

POSSIBLE ADA RULE CHANGES SPUR WORRY

Hotel industry fears litigation increase

by Elaine Yetzer Simon

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NATIONAL REPORT—In addition to the costs of complying with proposed updates to the 15-year-old Americans with Disabilities Act, another issue concerns hoteliers: the effect on drive-by lawsuits.

M.P. Rama, C.O.O. of JHM Enterprises and chairman of the Asian American Hotel Owners Assn., said there is great concern in the industry about the likelihood of increased ADA-related litigation. "When the final rules are enacted and become effective, the specific requirements will become a benchmark for ADA compliance," he said. "Even properties in compliance with the old rules will now face the possibility of having to defend against lawsuits for alleged violations of the new rules. Although much of this concern is financial, in view of the costs of defending even a frivolous lawsuit, there is concern about the overall time and effort involved in having to operate a business with a constant concern about litigation."

According to Eric Berg, a partner with DLA Piper Rudnick Gray Cary, the act itself isn't the problem. "Everybody recognizes there is a tremendous situation that had to be addressed by the ADA and was addressed," Berg said. "The problem comes at the margins. [Those suing are] not the disabled person who was turned away because there were no rooms for him; it's the ADA mills out there that bring hundreds of lawsuits. They just happen to have an affiliation with an accessibility organization and engage in drive-bys.

"It's a great idea. It works wonderfully in practice, but there are a few people out there who ruin it."

Martin Orlick, a partner with Jeffer, Mangels, Butler & Marmaro LLP, said he's not sure the new standards will have much impact on the lawsuits, but it's the current judicial temperament and legislative initiatives that will impact frivolous

litigation. Recently, in California, several federal judges have clamped down on drive-by ADA lawsuits.

"In one case, the court found that a plaintiff who filed over 400 ADA suits in four years lacked standing to sue," Orlick said. "He and his attorney were declared 'vexatious' litigants, were ordered to pay a fine, and obtain leave from the presiding judge to show merit of their claims before they can file any new lawsuits. In another recent case, a court held that in order for an ADA plaintiff to recover attorneys' fees (as opposed to filing an ADA lawsuit), the plaintiff is required to give the hotel specific notice of the alleged ADA violations encountered, and a reasonable opportunity to cure [the violations]."

Orlick said it remains to be seen what the final outcome of the cases will be. "Both cases will certainly be appealed, but some California courts have joined the Florida courts to impose limitations on ADA suits because Congress never intended the law to become a cottage industry for get-rich-quick schemes for plaintiffs' lawyers," he said. In one of Orlick's cases, the plaintiff was hired by a lawyer as an access consultant. The plaintiff went to a small California town to do inspections. While there for only one night, the plaintiff sued all six chain-affiliated hotels, although the plaintiff did not stay at any of them. The settlements and legal fees exceeded \$100,000.

Grandfathering certain properties or certain standards into the changes will help reduce the number of drive-by lawsuits, according to Berg.

"Will the regulations address drive-bys? Not in and of themselves," he said. "Certainly if there is no grandfathering, we will see a rash of suits."

There is a bill pending before the U.S. House sponsored by Rep. Mark Foley, R-Fla., that Berg said could have an impact on the suits.

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"This is a notice and cure period for the lawsuit where as a prerequisite to filing an ADA lawsuit, you have to notify defendants and give them a chance to fix the problem," he said. "That's the sort of revision to the act that really will address drive-bys because the sort of people it will discourage is the people who are in it to make a

profit.

"The argument against it is that the act's been around since 1991. How much time do you need to get in compliance?"



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