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# COMMENTS

“Let the shameful wall of exclusion finally come tumbling down”, President George H.W. Bush.<sup>1</sup>

## ADA REGULATORY COMPLIANCE: HOW THE AMERICANS WITH DISABILITIES ACT AFFECTS SMALL BUSINESSES

Joseph Chandlee

### I. INTRODUCTION

The Americans with Disabilities Act was signed into law July 26, 1990 to address “an appalling problem: [the] widespread, systemic, inhumane discrimination against people with disabilities.”<sup>2</sup> This included very few accommodations to government buildings, monuments, parks, abysmal treatment centers, and limited access to stores or businesses.<sup>3</sup> The passage of the ADA provided improved government services, public accommodations, and alleviated transportation by creating access to buildings and facilities through flat or ramped entrances.<sup>4</sup>

The ADA corrected many problems that Americans with disabilities faced in society.<sup>5</sup> However, there is now some good-willed pushback on the ADA with businesses supporting new legislation.<sup>6</sup> These businesses often do not debate whether they are violating the law or not, but rather, they challenge how easily they can be sued for perhaps minor ADA infractions.<sup>7</sup> The concern begins with the Americans with Disabilities Act, which most believe is a phenomenal law that ends with well-meaning small businesses suffering at the hands of relentless lawsuits for monetary benefit rather than ADA

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1. Tammy Duckworth, *Congress wants to make Americans with disabilities second-class citizens again*, THE WASHINGTON POST (October 17, 2017), [https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17/f508069c-b359-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.868f2a798fee](https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17/f508069c-b359-11e7-9e58-e6288544af98_story.html?utm_term=.868f2a798fee).
  2. Robert L. Burdgorf Jr., *Why I wrote the Americans with Disabilities Act*, THE WASHINGTON POST (July 24, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm\\_term=.e200ec7dd5bf](https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.e200ec7dd5bf).
  3. *Id.*
  4. *Id.*
  5. Duckworth, *supra* note 1.
  6. Duckworth, *supra* note 1.
  7. Duckworth, *supra* note 1.

compliance.<sup>8</sup>

This article will focus on ADA Title III enforcement through private litigation, primarily in the states of Maryland, California, and Florida and what causes the problem of serial ADA litigation and lawsuit abuse.

## II. BACKGROUND

### A. *Americans with Disabilities Act of 1990*

#### i. History of ADA

The history of the ADA did not begin with the President's signature of the Act in 1990.<sup>9</sup> Prior to any form of legislation, there was an establishment of local groups to advocate for disability rights for such a marginalized minority of the population.<sup>10</sup> This began the reversal of the nation's old "out of sight, out of mind" unwritten policy regarding the discrimination of disabled persons.<sup>11</sup> The first legal shift in disability public policy was the implementation of Section 504 of the 1973 Rehabilitation Act, which "banned discrimination on the basis of disability by recipients of federal funds, [and] was modeled after previous laws which banned race, ethnic origin and sex based discrimination by federal fund recipients."<sup>12</sup> This was the first time it was considered "discrimination" to exclude or segregate people with disabilities.<sup>13</sup>

The Department of Health, Education, and Welfare was given the task to promulgate the regulations set forth in Section 504, which primarily focused on establishing anti-discrimination protections.<sup>14</sup> These regulations not only included the dissolution of policy barriers but also mandated affirmative conduct in order to accommodate people with disabilities.<sup>15</sup> The regulations

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8. Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, FORBES (December 22, 2016), <https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/#2d75d89134ee>

9. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DREDF (visited Jan. 11, 2018), <https://dredf.org/news/publications/the-history-of-the-ada/>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DREDF (visited Jan. 11, 2018), <https://dredf.org/news/publications/the-history-of-the-ada/>.

that were issued by this task force founded the basis for the ADA as well as brought disability rights into mainstream political discussion, paving the way to pass the ADA in the near future.<sup>16</sup>

In the 1980's, President Reagan established a task force on regulatory relief, whose main purpose was to provide relief to businesses from burdensome regulations.<sup>17</sup> This effort targeted many types of regulations including Section 504 regulations that were candidates to be "de-regulated" for businesses.<sup>18</sup> "For two years, representatives from the disability community met with administration officials to explain why all of the various de-regulation proposals must not be adopted."<sup>19</sup> Protests and letters from the disabled community accompanied these discussions.<sup>20</sup> The Reagan administration, however, did end up removing any effort to de-regulate Section 504, which, without needing to be said, was a huge victory for the disability movement.<sup>21</sup> Not only were the existing regulations safe from extinguishment, this put the ADA in a place to educate the executive officials in the forthcoming Bush administration.<sup>22</sup>

During the 1980's "the disability community was [] successful in overturning by legislation several disability – specific negative Supreme Court rulings."<sup>23</sup> The disability movement became a prominent and powerful political force that led to the first version of the ADA in 1988 "through numerous drafts, revisions, negotiations, and amendments."<sup>24</sup> Teams of lawyers and advocates worked on the drafting of the ADA and navigating the various legal issues that arose.<sup>25</sup> Irrespective of the legal issues, "[t]he underlying principle of the ADA was to extend the basic civil rights protections extended to minorities and women to people with disabilities."<sup>26</sup> Furthermore, prior to the ADA, "no federal law prohibited private sector discrimination against people with disabilities, absent a federal grant or contract."<sup>27</sup>

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DREDF (visited Jan. 11, 2018), <https://dredf.org/news/publications/the-history-of-the-ada/>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

ii. The Law Today

In 2008, the ADA Amendments Act (ADAAA) was passed for the purpose of broadening the definition of disabilities, which had been previously constricted by U.S. Supreme Court decisions.<sup>28</sup> Furthermore, in 2010, the Department of Justice issued updated transportation regulations that refined Title II and Title III concerning Public Services and Public Accommodations, respectively.<sup>29</sup>

iii. Purpose of the Law

The Americans with Disabilities Act of 1990 (ADA) was signed into law for the “overall purpose to make American society more accessible to people with disabilities. The Act stated purpose was to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>30</sup> Furthermore, the ADA is divided into five titles: Employment (Title I), Public Services (Title II), Public Accommodations (Title III), Telecommunications (Title IV), and Miscellaneous (Title V).<sup>31</sup> All of these sections relate to areas of American society that disabled people are vulnerable to discrimination based on their disability.<sup>32</sup>

iv. Title III – Public Accommodation

It has been recognized that “[a] major source of discrimination suffered by disabled individuals is the inability to gain access to public accommodations such as restaurants, hotels, movie theaters, and gas stations.”<sup>33</sup> The discrimination suffered by disabled individuals was the result of ineffective architectural designs that, de facto, prohibited access to these individuals to

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28. *The Americans with Disabilities Act: A Brief Overview*, JAN, <https://ask-jan.org/links/adasummary.htm> (last visited Jan. 10, 2018).

29. *Timeline of the Americans with Disabilities Act*, NATIONAL NETWORK, <https://adata.org/ada-timeline> (last visited Mar. 7, 2018).

30. Samantha Katie Bernstein, Comment, *The Americans with Disabilities Act of 1990 – As Amended: Remediating the Boundary that Congress Overstepped*, 25 GEO. MASON U. CIV. RTS. L.J. 123 (2014); 42 U.S.C. § 12101(b)(1)-(2).

31. *The Americans with Disabilities Act: A Brief Overview*, *supra* note 28.

32. *Id.*

33. Carri Becker, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abuse or Commendable?* 17 HASTINGS WOMEN’S L.J. 93 (2006).

number of facilities.<sup>34</sup> The ADA recognized that these facilities did not enable disabled people to have proper access, so to address this form of discrimination, the ADA implemented Title III, requiring places of public accommodation and business facilities to comply with specific architectural accessibility guidelines.<sup>35</sup>

Title III of the ADA applies to places of ‘public accommodation’ defined as any facility, operated by a private entity, whose operations affect commerce and fits into one of the following:

- 1) an inn, hotel, motel or other place of lodging (excluding establishments with no more than five rooms for rent or hire that are occupied by a proprietor and used as his/her residence);
- 2) a restaurant, bar, or other establishment serving food or drink;
- 3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- 4) an auditorium, convention center, lecture hall, or other place of public gathering;
- 5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishments;
- 6) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel services, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- 7) a terminal, depot, or other station used for specified public transportation;
- 8) a museum, library, gallery, or other place of public display or collection;
- 9) a park, zoo, amusement park, or other place of recreation;
- 10) a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education;
- 11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment, and;
- 12) a gymnasium, health spa, bowling alley, golf course, or

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34. *Id.*

35. *Id.*

other place of exercise or recreation.<sup>36</sup>

This required businesses to remove structural barriers where “readily achievable,”<sup>37</sup> to continually evaluate accessibility, and to make ADA compliant modifications.<sup>38</sup> Furthermore, the standard of compliance with the ADA was dependent on “the date the actual facility was constructed or altered.”<sup>39</sup> For example, “facilities built or modified after January 26, 1992 must be readily accessible to and usable by individuals with disabilities. In contrast, facilities built or modified before January 26, 1992 are only required to remove architectural barriers when removal is ‘readily achievable,’ a standard that takes into consideration factors such as cost and potential burden on the business.”<sup>40</sup> Businesses also must comply with state, county, or city regulations and ordinances along with the ADA, creating a great constructional and monetary burden for businesses to negotiate.<sup>41</sup>

v. The Elements of Title III ADA Violation

To be protected by the ADA, “one must have a disability, which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities”, perceived as having an impairment by others, or a history of having a disability.<sup>42</sup> Furthermore, pursuant to the statute, liability may attach to “any person or entity who owns, leases (or leases to) or operates a place of public accommodation.”<sup>43</sup> Lastly, a person is denied a public accommodation or access when entity or person fails to

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36. Linda H. Wade and Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go Into A Bar: Serial ADA Litigation is No Joke*, 25 NO. 4 TRIAL ADVOC. Q. 31 (2006); 28 C.F.R. § 36.104.

37. 42 U.S.C. § 12181(9) (2000) (“Readily achievable” is defined as “easily accomplishable and able to be carried out without much difficulty or expenses”).

38. *Id.*; 42 U.S.C. § 12183(a)(2) (2000).

39. Wade and Inacio, *supra* note 36, at 32; *see generally Pascuiti v. New York Yankees*, 87 F. Supp.2d 221 (S.D.N.Y. 1999); *see also* 42 U.S.C. § 12181(9).

40. *Id.*

41. Becker, *supra* note 33.

42. *Introduction to the ADA*, UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, [www.ada.gov/ada\\_intro.htm](http://www.ada.gov/ada_intro.htm) (last visited Jan. 10, 2018).

43. Wade and Inacio, *supra* note 36, at 32; 42 U.S.C. § 12182(a) (“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.”).

comport with the standards.<sup>44</sup>

*B. Enforcement to Comply Expressed in the ADA*

The Americans with Disabilities Act not only describes the standards that people and entities must adhere to but also outlines the proper enforcement process in the Act.<sup>45</sup> There are two avenues of enforcement that the statute sets forth: first, there is a right of action for the Attorney General.<sup>46</sup> Secondly, there is a private right of action.<sup>47</sup> “The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.”<sup>48</sup> All that is required for the Attorney General to commence a civil action against the alleged offender of the ADA is “reasonable cause to believe that” there is a person or group that is engaging in discrimination.<sup>49</sup> The Americans with Disabilities Act gives private citizens as well as the Department of Justice the power to enforce the provisions of the Act.<sup>50</sup> However, we know that certain states, enforcing the same law, have a different amounts of ADA civil suits filed compared to others.<sup>51</sup> This article will analyze why there is a discrepancy and review where primarily Maryland falls within the private and overall litigation regarding the ADA, as well as California and Florida.

*C. Federal Governance Over ADA Compliance*

The ADA is “the nation’s first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.”<sup>52</sup> Under the Act, the Equal Employment Opportunity Commission has enforcement authority for Title I of the Act, which encompasses employment

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44. 42 U.S.C. § 12182(a); *Arizona ex re. Goddard v. Harkins Amusement Enters, Inc.*, 603 F.3d 666, 670 (9th Cir. 2012).

45. 42 U.S.C.A. § 12188(b).

46. 42 U.S.C.A. § 12188(b)(1)(A)(i).

47. 42 U.S.C.A. § 12188(b).

48. *Id.*

49. *Id.*

50. *Id.*

51. Barnes, *supra* note 8.

52. *The Americans With Disabilities Act of 1990*, THE EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Jan. 10, 2018).

discrimination provisions.<sup>53</sup> For the Commission, “litigation [] became an important vehicle [] to establish its policy positions on the provisions of the ADA” and ultimately enforce those ADA provisions.<sup>54</sup> The Federal Communications Commission (FCC), for public announcements regulates title IV of the ADA.<sup>55</sup> But what about Title III? The U.S. Department of Justice is authorized to enforce ADA regulations governing Title III of the ADA, public accommodations.<sup>56</sup> Furthermore, another federal agency, the Architectural and Transportation Barriers Compliance Board (Access Board) “issue[s] guidelines to ensure that buildings, facilities and transit vehicles are accessible to people with disabilities.”<sup>57</sup> The Access Board provides individuals, businesses, and the general public with guidelines, standards, training, and a gateway for enforcement.<sup>58</sup> The interesting thing about the Access Board is that they cover the Architectural Barriers Act of 1968, which is designed to govern “facilities designed, built, altered with Federal funds or leased by Federal agencies ... including post offices, social security offices, prisons, and national parks”,<sup>59</sup> whereas the “ADA applies to places of public accommodation, commercial facilities, and state and local government facilities.”<sup>60</sup>

On the other hand, The Department of Justice, generally first seeks to settle the ADA dispute with the alleged offending individual or business through negotiations.<sup>61</sup> If settlement negotiations are unsuccessful, the Department of Justice may file a lawsuit in Federal court and can obtain court orders with compensatory damages and back pay to remedy the illegal discrimination.<sup>62</sup> Furthermore, the Department of Justice plays a role in privately litigated ADA cases in which it is not a party by filing amicus briefs in an

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53. *Id.*

54. *Id.*

55. *Americans with Disabilities Act*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/disability/ada> (last visited Mar. 7, 2018).

56. *Id.*

57. *Id.*

58. *Enforcement of the Architectural Barriers Act*, THE UNITED STATES ACCESS BOARD, <https://www.access-board.gov/aba-enforcement> (last visited Mar. 7, 2018).

59. *Id.*

60. *ADA and ABA Accessibility Guidelines*, THE UNITED STATES ACCESS BOARD, <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/ada-aba-accessibility-guidelines-2004> (last visited Mar. 7, 2018).

61. Disability Rights Section, Civil Rights Div., *U.S. Dep’t of Justice, Enforcing the ADA: A Status Report from the Department of Justice 13* (2007), <https://www.ada.gov/aprjun07.pdf>.

62. *Id.*

attempt to guide courts in interpreting the ADA.<sup>63</sup> The Department of Justice also, under contract, refers complaints under title II and III for mediation by professional mediators to The Key Bridge Foundation.<sup>64</sup>

Additionally, many governmental agencies produce publications on the ADA accessibility requirements in order to synthesize the complex and meticulous regulations of the entire ADA standards into something those businesses can apply to their establishments.<sup>65</sup> However, these are not much more user-friendly than the original Americans with Disabilities Act regulations.<sup>66</sup> The Department of Justice issued a 660 page ADA Handbook including “Accessibility Guidelines” and “Uniform Federal Accessibility Standards.”<sup>67</sup> Moreover, the Department of Justice produced an “ADA Guide for Small Businesses” in conjunction with the U.S. Small Business Administration.<sup>68</sup> However, there are tax breaks available “to blunt the burden imposed on small businesses” because of the amount of money it takes to comply with the many nuances of the ADA.<sup>69</sup> Various tax credits are available:

The Small Business Tax Credit; the IRS Code Section 44, Disabled Access Credit, which held small businesses cover the cost of making their businesses accessible, up to a maximum benefit of \$5,000; the Architectural/Transportation Tax Deduction: IRS Code Section 190, Barrier Removal, which allows businesses an annual deduction of up to \$15,000 for expenses incurred to remove physical, structural, and transportation barriers for persons with disabilities at the workplace.<sup>70</sup>

### III. ISSUES

#### A. *The Current Struggle for Small Businesses*

Not only must businesses comply with the ADA Title III provisions generally, they must adhere to the specific 2010 ADA Standards for

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63. *Id.*

64. *Id.*

65. Becker, *supra* note 33, at 95.

66. *Id.*

67. *Id.*; See *Americans with Disabilities Act Handbook*, Equal Employment Opportunity Commission & U.S. Department of Justice (1991).

68. *Id.*; See U.S. Small Business Administration and U.S. Department of Justice, *Americans With Disabilities Act: ADA Guide for Small Businesses* (1999), <http://www.sba.gov/ada/smbusgd.pdf>.

69. *Id.*; See *Id.* at 95, n. 16.

70. *Id.* at 95, n. 16.

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Accessible Design<sup>71</sup> along with state, county, and city regulations.<sup>72</sup> For instance, construction in California, where the most ADA civil suits are filed, must meet ADA standards as well as the California Title 24, the American National Standards Institute, the International Building Code, and other county or city building regulations.<sup>73</sup>

For Maryland, construction must meet the standards for the ADA, the Maryland Accessibility Code – where “[t]here is also federal law governing many of the buildings and facilities covered by this Code, and to the extent federal law is more restrictive than this Code, federal law shall control”—implying that more regulations always mean more restrictive standards.<sup>74</sup>

Furthermore, the removal of architectural barriers disproportionately affect small businesses for the following reasons:

- (1) Small businesses are more likely to operate in older buildings and facilities;
- (2) the 1991 Standards are too numerous and technical for most small business owners to understand and then to square with the ADA requirements with state and local building or accessibility codes; and
- (3) small businesses are particularly vulnerable to title III litigation and are often compelled to settle because they cannot afford the litigation cost involved in proving whether an action is readily achievable.<sup>75</sup>

Of course, large corporations have the money and resources to self-regulate and make sure that they comply with all the meticulous requirements, however, small businesses have struggled to comply with all the different federal and state statutes, ordinances, and codes.<sup>76</sup>

### B. Congress' Response

First, Congress did anticipate that these requirements would be overly

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71. Institute for Human Centered Design, *ADA Checklist for Existing Facilities* (2010), <http://www.adachecklist.org/doc/fullchecklist/ada-checklist.pdf>.

72. Becker, *supra* note 33, at 96.

73. *Id.*

74. MD. CODE ANN. HOUS. & CMTY. DEV. COMAR 05.02.02.04(A) (2018).

75. Michael B. Mukasey, *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 73 FR 34508 (2008).

76. *Id.*

burdensome on small business and therefore, built caps into the cost of required alternations.<sup>77</sup> Generally, “[a]n alternation that affects the usability of or access to ‘primary function’ areas of a facility triggers the requirement that an accessible path of travel must be provided to the altered areas. The restrooms, telephones, and drinking fountains serving the altered areas must also be accessible, to the extent that the cost of making these features accessible does not exceed 20% of the cost of the planned alterations.”<sup>78</sup>

After further consideration of the difficulties of complete compliance with the ADA Title III standards or the vulnerability to a lawsuit, the “new ADA Accessibility Guidelines were issued by the Access Board in 2004, overhauling the original guidelines.”<sup>79</sup> The Access Board’s purpose for amending and superseding the original guidelines was to make the guidelines more consistent with standards by American National Standards Institute and the International Building Code.<sup>80</sup> Consistency with regulations limits the vulnerability of small businesses to potential lawsuits; however, there are still issues with compliance and rampant litigation.<sup>81</sup>

#### IV. ANALYSIS

##### A. ADA by the Numbers

As of 2015, it was reported by the Center for Disease Control and Prevention that about 53 million adults in the United States live with some type of disability.<sup>82</sup> According to this study, one out of five adults has a disability; where the most common functional disability type is one of *mobility limitation*.<sup>83</sup> Moreover, 13 percent of people in the United States have a mobility limitation, defined as “difficulty walking or climbing stairs – reported by one in eight adults.”<sup>84</sup> Mobility limitations are squarely in the purview of Title III of the Americans with Disability Act, where architectural and public accommodations are required to be made in order to accommodate the physical

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77. 28 C.F.R. §§ 36.402-36.403 (2004).

78. Becker, *supra* note 33, at 96, n. 12.

79. *Id.* at 96; *ADA and ABA Accessibility Guidelines supra* note 60.

80. *Id.*

81. *Id.*

82. Centers for Disease Control and Prevention, *CDC: 53 Million Adults in the US Live with a Disability*, CDC <https://www.cdc.gov/media/releases/2015/p0730-US-disability.html> (last viewed April 26, 2018).

83. *Id.*

84. *Id.*

effects of their disability.<sup>85</sup> Although the Centers for Disease Control and Prevention may define “disability” slightly different than what is considered one under the Americans with Disabilities Act, this is a good indicator of the potential plaintiffs for ADA violations.<sup>86</sup> The Director of CDC’s Division of Disability, Georgina Peacock, M.D., M.P.H., commented on the Americans with Disabilities Act in light of this study stating that, “[f]or the past 25 years, the Americans with Disabilities Act (ADA) has made a positive difference in the lives of those who have disabilities by ensuring better access to buildings, transportation, and employment. Access to preventive health care is also critically important for those with disabilities.”<sup>87</sup> Dr. Georgina Peacock continued stating that “[m]any of the health issues that people with disabilities face may be addressed by making sure they have access to health promotion programs and health care services, including preventive health screening, throughout their lifespan.”<sup>88</sup>

But what does this mean for ADA complaints that are filed, title III violations in particular? Well, in 2016 alone, a total of 6,601 ADA Title III lawsuits were filed in federal court.<sup>89</sup> That was 1,812 more ADA Title III lawsuits more than the previous year, which is a 37% increase in one year.<sup>90</sup> Furthermore, this does not even account for the mediated ADA violations and settlement agreements made prior to even filing a lawsuit.<sup>91</sup> California and Florida are clearly the hotbeds for litigation, where 2,468 and 1,663 ADA Title III lawsuits were filed, respectively, against mostly small businesses that had architectural accommodation violations.<sup>92</sup> There is a huge increase in physical accessibility lawsuits, largely due to plaintiffs asserting website accessibility claims as ADA title III violations.<sup>93</sup> However, for purposes of this article, an in depth analysis of website accessibility claims are beyond the scope.

It is true that California and Florida are both highly populated states and it makes sense that they contain most ADA lawsuits; however, New

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85. *Id.*; see 42 U.S.C. § 12101.

86. *Id.*

87. *Id.*

88. *Id.*; see Centers for Disease Control and Prevention, *Disability Impacts All of Us*, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>. (last visited Apr. 26, 2018).

89. Minh N. Vu, Kristina M. Launey, and Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, SEYFARTHSHAW (Jan. 23, 2017).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

York, housing close to 20 million people, is the next closest with the third most ADA lawsuits but with only 543 lawsuits filed in federal court.<sup>94</sup> Although it contains 12% of the country's disabled population, California is responsible for 40% of ADA lawsuits.<sup>95</sup> Although ADA litigation is on the rise throughout the entire country,<sup>96</sup> Maryland did not make the top ten for most ADA litigated states.<sup>97</sup>

*B. ADA Contagion:<sup>98</sup> How Bad is it Really?*

Ken Barnes, the executive director of California Citizens Against Lawsuit Abuse, analogized ADA lawsuit abuse with an “infectious disease plaguing small and micro businesses,” where “California remains patient zero” but the disease has been mutating to other states.<sup>99</sup> He recognizes the importance of the law but also that “a relentless group of personal injury lawyers” have taken the law as a way to make money “at the expense of well-meaning small businesses.”<sup>100</sup> The issue with these lawsuits is that if a “door handle is misaligned by 3/8th of an inch, or a disabled parking sign doesn't properly note the exact amount of potential parking violation” then a plaintiff's lawyer can easily bring suit and the business is forced to pay up because of the technical violation.<sup>101</sup>

These minor violations can strong-arm a business to pay an average of \$16,000 cash in California.<sup>102</sup> These settlements, although a huge burden on business, is monetarily the smarter decision rather than fighting in court where the average spent by a defendant is around \$75,000.<sup>103</sup> Small business harbor resentment towards those lawsuits in the belief that the violations have little bearing on accessibility compared to the cost that they must bear in order to litigate the lawsuits.<sup>104</sup> These suits are a real concern, legitimate or not, because of the harsh affect it has on small businesses, especially for those who cannot afford it as some lawsuits have forced businesses into

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94. *Id.*

95. The Editorial Board, *ADA Lawsuit Abuse Remains a Problem*, Los Angeles Daily News (Pub. May 24, 2017 7:20 PM ET) (Updated August 28, 2017 5:34 AM ET).

96. Vu, Launey, and Ryan *supra* note 89.

97. *Id.*

98. Barnes, *supra* note 8.

99. Barnes, *supra* note 8.

100. Barnes, *supra* note 8

101. Barnes, *supra* note 8

102. Barnes, *supra* note 8

103. *Id.*

104. *Id.*

bankruptcy.<sup>105</sup>

C. *Who is Filing ADA Lawsuits?*

In California and Florida especially, ADA lawsuits are being brought not by the Department of Justice but by private disabled people.<sup>106</sup> On the contrary, most ADA complaints that are filed against small businesses are by a small number of disabled individuals – along with the small group of plaintiff’s lawyers who enable these lawsuits.<sup>107</sup> For example, in just four years “[o]ne attorney ha[d] filed 740 lawsuits against Florida businesses.”<sup>108</sup> Even in Philadelphia, one law firm had “filed hundreds of lawsuits on behalf of two disabled men.<sup>109</sup> These two founded a non-profit group, the American Disability Institute; and plan “to roll out 400 to 500 suits a month until more than 5,000 businesses have been cited for ADA violations.”<sup>110</sup> And of course California, one infamous disabled plaintiff<sup>111</sup> has filed over 400 lawsuits alleging violations of the ADA.<sup>112</sup> Lawyers have no problem finding ADA defendants because:

Title III of the 1990 Americans with Disabilities Act, covering public accommodations such as stores and theaters, is so hard to comply with. It lays out hundreds of requirements –everything from the permissible height of countertops and mirrors in newer or renovated buildings to how heavy swinging entrance can be to the exact location where grab bars must be located in toilets, and on and on. A bathroom alone must meet 95 different standards, on one estimate.<sup>113</sup> Naturally, this will “ultimately result in greater accessibility for the disabled”<sup>114</sup> in these areas, but at what cost? This small faction of individuals with their lawyers<sup>115</sup> may technically be bringing businesses into “compliance” but this does have a massive financial burden on one of the

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105. *Id.*

106. Wade and Inacio, *supra* note 36, at 33.

107. Wade and Inacio, *supra* note 36, at 33.

108. Wade and Inacio, *supra* note 36, at 33.

109. Wade and Inacio, *supra* note 36, at 33.

110. Becker, *supra* note 33, at 97.

111. referred to as “the Sheriff”

112. *Id.*; see Walter K. Olsen, *The ADA Shakedown Racket*, THE CITY JOURNAL (2004), [http://www.city-journal.org/html/14\\_1\\_the\\_ada\\_shakedown.html](http://www.city-journal.org/html/14_1_the_ada_shakedown.html).

113. Walter K. Olsen, *The ADA Shakedown Racket*, THE CITY JOURNAL (2004), [http://www.city-journal.org/html/14\\_1\\_the\\_ada\\_shakedown.html](http://www.city-journal.org/html/14_1_the_ada_shakedown.html).

114. *Id.*

115. See *Rodriguez v. Investco, L.L.C.*, 305 F.Supp.2d 1278, 1280-81 (M.D. Fla. 2004).

most important aspects of our economy—small businesses?<sup>116</sup> The statutory setup “has resulted in an explosion of private ADA-related litigation... These cases have been filed by a relatively small number of plaintiffs (and their counsel) who have assumed the role of private attorneys general.”<sup>117</sup> However, if compliance were the main goal, why wouldn’t potential plaintiffs notify businesses of a violation that is essential to their access? Some believe, such as Florida ADA plaintiff’s lawyer John Mallah, that business’s will not “become accessible until they’re forced to do it.”<sup>118</sup> And therefore, there is “no effort to communicate with the property owner to encourage voluntary compliance, no warning and no offer to forbear during a reasonable period of time while remedial measures are taken.”<sup>119</sup>

*D. Why there is Lawsuit Abuse?*

i. California

ADA lawsuit abuse is prolific throughout the country but nowhere does it “run more rampant than in California.”<sup>120</sup> This is largely due to the fact that plaintiffs in an ADA lawsuit in California have the ability to not only recover injunctive relief and attorney’s fees, which would require businesses to fall into compliance and cover the cost of bringing suit; but a plaintiff can also recover monetary damages without alleging any additional injury such as psychological or physical trauma or even inconvenience.<sup>121</sup> The ADA does not offer a monetary award; however there are state laws in place that incorporate monetary awards for ADA violations.<sup>122</sup> Therefore, as will be discussed, changes to the ADA itself can remedy these issues.

1. State Law Incentives

Again, although private plaintiffs cannot recover a monetary award under the ADA but can recover monetarily under the state civil rights act, “an

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116. Becker, *supra* note 33

117. *Rodriguez*, 305 F.Supp.2d at 1280-81.

118. *Id.* at 97; See Bob Von Voris, *South Florida’s ADA Industry*, THE NATIONAL LAW JOURNAL, (July 16, 2001) at A1.

119. *Rodriguez*, 305 F.Supp.2d at 1281.

120. Becker, *supra* note 33, at 98.

121. *Id.*

122. *Id.*

ADA violation is also a violation of the California Unruh Civil Rights Act<sup>123</sup> and the California Disabled Persons Act.<sup>124</sup> The California Unruh Civil Rights Act provides for “treble damages” and the California Disabled Persons Act provides for attorney’s fees.<sup>125</sup> Because of this, the idea is to combine all these alleged violations of the state and federal law to recover monetary and injunctive relief and attorney fees, while still being able to file in federal court.<sup>126</sup>

The Unruh Civil Rights Act provides that “[a]ll persons...are free and equal, and no matter what their...disability, medical condition, genetic information...are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”<sup>127</sup> The Act then goes on to state that if any violation occurs, that entity or person “is liable for each and every offense for the actual damages, and any amount ... *up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000).*”<sup>128</sup> This provides a huge incentive to bring suits against even the most minor of infractions because of the guaranteed compensation if judgment is ruled in the plaintiff’s favor.<sup>129</sup>

The California Disabled Person Act creates another channel of claimed injury to recover from.<sup>130</sup> It also provides for “[t]he prevailing party in the action [to] be entitled to recover[y of] reasonable attorney’s fees.” This includes any type of violations that falls under the Americans with Disabilities Act.<sup>131</sup> Again, adding more incentive to bring, perhaps, frivolous lawsuits at the expense of small businesses in California.<sup>132</sup>

An example of a plaintiff using these laws for financial gain is the notorious California plaintiff, Jarek Molski who has filed several hundred suits claiming ADA infractions under Title III against small businesses.<sup>133</sup>

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123. CAL. CIV. § 51(f) (“A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.”).

124. *Id.*

125. *Id.*

126. *Id.*

127. CAL. CIV. § 51(b).

128. CAL. CIV. § 52(a).

129. *Id.*

130. *Id.*

131. CAL. CIV. § 54(c) (“A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.”).

132. *Id.*

133. *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860, 861 (C.D. 2004).

Molski has filed 334 lawsuits in the federal courts since 1998 and “Plaintiff’s counsel stated that Molski had filed approximately 400 suits, and the Court [accepted] that number. Despite this considerable number of filings, Molski has never litigated a suit on the merits in the Central District of California.”<sup>134</sup> However, “the vast majority of his claims settle, with a significant minority dismissed for lack of prosecution or violation of a court order”<sup>135</sup> For example, Molski sued Mandarin Touch Restaurant asserting a number of ADA infractions under Title III for accessibility into the restaurant.<sup>136</sup> However, the owner of the restaurant and defendant, filed a motion seeking an order to declare the plaintiff a vexatious litigant and requiring plaintiff to ask for leave of court before filing ADA lawsuits.<sup>137</sup> In coming to their holding, the court stated that to enforce Title III of the ADA there is private right of action and the right of action for the Attorney General, however private litigation can only provide injunctive relief, attorney’s fees, and costs.<sup>138</sup> Nevertheless, in the courts words, “enterprising plaintiffs have found a way to circumvent the will of Congress by seeking money damages while retaining federal jurisdiction” by suing not only under the ADA but also the California Disabled Persons Act, which allows for money damages.<sup>139</sup> The court found that Jarek Molski was a vexatious litigant and was required to file a motion for leave of court in order to file a complaint.<sup>140</sup> The Judge must assess “whether the proposed filing is made in good faith, or is simply another attempt to extort a settlement.”<sup>141</sup>

## 2. How it Creates Problems

The Federal court in California that decided the *Molski v. Mandarin Touch Restaurant* case noted: “[t]he scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA.”<sup>142</sup> The court continued, “rather than simply informing a business of the violations, and attempting to remedy the matter through conciliation and voluntary

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134. *Id.*

135. *Id.* at 861, n. 2.

136. *Id.*

137. *Id.*

138. *Id.* at 862.

139. *Id.* at 862-63.

140. *Id.* at 868.

141. *Id.*

142. Wade and Inacio, *supra* note 36, at 97, n. 31; *Molski v. Mandarin Touch Restaurant*, 347 F.Supp. 2d 860, 863 (C.D. Cal. 2004).

compliance, a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business.”<sup>143</sup> Logically, this results in more focus on enforcing the ADA rather than its original purpose.<sup>144</sup> The negative effects of this type of statutory scheme that make it easy to attack a small business include: increasing costs, making it harder to expand and employ workers, and even causing businesses to declare bankruptcy; but these problems are not only economical.<sup>145</sup> This is why the *Molski* court sanctioned a “professional plaintiff” and his law firm for filing ADA lawsuits for “their own financial gain and not the elimination of discrimination against individuals with disabilities.”<sup>146</sup>

ii. Florida

Florida is not far behind California in the current “ADA binge” problem that is plaguing the judicial system.<sup>147</sup> There is also an additional incentive to bring suit and to resist pre-trial settlement.<sup>148</sup> Judge Gregory A. Presnell, in a long discourse on the issues of ADA lawsuits, stated: [w]ouldn’t conciliation and voluntary compliance be the more rational solution? Of course it would, but pre-suit settlements do *not* vest plaintiffs counsel with an entitlement to attorney’s fees. Moreover, if a plaintiff forebears and attempts pre-litigation resolution, someone else may come along and sue first.<sup>149</sup> The current ADA lawsuit binge is, therefore, essentially driven by economics – that is, the economics of attorney’s fees.<sup>150</sup>

This leads to frustration in the court system where plaintiffs will “file boilerplate complaints with virtually identical claims, many of which do not withstand close scrutiny” in attempt to have something stick and then run with.<sup>151</sup> For instance, “one lawyer in Florida has filed numerous suits on behalf of a 12-year old girl, alleging that she has been denied full access to various businesses that a minor child would not ordinarily frequent, such as a pawnshop, a liquor store, and a swimming-pool supply shop, even though her

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143. *Id.*

144. *Id.*

145. *Id.* at 33-34; *see* Ken Barnes *supra* note 8.

146. *Id.* at 34

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*; *Rodriguez v. Investco, L.L.C.*, 305 F.Supp.2d 1278, 1282 (M.D. Fla. 2004).

151. *Id.* at 33.

family did not have a pool.”<sup>152</sup> Although the problem is pervasive in Florida, some courts have held that serial plaintiffs who merely “desire” or “intend” to return to the property is not adequate to state a claim of injury.<sup>153</sup> Some courts have been receptive to defense motions to temporarily stay these lawsuits to give business owners adequate opportunity to correct ADA violations, which fulfills the purpose of the ADA while excluding unnecessary financial burdens.<sup>154</sup>

#### *E. Maryland and ADA Lawsuits*

As previously stated, there are a number of contributing factors that have caused states such as California and Florida to have rampant ADA private litigation within their federal court systems.<sup>155</sup> So what about Maryland? Are ADA lawsuits litigated the same in the 4th Circuit? Are less businesses violating the ADA Title III standards? How has legal precedent and case law developed in Maryland, regarding ADA compliance? Is there even a recognizable difference in ADA litigation between Maryland and the other prominent states?

In Maryland, as of 2016, the overall percentage of people with a disability in Maryland was 11 percent, which is around 651,700 people.<sup>156</sup> This is, without argument, a large pool of potential ADA plaintiff's that can claim lack of public accommodation,<sup>157</sup> especially considering the fact that nearly 100 percent of businesses fail to come in perfect compliance with the lengthy, complex ADA regulations.<sup>158</sup> Mariana Nork, senior vice president of the

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152. Wade and Inacio, *supra* note 36, at 33-34.

153. *Id.* at 34, n. 19 (citing *See, e.g., Access for the Disabled v. Rosof*, 2005 WL 3556046, at \*2 (M.D. Fla. Dec. 28, 2005) (ADA “tester” lacked standing); *Equal Access for All, Inc. v. Hughes Resort, Inc.*, 2005 WL 2001740, at \*5-6 (N.D. Fla. Aug. 10, 2005) (intention of one day returning is insufficient for standing); *Access 4 All v. Oak Spring, Inc.*, 2005 WL 1213663, at \*2-6 (M.D. Fla. May 20, 2005) (plaintiff could not demonstrate future injury); *Tiger Partner, LLC*, 331 F.Supp.2d at 1372-75 (indefinite future harm is insufficient); *Brother v. Rossmore Tampa, Ltd. Partnership*, 2004 WL 3609350, at \*2-\*5 (M.D. Fla. Aug. 19, 2004); *Brother v. CPL Inv., Inc.*, 317 F.Supp. 2d 1358, 1368-69 (S.D. Fla. 2004)).

154. *Id.* at 34.

155. *See supra* notes 116-147.

156. Cornell University, *2016 Disability Status Report Maryland* (2018), [http://www.disabilitystatistics.org/StatusReports/2016-PDF/2016-StatusReport\\_MD.pdf?CFID=5275449&CFTOKEN=eaaff5d4a997ff3f-6CD0FAE7-BA0F-5551-5AFB487DFFFB59E9](http://www.disabilitystatistics.org/StatusReports/2016-PDF/2016-StatusReport_MD.pdf?CFID=5275449&CFTOKEN=eaaff5d4a997ff3f-6CD0FAE7-BA0F-5551-5AFB487DFFFB59E9).

157. *Id.*

158. Walter Olsen, *supra* note 112-13.

American Association of People with Disabilities, recently observed, “I have not found anything that’s 100 percent compliant with the ADA.”<sup>159</sup> Even firms and businesses that worked closely with an ADA consultant to make sure their architects were ADA compliant, virtually all fall short of complete compliance nationwide.<sup>160</sup> Firms may “think[] that it’s complying with the law because, say, its architect worked with an ADA consultant, can be in for a rude awakening when a different official swings by looking for violations.”<sup>161</sup> For example, in Frederick County, Maryland, 97 percent of the county’s curb ramps and 13 percent of its sidewalk fail to meet Americans with Disabilities Act standards.<sup>162</sup> County officials did not believe that they were required to ensure that the walkways were ADA compliant and, therefore, never instructed the developers.<sup>163</sup>

### 1. DOJ Certification

As previously stated, newly constructed or altered places of public accommodations and business facilities have to comply with Title III of the ADA<sup>164</sup>, along with the ADA Standards for Accessible Design.<sup>165</sup> The DOJ has been authorized, since the ADA came into law, “to certify that state and local accessibility requirements...meet or exceed the ADA’s accessibility requirements.”<sup>166</sup> DOJ certification is an important aspect regarding litigation in states.<sup>167</sup> This is because “[i]f a state or local code is certified, an entity that has complied with it can offer this certification as rebuttable evidence of compliance with the ADA.”<sup>168</sup> Therefore, it seems that owners of public accommodations and businesses would lobby to their state and local governments to obtain certification.<sup>169</sup> In 2005, only five states were DOJ certified with six

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159. Walter Olsen, *supra* note 112-13.

160. Walter Olsen, *supra* note 112-13.

161. Walter Olsen, *supra* note 112-13.

162. Bethany Rodgers, *Nearly All County's Sidewalk Ramps Fail ADA Standards*, FREDERICK NEWS POST (July 3, 2014), [https://www.frederick-newspost.com/news/health/nearly-all-county-s-sidewalk-ramps-fail-ada-standards/article\\_6ba7a974-96d9-587f-b26e-c4a491c38853.html](https://www.frederick-newspost.com/news/health/nearly-all-county-s-sidewalk-ramps-fail-ada-standards/article_6ba7a974-96d9-587f-b26e-c4a491c38853.html).

163. *Id.*

164. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1858 (2005).

165. 42 U.S.C. § 12183 (2005); see also 28 C.F.R. § 36 app. A §§ 4. 1.2, 4. 1.6 (2005) (providing the ADA Standards for Accessible Design).

166. Michael Waterstone, *supra* note 163.

167. Michael Waterstone, *supra* note 163.

168. Michael Waterstone, *supra* note 163.

169. Michael Waterstone, *supra* note 163.

states having their requests pending.<sup>170</sup> Maryland was one of the five states that was granted this certification for accessibility codes.<sup>171</sup> One would think that this separates Maryland from ADA lawsuit abuse, like in California and Florida. However, back in 2005, Florida was also one of the five states that were DOJ certified while Maryland and California's request were pending and has since been approved.<sup>172</sup> Therefore, the idea that Maryland businesses have the litigation benefit of DOJ certification for its accessibility codes is meritless, as Florida and California shared the same benefit.<sup>173</sup>

## 2. How Federal Courts Look at ADA Lawsuits in 4th Circuit

### *i. Nanni v. Aberdeen Marketplace, Inc.*<sup>174</sup>

In *Nanni v. Aberdeen Marketplace*, No. 16-1638 (4th Cir. 2017), the plaintiff was a Delaware resident with a disability who traveled into Maryland on Interstate 95 to visit family and friends.<sup>175</sup> The Plaintiff alleged that he was unable to access the stores and services of the Aberdeen Market due to defects inconsistent with ADA requirements.<sup>176</sup> The Court dismissed the ADA complaint and stated that the ADA was not intended to create “broad rights against individual local businesses by private parties who are bona fide patrons, and are not likely to be bona fide patrons in the future.”<sup>177</sup> However, this decision was reversed by the Court of Appeals, which held that the Plaintiff did in fact satisfy the injury-in-fact requirement for standing and that the Plaintiff sufficiently alleged a likelihood of future harm to properly seek prospective relief.<sup>178</sup> The Court further stated that “an ADA plaintiff has alleged a past injury at a particular location, his plausible intentions to thereafter return to that location are sufficient to demonstrate the likelihood of future injury—is entirely consistent with the decisions of our fellow courts of appeals.”<sup>179</sup>

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170. Michael Waterstone, *supra* note 163.

171. Michael Waterstone, *supra* note 163.

172. Michael Waterstone, *supra* note 163.

173. Michael Waterstone, *supra* note 163.

174. William Sinclair, *Federal Court Dismisses ADA Complaint*, STSW (June 23, 2016), <https://www.marylandbusinesslitigationlawyerblog.com/2016/06/federal-court-dismisses-ada-complaint.html>.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447 (4th Cir. 2017).

179. *Id.*; *See, e.g., Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 188 (2d Cir. 2013); *Goylor v. Hamilton Crossing CMBS*, 582 Fed.Appx. 576, 580 (6th Cir.

Furthermore, the Court declined to deny relief on the basis that Nanni's status as an "ADA tester ... does not strip him of standing to sue Aberdeen."<sup>180</sup> This decision seems to veer from the stringent requirement of being a bona fide purchaser or customer of business goods in order to claim a cognizable injury.<sup>181</sup>

ii. *Daniels v. Arcade, L.P.*

In *Daniels v. Arcade, L.P.*, 477 Fed. Appx. 125 (2012), a disabled customer brought an action against market owners alleging a violation of Title III of the Americans with Disabilities Act.<sup>182</sup> In March 2010, a Florida resident, who requires a wheelchair as means of mobility, filed a complaint against Arcade and later amended the complaint to add Daniels, a Maryland resident, as co-plaintiff who also requires a wheelchair.<sup>183</sup> The amended complaint alleged that Daniels "resides in close proximity to" the market and "regularly visits" it, and that the Market was in violation of the ADA because the "property had inaccessible entry routes, inaccessible ramps throughout the facility, inaccessible restrooms, inaccessible counters, and other amenities that are inaccessible for persons who require the use of a wheelchair."<sup>184</sup> The court held that Daniels' allegation of injury was "actual and concrete, rather than theoretical ... [and] is particularized because the injury affected Daniels in a personal and individual way," relying on how close he lives to Arcade.<sup>185</sup>

F. *Legislation to Address the Issue of Litigation Abuse*

On February 15, 2018, the ADA Education and Reform Act passed through the House of Representative.<sup>186</sup> It is now in the Senate for consideration. The ADA Education and Reform Act purportedly will "close[] the

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2014); *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013); *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000); *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1037 (9th Cir. 2008); *Tandy v. Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013).

180. *Id.* at 457.

181. *Id.*

182. *Daniels v. Arcade, L.P.*, 477 Fed.Appx. 125 (2012).

183. *Id.* at 127.

184. *Id.*

185. *Id.* at 129 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

186. *H.R. 620: ADA Education and Reform Act of 2017*, GOVTRACK (Last updated February 20, 2018) (Last visited March 4, 2018). <https://www.govtrack.us/congress/bills/115/hr620>.

loophole in the [Americans with Disabilities Act] that has unintentionally produced ‘drive-by’ ADA Title III lawsuits and adds safeguards that incentivizes the remedy of alleged violations,” but this does not take away any right to pursue the bad actors who ignore compliance and continue to do so.<sup>187</sup> The proposed law would prevent a civil action from being commenced by a person aggrieved by a failure to remove an architectural barrier to access into an existing public accommodation unless:

- (i) that person has provided to the owner or operator of the accommodation a written notice specific enough to allow such owner or operator to identify the barrier; and
- (ii) (I) during the period beginning on the date the notice is received and ending 60 days after that date, the owner or operator fails to provide to that person a written description outlining improvements that will be made to remove the barrier; or (II) if the owner or operator provides the written description under subclause (I), the owner or operator fails to remove the barrier or, in the case of a barrier, the removal of which requires additional time as a result of circumstances beyond the control of the owner or operator, fails to make substantial progress in removing the barrier during the period beginning on the date the description is provided and ending 60 days after that date.<sup>188</sup>

The proposed Act also gives more specific requirements:

(C) SPECIFICATION OF DETAILS OF ALLEGED VIOLATION.—The written notice required under subparagraph (B) must also specify in detail the circumstances under which an individual was actually denied access to a public accommodation, including the address of property, whether a request for assistance in removing an architectural barrier to access was made, and whether the barrier to access was a

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187. *ADA Lawsuit Reform*, ICSC (Last visited March 4, 2018) <https://www.icsc.org/news-and-views/global-public-policy/ada-lawsuit-reform>.

188. H.R. 620 (115th Congress 2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/620/text>.

permanent or temporary barrier.<sup>189</sup>

1. Proponents

The ADA Education and Reform Act, H.R. 620, is a “notice and cure” bill that requires plaintiff’s suing businesses or individuals for alleged ADA Title III violations to notify the property owners and allow them 120 days to correct the problem before the clock starts to run on paying for attorney fees.<sup>190</sup> This, seemingly, will start to address the problem since, as the International Council of Shopping Centers claims that “[t]he main driver in these actions is forcing a monetary settlement consisting mainly of attorney’s fees that only benefit the attorney and do little to increase access.”<sup>191</sup> This will surely cut down on the plaintiff’s firms that inspect shopping centers, theaters, stores, and restaurants, etc. in order to make allegations of ADA violations with regard to very minor, *easily-correctable* ADA infractions, including parking lot signs, bathroom soap dispensers, and ramps.<sup>192</sup> Lead sponsor, Congressman Ted Poe of Texas stated that “[c]ertain attorneys and their pool of serial plaintiffs troll for minor, easily correctable ADA infractions so they can file a lawsuit and make some cash. There is now whole industry made up of people who prey on small business owners and file unnecessary abusive lawsuits that abuse both the ADA and the business owners.”<sup>193</sup>

Furthermore, it is safe to say that those property owners who reasonably believe that they are ADA-complaint and have even hired outside ADA consultants to ensure compliance will gladly receive the notification and most likely come into compliance.<sup>194</sup> Congressman Ted Poe also stated that “[t]his bill will change that by requiring that the business owners have time to fix what is allegedly broken. If they fail to correct the infractions the plaintiff retains all of their rights to pursue legal action. This legislation restores the purpose of the ADA: to provide access and the accommodation to disabled Americans, not to fatten the wallets of attorneys.”<sup>195</sup>

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*; see *H.R. 620 and ADA Lawsuit Reform supra* note 185-86.

193. *H.R. 20 and ADA Lawsuit Reform supra* note 185-86.

194. *H.R. 20 and ADA Lawsuit Reform supra* note 185-86.

195. *H.R. 20 and ADA Lawsuit Reform supra* note 185-86.

## 2. Opponents

There is a strong opposition to this newly proposed legislation by disability activist groups.<sup>196</sup> The Consortium for Citizens with Disabilities stated, in a coalition letter of opposition for the ADA Education and Reform Act of 2017 to the House Judiciary Committee, the following: H.R. 620 would create significant obstacles for people with disabilities to enforce their rights under Title III of the Americans with Disabilities Act (ADA) to access public accommodations, and would impede their ability to engage in daily activities and participate in the mainstream of society. Rather, the burden of protecting the right to access a public place is shifted to the person with the disability, who first has to be denied access; then must determine that violations of the law have occurred; then must provide the business with specific notice of which provisions of the law were violated and when; and finally, the aggrieved person with the disability must afford the business a lengthy period to correct the problem.<sup>197</sup>

This letter further stated that proponents of the bill claim that the Americans with Disabilities Act puts a heavy burden on business owners yet imposes a burden on people with disabilities by shielding business owners from the specific legal obligations that they are violating.<sup>198</sup> Congressman Jim Langevin, the first quadriplegic ever elected to Congress stated in a press release, “[t]his bill reverses decades of progress by undercutting our ability to assert our rights under the law through the use of a notice and cure provision. But Justice delayed is justice denied.”<sup>199</sup> Congressman Langevin continued noting that, “[b]usinesses should not be encouraged to ignore the law until someone complains, which is exactly what this legislation does...I’m deeply concerned that this bill will bring our country back to the days when discrimination was commonplace.”<sup>200</sup> He was “saddened that Congress sent a message to people with disabilities that we are not equal, or worthy of the same civil rights protections as others.”<sup>201</sup>

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196. *H.R. 620 and ADA Lawsuit Reform supra* note 185-86.

197. Consortium for Citizens with Disabilities, *CCD Rights TF and Allies Letter of Opposition to the Americans with Disabilities Act (ADA) Education and Reform Act of 2017 (H.R. 620)* (March 13, 2017).

198. *Id.*

199. *H.R. 620 and ADA Lawsuit Reform supra* note 185-86.

200. *H.R. 620 and ADA Lawsuit Reform supra* note 185-86.

201. *H.R. 620 and ADA Lawsuit Reform supra* note 185-86.

Democrats had offered an amendment, led by Congressman Langevin, to remove the bill's requirement that a person alleging an ADA violation must first provide written notice allowing 60 days for the owner to acknowledge receipt of the notice and then another 120 days before legal action can be commenced.<sup>202</sup> This amendment failed with a vote of 188 to 226.<sup>203</sup> If the amendment had been implemented, several provisions would have remained intact for the legislation making it harder for a plaintiff to bring a civil suit against a business for failure to remove architectural barriers for disability access.<sup>204</sup> However, the ADA Education and Reform Act passed through the House of Representatives by a 225 to 192 vote in February and the bill is now in the Senate.<sup>205</sup>

## V. CONCLUSION

The Americans with Disabilities Act was undoubtedly law promulgated with good intentions, providing relief from a history of willful disregard to many people in the United States.<sup>206</sup> The enforcement, however, through private litigation has transformed the law into an industry that takes advantage of good-willed small businesses that are not ADA compliant in order to make money.<sup>207</sup> This prohibits economic growth while ignoring less intrusive solutions for businesses to comply with the Americans with Disabilities Act of 1990.<sup>208</sup> The new bill addresses this issue and could make positive changes to the law while maintaining the compliance of much needed ADA regulations for disabled Americans.<sup>209</sup> This new act will make positive change to the Americans with Disabilities Act by maintaining the overall goal of accessibility for disabled Americans while simultaneously reducing the negative effects that it has on good-willed small businesses.

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202. *H.R. 620 and ADA Lawsuit Reform supra* note 185-86.

203. *Id.* (Republicans largely opposed by 15-215, while Democrats largely supported by 173-11).

204. *Id.*

205. *Id.* (Republicans voted largely in support by 213-19, while Democrats were largely opposed by 12-173).

206. Ken Barnes *supra* note 8.

207. Ken Barnes *supra* note 8.

208. Ken Barnes *supra* note 8.

209. *H.R. 620 supra* note 185.