

The ADA Imposes Burden for Lenders at Foreclosure, Massachusetts Lawyers Weekly (Oct. 1995) 206

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Kathleen C. Stone's excellent article, "The Lender's Right To Take Possession: An Overview," (Real Estate, June 26), would be enriched by analysis of certain sections of the Americans with Disabilities Act.

Liability under the ADA can fall jointly upon the tenant, operator and owner of a place of public accommodation, which is broadly defined so as to include many commercial buildings. This principle can create an unexpected burden for lenders who take ownership of property through foreclosure. A lender will inherit any attendant ADA compliance responsibility.

The Department of Justice position is that any ownership - regardless of duration - will trigger liability. There appears to be no exception made for ownership intended merely to protect a security interest, as may be the case in liability for environmental contamination. Thus, an ADA site assessment to determine potential liability is essential before foreclosure.

In the initial loan documents, lenders should address ADA issues, including: the status of existing compliance; creation of a compliance plan (if needed); compliance with the ADA Accessibility Guidelines for any future improvements (possibly by escrowing funds); the right to monitor compliance and potential liability; and use and leasing restrictions to prevent triggering of ADA liability.

The need for leasing restrictions can arise as follows. A loan to a private club entails no compliance liability because such clubs are exempt from the ADA. However, if the club leases the building to a public day-care center, the ADA applies and compliance obligations are triggered. This could significantly affect the value of the collateral and the loan.

Consultation with the Department of Justice may be helpful. The DOJ's Civil Rights Division Disability Rights Section will answer legal questions at (800) 514-0301.

However, as in the enforcement of environmental laws, there is no safe harbor from private or state lawsuits created by an agreement with the DOJ. Nevertheless, there have been nearly 350 settlement agreements reached by the DOJ as of May 1995.

Lastly, it is noteworthy that the ADA has an unusual method of determining whether an obligation exists to make a building more accessible. The obligation depends in part upon the resources of the owner. This means that an owner of limited resources may have limited or no obligation under the ADA. But an obligation may be created if a lender comes to own the very same building. A lender who forecloses may be liable for compliance, even though the previous owner and tenants were not, if there are greater resources available to the lender. Previous allocation of liability between the lender and the borrower as to liability for ADA compliance is still valid between them, but has no effect on actions by others.

The last area is perhaps the one where the ADA presents the most novel danger to lenders. The existence of liability depends in part on the financial condition of the person or business - not just the condition of the place (as in environmental cases). Thus, no lender can consider the issue of ADA compliance for a particular property completely settled until it has revisited the issue in light of its own financial condition.