Civil Rights

The ADA Opening Doors for the Plaintiff's Bar: How Ambiguities in Title III Inhibit Access, Increase Litigation, and Hurt Business

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"I also want to say a special word to our friends in the business community," said George H.W. Bush, on July 26, 1990, moments before he signed the Americans with Disabilities Act into law, "I know that there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act."[1]

The Americans with Disabilities Act (ADA) was an ambitious piece of legislation that sought to eliminate discrimination against the 43 million disabled Americans, by opening doors and providing access to every aspect of society—from private sector employment to public programs and activities to public accommodation.[2] There was unprecedented bipartisan support for the passage of the ADA, and a firm commitment by the Bush administration for this landmark piece of civil rights legislation.[3] Supporters hailed the ADA as the next "emancipation proclamation,"[4] which would allow people with disabilities "to boldly go where everyone else has gone before."[5]

Fifteen years later, the ADA has become everything that the business community had feared—it is vague, costly and has led to endless lawsuits. This well-intentioned legislation has become a burdensome regulatory nightmare for businesses. In particular, compliance with the ambiguous terms of Title III of the ADA (the section that regulates public accommodations) has become a major source of confusion for small businesses. Title III of the ADA bans discrimination in almost all of the country's six million privately-owned public accommodations.[6] One provision of Title III bans architectural discrimination, and barriers that block accessibility to public facilities.[7] This provision requires a set of complex new building codes that apply to both new and existing facilities and buildings.[8] These regulations require businesses in existing facilities to remove "architectural barriers" when removal is "readily achievable."[9]

This paper examines the vague "readily achievable" standard for barrier removal, by analyzing the ADA statute, the legislative history of the ADA, and conflicting interpretations of this standard by the Department of Justice (DOJ) and courts. The business community has found it both difficult and costly to comply with this ambiguous "readily achievable" standard of the ADA, which ultimately inhibits access for the disabled and opens the doors to a growing "cottage industry" of plaintiffs' lawyers more interested in extorting attorney's fees than creating accessibility.[10]

ADA Background

In 1984, the National Council on the Handicapped (National Council), an independent federal agency, assessed whether federal programs were adequately serving people with disabilities and recommended legislative proposals for the problems they found.[11] Their report, entitled *Toward Independence*, found "pervasive discrimination" against people with disabilities, including a lack of physical access to buildings and facilities.[12]

The National Council issued 45 legislative recommendations, and suggested that, "Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."[13] In 1988, the National Council issued a progress report on its recommendations, entitled *On the Threshold of Independence*, and created a draft bill called *The ADA of 1988*.[14] This draft bill became the framework for ADA legislation.[15]

The ADA creates regulation against discrimination in five broad areas: private sector employment (Title I); public programs (Title II); public accommodations (Title III); telecommunications (Title IV); and other areas (Title V).[16] The ADA provides individuals with disabilities "civil rights protections with respect to discrimination that are parallel to those provided to individuals on the basis of race, color, national origin, sex and religion."[17] Congress patterned the ADA after two key civil rights statutes, the Civil Rights Act of 1964 and Title V of the Rehabilitation Act of 1973.[18] The ADA was enacted "to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities and to ensure that the Federal Government plays a central role in enforcing the standards."[19]

Title III: Statutory Requirements

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation.[20] It states specifically, "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[21]

Nearly all types of private businesses that serve the public are included regardless of size.[22] The ADA creates a comprehensive list of 12 categories that would constitute "a place of accommodation:" which includes hotels, restaurants,

auditoriums, retail establishments, modes of public transportation, museums, places of education, service centers and exercise facilities.[23]

Section 303 of the ADA deals specifically with architectural discrimination, or the failure of public accommodations and commercial facilities to design and construct facilities that are physically accessible to people who are disabled.[24] Congress directed an independent federal agency, the Architectural and Transportation Barriers Compliance Board (Access Board), to issue "minimum guidelines" for the implementation of this section; and empowered the Attorney General and the Department of Justice to issue more specific regulations.[25] The Access Board issued the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which are not legally binding.[26] The Department of Justice adopted the ADAAG in its Standards for Accessible Design (DOJ Standards), and they are binding regulations.[27]

Title III of the ADA requires different structural requirements for three categories of structures: new construction, alterations and existing facilities.[28] The DOJ Standards are 92-pages of technical regulations for new construction and alterations of facilities.[29] New construction built after January 26, 1993 and alterations made to facilities after January 26, 1992 must be "readily accessible and useable by individuals with disabilities."[30] A "readily accessible" facility can be approached, entered and used by individuals with disabilities easily and conveniently. A facility under this "readily accessible" standard must strictly follow the regulations under the DOJ Standards. Any deviation from these standards constitutes discrimination under this provision.[31]

Places of public accommodation built before January 26, 1993 are required "to remove architectural barriers" to ensure access, and fair and equal treatment to individuals with disabilities.[32] Businesses are required to inspect their premises to determine if any feature is an "architectural barrier" that makes the business inaccessible according to the DOJ standards.[33] Businesses often must hire expensive ADA consultants, architects and lawyers to determine whether they have an architectural barrier in their facility in violation of these accessibility regulations.[34] Although it does not offer any grandfather clauses, the ADA subjects these existing facilities to a lower standard; they only have to remove architectural barriers if removal is "readily achievable."

The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense."[35] The "readily achievable" standard is a flexible standard that is "determined on a case by case basis in light of the particular circumstances" of each business.[36] After determining that a barrier exists in their facility, each business must decide whether barrier removal is "readily achievable" by considering the following four factors:

- The nature and cost of the proposed action;
- The financial resources of the facility including the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- The overall financial resources of the covered entity; and
- The type of operation or operations of the covered entity.[37]

If removal of an architectural barrier is not "readily achievable," places of public accommodation must still make their facilities "available through alternative methods if such methods are readily achievable."[38]

Legislative History

On April 28, 1988, Senator Lowell P. Weicker introduced S.2345, the draft bill created by the National Council as model legislation.[39] This bill ultimately failed because of reservations raised by key sponsors.[40] On May 9, 1989, Senator Tom Harkin introduced a revised ADA bill that contained a drastically different section on public accommodations, which was renamed Title III.[41] Passage of Title III occurred as the result of two key compromises.[42]

Disability advocates criticized the narrow definition of public accommodations in the new bill that mirrored the definition found in Title II of the Civil Rights Act of 1964.[43] On the other side business and Congressional leaders like Senator Bob Dole were concerned about the remedies section,[44] which allowed individual plaintiffs a full range of remedies, including filing "a civil action for injunctive relief, monetary damages, or both in a district court in the United States."[45] This regulatory scheme paralleled the remedies found under the Fair Housing Act, which allows for both compensatory and punitive damages.[46] Attorney General Richard Thornburgh testified, "We are a litigious society. . . whether you like it or not, and there are a lot of people out there that the first thing they want to do is sue somebody, and particularly when you have provided punitive damages."[47]

In exchange for a broader scope of coverage in the definition of "public accommodations," disability advocates agreed to significant cutbacks in the remedies available to plaintiffs limiting them to only injunctive relief and attorney's fees.[48] This regulatory scheme paralleled the remedies present under the Civil Rights Act Title II. This compromise showed the intent of Congressional leaders like Senator Dole, who sought to ease the burden of excessive litigation and monetary damages on small businesses.[49]

The second compromise involved the architectural requirements required for accessibility under Title III of the ADA. In the 1988 bill, the requirements were strict and

required full accessibility for every type of building, irrespective of whether the building was new or already existing.[50] In the 1989 bill, new construction and alterations of buildings would be subject to a stricter "readily accessible" standard, while existing buildings would be subject to a lower "readily achievable standard."[51] Congress sought to explain the difference as follows:

> The concept of readily achievable should not be confused with the term "readily accessible" used in regard to accessibility requirements for alterations and new construction. While the word "readily" appears in both phrases and has roughly the same meaning in each context—*i.e.*, easily, without much difficulty—the concepts of "readily achievable" and "readily accessible" are sharply distinguishable and represent almost polar opposites in focus.
>
> The phrase, "readily accessible to and usable by individuals with disabilities" focuses on the person with a disability and addresses the degree of ease with which an individual with a disability can enter and use a facility; it is access and usability which must be "ready."
>
> "Readily achievable," on the other hand, focuses on the business operator in removing a barrier; if barrier removal cannot be accomplished readily, then it is not required.[52]

While the "readily accessible" standard was borrowed from other federal statutes and therefore tested by businesses and the public, the "readily achievable" standard was "developed during the ADA negotiation process in an effort to find terminology that would capture the concept of 'simple, relatively cheap barrier removal' such as the ramping of a single step."[53]

The Bush administration and Attorney General Thornburgh supported this ADA bill, but openly worried that "businesses could not make accurate predictions of the types of modifications required because the 'readily achievable' compliance standard was not well defined and did not exist under Section 504 of the Rehabilitation Act."[54] Thornburgh commented:

> I do not find the readily achievable language to be specific enough to answer the questions that are inherent in physical accommodations that have to be made for persons with disabilities. . .I suggest only that this area ought to be discussed in considerable detail before an undefined term is adopted at unknown cost and with unknown consequences to all the prospective accommodations that might be effected.[55]

The Congressional debates surrounding the "readily achievable" standard foreshadowed the problems that businesses currently face trying to comply with this vague and confusing standard. ADA advocates, on the other hand, recognized the tactical advantage a vague and flexible standard offered disabled advocates. Lex Frieden, the Former Executive Director of the National Council of the Handicapped, testified, "The standard is flexible, taking account the size and resources of the business. . .the beauty of this bill is that I suppose it depends on how successful a play on Broadway is as to the extent of the accommodations that one must make in order to. . .meet the readily achievable standard."[56]

In ADA hearings of the Committee of Small Business, business owners and their representatives voiced their concerns that the "readily achievable" standard was too flexible and vague for businesses to comply with. David Pinkus, a representative of the National Small Business United, testified, "We are looking for some degree of predictability of what we are supposed to do and not have the answer 'it depends'. . .we do not want the 'it depends answer.' Businesses—especially small ones—both need and deserve more certainty from their government about what will be expected of them, short of being dragged to court."[57] Kenneth Lewis, from the National Federation of Independent Business, testified, "If a business owners feels providing these accommodations is not 'readily achievable' and does not provide them, he can still be sued and face legal fees and court action before he knows if he guessed right or wrong on what the court believes is readily achievable in his particular business."[58]

The compromises behind Title III of the ADA show the intent of Congressional leaders, who sought to provide accessibility for disabled individuals and also ease the burdens to the business owners. Opponents of the "readily achievable" standard nevertheless predicted that businesses would face excessive litigation, a result antithetical to Congressional intent and the spirit of the ADA. Senator Dale Bumpers worried that this flexible standard would result in excessive and costly litigation. Bumpers observed that "the term 'readily achievable' is an unknown term of art and would therefore prove to be like the term beauty. Beauty is in the eye of the beholder and readily achievable means what some judge says it means?"[59]

Department of Justice Interpretations

Congress authorized DOJ to provide technical assistance to individuals and businesses affected by the ADA.[60] Unfortunately, DOJ has fallen short of fulfilling its obligation to provide "clear and consistent guidelines" to the business community on vague terms such as the "readily achievable" standard.

The "readily achievable" standard is not included in the 92-page DOJ Standards, but is found in other regulations in the ADA. Businesses have to make difficult and uncertain decisions on whether a barrier removal project is "readily achievable" based on their particular situation. DOJ has

published an *ADA Title III Technical Assistance Manual* to assist businesses in understanding these Title III regulations, but the manual is confusing and contains conflicting provisions.[61]

The manual provides examples of 21 modifications to architectural barriers that might be readily achievable, such as: installing ramps, making curb cuts in sidewalks, repositioning shelves, rearranging tables, widening doors, installing grab bars, creating designated accessible parking spaces and installing a raised toilet seat.[62] Some modifications, the manual explains, might not be "readily achievable" due to the cost or difficulty of a project. For example, "installing ramps" and "repositioning shelves" are listed as modifications that *may* be "readily achievable."[63] A business generally would not be required to remove a flight of stairs, however, if this would entail "extensive" ramping or an elevator.[64] Such measures would "require extensive restructuring or burdensome expense."[65] Removal or repositioning of shelves may not be "readily achievable" if "the change would result in a significant loss of selling space that would have an adverse effect on its business."[66]

Instead of providing clear standards capable of empowering small-business owners to honor their commitment to civil rights, DOJ concedes that providing clear "readily achievable" guidelines is impossible. DOJ has explicitly declined to establish any kind of numerical formula for determining whether an action is readily achievable: "It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodation requirements and the economic situation that any particular entity would find itself in at any moment."[67] DOJ did indicate in its *ADA Guide for Small Businesses* that a business's size and resources are most heavily weighted when making a "readily achievable" determination.[68] Therefore, it seems that large businesses must remove nearly all architectural barriers while small businesses are given more leeway.[69] How much leeway small businesses are given is just as much a mystery as what cost threshold excuses large businesses from removing architectural barriers.

DOJ's *ADA Title III Technical Assistance Manual* states that there is "no definitive answer" to this "readily achievable" standard, because "determinations as to which barriers can be removed without much difficulty or expense must be made on a case by case basis."[70] Since there is no definitive answer to this "case by case" inquiry, businesses are uncertain of whether they comply with these standards, making them vulnerable to lawsuits based on accessibility. Businesses often hire expensive ADA lawyers to analyze these technical documents and standards to determine whether a particular barrier removal such as the installation of a ramp or an accessible bathroom is "readily achievable."

Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.[71] illustrates the cost ambiguities that Title III imposes on both the disabled and businesses. The court criticized DOJ for not offering guidance or clarity to the standards it imposes on businesses:

> Unfortunately, while the DOJ has issued broad Standards for Accessible Design, it has not seen fit to step up to its statutorily mandated role by providing concrete guidance for architects and builders. Plaintiffs have asked the Court to enforce demanding, and controversial design requirements that the DOJ has never championed in any court or in any rulemaking procedure, and which the Department has declined to support in the present case, despite several invitations from the Court to do so. Therefore, the Court is forced to step in and decide issues which would have been far better left to the politicians in the Executive and Legislative branches.[72]

Paralyzed Veterans of America turned on whether the defendant's architects designed the sightlines for the disabled in compliance with ADA regulations.[73] The court found that the defendants acted in good faith to meet ADA guidelines when constructing the arena, and that the arena created better access for the disabled than any other arena constructed to date.[74] However, as the court put so well, "the ambiguity of the ADA regulations, and the lack of guidance and participation by the Justice Department in these matters, has created an unfortunate situation in which defendants can act in good faith and still fail to comply with the law."[75] The court continued its disapproval of DOJ's lack of involvement in assisting businesses with Title III compliance by stating:

> The [Justice] Department has not established a single, clear interpretation, but has instead left a nebulous record, comprised mostly of informal documents, press releases, announcements and correspondence. This has not provided clear guidance to architects, who have been left with at best an educated guess as to the design features required to comply with ADA regulations. The Justice Department decided against a rulemaking process, which would have left a concrete, workable record from which to discern a standard. It has further declined invitations to participate in the present litigation to explain its interpretation.[76]

As the court recognized, the lack of clear standards not only burdens businesses with unnecessary costs to try to determine how to meet the ambiguous ADA Title III standards, but it also shifts DOJ's responsibility to the courts. In the end, those the ADA seeks to help, the disabled, are actually further hindered from gaining equal access.

Both businesses and courts believe that DOJ has fallen short of fulfilling its obligations to provide "clear and

consistent guidelines" and to help businesses comply with the ADA's requirements. Congress did not create an administrative process to ensure that businesses comply with the hundreds of complicated regulations and standards such as "readily achievable" under the ADA. For example, there are no inspectors to warn businesses if they have a violation and there is no certification that a business is compliant. Businesses can hire expensive ADA consultants, architects or lawyers, but even these preventative measures cannot guarantee a judge will conclude that they are not fully compliant. "I have not found anything that's 100 percent compliant with the ADA," said Mariana Nork, senior vice president of the American Association of People with Disabilities."[77] DOJ's failure to provide effective technical assistance has increasingly made businesses vulnerable to "drive-by" lawsuits based on accessibility.

Court Interpretations: The "Readily Achievable" Standard

Courts are forced to step in and become the ultimate arbitrator in interpreting what "readily achievable" means on a "case by case basis," due to ambiguity and the lack of useful guidance by DOJ.[78] Most businesses settle at the prospect of the expensive litigation costs of an ADA case, so there is little case law to help businesses decide what types of modifications are "readily achievable."

Courts acknowledge that the "readily achievable" standard is ambiguous. In addressing the constitutionality of the term "readily achievable" in *Botosan v. Paul McNally Realty*,[79] the Ninth Circuit found that while "readily achievable" is not unconstitutionally vague the term does lack a precise meaning. Rather than clarifying the "readily achievable" standard, the court suggested that DOJ's regulations and interpretations overcome the low threshold of specificity required and provide enough information to owners of public accommodations on notice of Title III requirements.[80] The court avoided answering what most owners of public accommodations desire, articulated guidelines to evaluate whether or not removal of an architectural barrier is "readily achievable."

While courts have attempted to interpret the "readily achievable" standard, their analyses often pose more questions than answers. In *Spector v. Norwegian Cruise Line Ltd.*,[81] the Supreme Court held that Title III of the ADA applies to foreign cruise ships in U.S. waters. The Court noted, however, that these foreign cruise ships would not be subject to barrier removal and the "readily achievable" standard if these changes would make the vessel noncompliant with the International Convention of the Safety of Life at the Sea (SOLAS) or any other international legal obligation.[82] This case is important for businesses because it emphasizes that the "readily achievable" standard extends to considerations other than the cost of a modification, such as a conflicting international legal obligation.[83] The holding of the case is very narrow, and does address the question of whether a business must comply with the "readily achievable" standard for barrier removal if removal conflicted with local or state health and safety law, a discrepancy business owners often face.

In *Ass'n for Disabled Am., Inc. v. Concorde Gaming Corp.*,[84] the district court attempted to eliminate some of the ambiguity surrounding the "readily achievable" standard. The court ruled that it was not "readily achievable" to install an elevator in a casino ship to allow wheelchair-bound passengers access to the upper decks. Installation of the elevator would have cost $200,000 and put the ship out of commission for two months. Moreover, after installation of an elevator, the Coast Guard would need to recertify the ship as a commercial, passenger vessel.[85] To the court, this was clearly not "readily achievable" and not required by Title III. In regards to the "readily achievable" standard, the court noted, "Title III of the ADA only requires that places of public accommodation take remedial measures that are (1) effective (2) practical, and (3) fiscally manageable."[86]

In *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*,[87] the Court of Appeals pointed out that several factors made barrier removal not "readily achievable," such as the cost of the project and the ability of the business to obtain a permit for the modifications. In this case, the plaintiff had sued a historic block of shops and restaurants in Colorado for architectural barriers that prevented access by his wheelchair and sought installation of a ramp.[88] DOJ's standards provided little guidance and stated only that ramping a single step will likely be "readily achievable," while "extensive ramping" would probably not be required.[89]

In this case of first impression for a federal appellate court, the *Hermanson* court held that a plaintiff seeking barrier removal bears the initial burden of production to present evidence tending to show that the suggested method of barrier removal is readily achievable under the circumstances.[90] If the plaintiff does so, the defendant then bears the ultimate burden of persuasion on affirmative defense that barrier removal is not "readily achievable."[91] The Court of Appeals held that the plaintiff failed to meet his initial burden of production, because he failed to produce concrete evidence that ramp installation was "readily achievable" in his particular situation.[92] The plaintiff's expert witness produced only speculative evidence of cost estimates based on similar projects and a rough sketch instead of construction plans for this new ramp.[93] Also, the plaintiff failed to present any evidence to establish the likelihood that the City of Denver would approve a proposed modification of a historical building.[94]

In *Long v. Coast Resorts*, the Court of Appeals held that a bathroom door guideline for a hotel casino was "readily achievable" because "the terrain on which it is constructed has no unique characteristics that would make accessibility unusually difficult to achieve."[95] This case highlights the difficulty that businesses have in complying with these complicated architectural requirements. Ultimately, the court held that an ADA guideline addressing wheelchair accessibility requirements for existing hotel units applied to interior bathroom doors at a hotel casino.[96] The court found

that the casino failed to comply because it misinterpreted the regulations for the bathroom door width in a sleeping cabin.[97] Guideline 9.4 required that a door width of 32 inches for doors and doorways "within all sleeping units," but Guideline 9.2 distinguishes sleeping rooms from bathrooms.[98] Magistrate had ruled that although there was a "technical violation" of the guidelines, "there has been substantial compliance with the spirit of the law."[99] The appellate court disagreed and concluded that a violation of Title III left no left "no room for equitable discretion."[100]

Effects on Small Businesses

Small businesses are paying the highest price for the confusion surrounding Title III. Taking advantage of the ambiguity in "readily achievable" and the other complexities of compliance, vexatious litigants have filed thousands of lawsuits against small-business owners.[101] The statutory framework of the ADA has opened the door to what one court described as a "cottage industry"[102] for the Plaintiff's bar, a money making scheme more focused on extorting attorney's fees from businesses than actually gaining accessibility for the disabled.

Congress provided for two remedies under Title III of the ADA, a private suit and a suit by the Attorney General to investigate public accommodations that engage in a "pattern or practice of discrimination."[103] For private actions alleging Title III violations, the law only provides injunctive relief rather than monetary damages.[104] However, the ADA contains an attorney's fee provision that is an incentive to private litigation. The provision states: "In any action. . . commenced pursuant to this Act, the court. . .in its discretion, may allow the prevailing party. . .a reasonable attorney's fee, including litigation expenses, and costs."[105]

In *Rodriguez v. Investco,*[106] the district court noted that the attorney's fee provision creates a "cottage industry" for the Plaintiff's bar, and dissuades efforts for voluntary compliance with the property owner. The court explained that it would make sense for plaintiffs to notify business owners of ADA accessibility violations, and work with these businesses for "conciliation" and "voluntary compliance" to fix these problems.[107] Plaintiffs would gain accessibility to these facilities as intended by the ADA, and obtain the same result as a lawsuit for injunctive relief. The Court noted that "one might ask whether attorney's fees should be awarded where no effort is made pre-suit to obtain voluntary compliance."[108] However, the ADA does not require plaintiffs to notify a business owner or attempt pre-suit settlement before filing suit. Rather, the ADA discourages this option because "pre-suit settlement does not vest plaintiff's counsel with an entitlement to attorney's fees."[109] Plaintiffs seeking pre-suit settlement with a business owner would also risk another plaintiff suing this facility, which often occurs.[110] The Court noted that "the current ADA lawsuit binge is, therefore, essentially driven by economics—that is, the economics of attorney's fees." [111]

The plaintiff in this case, Jorge Luis Rodriguez, has filed almost 200 lawsuits against various establishments alleging ADA violations and used the same lawyer, William Charouhis.[112] In this case, Rodriguez unsuccessfully sued Investco, a new owner of a hotel, for accessibility violations he encountered at the hotel in the past.[113] Investco had just purchased the facility weeks before, hired an ADA consultant, and was planning a large-scale renovation to make the facility ADA compliant.[114] There was no effort by the plaintiff's counsel to communicate with Investco "to encourage voluntary compliance, no warning and no offer to forebear during a reasonable period of time while remedial measures were taken."[115] "[Plaintiffs] are filing lawsuits without making an effort to resolve it beforehand," explained K.O. Herston, a defense attorney for a small business, "They never told [us] that they had a problem and never wrote a letter or anything."[116] Another defense attorney, Mike Mollenhour, used much stronger language, complaining that "from a small-business person's point of view, this falls into the category of litigational terrorism."[117]

In *Molski v. Mandarin Touch Restaurant*, the court described the modus operandi of one "vexatious litigant" seeking attorney's fees that is typical in these ADA suits: "sue, settle, and move on to the next suit."[118] Jarek Molski, a physically disabled individual who uses a wheelchair, has filed over 400 ADA lawsuits in California.[119] Molski's prayer for relief always asks for injunctive relief and damages of $4,000 a day, for each day until the facility is compliant with the ADA.[120] Molski circumvented the legislative intent of Congressional leaders who sought to restrict a plaintiff's remedy under Title III of the ADA to injunctive relief, by seeking money damages in state court under the California's Unruh Civil Rights Act and the California Disabled Persons Act while retaining federal jurisdiction under the ADA.[121] Plaintiffs can sue for injunctive relief under the ADA, and tack on state law claims for money damages under these California provisions due to the federal courts concurrent jurisdiction over related claims.[122]

Until December 2004, none of Molski's suits had ever been litigated since the small businesses in question chose a painful but livable settlement over the possibly crippling negative court judgment.[123] When the owner of Mandarin Touch Restaurant finally challenged Molski's claims, the court granted Mandarin's motion, finding Molski to be a vexatious litigant.[124] While the court's ruling prevents Molski from filing any more federal ADA Title III suits before getting the court's approval, many businesses have had to shut their doors or quickly settle with Molski or similar litigants in order to avoid expensive legal fees and litigation.[125] Small-business owners, such as George Leage, must still face Molski in state court.[126] Molski sued Leage's three restaurants in Morro Bay, California, within a span of weeks, and Leage settled one of those cases for $18,000.[127] "I'm willing to do whatever I can to abide by the law," says Leage, "but this is nothing but a money making scam."[128]

The ADA has opened the doors for plaintiffs' lawyers,

who follow this same formula of extortion against small-business owners. One of the most frequent ADA Title III litigants, Access Now, boasts on its website that as of February 2005 it had filed over 907 lawsuits.[129] Approximately 235 of these cases involved hotels, restaurants and other types of small businesses.[130] Similarly, John Mallah, representing his disabled uncle, sued over 700 Florida businesses in a three-year span.[131] Using the same complaint and boilerplate language in each suit, Mallah typically asks the businesses to settle the suit by fixing the allegation and paying $3,000-$5,000 in attorney's fees.[132]

George Louie has filed over 500 lawsuits against a variety of firms—from Sears, Blockbuster Video and McDonalds, to mom-and-pop operations.[133] Some of his individual settlements have reached $100,000, and revenues from his nonprofit corporation, Americans with Disabilities Advocates, topped $500,000.[134] He has sued 130 California wineries, and allegedly told these businesses that they could settle out of court for over $10,000.[135] He even sued his own lawyer, Paul Ren, for minor ADA violations such as a toilet being two inches from the wall and grab bars "not positioned right." In a complaint to the California State Bar, he called Ren a "set-up specialist who on four occasions asked me to visit four businesses in my wheelchair to provide a pretext for suing them."[136]

A review of the flimsy complaints produced by this "cottage industry" of plaintiffs' attorneys reveals their true intent—to harass business owners and extort attorney's fees.[137] In *Molski*, the court found that the allegations contained in the plaintiff's complaints "are contrived and not credible."[138] The court found that Molski filed boilerplate complaints against three restaurants he visited in one day, and encountered the same architectural barriers and sustained the same injuries in each facility.[139] After reviewing Molski's litigious pattern, the court concluded that "these suits were filed maliciously, in order to extort a cash settlement."[140]

Unfortunately, "serial plaintiffs, like Molski, serve as a professional pawn in an ongoing scheme to bilk attorney's fees."[141] For example, in 1999, the Citizens Concerned About Disability Access filed dozens of lawsuits on behalf of a 12-year old wheelchair-bound girl in Florida, stating that she could not get into a liquor store, a pawnshop and other businesses in Palm Beach and Broward Counties.[142] In another example, Carlisle Wilson and his two lawyers filed almost 200 ADA lawsuits in Florida in one year.[143] On one particular day, Wilson and his attorneys filed 23 identical lawsuits against Miami-Dade strip clubs.[144] Wilson claims to have visited all of these facilities in his court papers, but could not remember the specific violations at most of them.[145] "If all the complaints are identical, these people aren't really concerned patrons who want to improve access to a building," said David McDonald, an attorney for Stir Crazy, a strip club in Miami.[146] This "cottage industry" haphazardly mass produces these boilerplate complaints, which is evident in the amount of errors they contain. For example, Wilson sued four businesses and referred to each of them as "the Floridian," a downtown Floridian restaurant not involved in his current complaint; the complaints contained the wrong addresses, and confused office buildings with restaurants.[147]

While many business owners are actively trying to become ADA compliant, the lack of clear guidelines and the ability for vexatious litigants to sue over the most minor infractions, such as improper height of toilet paper dispensers, makes the task nearly impossible. Not only are small businesses incurring unnecessary expenses that are not proportional to their minor ADA infractions, but the overall goal of the ADA Title III, to provide equal access to public accommodations for the disabled, is inhibited. For example, litigious plaintiff Wilson sued Peter Pan Diner in Florida.[148] To settle the suit, business owner Peter Kourkoumeils spent $500 in minor changes at his diner, such as adding two blue disabled signs and moving a toilet dispenser one-half inch. However, Kourkoumeils had to pay Wilson's attorneys $3,500.[149] The intent of the ADA was to create accessibility, which could have been accomplished with notice and voluntary compliance of this business owner for $500. Instead, "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)."[150]

Business owners trying to comply with the ADA are being held hostage in these "shotgun" lawsuits, and are forced to settle or face astronomical attorney's fees and litigation costs that could put them out of business. For example, litigious plaintiff Wilson sued Central Bark, a pet-supply store that had not yet opened for business for alleged ADA violations he encountered during his visits.[151] The business owner, Chris Gaba, had already spent $6,000 on a wheelchair-accessible bathroom and thousands on the entrance before opening this store, but Wilson claimed that these areas were in violation of the ADA.[152] Gaba had to complete thousands of dollars of renovations, pay his own lawyer and experts about $4,000, and pay Wilson's attorneys $2,000.[153] Dave Mock, a saddle maker and owner of Mock Brothers in California, was also sued for ADA violations and paid attorney's fees of $27,000 and $4,000 in damages.[154] Unfortunately, he was unable to make the $20,000 in ADA renovations and was forced to close the family business that was founded in 1941 by Archie Mock, Dave Mock's paraplegic uncle.[155] "Do you want to spend $20,000 to have a trial and voice your displeasure that this case is being driven by attorney's fees or pay much less to settle?" asked Fort Lauderdale attorney Paul Ranis.[156] Business owners who choose to go to trial face the possibility of their own litigation costs, as well the higher plaintiff attorney's fees if they lose.[157] For example, River City Brewing, a Sacramento bar, decided to fight an ADA lawsuit and had to declare bankruptcy after the court ordered the owner to pay $145,000 in plaintiff attorney's fees.[158]

Fixing the ADA: Courts or Congress?

Despite headline-generating cases like a 12-year old

wheelchair-bound girl suing a liquor store for discrimination,[159] support for a legislative fix to Title III remains low. The high point of Congressional involvement came after Clint Eastwood was hit with a Title III lawsuit over a historic hotel he was refurbishing in central California.[160] Spurred by abuses in his own state, Congressman Mark Foley (R-FL) introduced the ADA Notification Act which would require a person suffering from discrimination to provide formal notice of an ADA violation to a business owner 90 days before filing a Title III suit.[161] Despite gaining over 60 co-sponsors the bill never made it out of committee. Disability advocates argued that the 90-day notification requirement would undermine voluntary compliance with the ADA and would place an undue burden on a disabled person's ability to enforce their civil rights.[162] Congressman Foley has reintroduced the bill in every session since 2000 but none of these subsequent bills has made it any further than the first.

While small businesses have been thwarted in Congress, judges more familiar with vexatious litigation have begun to take an active role in reining in abusive ADA litigants. As discussed earlier some individual litigants are so obviously abusive that some courts have held them to be vexatious litigants and then required them to obtain written authorization from a judge before they could file a new ADA compliant.[163] Other courts recognize that the fuel for the litigation fire is the attorney's fees that are allowed after each settlement.[164] These courts attack the problem by using their discretionary power over attorney's fees to award significantly less than originally requested[165] or nothing at all.[166] Both of these solutions are inadequate at best since only the most egregious violators, like Molski, will get slapped with a pre-filing order and the same judges that award minuscule attorney's fees in one ADA case can use that same discretion and award virtually all requested fees in another case even though the defendants were equally culpable.[167]

A more comprehensive check on ADA litigation may come from asking the first question that should be asked in any litigation: has the plaintiff suffered any actual harm that can establish Article III standing? Judges in California,[168] Ohio,[169] and Florida[170] have all taken the Supreme Court's recent new focus on standing and used it to weed out the more disingenuous litigants. In *Harris v. Del Taco, Inc*, [171] the court dismissed a litigant's claim against a fast food restaurant that was 573 miles away from his home. The court held that the plaintiff failed to establish the sufficient intent to return to the Del Taco in question necessary to substantiate an imminent injury in fact.[172] In *Molski v. Mandarin Touch Restaurant*,[173] the court held that the distance (116 miles) between the plaintiff's home and the defendant's restaurant combined with the number of times the plaintiff visited the restaurant (once) showed that the plaintiff was not in danger of suffering irreparable and substantial immediate injury. In *Brother v. Tiger Partner*, [174] the court held that a litigant only had a general intent to return to a hotel 280 miles away from his home and that there were countless other hotels in the area for him to choose from. While this defense will not protect small businesses from all unscrupulous litigation, if properly raised it can encourage busy plaintiffs to focus their efforts elsewhere.

Conclusion

DOJ's refusal to produce clear accessibility standards coupled with the lack of political will necessary to add a notice requirement for Title III public accommodation lawsuits means small businesses will continue to bear a disproportionate burden of ADA compliance costs. Fortunately, courts are losing patience with ADA litigation abuses and are more and more open to either denying attorney's fees entirely, thus draining the litigation swamp, or entertaining standing challenges which can lead to entire suits being thrown out. For now, the courts are the best option small businesses have in reforming the ADA.

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Footnotes

[1] President George H.W. Bush, Remarks at the signing of the Americans with Disabilities Act (July 26, 1990), *at* www.eeoc.gov/abouteeoc/35th/videos/ada_signing_text.html.

[2] 42 U.S.C.A. § 12101(a)(1).

[3] Ruth Colker, The Disability Pendulum: The First Decade of the Americans with Disabilities Act 173 (2005).

[4] 136 Cong. Rec. S9689 (daily ed. July 13, 1989) (statement of Sen. Harkin).

[5] Kristina Hughes, *Michigan State U.: Michigan Rally Lauds Disabilities Act*, U-Wire (July 27, 2000) (quoting Al Swain, deputy director of the Capital Center for Independent Living), at 2000 WL 24488557.

[6] Jane Howard-Martin & Sandra K. Park, *Public Accommodations and Title III*, *in* The Americans With Disabilities Act: Private and Public Costs 59 (National Legal Center for the Public Interest 1996).

[7] 42 U.S.C.A. § 12182.

[8] 42 U.S.C.A. § 12182(b)(2)(A)(iv), 12183(a)(1).

[9] 42 U.S.C.A. § 12182(b)(2)(A)(iv).

[10] Rodriguez v. Investco. L.L.C., 305 F. Supp.2d 1278, 1280-81 (M.D. Fla. 2004).

[11] D. Russell Hymas, *Architectural Barriers Under the ADA: An Answer to the Judiciary's Struggle With Technical Non-Compliance*, 39 CAL. W. L. REV. 349, 354 (2003).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] 42 U.S.C.A. § 12101-12213.

[17] 56 Fed. Reg. 35,545 (1991).

[18] *Id.*

[19] 42 U.S.C.A. § 12101(b)(2).

[20] 42 U.S.C.A. § 12182.

[21] 42 U.S.C.A. § 12182 (a).

[22] U.S. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES ACT: ADA GUIDE FOR SMALL BUSINESSES (1999), *at* http://www.usdoj.gov/crt/ada/smbustxt.htm.

[23] 42 U.S.C.A. § 12181(7).

[24] 42 U.S.C.A. § 12182.

[25] Hymas, *supra* note 11, at 356.

[26] *Id.*

[27] *Id.*

[28] 42 U.S.C.A. § 12183(a)(1), 12182(b)(2)(iv).

[29] 28 C.F.R. § 36 (1994); U.S. DEPARTMENT OF JUSTICE, ADA STANDARDS FOR ACCESSIBLE DESIGN (1994), at http://www.usdoj.gov/crt/ada/stdspdf.htm.

[30] 42 U.S.C.A. § 12183(a)(1).

[31] Hymas, *supra* note 11, at 356.

[32] *Id.*

[33] 42 U.S.C.A. § 12182(b)(2)(iv).

[34] Comment Letter from Andrew Langer, Elizabeth Gaudio and Bruce Phillips, National Federation of Independent Business, to the Hon. R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Docket No. 2004-DRSO1; AG Order No. 2736-2004. (May 31, 2005) (on file with the Department of Justice).

[35] 42 U.S.C.A. § 12181(9).

[36] 28 C.F.R. § 36.204(b) app. B.

[37] 42 U.S.C.A § 12181(9).

[38] 42 U.S.C.A. § 12182(b)(2)(A)(v).

[39] Colker, *supra* note 3, at 27.

[40] *Id.* at 31.

[41] *Id.*

[42] *Id.* at 172-175.

[43] *Id.* at 174.

[44] *Id.* at 172.

[45] H.R. 4498, 100th Cong. § 405 (1989).

[46] Colker, *supra* note 3, at 173.

[47] *Hearings on S. 933 Before the Comm. on Labor and Human Resources and the Subcomm. of the Handicapped*, 101st Cong. 209 (1989).

[48] Colker, *supra* note 3, at 174.

[49] *Id.*

[50] Hymas, *supra* note 11, at 357.

[51] *Id.*

[52] H.R. Rep. No. 485, 101st Cong., 2d Sess., 109-110, reprinted in 1990 U.S.C.C.A.N. 267, *cited in* Howard-Martin & Park, *supra* note 6, at 65.

[53] Robert L. Burgdorf, Jr., *Equal Members of the Community: The Public Accommodations Provisions of the Americans with Disabilities Act,* 64 TEMP. L. REV. 551, 562-63 (1991).

[54] *Hearings on S. 933 Before the Committee on Labor and Human Resources and the Subcommittee for the Handicapped*, 101st Cong. (May 9, 10, 16, and June 22, 1989).

[55] *Id.*

[56] *Hearings Before the Committee on Small Business*, 101st Cong. (Feb. 22, 1990).

[57] *Id.*

[58] *Id.*

[59] 135 Cong. Rec. S10754-63 (daily ed. Sept. 7, 1989).

[60] U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION AND U.S. SMALL BUSINESS ADMINISTRATION, ADA GUIDE FOR SMALL BUSINESSES 1 (June 1999), at http://www.usdoj.gov/crt/ada/smbusgd.pdf.

[61] U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, ADA TITLE III TECHNICAL ASSISTANCE MANUAL § III-4.4200, at http://www.usdoj.gov/crt/ada/taman3.html.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] 28 C.F.R. § 36.104, app. B, at 507; *See* Pinnock v. Int'l House of Pancakes, 844 F.Supp. 574, 581-592 (S.D. Cal. 1993).

[68] ADA Guide for Small Businesses, *supra* note 60, at 2.

[69] *Id.*

[70] ADA Title III Technical Assistance Manual, *supra* note 61, at § III-4.4200.

[71] 950 F. Supp. 393. (D.D.C. 1996).

[72] *Id.* at 394.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 399.

[77] Walter K. Olson, *The ADA Shakedown Racket,* City Journal, Winter 2004, *at* http://www.manhattan-institute.org/cfml/printable.cfm?id=1206.

[78] 28 C.F.R. § 36.204(b) app. B.

[79] *See* Botosan v. Paul McNally Realty, 216 F.3d 827, 836 (9th Cir. 2000) ("Although the definition of 'readily achievable' and its corresponding factors are no models of precision, they do not qualify as vague.").

[80] *Id.*

[81] 125 S.Ct. 2169 (2005).

[82] *Id.* at 2171.

[83] *Id.*

[84] 158 F.Supp.2d at 1365 (S.D. Fla. 2001).

[85] *Id.*

[86] *Id.* at 1363.

[87] 264 F.3d 999 (10th Cir. 2001).

[88] *Id.*

[89] ADA Title III Technical Assistance Manual, *supra* note 61, at § III-4.42.

[90] *Hermanson Family Ltd.*, 264 F. 3d at 1002.

[91] *Id.*

[92] *Id.* at 1009.

[93] *Id.*

[94] *Id.*

[95] Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001).

[96] *Id.*

[97] *Id* at 922.

[98] *Id.*

[99] *Id.* at 923.

[100] *Id.*

[101] California Chamber of Commerce, Business Issues and Legislative Guide, Keeping California Open for Business: Agenda for Economic Growth and Development 2005, (noting that thousands of California businesses have been subject to ADA lawsuits), *at* http://www.calchamber.com/biz%20issues/2005/summaries/05-ADALawsuitAbuse.pdf.

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[103] 42 U.S.C. § 12188(b)(1) (2000).

[104] 42 U.S.C. § 12188(a)(1) (2000).

[105] 42 U.S.C. § 12205 (2000).

[106] 305 F. Supp.2d at 1281-82.

[107] *Id.* at 1281.

[108] *Id.*

[109] *Buckhannon Bd. and Care Home, Resources*, 532 U.S. 598, 605 (2001).

[110] *Rodriguez*, 305 F.Supp.2d at 1282.

[111] *Id.*

[112] *Id.* at 1278.

[113] *Rodriguez*, 305 F. Supp.2d at 1278.

[114] *Id.* at 1284.

[115] *Id.* at 1281.

[116] Bill Carey, *Revenge of the Disabled: Florida advocacy group files wave of Knoxville lawsuits,* Freezerbox Magazine, Mar. 19, 2003, at http://www.metropulse.com/dir_zine/dir_2003/1303/t_cover.html.

[117] *Id.*

[118] Molski v. Mandarin Touch Restaurant, 347 F. Supp.2d 860, 865 (C.D. Cal. 2004).

[119] *Id.* at 861.

[120] *Id.*

[121] *Id.* at 862.

[122] *Molski*, 347 F. Supp.2d at 862.

[123] *Id.*

[124] *Id.* at 868.

[125] *Id.* at 863.

[126] Justin Martin, *Why the Disabilities Act Exasperates Entrepreneurs*, Fortune-Small Business, May 2005, *at* http://www.fortune.com/fortune/smallbusiness/managing/articles/0,15114,1048529,00.html.

[127] *Id.*

[128] *Id.*

[129] http://www.adaaccessnow.org/feb05.htm (last visited Jan. 13, 2006).

[130] *Id.*

[131] Olson, *supra* note 77.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Molski*, 347 F. Supp.2d at 864.

[138] *Id.*

[139] *Id.*

[140] *Molski*, 347 F.Supp.2d at 865.

[141] *Id* at 863.

[142] Shannon O'Boye, *Disability Lawsuits Coming Under Scrutiny*, South Florida Sun-Sentinel, Aug. 26, 2001.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Brother v. Tiger Partner LLC, 331 F. Supp.2d 1368 (M.D. Fla. 2004).

[151] O'Boye, *supra* note 142.

[152] *Id.*

[153] *Id.*

[154] Martin, *supra* note 126.

[155] *Id.*

[156] O'Boye, *supra* note 142.

[157] Olson, *supra* note 77.

[158] *Id.*

[159] *See* O'Boye, *supra* note 142.

[160] *ADA Notification Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary,* 106th Cong., 2d Sess. 136 (2000).

[161] HR 3590, 106th Cong., 2d Sess. (2000).

[162] *Id.*

[163] *Molski*, 347 F. Supp.2d at 868.

[164] Rodriguez v. Investco, 305 F.Supp.2d 1278, 1281 (M.D. Fla. 2004) (describing ADA litigation as a "cottage industry").

[165] Sanford v. Thrifty Payless, 2005 WL 2562712 (E.D. Cal. 2005).

[166] Doran v. Del Taco, 375 F. Supp.2d 1028 (C.D. Cal. 2005); Assoc. for Disabled Americans v. Integra Resort, LLC, 385 F. Supp. 1272 (M.D. Fla. 2005).

[167] *Compare* Sanford v. Thrifty Payless, Inc., 2005 WL 2562712 (E.D. Cal. 2005) *with* White v. Savemart Supermarkets, 2005 WL 2675040 (E.D. Cal. 2005).

[168] Harris v. Del Taco, 2005 WL 2757301 (C.D.Cal 2005).

[169] Young v. Mahasagar, 2005 WL 1868151 (S.D. Ohio 2005).

[170] Brother v. Tiger Partner, LLC, 331 F.Supp.2d 1368 (M.D. Fla. 2004).

[171] 2005 WL 2757301 (C.D.Cal 2005).

[172] *Id.*

[173] Molski v. Mandarin Touch Restaurant, 385 F. Supp.2d 1042 (C.D. Cal. 2005).

[174] *Brother Tiger*, 331 F. Supp.2d at 1374.