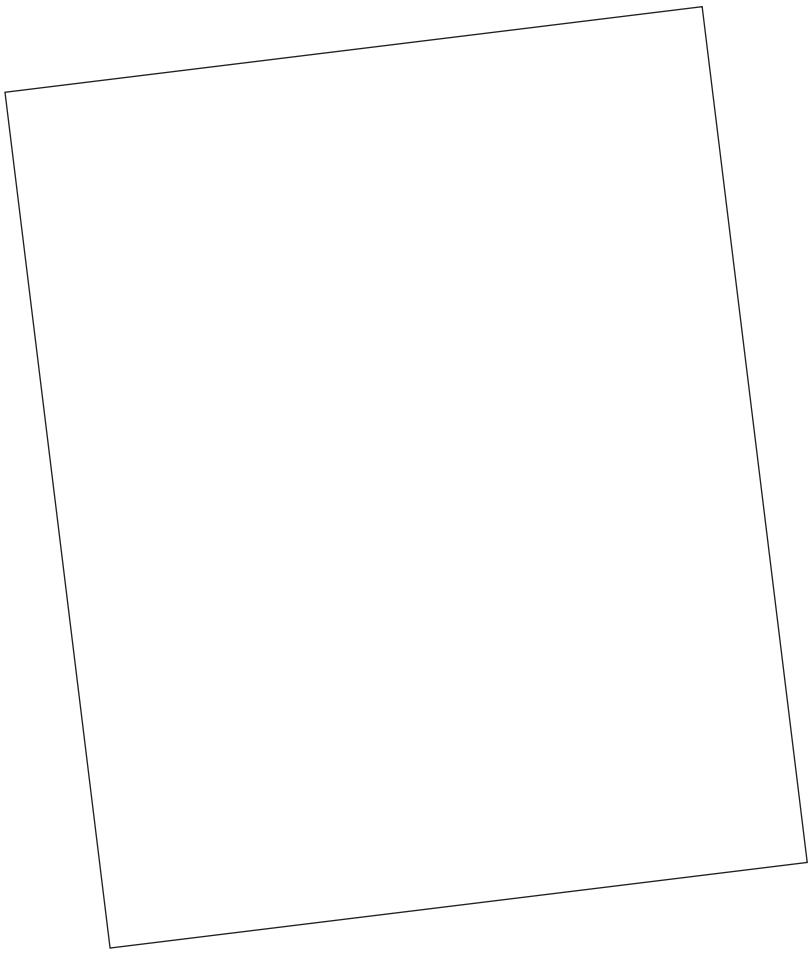

Accessibility Litigation

Is ignorance really bliss?

by Richard Hunt

The number of lawsuits filed against business owners based on violations of the Americans With Disabilities Act and Federal Housing Administration accessibility requirements grows every year. The best way to avoid a lawsuit is to find and fix any violations that exist, but many property owners, property buyers, and business operators believe that they are better off not knowing the truth. If they can't afford to fix a violation, they fear their knowledge will somehow count against them. While there is some cause for concern with respect to multifamily housing, as a general rule, ignorance can only make things worse.

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Title III of the ADA, which requires accessibility for most businesses, is a no-fault statute. If a business is not accessible, the law permits a court to order that it be fixed and that legal fees be paid to the plaintiff's lawyer, regardless of whether or not the owner knew of the problem in advance. Therefore, the owner who knowingly maintains an inaccessible business is no worse off than the innocent owner who has no idea.

Knowledge Is Power

But the owner who knows can fix problems before a lawsuit is filed and avoid litigation costs altogether. If fixing the problems is not financially possible, just having a plan to fix them can reduce litigation costs. Some courts have even dismissed ADA lawsuits on the theory that there was no point in ordering a business owner to do what he was already planning to do.

For retail stores, restaurants, shopping centers, and most other businesses that serve the public, knowledge of ADA violations is undoubtedly good. Commissioning an ADA survey will allow the owner to plan for remediation and reduce or eliminate the risk and expense of litigation.

The same should be true for owners and managers of multifamily housing. The Fair Housing Act sets accessibility standards for these properties, and like the ADA, it is usually enforced by orders to fix problems and an award of attorneys' fees to the plaintiff.

There is one controversial difference though. Under the ADA, the liability of the original property owner is not that much different than the liability of later owners. The original owner is responsible for the property meeting all of the ADA Standards, while later owners are only responsible for "barrier removal" that is "readily achievable." How-

ever, it turns out that most courts say that any violation of the ADA Standards is a barrier that has to be removed, and anything that doesn't put the business in bankruptcy can be readily achieved. As a practical matter, original and subsequent owners are in the same boat.

Under the Fair Housing Act, only the original owner of a property is responsible for making sure it complies with the applicable accessibility guidelines. As most courts read the statute, later owners cannot be made to bring the property into compliance with these guidelines. The most they can be compelled to do is allow the original owner access so the original owner can do the work. This is a burden, but much less of a burden than paying for all the work to be done. If the original owner is out of business, it is no burden at all.

There are, however, a few recent decisions in which a district court found that a later owner might be liable. Most of these decisions base later owner liability on some affiliation with the original owner, but one Florida district court has ruled that an unaffiliated later owner might be liable if it had "wrongful knowledge" that the property was not in compliance with the guidelines. The court never explained what "wrongful knowledge" might be, but some purchasers of multifamily housing are worried that if they know there is a problem they will have "wrongful knowledge" and be treated like an original owner. That would turn an inconvenience into a major financial liability.

So far this position has been taken only by the Florida court, with a court in Oklahoma reserving judgment on the matter. The Florida case is on appeal to the 11th Circuit U.S. Court of Appeals. In that appeal, the plaintiff has taken the position that knowledge is irrelevant and every owner has the same liability. If the 11th Circuit agrees, then the situation will be just like the ADA, where ignorance is no help but knowledge at least allows a plan to be made.

The defendant argues that knowledge is irrelevant and that later owners cannot be liable. If the 11th Circuit agrees, then there is no liability for subsequent owners regardless of knowledge. Only in the event that it adopts some middle position will knowledge be a bad thing.

Until the 11th Circuit rules, the best advice is that the devil you know is better than the devil you don't know. The modest expense of a survey to find FHA violations will allow an existing owner to assess its risk and make plans based on that assessment. It will allow a prospective buyer to accurately assess the risk of ownership before that risk becomes a fact. In the world of accessibility litigation, what you don't know almost always hurts you, and hoping that ignorance will protect you is a long shot gamble.

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