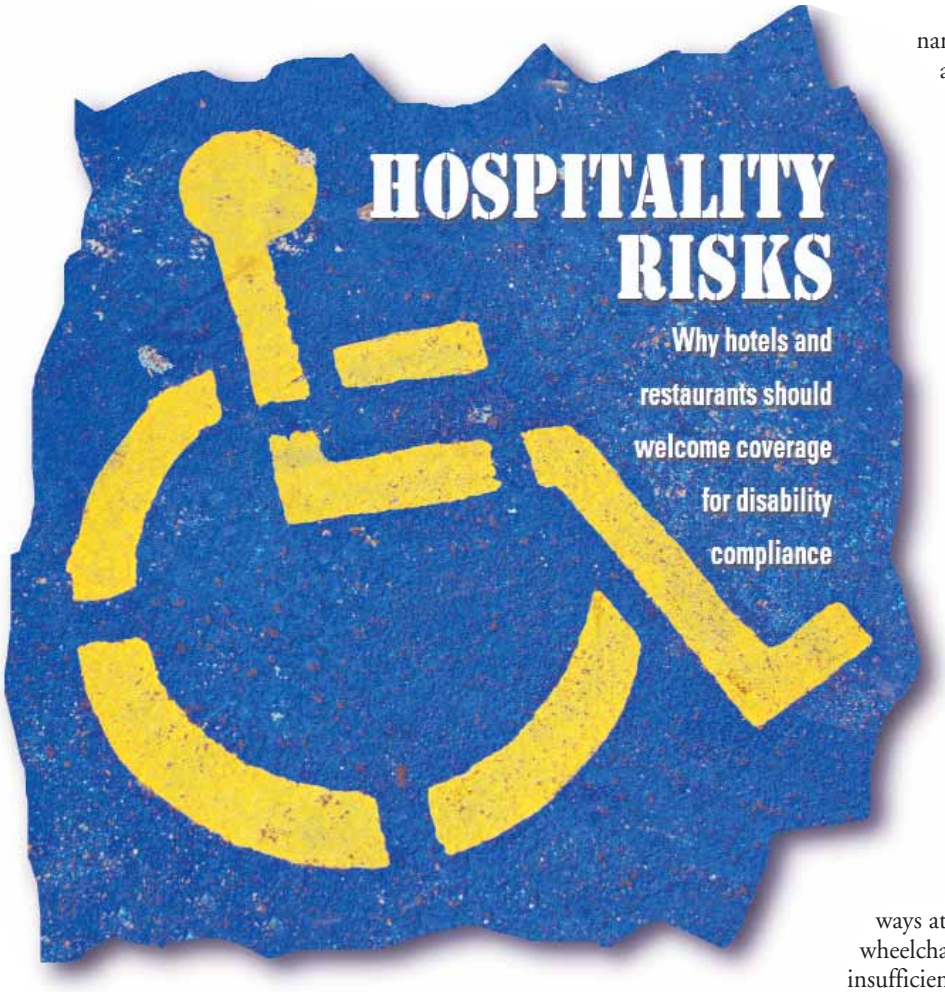
Hospitality Risks



By Karen Harris

In Pennsylvania, a disabled customer complained of emotional distress when she dined at a restaurant that lacked adequate parking for her wheelchair van and where the restrooms were not fully wheelchair-accessible. The same person sued 30 other Pennsylvania food service businesses, some of which had already been renovated for handicapped accessibility. When the owners offered to settle the patron's complaints, she demanded that the businesses also pay her attorney fees. Reportedly, the legal practice has filed more than 100 Americans with Disability Act (ADA) suits on the behalf of two individuals.

In another case, the world's largest hotel chain, Days Inn, agreed to make hundreds of its new hotels across the country more accessible to persons with disabilities. The consent decree, filed in U.S. District Court in Pikeville, Ky., resolved five lawsuits filed by the Department of Justice. The suits alleged that franchiser Days Inns of America Inc., and its parent company, Cendant Corp. (formerly HFS Inc.), because of their significant role in the design and construction of new Days Inns hotels, violated the ADA by allowing franchisees to construct hotels that failed to comply with the ADA Standards for Accessible Design.

In recent years, individuals and advocacy groups claiming discrimination, most notably discrimination against disabled persons under the ADA, have targeted restaurants, hotels, motels and retail operations — businesses that interact regularly with third parties, namely customers and suppliers. While some violations are mediated and settled with a fine, others make their way into the litigation system by either lawsuits filed by the Department of Justice or private individuals.

Third party lawsuits against hospitality businesses over disability compliance are not an epidemic, but hospitality risks also can't afford to ignore the exposure from third party lawsuits when deciding upon insurance.

The ADA was created in 1992 to provide a federal layer of protection for individuals with disabilities from discrimination. ADA regulations require public accommodations and commercial facilities to be designed, built and altered to comply with accessibility standards. In addition to federal standards, individual states may have their own disability regulations.

Compliance liability

In recent years, several settlements have been made with large, national hotel chains. Small mom-and-pop motels are also targets.

The Days Inn agreement came after four years of litigation that followed an 18-month investigation of newly constructed Days Inn hotels across the country. The investigation revealed that similar accessibility problems existed throughout the chain, including "insufficient accessible parking; inaccessible entrances and walkways at the facilities; inadequate space for persons who use wheelchairs to maneuver in guestrooms and bathrooms; insufficient visual alarm systems for persons who are deaf or hard of hearing; inadequate signage for persons who are blind or have low vision; inaccessible routes throughout the hotels; and guestroom and bathroom doors that were not wide enough to allow wheelchairs to pass inside."

The owners, contractors and all but one architect for each of the five hotels named in the lawsuits had earlier entered into consent decrees or agreements with the Department of Justice. In the end, Days Inn paid the United States a fine of $50,000, agreed to change construction for new hotels, was forced to set up a $4.75 million fund to provide interest-free loans to franchisees of newly constructed hotels to finance repairs and renovations required for ADA compliance, and paid numerous legal fees.

In another hospitality industry case, the Department of Justice reached two agreements with Bass Hotels & Resorts (BHR) and 20 separate agreements with individual hotel franchise owners to resolve ADA violations throughout BHR's Holiday Inn and Crowne Plaza hotel chains. The agreement with BHR on reservations and rental policies requires that each hotel in the two chains must: guarantee reservations for accessible rooms as they guarantee other types of reservations; hold all accessible rooms for persons with disabilities until 6 p.m., at which time they can release all but two rooms; and compile a list of accessibility features to be kept at the hotel's front desk, made available to anyone who calls the hotel.

The second agreement required BHR to make modifications in three hotels it currently owns or manages and pay $75,000 to the Key Bridge Foundation to establish a mediation program for ADA complaints. BHR also paid a total of approximately $75,000 to the United States and the complainants to resolve all outstanding issues.

Twenty other agreements with Holiday Inn and Crown Plaza franchisees were made to resolve similar accessibility complaints in numerous states.

Favorite state venues

The ADA has prompted numerous lawsuits throughout the nation, but California, Hawaii, and Florida seem the favorite venues. In 1992, shortly after the ADA's introduction, there were only 29 ADA-related lawsuits in California. Since that date there have been over 14,000 ADA lawsuits filed in California federal courts.

The California Restaurant Association reports that business owners have been particularly hard-hit with disabled access litigation brought by private attorneys. Many of the businesses targeted are small restaurants that are shocked when slapped with an ADA lawsuit — especially with no prior warning. Of course legitimate lawsuits are filed by sincere plaintiffs with just cause and there is no argument that the intent and purpose of the ADA regulations are inherently good and necessary. However, in a litigious society such as ours, there are also individuals who twist laws and regulations for their own monetary, political, or personal gain.

California is perhaps the extreme example of good intentions gone wrong. Its litigation troubles are complicated by state laws that provide for substantial monetary damages in addition to the attorneys' fees and injunctive relief allowed under the ADA. The Unruh Civil Rights Act and the California Disabled Persons Act (DPA) are often cited in these lawsuits, and even though the federal and state standards differ, both must be obeyed. In fact, a violation of the federal law is automatically a violation of California law.

Like California, other states have laws to protect the disabled, in addition to the federal ADA regulations. According to Elizabeth Gaudio, senior executive counsel for the National Federation of Independent Business (NFIB), Colorado, Texas, Hawaii, Massachusetts, New York, Oregon, and Florida all have some form of monetary damages provision. There is no consistency nationwide and in states without companion laws, businesses are still concerned about compliance and litigation.

Even the Midwest has witnessed legal action by third party complaints. In 2005, 26 small Wisconsin businesses were targeted for ADA violations. The law firm behind the lawsuits was based in Florida, and one of the co-plaintiffs was a Florida disability rights group. A majority of the businesses hired an attorney, paid for a Wisconsin ADA expert to evaluate their facilities, made the necessary changes to remove the barriers, and settled out of court.

No blueprint for businesses

The ADA Guide for Small Businesses has tried to clarify the regulations, but there is no easy blueprint for small business owners. According to the guide, full accessibility may not be achieved by small businesses, but "there is much that can be done without much difficulty or expense to improve accessibility" without "taking on excessive expenses that could harm the business." It further states that a business must "remove physical 'barriers' that are 'readily achievable,' which means easily accomplishable without much difficulty or expense."

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How does a small business owner interpret difficulty and excessive expenses? How is a business's financial stability determined and how often must it be evaluated? If a business is exempt from removing a barrier one year, is it required to make the change the following year if its financial situation changes sufficiently?

On any given day, a business may be in compliance when its doors open, but by the close of business, be in violation. All it may take is an impromptu change: a table is moved to seat a large party at a restaurant, or a paper towel holder falls down and is reattached at a slightly different height in a hotel bathroom.

Owners complain that there is no consistency in enforcement. Standards can change without notice, and local governments often do not check for or enforce the ADA. However, if a facility is evaluated for non-compliance, it will be examined by very exact standards — down to the inches and degrees. Businesses worry that once an accommodation has been adjusted there is no certification that indicates compliance to ADA, and there is no immunity from future suits once a violation is settled.

Lawsuits can be brought without prior notification, frustrating business owners who aren't given a chance to rectify the complaint.

On June 8, 2005, Rep. Mark Foley, R. Fla., introduced a bill to amend Title III of the ADA to require advance notice of a suit. However, the bill has not made it out of committee. Advocates suggest that requiring advance notice would give businesses a chance to work out any disputes amicably without taking them to the next level and helping both sides avoid costly legal fees. Critics complain that giving a business prior notification fuels complacency and does nothing to encourage voluntary ADA accommodation.

Insurance protection for businesses

Insurance companies offer coverage to protect against third party discrimination and harassment lawsuits. Besides the hospitality industry (restaurants, hotels and motels), other businesses such as universities and colleges, banks, retail operations, real estate firms and apartment complexes may have significant third party exposures.

The options are: directors and officers (D&O) with employment practices liability (EPL) and a third party discrimination and harassment endorsement; stand-alone EPL with a third party discrimination and harassment endorsement; or monoline third party discrimination and harassment.

Of course, the existence of coverage is no guarantee that a business owner will purchase it. While businesses express significant concern about potentially being forced out of business by a major lawsuit or uninsured claim, a 2001 U.S. Chamber of Commerce survey of 1,000 businesses reports that, many don't have EPL or D&O coverage or are underinsured.

If owners are more aware of mounting discrimination and harassment liability risks, why do so many businesses lack adequate coverage? The answer, in part, may be the cost and availability of liability insurance. Some owners find it too expensive or can't find a carrier willing to write it. In 2004, 30 percent of small business owners ranked accessing liability insurance as the second most important problem to them as compared to only 11 percent in a 2000 National

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Federation of Independent Business survey. Still others may believe that a general liability policy will protect them or that by having a written procedure they won't get sued. Small private businesses historically have failed to grasp the personal liability exposure of their directors and officers.

An agent or broker should not be deterred from explaining the need for third party discrimination and harassment insurance. Business owners want and value their advice. Topping the list of insurance services and benefits that most interested businesses in the U.S. Chamber survey was "having an agent/broker who provides access to a comprehensive slate of insurance" and who "provides frequent assessment of their insurance coverage including review of existing coverages, identification of exposures, and recommendations for risk management." It is up to the agent to help the business owner discern what is important versus what is available. An agent can offer every possible coverage, but at the end of the day it is up to the business owner to decide what coverages make the cut.

The right third party coverage

Third party discrimination and harassment insurance is available, although it is not always easy to get. Obtaining the third party extension on a policy where D&O is combined with EPL can be a little more difficult, than when the request is made for the third party extension on a monoline EPL policy. Dick Clarke, senior vice president, of J. Smith Lanier, said he sees "the third party extension about two to three times more frequently on monoline EPL than on combined D&O/EPL policies."

The alternative to a D&O or EPL endorsement is a stand-alone policy. However, it is also difficult to obtain, especially for smaller businesses in the high customer contact industries like the hospitality industry. Large businesses or those with little customer contact seem to be able to get this coverage more easily.

Which coverage option is best depends on the business. While it is unlikely that any insurance company will pay the cost of making accommodation repairs, it is quite possible to purchase a policy that will pay for defense or any fines levied.

Although third party discrimination and harassment coverage is relatively new, it is a necessary component of a comprehensive insurance program. A business owner may grumble about new coverages, but the risks from third parties are not going away and only seem to be increasing in number and variety. ■

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Third Party Discrimination & Harassment Coverage Comparison

Directors & Officers with Employment Practices Liability and a Third Party Discrimination & Harassment Endorsement

Benefits	Disadvantages
Usually a broad D&O policy.	Usually an insured does not purchase high enough limits.
Policy is available through many markets.	Too many potential losses sharing one limit.
Only one policy to negotiate.	Losses to more than one coverage part can diminish the limits exposing officer's or owner's personal assets.
Only one renewal to remember.	Extent of coverage may be narrow with respect to third party losses.
Typically, the least expensive option for the most coverage.	Predetermined allocation may limit coverage available for the EPL and the third party discrimination and harassment endorsements.
	Underwriter may not be as knowledgeable concerning third party exposures.

Monoline Employment Practices Liability with Third Party Discrimination & Harassment Endorsement

Benefits	Disadvantages
Usually a broad EPL policy.	Coverage is more focused on the employment side.
Policy is available through many markets.	Usually an insured does not purchase high enough limits.
If third party endorsement is an issue, it is more likely to be available on a monoline EPL policy than on a combined D&O/EPL policy.	Firms which have experienced employee claims may not wish to have their limits diminished by third party claims.
Monoline EPL may have more detailed coverage than when EPL is written in combination with D&O. (For example, monoline EPL forms often offer coverage for "breach of privacy" and this is often not available in EPL cover written in combination with D&O).	Extent of third party coverage may be narrow if underwriters restrict all or parts of third party coverage.
	Access to third party coverage may be limited as many EPL underwriters will not grant the third party extension for the types of businesses that need it most.

Monoline Third Party Discrimination & Harassment (stand-alone policy)

Benefits	Disadvantages
Offers the most focused coverage on third party issues.	One additional renewal to track.
Protects against the diminution of limits on other coverages (D&O, EPL) by providing separate limits.	One additional contract to negotiate.
Coverage is tailored to associated risks.	Since it is not readily available in many markets, stand-alone coverage can be hard to find.
Fullest protection especially if purchased with D&O and EPL.	Third party coverage can be more expensive if also buying separate D&O and EPL policies.
Underwriters understand the exposure and seek to work with clients to address their needs.	May require more time to educate a buyer as to the needs/benefits of purchasing a separate third party policy.