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Having It the ADA Way at Burger King — Getting and Staying Compliant After a Class Action Lawsuit

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A recent class action settlement approved by a federal court in California purports to be one of the largest of its kind.¹ The settlement involved 10 Burger King restaurants in California leased by Burger King to franchisees. In the lawsuit, wheelchair and mobility scooter users alleged that architectural barriers and policies at certain California Burger King restaurants denied equal access to them in violation of the Americans with Disability Act (ADA) and California disability access laws. Architectural barriers are physical features that limit or prevent people with disabilities from obtaining the goods or services that are offered.

Examples of the claimed access barriers at the Burger King restaurants included:

- Inaccessible parking areas, dining areas and restrooms
- Doors that were too narrow or difficult to open
- Inaccessible condiments, napkins and other items
- Sidewalks and ramps that were too narrow and/or steep

The plaintiffs (the wheelchair and mobility scooter users) wanted Burger King to adopt policies that would ensure access for customers who used wheelchairs and mobility scooters. The plaintiffs also wanted Burger King to modify the leased restaurants so that they were in compliance with the engineering and architectural mandates of the ADA. In early motion practice, the court found that Burger King had affirmative policies requiring compliance by franchisees with the ADA. The court further found that these Burger King policies were not the reason that the individual restaurants retained access barriers that were potentially in violation of the ADA.

The ADA was enacted in 1990 and the effective date of the ADA's design and construction mandates went into effect on January 26, 1993. The specific architectural standards that restaurants and buildings must meet are set forth in the ADA Accessibility Guidelines (ADAAG). ADA covers any business that serves the public, and applies to the parties that own, operate, or lease the business as lessor or lessee. Facilities built before 1993 were required to complete "barrier removal" as defined by the ADA, with substantial attention paid to the path of travel, the route by which the disabled patron must proceed to gain access to the business. Existing facilities that are substantially altered are not usually exempted by "grandfather provisions" that are often used in other circumstances to exempt older structures from later-adopted building code changes. Under the law, restaurants are required to make changes that are "readily achievable" to provide or attempt to provide "equivalent facilitation" for disabled customers. Under the doctrine of "equivalent facilitation," departures from the ADAAG provisions are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility. In addition, the ADA requires the business party to spend an additional amount equal to twenty percent of the remodel cost upgrading the path of travel for disabled customers throughout the restaurant.

In this case, all 10 of the Burger King restaurants were constructed in the 1970s and 1980s, long before the ADA was enacted. In the lawsuit, Burger King asserted as a defense that the restaurants complied with the ADA because they were all built long before the ADA was enacted and any necessary upgrades had been

made as part of any subsequent remodels. The wheelchair and mobility scooter users claimed that based on the substantial renovations that had occurred at the stores since the enactment of the ADA, Burger King had not done enough to comply with the remodeling requirements of the ADA and ADAAG .

The plaintiffs in the lawsuit claimed that a separate violation occurred each time a patron visited a Burger King store and encountered an architectural barrier there. The wheelchair and scooter mobility user sought the statutory minimum damages for each violation, which includes a \$4,000 fine per violation. Plaintiffs estimated that their damages were as high as \$20 million in this case. Before trial, a settlement was reached between the plaintiffs and Burger King. On July 12, 2010, a federal judge approved the settlement, awarding almost \$2.5 million in attorney's fees and \$5 million in damages to the plaintiffs and class members.

Given the potential exposure to liability, businesses should continue to be mindful of their legal obligations to provide access to all potential customers and make sure that the physical structures are compliant with all federal, state and local laws addressing accessibility. Companies with facilities built in conformity with corporate plans and designs prior to 1993 and subsequently substantially altered after 1993 should pay particular attention to accessibility issues. This is especially true when the parent's relationship with the facility is as a landlord only and the tenant is responsible for remodeling the facility. The remodeling triggers the joint obligation of landlord and tenant under the law. Accessibility issues will continue to garner national attention and more intense scrutiny as our population ages, more people take advantage of mobility scooters, and the disabled population's advocacy groups intensify efforts for effective implementation of this now well-understood ADA regulatory regime.

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1. See *Castaneda v. Burger King Corporation*, U.S. District Court for the Northern District of California, Civil Action No. C 08-04262 WHA.