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Potential Tort Liability for Transit Agencies Arising Out of the Americans with Disabilities Act

This report was prepared under TCRP Project -5, "Legal Aspects of Transit and Intermodal Transportation Programs, "for which the Transportation Research Board is the agency coordinating the research The report was prepared by Robert A. Hirsch. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.*

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

The Americans with Disabilities Act, Public Law 101-336, was enacted in 1990. The act provides a wide range of rights for disabled transit users. Since the act is relatively new and there is very little in the way of reported case law, there is a need for an assessment to determine the potential of tort liability and to identify unreported tort liability cases arising out of the act.

The objective of this research is to prepare and present an assessment of problems in implementing the act from the perspective of transit operators. The research results should be helpful to transit operators, administrators, planners, risk managers, and attorneys in devising a transit program that meets the objective of the act, minimizes risk of harm to disabled passengers, and ultimately minimizes the transit operators' potential for tort liability.

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* M Pia Terretti Gekas provided research assistance concerning general tort law and assisted in the analysis of survey responses

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POTENTIAL TORT LIABILITY FOR TRANSIT AGENCIES ARISING OUT OF THE AMERICANS WITH DISABILITIES ACT

by Robert A. Hirsch
Attorney, Washington, D.C.

INTRODUCTION

Public Law 101-336--the Americans With Disabilities Act of 1990 (ADA)[1]--was signed into law on July 30, 1990, heralding "a step to welcome individuals with disabilities fully into the mainstream of American society."[2] Indeed, the ADA's significance in furthering fundamental civil rights is evidenced by the following observations of President George Bush as he signed the ADA into law:

> This legislation is comprehensive because the barriers faced by individuals with disabilities are wide-ranging. Existing laws and regulations under the Rehabilitation Act of 1973 have been effective with respect to the Federal Government, its contractors, and the recipients of Federal funds. However, they have left broad areas of American life untouched or inadequately addressed. Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of the Handicapped Act, have found themselves on graduation still shut out of the mainstream of American life They have faced persistent discrimination in the workplace and barriers posed by inaccessible public *transportation*, public accommodations, and telecommunications.[3] [Emphasis added.]

The important and essential role that transportation plays in the daily lives of all Americans, but disabled ones in particular, cannot be ignored. "Transportation affects virtually every aspect of American life. Mainline services are geared to moving people to and from work, school, stores, and other activities on schedules that reflect most people's daily routines."[4] "Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society. People who cannot get to work or to the voting place cannot exercise their rights and obligations as citizens."[5] At the time of the ADA's enactment, some 43 million Americans were estimated to have had at least one physical or mental disability. Today, the number is estimated to be 49 million.

More than 7 years have passed since the ADA became law, and more than 5 years have passed since the U.S. Department of Transportation's (DOT) regulations implementing the transportation provisions of the ADA first went into effect. While the transit community has demonstrated continued support for the ADA's fundamental goal to provide the disabled with accessible transportation, questions have been raised concerning whether the accessibility obligations imposed by the ADA on transit operators[6] may not also be serving as a catalyst for increasing the civil tort liability of transit operators. For example, in expressing the need for this report and underlying study, the Transportation Research Board's "Problem Statement" notes the concerns of transit agencies "about individuals using wheelchairs who fall from the chair when a vehicle is stopped; and relative to disembarking passengers who utilize wheelchairs when the bus stop location is not fully accessible to, or 'unsafe' for individuals in wheelchairs."

While the transportation requirements of the ADA and implementing regulations have been clearly written to facilitate accessible transportation, it is the tort concerns that may be the most influential in terms of how many of the ADA's specific requirements are being implemented.

The purpose of this report is to determine whether and to what extent the ADA may indeed create, or increase, tort liability[7] for transit operators and, if so,

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[1] The ADA is codified in Title 42 of the United States Code, beginning at § 12101.

[2] House Report No 101-485(I), 101st Congress, 2d Session at page 24 (May 14, 1990) Because this report will be read by individuals involved in a broad range of transit-related functions, many of whom are nonattorneys, the initial reference to a congressional report relating to the legislative history of the ADA and its predecessor, the Rehabilitation Act of 1973, and to a Fed. Reg. publication providing the history and interpretative guidance to regulations implementing both statutes, are set forth in a "long-form" fashion for the benefit of the nonattorney readers Subsequent references are set forth in the official citation format, e.g., H.R. Rep. 101-485(I), 101st Cong., 2d Sess 24 (1990)

[3] Statement by President Bush upon signing S 933, 101st Cong., 2d Sess 1, reprinted in 1990 United States Code Congressional and Administrative News 601 (hereinafter U.S.C C.A.N vol 4) (Legislative Hist. p. 60)

[4] H R. Rep. No. 101-485(II), 101st Cong., 2d Sess 88 (1990).

[5] *Id* at 37

[6] The terms transit "operators" and "agencies" are used interchangeably throughout this report As used here, "transit" refers to ground transport and includes fixed and demand-responsive bus service, paratransit, and light and commuter rail transport While over-the-road (OTR) bus service is not specifically covered by this report, many of the tort issues that the report addresses for transit would be the same for OTR service. Air transport is not addressed in this report

[7] It is especially important for the reader to understand that the specific theories that underlie tort liability can, and often do, vary from state to state. In other words, because a particular tort theory or defense may not be recognized in every state, or because one state's application of a specific tort theory or defense can vary from other states, it is possible to be liable in one state and not in another, even though the facts of the two cases may be identical. Further, while general rules of tort law do exist and are discussed here, it is also important

what strategies, including a waiver of liability, may be legally available to operators to minimize that potential.

The first section of the report provides a summary of the particular duties imposed on transit operators by federal law prior to the ADA's enactment. Indeed, because many transit agencies were already subject to accessibility issues and obligations per force of federal laws predating the ADA, an objective assessment of the ADA's impact on tort liability must of necessity begin with a brief review of the principal federal statutes, the regulations issued to implement those statutes, and the specific duties that had been imposed on transit operators prior to the ADA's enactment.

Section 2 of this report provides the reader with a summary of data collected through a nonscientific survey that requested information on the transit agencies' experiences transporting disabled riders.

Section 3 contains a discussion of specific duties imposed on transit operators under the ADA/Rehabilitation Act, as well as those arising under common law. Particular attention is devoted in this discussion to the application of tort theories to several specific disabilities.

In Section 4 there is a discussion of waivers, warnings, and other remedial strategies that transit operators may want to consider when trying to limit tort liability while still complying with the ADA.

The reader should be aware that Public Law 102-240 (December 18, 1991) provided for the substitution of the title "Federal Transit Act" for the "Urban Transit Act of 1964."[8] This paper references statutory amendments that predate this title change. Therefore, with the exception of any historical context, the "Federal Transit Act" and the "Urban Transit Act" titles are used interchangeably.

I. REQUIREMENTS OF THE ADA AND PREDECESSOR FEDERAL LAWS GOVERNING ACCESSIBLE TRANSPORTATION

While the accessibility requirements issued under the ADA are the principal focus of this report, a number of federal laws predating the ADA were also aimed at making transportation accessible to the disabled. To assess fully whether and the extent to which the ADA has affected the tort exposure of transit agencies, this report will first provide a summary of the applicable statutes and regulations predating the ADA and the specific duties each imposed on transit operators with respect to the transport of the disabled. This will assist the reader not only in determining the extent to which the ADA has resulted in the imposition of new duties on operators, but will also provide some meaningful insight into the extent to which, as a result of the earlier actions of the federal government, accessible transportation was already available to the disabled community prior to the ADA.

Because the enactment of all the pre-ADA statutes occurred before the publication of any regulations actually took place, this summary will focus first on the statutory requirements and then proceed to the chronology and content of the regulations themselves.

As discussed below, DOT's regulatory efforts to define more precisely the duties of operators under the pre-ADA statutes did not proceed as smoothly as perhaps DOT may have hoped, due largely to an intervening presidential executive order and to three successful court challenges brought against the regulations by industry.[9] However, a number of the specific requirements DOT sought to impose were nonetheless adopted into law, and many other pre-ADA proposals have also served as the basis for DOT's ADA regulations. Further, during the pre-ADA rulemakings there were a number of occasions when DOT acknowledged it had revised a proposed requirement to avoid a potential adverse safety impact or made an effort to alert operators to potentially hazardous situations that individual operators could address voluntarily on those occasions when DOT decided not to mandate a specific requirement. Thus, even in the absence of regulations being promulgated by DOT, it would nonetheless appear that the pre-ADA rulemakings may have informally established, or at least influenced, the standard of care by which transit operators would be measured with respect to providing transportation to the disabled.[10]

Of necessity, therefore, the determination of whether and the extent to which the tort liability of transit operators may have been affected by one or more of the pre-ADA statutes must turn on a consideration of the chronology of regulatory events preceding the ADA's passage and, more particularly, to the specific DOT requirements that were adopted under each of the pre-ADA statutes.

A. Federal Statutes

Four statutes specifically addressed the need to increase access to public transit systems for the disabled.

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to understand that exceptions to the general rule also exist. Accordingly, the reader will need to refer to the applicable state law and court decisions to determine the exact extent to which the specific theories discussed in this report may apply.

[8] 49 U S.C. app 1601 *See* n 10 *infra.*

[9] EO 11914 and American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) and Americans Disabled for Accessible Pub. Transp. v. Dole, 676 F. Supp. 635 (E.D. Pa 1988), *aff'd sub nom.*, Americans Disabled For Accessible Pub. Transp. v. Skinner, 881 F.2d 1184 (3rd Cir 1989)

[10] An informal survey of 397 transit agencies throughout the United States was conducted in conjunction with this study (see Section 2 of this report for a discussion of the results) Of the 45 agencies that responded to the survey, 43 indicated that they were providing transportation services to the disabled community prior to the ADA

1. The Urban Mass Transportation (UMT) Act of 1964, as Amended

Section 16(a) required transit agencies to make *special efforts* in planning and designing their mass transportation facilities and services.[11] In an April 30, 1976, guidance document governing 23 C.F.R. Part 450--Planning and Assistance, the Urban Mass Transportation Administration (UMTA) and the Federal Highway Administration jointly instructed:

> "[S]pecial efforts" refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons With regard to transportation for wheelchair users and others who cannot negotiate steps, "special efforts" in planning means genuine, good-faith progress in planning service for wheelchair users and semiambulatory handicapped persons that is reasonable in comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period. Particular attention should be given to those handicapped persons who are employed or for whom the lack of adequate transportation constitutes the major barrier to employment or job training. [12]

2. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act directed that: "No otherwise qualified handicapped individual in the United States, as defined in Section 7(6),[13] shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[14] The act required the DOT to issue implementing regulations consistent with the statute's statement of federal policy concerning the civil rights of the disabled.

3. The Federal-Aid Highway Act of 1973, as Amended

Section 105 of the Federal-Aid Highway Amendments of 1974 (1974 Amendments) required: *"special efforts* shall be made in the planning, design, *construction, and operation* of mass transportation facilities and services so that the availability to the elderly and handicapped persons of mass transportation which they can effectively utilize will be assured" [emphasis added].[15] It also provided for the first time an enforcement mechanism for ensuring compliance.[16]

4. The Surface Transportation Assistance Act of 1982 (STAA)

Section 317(c) of the STAA directed DOT to publish regulations to establish: "(1) minimum criteria for the provision of transportation services to handicapped and elderly individuals by recipients of federal financial assistance under this Act or under any provision of law referred to in Section 165(b) of the Federal-Aid Highway Act of 1973, and (2) procedures for the Secretary [of Transportation] to monitor recipients' compliance

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[11] Urban Mass Transportation Act of 1964 (UMT Act), Pub. L No. 88-365, 78 Stat 302, added as Section 8 of the Urban Mass Transportation Assistance Act of 1970 (1970 Amendments), Pub L No. 91-453, 84 Stat. Originally codified at 49 U.S.C app. § 1612(a) Section 1612(a) was amended in 1991 by replacing "elderly and handicapped persons" with "elderly persons and persons with disabilities." *See* Pub L No. 102-240, 105 Stat. 2110 (1991). Section 1612(a) has since been recodified at 49 U.S.C § 5301(d), and words deemed to be surplusage were eliminated The name of the Urban Mass Transit Act was changed to the "Federal Transit Act" in 1991 Pub. L No 102-240, § 3003 (Dec 18, 1991)

[12] *See also* Snowden v Birmingham Jefferson Cty Tr. Auth., 407 F. Supp. 394, 397 (N.D Ala 1975) (finding that "in view of the present state of available bus technology,...it would seem inherently unreasonable to bring all bus procurement to a halt while new equipment is being designed, developed, tested and produced ") and Vanko v. Finley, 440 F Supp 656, 660 n 3 (N.D. Oh ED. 1977) (finding "'special efforts' mandate to be dynamic, rather than a static requirement, the specific contours of which can only be defined by the state of mass transportation technology at any particular moment,.. and does not now, in 1977, require universal accessibility ")

[13] As originally defined in Section 7(6) of the Rehabilitation Act, *"handicapped individual"* referred only to "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocation rehabilitation services provided pursuant to titles I and II of this Act."

Pub. L No. 93-112, 87 Stat. 355, 361 The definition was amended by Section 111 of the Rehabilitation Act Amendments of 1974 (1974 Amendments), Pub. L No 93-516, 88 Stat 1617, 1619 and has since meant "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has record of such impairment, or (C) is regarded has having such an impairment " This is the same language that Congress used in § 3 of the ADA (42 U S.C. § 12102) to define *"disability"* for purposes of the overall scope of the ADA's applicability, including for transit services subject to titles II and III

[14] Pub L No 93-112; Title V, § 504, Sept 26, 1973, 87 Stat 355

[15] Section 105(a) of 1974 Amendments Pub. L No 93-643, 88 Stat. 2283, 23 U.S.C § 142 note

[16] Section 105(b) of 1974 Amendments, Pub L. No. 93-643, 88 Stat 2283, 23 U.S C § 142 note:

> The Secretary of Transportation shall require that *projects* receiving Federal financial assistance under (1) subsection (a) or (c) of Section 142 of title 23, United States Code, (2) paragraph (4) of subsection (e) of Section 103, title 23, United States Code, or (3) Section 147 of Federal-Aid Highway act of 1973 [set out as a note above] shall be planned, designed, constructed, and operated to allow effective utilization by elderly or handicapped persons who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory, wheelchair bound and those with semiambulatory capabilities, are unable without special facilities or special planning or design to utilize such facilities and services effectively [Emphasis added]

with such criteria."[17] It further provided explicit direction to DOT that its regulations should "include provisions for ensuring that organizations and groups representing such individuals are given adequate notice of and opportunity to comment on the proposed activities of recipients for the purpose of achieving compliance with such regulations."[18]

B. Federal Regulations

1. 49 C.F.R. Part 609--Transportation for Elderly and Handicapped Persons[19]

UMTA's accessibility Part 609 rulemaking implementing rule of Section 16(a) of the UMT Act (as amended by the 1974 Amendments) and Section 504 of the Rehabilitation Act had two goals. First, to make "regular transit service more accessible to the large number of ambulatory elderly and handicapped."[20] Second, to "increase significantly the level of service for wheelchair users and other persons who cannot negotiate steps."[21]

The following are requirements that UMTA imposed specifically for the safety of disabled and elderly riders in its 1976 rulemaking, as well as circumstances that UMTA identified where a carrier's tort exposure could potentially be affected. [22]

A. Fixed Facilities.--For level-entry rail systems, the final rule replaced the "specific maximum gap" UMTA had proposed with "a more general requirement" after it was shown that the proposed requirement "was too narrow within the current technology to allow safe movement of trains within the station area."[23] Further, when designing new underground and elevated transit stations, operators were required to give "careful consideration to the location and number of elevators and other vertical circulation devices in order to minimize the extra distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to nonhandicapped persons."[24] In addition, the edges of boarding platforms "bordering a drop-off or other dangerous condition [were to] be marked with a warning device consisting of a strip of floor material differing in color and texture from the remaining floor surface," while at the same time permitting safe passage by wheelchair users and other elderly and handicapped individuals.[25]

B. Vehicles Generally.--All vehicles[26] were required to have handrails and stanchions in the vehicle's entranceway and throughout the vehicle sufficient to permit safe boarding and unboarding, onboard circulation, and sitting and seating by the handicapped and the elderly.[27] In addition, for expressed reasons of safety,[28] the final rule also required slip-resistant floors and step surfaces and mandated that the edges of all vehicle steps be identified by a band of bright, contrasting colors running the full length of the step.[29] Further, lighting standards were imposed for bus and light rail car stepwells, as well as for the street surfaces adjacent to the doorways of such vehicles.[30]

C. Buses.--The final rule included a "wheelchair accessibility option"; however, the effective date was "reserved for later completion" by DOT.[31] Notwithstanding the official delay, UMTA announced that it would "concur in transit bus bid packages only if the technical specification provided for a bus design which would permit the addition of a wheelchair accessibility option and if the bid documents required an assurance

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[17] Pub L No 97-424, 96 Stat. 2097, 2153-2154 Originally codified at 49 U.S C app. § 1612(e), now found at 49 U S.C. § 5310(f)

[18] *Id*

[19] 41 Fed Reg 18234

[20] *Id* at 18236

[21] *Id.*

[22] Even in those instances where UMTA refrained from imposing a specific requirement in the final rule, UMTA made an effort to alert carriers to specific circumstances in which a safety hazard could arise and, therefore, where there was potential tort exposure Thus, it could be argued that, in responding to those safety concerns that UMTA had identified during the rulemaking, UMTA may have helped in some way to minimize the tort exposure to which carriers might potentially be subject as a result of an increased access to mass transit by the disabled community

[23] *Id* at 18237

[24] While it would appear that UMTA's intended purpose for this requirement was to eliminate or at least minimize a service disparity between disabled and nondisabled riders, from the tort standpoint it would also appear that the imposition of this requirement would add a salient safety benefit by helping to facilitate quicker egress from the station during an emergency

[25] *Id* at 18240/609 13(4).

[26] In the case of bus vehicles, the vehicle design specifications imposed under Part 609 were to apply only to new transit buses exceeding 22 feet in length *Id* at 18240/609 15.

[27] *Id* at 18240/609 15 (as to buses) In its final rule, UMTA also alerted operators to a continued potential safety hazard by "encourag[ing] transit operators to consider modest padding on stanchions and handrails at the front of the bus, where a disproportionate number of injuries occur" *Id.* at 18238 and 18239.

[28] *Id* at 18239.

[29] *See id* at 18240 for buses and *id.* at 18241 for rapid and light rail.

[30] Generally, stepwells were required at all times to have at least 2 foot-candles of light when measured on the stepwell Stepwells located immediately adjacent to the driver required illumination only when the door was open *See generally, Id.* at 18240 for buses and *Id.* at 18241 for light rail Doorways were required to have outside lights of at least 1 foot-candle of illumination on the street for a distance of at least 3 feet when measured from any point to the bottom of the step tread edge. *Id* at 18240

[31] *Id.*

from each bidder that it offered a wheelchair accessibility option for its buses.""[32]

D. Rail Vehicles.--While the proposed rule would have required the width of all rail car doors to have been at least 36 inches (comparable to what was required for buildings), the final rule reduced this to 32 inches for the side doors only. As UMTA explained, "[w]e learned that since rail car doors are built with vertical collision posts next to the end doors, increasing the width between these points could decrease a car's ability to withstand a collision."[33]

E. Other Vehicles.--The design requirements for commuter rail vehicles and for other vehicles not covered under the "bus," "rapid," or "light" rail vehicle categories were to be established by UMTA on a case-by-case basis.[34]

On April 29, 1976, two days before UMTA's Part 609 requirements were scheduled to go into effect, President Ford issued Executive Order 11914 (EO 11914),[35] which directed the Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services) to coordinate the implementation of Section 504 of the Rehabilitation Act by all of the federal agencies. EO 11914 further directed that each of the federal agencies was to issue "rules, regulations, and directives" implementing Section 504 that were "consistent with the standards and procedures established by" HEW.[36]

2. 45 C.F.R. Part 85--Implementation of Executive Order 11914, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs[37]

In Section 85.51, HEW provided general guidance with respect to the prohibited discrimination of the disabled. This included the need for access to the affected services to be provided "in the most integrated setting appropriate to the needs" of disabled individuals.[38] With respect to existing facilities,[39] Section 85.57 directed that, "when viewed in its entirety," a transportation facility must be "readily accessible to and usable by handicapped persons," but that it would not be necessary for every existing facility or every part of an existing facility to be made accessible to or usable by handicapped individuals.[40] Similarly with respect to new construction, Section 85.58 directed that new facilities had to be "designed and constructed to be readily accessible to and usable by" disabled individuals but that DOT could extend the effective date for requiring new buses to be accessible up to October 1, 1979, if "comparable, accessible services" were available during the interim.[41]

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[32] *Id* Noting that "[a]t least one major transit operator" had advised UMTA of its interest and intent to purchase wheelchair-accessible buses, *Id.* at 18236, UMTA went on to state that for the "new bus designs, PMTA [sic] will insist that manufacturers offer as an option a wheelchair-accessibility package consisting of a level-change mechanism, sufficient front or rear door and passageway clearances to permit the wheelchair to reach a securement location in the bus, and at least one wheelchair securement device." *Id*

[33] *Id* at 18238.

[34] *Id.* at 18241/609.21.

[35] *Id* at 17871

[36] *Id* at 17871 In spite of EO 11914, however, the Part 609 regulations went into effect on May 31, 1976

[37] 43 Fed Reg 2132 (1978).

[38] *Id* at 2137, 2138. However, HEW also observed in the rule's preamble that the regulations were not to be construed to "preclude in all circumstances the provision of specialized services as a substitute for, or supplement to totally accessible services, or requir[ing] door-to-door transportation service...or requir[ing] buses to move their regular route stops to the doors of handicapped riders " *Id.*

[39] Under § 853, at 2137, "facility" was broadly defined to mean "all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property" Since the early 1970s, design guidelines for rapid transit facilities have independently been published and made available by the Rapid Transit Committee of the American Public Transit Association (APTA) (GUIDELINES FOR DESIGN OF RAPID TRANSIT FACILITIES) Separate guidelines concerning the design and procurement of 35-and 40-foot bus coaches have been published by APTA since April 1977 *(BASELINE ADVANCED DESIGN TRANSIT COACH SPECIFICATIONS)*, which included a recommended design standard (2 6.6) for the accommodation of wheelchair passengers.

[40] *Id.* at 2138-2139 Structural changes to be made to an existing facility were to be made "as soon as practicable, but in no event later than three years after the effective date," Jan. 13, 1978, pursuant to a transition plan developed by the transit agency with the assistance of disabled individuals or organizations representing the disabled. In those cases where the required structure changes involved a subway system or another particular mode of transportation that would be "extraordinarily expensive," DOT could extend the 3-year period "for a reasonable and definite period of time " *Id.*

[41] *Id* at 2139

3. 49 C.F.R. Part 27--Nondiscrimination on the Basis of Handicap in Federally Assisted Programs and Activities Receiving or Benefiting From Federal Financial Assistance[42]

The following are the relevant accessibility performance standards that Part 27 imposed on transit operators:[43]

A. Fixed Facilities.--Under Section 27.87 (for rapid and commuter rail systems) and Section 27.89 (for light rail), all stations were to be made accessible to disabled riders who could use steps, and in the case of wheelchair users all *"key"*[44] stations were to be made accessible. [45]

B. Public Transit Buses.--Under Section 27.85 at least half of the buses used during peak hours were required to be accessible within 10 years, and these would have to be used first during off-peak hours before inaccessible buses could be used.[46]

C. Rapid and Commuter Rail Vehicles.--Under Section 27.87, all cars were to be made accessible to disabled individuals capable of using steps, while in the case of wheelchair users at least one vehicle per train was to be accessible.[47] In the case of new rapid rail vehicles, accessibility to all disabled riders was required for solicitations issued after the effective date. In the case of new commuter rail vehicles, however, accessibility to disabled riders capable of using steps was required for solicitations issued after the effective date, while for wheelchair users, accessibility was required for solicitations issued on or after January 1, 1983.[48]

D. Light Tail (Trolley) Vehicles.--Under Section 27.89, all trolley cars were to be made accessible to disabled individuals capable of using steps. In the case of wheelchair users, at least one-half of the peak-hour services were to be accessible, and accessible trolleys were required to be used during off-peak hours before inaccessible trolleys could be used. Such accessibility was to be accomplished "as soon as practicable but no later than three years" following the effective date of the regulations (July 2, 1979).[49]

E. Paratransit.--The operation of paratransit systems as an alternate or supplement to mainline accessibility was addressed for the first time by DOT in Part 27. Under Section 27.91, in those communities where a paratransit system was being (or would be) operated, the system had to be accessible to all disabled riders, including wheelchair users, "when viewed in its entirety."[50]

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[42] 44 Fed. Reg. 31442 (1979). Under the final rule, the accessibility requirements applicable to mass transit were divided between Subpart C of Part 27 (§§ 27.61 through 27 69) and Subpart E (§§ 27 81 through 27.119). Depending on whether accessibility was aimed at a new or existing facility, or at a vehicle, differing definitions of *"accessibility"* were used. In the case of a new facility to which the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped" (hereafter the "ANSI standards") were applicable, accessibility meant that buildings and other fixed facilities would have to conform to the minimum standards of ANSI A117.1-1961 (1971), *id.* at 31469. It should be noted that compliance with these same ANSI standards had previously been required for fixed facilities under § 609.13 of UMTA's regulations. For vehicles and new fixed facilities to which the ANSI standards were not applicable, and for existing facilities, accessibility was defined to mean that the vehicle or facility had to be "able to be entered and used by a handicapped person." *Id*. Pursuant to § 27 67, alterations to existing fixed facilities made after the effective date of Part 27 were to be made in accordance with the minimum standards of ANSI A117 1-1961 (1971) *Id* at 31474.

[43] Unlike the vehicle accessibility requirements of Part 609, which consisted of a mixture of both design and performance standards, Subpart E's requirements for rail cars and buses were posed strictly in the form of performance standards. A similar dichotomy in the use of design versus performance standards to achieve accessibility existed as well between Part 609 and Subparts C and E, respectively, in the case of fixed facilities. For purposes of this report, the term *design standard* refers to requirements concerning the physical construction of a vehicle or facility, e g, § 609 19, requiring that door openings of light rapid vehicles be at least 32 inches wide when open The term does not include requirements that impose a qualitative standard on operators, e.g., § 27.85, requiring that "at least one-half of the peak-hour bus service must be accessible," *id.* at 31478

[44] Subpart E used differing criteria to define *"key"* station, based on whether a station was part of a rapid or commuter rail system, or part of a light rail system. *See id*. at 3147831479.

[45] Such accessibility was required to be achieved "as soon as practicable but no later than three years after the effective date of the" regulations (slated to have been July 2, 1979). However, the 3-year deadline was extended to a 30-year period for rapid and commuter rail facilities, and 20 years for light rail, in the case of "extraordinarily expensive structural changes to, or replacement of, existing fixed facilities necessary to achieve program accessibility." *Id*. at 31478.

[46] *Id.* at 31478.

[47] In either case, such accessibility was to be accomplished "as soon as practicable but no later than three years" following the effective date of the regulations (July 2, 1979). The 3-year time limit was extended to 5 years for rapid rail, and to 10 years for commuter rail, in the event that "extraordinarily expensive structural changes to, or replacement of, existing rail vehicles" was necessary. *Id*. at 31479/2789(a)(3).

[48] *Id.* at 31479/2789(a)(3)

[49] The 3-year time limit was extended to 20 years in the event that "extraordinarily expensive structural changes to, or replacement of, existing rail vehicles" had to be made *Id*. at 31479. In the case of new rapid rail vehicles, accessibility to all disabled riders was required for solicitations issued after the effective date In the case of new commuter rail vehicles, however, accessibility to disabled riders capable of using steps was required for solicitations issued after the effective date, while in the case of wheelchair users, accessibility was required for solicitations issued on or after January 1, 1983 *Id*. at 27 89(b).

[50] This meant that the system had to operate the "number of vehicles sufficient to provide generally equal service to

F. Program Policies and Practice.--Under Section 27.95, transit operators in general were directed to establish policies and practices to ensure that accessibility to the disabled community would be achieved. Among the required elements to be addressed were: safety and emergency policies and procedures, periodic sensitivity and safety training, accommodations for companions or aides of handicapped travelers, and maintenance and security of accessibility features.[51] DOT further advised that UMTA's Part 609 requirements were to be superseded by the requirements of Subpart E, and that "the former §§ 609.15-609.19 should continue to be used by recipients as guidance for determining accessibility features to be incorporated in new equipment until new guidance on what specific accessibility features are required, probably in the form of an UMTA circular, is issued."[52]

The new Subpart E requirements were successfully challenged in *American Public Transit Association v. Lewis,*[53] resulting in their being sent back to DOT to explain whether "the regulations are a valid exercise of DOT's authority to enforce other provisions of the" Urban Mass Transportation Act and the Federal-Aid to Highways Act. This resulted in the issuance of an interim rule that deleted Subpart E in its entirety from Part 27 and replaced it with Sections 27.77 and two new appendices A *(Advisory Information on Programming for Handicapped Persons)* and B *(Advisory Information on Planning for Handicapped Persons Under UMTA and FHWA Joint Regulations, 23 C.F.R. 450, Subparts A and C, and 49 C.F.R.-613, Subparts A and B).*[54] Under interim regulations Sections 27.77(a)(1) and (2) of the interim rule, operators subject to Section 3, 5, or 18 of the UMT Act grant programs were required to certify that "special efforts are being made in their service areas to provide transportation that handicapped persons, including wheelchair users and semiambulatory persons, can use."[55] The final rule in this proceeding was published on May 23, 1986,[56] and became effective on June 23, 1986.

Under the new Section 27.95, transit agencies operating buses and receiving financial assistance under Section 3, 5, 9, 9A, or 18 of the UMT Act would be required to submit a compliance plan to UMTA for review and to provide a *"full performance level"* of accessible transportation to the disabled as soon as "reasonably feasible...but in any case within six years of the initial determination by UMTA concerning the approval" of the agency's program.[57]

To achieve the "full performance level" of accessibility required under the regulations, operators could elect to operate either as a *"special service,"*[58] *"accessible bus," or "mixed"*[59] system. Irrespective of the option that was chosen, operators were further required to ensure that their vehicles and equipment were "capable of accommodating

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handicapped persons who need such vehicles as is provided to other persons " Subpart E, however, did not mandate the operation of a paratransit system Neither did Subpart E specify that particular types of vehicles had to be operated, or prohibit the operation of particular types of vehicles, thereby permitting the use of automobiles to provide paratransit services (subject to the conditions described above). *Id* at 31479

[51] *Id.* at 31479. Except for advising that "[s]afety and emergency policies and procedure should cover the routine transporting of persons with differing disabilities, so that the passengers' safety will be assured," *id* , no other details for compliance were provided in the regulations

[52] *Id* at 31458 It is noteworthy that to this day Part 609 continues to be published as part of 49 C F R

[53] APTA, 655 F 2d 1272 (DC Cir. 1981).

[54] 45 Fed Reg. 37488 (1980)

[55] *Id.* at 37490

[56] 51 Fed Reg 18994 (1986) 49 C.F.R. Part 27. § 27 77 of the interim rule, which previously replaced the Subpart E requirements challenged in American Pub Transit Ass'n v. Lewis, *supra,* was itself replaced by a new Subpart E (§§ 27 81 through 27 119). The new Subpart E requirements were subsequently challenged by a number of organizations representing the disabled Americans Disabled For Accessible Pub Transp v. Dole, 676 F Supp. 635 (E.D. Pa. 1988), *affd sub nom* , Americans Disabled For Accessible Pub. Transp. v Skinner, 881 F 2d 1184 (3rd Cir 1989) (ADAPT) The lawsuit sought to invalidate the regulations on two grounds First, that by not mandating mainstreaming DOT had unlawfully permitted transit agencies to exclude disabled riders from "effective and meaningful access to federally-assisted transit systems " 881 F.2d at 1190 Second, that DOT had acted improperly by authorizing agencies to spend no more than 3 percent of their operating costs on providing service to the disabled Both the district and appeals courts rejected the mainstreaming argument, but found that DOT had acted arbitrarily and capriciously by establishing the 3-percent cap and the case was sent back to DOT with respect to the latter issue Notwithstanding, the new Subpart E requirements, including the cost-cap provision, remained in effect pending DOT's issuance of a revised regulation, 55 Fed Reg. 40765 (1990)

[57] 51 Fed Reg, *supra* at 19026 While the *"full service level"* requirements of § 27 95 fell equally on large and small operators alike, the extent of an operator's paperwork and program approval requirements differed depending on the operator's size. Most operators were subject to the more extensive requirements of §§ 27 83 and 27 85 For regulatory ease, a simpler system for demonstrating compliance was provided under § 27.91 for § 18 recipients and other recipients in nonurbanized areas with populations of 50,000 or less (even if they were receiving some funds under the other sections). *Id.* at 10910; *see also id* at 19021

[58] "Special service system" was defined in § 275 as "a transportation system specifically designed to serve the needs of persons who, by reason of handicap, are physically unable to use bus systems designed for use by the general public. Special service is characterized by the use of vehicles smaller than a standard transit bus which are usable by handicapped persons, demand-responsive service, point of origin to point of destination service, and flexible routing and scheduling" *Id.* at 19017

[59] "Mixed system" was defined in § 27.5 as "a transportation system that provides accessible bus service to handicapped persons in certain areas or during certain times and provides special service to handicapped persons in the other areas or during the other hours in which the transportation system operates " *Id* at 19017.

all the users for which the service is designed, and are maintained in proper operating condition."[60] Additionally, transit personnel were to be "trained and supervised so that they operate vehicles and equipment safely and properly and treat handicapped users of the service in a courteous and respectful way."[61] Operators were also required to provide "adequate assistance and information concerning the use of the service available to handicapped persons, including those with vision or hearing impairments."[62] Since all of the Subpart E requirements were prescribed as performance standards,[63] additional guidance for compliance was provided in a new appendix.[64]

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[60] *Id.* at 19018

[61] *Id.* at 19018.

[62] *Id.* at 19018-19019

[63] It is important to remember that only Subpart E's requirements governing mass transit were challenged in the APTA lawsuit. Subpart C, governing the accessibility of transportation programs in general, was not challenged and remained in effect throughout this period of time. Under § 27.67 of Subpart C, the construction of new fixed facilities or the alterations to existing ones were required to be done in accordance with the minimum standards of ANSI A117.1-1961 (1971) For point of clarity, DOT eliminated § 27.67's incorporation of the ANSI standards in this 1986 final rule, and replaced it with the incorporation of the "Uniform Federal Accessibility Standards" (UFAS), set forth as Appendix A to 41 C.F.R 101-19 6. At the same time, however, this change was merely cosmetic since the UFAS were themselves an incorporation of this ANSI standard.

[64] *Id.* at 19021. Among other things, the appendix advised:

> [Section 27 851 also requires that the vehicles and equipment used by recipient be capable of accommodating all users for which service is designed For example, a recipient which chose to comply with the rule by making its bus fleet accessible would have to ensure that the lifts, securement devices, etc on its buses could accommodate all types of wheelchairs in common use A lift which accommodates manual wheelchairs, but fails to accommodate common models of electric wheelchairs (including, for example, the increasingly popular three-wheeled designs), does not make the buses accessible. .
>
> The attitudes and skills of providers' personnel are one of the most significant factors for determining whether service for handicapped persons will be good or inadequate The recipient must ensure that all personnel who may deal with handicapped individuals (whether as drivers or as administrative personnel) know, as necessary, how to operate lifts and other equipment properly, know how to recognize and deal with different kinds of disabling conditions that the users may have, and deal with handicapped individuals respectfully and courteously It is the responsibility of the recipient to make sure that this training does take place, and that handicapped users of the service are not treated poorly as a result of inadequate training....
>
> [Section 27 85(c)] of this section is intended to make explicit that the regulation does not permit recipients to engage in disparate treatment of handicapped persons, with respect to transportation on the recipient's regular mass transit system This means, for example, that a recipient must permit a person using means of assistance such as dog guides or crutches to use its vehicles and services for the general public, if the person can do so. *Id* at 19024.

4. 49 C.F.R. Part 37--Transportation Services for Individuals With Disabilities

The final pre-ADA regulatory effort to address accessibility was initiated by DOT on March 26, 1990.[65] However, on July 20, 1990, prior to the issuance of a final rule, the ADA was enacted. According to DOT, the ADA's requirements were not much different from what DOT had proposed in March.[66]

Thus, on October 4, 1990, the final so-called "pre-ADA" rule was published.[67] At that time, DOT further advised that, to avoid confusion, the regulation of Part 27 would continue to be used for implementing Section 504, while a new 49 C.F.R. Part 37 was being created for the purpose of implementing the ADA. And, that it anticipated "that, when Part 37 is completed in 1991 with the addition of provisions concerning supplemental paratransit, undue burdens, rail service and other ADA requirements, the Department's existing Section 504 rule--49 C.F.R. Part 27--will be revised to require compliance with Part 37's requirements."[68]

Pending the issuance of final ADA regulations, this last of the pre-ADA rulemakings imposed interim accessibility standards for bus (Section 37.31) and rail vehicles (Section 37.57). In both instances, the interim standards were premised on the existing design standards issued previously by UMTA under Part 609.

In the case of buses, vehicles were required to: (i) meet the requirements of Sections 609.15(d)-(i) of the UMTA design standards,[69] (ii) be equipped with a lift or other level change mechanism and have sufficient

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[65] 55 Fed. Reg. 11120 (1990). This effort was initiated in response to the Third Circuit Court of Appeals 1989 ADAPT decision, voiding the 3 percent expenditure cap that DOT had previously authorized. (See footnote for further discussion of the ADAPT decision).

[66] 55 Fed Reg 40765

> Though the ADA, as enacted differs in a number of details from the bills to which the Department had referred in preparing the March 1990 NPRM, the basic policy outlines of the Act are very similar to the Department's NPRM. All new vehicles must be accessible, there must be paratransit for persons who cannot use accessible mainline service, and relief may be provided where the paratransit requirements would result in undue financial burdens.
>
> In view of these developments, the Department has decided to proceed at this time with a final rule to implement the portions of the ADA concerning the acquisition of accessible buses Although the NPRM was issued under the authority of Section 504 rather than the ADA (which had not been enacted at that time), the NPRM's provisions paralleled the policy decisions embodied in the ADA bills The Department believes that the comments on the March 1990 NPRM provisions are an adequate basis for making decisions on the issues involved in implementing the parallel provisions of the ADA

[67] *Id* at 40764

[68] *Id* at 40765

[69] 49 C F R. 609.15 "prescribes a series of requirements for buses (e g., concerning priority seating signs, interior handrails and stanchions, floor and step surfaces, lighting, fare collection, and destination and route signs)." *Id.* at 40774.

clearances to permit individuals using wheelchairs or other mobility devices to reach a securement location, and (iii) have at least one wheelchair securement location onboard.[70] Under the interim accessibility standards for rapid and light duty rail, vehicles were required to comply with the requirements of Sections 609.17 and 609.19.[71]

Since the October 4, 1990, Notice of Proposed Rule Making (NPRM) was the last regulatory initiative that DOT undertook prior to the ADA's effective date of January 26, 1992, we are at the crossroads of our discussion. Accordingly, we pause for the moment to summarize and draw some conclusions with respect to the "state of accessible transportation" and, more particularly, the duties for achieving accessibility on the eve of the ADA.

As a result of the pre-ADA statutes and regulations, at the time the ADA was enacted:

- The majority of transit agencies (i.e., those receiving federal funding) had been subject to accessibility requirements of some sort since 1970;
- At minimum, those agencies were required to make "special efforts" in planning and designing their systems;
- The special efforts that were required affected fixed facilities as well as vehicles (buses, rapid rail, and light rail);
- The special efforts were intended to benefit a population of transit users (handicapped and the elderly) that was more broadly defined than those covered under the ADA (disabled); and
- The accomplishment of this accessibility was being achieved through a combination of design and performance standards.

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[70] According to DOT, the one issue that generated more comments than any other during this particular rulemaking concerned the accessibility and securement of the "nonstandard or non-traditional wheelchairs or mobility devices" such as three-wheeled scooters, the unusually heavy electric wheelchairs, and devices with cambered or small wheels. *Id* at 40767 DOT concluded its discussion of the securement of wheelchairs and other mobility devices with the following observations:

> Many commenters, principally transit providers, provided a lengthy list of problems they perceived with three-wheeled scooters Many scooters are not readily able to be secured by some types of securement systems, and lack of attachment points to the frame to facilitate being tied down Some models are too light-duty to stand up to stresses of the kind involved in transit accidents Some scooters are too long for some lifts Breakage of the seat stem and instability resulting from a high center of gravity narrow wheelbase were mentioned by numerous commenters (presenters at the conference described the engineering basis for stability problems).
>
> A lack of armrests to stabilize sideward motion of the occupant was another problem with some models, and other commenters mentioned a concern about injury from the non-folding steering column on some models Some manufacturers of scooters, apparently in order to limit their liability, do not recommend or warrant their products for use on transit vehicles.
>
> Scooters are not the only problematic type of mobility device of concern to transit providers Device/passenger loads in the 600700 pound weight range are too great for some lifts, and the dimensions of some devices exceed lift dimensions. Devices other than scooters lack attachment points Some securement systems do not work well with lightweight chairs, or sports chairs with cambered wheels, power wheelchairs with four small wheels in the base, or some designs with pneumatic tires Gurneys don't fit, and there are also problems with small stroller-type chairs used for children with disabilities
>
> Having to deal with the problems of all the different sorts of mobility devices created substantial concern about liability, many transit providers said For the most part, these comments reflected fear of what could happen in the future; only two comments mentioned knowledge of actual accidents or lawsuits related to wheelchair issues (Several commenters mentioned a lack of accident data related to the transportation of wheelchairs and wheelchair users) On the other hand, a major transit authority that has carried three-wheeled scooters for several years mentioned that it had experienced no accidents or lawsuit problems, and said it was not greatly concerned about liability
>
> How do transit authorities now deal with the problems they see with carrying various sorts of non-standard mobility devices? First, a number of transit providers relate having found or devised securement systems that do a good job of restraining a variety of mobility devices, including scooters These were usually four-point belt systems or combined wheel clamp and belt systems
>
> Second, a number of transit authorities either refuse to carry scooters and other non-standard devices or carry the devices but require the passenger to transfer out of his or her own device to a vehicle seat This latter requirement typically is imposed when the transit provider believes it can successfully secure the mobility device but not the passenger while sitting in the device
>
> Based on both the comments and on a survey conducted by a presenter at the conference, it appears that a majority of transit providers (both fixed route and demand responsive) take one or another of these approaches They do so on grounds of safety (i.e, preventing injuries to wheelchair passenger and also, to some extent, other passengers) On the other hand, a smaller number of transit providers (including some with the longest and most successful history of providing accessible bus service) said they transported scooters and other devices regularly, did not require transfer in many cases, and had not experienced the problems about which other transit agencies expressed concern
>
> A number of disability group commenters and individuals with disabilities argued that transit authorities should not be able to impose restrictions of this kind (A few transit providers made similar comments as well) Such commenters supported the NPRM proposal on this point
>
> While not necessarily disagreeing with the idea that some devices could create problems in transit, these commenters argued that actual experience did not bear out the fears expressed by transit providers who imposed restrictions Some commenters related personal experiences of riding in transit vehicles safely "in panic stops" situations while not restrained. Some commenters mentioned that there were a number of risks to passengers from transferring out of their personal devices (e g, injury during transfer, lack of appropriate restraints in the vehicle seat, greater likelihood of injury in a vehicle seat than in a device designed for their needs) This may be particularly true for individuals who, because of the effects of their disability, have less strength or muscular control than other persons
>
> Other commenters, and participants in the conference, suggested that it was unreasonable, and discriminatory, to focus risks posed by disabled passengers For example, if a wheelchair user sitting in his seat is not personally restrained, the person may be thrown about the vehicle during a rapid deceleration A standing able-bodied passenger, who is permitted to be in the aisle without restraint, will likewise become mobile So will large packages, infants in the arms of parents, strollers, shopping carts and other items which transit authorities do not restrict...

[71] *Id* at 40764, 40781

C. Americans With Disabilities Act

1. The Statute

The ADA became law on July 26, 1990. It went into effect 2 years later on July 26, 1992. The requirements governing public transportation of the disabled by public entities[72] are addressed, in general, under Title II of the ADA. Title II is itself subdivided into two parts. With the exception of commuter and intercity rail, air transit, and school buses, all other forms of public transportation by public entities, including paratransit, are specifically addressed in Sections 221 through 231[73] (Part I of Title II). Commuter and intercity rail operations are governed under Part II, by Sections 241 through 246.[74] Transportation of the disabled by private entities[75] is governed in general under Title III. Public transportation that is provided by a private entity is specifically covered under Section 304.[76]

While some differences exist between the requirements that Titles II and III respectively impose on public and private entities providing public transportation services, insofar as they may affect the tort exposure of such transit operations the statutory differences are only slight.[77] Essentially, however, the ADA merely picked up and continued where the pre-ADA laws left off concerning the provision of accessible transport to the disabled through public transportation,[78] and many of the ADA's provisions derive from one or more of the pre-ADA laws.[79] The following requirements of the ADA are considered relevant to the discussion here.

Under Section 222 of Title II, public entities that operate fixed route services are prohibited from purchasing any new bus, rapid rail, or light rail vehicle that is not "readily accessible to and usable by individuals with disabilities, including individuals who use wheel-chairs."[80] Section 222 imposes a similar prohibition on such operators with respect to the remanufacture[81] of a, or the purchase or lease of a remanufactured, bus, rapid rail, or light rail vehicle. In this latter case, however, the requirement that the remanufactured vehicle must be "readily accessible" is qualified "to the maximum extent feasible."

Under Section 224 of Title II[82] (applicable to public entities) and Section 304 of Title III[83] (applicable to private entities providing public transportation services), operators of a demand-responsive system are prohibited, in general, from purchasing or leasing new vehicles, including rail passenger cars, that are not "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."[84] A similar prohibition is imposed on private entities providing public transportation services with respect to the accessibility of remanufactured rail passenger cars.[85]

Under Section 226 of Title II (applicable to public entities), new stations and other fixed facilities are required to be constructed so as to be "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."[86] In the case of existing facilities, Section 227 requires that, in general, alterations that "affect or could affect the usability of the facility or part thereof' be made so that "to the maximum extent feasible" the altered portion of the facility is "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."[87] A similar "readily accessible" requirement is imposed on private entities providing public transportation services under Section 303, with respect to the construction of new facilities, while in the case of existing facilities, Section 304 requires the removal of architectural barriers "where such removal is readily achievable" and, if not, requires accessibility by

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[72] For purposes of Title II of the ADA, *"public entity"* means "any State or local government," "any department, agency, special purpose district, or other instrumentality of a State or States, or local government," and "the National Railroad Passenger Corporation, and any commuter authority (as defined in Section 103(8) of the Rail Passenger Service Act)."

[73] 42 U S C. §§ 12141 through 12150

[74] 42 U S C. §§ 12161 through 12165.

[75] Title III defines *"private entity"* as "any entity other than a public entity "

[76] 42 U S.C. § 12184.

[77] For example, § 202 of Title II prohibits public transit agencies from discriminating against a "qualified individual with a disability," whereas § 304 prohibits private entities from discriminating against an "individual ..on the basis of disability." Likewise, § 202 requires public entities to provide paratransit services as a complement to their fixed route services, while no similar obligations are imposed on private entities under § 304.

[78] *See* 55 Fed. Reg. 40765 (1990).

[79] For example, the ADA's definition of *"disability,"* 42 U.S C § 12102, is the same as the Rehabilitation Act's, 29 U S C. § 706(7)(A) and (B)

[80] It should be noted that § 222's requirements are also made applicable to compliance with § 504 of the Rehabilitation Act, (42 U.S C. § 12142(c))

[81] The requirements concerning remanufactured vehicles applies to any vehicle whose remanufacture would extend the useful life of the vehicle for 5 or more years, *see* 42 U.S C § 12142(c)

[82] 42 U S.C. § 12144

[83] 42 U.S C § 12184.

[84] An exception from this general prohibition is provided under both sections, however, if the transit agency can demonstrate that its system "when viewed in its entirety" is providing service to disabled individuals equivalent to the level of service being provided to those without disabilities.

[85] 42 U.S.C. § 12184(b)(7). For purposes of this requirement, however, rail cars will not be considered to be "remanufactured" unless their useful life will be extended for 10 or more years.

[86] 42 U.S C § 12146.

[87] 42 U.S C § 12147.

"alternative methods where such methods are readily achievable."[88]

Finally, per Section 229 (applicable to public entities) and Section 306 (applicable to private entities performing public transportation services),[89] DOT was directed to issue regulations providing the specific details for operator compliance, which were to include vehicle and facility standards "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board" (ATBCB).

2. The ADA Regulations

DOT's proposed rule to implement the ADA was published on April 4, 1991.[90] It added new requirements to Part 37 (the new part set up by the October 4, 1990, final rule) and revised requirements of Part 27 (implementing Section 504 of the Rehabilitation Act), intending to make the accessibility duties imposed under both Parts 27 and 37 mutually consistent. Additionally, DOT incorporated the ATBCB's accessibility standards as an appendix to Part 37.[91] DOT's final rule implementing the ADA was published on September 6, 1991.[92]

While Part 37's requirements imposed a number of duties on operators, for purposes of this discussion some of the requirements are considered more relevant to this study and more problematic in the matter of potential tort exposure. The requirements of each, and the potential exposure to which they may subject operators, are discussed in detail in Section 3 of this report.

II. SURVEY--IMPACT OF THE AMERICANS WITH DISABILITIES ACT ON TORT LIABILITY

As part of this study, a targeted survey was conducted that requested transit agencies to provide general demographic information, as well as specific operational information concerning the agencies' experiences transporting disabled riders.[93] The survey was sent to 397 transit agencies, of which 45 agencies (11.3 percent) responded. In spite of the fact that scientific methods were not used for conducting the survey, the responses nonetheless provide some reasonable insight into the current and pre-ADA operations of transit agencies nationwide and, therefore, are beneficial. It must be pointed out, however, that the response to the survey varied significantly from agency to agency, either in terms of the amount of information given or the detail provided, and in many cases not every question was responded to by each agency.[94] This unfortunately prevented a more comprehensive comparison of the agencies' operations, and as a result it was necessary to use aggregate totals and simple or weighted averages in some cases. It should also be noted that many of the questions permitted respondents to check more than one applicable response, so that in a number of instances the number of responses to a particular question exceeds 45.

Appendix B, Tables 1, 2, and 3, contains a summary of the responses to the survey. The following highlights the response to the survey considered by the authors to be the most relevant to this study.

The communities being served: Over half (24) of the agencies that responded conduct their transit operations in urban centers with populations exceeding 200,000. In terms of the types of communities being served (i.e., "urban," "suburban," and/or "rural"), the responses indicated the following: 37 of the agencies operate exclusively or partially in an urbanized environment[95]; 26 agencies indicated a total or partial suburban operation (the range was from 10 percent to 100 percent of their total); and 12 agencies indicated that a portion of their operation was rural (from 1 percent to 50 percent of their total).

Terrain and climate: Twenty-three agencies reported serving communities with hilly terrain, and two reported that they conduct operations with mountainous terrain. Thirty-four agencies serve bus stops without sidewalks, and five agencies reported servicing rail stations without platforms.[96]

Forty-three agencies reported weather conditions that could have a significant effect on the accessibility

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[88] *See* 42 U.S.C § 12184(b), which incorporates by reference the requirements of § 302(b)(2)(A)(iv) and (iv).

[89] 42 U.S.C. §§ 12149 and 12186, respectively

[90] 56 Fed Reg. 13856 (1991)

[91] ATBCB's proposed accessibility guidelines for vehicles were published previously on March 20, 1991 *(Id* at 11824) As the ATCBC would later explain in its final guidelines *(Id.* at 45530-45531):

> Where possible and consistent with the ADA, the proposed guidelines were based on existing guidelines, regulations, and industry practices The proposed requirements for mobility aid accessibility were based on a set of advisory guidelines developed in 1986 under the sponsorship of [UMTA]: Guideline Specifications for Active Wheelchair Lifts; Guidelines Specifications for Passive Wheelchair Lifts; Guideline Specification for Wheelchair Ramps; and Guideline Specification for Wheelchair Securement Devices Some of the proposed requirements for lifts were also based on specifications developed by the State of California The proposed requirements for many of the other elements and features were based on regulations issued by DOT in 49 C F R Part 609 to implement the accessibility requirements of the Urban Mass Transportation Act of 1964, Federal-Aid Highway Act of 1973, and Section 504 of the Rehabilitation Act of 1973

[92] *Id* at 45584

[93] A copy of the questionnaire is provided as Appendix B to the report

[94] All the agencies that responded to the survey answered most of questions 1 through 29. However, the agencies were much less consistent in responding to questions 30 through 59.

[95] A range of 19 percent to 100 percent of total operation was indicated by the responses overall. Eleven agencies are operating exclusively in urban areas

[96] The information concerning the terrain was considered to be considerably relevant by the authors in light of Seattle Metro's experiences and DOT's response to the Seattle petition (see discussion in Part IV for further details).

of transit stops, particularly bus stops. Of these, nine agencies reported that they conduct operations in areas that experience heavy rainfall, 24 reported that they conduct operations in areas that experience freezing rain, and 12 reported that they conduct operations in areas with substantial accumulations of snow.[97]

The ridership being served: The agencies' responses indicate that the composition of their ridership has changed during the 5 years since the ADA was enacted. For the 43 agencies that provided financial information, the total number of one-way fare trips for *"all riders"* (disabled and nondisabled) decreased between 1990 and 1991 (from 2,740,949,487 in 1990 to 2,706,725,142 in 1991).[98] For the same period, however, the total number of one-way fare trips for "all disabled riders" conducted by the 43 agencies increased 7.7 percent (from 2.6 percent of the total in 1990 to 2.8 percent in 1991).[99] The responses also evidenced an increase in the number of "riders in wheelchairs" over the same 2-year period. In the latter case, the responses indicated that, during 1990, approximately one-quarter of 1 percent (0.0022) of all riders were wheelchair riders By the end of 1991, the total number of wheelchair riders for the 43 agencies[100] increased to over one-third of 1 percent (0.0034) of all riders, which represents a 55 percent increase in the number of wheelchair passengers during the calendar year in which the ADA was enacted, but before the ADA was in effect.[101]

Of the 43 agencies just discussed, only seven provided data on their number of "disabled riders," "riders in wheelchairs," and "all riders" for each of the years 1991-1995. In the case of these seven agencies, more dramatic increases in disabled and wheelchair riders were indicated. For "disabled riders," an increase of 25 percent (from 2.4 percent to 3 percent) was indicated during this 5-year period, and an even greater increase of 70 percent (from 0.1 percent to 0.17 percent) was indicated for "riders in wheelchairs" for the same 5-year period.

Thirty-five of the agencies responding to the survey provided information concerning the percentage of their annual capital and operating budgets being used to make reasonable accommodations for disabled passengers. These agencies indicated that between zero and "more than" 85 percent of their annual capital budget[102] and between zero and "more than" 90 percent of their "annual operating budget[103] is being allocated for reasonable accommodations for "disabled riders." The agency allocating the highest percentage of its annual capital and annual operating budgets (85 percent and 90 percent, respectively) is a paratransit agency. As an average, of the 35 agencies that responded, 8.6 percent of the annual capital budget and 9.7 percent of the annual operating budget are being expended for reasonable accommodations.[104]

Extent of service to the disabled prior to the ADA: Although 35 of the agencies advised that they were subject to the Rehabilitation Act of 1973 and were, therefore, providing transport services to the disabled community (in general) prior to the ADA,[105] 43 agencies responded that they were serving passengers in wheelchairs prior to the ADA. This suggests that agencies that were not otherwise subject to the pre-ADA accessibility mandates were nonetheless voluntarily undertaking to make transportation accessible to the disabled prior to the ADA.[106] Of the 43, 20 indicated that they were using adapted equipment, six were providing services with unadapted equipment, and 32 were providing services via paratransit.

Vehicles being used: Of the 45 agencies that responded to the survey overall, 34 are conducting transportation in more than one type of mass transit vehicle: 37 operate buses, five provide rapid rail service, six offer light rail service, and 32 provide paratransit services.[107]

With respect to current operations, 27 agencies reported that they are providing nonrail transit (nonparatransit) services to wheelchair passengers using

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[97] Two agencies did not respond to this question

[98] This number reflects a drop in ridership reported by 18 agencies Conversations with one large agency indicated that their loss in ridership was a result of the addition of dial-a-ride programs in their area We do not, however, have explanations from any of the other 17 agencies that reported a drop in ridership. Two agencies did not respond to this question

[99] The percentage increase in ridership for "all disabled riders" and for "riders in wheelchairs" were calculated using weighted averages The weighted averages were calculated using "total fares (one way) for all riders for the year 1991" for each agency Therefore the data from the three agencies that did not supply this information could not be figured in on the averages.

[100] Twenty-six of the responding agencies did not provide passenger data for 1990, and 22 did not provide data for 1991.

[101] This increase, after the ADA was enacted but before the ADA went into effect (Jan. 1992), may in part be due to the media coverage the ADA received during 1991

[102] Only one agency responded that it allocates nothing of the annual capital budget to reasonable accommodations. Six agencies did not answer this question

[103] Only one agency responded that it allocates nothing of the annual capital budget to reasonable accommodations Six agencies did not respond to this question.

[104] In response to questions 8 and 9, the agencies checked boxes with ranges of "nothing," "1-3 percent," "4-10 percent," "11-15 percent," and "more than __ percent." The median of each category was used to calculate these simple averages

[105] Six agencies were not subject to the Rehabilitation Act Three agencies did not respond to this question, and one agency responded that they came into existence after 1991.

[106] One agency did not respond to this question, and one agency responded that they came into existence after 1991

[107] Additionally, the following other vehicle services were also noted by the agencies, but are not addressed in our report: commuter rail (7), heavy-rail service (5), ferryboat (2), vanpools (1), automated guideway (1), incline (1), and water-shuttle (1)

either kneeling buses, lift-equipped buses, or both. Thirteen agencies reported that some percentage of their bus fleet is still unadapted and that the drivers of those buses have to assist disabled passengers in boarding[108] The percentage of the unadapted buses in each of the 13 fleets ranged from a low of 7.6 percent to as much as 73 percent.

Communications between agencies and passengers: One particular area the authors were asked to survey concerned the extent and methodologies being used by agencies to warn disabled passengers about a potentially dangerous transit condition such as the hazards at a particular bus stop, or a station elevator that is not working.

In general, the responses indicated an increase in the number of agencies communicating "dangerous riding conditions" to disabled riders, as well as in the methods being used, since implementation of the ADA. Thirty-two agencies reported that, prior to the ADA, their drivers had been giving verbal warnings to advise passengers of dangerous riding conditions. Thirty-five agencies responded that they have been providing verbal warnings since the ADA went into effect. However, one agency responded that it did not provide warnings to its passengers prior to nor since passage of the ADA.[109]

The survey responses indicated that a variety of methods are being used to communicate warnings. The two most prevalent methods being used are the posting of signs and broadcasting of public address announcements. Eight agencies post warning signs at exits, while eight provide public announcements at stations. In addition, the responses indicated that the following methods are also being used: physical assistance, announcement of significant stops, electronic bus destination system, communicating through the media, conductor, visual message boards, posting signs on elevators, rail guards, and a visual public address system.

The occurrence of injuries to disabled passengers: Notwithstanding the apparent increase in ridership among disabled riders in general, and wheelchair riders in particular, the responses were insufficient to support any conclusion as to an increase, decrease, or constancy in the *incidence* of injuries to disabled riders. However, the following information was indicated by the survey responses

Twenty-three agencies reported a total of 361 incidents involving injuries to disabled riders, in general, during the period 1991-1995, which occurred either during transit, at a transit stop, or while the passenger was boarding or alighting from the vehicle.[110] Specifically, 23 incidents of disabled riders having been injured at transit stops were reported; 40 incidents occurred while the passenger was getting off the vehicle; 24 incidents occurred while the passenger was getting on the vehicle; 51 incidents occurred while the passenger was riding while seated; 19 injuries happened while the passenger was riding and not seated; two injuries occurred while the passenger was on an escalator; and one after the passenger alighted from a fixed route bus.

In the case of wheelchair passengers, 145 incidents in which the rider was injured while riding in the wheelchair were reported, and 56 incidents were reported to have occurred while the passenger was "in wheelchair, at transit stop."

Of the 361 injury incidents that were reported overall, three agencies accounted for 224, or 62 percent. On further review of the three agencies, however, there is nothing similar about their operations in general, or so significantly different about any one of the three, to suggest why their particular experiences were out of line with the other responding agencies. The only similarity was that each serves a large urban community; otherwise, they are located in different regions of the country (East Coast, Midwest, and West Coast), and their weather and terrain also differ. While two agencies reported that most of their incidents occurred to passengers while riding in their wheelchairs (74 percent and 81 percent of total injuries), the third agency reported that the largest number of its incidents occurred during transit while the passenger was sitting on the vehicle seat (44 percent of total injuries).

Addressing law suits that were formally filed, 10 agencies reported being sued by a disabled rider for a "disability-related" tort, either under the Rehabilitation Act of 1973 or the ADA.[111] The responses, however, do not elaborate on how many times an agency was sued, or under which statute.[112] Thirty-one agencies indicated they have not been sued for any "disability related tort."[113]

For the period 1991 to 1995, the responses identified 86 instances in which a tort lawsuit was brought by a disabled passenger against a transit agency, of which 49 involved a wheelchair passenger. In five cases, the plaintiff was visually impaired, one case involved a passenger with Tourette's syndrome, two of the plaintiffs

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[108] Five agencies did not respond to this question.

[109] Six agencies did not respond to the question.

[110] Fourteen agencies reported that this data was not available Eight agencies did not respond to question.

[111] For purposes of the survey, *"disability-related tort"* refers to a "personal injury" and/or to "property damage" to any disabled rider that resulted from (or is alleged to have been the result of) the agency's transit service to the disabled community

[112] Discussions the authors had with a number of the agencies that responded to the survey indicated that it is not uncommon for agencies to settle cases involving an injury to a passenger, or damage to a passenger's property, before the matter becomes formalized by the filing of a lawsuit in court; the agencies indicated that this especially occurs in the case of a "minor" injury or property damage The survey responses, however, do not include information concerning such pre-lawsuit settlements, as the survey focused on the agencies' tort claims experience with respect to claims for which a lawsuit had been filed in court

[113] Four agencies did not respond to the question

were hearing impaired, one had a developmental disability, and in one case a service animal was involved.[114] In addition, one agency reported having been sued by a nondisabled rider as a result of the ADA; that case resulted from the plaintiffs foot having been run over by a wheelchair.[115]

The survey responses further indicated that one or more of the following legal theories have been alleged by plaintiffs in these actions: negligence of the agency (17 lawsuits), injury due to inadequate reasonable accommodation by the agency (six lawsuits), and intentional infliction of emotional harm (five lawsuits).[116]

The following were the defenses most often used by agencies: contributory negligence (16 lawsuits), assumption of the risk (six lawsuits), sovereign immunity (two lawsuits), and comparative negligence (one lawsuit).[117]

The use of waivers and releases: Only six agencies reported having ever used, or having attempted using, a release or waiver to limit their liability to "any rider or group of riders generally."[118] Five of these waivers were aimed at bicycle riders."[119] One agency reported having made an attempt to use a release of liability in its paratransit service; the waiver was withdrawn by the agency shortly after its implementation, however, when its legality was challenged.

Anecdotal problems being experienced by agencies: In addition to providing quantitative answers, a number of agencies supplied the following anecdotal descriptions of problems they have experienced in their transport of the disabled:"[120]

- "Excessive movement when wheelchair belted in"
- "Oversized wheelchair and scooters can't be strapped in because belt is too short"
- "Unique chairs and scooters which don't tie down"
- "Lack of cooperation by riders to properly use safety equipment"
- "Old, small wheelchair lifts"
- "Inadequate wheelchair securement devices"
- "Lift equipment unreliable"
- "Occasional problems boarding wheelchairs at unimproved bus stops"
- "Complaints and Workman's Compensation claims for driver injuries from assisting wheelchair riders on and off bus (primarily for the heavier passengers)"
- "Drivers assuming, unjustifiably, role of aide or attendant"
- "Lack of accessibly designed stops/Lack of sidewalks"
- "Inadequate sidewalk system and ice and snow prevents people using mobility devices from traveling to and from bus stops"
- "Lack of public announcement system on buses"
- "Inability to meet exploding demand for demandresponsive service"
- "Persons with disabilities not wanting to go from paratransit to fixed route"
- "Shrinking funding" (2)
- "Paratransit costs" (2)
- "Nothing unusual" (4)

Overall, the survey responses reflect *increases* in the ridership of "all disabled riders" in general[121] and "riders in wheelchairs" in particular[122] during the period 1992-1995 while the ridership of "all riders" decreased.[123] Such increases in the number of disabled and wheelchair riders over the 4 years following the ADA would tend to suggest that the ADA's transportation objectives are being achieved and, therefore, that continued increases in disabled and wheelchair ridership can be expected in the future.

The survey responses likewise denote *increases* in the number of tort claims filed by "all disabled riders" generally[124] and "riders in wheelchairs" in particular[125]

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[114] Ten agencies responded that they had not been sued by anyone with any disabilities Eighteen agencies did not respond.

[115] Thirty-six agencies reported that they had not been sued in this situation Four agencies did not respond

[116] Additionally, one agency reported being sued for an alleged civil rights/discrimination violation, two reported suits alleging product liability, one reported a suit alleging strict liability, and one agency reported that allegations of "dangerous condition/nuisance" and "statutory violation" had been included in the plaintiffs negligence action. Additionally, 10 agencies reported that the question was not applicable to them, four responded that the data was not available, and 10 agencies did not respond to the question at all.

[117] In addition, agencies also report pleading "not negligent," "in compliance with regulations," "reasonable accommodation," and "third party liable" as defenses Fifteen agencies responded that the question was "not applicable," and eight agencies did not respond at all.

[118] Thirty-eight agencies reported not having tried a waiver or release of liability

[119] In all of these cases, the riders were permitted to bring their bicycles onboard the vehicle in exchange for releasing the agency from liability and indemnifying the agency for damages caused by the bicycle to the vehicle or to another passenger

[120] Thirty agencies did not respond to this question

[121] According to those agencies that responded, the number of "all disabled riders" fare trips increased from 8,358,854 in 1992 to 16,839,291 in 1995.

[122] According to those agencies that responded, the number of "riders in wheelchairs" fare trips increased from 1,261,806 in 1992 to 1,498,395 in 1995

[123] According to those agencies that responded, the number of "all riders" fare trips decreased from 506,000,000 in 1992 to 268,000,000 in 1995. However, one agency that reported over 200 million fare trips for 1992 did not have any data available for 1995 Nonetheless, even if we were to add 200 million to the 1995 data, the data would still reflect a drop from 506,000,000 in 1992 to 468,000,000 in 1995

[124] According to those agencies that responded, the number of disability-related tort claims filed against them by "all disabled riders" increased between 1991 and 1995; the suits filed went from 11 in 1991 to eight in 1992, 12 in 1993, 17 in 1994, and 38 in 1995

during the same period of time (1992-1995). Therefore, ADA/tort issues are evaluated purely from a quantitative standpoint, i.e., that an operator becomes exposed to a greater likelihood of liability arising from incidents involving the disabled as the number of disabled riders increase (without regard to the substantive cause). The responses to the survey suggest that the increases experienced in the number of tort claims filed was attributable at least partially to the ADA and, therefore, that the overall potential for tort liability of operators has been increased by the ADA. However, as shown in Appendix B, Table III, the actual dollar amount of that exposure, based on survey responses, remains relatively small.

The authors cannot draw such a firm conclusion from these specific survey responses alone. Accordingly, the analysis must of necessity turn to a more substantive evaluation of the exposure of operators to potential tort liability by focusing on the specific duties of operators to disabled riders.

III. REQUIREMENTS IMPOSED ON TRANSIT OPERATORS BY THE AMERICANS WITH DISABILITIES ACT (ADA)

The obligation of a transit agency to its passengers generally, and to disabled passengers in particular, was established by the common law,[126] or in some cases by state statute,[127] long before the ADA or any of the pre-ADA statutes were enacted.

Under common law, a transit agency has been expected to provide the highest standard of care to all of its passengers, as stated in *Orr v. New Orleans Public Services Inc.*[128] (public carrier held to "the highest degree of vigilance, care and precaution for safety" of passengers). A transit agency has been expected to provide an additional measure of care in the case of a passenger whom the agency knew to be disabled ("carrier owes a greater duty to a handicapped person if the passenger's condition has been made known to the carrier or is readily apparent," *Washington Metropolitan Area Transit Authority v. Natalie Noel Reading, a Minor, Etc. et al.)*[129] The standard has generally been held to apply throughout the entirety of a passenger's journey, beginning from the time someone presents himself or herself at the designated time and place with the intent of becoming a passenger, and ending at the time the passenger alights from the vehicle. *Washington Metropolitan Area Transit Authority v. Natalie Noel Reading, a Minor, Etc. et al.*[130] (Common carrier's duty to exercise highest degree of care commences "when passenger presents himself to the conveyance of the carrier within the time and at the place fixed by the contract," *Sanchez v. Pacific Auto Stages et al.)*[131]

This standard has also been held to apply both to the operator's services (under the prevailing view, the general duty includes duty to render assistance to a passenger when it has been reasonably apparent that such assistance is required for the safety of that passenger, even if no special request for such assistance has been made, *See Yu v. New York, New Haven & Hartford Railroad Co.*[132]*)*, and to the stations and other facilities over which the carrier had control. *Ortiz v. Greyhound Corp.* [133]

In the case of the design of a transit facility or a vehicle design, transit agencies have been held to at least a duty of "reasonableness." *Sledd v. Washington Metropolitan Area Transit Authority.*[134] *Sledd* involved the relative safety of a platform-to-train gap at a subway station that had been designed between 1966 and 1968, in conformity with then-applicable industry custom, but which plaintiff alleged exceeded design standards subsequently published by the American Public Transit Association in 1979. Rejecting the plaintiffs argument, the court explained that an operator's duty is to design the platform so that it is safe for its intended use, which does not mean that a design has to be "accident proof."[135] The court further explained that the operator could provide evidence of its compliance with industry custom to demonstrate that its duty had been met, which the plaintiff could then rebut by showing that the design created an "unreasonable danger."[136]

While the singular objective of the pre-ADA statutes and regulations was to make transportation accessible to the disabled, the pre-ADA statutes and regulations nonetheless added further specificity and clarity to the standard of care imposed on transit agencies under

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[125] According to those agencies that responded, the number of disability-related tort claims filed against them by "riders on wheelchairs" increased between 1991 and 1995; the suits filed went from one in 1991 to six in 1992, two in 1993, 12 in 1994, and 27 in 1995

[126] *See, eg,* GA CODE ANN. § 46-9-132 (Michie 1992), which specifies that "[a] carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers but is not liable for injuries to them after having used such diligence " Additionally, see also the following state antidiscriminatory laws: ARIZ REV. STAT ANN § 41-1492 (1995), CAL CIV CODE § 54 1 (Deering 1996), MASS GEN. L. ch 272 §§ 98 and 98A (1995), Mo. REV. STAT § 213 065 (1996)

[127] As summarized in Part II of the report, the first of the pre-ADA legislation aimed at making transportation for the disabled accessible was not enacted until 1970 (see § 8 of the Urban Mass Transportation Assistance Act of 1970, amending § 16(a) of the Urban Mass Transit Act of 1964); for further details refer to Part II

[128] Orr, 349 So 2d 417, 419 (4th Cir. 1977)

[129] Washington Metro Area Transit Auth., 674 A 2d 44, 54 (Md Ct. Spec App 1996); *see also,* Paolone v Am Airlines, Inc, 706 F Supp. 11 (S D N.Y 1989), *cf,* Crear v Nat'l Fire & Marine Ins Co., 469 So. 2d 329 (La. App 1985)

[130] Washington Metro Area Transit Auth, 674 A 2d 44, 54 (Md Ct Spec App. 1996).

[131] Sanchez, 2 P 2d 845, 847 (Cal. Dist Ct App. 1931).

[132] Yu, 144 A 2d 56, 58 (Conn. 1958)

[133] Ortiz, 275 F 2d 770 (4th Cir. 1960)

[134] Sledd, 439 A.2d 464, 469 (D.C. App. 1981).

[135] *Id.*

[136] *Id.*

common law. For example, the American National Standard Specifications for Making Buildings and Facilities Accessible to, and Useable By, the Physically Handicapped (ANSI) A117.1 (1961) and part 609 standards governing facility and vehicle design provided further definition to the meaning of "reasonableness," and, among other things, were intended to minimize the safety risk to disabled passengers throughout transit. Although neither part 609 nor ANSI A117.1 (1961) was specifically aimed at minimizing the tort exposure of transit agencies, both nonetheless established specific criteria which, if complied with, should, in a practical sense, have helped agencies to minimize their tort exposure. *Cf Sledd v. Washington Metropolitan Area Transit Authority*,[137] *supra.*

As a civil rights statute,[138] the ADA did not specifically address the standard of care imposed on transit agencies under the common law. Neither does it appear that the ADA was intended to affect or otherwise influence the tort liability of transit agencies. Thus, the ADA merely consolidated, and in some cases clarified, the duties to which transit agencies were already subjected and as such did not specifically affect the potential tort liability of transit agencies. For example, during its pre-ADA rulemakings, there were a number of instances where the DOT identified potential safety hazards and/or service concerns where appropriate action on the part of transit agencies was recommended, and also instances where remedial measures were being taken by some transit agencies.[139] Such DOT commentaries should have alerted agencies to the existence of potential tort exposure sufficiently beforehand so that appropriate measures could be taken and the potential exposure minimized as much as possible."[140]

The authors conclude otherwise, however. In addition to the potential increase in liability due to the increase in disabled ridership, the ADA has slightly increased the tort exposure of transit agencies, notwithstanding that this particular consequence may not have been what either Congress or even the ADA's proponents may have intended. This increased exposure is essentially attributed to the specific and precise requirements imposed by implementing regulations.

The following is a discussion of the potential tort exposure of transit agencies as a result of the ADA, with particular focus given to those ADA regulations that the authors believe are likely to be the most problematic for transit agencies and the reasons why.[141]

A. Duty to Provide Nondiscriminatory Service

Under Section 37.5, operators (both public[142] and private entities engaged primarily in the business of transporting people) are prohibited from requiring a disabled individual to use a segregated service if that individual can, in fact, use the service that is provided to the general public. In terms of compliance, the dynamics of this requirement could be significant to the potential tort exposure of transit agencies. According to "Appendix D to Part 37--Construction and Interpretation of Provisions of 49 CFR Part 37" (Appendix D), an operator "may refuse service to someone who engages in violent, seriously disruptive, or illegal conduct."[143] However, "involuntary conduct related to a disability that may offend or annoy other persons, but which does not pose a direct threat, is not a basis for refusal of transportation."[144]

In the tort context, the latter admonition is of particular relevance to passengers with Tourette's syndrome (TS), a disability specifically mentioned by DOT in its description of this duty.[145] Tourette's syndrome is a neurological disorder characterized by repeated involuntary movements and uncontrollable vocal sounds. Individuals with TS will exhibit symptoms such as facial tics (e.g., eye blinking, nose twitching, or grimaces), head jerking, neck stretching, foot stamping, body twisting, or bending. They may also utter strange and unacceptable sounds (e.g., grunts, yelps, or barks), words, or phrases. They may shout obscenities (coprolalia) or constantly repeat the words of others (echolalia). They may also touch other people excessively, or repeat actions obsessively and unnecessarily. In cases of severe TS, they may demonstrate self-harming

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[137] *Id.*

[138] *See, eg,* former President Bush's comments when signing the ADA into law, at p 1 of the report.

[139] 40 Fed Reg. 8314 (1975). *See also* Part II, which discusses the need for agencies to address safety and emergency evacuation, employee training, and maintenance in their policies and practices and also the need for agency personnel to be trained in the proper operation of lifts and equipment and in recognizing and dealing with various kinds of disabilities.

[140] *Id.* at 8314.

[141] The order in which the regulatory requirements are discussed parallels the numerical sequence in which the requirements have been codified in the regulations and is not intended to rank the requirements according to the extent to which they may affect an agency's tort exposure Further, neither the survey conducted as part of this study nor the authors' own search of the case law disclosed any reported or unreported cases since the ADA in which any of the specific tort theories discussed have been raised Nonetheless, the analogous cases cited in the discussion below should demonstrate the problematic nature of such tort theories relative to the agencies' specific duties under the ADA. The case of Bacal v. SEPTA, discussed in Part III, § 3, infra, in the context of the operator's duty to keep lifts operative, demonstrates this further, and shows the creative lengths to which some plaintiffs' attorneys are willing to go on behalf of their clients.

[142] Although a number of public transit agencies provide their transportation services through third-parties under contract to the agency, under § 37 23 a public entity may not contract away its ADA responsibilities.

[143] Appendix D to Part 37, 56 Fed. Reg. 45734 (1991)

[144] *Id.* at 45734.

[145] *Id* at 45734.

behaviors such as lip or cheek biting and banging their head with hard objects.[146]

Because of the particular physical manifestations of TS, one tort to which there may be potential susceptibility in the case of TS passengers is the *intentional infliction of emotional harm* by drivers on passengers suffering from TS. Operators may be equally susceptible to this tort in the case of other disabilities as well because of a driver perceiving the disability (or its physical manifestations) as an intrusion into the driver's personal domain. For example, a driver may perceive that his/her bus is being unnecessarily delayed because a wheelchair rider is experiencing problems getting on or off of the bus and because of that may act provocatively toward that passenger.

It is important for agencies to recognize that the courts have gone to great lengths in the past to impose liability for this tort in the case of common carriers, even where the presence of a disability was not evident. However, the physical manifestations of a disability could easily exacerbate an existing potential in some drivers for this to occur. Language that to many might be considered as only a mild insult ("a big fat lady like you,"[147] *Haile v. New Orleans Railway & Light Co.)*[148] ("you're a lunatic," *Lipman v. Atlantic Coast R. Co.),*[149] has nonetheless caused common carriers to be liable for an intentional infliction of mental distress.

Most, if not all, of the potential exposure in these cases can be eliminated with effective sensitivity training and disability awareness, provided as part of the training agencies should be providing (and are required to provide) in accordance with the requirements of Section 37.173 (discussed below).

B. Duty to Maintain Accessibility Features

Under Section 37.161, operators[150] have a general duty to maintain all of the accessibility features of their vehicles[151] and facilities[152] in "operative condition." This obligation applies, but is not limited, to an operator's "lifts, and other means of access to vehicles, securement devices, elevators, signage and systems to facilitate communications with persons with impaired vision or hearing." Operators are further required to repair such features "promptly" when "damaged or out of order," and to "take reasonable steps to accommodate" disabled individuals "who would otherwise use the feature."

In explaining this requirement, Appendix D Part 37 advises that although:

> [T]he rule does not, and probably could not, state a time limit for making particular repairs, given the variety of circumstances involved. However, repairing accessible features must be made a *high priority* Allowing obstructions or out of order accessibility equipment to persist beyond a reasonable period of time would violate this Part, as would *mechanical failures due to improper or inadequate maintenance*[153] [Emphasis added.]

While Section 37.161(c) also provides that "isolated or temporary interruptions in *service or access* due to maintenance or repairs" [emphasis added] is not a violation of the ADA or the regulation, the operator is nonetheless under a duty to take reasonable steps to accommodate.[154]

In the context of this duty, the one tort that the authors believe may be more problematic than others is the intentional tort of false imprisonment. Operators need to exercise particular care in communicating when there are system breakdowns at their locations, to ensure that wheelchair riders do not unnecessarily become entrapped at a station where a broken elevator effectively deprives them of freedom of movement. Although another train may shortly arrive to transport those passengers to a station with an operative lift, it is also important to remember that the duration is not critical and that even a momentary loss[155] of one's freedom of locomotion can result in false imprisonment.

The case of *Abourezk v. New York Airline, Inc.*,[156] provides a good example of this. The plaintiff unsuccessfully sued for false imprisonment and intentional infliction

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[146] *See* U S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. No 95-2163, TOURETTE SYNDROME (1995).

[147] It should be noted that for purposes of employment disability under Title I of the ADA, "gross" or "severe" cases of obesity have been considered to be a disability by the EEOC *(see* 29 C.F R Part 1630 app. § 1630.2(j)), and by the courts, *see, e.g,* Cook v. Rhode Island Dept. of Mental Health Retardation and Hosp., 10 F 3d 17 (1st Cir 1993).

[148] Haile, 65 So 225 (La 1914)

[149] Lipman, 93 S E 714 (S C. 1917).

[150] Unless otherwise noted, *operators* refers to public transit agencies, as well as to private entities providing public transportation services

[151] Although the term is defined more broadly in § 37 3 of the regulations, for the limited purposes of this study, *vehicle* refers only to a *bus, light rail* vehicle, *rapid rail* vehicle, and to the vans and other vehicles used for performing paratransit. Under § 37 3, *light rail* means "a streetcar-type vehicle," other than an electrically-powered bus trolley, that is operated on city streets, or semi-exclusive or exclusive rights of way

Section 37 3 defines *"rapid rail"* as "a subway-type transit vehicle railway [that is] operated on exclusive private rights of way with high level platform stations "

[152] Section 375 of DOT's ADA regulations define *"facility"* broadly as "all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."

[153] 56 Fed Reg. 45753.

[154] For example, Appendix D advises that when an agency discovers that the elevator at one of its rail stations is out of order, an appropriate accommodation would be to "announce the problem at other stations to alert passengers and offer accessible shuttle bus service around the temporarily inaccessible station " *Id* at 45754

[155] Strain v. Irwin, 70 So 734 (Ala 1915).

[156] Abourezk, 705 F Supp. 656 (D D C. 1989), *affd* 859 F.2d 1456 (D C. Cir 1990).

of mental distress, which he claimed had been caused by the airline's refusal to allow him to deplane after it was announced that the plane would be delayed because of bad weather. *See also Bacal v. SEPTA,* which is discussed under the next duty, as a further example of the extent to which individuals will seek redress when *they* believe that they have been wronged.

Even though a transit agency might ultimately prevail in such a tort case, the time and expense of having to defend or settle it can be great, and, it would seem, are to be avoided as much as possible, especially if the means and ability to prevent such circumstances from arising in the first place are within the agency's control.

C. Duty of Public Entities to Keep Nonrail Vehicle Lifts Operative

As an adjunct to the general duty of transit agencies (under Section 37.161) to maintain their vehicles' accessibility features, Section 37.163 imposes a special duty on public transit agencies operating nonrail vehicles. Under Section 37.163, such operators must have a "system of regular and frequent maintenance checks of the lifts sufficient to determine if they are operative." According to Appendix D, daily inspections of vehicle lifts are not required; however, "[i]t would be a violation...for the entity to *neglect to check lifts regularly and frequently,* or to *exhibit a pattern of lift breakdowns in service* resulting in stranded passengers when the lifts had not been checked before the vehicle failed to provide required accessibility to passengers that day" [emphasis added].[157] A lift found to be inoperative during a maintenance check or during service must be reported to the operator "by the most immediate means" and the vehicle removed from service before the beginning of the next service day for repair. However, under a limited exception provided for under Section 37.163(e), if another vehicle (accessible or inaccessible) is not available to replace the one with the inoperative lift and the latter's removal would cause a reduction in overall service, the vehicle can continue to be operated for up to 5 days where the population of the service area is 50,000 or less, or for up to 3 days where the population of the service area exceeds 50,000. In the case of a fixed route system, however, a duty to promptly provide alternative service is imposed where there is an inoperative lift and the headway time to the next accessible vehicle will exceed 30 minutes. Appendix D advises "[t]his accommodation would be by a paratransit or other special vehicle that would pick up passengers with disabilities who cannot use the regular bus because its lift is inoperative."[158] Further, Appendix D warns that if disabled riders would have no way of knowing that an accessible bus would not be available to them, the operator has a duty to "actively provide alternative service."[159] This could be done, for example, by having an accessible vehicle "shadow" the inaccessible bus or "by having the bus driver call in the minute" the driver sees a passenger who needs to be picked up.[160]

While the case of *Bacal v. SEPTA*[161] involves solely paratransit services and is still in the preliminary stages of litigation, it nonetheless provides a good example of an agency's exposure under this duty, and an insight into how a plaintiff might pursue what is perceived to be an agency's noncompliance.[162]

As described by the court, the plaintiffs' discrimination complaint is based on the following alleged service failures: requests for service made a day in advance have not been met; requested rides have not been scheduled at the requested times; trips are "routinely excessively long"; vehicles are either routinely late, early, or never arrive for the scheduled pick-ups; and vehicles that arrive early routinely leave before the scheduled time and without having picked up the passenger.[163] The plaintiffs have further alleged that as a result of these service failures they "have had to waste countless hours scheduling SEPTA paratransit rides, waiting for rides, or taking excessively long rides," and have therefore "had their work, and personal lives disrupted, and, in some cases, have had to pay to use other means of transportation."[164]

D. Prohibition Against Denying Transport to a Rider Whose Mobility Device Cannot be Secured to the Operator's Satisfaction

Under Section 37.165(a), operators have a duty to transport "[a]ll common wheelchairs and their users."[165] While an operator may, in carrying out this duty, require that the wheelchair be parked in a designated securement area,[166] and may also require that the wheelchair be secured or restrained in order to ensure that the wheelchair stays in the secured area,[167] Section 37.165(d) expressly prohibits operators from denying

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[157] 56 Fed. Reg 45754

[158] *Id.*

[159] *Id.*

[160] *Id*

[161] Bacal, 4 A.D Cases 707 (E.D Pa 1995).

[162] Bacal involves a class action for injunction relief and compensatory damages alleged to arise from violations of the ADA (43 U S C $ 12143(a), and 49 C.F R. §§ 37 121-37.155), which was brought under 28 U S.C. § 1331. The particular decision that is cited concerns the certification of the class.

[163] Bacal, 4 A D Cases at 709 Additionally, the Bacal plaintiffs have also alleged that the fares for paratransit and fixed-route services are not comparable *Id.*

[164] *Id.*

[165] *"Common wheelchair"* is defined in § 37.3 to mean a "device which does not exceed 30 inches in width and 48 inches in length measured two inches above the ground, and does weigh more than 600 pounds when occupied"

[166] Section 37 165(b).

[167] Section 37.165(c)(3)

transportation to a rider whose wheelchair cannot be secured to the operator's satisfaction.

Whether an unsecured mobility device will present a danger to other passengers is a factual issue that will have to be determined by the driver on a case-by-case basis.[168] Clearly, the driver's demeanor toward the passenger, and the substance of the driver's communication, will directly affect the outcome. Where a strong perception of this need exists on the part of an agency or its driver, however, that agency may be more likely to be subject to a lawsuit for an intentional infliction of mental distress solely due to the "zeal" of a driver; *see, e.g., Laney v. City of Pittsburgh.*[169] Appropriate training in this area would therefore seem extremely important and it is recommended that it be made a fundamental part of an agency's driver training program (see discussion below).

E. Prohibition Against Requiring a Passenger to Transfer from His/Her Mobility Device to a Vehicle Seat

Under Section 37.165(e), an operator is permitted to ask, as well as recommended to ask, that a rider transfer from his/her wheelchair to a vehicle seat. According to Appendix D,[170] the operator is also authorized to give a rider information about the risks involved by not transferring. However, Section 37.165(e) expressly prohibits an operator from requiring the rider to transfer, and implicitly prohibits the operator from denying transport if the rider refuses.

To the extent that an agency believes that one or more mobility devices pose a risk to a rider if he/she remains on the device during transit, and the agency has reliable evidence to support its position, by providing that information to riders (even though the information is rejected) that operator may later be able to avail itself successfully of the defense of assumption of the risk,[171] contributory negligence,[172] or comparative negligence.[173] In this regard, the transit community would in general benefit from the establishment of a centralized database containing information on the experiences of agencies with specific lifts.

Fundamentally, however, agencies need to take care to avoid putting themselves in the situation where a driver's comments and actions directed at a disabled passenger could make possible a lawsuit for the intentional infliction of mental distress or false imprisonment.

With respect to the transfer issue, such a situation could potentially occur where a passenger consents to

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[168] Although there appears to be a fundamental belief by many operators that unsecured mobility devices onboard vehicles pose a danger to the other passengers, there do not appear to be any reported or unreported cases in this regard, and the study's survey does not suggest that this has been a problem for agencies

[169] Laney, 663 F. Supp 1097 (W D Pa 1987) In that case, the Port Authority of Allegheny County (PATCO) was sued for, among other things, intentional infliction of mental distress and false imprisonment when its driver confiscated the plaintiffs student pass after refusing to let him use the pass to board the bus, and the driver then refused to allow the plaintiff to get off the bus The driver was found to be liable for his actions but similar liability was not imposed on PATCO, due solely to the state's sovereign immunity law

[170] 56 Fed Reg. 45755

[171] Assumption of the risk is an absolute defense to an action for negligence Fogel at 681-682 and n 829 The assumption of a risk can arise either from an express agreement between the plaintiff and the defendant, or by implied acceptance of the risk. Buchan v U. S. Cycling Fed'n, Inc 277 Cal. Rptr 2d 887 (Cal Rptr. 2d 887 (Cal App. 1991) (negligence action by plaintiff who signed express release and assumption of the risk provisions assuming all risks inherent in a bicycle race was effectively barred.) But assumption of the risk "has been completely abolished as a defense" by some states, including New Jersey, New Hampshire, Hawaii, and Kentucky Prosser § 68 at 493-494 and n 39 and n 40 As a general rule, the assumption of the risk defense has not been recognized for common carriers Dieks v Alaska Air Transport, 109 F. Supp 695 (D Alaska 1953) ("[I]t is too well settled to warrant extended discussion that a passenger on a common carrier does not assume the risk of injury to himself or to his property due to the negligence of the carrier") Additionally, the assumption of the risk will not be available where the purpose of a statute enacted to benefit or protect plaintiff would be defeated by the assumption Scoggins v Jude, 419 A 2d 999 (D C App. 1980).

[172] Contributory negligence is "unreasonable conduct" on the part of the plaintiff, i e., "conduct which falls below the standard to which a plaintiff should conform for his [or her] own protection and [which] contributes to [the] plaintiffs injury," District of Columbia v Mitchell, 533 A 2d 629 (D C. 1987). Contributory negligence is a complete defense to an action of negligence in states that permit this defense (McElroy v. Boise Cascade, 632 S.W.2d 127 (Tenn App 1982) ("under Tennessee law, contributory negligence is ordinarily a complete bar to plaintiffs recovery"); Hoover v. Gray, 616 S.W 2d 867 (Mo App. 1981) (contributory negligence is bar to recovery only where it was proximate cause of plaintiffs injury and not where it was just a contributing cause) and as such it is seen by many modern courts as too severe. Scott v Alpha Beta Co, 163 Cal Rptr. 544 (Cal App 1980) (court upheld 40-60 percent apportionment of fault where plaintiffs trick knee gave way, rather than remanding case with instruction of contributory negligence because jury decision to be read in light most favorable to plaintiff) In evaluating whether the plaintiffs conduct was unreasonable, the law will take into consideration any relevant physical or mental infirmities the plaintiff may have Eden v. Conrail, 435 A 2d 556 (N J. 1981) (epileptic attack meant plaintiffs act was not volitional).

[173] The defense of comparative negligence apportions damages between the plaintiff and defendant, based on each one's degree of fault. However, not all states apply this defense in the same way, so it will be necessary to refer to the applicable state law to determine how the defense is applied As of 1988, some 44 states had adopted some general form of comparative negligence As of 1988, the remaining contributory negligence states were Alabama, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia. Prosser § 67 at 471 and n.30 Some states use pure comparative principles, while others have modified the defense so that it approaches principles of contributory negligence defense as the plaintiffs fault reaches a certain threshold level.

an agency's request to transfer but after doing so is prevented from transferring back when the driver fails or refuses to assist the passenger, thereby leaving the passenger, even if only momentarily, deprived of his/her freedom of movement.[174] In *Griffin v. Clark*,[175] for example, false imprisonment was found to have occurred where the defendant removed plaintiffs luggage from a train and thereby effectively deprived her of the most expedient means of travel. See, also, *Warren v. Parrish*[176] (citing *Griffin*, but finding that a repair shop's refusal to return property to owner for 3 hours was not false imprisonment when owner was free to leave shop's premises), and *Burrow v. K-Mart Corporation*[177] (issue of whether restraint of plaintiffs property constituted false imprisonment was for jury to decide).

F. Duty to Assist Disabled Passengers in the Use of the Operators' Securement Systems, Ramps, and Lifts

Under Section 37.165(f), operators have a duty to assist disabled passengers in the use of the vehicle's securement systems, ramps, and lifts. Appendix D provides the following guidance concerning this duty:[178]

> The entity's personnel have an obligation to ensure that a passenger with a disability is able to take advantage of the accessibility and *safety* features on vehicles [emphasis added] Consequently, the driver or other personnel must provide assistance with the use of lifts, ramps, and securement devices For example, the driver must deploy the lift properly and safely. If the passenger cannot do so independently, the driver must assist the passenger with using the securement device. On a vehicle which uses a ramp for entry, the driver may have to assist in pushing a manual wheelchair up the ramp (particularly where the ramp slope is relatively steep) All these actions may involve a driver leaving his seat Even in entities whose drivers traditionally do not leave their seats *(eg*, because of labor-management agreements or company rules), this assistance must be provided This rule overrides any requirements to the contrary
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> Wheelchair users--especially those using electric wheelchairs often have preference for entering a lift platform and a vehicle in a particular direction (e g, backing on or going on frontward). Except where the only way of successfully maneuvering a device onto a vehicle or into its securement area, or an *overriding safety concern* (i.e., a direct threat) requires one way of doing this or another, the transit provider must respect the passenger's preference *We note that most electronic wheelchairs are usually not equipped with rearview mirrors, and that many persons who use them are not able to rotate their heads sufficiently to see behind.* When an electric chair must back up a considerable distance, this can have unfortunate results for other people's toes [179]

Although Section 37.165(f) would appear merely to codify the common law duty of transit agencies to exercise the highest standard of care on behalf of their passengers, one consequence is that a driver's failure to provide the requisite assistance could be held to be negligence *per se*,[180] or subject an agency to a presumption of negligence,[181] for any injuries or damages that the failure may cause. On the other hand, by exercising the care that Section 37.165 requires, an agency may later be provided with the opportunity to avail itself of the defense of assumption of the risk, contributory negligence, or comparative negligence.[182]

At a minimum, the inclusion of training on an agency's policies and the procedures that drivers should use in implementing this provision will be extremely important in mitigating the exposure that this duty may impose.

G. Right of Standees to Use Lifts

Under Section 37.165(g), operators have a duty to permit disabled riders who do not require the use of a wheelchair, including standees, to use the vehicle's lifts. As Appendix D further explains: "People using canes or walkers and other standees who do not use wheelchairs but have difficulty using steps (e.g., an elderly person who can walk on a plane without use of a mobility aid but cannot raise his or her legs sufficiently

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[174] In Griffin v Clark, 42 P.2d 297 (Idaho 1935), for example, false imprisonment was found to have occurred where the defendant removed plaintiffs luggage from a train and thereby effectively deprived her of the most expedient means of travel A further extension of the Griffin case might also support false imprisonment where a wheelchair rider is denied access to a bus because of, for example, his/her refusal beforehand to agree to transfer as a condition of travel, or because the operator's driver refuses to permit the rider's service animal to accompany him/her

[175] Griffin, 42 P 2d 297 (Idaho 1935).

[176] Warren, 436 S W 2d 670, 672 (Mo. 1969).

[177] Burrow, 304 S E 2d 460, 464-465 (Ga. App. 1983).

[178] 56 Fed. Reg 45755.

[179] In the preamble to the Sept 26, 1991, final rule, DOT noted that some transit agencies prohibited their drivers from leaving their seat to assist a passenger for a variety of reasons, including a concern over liability 56 Fed Reg 45617

[180] Some courts view a violation of, or noncompliance with, a statutory or regulatory requirement as negligence *per se* (in itself); *it* is considered conclusive evidence of the agency's negligence However, the jury or court would still have an opportunity to determine whether there is a causal connection between the violation and the harm experienced by plaintiff, and the appropriateness of the transit agency's defenses.

[181] Some courts view a violation of a statutory or regulatory requirement merely as creating a *presumption of negligence*, which the defendant then has an opportunity to rebut by showing that its actions were nonetheless justified. Sheehan v Nims, 75 F.2d 293, 294 (2d Cir. 1935) (In Vermont "a violation of the statute. gives rise to a rebuttable presumption of negligence which may be overcome by proof of the attendant circumstances if they are sufficient to persuade the jury that a reasonable and prudent driver would have acted as did the person whose conduct is in question.").

[182] *See* footnotes 169-171 for a more detailed discussion of these defenses

to climb bus steps) must also be permitted to use the lift on request."[183] Although some transit agencies opposed the adoption of this requirement during the 1991 rulemaking for safety reasons, DOT was unpersuaded and adopted the requirement, pointing out that the "lifts meeting the [ATCBC's] standards will have handrails."[184] However, in 1993, an exception to this blanket requirement was made by DOT for one particular model of lift, the use of which was demonstrated to be unsafe for standees:

> The information cited in the comment--which is consistent with the Department's information about this lift--provides a reasonable basis for believing that its operation may be particularly hazardous to standees. For this reason, the final rule will permit transit providers who operate buses having this lift model to deny its use to standees (who would, of course, be eligible for paratransit as a result). The transit provider would notify passengers (e g, via signage on affected buses) that this particular lift was not available to standees.[185]

DOT's past rulemakings in this regard evidence the strong concerns that agencies have about this requirement vis-a-vis the agencies' potential liability to a standee. With the exception of the front-door "arcing" lift manufactured by EEC, Inc., (which DOT addressed in its 1993 rulemaking, *supra),* no further problems in this area have been evidenced, either by this report's survey or a search of reported case law. Nonetheless, the 1993 rulemaking demonstrates that certain models of lifts can present a safety hazard if used by standees. Further, the transit community, in general, would benefit from a centralized database on the agencies' experiences with specific lifts, as was suggested above with respect to mobility devices.

The use of lifts by standees is one area where an operator may be able to avail itself of the assumption of risk, contributory negligence, or comparative negligence defenses. In order to take advantage of these defenses, however, the operator would need to ensure that the standee is fully aware of the risk, has accepted the risk, and has also been fully informed of what he/she needs to do to avoid being hurt while using the lift. For further discussion in this regard, refer to the section of this report concerning waivers and other remedial strategies. At a minimum, however, driver training in this area, as well as effective communication with each passenger, are essential.

H. Duty to Announce Stops

Under Sections 37.167(a) through (c), operators have a duty to announce stops. For fixed route systems, this includes a duty to announce stops requested by a rider, transfer points, destinations, and "major" intersections, and at sufficient intervals along the route to orient riders with vision impairments and other disabilities of their location. In the latter two instances, the rule is silent on what a "major" intersection is, or what will be considered sufficient for purposes of the periodic announcements. As Appendix D explains in the case of major intersections, "[t]his is a judgmental matter best left to the local planning process."[186]

A driver's failure to announce stops, especially when requested by the rider, could be particularly problematic in the case of those disabled passengers for whom distance and time may be more critical and not merely an inconvenience.

I. Right of a Disabled Passenger to Be Accompanied by a Service Animal

Under Section 37.165(d), transit operators have a duty to permit disabled riders to be accompanied by their service animal. As Appendix D explains:

> Service animals shall always be permitted to accompany their users in any private or public transportation vehicle or facility. One of the most common misunderstandings about service animals is that they are limited to being guide dogs for persons with visual impairments Dogs are trained to assist people with a wide variety of disabilities, including with hearing and mobility impairments Other animals (e.g, monkeys) are sometimes used as service animals as well In any of these situations, the entity must permit the service animal to accompany its user.[187]

This duty has the potential to be problematic for operators in several ways. Although the use of guide dogs has for many years been quite common, there nonetheless continue to be instances in which a disabled rider will be refused service because of a service animal, even in the case of a guide dog.

For example, the recent case of *O'Brien v. Werner Bus Lines*[188] involved a suit by a blind couple who were denied transit by the driver of a tour bus because of the couple's dog. While the case resulted in a judgment in favor of the operator,[189] it shows how even guide dogs continue to be an exposure problem, and it further suggests that the more exotic service animals may be even more problematic to agencies.

The duty to service animals is also problematic regarding the intentional infliction of mental distress,

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[183] 56 Fed Reg 45755.

[184] *Id.* at 45618

[185] 58 Fed. Reg. 63092, at 63097 (Nov. 30, 1993) The particular lift involved was model 141 manufactured by EEC, Inc., a front-door "arcing" lift

[186] 56 Fed. Reg. 45755

[187] *Id.*

[188] O'Brien, 5 A D. Cases 444 (E.D. Pa. 1996).

[189] The O'Brien case is also interesting because in the authors' (as well as it would seem the court's) opinion, the case ineffectively sought injunctive relief under the ADA (which does not provide for monetary damages), rather than for compensatory damages in tort under state law. Aided by the O'Brien case, plaintiff attorneys may be wiser the next time

particularly in the case of the more exotic animals.[190] Drivers and passengers alike may have strong reactions when an unusual service animal is brought onto a vehicle. To best ensure against this exposure, therefore, an agency's training program should not overlook the service animal issue.

J. Duty to Provide Disabled Riders with Sufficient Time to Board and Exit Vehicles

Under Section 37.165(g), operators are prohibited from preventing a rider who requires the use of "a lift to disembark at *any designated stop,* unless the lift cannot be deployed, or *temporaly conditions* at the stop," which are beyond the operator's control, prevent *all* passengers from using the stop. Appendix D further explains that this would cover situations where the lift cannot be deployed without being damaged, and such temporary conditions as construction, an accident, or a landslide, which make the stop unsafe for any passenger to get on or off the vehicle.[191]

This may be one of the more problematic duties for transit agencies, not for the reason that it is difficult to comply with, but rather because it is a duty that can easily be abused by drivers. At a minimum, because the duty arises under regulation, an agency's failure to comply could be held to be negligence *per se,* or subject an agency to a presumption of negligence for any injuries or damages that the failure may cause. Further, the agency will also be susceptible to punitive damages if the plaintiff can prove that the agency's driver acted willfully or with reckless disregard.

K. Duty to Train Drivers

Under Section 37.173, operators are required to ensure that their employees are "trained to proficiency, as appropriate to their duties, so that they can *operate vehicles and equipment safely* and properly assist and *treat* individuals with disabilities who use the service in a courteous way" [emphasis supplied]. Appendix D further emphasized that "[a] well-trained workforce is essential in ensuring that the accessibility related equipment and accommodations required by the ADA actually result in the delivery of good transportation to individuals with disabilities.[192] Appendix D also stated that a "bus driver must know how to operate lifts and securement devices properly [, and that a] mechanic who works on lifts must know how to maintain them."[193] Further, such training is required to address a driver's technical tasks as well as human relations:

> Employees obviously need to know how to run equipment the right way If an employee will be assisting wheelchair users in transferring from a wheelchair to a vehicle seat, the employee needs training in how to do this safely But every public contact employee also has to understand the necessity of treating individuals with disabilities courteously and respectfully, and the details of what that involves.
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> …
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> All individuals with disabilities, of course, are not alike. The appropriate ways one deals with persons with various kinds of disabilities (e g, mobility, vision, hearing, or mental impairments) are likely to differ and, while no one expects bus drivers to be trained as disability specialists, recognizing relevant differences and responding to them appropriately is extremely significant.[194]

Unlike the other duties imposed by the ADA regulations, wherein noncompliance may directly expose an operator to liability, the exposure under this section is entirely indirect and, as has been discussed above, will manifest itself through an agency's acts or omissions that are associated with some other duty. It is for this reason that the duty to train employees takes on added significance: the greater an agency's effort to provide training, and the more successful an agency is in ensuring that its drivers and other personnel are properly and fully trained, the lesser an agency's liability exposure should be.[195] Therefore, in addition to the elements of training that the authors have suggested should be added to an agency's baseline ADA training program, periodic retraining of drivers is also recommended.[196]

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[190] Although it did not result in any liability to the carrier, one tour bus operator has advised the authors of an incident involving a passenger who had a mental disability that could only be controlled when he was accompanied by his pet python.

[191] 56 Fed Reg. 45755 The prohibition of § 37 165(g) was revisited by DOT in 1994, as a result of a petition filed by Seattle Metro Through its petition, Seattle sought to amend the provision in order to allow transit providers to refuse service to wheelchair passengers at stops that did not meet the ATCBC's standards, and a rulemaking to that effect was published on July 21, 1994 59 Fed. Reg. 37208 (1994). However, on May 31, 1996, DOT announced that it did not have a basis to grant Seattle the relief it had requested See 61 Fed Reg 25409, at 25410-25411 (1996). For further discussion of the Seattle rulemaking, refer to Part IV of this report.

[192] 56 Fed Reg 45756

[193] *Id*

[194] *Id*

[195] The informal interviews that the authors conducted with several advocacy groups for the disabled as part of the study confirmed the key role of training. The National Easter Seal Society's Project ACTION, in particular, observed that most of the problems which it was seeing could be attributed to deficiencies in training

[196] The value of periodic retraining has been acknowledged by one transit agency in particular, which has been enjoined from denying a passenger with Tourette's syndrome from using its lifts to enter the bus The agency attributes the underlying cause of the problem to its drivers, who, the agency conceded, had not been made properly aware of the relevant facts concerning this passenger due to substantial turnover

IV. WAIVERS AND OTHER REMEDIAL STRATEGIES

The authors considered the viability of waivers under the ADA. More specifically, to what extent does the ADA permit transit agencies to make transport to a disabled passenger who rejects the use of a seat belt or other restraint, or who disembarks at an inaccessible or unsafe stop, conditional upon the execution of a waiver or release of liability by that rider, when the execution of such a waiver or release would not be required from nondisabled passengers under the same circumstances? This question, in effect, raises two issues for consideration here. The first is fundamental and concerns whether waivers, in general, would be permitted under the ADA, and, if so, under what circumstances. The second issue looks more specifically at the circumstances under which a waiver of liability might be upheld. Each issue is addressed below.

A. ADA and Waivers in General

To date, the fundamental legality of waivers under the ADA has not yet been addressed by the courts. Accordingly, the authors have looked to similar statutes for the standards governing waivers asserted under those laws. In this case, consideration has been given to the use and validity of waivers under two other antidiscrimination laws, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA). Those laws are sufficiently analogous to the ADA so as to provide helpful insight and a likely scenario for how a waiver might be construed by the courts and DOT under the ADA.

The seminal case with respect to waivers arising under Title VII is *Alexander v. Gardner-Denver Co.*[197] *(Gardner-Denver)*, wherein the Supreme Court articulated two requirements for a waiver issued under that statute, holding that, while "an employee may waive his cause of action under Title VII *as part of a voluntary settlement,"*[198] [emphasis supplied][199] "there can be *no prospective waiver* of an employee's rights under Title VII" [emphasis supplied].[200]

The crucial issue here is the scope of the rights conferred by the ADA. In other words, whether the ADA merely conferred right of transit access (i.e., a "right to ride"), or conferred broader rights, including the right to pursue a cause of action for injuries sustained by a passenger during transit.

In this regard, the scope of the transit rights conferred by the ADA must be considered within the boundaries of the transit requirements and guidance articulated by the DOT. The DOT has said that "the ADA is a nondiscrimination statute, intended to ensure...that people with disabilities have access to transportation services."[201] According to DOT, this means, among other things, that:

> a proposed action which treats a disability-based class of persons differently from the rest of the public cannot be accepted merely because it may assuage a party's good faith concerns about safety This is the position that the Department has taken consistently as it has developed and implemented its regulations. [Emphasis added.][202]

While DOT has yet to address the validity of waivers under the ADA specifically, the foregoing would strongly suggest that DOT would be inclined in favor of the broader set of rights under the ADA and would therefore hold that, in order to be valid under the ADA, any such waiver would have to be required of all riders and not limited solely to those with a disability.

Thus, if the *Gardner-Denver* test for Title VII were also held by the courts to apply to ADA waivers, three conditions would have to be met in order for a waiver to pass muster under the ADA. First, following DOT's admonition, the execution of such a waiver would have to be required of all riders, not disabled riders only.

Second, applying the Title VII analysis, such a waiver could not require the rider to give up his/her right to future transport or otherwise condition the right to future transport upon the rider's execution of a waiver at the current time. In other words, it appears that waivers would have to be executed for each trip rather than on a one-time basis.

Third, the waiver must be part of a voluntary settlement.

Putting aside for the moment Title VII's prohibition against the use of prospective waivers and its requirement that the waiver be entered as part of a settlement, it is almost a certainty that any waiver that would be required would, at a minimum, have to be voluntary. In this regard, the Supreme Court has instructed that "voluntary" means both "voluntary *and knowing"* [emphasis added]. *Gardner-Denver, supra.*[203]

The determination of whether a "voluntary and knowing" waiver has been executed has been analyzed using either the traditional contract principles of mistake, fraud, or duress, *Pilon v. University of Minnesota,*[204] or by examining the totality of the circumstances, *Mosely v. St. Louis S.W. Ry.*[205] (The party executing the waiver has inherent right to have waiver reviewed by counsel), *United States v. Trucking Employers, Inc.*[206] (Employee's waiver of right to seek back pay in a private Title VII action in return for monetary compensation will be valid if freely executed without

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[197] Gardner-Denver, 415 U S 36 (1974).

[198] The issue before the court was whether a collective bargaining agreement's requirement that all differences between the company and union, including grievances over an employee's discharge, be submitted to binding arbitration constituted a valid waiver of the employee's rights under Title VII

[199] Gardner-Denver, 415 U.S at 52.

[200] *Id* at 51

[201] 61 Fed. Reg 25411, quoting 58 Fed. Reg. 63096 (1993).

[202] *Id.* at 25410

[203] Gardner-Denver, 415 U.S. at 52 n.15.

[204] Pilon, 710 F 2d 466 (8th Cir 1983).

[205] Mosely, 634 F 2d 942, 946-47 (5th Cir.), *cert denied,* 452 U S. 906 (1981)

[206] Trucking Employers, Inc, 561 F.2d 313 (D.C Cir. 1977).

deception or coercion and with full understanding of rights being waived. However, a waiver for a future discriminatory act is barred). Under either analysis, however, the burden imposed on the person seeking the waiver to prove the voluntary and knowing nature of the waiver is considerable, and it is extremely difficult to imagine the specific circumstances under which such proof could be successfully proffered by an agency.

In the case of age discrimination waivers, an even more exacting statutory standard for determining whether a waiver is "knowing and voluntary" has been prescribed. To be a valid waiver under ADEA, 29 U.S.C. § 626(f) requires that the following requirements must at a minimum be met:

1. The waiver must be "part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate";

2. "the waiver must specifically refer to rights or claims arising under" ADEA;

3. "the individual does not waive rights or claims that may arise after the date the waiver is executed";

4. "the individual waives rights or claims only in exchange for consideration in addition to the value to which the individual is already entitled";

5. "the individual is advised in writing to consult with an attorney prior to executing the waiver";

6. "the individual is given a period of at least 21 days within which to consider the agreement";[207] and

7. "the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the expiration period has ended."

Clearly, having to comply with either the Title VII or ADEA standards would seem to pose almost insurmountable logistical burdens for transit agencies. The ADA, like Title VII and ADEA, is an antidiscriminatory statute While no court has been asked, or has yet held, that the waiver requirements of Title VII or ADEA apply to the ADA, there would seem to be no logical basis upon which to conclude that a different path would be chosen in the case of the ADA than has previously been followed in the case of those other protected classes.

Even assuming that such logistical obstacles can be overcome, in order to be viable the liability waiver would still have to withstand legal scrutiny under the applicable state tort law, as the ADA does not preempt the application of state tort law.

B. Waiver of Liability

As a general rule, waivers designed to limit liability for negligence, i.e., exculpatory clauses, have been closely scrutinized. And historically, such efforts by common carriers, in particular, have generally been held to be against public policy.

> There is a close historical relationship between the duty of common carriers, public warehousemen, innkeepers, etc to give reasonable service to all persons who apply, and the refusal of courts to permit such businesses to obtain exemption from liability for negligence. [Citation omitted] This relationship has led occasional courts and writers to assert that exculpatory contracts are invalid only if the seller has a duty of public service. [Citation omitted.] *Tunkl v. The Regents of the University of California,*[208] *(Tunkl).*

In *Tunkl*, the Supreme Court of California laid out a six-factor test[209] for determining whether an exculpatory clause would violate public policy. Constructed from a "rough outline" of the various types of exculpatory transactions that other courts were holding to be invalid for public policy reasons,[210] an exculpatory clause could be invalidated for exhibiting some or all of the following characteristics:[211]

1. The transaction involves a type of business generally thought suitable for public regulation;

2. The party seeking the exculpation (the seller) is engaged in a service of great importance to the public, which is often a matter of practical necessity for some members of the public;

3. The seller holds itself out as willing to provide the service to any member of the public who seeks it, or at least for any member coming within certain established standards;

4. As a result of the essential nature of the service, the seller possesses a decisive economic advantage in bargaining strength against any member of the public who seeks the service;

5. In exercising the superior bargaining strength, the seller confronts the public with a standardized adhesion contract of exculpation, and makes no provision

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[207] A grace period is extended to at least 45 days in the case of waivers requested in connection with an exit incentive or other employment termination program that is offered to a group or class of employees. Given that the ADA waiver would most likely be considered as having been given to a "group or class" of individuals, it is not beyond reason to suggest that a court construing an ADA waiver under the ADEA standards might be somewhat inclined to apply the 45-day rule as opposed to the 7-day one.

[208] Tunkl, 383 P 2d 441, 445 n 12 (1963).

[209] *Id.* at 444-446

[210] *Id* at 443.

[211] Tunkl involved the validity of a pre-admission hospital liability release exculpating the hospital from all liability to a patient for the negligent or wrongful acts or omissions of the hospital's employees. While all six of the criteria were present in Tunkl, the court made clear that the presence of all six criteria would not be required to invalidate a waiver. *Id.* at 445. *See also* Wagenblast v. Odessa School District No 105-157-166J, 758 P.2d 968 (Wash 1988)

whereby a purchaser may pay additional reasonable fees and obtain protection against negligence;[212]

6. As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

While *Tunkl* is not the sole test being applied by courts to evaluate the validity of exculpatory clauses,[213] its criteria have been followed in a number of states. *See, e.g., Morgan v. South Cent. Bell Tel. Co.*[214] (invalidating telephone company's exculpatory clause); *Municipality of Anchorage v. Locker*[215] (exculpatory clause in telephone company's yellow page's contract invalidated); *Brooks v. Timberline Tours, Inc.*[216] (release exculpating snowmobile tour company from liability upheld); *Porubiansky v. Emory Univ.*[217] (exculpatory clause in dentistry clinic contract invalidated); *LaFrenz v. Lake County Fair Bd.*[218] (release upheld in case of demolition derby); *Baker v. Roy Haas Associates*[219] (exculpatory clause upheld in case of home inspection service); *Schrier v. Beltway Alarm Co.*[220] (limitation of liability clause upheld in case of burglar alarm business); *Schlobohm v. Spa Petite, Inc.*[221] (exculpatory clause limiting health spa's liability upheld); *Lynch v. Santa Fe Nat'l Bank*[222] (exculpatory clause upheld in case of escrow agent's services); *Lee v. Consolidated Edison Co.*[223] (public utility's exculpatory tariff clause invalidated); *Olson v. Molzen*[224] (exculpatory clause required as condition of abortion invalidated).

A case that is more closely aligned with both the circumstances confronting transit agencies and also the potential injury factors at which the proposed transit waiver would be aimed is *Wagenblast v. Odessa School District No. 105--157-166J*[225] (Wagenblast). Wagenblast involved the validity of liability releases that the school districts of Odessa and Seattle were requiring students and their parents to sign as a condition of a student's participation in interscholastic athletic activities; the releases included language that was intended to serve as an express assumption of the risks by the students and their parents.[226]

Applying the criteria set forth in *Tunkl*, the Supreme Court of Washington held the releases to be invalidated, stating as follows:

> If a plaintiff has released a defendant from liability for a future occurrence, the plaintiff may also be said to have assumed the risk of the occurrence. If the release is against public policy, however, it is also against public policy to say that the plaintiff has assumed that particular risk This court has implicitly recognized that an express assumption of risk which relieves the defendant's duty to the plaintiff may violate public policy. [Footnote omitted] Accordingly, to the extent the release forms represent a consent to relieve the school districts of their duty of care, they are invalid whether they are termed releases or express assumption of the risk.[227]

Against the foregoing landscape it would appear highly problematic that a liability waiver could be constructed and used as a direct shield against consequences arising out of an agency's compliance with the ADA's transit requirements.[228] However, a more indirect

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[212] Although the adjustment of the service fee may be an available option under the criteria of Tunkl, its application in the case of charging disabled riders a higher fee would, on its face, conflict with the DOT admonition that "[u]nder the ADA, a proposed action which treats a disability-based class of persons differently from the rest of the public cannot be accepted merely because it may assuage a party's good faith concerns about safety." 61 Fed Reg. 25410.

[213] For example, in Idaho the test is whether "one party is at an obvious disadvantage power" or if a public duty is involved, Rawlings v Layne & Bowler Pump Co, 465 P 2d 107 (1970) In Kansas, the test is whether the exculpatory clauses offends the "interests of the public, contravenes some established interest of society, violates some public statute, or tends to interfere with the public welfare or safety," Hunter v. Am Rentals, Inc., 371 P 2d 131 (1962). While in New Hampshire, exculpatory clauses are invalid, *see, e g:*, Papakalos v. Shaka, 18 A 2d 377 (1941)

[214] Morgan, 466 So 2d 107 (Ala 1985)

[215] Locker, 723 P.2d 1261 (Alaska 1986)

[216] Brooks, 959 F Supp. 959 (D Colo. 1996).

[217] Porubiansky, 275 S E.2d 163 (Ga App 1980), *aff'd*, 282 S E 2d 903 (1981).

[218] La Frenz, 360 N.E 2d 605 (Ind. 1977).

[219] Baker, 629 A 2d 1317 (Md. App. 1993).

[220] Schrier, 533 A.2d 1316 (Md App. 1987)

[221] Schlobohm, 326 N.W.2d 920 (Minn 1982).

[222] Lynch, 627 P 2d 1247 (N.M Ct App. 1981).

[223] Lee, 407 N.Y.S 2d 777 (N.Y. Civ. Ct. 1978), *rev'd on other grounds*, 413 N.Y.S.2d 826 (N.Y. App Term 1978).

[224] Olson, 558 S W.2d 429 (Tenn 1977)

[225] Wagonblast, 758 P.968 (Wash 1988)

[226] As described in the court's opinion, the language of the Odessa district's standardized release form provided that the school district would be released from "liability resulting from any ordinary negligence that may arise in connection with the school district's interscholastic activities programs" Seattle's standardized form provided for the release of "any liability resulting from the any negligence that may arise in connection with the School District's wrestling program" *Id.* at 969. Other than making the general reference, however, the court's opinion did not provide further details on the "numerous risks," which the opinion noted had been specifically identified on the release forms

[227] *Id.* at 974. In a subsequent case, Am Nursery Products v. Indian Wells, 797 P 2d 477 (Wash 1990), the Tunkl test was again applied by the Washington Supreme Court, concerning a clause of a plant nursery that sought to limit potential damages to its customers; the clause was upheld based on the court's finding that such services are not required as a matter of practical necessity and the contract was not one of adhesion

[228] Having reached this conclusion, however, it is also recognized that disclaimers are widely used by the operators of parking lots, garment cleaners, and other industries to avoid or minimize liability While the courts have deemed such disclaimers to be against public policy and therefore invalid, the

approach may be possible that would nonetheless mitigate the potential exposure posed by the ADA's requirements.

Having invalidated the releases with respect to the school districts' efforts to exculpate themselves from their own negligence, the *Wagenblast* court went on to provide the following guidance concerning an exculpation from the acts of the students:

> Nonetheless, risks other than that of a school district's negligence may be present in any sporting event For instance, an opponent may play recklessly, or the sport may be so inherently dangerous that no amount of reasonable supervision or training can eliminate all the vestiges of danger. If a student knowingly encounters one of these risks, but chooses to play on, it could be argued that the student has voluntarily encountered the risk. By our opinion, today we do not rule on this question; the law of assumption of risk has developed on a case-by-case basis and there are no facts before us on the basis of which we can appropriately make any decision on this
>
> Nor do we decide whether the listing of various risks on these forms can or will in a given case establish that the student has assumed any of the listed risks To elaborate, in addition to the release language discussed above, the forms supplied by both school districts recite numerous risks associated with participation in interscholastic sports. .[I]n order to prove an express assumption of risk, the evidence must show that the plaintiff (1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter that risk By their very nature, the existence of these characteristics can only be determined with reference to the facts of an actual lawsuit.[229]

It is in this latter regard that the case of *Poole v. South Plainfield Board of Education,*[230] a case brought in part under Section 504 of the Rehabilitation Act, may be further instructive.

Poole concerned the right of the school board to refuse to permit a student with one kidney to participate in its wrestling program. The board's refusal was based on its fear that the student could injure his kidney during a match. However the student and his parents had provided expert medical opinions to the board stating that he could safely participate. Finding against the board and in favor of the student's right to participate, the court held that the board had acted improperly by "imposing its own rationale decision over the rationale decision of the Pooles...[which] it had neither the duty nor the right under § 504 to do."[231] The court held further that the board's responsibility was twofold: to see that the student did not pursue his course in a "foolish manner" and "to alert [the student and his parents] to the dangers involved and to require them to deal with the matter rationally."[232]

It would appear, therefore, that a remedial option that agencies might be able to avail themselves of is the concept of an *"acknowledgment and consent to the risk."* Rather than seeking to obtain the rider's written waiver, the objective of the "acknowledgment and consent to the risk" is to document that the rider has been fully apprised of and understands the specific dangers involved (e.g., of not using a wheelchair's seat belt, not securing the wheelchair, or by disembarking at an inaccessible or unsafe stop), but nonetheless voluntarily chose to disregard the safer course.[233] Such documentation would later be available to the agency as proof that the rider had been made aware of the specific dangers involved but had nonetheless consented to assume that risk, as well as for proof that the rider's actions had superseded whatever negligence the agency may have committed.

From a logistical standpoint, obtaining such documentation may be easier in the case of paratransit than in the case of general transit. In the former, because of the eligibility requirements and the more continuing nature of a rider's relationship with an agency, agencies should be able to prepare a customized written description of the specific risk(s) involved with the particular transport of each rider, together with specific instructions on what the rider would be required to do (or refrain from doing) to ensure a safe ride. The document could then be given to, and at the agency's option also read to, the rider during the qualifying process, which the rider could be asked to sign.[234]

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continuing presence of such disclaimers on the front or back of a parking ticket suggests that the disclaimer may nonetheless serve to deter claims and legal action on many occasions The authors have also looked at indemnifications being used by several transit agencies in the case of bicycle riders The language of those indemnifications varied among each other, and in some cases included broad language intended to release the transit agency not only from liability to the physical being of the rider but also required the rider to indemnify the agency for injuries and property damage to other passengers caused by the bicycle Whether or not individual state public policy would invalidate the use of such indemnifications in the case of bicycle riders (the authors are not aware of any legal challenges to their use in such regard), because bicycle riders are not in and of themselves a protected class, the use of an indemnification in the case of bicycles is distinguishable from their use in the case of the disabled

[229] Wagenblast, 758 P.2d at 974.

[230] Poole, 490 F Supp. 948 (D. N.J 1980).

[231] *Id.* at 954

[232] *Id.*

[233] While DOT has admonished against actions that treat a disability-based class of persons differently from the rest of the public, the use of such informed consent would hardly run afoul of this, either by barring transport altogether or by depriving a disabled rider of the right to elect a course different than the one being recommended by the agency To the contrary, informed consent would merely help to ensure that the conditions of a transport are as safe for disabled riders as they are for the nondisabled, which is the fundamental obligation of transit agencies to any rider

[234] Whether transport could be conditioned on the rider's execution of the form remains for debate. An agency's inability to obtain the signature may not be critical, depending on the sum and substance of the agency's process of informing the

In the case of general transit, the logistics might be somewhat more complex but should not be insurmountable. In lieu of a document customized to and signed (if at all possible) by individual riders, the agency should nonetheless be able to prepare an appropriate and comprehensible warning and set of instructions customized to the particular risk(s) of concern to that agency, e.g., proper securement of the mobility device, transferring to a seat, etc. The information could be distinctly posted at one or more appropriate locations in the transit vehicle and at terminals and transit stops, as well as orally conveyed by the driver. In the case of bus and trolley transit, the latter could be done as needed, while in the case of subway and other light rail, information could be routinely announced over a loudspeaker.

Additionally, agencies could identify on their schedules and/or route maps those particular transit stops at which a steep slope or another potential danger to disabled riders exist. For example, the particular stops could be identified in red and accompanied by a brief description of the risk involved, or a symbol could be used to identify a particular risk. Similar information could be made available in an agency's guide on how to use its system.

Lastly, for certain types of risks, such as a rider's demand to be let off at an unsafe stop, the agency could prepare a written form that the rider would be required to sign as a condition of leaving the vehicle. The form would state that the rider acknowledges and accepts the risk, and could be used for both disabled and nondisabled passengers.

C. Other Remedial Actions

Waiver of Compliance--the Seattle Metro Petition and the Defense of "Direct Threat"

Because the ADA is an antidiscrimination statute, one inadvertent (albeit direct) consequence of the ADA may be to force agencies to choose between providing a nondiscriminatory service and thereby knowingly expose disabled passengers and themselves to an increased safety hazard, and paring back services to all passengers in order to avoid the hazard. In the context of potential tort liability, this Hobson's dilemma is perhaps best exemplified by the recent DOT decision concerning Seattle Metro.

The Seattle matter involved the application of Section 37.167(g), which provides that agencies may not prevent a passenger who uses a lift from disembarking at a stop because of a safety concern, "unless the lift cannot be deployed, the lift will be damaged if it is deployed, or temporary conditions at the stop, not under the control of the entity, preclude the safe use of the stop by all passengers." In October of 1993, Seattle Metro petitioned DOT to amend this provision, citing the fact that within its system, "even though a lift might be able to be deployed, without damage as per the regulation, it would not necessarily provide the passenger with an effective means of deboarding because of a lack of sufficient suitable space on the ground."[235] Further, that, "[u]nder the literal terms of the regulation" the determination of any particular stop's "effectiveness is left to the individual passenger who is apparently free to attempt even a physically impossible deboarding." Seattle's concerns were based on specific stops within its transit system, which Seattle Metro felt made it extremely likely for a passenger in a wheelchair to be injured if permitted to use the stop, due either to the inadequacy of space for the safe movement of wheelchairs at those stops or the stops' topography and terrain.[236] In support of its contentions, Seattle Metro provided a videotape, specifically showing attempted deboardings by wheelchair users at various representative stops. For example, the Seattle Metro video showed a wheelchair passenger making two separate exits at a stop located on a hill with a steep slope of 18 degrees. In both instances, the passenger came extremely close to tipping over during the course of turning right when disembarking from the lift onto the downward slope of the hill.

In response to the petition, DOT proposed amending Section 37.167(g) to provide that the use of a lift could additionally be denied if "[t]he lift when fully deployed, would leave inadequate space at the stop for the passenger to obtain a secure and maintainable position on the ground."[237] In its final decision, however, DOT withdrew its proposed amendment, advising that, based on a "direct threat" analysis,[238] "[a]ny transit provider that

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rider An agency may also wish to consider repeating the instructional process (with or without the rider's need to sign) prior to the start of each trip as part of its standard operating procedures.

[235] A copy of Seattle Metro's Oct 25, 1993, letter to DOT is provided as Appendix C of this report.

[236] In particular, Seattle Metro stressed:

> *Steep hills pose a particular hazard for people using mobility devices* There are many other invisible hazards as well These include; [sic] uneven ground under grass, hills or culverts behind the loading area, and uneven ground or pavement creating a *hidden gap between the lift and the sidewalk* Most of these conditions, and the severity of the risk they impose, can not be determined from the passenger area or the driver area within the bus [Emphasis added]

[237] 59 Fed. Reg 37213.

[238] "Direct threat" is one of the statutory defenses provided under the ADA, which allows an exception from the ADA's nondiscrimination requirements on the basis of health and safety As DOT properly pointed out in its decision, the defense is available under other provisions of the ADA but "does not necessarily apply in its entirety to transportation issues .." 61 Fed Reg 25411. The defense is available, however, under the Department of Justice (DOJ) regulations implementing Title III of the ADA (governing public accommodations) and the Equal Employment Opportunity Commission's (EEOC) regulations implementing Title I of the ADA (governing employment) The only significant difference between the DOJ and EEOC in this regard is that the EEOC will consider the existence of health and safety risks to the disabled

may have instituted limits on the use of particular stops by lift users, except authorized by [the existing requirements of] this provision, must cease implementing the limits, as they are explicitly contrary to the Department's ADA rule."[239] DOT further advised that other options were available to agencies as alternatives to refusing to let a wheelchair rider get off at a particular stop. As alternatives, DOT suggested that transit agencies provide "information to lift users about potential hazards at certain stops and offer[ing] information on alternative stops or routings to such passengers"; offer "paratransit to those passengers who *chose* to avoid using the stops as a result" [emphasis added]; make "operational modifications to mitigate potential hazards," such as "let[ting] a wheelchair user board at a nearby area that was easier to use or stop at a greater distance from the curb"; and "urge local governments to improve accessibility to bus stops, mitigate hazards at stops, or, if need be, move stops to better locations."[240]

While withdrawing the regulatory relief it had proposed on Seattle Metro's behalf, DOT's discussion can nonetheless be read to suggest its willingness in the future to consider the "direct threat" posed by particular bus stops on an *individualized* basis. Although it remains to be seen whether this in fact will occur, it is certainly in the interest of transit agencies to proceed as though this would be DOT's future approach.[241] However, extreme care should be taken in preparing individual cases for presentation to DOT, if a favorable outcome is to be achieved. Specific and detailed evidence demonstrating the harm to disabled riders at each particular stop, as well as the provision of evidence documenting why no other remedial action would be possible or the specific and adverse consequences of other remedial actions, will be essential.

Training

Compliance with regulatory regime is often viewed by industry as a perfunctory exercise, for which a checkmark can be made to demonstrate that it was done.

A number of examples have been identified where the extent of an agency's exposure will be directly proportional to the content and quality of the training being provided to drivers and other front-line personnel, as well as the frequency with which it is given. The importance of this point cannot be stressed enough. Agencies know well enough the number of driver-related problems they have experienced involving the nondisabled passenger community, with whom drivers would be expected to identify and relate. In the case of the disabled, however, the perception that a *difference* exists (no matter that it does not) can be sufficient to erect a needless barrier between the passenger and the driver, and thereby introduce the agency to exposures it neither wants nor needs.

However, the only true difference between the nondisabled and the disabled is an instant of time misapplied, or a gene or chromosome that somehow went awry. It is important for drivers, and indeed for us all, to understand and appreciate this fact, as the number of disabled riders who avail themselves of the benefits and opportunities of mass transit increases, just as the ADA intends.

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individual, as well as to others DOJ will only consider the existence of risk to others. In the authors' opinion, the approach taken by Title I makes greater sense overall

[239] 61 Fed. Reg 25411 While commending Seattle Metro for its effort to show that problem stops exist, including its submission of "a videotaped demonstration of wheelchair users attempting to get on and off buses using lifts at several problem stops", *id*, DOT nonetheless went on to conclude that the evidence was insufficient "to justify carving out an exception to the nondiscrimination mandate of the ADA" *Id* In other words, the relief that Seattle Metro had requested--an amendment to the regulation--was too broad for the evidence presented

[240] 61 Fed Reg 25411

[241] The former UMTA's comment in 1976, at the time it issued its initial Part 609 regulations, provides further support for this. As UMTA expressly acknowledged: "In fact, it is likely that site-specific planning and tailoring services will always be necessary " See prior discussion in Part I, *supra*

APPENDIX A DISABILITY RELATED TORT SURVEY 31

TCRP J-5, Study Topic 2-02

Tort Liability For Transit Agencies Arising Out Of Americans With Disabilities Act

(check, if applicable)

_____ [ ] in-house counsel

Name [Please print] Title [ ] outside counsel

[ ] other

_____

Employing Transit Agency City State Zip Code

(____)_____ (____)_____

Telephone number Fax number

1. Transit vehicles operated by agency or under contract to agency: (check applicable) [ ] bus [ ] commuter rail
   [ ] heavy-rail [ ] subway [ ] para-transit [ ] other (specify)

2. Bus equipment operated by agency or under contract to agency: (check applicable and specify percentage of each to total buses operated)
   [ ] kneeling buses _____ % [ ] lift equipped _____ % [ ] Not equipped, passenger must be assisted by driver ____ %

3. Community demographics: (check applicable and specify percentage of each to total operation)
   [ ] City % [ ] Rural % [ ] Suburban %

4. Physical conditions of routes served: (check applicable) [ ] flat [ ] hilly [ ] mountainous
   [ ] bus stops with sidewalks [ ] bus stops without sidewalks [ ] rail with platforms [ ] rail without platforms

5. Weather conditions throughout year best describing routes served: (check applicable)
   [ ] very hot [ ] temperate [ ] moderate rainfall [ ] moderate snow [ ] freezing rain
   [ ] very cold [ ] generally dry [ ] heavy rainfall [ ] heavy snow

6. Indicate how agency's fiscal year is computed: [ ] calendar year [ ] other (specify) _____

7. Total number of fare trips (one-way) by *all riders* (disabled and non-disabled) during 1990 and 1991:
   1990 _____ 1991 _____

8. Indicate percentage of agency's annual capital budget allocated to reasonable accommodations for *disabled riders* since the ADA? [ ] 0% [ ] 1-3% [ ] 14-10% [ ] 11-15% [ ] more than _____

9. Indicate percentage of agency's annual operating budget allocated to reasonable accommodations for *disabled riders* since the ADA? [ ] 0% [ ] 1-3% [ ] 4-10% [ ] 11-15% [ ] more than _____

10. Percentage of total fare trips (one-way) representing *all disabled riders* during 1990 and 1991:
    1990 _____ % 1991 _____ %

11. Percentage of total fare trips (one-way) representing *wheelchair riders* during 1990 and 1991:
    1990 _____ % 1991 _____ %

12. Prior to the ADA, was your agency subject to Rehabilitation Act of 1973 (Rehab Act)?
    [ ] yes [ ] no

13. Prior to the ADA, how did agency serve *disabled riders in wheelchairs?* (check applicable)
    [ ] did not [ ] with existing unadapted equipment [ ] with adapted equipment [ ] para-transit

(over)

14. Prior to the ADA, what did agency do to warn and/or assist *disabled riders* of "dangerous riding conditions" *(e.g.,* elevator not working)? (check applicable) [ ] nothing [ ] verbal warnings given by drivers [ ] warning signs at exits [ ] public announcement at station [ ] other(s) _____

15. Since the ADA, what does agency do to warn and/or assist *disabled riders* of 'dangerous riding conditions" *(e.g.,* elevator not working)? (check applicable) [ ] nothing [ ] verbal warnings given by drivers [ ] warning signs at exits [ ] public announcement at station [ ] other(s) _____

16. Has agency been sued by *disabled riders* under the Rehab Act and/or the ADA for "disability-related" torts? [ ] yes [ ] no

17. Has agency been sued by *non-disabled riders* since the ADA for torts resulting from disabled riders riding on transit vehicles? *(e.g.,* a rider pinned by another riders wheelchair, or a rider bitten by a guide dog) [ ] yes [ ] no

18. Indicate legal theories typically used by *disabled riders* to bring "disability-related' tort suits against transit agency: (check applicable) [ ] Strict liability [ ] Intentional infliction of emotional harm [ ] Negligence [ ] Injury due to inadequate reasonable accommodation [ ] Other (specify) _____

19. Indicate legal theories typically used by agency to defend "disability-related' tort suits brought by *disabled riders* (check applicable): [ ] Assumption of the risk [ ] Contributory Negligence [ ] Sovereign immunity [ ] Others _____

20. In the "disability-related" tort cases filed by *disabled riders* were there any other defendants? [ ] yes [ ] no If yes, indicate who: [ ] vehicle manufacturer [ ] vehicle equipment manufacturer [ ] driver of other vehicle [ ] other _____

21. In the 'disability-related" tort cases filed by *riders in wheelchairs* were there any other defendants? [ ] yes [ ]no If yes, indicate who: [ ] vehicle manufacturer [ ] vehicle equipment manufacturer [ ] driver of other vehicle [ ] wheelchair manufacturer [ ] other _____

22. Has your agency ever used or attempted to use a release or waiver to limit its liability to *any rider or group of riders generally (e.g.* riders with bicycles): [ ] yes [ ] no If yes, please attach a copy of each waiver or release.

23. Has the validity or legality of the release or waiver ever been challenged in court? [ ] yes [ ] no If yes, did the court rule in favor of the release or waiver? [ ] yes [ ] no

24. Have any "disability-related" tort suits been brought by a plaintiff who signed a waiver? [ ] yes [ ] no If yes, please indicate if release or waiver was upheld? [ ] yes [ ] no

25. Has your agency ever been subject to 'disability-related" tort suits involving any of the following disabilities? [ ] wheelchair [ ] visually impaired [ ] turrets syndrome [ ] hearing impaired [ ] other(s) _____

26. Does your State have its own ADA or similar statute, or impose constitutional or other statutory duties on your agency that would effect your tort liability with respect to the transportation of *disabled riders?* [ ] yes [ ] no If yes, please provide citation(s) to appropriate law(s) and if possible attach copies of applicable provisions. _____ _____

27. Indicate by whom and where any Rehab Act/ADA suits against your agency have been filed? (check all applicable) [ ] class action [ ] individuals [ ] state court [ ] federal court [ ] none have been filed

28. If you are aware of any legal cases (reported and/or unreported) against your agency or another transit agency which could provide data for this survey, please attach a copy of the decision, or provide name of case, court, docket # and date, or citation. _____

29. Briefly describe on a separate sheet problems agency has experienced providing transit service to *disabled riders.*

The following tables are provided for your ease and convenience. The information requested is detailed but, necessary to evaluate what is happening in the industry. Please fill in the each table as accurately as possible. If necessary, you may attach additional pages.

30. In cases where *disabled riders* have been injured, indicate location of riders:

Location	1991 yes	1991 no	1992 yes	1992 no	1993 yes	1993 no	1994 yes	1994 no	1995 yes	1995 no	TOTAL yes	TOTAL no
a. In wheelchair, riding												
b. In wheelchair, at stop												
c. On vehicle seat, riding												
d. While getting onto vehicle												
e. While getting off vehicle												
f. At transit stop												
g. Other(s) specify												

TABLE I: ***ALL RIDERS*** Responses reflect: [ ] Actual data [ ] "Reasonable" estimate

Question	1991	1992	1993	1994	1995
31. # of fare trips					
32. # of "tort claims" filed against agency					
33. # that went to trial					
34. # settled before decision					
35. # litigated to decision					
36. # of cases where agency was found liable					
37. Average damage $ award					
38. Highest $ award					
39. Lowest $ award					
40. Damages awarded (express as % of total Q36 cases) a. "personal injury" b. "property damage" c. punitive damages d. both a. & b. e. all	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.

(over)

TABLE II: *ALL DISABLED RIDERS*

Question	1991	1992	1993	1994	1995
41. # of fare trips					
42. # of "disability-related" tort claims filed					
43. # that went to trial					
44. # settled before decision					
45. # litigated to decision					
46. # of cases where agency was found liable					
47. Average damage $ award					
48. Highest $ award					
49. Lowest $ award					
50. Damages awarded (express as % of total Q46 cases) a. "personal injury" b. "property damage" c. punitive damages d. both a. & b. e. all	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.

TABLE III: *RIDERS IN WHEELCHAIRS*

Question	1991	1992	1993	1994	1995
51. # of fare trips					
52. # of "disability-related" tort claims filed					
53. # that went to trial					
54. # settled before decision					
55. # litigated to decision					
56. # of cases where agency was found liable					
57. Average damage $ award					
58. Highest $ award					
59. Lowest $ award					
60. Damages awarded (express as % of total Q56 cases) a. "personal injury" b. "property damage" c. punitive damages d. both a. & b. e. all	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.	a. b. c. d. e.

APPENDIX B

Responses to Survey Tables

The following three tables provide an aggregate summary of the responses to questions 31 through 60 of the survey, concerning the experiences of transit agencies since the ADA.

TABLE I: ALL RIDERS

Question[242]	1991	1992	1993	1994	1995
31 No of fare trips	516,000,000	506,000,000	499,000,000	281,000,000[243]	268,000,000
32. No of "tort claims" filed against agency[244]	7,450	6,618	5,844	5,650	5,505
33. No. that went to trial	87	82	83	133	119
34. No. settled before decision	255	239	244	257	155
35. No. litigated to decision	89	92	97	71	71
36 No. of cases where agency was found liable	102	68	113	86	53
37. Average damage award[245]	$1,800–$9,300	$1,200–$49,500	$740–$34,000	$2,900–$58,000	$490–$57,800
38 Highest award	$35,000–$45,000 $175,000–$773,000	$2,000–$60,000 $125,000-$150,000 $1,300,000	$2,400–$36,000 $90,000–$150,000 $825,000	$4,000–$19,000 $50,000–$78,000 $550,000–$750,000	$490–$9,000 $56,000–$57,000
39 Lowest award	$100–$600 $3,500–$9,300	$0–$550 $2,000–$7,500 $44,000–$60,000	$84–$750 $1,000–$2,750	$250–$696 $1,300–$2,500 $6,000–$11,500	$59–$863 $2,000–$5,000
40 Damages as a percentage of total question 36 cases[246]					
a. "personal injury"	a 84-100% (3)	a 100% (3)	a. 100% (4)	a. 100% (1)	a. 100% (2)
b. "property damage"	b 16%	b. 0%	b. 0%	b. 0%	b 0%
c punitive damages	c 0%	c 100% (1)	c 0%	c 0%	c. 0%
d a & b	d. 100% (2)	d. 100% (1)	d. 100% (1)	d. 100% (1)	d. 100% (1)
e. all	e. 0%	e 0%	e. 0%	e 0%	e. 0%

[242] Fourteen agencies did not respond to these questions

[243] An agency that reported over 200 million fare trips for 1991, 1992, and 1993 did not have the data available for years 1994 and 1995

[244] More than half of these "tort claims" were filed against the same transit agency.

[245] For questions 37-39, the awards are grouped in ranges to more accurately reflect the answers received.

[246] Eight agencies responded to question 40. The number of agencies responding to a specific subquestion is indicated in parentheses

TABLE II: ALL DISABLED RIDERS

Question[247]	1991	1992	1993	1994	1995
41. No. of fare trips	7,534,002	8,358,854	8,248,055	8,758,567	16,839,291
42 No. of "disability-related" tort claims filed	11	8	12	17	38
43. No. that went to trial	4	4	4	3	20
44. No. settled before decision	2	1	4	3	6
45. No. litigated to decision	1	1	1	1	2
46 No of cases where agency was found liable	1	1	1	4	1
47 Average damage award[248]	$3,000–$12,500	$16,000	$3,500–$11,5000	$2,800–$50,000 $469,900	$400–$4,200
48 Highest award	$12,500	$31,000	$1,500	$8,800–$50,000 $512,955	$400–$11,000
49. Lowest award	$3,000	$16,000	$3,500	$1,500	$400
50 Damages as a percentage of question 46 cases[249]					
a. "personal injury"	a. 100% (1)	a 100% (1)	a. 100%	a 100% (1)	a. 0%
b "property damage"	b 0%	b. 0%	b. 0%	b 0%	b. 0%
c punitive damages	c 0%	c. 0%	c. 0%	c 0%	c 0%
d a & b	d 100% (1)	d. 0%	d. 100% (1)	d. 0%	d. 0%
e. all	e 0%	e. 0%	e. 0%	e 0%	e. 0%

TABLE III: RIDERS IN WHEELCHAIRS

Question[250]	1991	1992	1993	1994	1995
51. No. of fare trips	298,912	1,261,806	1,200,600	1,241,135	1,498,395
52 No. of "disability-related" tort claims filed	1	6	2	12	27
53. No. that went to trial				2	16
54. No. settled before decision		2	3	5	6
55. No. litigated to decision				1	
56 No. of cases where agency was found liable			3	3	1
57 Average damage award[251]		$5,000	$11,000–$16,000 $175,000	$2,850 $50,000	$400–$4,200
58 Highest award			$11,500–$16,000 $175,000	$7,500–$50,000	$400–$11,000
59 Lowest award		$2,500	$11,500–$16,000 $175,000	$1,500 $50,000	$400–$2,500
60 Damages as a percentage of total question 56 cases[252]					
a "personal injury"	a no answers (n/a)	a n/a	a n/a	a n/a	a. n/a
b. "property damage"	b n/a	b n/a	b. n/a	b n/a	b n/a
c punitive damages	c. n/a	c. n/a	c. n/a	c. n/a	c. n/a
d a & b	d. n/a	d. n/a	d. 100% (1)	d. n/a	d n/a
e. all	e n/a	e. n/a	e. n/a	e. n/a	e. n/a

[247] Seven agencies did not respond to these questions. Eight agencies reported that the data was not available

[248] For questions 47-49, the awards are grouped in ranges to more accurately reflect the answers received.

[249] Two agencies responded to question 50 The number of agencies responding to a specific subquestion is indicated in parentheses

[250] Five agencies did not respond to these questions Five agencies responded that the data was not available

[251] For questions 57-59, the awards are grouped in ranges to more accurately reflect the answers received

[252] One agency responded to question 60.

✻ METRO
Municipality of Metropolitan Seattle
Exchange Building • 821 Second Ave. • Seattle, WA 98104-1598 • (206) 684-2100

October 25, 1993

The Honorable Federico Pena, Secretary
United States Department of Transportation c/o Docket Clerk
Office of the General Counsel
Department of Transportation
Washington D.C. 20590

Dear Mr. Secretary:

On behalf of the Municipality of Metropolitan Seattle (Seattle Metro), I am writing to express our concerns over the implementation of 49 CFR 37.167(g), which provides as follows:

> The entity shall not refuse to permit a passenger who uses a lift to disembark from a vehicle at any designated stop, unless the lift cannot be deployed, the lift will be damaged if it is deployed, or temporary conditions at the stop, not under the control of the entity, preclude the safe use of the stop by all passengers.

Wheelchair lifts operated by Seattle Metro require an unobstructed space four to five feet from the side of the bus in order to be fully deployed. Beyond the deployed lift, standees using the lift need, at a minimum, another twelve to twenty-four inches to alight on the ground. A person using a mobility aid would need at least four feet beyond the deployed lift in order to maneuver off the lift.

It is apparent, therefore, that even though a lift might be able to be deployed without damage as per the regulation, it would not necessarily provide the passenger with an effective means of deboarding because of a lack of sufficient, suitable space on the ground. Under the literal terms of the regulation, however, the determination of a zone's effectiveness is left to the individual passenger who is apparently free to attempt even a physically impossible deboarding.

The provision at issue was added to the Department's ADA rulemaking for the first time in the Final Rule. Neither Metro nor any of the transit operators had any notice of this provision or any opportunity to comment prior to its final adoption. For the reasons stated in this letter, we believe that implementation of a literal interpretation of the regulation would be neither practical for transit operators nor in the best interests of passengers.

Without waiving any rights to object in any proceeding or forum to the application of the current 49 CFR 37.167(g), Metro respectfully requests that it be amended as follows:

> The entity shall not refuse to permit a passenger who uses a lift to disembark from a vehicle at any designated stop, unless (1) the lift cannot be deployed, (2) the lift will be damaged if it is deployed, (3) the lift when fully deployed would leave an inadequate space at the stop for the passenger to obtain a secure and maintainable position on the ground, or (4) temporary conditions at the stop, not under the control of the entity, preclude the safe use of the stop by all passengers. A stop which does not meet the specifications set forth in Section 10.2.1(1) of Appendix A to 49 CFR Part 37 shall be deemed to provide inadequate space for passengers using common wheelchairs to obtain a secure and maintainable position on the ground.

Seattle Metro believes this language would still require deployment of the lift for a standee at zones that do not meet section 10.2.1(1) of Appendix A to 49 CFR Part 37 provided such zones afford such standee a secure and maintainable position.

In the alternative, Seattle Metro requests that it be granted a system-wide permanent exemption to the extent that it would not be required to permit a passenger using a common wheelchair to deboard at a stop which does not meet the specifications set forth in Section 10.2.1(1) of Appendix A to 49 CFR Part 37.

In support of this request for amendment to or exemption from 49 CFR 37.167(g), Seattle Metro would ask you to consider the following;

1. Washington State Common Carrier requirements

It is inconsistent with Seattle Metro's obligations as a common carrier under Washington State tort law to allow passengers who use wheelchairs to deboard at bus zones that do not afford a secure space.

It is difficult for a rider using a mobility aid to judge whether a zone has adequate space associated with it by merely looking at it from onboard the bus. This judgement could be further affected if the person has limited visual or cognitive abilities. Seattle Metro does not want to place drivers and riders in the position of making a judgment on bus zone accessibility from merely a visual inspection.

2. Rider Confusion

Seattle Metro has been operating lift equipped bus service since 1980. Over the past 13 years ridership by people who use the lift has increased steadily. With approximately 90% of the service accessible, over 207,500 trips are taken annually. Riders using mobility aids and who use the lift have been instructed to board at zones marked "accessible" and have been told and learned through experience that these zones will be safe and functional for them. It would be difficult to inform the thousands of people who use the lift service that a zone marked "accessible" (merely because the lift can be deployed) no longer means that the zone is safe and functional. It would put the rider's safety at risk to change the definition of "accessible" at this time.

3. Jurisdictional control over bus zones

Seattle Metro operates in approximately 30 jurisdictions. Since 1978, Seattle Metro has funded over $2 million in bus zone improvements and continues to work with local jurisdictions to improve bus zones. However, each jurisdiction makes the final determination of bus zone location, zone accessibility and zone improvements. Issues other than space at the zone can determine whether or not a zone will be allowed to be accessible by the jurisdiction. These include line of sight, traffic speed, dwell time, and access to shoulder pullout areas. Often the situation which prevents accessibility occurs for an ongoing stretch of roadway, not allowing for simply relocating a zone by moving it a few feet.

With our proactive efforts over the last 13 years to make bus zones accessible to Metro standards, of the 8,493 bus zones served by accessible bus routes, presently 6,220 (73%) of the bus zones are fully accessible to common wheelchair users and standees, 702 (8%) could be accessible to standees, but do not provide adequate space for a common wheelchair, and 1,571 (19%) are inaccessible by ADA standards. An additional 1,206 zones have not yet been evaluated since presently there is no accessible service operating to these zones.

4. Topography and Terrain

The varied topography and terrain of the King County area increases the risk of rider injury if Seattle Metro were to use the ADA definition of what is an accessible bus zone.

> Steep hills pose a particular hazard for people using mobility devices. There are many other invisible hazards as well. These include; uneven ground under grass, hills or culverts behind the loading area, and uneven ground or pavement creating a hidden gap between the lift and the sidewalk. Most of these conditions, and the severity of the risk they impose, can not be determined from the passenger area or the driver area within a bus.

Enclosed is a videotape of seven bus zones in the Seattle area at which lifts would have to be deployed under the current language of 49 CFR 37.167(g). These zones are examples of over 700 bus zones which do not provide adequate space for a passenger using a common wheelchair.

If you have any questions about this request for an amendment or exemption, please call Ms. Cathryn Rice, Supervisor of Accessible Services, at (206)689-3111. Thank you for your consideration of this request.

Sincerely,

Richard K. Sandaas
Executive Director

RKS:krs

cc: Cathryn Rice
Karen Rosenzweig

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by RICHARD J. BACIGALUPO, N.E. Illinois Regional Transit Authority. Members are ARTHUR P. BERG, Port Authority of New York and New Jersey; RICHARD W. BOWER, California Department of Transportation; SHELLY R. BROWN, Federal Transit Administration-Region 10; DORVAL RONALD CARTER, JR., Federal Transit Administration--Region 5; PAUL STEPHEN DEMPSEY, University of Denver; DENNIS C. GARDNER, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; EDWARD J. GILL, JR., Eckert, Seamans, Cherin & Mellott; BRIGID HYNES-CHERIN, BHC Trans, Arlington, Virginia; CLARK JORDAN-HOLMES of Stewart, Joyner, Jordan-Holmes, Holmes, P.A.; and JEANETTE J. CLARK, Washington Metropolitan Transit Authority. NANCY ZACZEK provided liaison with the Federal Transit Administration during the preparation of this study, and GWEN CHISHOLM SMITH represents the TCRP staff.

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