

## The Latest Litigation Rage: Public Accessibility Lawsuits Against Retail Establishments

By Steve A. Miller (Chicago)

Title III of the Americans with Disabilities Act (ADA) requires retail stores and other public accommodations to accommodate disabled patrons, guests, and members of the public, to the greatest extent possible. Title III specifies that no individual with a disability may be discriminated against or denied the full use of “goods, services, facilities, privileges, advantages or accommodations” offered by a “public accommodation.”

Also, Title III requires that public accommodations, such as retail establishments, remove all “physical barriers” to disabled individuals whenever it is “readily achievable” to do so. The goal is to ensure that a public accommodation provides essentially the same opportunities for access to individuals with disabilities as it does to all other individuals.

Despite its commendable purpose, Title III has been abused by certain individuals, organizations, and plaintiffs’ attorneys for the purpose of monetary gain. The primary reason is that Title III is an easy hammer to pick up, and retail establishments are relatively high standing nails. Title III’s interpretive regulations set forth a slew of architectural guidelines, such as how wide an accessible parking space must be. If the parking space doesn’t satisfy the minimum width requirements, a technical violation may well exist, and the plaintiff is entitled to injunctive relief (to have the parking space widened) and – more importantly to litigants – attorney’s fees.

While Title III does not provide for the recovery of compensatory damages or punitive damages by a private litigant, the U.S. Department of Justice can recover compensatory damages and civil penalties. On top of that, a number of states provide for the recovery of actual damages or have a minimum statutory penalty for violations of state accessibility and anti-discrimination laws, providing still more incentive for such lawsuits.

In California alone, a mere handful of individuals have filed over 400 lawsuits each within a 2-3 year period. While states such as California, Florida, and Hawaii have seen a significant share of these types of lawsuits, Title III lawsuits are by no means limited to these states or geographic areas.

### Everything old is new Again

The scope of the legal duty of an owner/operator of a public

accommodation to remove physical barriers is determined by the building’s construction date. The new construction provision of Title III requires that newly constructed facilities, scheduled for first occupancy after January 26, 1993, must be readily accessible to and usable by individuals with disabilities, to the extent that it is not structurally impracticable.

But if the building was constructed and occupied prior to January 26, 1993, the owner/operator is only required to make those changes to improve access that are “readily achievable.” Nevertheless, even as to “old construction,” when remodeling areas that are open to the public, such as lobbies, restrooms, parking lots and merchandise aisles, the renovations must comply with the “new construction” standard.

While the term “readily achievable” is defined to mean “easily accomplishable and able to be carried out without much difficulty or expense,” this analysis involves multiple factors, including the overall financial resources of the owner/operator of the public accommodation. It’s determined on a case-by-case basis. The obligation to make “readily achievable” modifications is a continuing one and a barrier removal that may not be “readily achievable” at one point may later

be required when there is a change in circumstances which makes the removal possible.

### Things to Watch out For

In Title III lawsuits involving retail stores, plaintiffs tend to identify a number of common alleged barriers to access. For example, some of the commonly asserted exterior violations include:

- the lack of an accessible path of travel to the store entrance, due to the lack of or an improperly constructed ramp or curb cut along the path of travel from the designated accessible parking spaces to the store entrance or a path of travel that exceeds the permitted slope;
- not enough designated accessible parking spaces (the number of required parking spaces is determined by the total number of overall parking spaces);



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- improperly designed accessible parking spaces and access aisles between the spaces (not wide or long enough);
- missing or incorrect signage at the accessible parking spaces;
- improper hardware on the entrance doors (such that would require twisting or grasping); and
- excessive pressure needed to open the entrance doors.

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Title III's interpretive regulations, and some courts, suggest that remedying these types of barriers is "readily achievable" under most circumstances.

As for the interior areas of retail stores, some of the more common barriers identified by plaintiffs in Title III lawsuits include:

- service counters being too high;
- the lack of accessible tables in restaurants, snack shops open to the public and located within the store;
- no accessible path of travel through the store (merchandise aisles being too narrow, product blocking the path of travel through merchandise aisles);
- the lack of accessible restrooms including, but not limited to, the lack of grab bars, restroom fixtures being mounted too high, restroom stalls being too small, and the lack of clear floor space to turn a wheelchair around; and
- the lack of an accessible internet website (a growing issue in Title III cases).

### Stopping Trouble Before it Starts

Modifications such as installing grab bars and lowering restroom fixtures, for example, have been deemed "readily achievable" under Title III's interpretive regulations and by some courts. But removing restroom barriers can be problematic and costly where there is a lack of clear floor space and the only remedy involves elaborate construction or relocating existing walls.

In these cases, an argument can be raised that such modifications are not "readily achievable" and some courts have agreed (based on the particular circumstances presented in those cases). But that's where the lawsuits come in. Whether such modifications are "readily achievable" is a frequent issue in Title III litigation and a source of contention.

In light of the growing number of Title III lawsuits, a common question for many is what can be done to avoid such litigation. One approach is to consult with legal counsel or an accessibility consultant to identify the existence of any barriers to access at your facility, and prepare and implement an appropriate remediation plan. Remember to pay attention not only to the Title III public accommodation guidelines, but also any applicable state, county or city guidelines. This will help deter potential lawsuits.

In addition, review, and if necessary rewrite, your personnel policies to direct employees to provide necessary assistance to disabled patrons. In the event your facility is sued, retain qualified counsel as soon as possible so that an appropriate litigation and remediation plan can be developed.

As with the prevention of most discrimination-based lawsuits, taking appropriate preventive measures is the best defense against Title III lawsuits. And as a bonus, it may serve to encourage a new customer base!

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