

What Landlords and Tenants Should Know About the Barrier Removal Requirement Of The Americans With Disabilities Act



By David Y. Joe

The Americans with Disabilities Act of 1990 is a wide-ranging civil rights legislation that prohibits discrimination on the basis of disability under certain circumstances. Although many landlords and tenants are already aware that the ADA precludes new construction or alterations in existing structures that create obstacles to the disabled, landlords and tenants need to also be cognizant of the so called "barrier removal" requirement of Title III of the ADA, which obligates any person who owns, leases (or leases to), or operates a place of public accommodation (as opposed to a commercial facility) to:

"remove architectural, and communication barriers that are structural in nature, in existing facilities...where such removal is readily achievable."

Readily achievable barrier removal imposes a broad range of compliance obligations that may include: creating specially designated and accessible parking spaces, installing ramps and making curb cuts in sidewalks and entrances, widening doors, repositioning telephones and installing grab bars in toilet stalls. Because remedial action can be costly, ADA compliance issues must be carefully considered by both landlords and tenants, with the parties determining responsibility for compliance obligations.

An important concern created by the statutory language is the meaning of "readily achievable" barrier removal. The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." Factors to be considered include the cost of the remedial action and the financial resources of the party responsible for the same (42 U.S.C. § 12181(9)).

Whether or not specific work is "readily achievable" is determined on a case-by-case basis. By defining

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Available Remedies For Breach Of Real Property Purchase and Sale Agreements



By Bernard M. Resser

After more than a decade of rising housing prices and a similarly robust market for commercial properties during the last five years, it is sobering to accept that a real estate market downturn is in full swing. Sales volumes are at 20-year lows. The disarray in financial markets is now causing a downturn in commercial real estate as well. Logic and experience tell us that breaches and defaults of property purchase agreements are likely to become more prevalent given today's declining markets compounded by tight credit. Hence, a renewed look at the legal and equitable remedies available to sellers and buyers of real property in failed transactions is timely.

Seller Remedy: Breach of Contract Damages

While the money damages remedy for a seller generally is not favorable in a stable or rising market, it may be advantageous in a declining market. Under the California Civil Code, a seller's measure of damages for breach is the difference between the contract price and the value of the property to the seller on the date of breach (usually the market value), plus consequential damages and interest.

Recovery of damages usually requires reasonably diligent efforts to resell. If the property is resold before trial at a profit, the seller would recover no actual damages for breach. But in the case of today's declining market conditions, the damages remedy could become a viable option.

Seller Remedy: Liquidated Damages

Because the money damages remedy is not usually advantageous in a stable or rising market, sellers routinely rely on "liquidated damages" provisions to compensate for a buyer's breach. Liquidated damages are a fixed amount defined in the purchase agreement. In theory, upon the purchaser's breach, the seller automatically

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"readily achievable" in this way, barrier removal becomes a continuing obligation of the responsible party or parties. Remedial action that may not have been "readily achievable" at one time may later become "readily achievable" as the financial resources of the responsible party, or parties, increase.

Both landlords and tenants are obligated to comply with the ADA. Such obligations may not be eliminated by contract (*Botosan v. Paul McNally Realty*, 216 F.3d 827 (2000)). However, although landlords and tenants will at all times remain fully liable to third parties for ADA compliance, they can, between themselves, allocate compliance responsibility in their leases. As such, parties to a commercial lease should consider the following ADA specific provisions:

1. Representations and Warranties. A tenant may want to obtain a representation and warranty from its landlord that the premises are currently ADA compliant. A landlord may want to obtain a representation and warranty from its tenant that any alterations to the premises performed by the tenant will comply with the ADA.

2. Compliance Allocation. The parties should determine who will bear the cost of ADA compliance and which party will be responsible for performing any necessary remedial action. If the landlord is responsible for the work, a tenant should negotiate an appropriate remedy for the landlord's failure to do so in a timely manner and ensure that such costs are not passed back as an operating expense. If the tenant is responsible for

the cost, it may want to negotiate a maximum dollar amount for which it could be obligated.

3. Indemnification Provision. Once the parties determine who is to bear the cost of ADA compliance, appropriate indemnification provisions should be incorporated into the lease agreement. Thus, in the event that either a landlord or a tenant is held individually liable in an ADA enforcement action, the indemnified party can seek indemnification from the indemnifying party.

The parties should be careful to exclude lease provisions that could prevent ADA compliance. For example, a provision that restricts a tenant from making alterations to the premises might effectively impede the tenant's ability to remove architectural barriers.

Should parties to a commercial lease fail to determine, allocate and perform ADA compliance obligations, landlord and/or tenant liability to third parties may result. Moreover, unexpected compliance costs may be incurred and unnecessary litigation may ensue. To avoid these undesirable consequences, prudent landlords and tenants should address the issues discussed above in their lease negotiations and documentation.

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is entitled to recover the liquidated damages, even when the actual damages remedy would result in little or no recovery.

On the other hand, when a purchase agreement includes a provision for the seller's liquidated damages, the seller is precluded from recovering actual damages for a breach. Thus, in a declining market, sellers should give careful consideration before routinely employing a liquidated damages clause in a real estate sale contract since the contractual liquidated damages may only be a fraction of the potential decline in value.

Buyer Remedies in a Declining Market

The damages available to a buyer in the event of a seller's breach also are affected by market conditions. If the seller breaches his promise to convey the real property, the buyer's damages include (among other things) the difference between the contract price and the value of the property at the time of breach. In a declining market these damages are usually zero, while in a rising market, they can be significant.

While liquidated damages are theoretically available to buyers, they are rarely provided for in a real estate purchase agreement. However, in today's declining market, a buyer might benefit from a liquidated damages clause, recoverable in the event of the seller's default, even when actual damages are zero.

Specific Performance

In light of the aforementioned limitations and impact of market conditions on the measure and recoverability of actual and liquidated damages, sellers should now consider the equitable remedy of "specific performance," usually employed by buyers in a rising market. The primary "down side" to the seller's specific performance remedy is that the seller must refrain from attempting to sell the property while the lawsuit is pending in order to establish that the seller is ready, willing, and able to perform once the buyer is ordered to complete the purchase.

Election of Remedies: Considerations

The law generally allows the non-breaching party to

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pursue alternative remedies in the same legal action, pleading them "in the alternative." Often, a non-breaching buyer does not have to elect between the available remedies until after the verdict, before the judgment is entered. However, a seller has less flexibility, requiring them to make choices among available remedies early in the process after (and sometimes even before) the buyer's breach.

Choosing the Right Remedy

The recent reversal in market conditions, from increasing to decreasing real estate values, means that the most appropriate remedy for breach of real property purchase and sale agreements has changed

as well. Careful analysis of available remedies is critical at the time of contracting and at the time a legal action may be required to maximize the recovery of the non-defaulting party and/or to defend an alleged defaulting party against excessive and inappropriate relief.

Bernard is an accomplished trial lawyer, applying over 25 years of experience to deliver innovative trial techniques to a diverse and sophisticated clientele. His practice encompasses litigation in the areas of real estate, business, intellectual property, competitive business practices, creditors' remedies, insurance, and local government contracts (bresser@rutterhobbs.com).



RHD ATTORNEY UPDATE

We are pleased to welcome Wendy E. Lane to the firm's Litigation practice. Wendy focuses on business litigation and dispute resolution, and also represents plaintiffs and defendants in employment litigation matters. Wendy previously worked at Liner Yankelevitz Sunshine & Regenstreif and Baker & Hostetler, and received her J.D. in 1998 from the University of California at Los Angeles (wlane@rutterhobbs.com).

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- Represented a regional bank in the disposition of bank-owned properties and bank-related leases and subleases.
- Represented a developer in the acquisition, development, financing and leasing of shopping center sites in Rancho Mirage, City of Commerce and Hanford, California.

RECENT LITIGATION

- Won summary judgment for client, the pension fund owner of a 350-unit apartment complex in Santa Monica, dismissing the following alleged claims by 49 plaintiffs and class action representative: breach of implied warranty

of habitability; public nuisance; fraudulent concealment; negligence; and, unfair business practices.

- Successfully prosecuted action by owner of downtown property against the city of Los Angeles for breach of contract regarding client's historic building restoration. Obtained specific performance of contract by the city and payment of past due balances and attorneys' fees.
- Assisted major retailer tenant in a construction defect/breach of lease lawsuit against landlord relating to falling roof beams and structural issues at a large store in Orange County. Following mediation, obtained seven figure settlement and complete repair of the property by landlord.
- Successfully resolved action by former corporate shareholder claiming interest in real property acquired by shareholders for benefit of the corporation, but held in their individual names. Obtained agreement by former shareholder to deed and release any interest in real property to the corporation.

R H D I N T H E N E W S

February 20, 2008	Olivia Goodkin will be presenting "Wage and Hour Law Traps for the Unwary" to the California Society of CPAs , Business & Industry Group.
January 31, 2008:	Andrew Apfelberg moderated a panel for ProVisors members regarding the identification and nurturing of strategic allies.
January 30, 2008:	Frank Melton was a panelist at the 2008 Nonprofit Forum discussing board governance and board/employee relations. Rutter Hobbs and Davidoff was a proud co-sponsor of the event.
Winter 2008:	Greg Sater and Natasha Shabani's article "Internet Contests and Promotions: A Primer for Online Retailers" was published in electronicRETAILER .
December 2007:	Eric Peterson's article "Getting Personal" was the feature and Eric's photograph was on the cover of LA Lawyer Magazine .
October 2007:	Brian Davidoff was appointed Chairman of the Primerus Business Corporate International (BCI) Group.
October 2007:	Brian Davidoff was appointed to the Board of Directors of the Beverly Hills Bar Association .
November 2007:	electronicRETAILER published Greg Sater and Eric Peterson's article "Manufacturers Have More Freedom to Regulate Distributor Pricing."

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