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ADA Claims, Is There A Target On Your Back?

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On July 26, 1990, President Bush signed into law the Americans with Disabilities Act ("ADA"), The Americans with Disabilities Act Accessibility Guidelines (the "1991 Regulations") were shortly thereafter developed to guide new construction and alterations undertaken by covered entities and established the minimum requirements for "accessibility" for disabled persons in buildings and facilities and in transportation vehicles. After more than twenty years, the Department of Justice implemented new regulations, which became mandatory in 2012 (the "2012 Regulations.") Your state may have passed parallel laws, which could increase the protection of individuals with disabilities, e.g., the Unruh Act in California. However, this article focuses on Federal ADA compliance. Keep in mind that the ADA is a civil rights law, which addresses a number of subjects, but this article focuses on accessibility (no longer called "handicap") issues only.

A mobile home park owner might ask, "How about my pre-existing park, does it need to comply with ADA issues?" Answer: "It depends." If your mobile home park pre-dates the ADA statute, and the Park has not gone through any significant renovations (determined on a case-by-case basis), then the park may be "grandfathered in" in most cases. However, there can still be considerations of "reasonable accommodation" and "readily achievable barrier removal" under the ADA that could require a park owner to make modifications to existing structures and to make existing buildings "accessible" to the disabled. There may be no "grandfathering in" under these provisions of the ADA. In addition, if the park has undergone substantial alterations/renovations, this could also trigger ADA compliance. A mobile home park owner might also ask "If my park needs to comply with ADA issues, then does the park have to comply with the 1991 Regulations or the 2012 Regulations?" Once again, the answer is "it depends." There is a broad "grandfather" clause that exempts all building elements constructed in compliance with the 1991 Regulations until those elements are subject to a planned alteration.

So--is a mobile home park a "place of public accommodation" or not? The ADA defines a "public accommodation" to be "a private entity that owns, leases (or leases to), or operates a place of public accommodation." Examples of places of "public accommodation" include places of lodging; establishments serving food or drink; places of exhibition or entertainment; places of public gathering; sales or rental establishments; service establishments; stations used for public transportation; places of public display or collection; places of public recreation; places of public education; social service center establishments; and places of exercise or recreation. Does a mobile home park fit within these descriptions? Based on discussions with ADA experts, the typical mobile home park does not appear to "fit" under any of the enumerated examples of a "public accommodation," assuming the park's facilities are only open for the sole use and enjoyment of the park's residents, rather than the "general public." In some cases, however, a park's clubhouse and office could be determined to be "public accommodations" as they are generally "opened to the public." In addition, the park's office is necessarily "opened to the public" as persons, not otherwise residents of the park, are allowed in and, in fact, are invited in to inquire about available spaces and/or mobile homes in the park. One issue which has been "rearing its ugly head" recently in connection with what are referred to as "drive-by" ADA lawsuits is the inadvertent conversion of a "non-public" accommodation to a "public" accommodation. For example, if the park clubhouse is not open to the general public, but the park allows the clubhouse to be used as a polling station for elections, or for classes for the local college, or for swimming lessons in the pool, the park may have inadvertently converted the area to a "public" accommodation and will be required to comply with the ADA for the impacted area, e.g., pool or clubhouse. Even the "innocent" request by one person to use the "private" restroom at the management office could trigger thousands of dollars in improvements to make the restroom "accessible".

If the park has "public accommodations" which have "barriers" to "access," then the next consideration is whether the "removal of the barrier" is "readily achievable." Remember that these barriers apply to all sorts of disabilities, including sight and hearing, and not just accessibility for wheel chairs. The ADA generally defines "readily achievable" as easily accomplished and able to be carried out without much difficulty or expense. 42 U.S.C.S. § 12181(9). Federal courts have developed several factors in determining what is "readily achievable": (1) nature and cost of the removal; (2) overall financial resources of the facility or facilities involved; (3) number of persons employed at such facility; (4) effect on expenses and resources; (5) impact of such action upon the operation of the facility; (6) overall financial resources of the covered entity; (7) overall size of the business of a covered entity with respect to the number of its employees; (8) the number, type, and location of its facilities; (9) type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity; and (10) geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity. *Colorado Cross Disability Coalition v. Hermanson Family Ltd. Pshp.* The park however will bear the ultimate burden to prove that the barrier removal is not readily achievable. This will be determined on a case-by-case basis for each individual park. The 1991 Regulations provide examples of steps that may be "readily achievable" according to the Department of Justice.

So, how do you lessen the chance of your park becoming a "target" of an ADA lawsuit? There are no "bright lines" as to whether

a park has ADA issues or not. Since an "ounce of prevention is worth a pound of cure," the prudent park owner might be best served by hiring a knowledgeable ADA Consultant to review and comment on whether the park has any ADA issues and how they should or could be addressed. California has implemented a Certified Access Specialist ("CASp") training and licensing program, which provides incentives (i. e., some protections from lawsuits) for property owners who conduct a CASp inspection. Another, and more conservative approach would be to simply make sure that all of the park facilities are "ADA compliant," even if, technically and legally, you may not be required to do so. Little things can make a big difference in your park. Examples of ADA compliance include: levers on the entrance doors; levers on bathroom doors and fixtures; bathroom fixtures at proper height; proper bathroom accessories; doorways that accept wheelchair access; bathrooms that accept wheelchair access; counters at correct height for wheelchairs users; alternatives (ramps/elevators) to steps into the clubhouse and office; acceptable transitions (no lips) at doorways (interior and exterior); accessible parking and van access spaces; acceptable transitions (commonly referred to as "curb cuts") to sidewalks at street junctions and accessible parking; and acceptable inclines from parking areas to the park's "public accommodations," to name a few.

Your ADA consultant can walk your park and let you know what facilities do and do not comply with ADA. Making the necessary improvements will be money well spent, and potentially "ward off' expensive litigation, which litigation, in all probability, will not be covered by your general liability insurance policy. You might also want to turn this into a "PR plus" for your park - i. e., tell your residents about the improvements after they are done! However, such actions may not be right for every park. The park owner should first discuss ADA considerations with its legal counsel to determine what the right course of action is under the particular circumstances.

In addition, insurance is playing an ever more important role in protection against ADA claims. More and more often, ADA plaintiff lawyers are adding causes of action for negligence and alleging bodily injury to trigger the potential for coverage under the park owners CGL policies. Our recommendation is to tender any ADA claims to your carrier immediately. In addition, some insurers now offer what is known as "tenant discrimination" insurance, which may protect the park owner in the event of an ADA claim since the ADA claim is a civil rights claim. We suggest all park owners speak with their industry insurance broker about possible insurance protection.

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