



Jeffer, Mangels, Butler & Marmaro LLP

The premier hospitality practice in a full-service law firm™

HOW HOTEL SWIMMING POOLS MAY SPAWN ADA LAWSUITS AND WHAT TO DO ABOUT IT

by Jim Butler

This article was published in ehotelier.com, May 18, 2007

In case you haven't noticed, ADA lawsuits -- suits filed under the Americans with Disabilities Act -- are on the rise. We have covered a number of troublesome ADA claim areas here on www.HotelLawBlog.com in the past.

Today, I would like to introduce Marty Orlick, one of my hotel lawyer partners who specializes in defending ADA cases. In fact, Marty Orlick has represented property owners in defending nearly 200 ADA cases! So let's get Marty's street savvy advice on how to recognize the threat and then to avoid the potential lawsuits lurking at the bottom of your pool.

Marty, this sounds like a very specialized and narrow category of claim. Can you give the readers of HotelLawBlog.com some idea of how significant the ADA claim threat is in this area?

Last year, I would estimate that there were 50-100 ADA lawsuits in California alone, involving pools for hotels, health clubs and spas. I personally handled 5 ADA lawsuits involving hotel pools in 2006.

What are a few high-risk states for ADA pool-related lawsuits?

California, California, California. After that, Florida, New York, Colorado.

Why is this a growing problem?

Disabled Americans are traveling at record levels and staying at hotels in increasing numbers. Hotels are required to be accessible.

Unless hotels are accessible, disabled guests may not be able to take showers, access restrooms, restaurants, fitness centers, or use other facilities. Disability rights activists have targeted hotels and are filing lawsuits against hotels that provide pools and spas to their guests, but do not have pool lifts, claiming discrimination under the ADA.

Is there case law that created a precedent for ADA pool lawsuits at the state level?

There is no case law in California. And I am not aware of case law in other states specifically on the subject of pool lifts. The current ADA Accessibility Guidelines (ADAAG) do not require pool lifts in swimming pools or spas. Specifically, the Department of Justice (DOJ) Technical Assistance Manual, II-5.3000 Application of ADAAG, Illustration I, states, "ADAAG does not contain technical standards for access to the pool itself. Thus, the owner cannot be found in violation of ADAAG for failure to install a lift of other means of access into the pool."

In fact, in a recent case I handled for a national hotel company, the agreement reached with the Department of Justice (DOJ) underscored that the hotel was required to provide access *to* the pool and *around* the pool, but not *into* it.

What ADAAG requires is access to the pool, not entry into it. Access would include a clear path of travel to the pool area, an accessible gate, and an accessible path around the pool itself.

Plaintiffs groups for the disabled argue that inns, hotels and motels are defined as "public

1900 Avenue of the Stars, 7th Floor
Los Angeles, California 90067
310.203.8080—(fax) 310.203.0567

Two Embarcadero Center, 5th Floor
San Francisco, California 94111
415.398.8080—(fax) 415.398.5584

3 Park Plaza, Suite 1100
Irvine, California 92614
949.623.7200—(fax) 949.623.7202

HOW HOTEL SWIMMING POOLS MAY SPAWN ADA LAWSUITS AND WHAT TO DO ABOUT IT

by Martin H. Orlick

accommodations" under the ADA, and under Title III of the ADA, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the services, facilities, or privileges of a place of accommodation. They argue that the use of the pools at the facilities is one such service or privilege. They might argue that because they pay the same room rate as other guests, they should have access to the same facilities. They will also argue that adding a \$1,500 pool lift to a pool in, say, a \$200 million hotel property, is always "readily achievable." These are arguments, not legal precedents.

But some states, like California, have their own state law on top of the federal ADA, right?

Yes, California has its own set of laws and regulations in this area, including the California Building Code, the Unruh Civil Rights Act and the Disabled Persons Act. None of them require pool lifts in hotel properties built before 1992. However, the California Building Code requires pool lifts to be included in hotels constructed after about 1992. It also requires that any pool that is renovated or altered -- anything other than routine maintenance -- must have a pool lift installed as part of the alteration.

However, things could change. The ADAAG has been under review for some time. The new proposed guidelines would require lifts for swimming pools, wading pools and spas. Specifically, the ADAAG proposes that where pools are provided, pool lifts, sloped entries,

transfer walls, transfer systems and pool stairs will be required. However, the proposed guidelines are still in the public comments phase, and the DOJ has yet to adopt the new guidelines. When the new guidelines will be adopted and exactly what they will contain is anyone's guess.

With regards to pool safety, what measures should a hotelier take in order to ensure that he/she does not face a lawsuit or complaint from a guest?

Well, I have already mentioned the whole area of accessibility into the pool as opposed to merely up to and around the pool.

But there are other issues, such as entry into the pool area, which can be troublesome. For example, the latch to a pool gate must be low enough so that it is accessible to those in wheelchairs, but at the same time, the gate must prevent toddlers from entering the pool area. Additionally, lifesaving equipment around the pool/spa area, such as life preservers, rings and poles, must be accessible to the disabled.

As we see more Americans travel, we will undoubtedly see more ADA issues arise as well. This is an area that is constantly undergoing change, and it is important to stay informed on the latest developments.

Thanks, Marty. We know who to call when the ADA plaintiffs start sniffing around!



Martin H. Orlick is a senior member of the law firm's Global Hospitality Group® and a partner in the Real Estate Department. He has helped clients with almost 200 ADA cases for hotels and other businesses. He is also a member of the American College of Real Estate Lawyers (ACREL). For more information about ADA compliance and defense, contact Martin H. Orlick at 415.984.9667 or morlick@jmbm.com.

1900 Avenue of the Stars, 7th Floor
Los Angeles, California 90067
310.203.8080—(fax) 310.203.0567

Two Embarcadero Center, 5th Floor
San Francisco, California 94111
415.398.8080—(fax) 415.398.5584

3 Park Plaza, Suite 1100
Irvine, California 92614
949.623.7200—(fax) 949.623.7202