

Who's Responsible for ADA Compliance—Landlords or Tenants?

BY DAVID WARREN PETERS

CONSIDERABLE MISUNDERSTANDING HAS ARISEN between commercial landlords and tenants about the responsibility of each for compliance with laws—as well as the defense and settlement of lawsuits—relating to access for the disabled, under terms of many common commercial leases. Misconceptions about the obligations of commercial tenants under many standard commercial “triple net” and other leases have caused many firms to close, dismiss employees, or file bankruptcy—in many cases unnecessarily.

This article concludes that (1) in most cases, neither landlords nor tenants will be able to state, as a matter of law, that they are relieved from their responsibility to provide access for the disabled, and (2) the standardized terms of many—if not all—common commercial leases most likely will not, in themselves, be sufficient to transfer this obligation from one to the other. For these reasons, commercial landlords, tenants and others may well be indispensable parties in ADA (the Americans with Disabilities Act of 1990, 42 USC §12101) and access lawsuits, and leases should be immediately revised to clearly confirm responsibility for compliance with access laws.

1. WHAT CAN HAPPEN IF AN ESSENTIAL PARTY IS NOT INCLUDED IN AN ACCESS LAWSUIT

Many have suggested that a major part of the current crisis of ADA/access lawsuits is the misunderstanding between landlords and tenants as to which of them is responsible for complying with access laws or defending lawsuits involving them. Many tenants have mistakenly undertaken the defense of lawsuits, and even made major structural renovations, because they incorrectly believed that their leases required it; others just started defending lawsuits because they hap-

pened to be sued. Some landlords have also taken on obligations that should have been borne by (or at least shared with) their commercial tenants.

The failure to have all necessary parties involved in an ADA/access lawsuit at the earliest possible point will most likely result in unnecessary and avoidable expense to all involved. For example, even if a tenant had an obligation to defend a lawsuit, to the extent the lawsuit seeks injunctive relief (ie, a court order, for example, requiring that structural renovations be made), the tenant might not have the legal right to make such renovations. Similarly, if a landlord is the sole defendant in a lawsuit and part of the resolution requires that the restroom not be available to the public, if the tenant is not a party to the proceedings, s/he may object to such a reduction in their leasehold rights.

Too often, the parties realize too late that an essential party has been omitted from a case, and that party will, quite appropriately, object to being brought in at the “last minute” when important decisions may have been made without them. Because a plaintiff may well be entitled to an award of attorneys fees during the entire time the defendants try to sort out responsibility, it is essential that all conceivably appropriate parties be joined in an access lawsuit at the earliest possible opportunity, even if some are later dismissed.

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Defendants should not assume that a plaintiff has joined all necessary parties in an access lawsuit; while there is a strong incentive to do this in non-access cases, a plaintiff is probably not required to research all possible defendants and consider documents (to which they may not have access when the suit is filed) just to gain access to commercial premises.¹ They may be entitled to sue just one party doing business on the property; the party they sue has the right to bring in other parties responsible for the harm, and should consider joining them at the earliest possible opportunity to avoid irreparable harm.

2. JOINT AND SEVERAL LIABILITY OF COMMERCIAL LANDLORDS AND TENANTS FOR ACCESS IMPEDIMENTS

In general, landlords and tenants are jointly responsible for compliance with access laws, at least from the standpoint of third-parties (eg, disabled visitors to the property); however, they are free to shift the allocation of responsibility between them by contract.² Of course, such a reallocation is only binding as between the landlord and tenant³—a disabled plaintiff will generally have recourse against both of them, and if just one of them is sued, or found liable, s/he may have a claim against the other for indemnity and/or contribution (ie, a legal action to recover losses that are another's responsibility). The rationale for this policy is that it would be unfair to a disabled plaintiff if a landlord tried to avoid making access renovations by leasing only to tenants with limited resources or for tenants to avoid taking responsibility for removing access barriers over which they have complete control.

3. DON'T ASSUME YOU HAVE FULL (OR ANY) RESPONSIBILITY FOR THE LAWSUIT

Too often, a party is sued, assumes they are at fault, and just starts defending the lawsuit. Sometimes they are correct; often they are not. More commonly, there are a number of individuals and firms that may bear some responsibility for the problem, and the participation of multiple defendants can ease the burden of resolving any access case considerably.

It is essential to consider which parties should be included in a lawsuit at the earliest possible opportunity. For example, because some insurance companies will cover some ADA/access claims and others will not, one party or another may have insurance that will cover a claim while another may not. As facts emerge in a case through the exchange of documents and information, parties are often

surprised to discover that those originally thought to be responsible for access issues may not, in fact, be liable, while others initially overlooked should be joined.

4. AMBIGUITIES IN THE LEASE WILL GENERALLY BE CONSTRUED AGAINST THE PARTY WHO PREPARED IT

Many landlords have tried to convince tenants that they have taken on the responsibility of making fundamental structural improvements to the landlord's property (which would increase the value of the property when returned to the landlord at lease-end), simply by virtue of the tenant having signed a fairly standard commercial "net" lease agreement. Because commercial tenants indeed take on many obligations of the property owner when they enter many commercial leases, they often incorrectly assume that they have undertaken all of them, or that they are responsible for "everything inside the exterior walls."

It is a well-settled legal principle that ambiguities in a document will generally be construed against the party who drafted (ie, prepared) it. The reason for this is that the party who prepares a document is in the better position to make it as clear and unambiguous as possible; additionally, the non-drafting party may not always be in a position to meaningfully negotiate the terms.

Typically, because most commercial leases are drafted by the landlord, matters of uncertainty will often be construed in the tenant's favor because the landlord would be seen as having more time and opportunity to clarify uncertain terms, and the tenant might have less ability to bargain. Accordingly, unless the tenant expressly agreed in writing to make specific structural renovations to the property, many attorneys do not believe that relatively standardized provisions, like those found in many commercial "net" leases, transfer the landlord's obligation to make significant access improvements to the tenant.

5. WHAT DOES THE LAW SAY?

As of the date of this article, many jurisdictions lack decisive case law that confirms the respective responsibility of landlords and tenants under standard commercial leases; additionally, commercial lease terms vary considerably, despite the fact that they are usually referred to as "standard." A surprising number of leases still in use do not address the responsibility for access compliance and claims, and this obligation is substantially different from other obligations the tenant may assume, as discussed below. Certainly, any landlord and tenant can agree that a

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tenant will make specific structural modifications to the property, but the question in most access lawsuits is whether the standardized terms commonly found in commercial net leases would in fact transfer the obligation to the tenant without such an express agreement.

Because most commercial leases rarely identify specific access improvements the tenant agrees to make, many landlords have tried to claim that standard commercial lease terms require the tenant to make such improvements by implication (ie, based on cases that have interpreted certain standard lease terms to require the tenant to undertake certain renovations, which were unknown at the time the lease was executed). Of course, an important difference between the facts in these cases and most ADA/access cases is the fact that the need for access renovations is usually apparent to the unaided eye, and both landlord and tenant are equally charged with knowledge of the noncompliance of the facility; accordingly, there is no "surprise" as there is in the cases on which many landlords have tried to rely (as discussed below).

In one California case, *Botosan v. Fitzhugh*⁴ held that one commercial lease for a chain "fast food" restaurant did not transfer responsibility for access improvements from landlord to tenant, based on the standard "compliance with laws" provisions it contained. Since *Botosan*, many landlords have attempted to claim that other provisions in standard commercial leases somehow operate collectively to shift this burden in situations where there was no clear agreement about responsibility for specific structural renovations that needed to be made. Because many of the ADA compliance disputes between landlords and tenants arise in smaller properties, they are less likely to be litigated. Unfortunately, this forces consideration of similar, but not identical cases, that may not be entirely comparable.

In California, the cases that currently come closest to providing guidance on this question differ from ADA/access cases in at least one critical respect—each of them deals with relatively concealed defects in the property that would most likely not have been identifiable to the casual observer at the time the lease agreement was signed. One case involved a structural seismic retrofit and the other involved the removal of friable asbestos, each problem was discovered some time after the lease agreement was signed. In each case, the problems in question would most likely not be ascertainable without the aid of experts. In contrast, virtually all common access impediments are

visible to the naked eye and the regulations relating to them are matters of public record. Indeed, many businesspeople make their own accessibility inspections and renovations without the use of experts, and sometimes do it properly, based solely on the diagrams and guidance in the ADA Accessibility Guidelines ("ADAAG"), state building codes and other similar sources. Of course, such "self help" can also result in costly mistakes.

The fact that the overwhelming majority of access impediments are visible to both landlord and tenant, and each are deemed to be "on notice" of the access laws means, for practical purposes, that both landlord and tenant "knew" (or should reasonably have known) that the property was noncompliant at the time it was leased (or the lease renewed) and knowingly failed to make written arrangements for any structural renovations that were required. Under these circumstances, it seems reasonable to assume that the tenant agreed to comply with all laws *within* the confines of the premises s/he leased, but not to *improve* them by making significant structural renovations, unless the parties expressly entered into a clear written agreement providing exactly for that. Many judges may be reluctant to invest valuable court time considering an issue the parties were free to address for themselves when they entered the lease—at least to the extent that the landlord wants the court to interpret a broader obligation for the tenant than the plain reading of the document they prepared might create.

5A. THE LEGAL FRAMEWORK

As of the date of this article, commercial landlords may still be unable to point to a case or law that allows them to transfer responsibility for access law compliance to their tenants through the standardized general terms of most commercial leases—the matter will most likely remain an arguable question of fact a judge or jury would have to decide. For this reason alone, most commercial landlords and tenants will most likely be necessary parties in many access lawsuits. Because the terms of commercial leases vary considerably and the conduct of the parties will also have considerable bearing on this question, it is unlikely that any landlord or tenant will be able to claim that, as a matter of law, they are entitled to look to the other to take responsibility for making access improvements to the property, unless they have entered into a clear, express agreement for this purpose (which is often not the case).

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5B. HAS THE LANDLORD BEEN RELIEVED OF THE OBLIGATION TO PROVIDE ACCESS?

The starting point in any analysis must begin with the premise that the landlord never loses the obligation to provide access to the property—public policy requires that some party be continuously responsible for health and safety issues for any given property. In many jurisdictions including California, this obligation is presumed to rest with the landlord,⁵ and the landlord may contract with others (including tenants) to fulfill this obligation, but will never be relieved of it with regard to the claims of third parties (such as disabled visitors). Of course, if the tenant makes fundamental changes to the leased premises, s/he may take on the obligations of the landlord with regard to those changed areas for claims of inaccessibility by disabled visitors to the premises.⁶ While the tenant(s) would certainly have undertaken the obligation to provide barrier-free access within the areas leased to them, is there evidence that the tenant agreed to take on the *additional* obligation of making structural improvements to the property, which would return a better building to the landlord at lease-end than was received?

5C. GUIDANCE FROM NON-ADA CASES

ADA/access cases are a fairly recent phenomenon, while disagreements between landlords and tenants over responsibility for repairs have persisted for centuries. While cases interpreting these disputes will most likely not resolve all landlord/tenant issues in an ADA/access lawsuit, they can provide limited guidance until more applicable cases become available. An essential distinction between this line of cases and most ADA/access lawsuits is that the defects in these cases were concealed or otherwise not likely to be seen by the casual observer, as they are in ADA/access lawsuits.

In access cases, there can usually be no question that any party visiting the property would have had to look at—if not physically pass through—the same path of travel a disabled visitor would use. Thus, it would be rare for any access impediment not to have been seen by even the most casual visitor (even if not understood to be an article), and both landlord and tenant are deemed to have “constructive” (imputed) knowledge of all access laws and regulations. Accordingly, if both the landlord and tenant must be presumed to know of a problem and declined to clearly confirm the responsibility for remediating it in the agreement between them, how can we assume that the

responsibility (which is presumed to reside with the landlord) had been transferred to the tenant, in light of Sections 4 and 5b, above?

Two California cases provide guidance as to some of the issues courts consider relevant in resolving disputes over problems that were *unknown* to both landlord and tenant when the lease was signed:

- *Hadian v. Schwartz*⁷ confirmed that a commercial tenant who had renewed a three-year lease for an additional five-year period had not assumed the obligation of paying for a seismic retrofit required by the City of Los Angeles solely by virtue of having executed a standard “fill-in-the-blanks” commercial net lease.
- *Brown v. Green*⁸ held that commercial warehouse tenants *did* assume the responsibility for removing asbestos-laden material from a building, even though such renovation would inure to the landlord’s long-term benefit, when the tenants, who were particularly sophisticated in commercial leasing, had been advised in advance of the possibility that such contamination might exist and declined to inspect for it, nevertheless signed a long-term lease in which a majority of the risks of ownership were expressly shifted to the tenant.

The *Hadian* and *Brown* cases were decided the same day and reached different conclusions. Both cases were decided by the California Supreme Court, and the Court applied many of the same factors to each case. In each case, the specific facts and circumstances (including the conduct and experience of the parties and the specific language of the lease) determined the outcome of the case. As stated above, each of these cases involved “surprises” that were discovered during the term of the lease—quite different from the access obligations, of which landlords and tenants have had at least “constructive” notice for some time.

6. WHY IT IS IMPORTANT TO DETERMINE THE EXACT PROBLEMS THE DISABLED VISITOR ENCOUNTERED ON THE PROPERTY

Basically, most access lawsuits are filed because a disabled plaintiff claims they encountered difficulty entering a facility or had problems once inside. Because disabled plaintiffs are not required to attempt to enter premises that appear physically inaccessible,⁹ they will often do a

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“drive by” and properly determine that access impediments make entry potentially dangerous. Nevertheless, the lawsuits they file are often replete with references to the barriers inside the premises. This is because they may have a friend or a scout enter the premises to gather information about problems inside.

The significance of identifying the specific obstacles the plaintiff actually encountered can prove fairly important in apportioning liability between landlords and tenants in access lawsuits. For example, if the plaintiff revealed that s/he made a determination from the appearance of the exterior that entering business premises was unwise or potentially dangerous, it might support an inference that all, or substantially all, of the cost or liability of the access lawsuit should properly be borne by the landlord. Likewise, if all of the access impediments complained of by the plaintiff were of a structural nature (eg, matters that existed on the property the day the tenant took possession), a similar result could be reached. However, if it appeared that the building and property were not the problem, but a rolling rack or moving palette blocked access on the day in question, a majority (if not all) of the liability might be borne by the tenant. In many cases, it will be a combination of factors—some the responsibility of the landlord and some the responsibility of the tenant—which result in access claims; understanding exactly which problems led to the claims is essential to any later apportionment of liability between landlord and tenant.

7. COMMON LEASE PROVISIONS:

Several common lease provisions, particularly those found in commercial “triple-net” leases, contribute to the misunderstanding between landlords and tenants as to which of them is responsible for renovations and compliance with access laws:

7A. “TENANT IS RESPONSIBLE FOR COMPLYING WITH ALL APPLICABLE LAWS”

A common provision of many commercial leases is a requirement that the tenant comply with “all applicable laws.” A plain reading of such provisions requires that the tenant not violate the law in the things they do *within* the areas they are leased.

Some landlords have suggested that such a provision requires the tenant to make fundamental structural renovations

which would *improve* the property the landlord will receive back at lease-end, or to defend lawsuits resulting from structural inaccessibility. This question was addressed in *Botosan*¹⁰ where the relevant provision of the commercial lease stated “Tenant shall . . . keep and maintain . . . the Premises . . . in compliance with all laws and regulations . . .”. The *Botosan* court considered a number of common provisions of commercial leases, which were also found in the lease in question, including one which required the tenant to obtain the landlord’s approval for any major renovations to the leased premises; based on these, they rejected the landlord’s claim that the responsibility for access compliance had been shifted to the commercial tenant, in this case, a small Mexican restaurant that was part of a chain. The *Botosan* court went on to say “. . . even if the lease allocated all responsibility to the tenant, that would not insulate [the landlord] from liability under the ADA. Under the ADA liability attaches to landlords and tenants alike.” Based on the foregoing, if landlords want such “compliance with laws” provisions of leases to be construed to require tenants to make fundamental structural improvements to the leased premises (ie, improving them over the condition in which they were received)—and not just to obey all laws in conducting their operations—they should make this conspicuously clear in the agreements they prepare.

7B. “TENANT SHALL INDEMNIFY LANDLORD FOR ALL CLAIMS ARISING OUT OF TENANT’S USE OF THE PROPERTY”

Many commercial landlords have attempted to persuade tenants that they are required to indemnify them for access claims, even if there is no evidence that the claim resulted from any act or omission by the tenant—for example, if the plaintiff just did a “drive by” and was discouraged from entering by the structural inaccessibility of the premises (and not, for example, some impediment the tenant had introduced to the property).

In many states, it is well settled that one cannot seek indemnification for one’s own negligence.¹¹ To the extent a property owner has failed to comply with applicable access laws or regulations, s/he may not be entitled to demand indemnification from a tenant, when the decision to refrain from making access renovations on an ongoing basis may be deemed to be a conscious, deliberate and/or intentional one.¹² Thus, the question is whether the claim

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arises out of the tenant's use of the property or the landlord's ongoing negligence in failing to renovate it. Clearly, the analysis in Section 6, above, becomes more relevant in cases like this.

A tenant or franchisee in an access case should also consider a cross-claim for "equitable indemnity" against the landlord or franchisor, even if there are provisions in the lease or franchise agreement whereby the tenant/franchisee agrees to indemnify the lessor or franchisor. In many cases, the tenant or franchisee will read provisions whereby they have agreed to indemnify the landlord or franchisor and incorrectly conclude that they have undertaken an unqualified obligation to indemnify them for any and all claims, including the landlord's or franchisor's negligence. As discussed above, however, a landlord or franchisor may be partially or fully responsible for the harm from which the claims arise, and such indemnification provisions may well not require the tenant/franchisee to indemnify the landlord or franchisor from their own negligence. The problem, of course, is that if the tenant or franchisee does not assert these claims early in the lawsuit, they may be barred.

7C. THE REPAIR COVENANT

Although a tenant's covenant to repair and maintain the property, usually at the tenant's expense, is a common provision in many commercial net leases, the *Hadian* and *Brown* courts each considered this obligation in their analysis. Because a requirement to repair or maintain the property may under certain circumstances be interpreted to require the tenant to repair the item in a manner that causes it to comply with current law, some landlords have tried to argue that the tenant should be required to improve non-complying areas of the property by bringing them up to current accessibility standards (ie, that the inaccessible areas of the property are "broken" and it is the tenant's obligation to "fix" them). The analysis in *Hadian* and *Brown*, above, confirms that such arguments may be ambitious, at best. In addition, additional clauses, such as (1) the tenant's obligation to return the property to the landlord in substantially the same condition to the landlord, and (2) limitations on the tenant's right to make significant structural (or any unapproved) modifications, can provide important clarification of this question.

8. IS THE PROPERTY EXEMPT FROM COMPLIANCE OR "GRANDFATHERED"?

A striking number of defendants incorrectly believe that their properties are exempt from compliance with access laws (because they have been "grandfathered" in some respect) because they are of a certain age, or because no major renovation has ever been performed. While it is not the intention of this article to provide legal advice about specific renovations that are required for any particular property, the reader is reminded that:

- The ADA requires removal of such access impediments as are "readily achievable" for the defendant,¹³ there is no "exception" or "grandfather" provision exempting older properties.
- The ADA and attendant regulations confirm that what is "readily achievable" depends on the total financial resources of both the commercial tenant and property owner,¹⁴ and would presumably include equity in the property. Many defendants read this and think they will assert the defense that a particular renovation was not "readily achievable" for them because it was too expensive or complicated; once they find out they will have to produce their financial statements to support this argument, they often re-evaluate this position, but only after considerable time and legal expense. Assuming all appropriate defendants are joined in an action (see Section 10, below), and considering the vast increase in equity that has applied to commercial real estate in many parts of the country, it may be difficult to argue that almost any barrier removal was not "readily achievable" at many properties.
- Certain state laws enhance the power of the ADA, and should not be overlooked; for example, California's Unruh Act provides that a violation of the ADA (and presumably the ADA Accessibility Guidelines, or "ADAAG") constitutes actionable discrimination.¹⁵

9. THE NEED TO REVIEW, AND REVISE, LEASE AGREEMENTS

More than a decade after the passage of the ADA, a remarkable number of leases remain silent about the allocation of responsibility for complying with access laws and regulations, and/or the lawsuits for noncompliance. The time may be fast approaching, if it is not already here, when courts will have lost sympathy for any party who

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doesn't make advance written arrangements clearly apportioning responsibility for access matters; the ADA is here and is not going away. If landlords want to shift this burden to tenants, they will need to do so through particularly clear and conspicuous terms.

10. RULING OUT ALL POTENTIAL CO-DEFENDANTS

Initial defendants should consider all of the following categories of potential defendants in a lawsuit before concluding that they are solely responsible for defending it (of course, this list is not all-inclusive):

- Architects and other design professionals (depending on the date of the design and the agreement of the parties);
- Coastal, district and other agencies and commissions (to the extent they prevent necessary/appropriate renovations from being made, or failed to require them during the approval process, and to the extent they are not immune from suit);
- Contractors (depending on the date of construction/renovation and whether the contractor was responsible for causing the work to comply with access requirements);
- Experts in previous access cases (to the extent they failed to identify appropriate renovations and the law has not changed with regard to the claims in the current lawsuit);
- Franchisors (to the extent they designed/built premises in question, dictate operating policy at franchisee's facilities, inspect for violation of laws/compliance with regulations, have renewed franchise agreements without requiring compliance since the accessibility laws in question were enacted, etc.);
- Historic site board(s) (to the extent they made determinations about renovations that would be required or allowed after applicable access laws were enacted, or refuse to permit a property owner to make necessary access renovations, to the extent not immune from suit);
- Landlords (to the extent the landlord is different from the property owner and/or has engaged in activity (including without limitation a decision to refrain from removing access impediments) that could be claimed to be discriminatory to the disabled);
- Lawyers (to the extent they prepared commercial leases since the access laws in question were enacted that did not address the issue of responsibility for access renovations and defense of access lawsuits);
- Lawyers in previous access lawsuits on the same property or issue (to the extent they demanded fewer renovations than were actually necessary/required in exchange for a larger payment to their clients or themselves, and sought or received fees based on an assertion that their work was responsible for a significant benefit to society under, for example, "Private Attorney General" provisions like California's Code of Civil Procedure § 1021.5);
- Municipalities (depending on when building permits were issued and whether compliance with applicable access laws was expressly disclaimed, to the extent not immune from suit);
- Plaintiffs (to the extent they engaged in intentional conduct that could create or exacerbate their harm);
- Previous occupants (to the extent they took, or refrained from taking, actions that had a material impact on the accessibility of the property or failed to comply with access laws);
- Property Owner(s), who, in most cases, would never be relieved of the obligation to the disabled community to cause their properties to comply with access laws;
- Realtors (to extent noncompliance with applicable laws was not disclosed; or appropriate inspections were not recommended);
- Sellers (to the extent notice of noncompliance with applicable laws, or prior lawsuits, were not disclosed or if they failed to comply with applicable access laws); and
- Tenants, who would never be relieved of the obligation to comply with access laws, at least within that portion of the premises they occupy.

Based on all the foregoing, it is essential that all necessary parties be involved in the resolution of an ADA/access lawsuit at the earliest possible opportunity.

11. SPECIAL CONSIDERATIONS FOR FRANCHISES

Many franchise chains have been especially hard-hit by ADA/access lawsuits. In some cases, this is because fran-

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chise chains are perceived to have greater financial resources available to meet accessibility obligations, or to pay judgments.

Many franchise chains have made commendable progress in ensuring compliance standards in each of their locations while others, astoundingly, have done almost nothing. Worse still, many new locations do not meet applicable access standards and are subject to suit virtually from the day they open.

Remarkably, many of these franchisors have taken the position that the franchisee must bear the financial responsibility for access lawsuits, even though the basis for the lawsuit relates directly to the franchisor's design or policies. Many franchisors have attempted to invoke indemnification provisions to require the franchisee to, in essence, indemnify the franchisor from the franchisor's own negligence (see Section 7b, above). Such positions should be carefully scrutinized in that it is usually the franchisor who:

- (1) designed, approved and/or built the structures on the property,
- (2) regularly inspects the property for compliance with laws (surprisingly, though, access laws are often not part of these inspections), and
- (3) imposes contractual provisions prohibiting changes to the property without franchisor approval.

Often, franchisees are immediately cited for violations that could injure the non-disabled, but violations of decade-old access laws are ignored, so lawsuits often come as a complete surprise to the franchisee.

Franchisors should immediately institute chain-wide compliance requirements, certainly for the renewal of franchisees, but franchisees should not wait for franchisors to do this—a lawsuit may already be pending. Franchisees should demand that franchisors play a strategic role in chain-wide access renovations, because they can accomplish such renovations far more cost-effectively than individual franchisees. Because the renovations will make the properties more valuable, the property owners should also play a financial role in the process.

12. THE NEED FOR IMMEDIATE ACTION

Anyone who has completed accessibility renovations knows it can be an overwhelming task—reconciling feder-

al, state and local standards, ensuring that construction irregularities don't form the basis for future claims, regularly inspecting for vandalism and keeping up with the constant stream of changes in standards—can be an overwhelming task for access professionals, much less those who find running their businesses to be more than a full-time job. An ADA/access lawsuit will not make things simpler. A business that has not been sued has an invaluable opportunity to save tens, if not hundreds, of thousands of dollars by taking immediate action.

The first step in preventing, or resolving, an ADA/access lawsuit is to have the property inspected by a highly qualified inspector. It is extremely important that the inspector be retained through an attorney so that the report is protected by the attorney-client and/or attorney work product privileges; without such protection, the report can be obtained in any future lawsuit, and could be deemed notice of noncompliance.

While it has always been riskier to do business or hold property in one's own name, the increase in access litigation make it even less advisable. Because the obligation to make renovations can depend upon the financial resources of the defendants, defendants with significant financial resources are particularly at risk. Accordingly, property owners should consider holding the property in a separate limited liability company ("LLC") or a limited partnership with a corporate general partner. Commercial tenants should also consider doing business as a corporation or LLC.

Business owners need to understand that there is generally no limit to the number of times they can be sued about even minor non-compliance with access laws. The number of "professional plaintiffs" seems to increase on a daily basis, and judges are becoming increasingly reluctant to shelter firms that have ignored a law passed in 1990. Businesses should evaluate access renovations in terms of the considerable cost of litigating the failure to make them. Landlords and tenants—and especially franchisors—should all work together to prevent a problem from becoming a crisis. ■

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ENDNOTES

1. Independent Living Resources v. Oregon Arena Corp, 982 F. Supp 698, 768 (D. Or. 1997) supplemented 1 F. Supp 2d 1159 (D. Or. 1998)
2. Botosan v. Fitzhugh 13 F. Supp 2d 1047, 1054 (S.D. Cal 1998)
3. A number of jurisdictions have laws that support this principle, as one such example, California Civil Code §3513 confirms that “. . . a law established for a public reason cannot be contravened by a private agreement.”
4. Botosan, *infra*.
5. Glenn R. Sewell Sheet Metal v. Loverde (1969) 70 C2d 666, 672 n6, 75 CR 889
6. Sewell, *infra*
7. Hadian v. Schwartz (1994) 8 Cal 4th 836; 35 Cal Rptr. 2d 589; 884 p2d 46
8. Brown v. Green (1994) 8 Cal 4th 812; 35 Cal Rptr 2d 598, 884 P2d 55
9. 42 USC §12188; also see Pickern v. Holiday Quality Foods 2002 293 F. 3d 1133
10. Botosan at 1053
11. For example, in California Rooz v. Kimmel (1997) 55 Cal App 4th 573; 64 Cal Rptr 2d 177 and it's progeny provide considerable guidance; an exception to this rule is that when a contract expressly provides that a party will be indemnified against that party's own negligence, as is the case in insurance policies. In such cases, however, the requirement that a party is being indemnified against his/her own negligence must be very clearly and expressly stated, as is rarely the case in most commercial leases. Even then, strong considerations of public policy may override such provisions, particularly when the indemnitee has foreknowledge of a problem that could trigger indemnification, as in Westlye v. Look Sports, Inc., (1993) 17 Cal App 4th 1715.
12. Modern Development Company v. Navigators Insurance Company (2004) 111CA4th 932
13. The Americans with Disabilities Act of 1990 42 USC 12101; specifically §12182(b)(2)(a)(iv), (v) and (vi)
14. 42 USC 12181(9)
15. California Civil Code § 54(c)