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Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?

Carri Becker*

I. INTRODUCTION: ADA COMPLIANCE AND ENFORCEMENT

The Americans with Disabilities Act (ADA)[1] was signed into law by President George H. W. Bush on July 26, 1990.[2] The stated goal of the ADA was to eliminate discrimination against individuals with disabilities.[3] 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.[4] The ADA recognized that the majority of public facilities across the nation were inaccessible to those using wheelchairs and other disabled individuals. To address this form of

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1. 42 U.S.C. §§ 12101-12213 (2000).

2. David Harger, Comment, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, 41 U. KAN. L. REV. 783, 783 (1993).

3. The ADA states:

It is the purpose of this chapter:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (1990).

4. Lack of accessibility makes it impossible for many disabled individuals to take part in everyday activities such as eating in a restaurant, going to work, shopping, or seeing a movie. U.S. SMALL BUSINESS ADMINISTRATION AND U.S. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES ACT: ADA GUIDE FOR SMALL BUSINESSES 1 (1999), *available at* http://www.sba.gov/ada/smbusgd.pdf [hereinafter *ADA Guide*]; public accommodations include all private businesses that provide goods or services to the public. *See id.* at 2.

discrimination, Title III[5] of the ADA requires places of public accommodation and commercial facilities to be designed and constructed in compliance with detailed accessibility standards.[6] For existing buildings, Title III requires that structural barriers be removed where readily achievable.[7] Although the definition of readily achievable refers to minimal difficulty and cost, this is an elastic term that takes into account the financial means of the business in question.[8] Businesses are required to continually evaluate the accessibility of their facilities and make modifications to comply with the ADA whenever feasible.[9]

Aside from tailoring new construction to the ADA standards and making changes to existing structures where readily achievable, ADA compliance is also required when alterations are made to existing buildings.[10] Any alteration that affects the usability of or access to a building or facility must comply with the ADA requirements unless technically infeasible to do so.[11] Alterations aside from normal maintenance (i.e., painting, replacing carpet, removing asbestos) trigger full

5. 42 U.S.C. §§ 12181-12189 (1990).

6. Detailed design standards and modification guidelines for existing buildings have been released by the Department of Justice. 28 C.F.R. pt. 36, app. A (2004).

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

8. Determining if barrier removal is readily achievable is, by necessity, a case-by-case judgment.

Factors to consider include:

1) The nature and cost of the action;

2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;

3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

If the public accommodation is a facility that is owned or operated by a parent entity that conducts operations at many different sites, you must consider the resources of both the local facility and the parent entity to determine if removal of a particular barrier is "readily achievable." The administrative and fiscal relationship between the local facility and the parent entity must also be considered in evaluating what resources are available for any particular act of barrier removal.

U.S. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES ACT, TECHNICAL ASSISTANCE UPDATES FROM THE U.S. DEPARTMENT OF JUSTICE: COMMON QUESTIONS: READILY ACHIEVABLE BARRIER REMOVAL 7 (1996), *available at* http://www.usdoj.gov/crt/ada/adata1.pdf.

9. 42 U.S.C. § 12183(a)(2) (2000).

10. *Id.*

11. *Id.*; Jean Batchelder, Creating an ADA Facility Master Plan, http://www.access-by-design.com/journal/m-plan.htm (last visited Mar. 8, 2005).

ADA compliance of the altered area.[12] Alterations can be as limited as replacing a door handle or installing a new toilet. When any fixture such as a door handle or toilet is replaced, the new fixture must comply with the ADA.

For example, if a restaurant owner installs a wall partition between dining areas, this would trigger ADA compliance because it affects access to the primary function areas of the restaurant. Compliance would be required as to the affected dining areas as well as the restrooms, telephones, and drinking fountains served by those areas.[13] Congress did anticipate that these requirements could be overly burdensome to small businesses, however, and built caps into the costs of making required alterations. The restaurant owner would only be required to comply up to the point when the ADA alterations equal 20% of the planned expenditure for the new wall partition.[14] In addition to the caps, Congress created less strict requirements for existing facilities built prior to 1993.[15] Tax breaks are also available to blunt the burden imposed on small businesses.[16]

Many governmental agencies produce publications regarding ADA accessibility requirements in an effort to transform the complex and detailed regulations into to a user-friendly guide. In 1991, the Equal Employment Opportunities Commission and the Department of Justice issued a 660-page Americans with Disabilities Act Handbook with technical details regarding the new regulations including "Accessibility Guidelines" and "Uniform Federal Accessibility Standards."[17] The U.S. Small Business Administration in conjunction with the U.S. Department of Justice provides an "ADA Guide for Small Businesses."[18] The Department of Justice also provides detailed guidelines in the Code of Federal

12. An alteration 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. 28 C.F.R. §§ 36.402-36.403 (2004).

13. *Id.*

14. *Id.*

15. *ADA Guide*, *supra* note 4.

16. Various tax credits are available: the Small Business Tax Credit; the IRS Code Section 44, Disabled Access Credit, which help 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. The Center for an Accessible Society, Employers Know Little About Tax Credits, Says Study, http://www.accessiblesociety.org/topics/economics-employment/shrmstudy.html (Apr. 29, 2003); *see also* ADAPTIVE ENVIRONMENTS CENTER, INC. & BARRIER FREE ENVIRONMENTS, INC., CHECKLIST FOR EXISTING FACILITIES (Version 2.1, 1995), *available at* http://www.adaptenv.org/publications/checklist-pdf.pdf.

17. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION & U.S. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES ACT HANDBOOK (1991).

18. *ADA Guide*, *supra* note 4.

Regulations.[19] These publications provide general guidelines, technical specifications, answers to frequent questions, and specific examples of what kinds of alterations trigger full compliance requirements.

A cottage industry has also developed of ADA specialists, consultants, and not-for-profit organizations dedicated to educating the public regarding the ADA and encouraging compliance.[20] For instance, Barrier Free Environments, Inc. and Adaptive Environments Center, Inc. created a "Checklist for Existing Facilities version 2.1" in an effort to better inform businesses of their responsibilities under Title III.[21] The presence of numerous publications, specialists, and consultants acknowledges that assessing compliance requirements and making necessary modifications can be a daunting task to many small and medium sized businesses.

Adding to the burden, businesses must comply not only with the federal standards outlined in the ADA, but also with any state, county, or city-specific regulations. For instance, in California plans for new construction must meet the standards of California Title 24, the American National Standards Institute, the International Building Code, the ADA, and any county or city-specific building regulations. With so many different regulations to follow, it is not surprising that many buildings are out of compliance. Compounding this problem is the fact that the regulations differ substantially. For example, California's Title 24 regulations require that curb ramps have a one-half inch lip at the bottom, beveled at a 45-degree angle, whereas the ADA requires a flush transition at the bottom of the ramp.[22] Total compliance with both state and federal regulations is thus impossible.

In acknowledgement of the difficulties of total compliance, new ADA Accessibility Guidelines were issued by the Access Board in 2004, overhauling the original guidelines.[23] The Access Board specifically sought to make its guidelines more consistent with standards issued by the American National Standards Institute (ANSI) and the International

19. 28 C.F.R. § 36.101 (2004).

20. For instance, Access by Design is a business providing a full range of Americans with Disabilities Act accessibility compliance consulting services, such as compliance audits and training, to public entities and to the private sector. *See* Access by Design Services, http://www.access-by-design.com/consulting/services.htm (last visited Mar. 9, 2005). *See also* ADA Portal, http://www.adaportal.org/ (last visited Mar. 9, 2005).

21. This publication was made under a federal grant to create a user-friendly overview of ADA compliance requirements. ADAPTIVE ENVIRONMENTS CENTER, INC. & BARRIER FREE ENVIRONMENTS, INC., CHECKLIST FOR EXISTING FACILITIES (Version 2.1, 1995), *available at* http://www.adaptenv.org/publications/checklist-pdf.pdf; *see also* Batchelder, *supra* note 11.

22. Kim Kimball, ADA Fact Sheet, http://morrobay.org/ecm/ Chamber_of_ Commerce/Facts.html.

23. United States Access Board, A Guide to the New ADA-ABA Accessibility Guidelines, http://www.access-board.gov/ada-aba/summary.htm.

Building Code (IBC).[24] Accessibility laws should be reasonably certain and accessible. Businesses that want to comply with the laws should be able to do so without undue cost, delay, or uncertainty. Still, the lack of consistency among regulations opens businesses to potential lawsuits.

To enforce the accessibility requirements embodied in Title III, the ADA authorizes both a private right of action[25] and a right of action for the Attorney General.[26] Under a private right of action, an aggrieved party can only seek injunctive relief remedying the violation and attorney's fees and costs.[27] Monetary damages are not available to private parties seeking to enforce Title III, but can be sought by the Attorney General.[28] The provision of differing remedies for private and public enforcement shows Congress's underlying intent to prevent private plaintiffs from recovering monetary relief under the ADA. Despite this clear intent, there is evidence of abuse of the private remedies provided by the ADA.[29] These lawsuits are criticized as unjustly benefiting attorneys and disabled individuals alike, and unnecessarily straining the court system thus costing the government and taxpayers millions.[30]

II. SERIAL ADA LITIGATION

A. INDICATIONS OF ABUSE

ADA lawsuit abuse is prolific throughout the nation, and profitability of ADA litigation has given rise to what courts have described as "a cottage industry."[31] A single law firm in Philadelphia has filed hundreds of lawsuits on behalf of two disabled men, reaping thousands in attorney's fees.[32] These disabled men have created a nonprofit group, the American Disability Institute, which plans "to roll out 400 to 500 suits a month until more than 5,000 businesses have been cited for ADA violations" — crusading "to bring all businesses in the Philadelphia area into compliance

24. *Id.*
25. 42 U.S.C. § 12188(b) (2000).
26. *Id.*
27. *Id.*
28. *Id.*
29. Walter K. Olson, *The ADA Shakedown Racket*, THE CITY JOURNAL, *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html.
30. *See* Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 866 (C.D. Cal. 2004).
31. Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1280-81 (M.D. Fla. 2004). The 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. Then, rather than simply informing the business of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance," *id.* at 1281, a lawsuit is filed, requesting damages awards that forces many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter. Molski v. Mandarin Touch, 347 F. Supp. 2d at 863.
32. Olson, *supra* note 29.

with the ADA."[33] Although this crusade will ultimately result in greater accessibility for the disabled in the Philadelphia area, it will also reap tremendous financial benefits for the attorneys behind the lawsuits.

In Florida, attorney John Mallah filed 740 lawsuits against Florida businesses in less than four years.[34] These suits were all brought on behalf of his disabled elderly uncle, and typically settled for between $3,000 and $5,000 in legal fees (although sometimes more), along with agreements to fix violations. Mallah purports that businesses will not "become accessible until they're forced to do it."[35] Mallah is only one of many lawyers making millions from suing small businesses under the ADA in Florida, California, and Hawaii.[36] Those critical of these tactics call the attorneys' methods legal extortion.[37]

Nowhere has the lawsuit abuse run more rampant than in California, where plaintiffs are able to recover not only injunctive relief and attorney's fees, but also monetary damages even without allegations of psychological or physical trauma, or even inconvenience.[38] Although monetary damages are not available to a private plaintiff under the ADA, they are often provided for under California state law. In California, an ADA violation is also a violation of the California Unruh Civil Rights Act[39] and the California Disabled Persons Act[40] (CDPA). The Unruh Act provides for

33. *Id.*

34. Bob Van Voris, *South Florida's ADA Industry*, THE NATIONAL LAW JOURNAL, July, 16, 2001, at A1.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. California Unruh Civil Rights Act ("Unruh"), CAL. CIV. CODE § 51(f) (West 2004). Unruh in relevant parts provides:

§ 51. (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act. . . .

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section. . . .

§ 52. (a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

40. California Disabled Persons Act, CAL. CIV. CODE § 54(c) (West 2004).

The CDPA in relevant parts provides:

§ 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.

§ 54.3. (b) Any person who claims to be aggrieved by an alleged unlawful practice in violation of Section 54, 54.1, or 54.2 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code. The remedies in this section are nonexclusive and are in addition to any other remedy provided by law, including, but not limited to, any action for injunctive or other equitable

treble damages, while the CDPA provides for reasonable attorney's fees. Because of this, private plaintiffs often combine complaints to allege violations of the ADA, the Unruh Act, and the CDPA, and thus avail themselves of monetary relief, injunctive relief, and attorneys' fees.[41] Although these private plaintiffs' claims are essentially state law claims when combined, they still allege violations under the ADA in order to get a ticket into federal court.

B. WHY ARE SO MANY BUSINESSES NON-COMPLIANT?

One of the major problems with the ADA is how easy it is to be out of compliance: a single bathroom must meet at least 95 different standards from the height of the toilet paper dispenser to the exact placement of hand rails.[42] Even through good faith efforts, such as hiring an ADA compliance expert, a business can still find itself subject to a lawsuit for the most minor and unintentional of infractions, such as telephone volume controls needing adjustment.[43] In fact, it is estimated that less than 2% of public buildings nationwide are in full compliance of the ADA.[44] At a recent Congressional hearing an American Hotel & Lodging Association representative testified that:

> Our members have long been frustrated with the inability to get clarity in compliance with the ADA. When a hotel operator wants to open a new property, an architect will be hired, zoning permits will be obtained from the local zoning boards, operating licenses will be obtained from the proper local and state offices. These various boards, commissions and government entities will perform their duties, but at no point will anyone check for compliance with the ADA. There is no entity that will give an ADA certificate informing a business that they comply with this law. This in no way mitigates ones obligations under the law, nor should it. However when our members suffer from numerous drive-by lawsuits focused on the vagaries or easily corrected aspects of the

relief available to the aggrieved party or brought in the name of the people of this state or of the United States.

§ 55. Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees.

41. *See* Moeller v. Taco Bell Corp., 220 F.R.D. 604 (N.D. Cal. 2004).

42. *Id.*

43. *Id.*

44. The Original Musings, Sept. 27, 2004, http://www.naebunny.net/~mommylemur/archives/2004/09/this_is_wrong.html.

ADA, one is forced to ask what is the goal of the ADA: to litigate or to accommodate?[45]

California businesses are at a distinct disadvantage due to inconsistencies between the ADA and Title 24, making compliance with both impossible. Another disadvantage to businesses is that the ADA is strongly plaintiff biased. Similar to other civil rights laws, the ADA awards successful plaintiffs' attorneys' fees to be paid by losing defendants. However, successful defendants do not get their attorneys' fees covered by the losing plaintiffs. Because violations are so easy to find, businesses more often settle since it is cheaper than successfully defending a lawsuit when the lawyer's fees associated with defending are taken into account.[46]

C. CASE STUDY: JAREK MOLSKI

Jarek Molski, a law school graduate and resident of Woodland Hills, California, was injured in a motorcycle accident when he was 18, and has used a wheelchair ever since.[47] Molski has made what appears to be a very successful career out of suing small businesses across California for failing to comply with the requirements of the Americans with Disabilities Act.[48] Although encouraging businesses to comply with the accessibility requirements of the ADA is indisputably a noble goal, Molski's actions are seen by many as predatory, exploitive, and frivolous.[49]

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45. American Hotel and Lodging Association, AH&LA Testifies Before Congress on ADA, Encourages "Common-Sense Approach to Inadvertent Noncompliance", http://www.ahla.com/public_view_advisory.asp?mstr=179 (last visited Mar. 9, 2005).

46. "Even a firm that thinks that it's complying with the law because, say, its architect worked with an ADA consultant, can be in for a rude surprise when a different official swings by looking for violations. 'I have not found anything that's 100 percent compliant with the ADA,' Mariana Nork, senior vice president of the American Association of People with Disabilities, recently observed." Walter K. Olson, *The ADA Shakedown Racket*, THE CITY JOURNAL, *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html.

47. Molski is a paraplegic (no feeling or movement below his waist). Molski v. Franklin, 224 F.R.D. 433, 434 (S.D. Cal. 2004); *see also The Hitching Post Restaurant - ADA Information*, http://www.hitchingpost1.com/ADA.html (last visited Mar. 9, 2005); *see also* Ken McCalip, *The Hitching Post Fights the Good Fight*, SANTA MARIA SUN, Jan. 20, 2005, at 25, *available at* http://www.santamariasun.com/index.php?p=showarticle&id=205.

48. "For example, one plaintiff specializes in alleging toilet paper dispenser heights don't meet the ADA-required 40 inches, causing him emotional pain, humiliation, and physical injuries. He has filed more than 700 ADA lawsuits in California and collected millions from California small businesses." California Chamber of Commerce, The California Chamber of Commerce Seeks Business Comments on ADA Lawsuit Abuse (Feb. 1, 2005), http://www.calchamber.com/headlines/ index.cfm?id=510&action=detail&navid=269.

49. *The Hitching Post Restaurant - ADA Information*, http://www.hitchingpost1.com/ADA.html (last visited Mar. 9, 2005).

Since 1998 Molski has filed somewhere between 400 and 700 lawsuits in federal courts throughout the state of California.[50] Nearly all of these suits settle out of court. The majority of the suits filed by Molski have strikingly similar fact patterns.

Molski initially reports having trouble finding adequate van-accessible parking. Then, almost uniformly, he reports difficulties entering the business, often citing ramps that are too steep, or doors that require more pressure to open than is permitted by law. After entering the business, Molski generally complains that the service counter is too high. Virtually every complaint ends with Molski venturing to the restroom, which inevitably suffers from at least one violation. Molski almost always suffers some injury — typically to the upper extremities — in the process of transferring himself from his wheelchair to the toilet. He also regularly complains of suffering humiliation or other emotional distress from the experience.[51]

Because of the hundreds of lawsuits he has filed across the state of California Molski is renowned as "The Sheriff" by ADA activists.[52] These lawsuits allege violations of the ADA as well as California's Title 24 Building Code Requirements,[53] California's Unruh Civil Rights Act,[54] and the California Disabled Persons Act (CDPA).[55]

Under the ADA, private citizens enforcing accessibility requirements via lawsuits are limited to injunctive relief and attorneys fees.[56] However, by including California state law claims in his lawsuits, Molski is able to demand damages up to $4,000 per day from the date of his visit until the business meets ADA accessibility requirements.[57] The total relief requested in his lawsuits often climbs into the millions since Molski files the suits one year or more after his visit to the establishment.[58]

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50. In the Central District of California, Molski admits filing 343 federal lawsuits in the defendant's Memorandum on Points and Authorities. During the same hearing, defendant's counsel stated that Molski had in fact filed approximately 400 suits. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 861 n2 (C.D. Cal. 2004). Other sources indicate that the number of suits filed by Molski could be as high as 700. California Chamber of Commerce, The California Chamber of Commerce Seeks Business Comments on ADA Lawsuit Abuse (Feb. 1, 2005), http://www.calchamber.com/headlines/index.cfm?id=510&action=detail&navid=269.

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

52. A.J. Ferguson, *The Last Supper*, Liberty Vol. 18 no. 12 (Dec. 2004), http://libertyunbound.com/archive/2004_12/ferguson-lastsupper.html.

53. Molski v. Franklin, 222 F.R.D. 433, 434 (S.D. Cal. 2004).

54. CAL. CIV. CODE § 51(f) (West 2004).

55. *Id.* § 54(c) (West 2004).

56. 42 U.S.C. § 12188(b) (2000).

57. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 866 n.7 (C.D. Cal. 2004).

58. "[T]he damages requested are quite significant. Molski routinely asks for $4,000 per day, for every day from his visit until the repairs are completed. And Molski often waits a year or more before filing suit." *Id.*

In addition to the similarity across suits, courts have also noted the implausibility that Molski suffered identical injuries at three or more establishments on the same day.[59] In *Molski v. Mandarin Touch Restaurant*, the court concluded that allegations contained in Molski's complaints were "contrived and not credible" based on the implausibility that Molski suffered three identical injuries in a single day, each warranting a separate federal lawsuit.[60]

In this case, Molski alleges injuries to his hand when using the restroom at Mandarin Touch Restaurant, located in Solvang, California, on January 25, 2003.[61] Molski's complaint details that after having dinner at the restaurant, he attempted to use the restroom and his hand was "caught in the exterior door causing trauma to it."[62] The lawsuit prays for injunctive relief, bringing the restaurant to ADA standards, as well as damages not less than $4,000 per day from the date of his visit to the restaurant until such compliance with ADA standards is met.[63] "In the instant case, the purported violation took place on January 25, 2003, but the suit was not filed until January 23, 2004. That delay alone would be worth $1,452,000 if Molski received the damages requested."[64]

The court in this case went on to discuss the background and purpose of the Americans with Disabilities Act, finding that "enterprising plaintiffs (and their attorneys) have found a way to circumvent the will of Congress by seeking money damages while retaining federal jurisdiction."[65] By filing the case in federal court within the state of California, plaintiffs are able to avail themselves of California's Unruh Civil Rights Act[66] and the California Disabled Persons Act (CDPA),[67] which provide for monetary damages.[68] The court noted serial litigators, like Molski, serve as "professional pawns in an ongoing scheme to bilk attorney's fees."[69]

In the court's analysis, the court's authority to issue a pre-filing order

59. *Id.* at 865.

60. *Id.* at 864-65. The court went on to note the further implausibility that Molski suffered 13 identical injuries over a five-day period from May 19, 2003, to May 23, 2003, as well as the improper motive behind filing of the lawsuits: "The Court simply does not believe that Molski suffered 13 nearly identical injuries, performing the same activity, over a five-day period. This is to say nothing of the hundreds of other lawsuits Molski has filed over the last four years, many of which make nearly identical allegations. The record before this Court leads it to conclude that these suits were filed maliciously, in order to extort cash settlement."

61. *Id.* at 862.

62. *Id.*

63. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d at 862.

64. *Id.* at 866 n.7.

65. *Id.* at 862.

66. CAL. CIV. CODE § 54(f) (West 2004).

67. *Id.* § 54(c) (West 2004).

68. *See, e.g.*, Moeller v. Taco Bell Corp., 220 F.R.D. 604, 607 (N.D. Cal. 2004).

69. *Mandarin Touch*, 347 F. Supp. 2d at 863 (quoting Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1285 (M.D. Fla. 2004)).

was discussed. The court noted that it had "inherent power to levy sanctions in response to abusive litigation practices."[70] Exercise of this power is deemed appropriate in defending against vexatious litigation, and is augmented by Local Rule 83-8, providing:

> It is the policy of the Court to discourage vexatious litigation and to provide persons who are subjected to vexatious litigation with security against the costs of defending against such litigation and appropriate orders to control such litigation. It is the intent of this rule to augment the inherent power of the Court to control vexatious litigation and nothing in this rule shall be construed to limit the Court's inherent power in that regard.[71]

This rule allows the court to sanction a vexatious litigant by directing "the Clerk not to accept further filings from the litigant without . . . , written authorization from a judge of the Court or a Magistrate Judge," or any other sanctions the court deems fit.[72] Based on this power, the court looked to five factors to determine whether Molski is a vexatious litigant.[73]

The first factor considered was the litigant's history of litigation. The court determined that Molski's collection of lawsuits showed a "scheme of systematic extortion, designed to harass and intimidate business owners into agreeing to cash settlements."[74] This determination was based on the sheer volume of lawsuits filed by Molski, the textual and factual similarities of the numerous complaints, and the court's view that the complaints were contrived and not credible.[75] Credibility was deemed lacking by the court due to the duplicity of complaints filed in the same day all alleging the same injuries.[76] On May 20, 2003, Molski visited El 7 Mares Restaurant, Casa de Fruta, and Rapazzini Winery, all of which are located in Gilroy, California.

At El 7 Mares restaurant, Molski alleges that there was inadequate

70. *Mandarin Touch*, 347 F. Supp. 2d at 863.

71. C.D. Cal. R. 83-8.1.

72. *Mandarin Touch*, 347 F. Supp. 2d at 863.

73. The five factors are:

(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits;

(2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?;

(3) whether the litigant is represented by counsel;

(4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and

(5) whether other sanctions would be adequate to protect the courts and other parties. Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties. Safir v. United States Lines, Inc., 792 F.2d 19, 23 (2d Cir. 1986).

74. *Mandarin Touch*, 347 F. Supp. 2d at 864.

75. *Id.* at 865.

76. *Id.*

handicapped parking and the food counter was too high.[77] Upon completing his meal at the restaurant, Molski's complaint describes his attempt to use the restroom which resulted in injury because the grab bars were not installed properly.[78] Finally, Molski was unable to wash his hands after attempting to use the restroom because the bathroom was improperly designed.[79] The same problems afflicted Molski when wine tasting at Casa de Fruta: the parking lot lacked adequate handicapped parking; the counter was too high; and the restroom was improperly designed, resulting in injuries and Molski being unable to wash his hands.[80] The final stop on Molski's trip through Gilroy was to Rapazzini Winery, where Molski found that the handicapped parking was inadequate, the counter was too high, and the design of the restroom resulted in Molski injuring himself.[81] Again, he was unable to wash his hands.[82]

In response to these claims, "[t]he Court is tempted to exclaim: 'what a lousy day!' It would be highly unusual — to say the least — for anyone to sustain two injuries, let alone three, in a single day, each of which necessitated a separate federal lawsuit."[83] The pattern observed in Molski's complaints clearly demonstrates bad faith and action tailored to extort monetary settlements.[84] The court notes that it is likely that each of these businesses was not in full compliance with the ADA, but finds that the bad faith exhibited by Molski outweighs the fault of the business for not following ADA accessibility standards, and that Molski thus has a history of vexatious litigation.[85]

The second factor considered was the litigant's motive in pursuing the litigation. Molski claims that his motives are only to achieve injunctive relief. However, if that were true, Molski would limit his claims to violations of the ADA, and refrain from making state law claims, which provide for money damages.[86] The court found that based on this, Molski's ultimate motivation is to extract cash settlements.[87] This is further supported by the fact that not one of the hundreds of cases filed in the U.S. District Court for the Central District of California has been litigated on the merits; all have either settled or been dismissed for failure to prosecute the claim.[88]

The next factor was whether the litigant was represented by counsel.

77. *Id.* at 864.
78. *Id.*
79. *Id.*
80. *Id.*
81. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 865 (C.D. Cal. 2004).
82. *Id.*
83. *Id.*
84. *See id.*
85. *Id.*
86. *Id.* at 866.
87. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 865 (C.D. Cal. 2004).
88. *Id.*

Molski has been represented by counsel in every lawsuit that he has filed, and therefore this factor weighs against him.[89] This is because *pro se* (unrepresented) submissions should be held to less stringent standards than formal pleadings drafted by lawyers.[90]

The fourth factor was the burden on the courts posed by the litigation. The court easily found that based on the number of vexatious claims filed by Molski, he clearly poses a tremendous burden for the courts.[91]

The final factor looked to the adequacy of alternative sanctions. The court found that sanctions other than the requirement of a pre-filing order would not be sufficient protection for the court and other parties. The court thus held that Molski is required to "file a copy of this order with every new complaint that he seeks to file." This requirement would allow the reviewing judge to properly assess whether the complaint has merit or is just another vexatious claim attempting "to strong arm a business into settling."[92]

Jarek Molski is not unique in the number of ADA compliance lawsuits he has filed; many disabled Americans throughout the nation have filed as many suits if not more.[93] Despite the large numbers of suits filed by single individuals, perhaps no suit has gained more notoriety than the case involving actor and Academy Award winning director Clint Eastwood's Mission Ranch Inn in Carmel, California. In 1996, Diane Zum Brunnen, who has muscular dystrophy and uses a wheelchair, visited the Inn with her husband.[94] She later sued Mr. Eastwood's resort for damages because of the following ADA access violations: not providing a ramp to the registration office; not providing a second accessible guest room; and failure to provide proper signage regarding accessible restrooms.[95] Unlike the majority of businesses sued for ADA violations, Mr. Eastwood did not agree to a settlement that demanded alterations to come into compliance, damages, and $577,000 in attorneys' fees.[96] Instead, he let a jury decide the matter.

89. *Id.*

90. Iwachiw v. N.Y. City Bd. of Elections, 273 F. Supp. 2d 224, 228 (E.D. N.Y. 2003).

91. *Mandarin Touch*, 347 F. Supp. 2d at 866.

92. *Id.* at 866-67.

93. One plaintiff has filed more than 700 lawsuits in California, collecting millions in settlements from small businesses. Another plaintiff has filed more than 1,300 lawsuits since 1998, many of which were against small, family-owned wineries in Northern California. A third plaintiff has filed more than 300 lawsuits against San Diego businesses. California Chamber of Commerce, The California Chamber of Commerce Seeks Business Comments on ADA Lawsuit Abuse (Feb. 1, 2005), http://www.calchamber.com/headlines/index.cfm?id=510&action=detail&navid=269.

94. Mark Armstrong, *Jury Makes Eastwood's Day*, E! ONLINE NEWS, Sept. 29, 2000, http://www.eonline.com/News/Items/0,1,7170,00.html.

95. *Id.*

96. Olson, *supra* note 29.

In federal court, a jury found that Eastwood was in violation of the ADA, and ordered compliance, but refused to award damages to Zum Brunnen or attorneys' fees to her counsel.[97] Following the victory in court, Eastwood appeared on television talk shows "Hardball" and "Crossfire" and was covered by many major news networks.[98] He championed himself as fighting on behalf of small-business owners who are victims of "renegade lawyers" who use people with disabilities to collect a "fistful of dollars."[99] Eastwood also argued before the U.S. House Committee in support of HR 3590, which would require that 90-day notice be given to a business before an ADA complaint could be filed.[100] Ironically, there is evidence that Eastwood received numerous notifications that his resort was not up to ADA standards prior to being sued.[101]

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97. *Id.*

98. Mary Johnson, *Eastwood: no friend of the disabled*, THE COURIER JOURNAL, Mar. 1, 2005, at A11, *available at* http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050301/OPINION04/503010343

99. "If you're right, you've got to hold your ground," Eastwood said. "I also fought for the businessmen and businesswomen who own small businesses who are trying to get by and they get worked over by those people." Maria A. Gaura and Alan Gathright, *Eastwood Wins Suit Over ADA, But Jury Says Resort Needs Improvements*, S.F. CHRON., Sept. 30, 2000, at A15, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/09/30/MN111950.DTL; Dave Reynolds, *Eastwood Found Liable for Not Providing Access*, INCLUSION DAILY EXPRESS, Oct. 2, 2000, http://www.inclusiondaily.com/news/access/notification.htm#100200.

100. Bill Summary & Status for HR 3590, http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR03590:@@@L&summ2=m& (last visited Mar. 9, 2005). *The text of HR 3590 provides the following:*

(B) OPPORTUNITY FOR CORRECTION OF ALLEGED VIOLATION — A court does not have jurisdiction in a civil action filed under subparagraph (A) with the court unless —

(i) before filing the complaint, the plaintiff provided to the defendant notice of the alleged violation, and the notice was provided by registered mail or in person;

(ii) the notice identified the specific facts that constitute the alleged violation, including identification of the location at which the violation occurred and the date on which the violation occurred;

(iii) 90 or more days has elapsed after the date on which the notice was so provided;

(iv) the notice informed the defendant that the civil action could not be commenced until the expiration of such 90-day period; and

(v) the complaint states that, as of the date on which the complaint is filed, the defendant has not corrected the alleged violation.

(C) CERTAIN CONSEQUENCES OF FAILURE TO PROVIDE OPPORTUNITY FOR CORRECTION- With respect to a civil action that does not meet the criteria under subparagraph (B) to provide jurisdiction to the court involved, the following applies:

(i) The court shall impose an appropriate sanction upon the attorneys involved (and notwithstanding the lack of jurisdiction to proceed with the action, the court has jurisdiction to impose and enforce the sanction).

(ii) If the criteria are subsequently met and the civil action proceeds, the court may not under section 505 allow the plaintiff any attorneys' fees (including litigation expenses) or costs. HR 3590, 106th Cong. (2000), *available at* http://www.ohiosilc.org/il/ada_notification_act/h3590ih.php.

101. There is evidence that Zum Brennan sent Eastwood two letters prior to filing suit. After failing to get a response to the first letter she sent another letter by certified U.S.

HR 3590, known as the "ADA Notification Act," was the first of many attempts to pass legislation requiring notification to businesses of ADA accessibility violations prior to filing lawsuits. The bill was introduced by Congressmen Mark Foley and E. Clay Shaw, with the purpose of reducing so-called "frivolous" lawsuits that, according to business owners, are filed by attorneys for the sole purpose of profiting from settlements via provision of attorney's fees. One bill supporter predicted that if Congress did nothing, "more and more attorneys are going to find out that this is a great way to make fees," a prediction which seems to have come true based on the yearly increase of lawsuits filed.[102] This and similar legislation has been severely criticized by disability rights advocates because it weakens the impact of the ADA. Critics point out that businesses have been on notice of the ADA requirements since 1992, and thus granting notice periods only encourages businesses to ignore their obligations under the act.[103]

HR 3590 passed in the Senate in 1992, but no further action was taken and the bill died in the House.[104] Despite this failure, there have been many subsequent attempts to amend the Americans with Disabilities Act to include a provision requiring notice to a business before an ADA complaint could be filed. First, S.3122 was introduced by Senator Tim Hutchinson.[105] Then, in March 2001, Congressman Mark Foley introduced HR 914,[106] a bill nearly identical to HR 3590. A companion bill, S.782,[107] was also introduced by Senator Daniel Inouye in April 2001.[108] These bills also died.[109] Finally, Congressman Foley reintroduced the ADA Notification

mail, which was refused. Marta Russell, *ADA Celebration, Protest and Dirty Harry*, ZNET DAILY COMMENTARIES, July 28, 2000, http://www.zmag.org/sustainers/content/2000-07/28russell.htm.

102. *Id.*; in 1992 only 36 lawsuits were filed in Federal District Court in California alleging ADA Title III violations. In 2003 there were 2,302 lawsuits filed. It is predicted that 2,544 lawsuits will be filed in 2005. *See* chart "ADA Lawsuits Filed in California," http://republican.sen.ca.gov/opeds/14/oped2725.asp.

103. Dave Reynolds, *Notification Act Could Weaken ADA*, INCLUSION DAILY EXPRESS, Feb. 16, 2000, http://www.inclusiondaily.com/news/access/notification.htm; Dave Reynolds, *Eastwood Fights To Weaken Disability Rights Law*, INCLUSION DAILY EXPRESS, May 12, 2000, http://www.inclusiondaily.com/news/access/notification.htm.

104. *Bill Summary & Status for HR 3590*, http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR03590:@@@S (last visited Mar. 9, 2005); *see also* Dave Reynolds, *ADA Notification Rears Its Ugly Head, Again*, INCLUSION DAILY EXPRESS, Oct. 20, 2000, http://www.inclusiondaily.com/news/access/notification.htm#040401.

105. S. 3122, 106th Cong. § 2 (2000).

106. H.R. 914, 107th Cong. § 1 (2001).

107. S. 782, 107th Cong. § 1 (2001); Dave Reynolds, *ADA Notification Rears Its Ugly Head, Again*, INCLUSION DAILY EXPRESS, Oct. 20, 2000, http://www.inclusiondaily.com/news/access/notification.htm#040401.

108. *Bill Summary & Status for the 107th Congress*, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN00782:@@@L&summ2=m& (last visited Mar. 9, 2005).

109. *See Bill Summary & Status for the 107th* Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00914:@@@X. *and* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN00782:@@@L&summ2=m& (last visited Mar. 9, 2005).

Act a third time, as HR 728 in 2003.[110] Little Congressional support for the bill was established and no attempts to provide for a 90-day notice period have been successful.[111]

There have also been efforts at the state level to pass legislation addressing ADA lawsuit abuse. In California, Senator Charles Poochigian introduced Senate Bill 855 which would have provided business owners with notice and an opportunity to cure violations before lawsuits can be filed for compensatory damages, punitive damages, or attorneys' fees.[112] Under this scheme, compensatory and punitive damages would only be available if the violations were not remedied in 120 days. In support of the bill, Senator Poochigian stressed that the "bill protects the right of an individual who suffers a physical injury to get actual damages paid, while limiting lawsuits for fees and general damages if property owners correct the problem."[113] Although the bill had broad support from small businesses, members of the disabled community, and others impacted by ADA lawsuit abuse, it was defeated.[114]

III. CONCLUSION: DOES SERIAL LITIGATION HELP OR HINDER THE CAUSE?

As the court noted in *Brother v. Tiger Partner, LLC*, "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals).[115] But this is

110. H.R. 728, 108th Cong, §1 (2003).

111. Nancy Lee Jones, CRS Report for Congress, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, 40-41, http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/98-921_A.pdf (last visited Mar. 9, 2005).

112. Access Law Abused by Shakedown Artists (Apr. 8, 2005), 112. Access Law Abused by Shakedown Artists (Apr. 8, 2005), http://republican.sen.ca.gov/news/14/pressrelease3321.asp.

113. Senator Charles Poochigian, *Using the ADA to abuse the legal system*, SAN DIEGO UNION-TRIBUNE , Apr. 8, 2005, *available at* http://www.poochigianforag.com/news/news_lz1e8poochlgn.html.

114. Senator Poochigian made the following statement regarding the defeat of SB 855: "SB 855 would have dealt a blow to shakedown lawsuits while improving access for the disabled. The measure was written to focus on the small subset of litigants who are abusing the ADA, and going after those property owners who don't have the resources or the ability to respond." *Measure to Provide Relief from ADA Lawsuit Abuse Killed* (May 5, 2005), http://republican.sen.ca.gov/opeds/14/oped2725.asp.

115. Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004). The Brother court expressed serious concerns about the "vexatious litigation tactics" employed by serial ADA plaintiffs, and called upon the Congress to formulate a legislative solution to the problem." 331 F. Supp. 2d at 1375. Pending legislative reform, however, "the appropriate mechanism for addressing allegations of such behavior lies with the ethics and disciplinary bodies of State bar associations or with the court where the litigation is pending." ADA Notification Act: Hearings on H.R. 3590, before the Subcomm. On the Constitution of the House Comm. On the Judiciary (May 18, 2000), *available at* http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0.htm. *Quoted in* Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 863 n.5 (C.D. Cal. 2004) (quoting *ADA Notification Act: Hearings on H.R. 3590 before the Subcomm. on the Constitution of*

just one side of the story. Many disability advocates paint a very different picture. Amy B. Vandeveld is an attorney and member of the disabled community who has represented Molski in cases alleging ADA violations. She maintains that:

> [T]he point of Mr. Molski's lawsuits has been lost in the propaganda spouted by "small businesses" and defense counsel. In EACH of his suits, Mr. Molski identifies verifiable barriers that should have been removed by the defendants. The existence of those barriers and the dilatory conduct of businesses and property owners have failed to garner as much attention as the number of suits filed by some plaintiffs. I continually raise the question: 'What difference does it make whether one person with a disability files 300 lawsuits or whether 300 different people with disabilities file one suit apiece?' The barriers are the same. The damages are the same.[116]

Vandeveld makes a very convincing point. The ADA has been on the books since 1990, yet very few businesses are in compliance with its accessibility standards. Obviously, voluntary compliance and the limited suits filed by attorneys general are not achieving the widespread accessibility that Congress envisioned in implementing the detailed accessibility standards contained within Title III of the ADA. If Molski's and other serial litigants' actions result in greater accessibility to disabled individuals, what basis does the media or the courts have for attacking his methods when no other methods have proven effective?

One explanation for many people's distaste for the enforcement of the ADA via serial litigation is that the plaintiffs and their attorneys stand to financially gain from each of the suits they file. By alleging violations of California state law, Molski can and does request $4,000 per day from the date of violation until ADA standards are met, in addition to attorneys' fees. Although the vast majority of his cases settle, the money private businesses pay out through settlements goes directly to Molski and his attorneys. If Molski and others truly had an end goal of compliance, they would recognize those who have taken reasonable means to bring their businesses into compliance, and allow those businesses to remedy the situation without demanding the payment of money to settle the case.

In response to the criticism that serial litigators are in it for the money, some plaintiffs have formed nonprofit organizations that aim to channel settlement money that is not spent on attorney's fees to finance additional lawsuits or compliance efforts.[117] Despite not-for-profit status, these

the H. Comm. on the Judiciary, 106th Cong. 138 (2000)).

116. Email from Amy B. Vandeveld, Attorney (Mar. 8, 2005, 09:39 AM PST) (on file with author).

117. For instance, the American Disability Institute is a nonprofit dedicated to

groups still reap significant criticism from the disabled and nondisabled communities alike.[118]

Small businesses are decidedly against serial litigation of ADA claims, and have strongly supported Congressional attempts to establish notification requirements.[119] The California Chamber of Commerce

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encouraging ADA compliance via lawsuits. In 2003, the president of the Institute planned to file 400 to 500 suits a month until 5,000 Philadelphia businesses were cited for ADA violations. A disabled couple shared their opinion of the Institute in a letter to the editor of the *Philadelphia Inquirer*:

> Re: "Business owners call flood of disability suits an ambush," Aug. 31:
>
> As a deaf couple, we are shocked at the apparent frivolity of such lawsuits and wonder if we have the whole story. We agree that at the very minimum business owners should be alerted and given time to correct the violations or be sued.
>
> In our dealings with businesses and professionals regarding the failures to meet our communication access needs, we've had much success by informing and working with the establishment to correct the violations, as well as many failures. We have found motels and hotels to be the most accommodating.
>
> The medical establishment, such as hospitals — especially those in Philadelphia — and doctors in their resistance to arranging for sign language interpreters or effective, accessible means of communication for deaf and hard-of-hearing people are among the worst violators of the Americans with Disabilities Act. Meaningful communication with the medical establishment often concerns quality-of-care decisions as well as life-or-death matters.
>
> We do wish the lawyers and the American Disability Institute were more selective in their battles, but then, after more than 10 years since the passage of the disabilities act and the painfully slow progress combined with serious setbacks in recent Supreme Court decisions, maybe it takes an extremist group to increase awareness of the shameful failure to make "reasonable" accommodations for disabled Americans.

Lawrence and Carolyn J. Brick, *Letter to the Editor*, PHILA. INQ., Sept. 14, 2003, *available at*, http://www.macon.com/mld/inquirer/2003/09/14/news/editorial/6763815.htm.

118. *Id.*; *see also* non-disabled criticism:

> "Turning Wheelchairs into Wheelbarrows — of Money"
>
> In what amounts to little more than a shake-down racket, a small Philadelphia-area law firm has filed more than 100 lawsuits against local restaurants and pubs claiming they violate the Americans with Disabilities Act (ADA) because their restrooms are not fully accessible to people in wheelchairs. All of the suits have been filed on behalf of only two men and a recently formed front group called the American Disability Institute. The suits claim the wheelchair-bound men have suffered "severe emotional distress" and demand legal fees, generally in the $2,000-$3,000 range. Many restaurants are paying simply to make the litigation go away. The president of the Institute says the plan is to file 400 to 500 suits a month until 5,000 businesses have been cited for ADA violations.

Lawsuit Abuse Fortnightly, LAWSUIT ABUSE, (Joseph L. Bast, ed., The Heartland Institute, vol. 2, no. 11) (Sept. 2003), *available at* http://heartland.org/Article.cfm?artId=12975.

119. The following summarizes the vulnerability of small businesses under the current law:

> Currently, the slightest deviation from ADA guidelines can prove disastrous for a small business that is targeted by a plaintiffs' trial lawyer. Many small businesses have become the targets of ADA lawsuits designed to generate

describes the following impact on small businesses:

> Businesses throughout California have spent thousands, even hundreds of thousands of dollars in modifications to make their businesses accessible to all. Building inspectors sign off on the changes. With the ADA's rigorous standards, however, violations are easy to allege. Even if only one minor violation out of 20 alleged violations is found to be accurate, the law's provision of strict liability for businesses means the business loses and faces paying, not only its own defense costs, but damages and the plaintiff's lawyer's fees and costs as well.[120]

In addition, the lack of consistency in California between Title III of the ADA and California's building requirements under Title 24 creates an unfair playing field. In states like California, the provision of a single, clear and consistent guideline for business owners would be a step in the right direction by making compliance an achievable goal.

Community dissent over the permanent closure of businesses due to Title III lawsuits has garnered significant media attention. Roy's Drive-in has been an institution in Salinas, California since the 1950s.[121] The owner, Roger Patterson, 61, who has worked at Roy's since 1960 and counted on selling the business for his retirement, closed the doors after being sued by Molski.[122] Patterson said it would cost about $10,000 to make the necessary repairs to bring the restaurant into compliance, an amount he was willing to spend. But, Molski's suit also asked for extensive legal fees and damages that Patterson could not afford. Molski's attorney, Thomas Frankovich, has the following response to the closure of Roy's, "[i]f a guy wants to go out of business, then fine, he

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> quick settlements and/or the award of attorneys' fees. A small business could spend tens thousands [sic] of dollars defending a lawsuit even though it has complied with the ADA. The high cost associated with lawsuits resulting from confusion over ADA requirements does nothing to improve access for disabled customers.

NFIB - The Voice of Small Business, Action Alert, http://capwiz.com/nfib/issues/alert/?alertid=6825226 (last visited Mar. 9, 2005).

120. CALIFORNIA CHAMBER OF COMMERCE, 2005 CALIFORNIA BUSINESS ISSUES, ADA LAWSUIT ABUSE (2005), http://www.calchamber.com/biz%20issues/2005/summaries/05-ADALawsuitAbuse.pdf.

121. Jonathon Segal, *Roy's Drive-In Checks Out: Salinas eatery faced lawsuit over access*, MONTEREY HERALD, Sept. 21, 2004, *available at* http://www.montereyherald.com/mld/montereyherald/news/9720243.htm (last visited Mar. 9, 2005); and reaction to the closure: "One hopes that Molski's heart is warmed by the sight of shuttered buildings, with their empty parking lots proclaiming equal treatment for all: now, nobody has access." A.J. Ferguson, *The Last Supper*, Liberty Vol. 18 no. 12 (Dec. 2004), http://libertyunbound.com/archive/2004_12/ferguson-lastsupper.html.

122. Jonathon Segal, *Roy's Drive-In Checks Out: Salinas eatery faced lawsuit over access*, MONTEREY HERALD, Sept. 21, 2004, *available at* http://www.montereyherald.com/mld/montereyherald/news/9720243.htm (last visited Mar. 9, 2005).

can go out of business."[123] On Lock Sam, a Chinese restaurant in Stockton, California, also closed its doors due to an ADA lawsuit.[124] The restaurant had considerable history in Stockton, dating back to 1898, with the current owners involved since 1920. The ADA suit was brought by Charles Hager, a man who uses a wheelchair and alleges that he suffered humiliation when unable to use the restroom.[125] The closing of the 100 year old restaurant sparked controversy among the Stockton community; included in the uproar against the closure of the restaurant were many disabled community members.[126]

Compounding the negative impact of ADA lawsuits on small businesses is the fact that the majority of these businesses lease their premises. Landlords include indemnity provisions in their leases that release liability for ADA noncompliance, thus forcing lessees to bear the brunt of both the costs of meeting ADA accessibility guidelines and the risks of being found noncompliant. The ADA does provide responsibility to landlords, but this responsibility is transferred to lessees through the inclusion of indemnity provisions in leases.[127]

Reforms to the ADA should focus on providing protection to businesses that have demonstrated good faith efforts to come into compliance. Certification is a means of providing protection to small businesses that is supported by the California Chamber of Commerce.[128] Recently enacted legislation establishes a scheme by which individuals can become certified ADA access specialists.[129] These specialists can assist businesses in identifying compliance issues and foster greater accessibility statewide. However, these specialists will not prevent vulnerability to lawsuits.

According to the Chamber of Commerce, unless safe harbor provisions are adopted, businesses will continually be vulnerable to lawsuits even when following the advice of certification specialists and making good

123. *Id.*

124. Howard Lachtman, *On Lock Sam leaves a little less than 'contented hearts'*, RECORD NET, Apr. 2, 2004, http://www.recordnet.com/articlelink/040204/lifestyle/articles/040204-l-9.php.

125. Walter Olson, *Access suit closes landmark Calif. Eatery*, OVERLAWYERED, Sept. 2, 2003, http://www.overlawyered.com/archives/000291.html.

126. *Id.*

127. 28 C.F.R. 36.201(b). *The text follows:*

Sec. 36.201 General.

(b) Landlord and tenant responsibilities. Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.

128. CALIFORNIA CHAMBER OF COMMERCE, 2005 CALIFORNIA BUSINESS ISSUES, ADA LAWSUIT ABUSE (2005), http://www.calchamber.com/biz%20issues/2005/summaries/05-ADALawsuitAbuse.pdf.

129. *Id.*

faith efforts to comply with all of the accessibility guidelines of the ADA.[130] An effective safe harbor provision should provide immunity from lawsuits to businesses that solicit and follow a certified ADA specialist's recommendations, unless that business is given specific notice of violation and fails to make necessary repairs in a reasonable time.[131]

I believe that the California Chamber of Commerce has the right idea. A safe harbor provision should be provided to business owners who make good faith efforts to come into full ADA accessibility requirements. This solution is more appropriate than a mandatory notification period, which has been introduced in both the House and the Senate, because it does not reward bad faith efforts of businesses to avoid making accommodations. Under the proposals of the House and Senate, businesses can avoid following ADA guidelines without repercussions up to the point when notice of a violation is received. Adopting a safe harbor according to the provisions outlined above would avoid this major criticism, which is often made by ADA activists and members of the disabled community.

I would modify the Chamber of Commerce's suggestion in one way, however. Instead of only allowing a safe harbor to those business owners who employ the services of certification specialists, I would extend the safe harbor to businesses that are able to make an affirmative showing of good faith efforts to comply with the ADA. This would avoid the imposition of the costs of hiring a certification specialist for those businesses that are comfortable following the ADA Accessibility Guidelines without professional assistance. This provision could be effectuated by allowing businesses an opportunity to prove that violations were unintentional and not made in bad faith. If the court is satisfied that the business acted in good faith, the business should be granted a safe harbor period in which to remedy the situation without being subject to plaintiff's attorney's fees or damages. This provision would only apply to minor infractions, however. For example, if the grab bar in a bathroom was installed one inch too high despite architectural drawings depicting proper placement, the business that hired the contractors should not be liable for the inadvertent mistake, provided such mistakes are extremely limited in number. The downside of this modification, however, is that making such an affirmative case in court would undoubtedly require the expenditure of attorney's fees. Still, the expenditure of fees may be warranted when the cost of settling is substantially higher.

In addition to an opportunity to demonstrate good faith efforts to comply, I also suggest legislation prohibiting landlords from completely indemnifying themselves against responsibility for accessibility lawsuits. I would modify the Code of Federal Regulations §36.201(b), which

130. *Id.*
131. *Id.*

currently allows responsibility to be allocated entirely to either party via lease. I would instead provide that landlords are responsible for the inherent structural form of the building such as street access, parking, ramps, and front door accessibility. Lessees would be responsible for any modifications made to their specific leased areas including accessibility requirements triggered by such modifications. In other words, the landlord is liable for everything up to the doors leading into the business place. Once you reach the doors, all liability falls to the lessee. This change would be constructive on two levels: First, it would allow the costs of ADA accessibility compliance to be split (although potentially unevenly) among landlord and tenant, thus reducing the financial burden on small-business owners. Second, it would encourage landlords to bring their buildings up to code in order to avoid costly lawsuits, thus resulting in a dramatic increase in the number of buildings that are accessible to the disabled.[132]

These changes to the law, I believe, are in line with Congress's intentions in enacting the ADA and also are a workable solution to the strains on the courts and small businesses from ADA serial lawsuits. After all, when the ADA was adopted by President Bush it was hailed as an "emancipation proclamation" by the estimated 43 million disabled Americans at the time.[133] It is clear that the level of access envisioned by the ADA has not yet been reached. Fifteen years after its enactment, it is time to look at the ADA with a critical eye towards improvements in the areas of enforcement and accessibility.

Most importantly, these changes will result in greater access to public accommodations for the disabled community. Business owners who disregard the law and make no efforts to come into compliance deserve very little sympathy. However, those who make good faith efforts to abide by the regulations of the ADA should not be hung out to dry. New legislation addressing accessibility under Title III should focus on finding a balance between vigorously enforcing the rights of the disabled community and protecting good faith efforts of businesses to come into compliance.

132. This would also reduce the number of "drive-by lawsuits" in which the determination of whether or not to file a lawsuit is based on a drive-by assessment of compliance of the parking lot. *See* American Hotel and Lodging Association, AH&LA Testifies Before Congress on ADA, Encourages "Common-Sense Approach to Inadvertent Noncompliance," http://www.ahla.com/public_view_advisory.asp?mstr=179 (last visited Mar. 9, 2005).

133. Harger, *supra* note 2.