements, these consent decrees emphasize the DOJ's zealousness in ensuring that public accommodations provide sign language interpreters where such auxiliary services would neither pose an undue burden nor fundamentally alter the accommodations being rendered.

[24] *Id*. at 21-22.

[25] *Id.* at 25.

[26] *Todd.,* 2003 U.S. Dist. LEXIS 25317, *13-15.

[27] *Id.* at *1.

[28] *Cornilles v. Regal Cinemas, Inc.*, 2002 U.S. Dist. LEXIS 7025 (D. Or. 2002).

[29] Status Reports, *supra* note 17.

[30] *U.S. v. Saimovici*, No. 05-7712 (S.D.N.Y. 2005), Consent Decree (2005), *available at* http://www.usdoj.gov/crt/ada/advancedeyecr.htm.

[31] *Gillespie v. Dimensions Health Corp.*, No. DKC-05-CV-3 (D. Md. 2006), Consent Decree (2006) *available at* https://www.ada.gov/laurelco.htm.

[32] *U.S. v. Parkway Hosp.*, No. 03-1565 (E.D.N.Y. 2006), Consent Decree (2004) *available at* http://www.usdoj.gov/crt/ada/parkway.htm.

IV. Removal of Architectural Barriers

The ADA also requires public accommodations and commercial facilities to remove architectural barriers that inhibit the mobility of persons with disabilities.[33] This barrier removal requirement only applies to buildings constructed before January 26, 1993. Buildings constructed after that date must comply fully with the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which detail the specifications to which buildings must conform. The Guidelines specify the size and location of everything from doors and ramps to drinking fountains and elevator call buttons.

Generally, any deviation from the ADAAG constitutes an architectural barrier. Owners of existing buildings, however, are not necessarily required to bring the building into compliance with the ADAAG. Rather, they must only remove barriers where removal is "readily achievable." The ADA defines readily achievable as "easily accomplishable and able to be carried out without much difficulty or expense." For example, where a restroom is accessible by climbing one or two steps, the DOJ has stated that ramping the steps would be readily achievable in most cases. But ramping an entire flight of steps would not likely be readily achievable.

Once the plaintiff puts forward some evidence that a modification is readily achievable, many courts hold that the burden shifts to the defendant to rebut this showing. The defendant's burden is not particularly high, however, and is far lower than the "undue burden" standard applicable to the provision of auxiliary aids and services.[34] The regulations purposefully do not elucidate the extent to which parent corporation resources are factored into the determination of whether modifications at a particular corporate location are "readily achievable." Rather, the DOJ cautions that "any analysis will depend so completely on the detailed fact situations and the exact nature of the legal relationship involved" that only a case-by-case determination is appropriate.[35]

The "cost" of removing the barrier includes not only the cost of the removal itself, but also any lost revenue that results from the removal. The amount of lost revenue thus includes loss of business revenue attributable to closing the facility, if required to make the modification, and particularly in retail stores, from reducing the amount of space available to display merchandise. For example, in *Association for Disabled Americans, Inc. v. Concorde Gaming Corp*., disabled passengers of a cruise ship claimed that they were unable to access the upper levels of a cruise ship because the ship did not have an elevator.[36] The court ruled that installation of an elevator was not readily achievable because, in addition to the $200,000 cost of the elevator itself, installation would require the boat to remain docked for approximately two months. Thus, "installation of an elevator would be both extremely difficult and expensive." The court did not, however, refer to any estimate of the amount of lost business that would be attributable to placing the boat out of operation during the installation process.

In *Lieber v. Macy's West, Inc*., a class action lawsuit, plaintiffs challenged the amount of space between merchandise display racks as too little to accommodate shoppers in wheelchairs.[37] The court first noted that the DOJ regulations do not require retailers to relocate movable display racks "to the extent that [this modification] results in a significant loss of selling or serving space." The court explained that a showing of a significant loss of space is not itself sufficient to prove that relocating display racks is not readily achievable. Rather, the "'significant loss of selling space' standard is only meaningful to the extent that it affects operations." Thus, defendants must submit credible evidence that a reduction in available space for merchandise would result in a significant loss of revenue. In *Lieber*, however, Macy's offered no more than "guesstimates" of the potential impact on revenue of widening the space between display racks. After a bench trial, the court found that Macy's violated the ADA by failing to make readily achievable accommodations for customers with mobility impairments.

Although not required by the ADA, public accommodations should conduct a review of their compliance with accessibility standards. The DOJ encourages covered entities to "establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements."[38] In addition to avoiding litigation in the first place, self-reviews may influence the outcome of litigation that cannot be avoided. Although conducting a review does not excuse violations of the Act, courts appear to be more negatively influenced when defendants do not even attempt to assess their facilities' compliance with the ADA. In *Lieber*, for example, the district court repeatedly noted that Macy's "witnesses admitted that they never even examined their merchandizing practices to see if they could be modified to address the pervasive access barriers issue."

[33] 42 U.S.C. § 12182(b)(2)(A)(iv).

[34] *See* S. 933, 101st Cong. § 302(b)(2)(A)(iii).

[35] 56 Fed. Reg. 35,554.

[36] 158 F. Supp. 2d 1353, 1365 (S.D. Fla. 2001).

[37] 80 F. Supp. 2d 1065, 1078 (N.D. Cal. 1999).

[38] 56 Fed. Reg. 35,569.

The DOJ has aggressively pursued architectural barriers cases, particularly against hotels and restaurants. The DOJ has also settled with retailers, grocery stores, and movie theaters. These settlement agreements typically include every store owned or operated by the defendant. NPC International, for example, agreed to remove architectural barriers at all 800 Pizza Hut restaurants that it owns.[39]

The settlements contain detailed requirements for the modifications that the defendants must make. The consent decree against AMC Entertainment in *U.S. v. AMC Entertainment, Inc.*, for example, covered all of the chain's movie theaters and ran over 50 pages in length. It specified everything from auditorium ramps to the exact location of a grab bar in a women's restroom located in one of its theaters.[40] Additionally, the agreements typically call for payment of restitution and civil monetary penalties, often in substantial amounts.

The government has also sought to hold franchisors directly liable for their franchisees' ADA violations. Most prominently, the DOJ entered into a consent agreement with Days Inns of America – a large hotel franchisor – requiring the company to ensure the accessibility of their hotels, to establish a $4.75 million fund to provide interest-free loans to its franchisees for necessary changes, and to pay a $50,000 civil penalty.[41]

The Days Inns litigation resulted in a split among the courts over the issue of franchisor liability for ADA violations by franchisees. Two district courts ruled that Days Inns was not liable, and one district court and the Eighth Circuit Court of Appeals held Days Inns liable for their franchisees' violations.[42] These courts disagreed over whether Section 302 of the ADA – which limits liability to owners, operators, lessors, and lessees of places of public accommodation – also applies to Section 303 of the ADA, imposing liability for a "failure to design and construct [commercial] facilities" in compliance with the ADA's requirements.[43] Days Inns conceded that its hotels are commercial facilities, but argued that it was not liable because Section 303 incorporates the limitation on responsible parties set forth in Section 302.

The Eighth Circuit, reversing the district court, rejected Days Inns' interpretation of the ADA. The court concluded that liability under Section 303 is not limited to owners, operators, lessors and lessees. Rather, the court held that "to bear responsibility for an inaccessible facility under Section 303, a party must [only] possess a significant degree of control over the final design and construction of the facility." It reversed the district court because "the district court improperly focused on the amount of control [Days Inns] actually exerted rather than the amount of control [Days Inns] had available." Clarifying somewhat, the court suggested that a "franchisor's mere instruction that the franchisee's facility comply with the ADA ... would not constitute significant control." Further, the franchisor is not liable, the court explained, when it has no knowledge of the violation.[44]

The district court for the Central District of Illinois held Days Inns liable using similar reasoning as the Eighth Circuit, but also concluded that Days Inns "own[ed], lease[d], or operate[d]" its hotels. Relying on legislative history, the district court explained that "[c]orporate headquarters would be covered to the same extent as the operator of the accommodation."

In contrast, the Eastern District of California and the Eastern District of Kentucky have held that Section 303 of the ADA incorporates the limitation on responsible parties set forth in Section 302.[45] The Kentucky court explained that Section 303 of the ADA "itself refers back to § 302 in a manner that makes it clear that the prohibitions relating to new construction apply to owners, operators and lessees. It follows that this reference to § 302 was Congress's intention of continuing the same scope of liability." Similarly, the California court concluded that "Section 303(a) ... [is] governed by the 'General Rule' of § 302(a)" imposing liability only upon owners,

[39] Dep't of Justice, Enforcing the ADA: A Status Report from the Dep't of Justice, Jan.-Mar. 2006, *available at* http://www.usdoj.gov/crt/ada/janmar06.htm.

[40] *U.S. v. AMC Ent., Inc.*, No. CV-99-1034 FMC (C.D. Cal. Nov. 14, 2003), Consent Order (2003) at ¶ 85, *available at* http://www.usdoj.gov/crt/ada/amcnonlos.htm.

[41] Dep't of Justice, Enforcing ADA: A Status Report from the Dep't of Justice, Oct.-Dec. 1999, *available at* http://www.usdoj.gov/crt/ada/octdec99.htm.

[42] *U.S. v. Days Inns of Am., Inc.*, 22 F. Supp. 2d 612 (E.D. Ky. 1998) (not liable); *U.S. v. Days Inns of Am., Inc.*, No. CIV. S-96-260 WBS/GGH, 1998 U.S. Dist. LEXIS 21945 (E.D. Cal. Jan. 12, 1998) (not liable); *U.S. v. Days Inns of Am. Inc.*, 151 F.3d 822 (8th Cir. 1998) (liable); *U.S. v. Days Inns of Am., Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998) (liable).

[43] 42 U.S.C. § 12183(a)(1).

[44] *U.S. v. Days Inns of Am., Inc.*, 151 F.3d at 826 n.3, 827 n.4.

[45] *U.S. v. Days Inns of Am., Inc.*, 998 U.S. Dist. LEXIS 21945, at *6 (E.D. Cal. Jan. 12, 1998); *U.S. v. Days Inns of Am., Inc.*, 22 F. Supp. 2d at 615 (E.D. Ky. 1998).

operators, and lessors and lessees. Days Inns was not, therefore, subject to liability merely for its involvement in designing and constructing the franchisees' hotels.

Nor did Days Inns "operate" the hotels, according to these district courts. Both opinions[46] cited *Neff v. American Dairy Queen Corp.*, a Fifth Circuit case holding that Dairy Queen did not operate one of its franchisees for purposes of the ADA.[47] In *Neff*, the plaintiff argued that Dairy Queen operated one of its stores because the franchise agreement gave Dairy Queen sufficient control over the store. The agreement required Dairy Queen's approval for "any replacement, reconstruction, addition or modification [of the] building." Thus, the relevant inquiry is whether the franchisor "specifically controls the modification of the franchises to improve their accessibility to the disabled."

Based on *Dairy Queen*, the district courts in the Days Inns' cases found that the hotel corporation did not have sufficient control over its franchisees. The Kentucky court reasoned that, while Days Inns did possess "veto power pertaining to the construction of the facilities," the "agreement specifically provided that [Days Inns'] review and approval of the facilities' plans were solely for the purpose of determining compliance with [Days Inns'] system standards and not for determining whether those plans satisfied legal requirement such as ADA standards." The California court similarly held that Days Inns did not "operate" its franchisees because it did not have control over the "discriminatory" conditions.

V. Transportation

A. Transportation Services Provided by Places of Public Accommodation Must Comply with the ADA

Under Title III of the ADA, places of public accommodation providing transportation services may not discriminate against individuals with disabilities.[48] The ADA's requirements apply not only to companies such as taxis that provide transportation as their primary business, but also to other entities that provide transportation merely as an adjunct to a larger service.[49] Transportation services at shopping centers, zoos, and amusement parks, for example, must comply with the ADA.

An entity operating a demand-responsive system must ensure either that any new vehicles it purchases are accessible to individuals with disabilities or that its system, taken as a whole, provides an equivalent level to service to individuals with disabilities as it does to those without. Entities operating a fixed-route system must meet the same requirements. Additionally, whenever an entity operating a fixed-route system purchases or leases a vehicle capable of seating more than 16 passengers, the vehicle must be accessible to individuals with disabilities regardless of whether the system otherwise provides an equivalent level of service.

B. Standing Is a Recurring Issue in Title III Transportation Cases

One frequently litigated issue in transportation cases is the plaintiff's standing to sue. In federal court, the plaintiff must establish standing by showing that: (1) he or she has suffered an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) the injury is likely to be redressed by the requested relief. [50] The first and third prongs of this test often present a problem for plaintiffs. Under Title III, plaintiffs can only request prospective relief. The ADA authorizes the court to issue an injunction to correct an ongoing violation, but it does not authorize punitive damages for past violations.[51] The problem some plaintiffs encounter is demonstrating how an award of *prospective* relief redresses a *past* violation. Alternatively, the same problem can be characterized as a failure to demonstrate an injury in fact to plaintiffs' ability to obtain transportation services in the future.[52] Thus, courts consistently hold that "plaintiffs lack standing to seek ... relief under the ADA when they have not stated an intention or desire to return to the place where they had previously encountered an ADA violation, or have failed to show a likelihood of discrimination

[46] 22 F. Supp. 2d at 617; 1998 U.S. Dist. LEXIS 21945, at *14.

[47] 58 F.3d 1063 (5th Cir. 1995).

[48] 42 U.S.C. § 12182(a); 49 C.F.R.§ 37.5.

[49] 42 U.S.C. § 12184 (primarily engaged in business of transportation); 42 U.S.C. § 12182(b)(2)(A)-(C); 28 C.F.R. § 36.310 (listing examples).

[50] *Allan v. Wright*, 468 U.S. 737, 751 (1984).

[51] 42 U.S.C. §§ 12188(a)(2), 12188(b)(4).

[52] *See Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329, 1333 (N.D. Cal. 1994) (plaintiff could not establish that she suffered an injury in fact under Title III when she was not likely to use defendant's services again).

should they return to the place."[53] Plaintiffs have the greatest difficulty establishing standing for violations in situations where they do not have concrete plans to use the defendant's services at a future date.

O'Brien v. Werner Bus Lines is a typical example of the standing issues that plaintiffs encounter.[54] In *O'Brien*, the driver for a tour bus company refused to permit a blind couple (the O'Briens) to board the bus along with their service dogs. The driver's conduct clearly violated the ADA, which requires public accommodations to allow service animals to accompany their passengers into vehicles. The O'Briens were thus unable to travel from Pennsylvania to Atlantic City, where they expected to attend a concert for which they had won tickets from a radio station. Based upon the circumstances motivating their travel plans, the court characterized the trip as an "isolated, chance event." Thus, the court held that the O'Briens lacked standing because they made no "specific allegations" that "they are likely to use Werner buses in the near future."

The court went on to say that even if the plaintiffs could demonstrate that they were likely to use the bus service again, their lawsuit still would not survive a motion to dismiss for lack of standing. The court explained that the O'Briens were unable to establish standing because they could not show that the bus company was likely to violate their rights under the ADA again. Remedial actions taken by the bus company after the incident with the O'Briens reduced the possibility that the bus drivers would repeat this conduct. The company clarified its ADA policies and spoke with each driver to ensure that they understood their obligations to passengers with disabilities. Satisfied with the adequacy of the corrective measures and management's dedication to addressing the problem, the court held that "there is [not] a substantial likelihood that Werner will violate the O'Briens' rights under the ADA again." Thus, the court concluded that plaintiffs could not demonstrate how a court order would redress the plaintiff's injury and dismissed the action for lack of standing.

O'Brien suggests that defendants can obtain dismissal of ADA lawsuits on standing grounds by implementing remedial measures. Although the court did not clarify the extent of the remedial measures defendants must implement, it nevertheless provided some guidance. Of particular note is that the court did not tie its holding to the relief the plaintiffs requested, but to the objective standard of "substantial likelihood." This suggests that defendants can obtain dismissal for lack of standing even though they do not implement the requested relief in its entirety. Rather, they must only implement as much as necessary to make a showing that there is not a "substantial likelihood" plaintiffs will encounter the same violation.

Although the court rested its holding on the injury in fact requirement, courts have applied this holding to the redressability requirement as well. In *Hoepfl v. Barlow*, for example, the Eastern District of Virginia held that a medical patient lacked standing to sue a physician who refused to treat her because of her HIV-positive status.[55] The plaintiff could not meet the third prong of the standing test, the court explained, because she did not express any desire to use the physician's services again. Similarly, two district courts have held that emergency room patients lacked standing to sue when they failed to demonstrate a "real and immediate threat" of future harm.[56] Plaintiffs could not make this showing because they did not submit evidence demonstrating that they were likely to return to the defendant's emergency department.

O'Brien takes these precedents a step further in finding that defendants' corrective measures provide an independent basis for dismissing the claim for lack of standing. Other courts have followed *O'Brien*'s lead. For example, a Pennsylvania district court held that plaintiffs did not have standing because the defendant "has recognized [its] lack of conformance with the ADA and has remedied these problems."[57] Courts still have not, however, provided clear guidance on what level of corrective action is sufficient to obtain dismissal on standing grounds.

In contrast to the general trend narrowing the circumstances under which plaintiffs have standing, most courts read the ADA broadly as granting standing to individuals and corporations that, although not disabled themselves, are discriminated against because of their association with persons with disabilities. In one frequently cited opinion, the Second Circuit ruled that an outpatient drug and alcohol rehabilitation center had standing under Title II to sue the city for refusing to grant it a necessary building permit. The appeals court explained that Congress intended to make standing under the ADA as broad as the Constitution allows.

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[53] *Disabled in Action of Metro. N.Y. v. Trump Int'l Hotel & Tower*, No. 01 Civ. 5518 (MBM), 2003 U.S. Dist. LEXIS 5145, at *24 n.4 (S.D.N.Y. Apr. 1, 2003).

[54] *O'Brien v. Werner Bus Lines*, Civ. A. No. 94-6862, 1996 WL 82484 (E.D. Pa. 1996).

[55] *Hoepfl v. Barlow*, 906 F. Supp. 317, 321 (E.D. Va. 1995).

[56] *Schroedel v. New York Univ. Med. Ctr.*, 885 F. Supp. 594, 598 (S.D.N.Y. 1995); *Aikins*, 843 F. Supp. at 1333-34 (finding that plaintiff suffered no injury in fact).

[57] *Douris v. Bucks Cnty. Off. Of Dist. Att'y*, No. 03-CV-5661, 2004 WL 1529169, at *7 (E.D. Pa. July 4, 2004), *aff'd* 174 Fed.Appx. 691 (3d. Cir. 2006).

Courts have adopted this interpretation of the ADA in the Title III context, including in cases based upon discrimination in transportation services. In *Raver v. Capitol Area Transit*, for example, the defendant moved to dismiss the claims by one of the plaintiffs, the Center for Independent Living of Central Pennsylvania, on the grounds that a corporation is not a "person with a disability" and thus does not have standing to sue.[58] The district court rejected this argument. It noted that although the Center itself was not disabled, the Center's clients included persons with disabilities. The court held that because the corporation's ability to serve its client was frustrated by the defendant's acts of discrimination, the Center qualified as a "person alleging discrimination on the basis of disability," and thus had standing to sue.

C. The Department of Justice Frequently Enforces Title III Provisions Against Entities Providing Transportation Services

In addition to lawsuits by private individuals, the ADA also authorizes the DOJ to bring enforcement actions to remedy acts of discrimination "rais[ing] ... issue[s] of general public importance."[59] The government frequently settles with the entity or, more rarely, enters into a consent decree.[60] Settlement terms typically include specific modifications that the defendant agrees to implement as well as payment of modest restitution to the affected individuals.[61] Occasionally, the settlement calls for payment of a civil monetary penalty in addition to restitution.[62] Settlement agreements also allow the government to monitor compliance with the agreement, although the settlement remains in effect only for a limited period of time.[63] Most of the violations that the government takes action on involve failures to accommodate wheelchairs or service animals in vehicles. The government has focused these enforcement actions on the vans rental car companies use to provide passengers transportation between the airport and the rental car facility, and transportation services to and from the airport and the disabled passenger's home or hotel.

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[58] *Raver v. Capitol Area Transit*, 887 F. Supp. 96, 97 (M.D. Pa. 1995).

[59] 28 U.S.C. § 12188(b)(1)(B)(ii).

[60] *See, e.g.,* Settlement Agreement Under the ADA Between the U.S. and Limo Economy Cab, Dep't of Justice No. 202-86-27, *available at* http://www.usdoj.gov/crt/ada/limocab.htm ("Limo Economy Settlement"); Settlement Agreement Between the U.S. and SuperShuttle Int'l, Inc., Dep't of Justice Nos. 202-8-40, 73-70 and 73-56, *available at* http://www.usdoj.gov/crt/ada/superstl.htm ("SuperShuttle Settlement"); Settlement Agreement Between the U.S. and ANC Rental Corp., Alamo Rent-A-Car, LLC and Nat'l Rental Sys., Inc., Dep't of Justice Nos. 202-12C-153, 202-18-119 and 202-37-55, *available at* http://www.usdoj.gov/crt/ada/alamonat.htm. ("Alamo/National Settlement"); *U.S. v. Bette Bus Shuttle, Inc.*, No. 03-2100-D (W.D. Tenn. 2005), Consent Order (2004) *available at* https://www.ada.gov/bettebus.htm ("Bette Bus Consent Order").

[61] *See, e.g.,* Alamo/National Settlement, *supra* note 64, at ¶¶ 15-22 (requiring companies to procure accessible vehicles and conduct training); Limo Economy Settlement, *supra* note 64, at ¶¶ 22-23 (payment of restitution to affected individuals).

[62] *See, e.g.,* Bette Bus Consent Order, *supra* note 64, at ¶ 15 ($500 civil monetary penalty); Settlement Agreement Between the U.S. and Resort Express, Inc., Under the ADA, Dep't of Justice No. 202-77-37, at ¶ 21, *available at* http://www.usdoj.gov/crt/ada/resortex.htm ("Resort Express Settlement") ($1,500 civil monetary penalty).

[63] *See, e.g.,* Alamo/National Settlement, at ¶¶ 23, 28.