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# What Is the "Americans with Disabilities Act" and What Is its Impact on the Real Estate Industry?

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The "Americans With Disabilities Act" (hereinafter referred to as the ADA or Act) was enacted in 1990. The initial phased-in compliance deadlines are now past, and the government and its various adjunct agencies have shifted their focus from education to enforcement of the Act.

Yet most Americans remain unaware of the Act, and in particular Title III, which deals with Public Accommodations & Commercial Facilities. Title III has substantial impact on existing real estate and new real estate construction. A rapidly growing body of settlement and case law interpreting and defining responsibility and responsible parties in this area is already establishing legal precedents. The Department of Justice (DOJ) has reported the filing of over 700 Title III complaints in a single year, and expects the number to grow as more Americans become cognizant of the Act.

Enforcement of Title III of the ADA has and will prove costly for those who fail to allocate responsibility for compliance in their contracts in general, real estate contracts, leases and loan documents.

While non-compliance can be expensive, the cost of complying with the ADA is relatively low compared to the economic potential. For example, would you or your client turn down the opportunity to invest \$1.00 to make \$10.00? Business owners do this all the time when they advertise.

By complying with the Act, making the necessary alterations, two-thirds

of which often cost less than \$500.00, more than half often less than \$50.00, and 31 percent nothing, a business can be opened to an entire marketplace of potential customers. And as the population ages, the number of persons who fall under the ADA protection is growing, as is their political and economic power. An investment in compliance is an

investment in future business.

Non-compliance, on the other hand, not only closes off a business to those who do not have access; it can bring on suits and sanctions. This Act is a civil rights, anti-discrimination piece of legislation, and carries with it a potential for a jury trial which, by itself, may be more costly than compliance. In addition, of course, a plain-

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tiff may be granted a large settlement and attorney's fees.

How can people in the Real Estate industry comply with the Act, thereby protecting themselves and their clients, and capitalize on their investment by opening their businesses to the entire marketplace of potential customers? First, by becoming knowledgeable about the details of the Act itself. Second, by choosing the right people to interpret the Act, the case law, and all legal precedents that will inevitably impact their compliance with the Act, as well as knowledgeable people who can help renovate existing space or new construction, such as interior designers and architects.

First, an introduction to the Act itself. The Americans With Disabilities Act, Title III, prohibits the discrimination by private entities against any disabled individual (as defined by the act) in places of "public accommodation" and "commercial facilities," mandating accessibility in new construction and alterations of existing structures.

This prescript also includes residential property with mixed use purposes. Except with respect to landlords and tenants, the ADA does not identify who among the various parties should bear the responsibility and cost for the failure to comply.

The chain of responsible parties could include sublessees, management/realty companies, lenders (particularly regarding new construction loans and foreclosure property), owners, operators, builders/contractors, and buyers/sellers of non-residential property. The DOJ's refusal to allocate responsibility in the Final Rules seems to imply that parties will be held equally responsible, with potentially similar liability for non-compliance with the ADA's accessibility

Even Real Estate brokers who have no direct liability under the Act have had obligations imposed upon them in various states for failure to disclose information about the property in question. Brokers should likewise seek protection in the language of their various contracts and notices, and be educated about the ADA. They can then inform their clients to seek legal and design advice concerning the economic implications of the ADA and other laws on the particular transaction.

At least two types of non-compliance suits can be filed. In the first, an individual can allege discrimination before a structure is even built if it appears that the facility would be inaccessible as constructed—thus avoiding costly retrofitting. In other non-compliance circumstances, the Attorney General may file suit and seek to impose monetary penalties.

In each instance, up to \$ 50,000.00 can be assessed for the first violation, and \$ 100,000.00 for each violation thereafter in addition to other relief. Furthermore, nothing in the Act limits or invalidates the rights, remedies, or procedures afforded under other laws that may provide equal or greater protection. State Tort claims confer greater remedies and are not pre-empted by the ADA.

A document that clearly allocates the responsibility might be favored by the DOJ in the process of attempting to resolve a claim through mediation. However, it would be a problem if the same document were silent on the matter. A court, in third party claims or suits for breach of contract or lease terms with regard to ADA compliance, may still hold all parties fully liable. That is why a clear allocation or responsibility and cross-indemnification clause written into these documents will become important.

Liability and responsibility should be

a shared concern, and the obligation to ensure that new construction and altered existing properties are readily accessible to and usable by individuals with disabilities should be a continuing one. It is not always clear what one must do to conform, but what is clear is that every entity covered under the Act must make a good faith effort at compliance. This is easiest to accomplish by following a three-step approach:

1. Keep informed about the law.
2. Always seek knowledgeable counsel before you act.
3. Perform feasibility studies where new construction or a purchase are involved; or for existing entities, perform periodic self-evaluations. □

## Leases Signed At The Burnham Center

The Burnham Center at 111 W. Washington has signed new and renewal leases for a total of 55,371 sq. ft., said Mark J. Sullivan, vice president-asset management, ORIX Real Estate Equities Inc. Jonathan Seeley, leasing manager, represented the building's owner in all negotiations. ORIX is leasing and management agent for Burnham Center.

Northwestern Medical Management Corp. leased 4,717 sq. ft., with Michael Baum and Kevin Duckler of Stein & Company as its broker.

Several law offices sharing space on the building's 11th floor nearly doubled their space with a renewal and expansion for 28,375 sq. ft. They are: William J. Harte Ltd., Kevin M. Forde Ltd., Richard J. Prendergast, Joseph Tighe, Thomas J. Tyrrell, Ross Tyrrell, Frederick J. Czerwionka, Michael J. LeFevour and William T. Rodeghier. Edward Gerstein and Thomas Dubois of Edward Gerstein & Assoc. represented the tenants.

Palmer Bellevue Corp., consultants to large utilities and recently acquired by Coopers & Lybrand, renewed its lease for 4,991 sq. ft., with Seeley as sole broker.

Three law firms renewed leases that more doubled their space, with Seeley representing all parties. O'Reilly, Cunningham, Norton & Mancini signed for 3,300 sq. ft. Shaw Gussis & Fox leased 2,655 sq. ft. Robert N. Wadington signed for 1,700 sq. ft.

Daniel J. Houlihan & Assoc., law offices, renewed for 3,227 sq. ft., with Paul Zeller of Zeller Realty as its representative.

A new lease for 2,149 sq. ft. was signed by the American Society for Technion, an educational fundraising organization, with Tony Kahan and Diana Applehof as brokers.

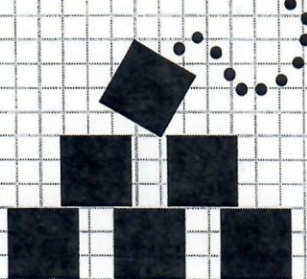
Uhleman Optical, an optical shop, leased 1,457 sq. ft. Elliott Weiner of Marc Realty represented the tenant.

Boise Cascade, a paper products manufacturer, renewed its lease for 1,200 sq. ft., with Seeley representing all parties.

The law firm of Hynan & Murphy renewed for 875 sq. ft., with Seeley as sole broker.

Two insurance agents, Weinstein & Ryan and Trausch Insurance Agency, leased 375 and 350 sq. ft., respectively, with Seeley as sole broker.

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