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Enforcement of the Americans with Disabilities Act: Remediating “Abusive” Litigation While Strengthening Disability Rights

Evelyn Clark

Washington and Lee University School of Law, clark.e@law.wlu.edu

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Enforcement of the Americans with Disabilities Act: Remediating “Abusive” Litigation While Strengthening Disability Rights

Evelyn Clark*

Abstract

This Note explores the Americans with Disabilities Act and the private litigation used to enforce compliance. While the ADA was designed to be enforced by private citizens, many have called for reform to limit what they see as “abusive” litigants. This Note focuses on (1) the perceived problem of vexatious litigants abusing the ADA and its state counterparts to benefit monetarily, (2) the attempted solutions on both a state and federal level, and (3) recommended solutions that focus on protecting the rights of individuals with disabilities while limiting abusive litigation meant to extort businesses.

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* Candidate for J.D., May 2020, Washington and Lee University School of Law. I began my law school career just a year and a half after suffering a traumatic T6 spinal cord injury. New to navigating the world in a wheelchair, I became interested in disability rights and the legal perspective to accessibility. I would like to thank my family for their unwavering support and love, as well as the many communities that rallied behind me after my accident.

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I. Introduction

“This is not a case to vindicate a disabled person’s rights; it is a case brought to extract a money settlement from a restaurant in Brooklyn, with plaintiff exploiting the ADA’s jurisdictional hook to achieve that goal.”¹

1. Phillips v. 180 Bklyn Livingston, LLC, No. 17 Civ. 325 (BMC), 2017 U.S. Dist. LEXIS 75154, at *8 (E.D.N.Y. May 16, 2017).

*“Serial plaintiffs, like Molski, serve as ‘professional pawns in an ongoing scheme to bilk attorney’s fees.’ It is a ‘type of shotgun litigation [that] undermines both the spirit and purpose of the ADA.”*²

*“The current ADA lawsuit binge is, therefore, essentially driven by economics—that is, the economics of attorney’s fees.”*³

*“The Act was never intended to turn a lofty and salutary mission into a fee-generating mill for some lawyers to exploit the statutory scheme to see how many billable hours they could cram into a case before it is either tried or settled. They do a disservice to the disabled”*⁴

*“Physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society.”*⁵

One of these quotes is not like the others. The Americans with Disabilities Act was enacted to eradicate discrimination against individuals with disabilities, but some say there have been unintended consequences.⁶ The law was designed to be enforced by private citizens filing suits against noncompliant and inaccessible businesses.⁷ Unfortunately, Congress did not anticipate the unintended consequences of plaintiffs and attorneys abusing the system for monetary gain.⁸ Some courts have painted a picture of a vicious “cottage industry”—litigants

2. *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) (citations omitted).

3. *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004).

4. *Brother v. Miami Hotel Invs., Ltd.*, 341 F. Supp. 2d 1230, 1233 (S.D. Fla. 2004).

5. 42 U.S.C. § 12101 (2018).

6. *See id.* (providing eight overarching findings, which necessitated the creation of the ADA).

7. *See infra* notes 52–56 and accompanying text (discussing the congressional intent to put enforcement in the hands of private citizens).

8. *See infra* notes 52–56 and accompanying text (discussing the congressional intent to put enforcement in the hands of private citizens).

and their attorneys abusing the system for monetary gain through settlements and attorney's fees."⁹ While some litigants may exploit the ADA, many advocates remain committed to using the law for its intended purpose: Achieving equality for disabled Americans.¹⁰ These individuals and their attorneys, regardless of their motives, have faced frequent negative press coverage, unpopular public opinion, and increasing beratement from courts.¹¹

Media outlets often tell the stories of greedy individuals targeting unassuming small business owners who were unaware of the ADA and their noncompliance (despite the law having been in effect since 1990).¹² The popular podcast *This American Life* produced an episode entitled "Crybabies" in

9. See *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1280–82 (M.D. Fla. 2004) (arguing that the recovery of attorney's fees under the ADA has led to a "cottage industry" of plaintiffs and attorneys attempting to make money off the statute); see also *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) (stating that this "shotgun litigation" is an ongoing scheme to bilk attorney's fees); see also *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1374–75 (M.D. Fla. 2004) (deciding that plaintiff had not sufficiently established a credible threat of future injury and was only involved in a "vexatious litigation tactic" to recover monetary damages or attorney's fees).

10. See *supra* note 6 and accompanying text (explaining why the ADA was enacted).

11. See *Phillips v. 180 Bklyn Livingston, LLC*, No. 17 Civ. 325 (BMC), 2017 U.S. Dist. LEXIS 75154, at *8 (E.D.N.Y. May 16, 2017) ("This is not a case to vindicate a disabled person's rights; it is a case brought to extract a money settlement from a restaurant in Brooklyn, with plaintiff exploiting the ADA's jurisdictional hook to achieve that goal."); see also *Brother v. Miami Hotel Invs., Ltd.*, 341 F. Supp. 2d 1230, 1233 (S.D. Fla. 2004) ("[Lawyers exploiting the ADA] do a disservice to the disabled . . ."); see also Walter Olson, *The ADA Shakedown Racket*, CITY J. (Winter 2004), <https://www.city-journal.org/html/ada-shakedown-racket-12494.html> (last visited Mar. 25, 2020) ("The good faith of these complainants in many of these suits is open to doubt.") [<https://perma.cc/LHS7-C2D2>].

12. Amy Shipley & John Maines, *South Florida Leads Nation in Controversial Disability Lawsuits*, SUN SENTINEL (Jan. 11, 2014), <https://www.sun-sentinel.com/news/fl-xpm-2014-01-11-fl-disability-lawsuits-strike-sf-20140112-story.html> (last visited Mar. 25, 2020) ("Local business owners say they are being extorted by a handful of serial-filing lawyers more concerned with turning profits than helping the disabled.") [<https://perma.cc/MH9J-TZEQ>].

2010.¹³ The episode's description reads: "Crybabies are annoying. They whine, they complain, sometimes they ruin it for the rest of us. But being a crybaby can be a really effective tactic."¹⁴ The third segment of the podcast introduces Tom Mundy, a disabled individual and disability rights lawyer who has filed hundreds of lawsuits under the ADA.¹⁵ The segment's description begins:

In California, a kind of crybaby cottage industry has popped up around, of all things, the Americans with Disabilities Act—the federal law that requires public places to meet a minimum level of accessibility. Some people make a living by suing business owners for not being up to code. Alex MacInnis hung out with one of them.¹⁶

The fifteen-minute segment presents a brief but poignant case study of how able-bodied people interact with individuals with disabilities. Mr. Mundy, a disabled lawyer fighting for ADA compliance, takes the journalists to a nearby business to demonstrate how frustrating inaccessibility can be.¹⁷ He backs into an "accessible" parking space, explaining that the striped blue lines are not big enough for him to unload the ramp from his van and maneuver his wheelchair out of the car.¹⁸ Mr. Mundy unfolds his ramp to demonstrate.¹⁹ The journalist immediately questions whether Mundy can actually get out of the van or not.²⁰ Then MacInnis states cavalierly, "Well, I'd love to see you try."²¹ The instant condescension and disbelief of Mr. Mundy's struggle drips from the journalist's voice.²² Disabled

13. Ira Glass, *This American Life: Crybabies*, WBEZ (Sept. 24, 2010), <http://www.thisamericanlife.org/radio-archives/episode/415/transcript> (last visited Feb. 27, 2020) [<https://perma.cc/N6BW-5US8>].

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

individuals listening to the podcast can likely relate to Mr. Mundy's frustration, not only with the lack of accessibility in public places, but with the constant pressure from able-bodied individuals to *prove* one's disability.

Throughout the segment, little weight is given to the fact that some businesses in the area have fixed their inaccessible parking because of Mr. Mundy's work.²³ Instead, the journalist narrates, "Tom, like a handful of other people in California, makes his living by [suing under the ADA], over and over. He has no other job. It's his sole means of support."²⁴ Whimsical music begins in the background, evoking images of luxury and ease, painting Mr. Mundy as a carefree and well-to-do leech on the system.²⁵ Litigating under the ADA is depicted as nothing more than a money-grabbing scheme for "crybabies" to exploit businesses and make millions.²⁶

As both a wheelchair user and a fan of the show, I was shocked and saddened to hear disabled individuals being branded as "crybabies" for fighting for equality. This sentiment, however, is not rare.²⁷ Countless news articles feature titles such as "The ADA Lawsuit Contagion Sweeping U.S. States"²⁸ or "Florida's Serial ADA Lawsuits: Long Overdue or 'Legal Extortion?'"²⁹ Press coverage almost always focuses on the

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See Casey L. Raymond, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III*, 18 TEX. J. ON C.L. & C.R. 235, 237 (2013) (discussing *This American Life*'s "Crybabies" episode as well as the frequent negative coverage of mass plaintiff filings under the ADA).

28. See Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, FORBES (Dec. 22, 2016 11:05AM), <https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/#3730448634ee> (last visited Mar. 25, 2020) (discussing the vast amount of ADA litigation) [<https://perma.cc/MW7V-4BV5>].

29. See Raychel Lean, *Florida's Serial ADA Lawsuits: Long Overdue or 'Legal Extortion?'*, DAILY BUS. REV. (Nov. 1, 2018 10:04AM), <https://www.law.com/dailybusinessreview/2018/11/01/floridas-serial-ada-lawsuits-long-overdue-or-legal-extortion/?slreturn=20190127222824> (last visited Mar.

sensationalized and unsympathetic serial plaintiffs who are abusing the system, giving little exposure to the view that some serial litigants are advocates fighting for equal rights.³⁰ One such article states:

No one exemplifies the emergent disability-shakedown industry better than the wheelchair-using Louie, whose past includes multiple felony convictions on assault, grand-theft, and other charges—though he says he is straight with the law today, having after all prospered as one of its enforcers. Over the years, he has filed at least 500 lawsuits Some of his individual settlements have reached \$100,000³¹

Negative media coverage has the ability to affect public opinion of disability-rights activists, individuals with disabilities, and the legal profession that supports them.³² “The negative press coverage has even translated into legislation, including California’s recently passed law protecting small businesses from predatory ADA lawsuits.”³³ Legislation has repeatedly been introduced on the state and federal level in an attempt to curb vexatious ADA litigation.³⁴ Although cries for ADA reform may be warranted, legislators hoping to protect business interests must remember the fundamental purpose of the ADA: *To protect disabled individuals’ right to equal access and opportunity.*³⁵

25, 2020) (discussing the vast amount of ADA litigation) [<https://perma.cc/X2DT-M2Q3>].

30. See Patrick S. Pemberton, *Arizona Pedophile Sues 6 SLO County Businesses for Alleged ADA Violations*, THE TRIB. (Feb. 6, 2015, 6:20PM), <https://www.sanluisobispo.com/news/local/article39511665.html> (last visited on Mar. 25, 2020) (“A convicted pedophile from Arizona with a litigious past has sued six local businesses, saying their facilities did not comply with the [ADA]. Meanwhile, a bill currently pending at the statehouse seeks to limit the impact of such lawsuits, which some describe as predatory.”) [<https://perma.cc/LJF7-BAEE>].

31. Olson, *supra* note 11.

32. See Pemberton, *supra* note 30 (including quotes such as “as a local community member I am outraged” and “It’s just so sad hearing about these” in an article on ADA litigation).

33. Raymond, *supra* note 27.

34. See *infra* notes 63–76 (discussing proposed and enacted legislation to curb vexatious litigation on the state and national level).

35. See 42 U.S.C. § 12101 (2018) (explaining why the ADA was enacted).

This Note explores the Americans with Disabilities Act and (1) its unintended consequence of abuse in the legal system, (2) previous attempts to curb that abuse, and (3) potential recommendations to shield businesses from abusive lawsuits while protecting disabled individuals' rights. First, this Note will explore why abusive litigation is happening, where it occurs the most, who is filing, and who is benefitting. Second, this Note will analyze the solutions attempted through state law, federal legislation, and alternate means. Third, this Note will propose solutions for the legal profession, state and federal legislative bodies, and the disability community as a whole.

II. The Problem

A. Background of the Americans with Disabilities Act

On July 26, 1990, Congress enacted the Americans with Disabilities Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.³⁶ The ADA's official acronym is now the ADA³⁷ after it was amended most recently in 2008 to reaffirm the broad scope of the term "disability."³⁷ Although the ADA is now the ADA³⁷, this Note will use the acronym "ADA" for ease of reading.

Title III of the ADA prohibits discrimination by public accommodations and services operated by private entities.³⁸ This includes anything from restaurants and bars to hotels and gyms.³⁹ Title III states that "it shall be discriminatory to subject

36. 42 U.S.C. § 12182 (2018).

37. See ADA Amendments Act of 2008, 110 Pub. L. No. 325, 122 Stat. 3553 (finding that the definition of disability under the ADA had not been interpreted consistently and further narrowed the broad scope of protection intended to be afforded by the ADA).

38. See 42 U.S.C. § 12181 (outlawing discrimination by public accommodations and services operated by private entities).

39. See *id.* § 12181(7) (including the substantive list of places of lodging (hotels), exhibitions of entertainment (movie theaters), food or drink establishments (bars and restaurants), shopping centers (grocery and clothing stores), service establishments (laundromats, gas stations, professional offices), public displays or collections (museums and libraries), places of recreation (parks, zoos, amusement parks), private schools (from nurseries to

an individual or class of individuals on the basis of disability . . . to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.”⁴⁰

This discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable.”⁴¹ If an entity demonstrates that the removal of a barrier is not readily achievable, it should make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.⁴² Factors to determine whether an accommodation is readily achievable include the nature and cost of the action, the financial resources of the facility, and the type of operations of the entity.⁴³

To enforce the accessibility requirement of Title III, the ADA authorizes (1) a private right of action, and (2) a right of action by the Attorney General.⁴⁴ Private plaintiffs initiating civil action are entitled to injunctive relief remedying the violation and attorney’s fees and costs.⁴⁵ Injunctive relief includes an order to alter facilities to make them readily accessible and usable by individuals with disabilities.⁴⁶ The ADA allows for reasonable attorney’s fees, including litigation expenses and costs, to encourage individuals to file claims and keep businesses accountable.⁴⁷

postgraduate education), social services establishments (day care centers, homeless shelters, adoption agencies), places of exercise (gymnasiums, health spas, golf courses)).

40. *Id.* § 12182(b)(1)(A)(i).

41. *Id.* § 12182(b)(2)(A)(iv)–(v).

42. *See id.* § 12181(9) (defining “readily achievable” as easily accomplishable and able to be carried out without much difficulty or expense).

43. *Id.* § 12181(9)(A)–(D).

44. *Id.* § 12188(b).

45. *Id.*

46. *Id.* § 12188(a)(2).

47. *See id.* § 12205 (allowing for the prevailing party to be granted a reasonable attorney’s fee, including litigation expenses and costs).

The Attorney General's right to action differs slightly from private plaintiffs'.⁴⁸ Notably, the court may award monetary damages to aggrieved individuals when requested by the Attorney General.⁴⁹ The civil penalty against the entity may not exceed \$50,000 for the first violation or \$100,000 for any subsequent violation.⁵⁰ The court may also consider good faith efforts to comply with the Act when considering what amount of civil penalty may be appropriate.⁵¹

The differing remedies demonstrate "Congress's underlying intent to prevent private plaintiffs from recovering monetary relief under the ADA."⁵² To emphasize this intent, Congress outlined the specific conditions that may warrant an award of monetary damages.⁵³ Monetary relief may be awarded by a court to vindicate the public interest in a civil action that was brought by the Attorney General.⁵⁴ "By specifying the circumstances under which monetary relief will be available, Congress evinced its intent that these damages would be available in no other[] [circumstance]."⁵⁵ Anti-discrimination litigation does not allow for recovery of monetary damages

48. See *infra* notes 49–51 and accompanying text (explaining the differences between the Attorney General's right to action when compared to private plaintiffs').

49. See 42 U.S.C. § 12188(b)(2)(B) (stating that in a civil action, the court "may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General").

50. *Id.* § 12188(b)(2)(C).

51. See *id.* § 12188(b)(5) (defining good faith by allowing the court to consider whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability).

52. Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 97 (2006).

53. See 42 U.S.C. § 12188 (2018) (granting courts the ability to award monetary damages when requested by the Attorney General or to vindicate the public interest).

54. *Id.* § 12188(b)(2)(B)–(C).

55. *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000).

because plaintiffs are seeking to vindicate the policy of the United States, not seek redress of their own injuries.⁵⁶

B. States Awarding Monetary Damages Under the ADA

Some states, however, have enacted their own anti-discrimination statutes allowing for the recovery of monetary damages for accessibility lawsuits.⁵⁷ Plaintiffs in such states may “circumvent the will of Congress by seeking money damages while retaining federal jurisdiction.”⁵⁸ For example, in California, because a violation of the ADA also constitutes a violation of California’s Unruh Civil Rights Act, plaintiffs can sue in federal court for injunctive relief under the ADA while collecting money damages under California’s state statute.⁵⁹

States that allow for monetary damages under their own anti-discrimination statutes experience more accessibility lawsuits than those who do not provide for additional recovery.⁶⁰ Statistics of geographically concentrated ADA litigation have

56. See *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (explaining the difference between statutes allowing for recovery of attorney’s fees to encourage litigants and monetary damages).

57. See 42 U.S.C. § 12188(b) (2018) (granting plaintiffs of private civil actions the remedy of injunctive relief and attorney’s fees); see also, e.g., ARIZ. REV. STAT. § 41-1492.08(C) (2017) (granting “appropriate relief” including intangible damages to plaintiffs in Arizona); CAL. CIV CODE § 52(a) (West 2015) (establishing minimum damages of \$4,000 to aggrieved plaintiffs in California); FLA. STAT. § 760.11(5) (2015) (allowing Florida plaintiffs to recover for compensatory damages including mental anguish, loss of dignity, and other intangible injuries).

58. *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 862 (C.D. Cal. 2004).

59. See *id.* at 862–63 (“Plaintiffs can sue in federal court for injunctive relief under the ADA, and tack on state law claims for money damages under the Unruh Act and CDPA.”).

60. See Minh Vu et al., *2014 May Be a Banner Year for ADA Title III Lawsuit Filings*, SEYFARTH SHAW LLP (Aug. 5, 2014), <https://www.adatitleiii.com/2014/08/2014-may-be-a-banner-year-for-ada-title-iii-lawsuit-filings/> (last visited Mar. 25, 2020) (citing California and Florida as the two states which consistently had the highest number of ADA lawsuits nationwide) [<https://perma.cc/TLC6-Z2DY>].

raised concern over plaintiffs' motivations for filing suit.⁶¹ Repeat plaintiffs' incentives may be to recover monetarily through litigation or settlement rather than enforcing the ADA and promoting accessibility.⁶²

All but a few states have adopted their own version of the ADA.⁶³ Most, however, do not allow for additional remedies outside of the federal statute.⁶⁴ For example, the Virginia Human Rights Act emphasizes that the policy of the Commonwealth is "to safeguard all individuals within the Commonwealth from unlawful discrimination because of . . . disability."⁶⁵ The statute has an entire section highlighting that the Human Rights Act (VHRA) does *not* allow for additional causes of action.⁶⁶ "Nothing in this

61. See Kristina M. Launey et al., *ADA Title III Lawsuits Increase by 16% in 2017 Due Largely to Website Access Lawsuits; Physical Accessibility Legislative Reform Efforts Continue*, SEYFARTH SHAW LLP (Feb. 1, 2018), <https://www.adatitleiii.com/2018/02/ada-title-iii-lawsuits-increase-by-14-percent-in-2017-due-largely-to-website-access-lawsuits-physical-accessibility-legislative-reform-efforts-continue/> (last visited Mar. 25, 2020) (noting California and Florida as the two states with consistently highest ADA lawsuits with 2,751 and 1,488 respectively out of 7,663 suits total in the United States in 2017 and New York doubling its 543 lawsuits in 2016 to 1,023 in 2017) [<https://perma.cc/6CLY-C5RB>].

62. See *Cankat v. 41st Ave. Rest. Corp.*, No. 15 CV 4963 (SJ) (MDG), 2016 U.S. Dist. LEXIS 171406, at *12–13 (E.D.N.Y. Dec. 8, 2016) (addressing the plaintiff and his attorney's reputation as serial filers who target small businesses that default or settle with nearly identical claims to recover monetary damages and attorney's fees, claiming they "mock" the ADA's mission as a trailblazing civil rights law).

63. See Stephen A. Rosenbaum et al., *Disability Rights and Public Accommodations: State-by-State*, SOUTHEAST ADA CTR. (Feb. 2011), https://adasoutheast.org/publications/ada/public_accommodations_disability_rights_state-by-state_Final.pdf ("Many states have their own disability rights law that complement the Americans with Disabilities Act.") [<https://perma.cc/KJ38-63ST>].

64. Compare VA. CODE ANN. § 2.2-3903 (2014) (explaining that Virginia's statute does not create any additional rights of action from the ADA); with CAL. CIV. CODE § 52(a) (2015) (allowing for actual damages of no less than \$4,000 for noncompliance).

65. VA. CODE ANN. § 2.2-3900(B)(1) (2001).

66. See VA. CODE ANN. § 2.2-3903 (2014) ("Nothing in this chapter or in Article 4 (§ 2.2-520 et seq.) or Chapter 5 creates, nor shall it be construed to

chapter . . . creates . . . an independent or private cause of action to enforce its provisions”⁶⁷ Causes of action based on the public policies of the VHRA are exclusively limited to those actions, procedures, and remedies afforded by applicable federal or state civil rights statutes.⁶⁸

In contrast, Illinois and New York allow for recovery of actual damages for injury, loss, or other remedies as may be necessary to “make the complainant whole.”⁶⁹ States may set a minimum or maximum amount of damages for which a plaintiff may recover.⁷⁰ California’s Unruh Civil Rights Act establishes recovery of actual damages of *no less than* \$4,000 in addition to attorney’s fees.⁷¹ California has also enacted the Californians with Disabilities Act, which allows for actual damages of no less than \$1,000 for those who deny or interfere with enjoyment of public facilities.⁷²

In contrast to California’s *minimum* penalties, Pennsylvania and Florida have set *maximum* penalty amounts.⁷³ Pennsylvania allows for the awarding of actual damages including (1) reimbursement of travel expenses related to the claim, and (2) compensation for loss of work, but the state law sets maximum penalties based on the respondent’s prior

create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsections B and C.”)

67. *Id.* § 2.2-3903(A).

68. *Id.* § 2.2-3903(D).

69. *See* 775 ILL. COMP. STAT. 5/8A-104 (1989) (allowing Illinois plaintiffs to recover for damages to make the complainant whole); *see also* N.Y. EXEC. LAW § 297(9) (McKinney 2019) (allowing New York plaintiffs to recover for punitive damages and such other remedies as may be appropriate).

70. *See infra* notes 71–76 (explaining how some states have set minimum and maximum penalties).

71. CAL. CIV. CODE § 52(a) (2015) (emphasis added).

72. *See* CAL. CIV. CODE § 54.3(a) (1996) (stating that a person may not be liable for damages pursuant to both the CDA and the Unruh Civil Rights Act for the same action).

73. *See* 43 PA. CONS. STAT. § 959 (2020) (establishing that penalties should not exceed \$10,000 if the respondent had not committed any prior discriminatory practice or \$25,000 if the respondent committed one other discriminatory practice within a five-year period); *see also* FLA. STAT. § 760.11(5) (2015) (limiting punitive damages to no more than \$100,000).

offenses.⁷⁴ Florida's Civil Rights Act allows for compensatory damages which may include back pay, attorney's fees, damages for mental anguish, loss of dignity, any other intangible injuries, and punitive damages.⁷⁵ The statute further specifies that punitive damages shall not exceed \$100,000.⁷⁶

C. Geographic Concentrations of ADA Litigation

Title III lawsuits have increased dramatically over the course of the ADA's lifetime, especially in states allowing for recovery of monetary damages.⁷⁷ In 2012, there were 2,495 federal ADA Title III lawsuits, compared to 7,663 in 2017.⁷⁸ More suits were filed in federal court in the first half of 2016 than in all of 2013.⁷⁹ California and Florida consistently remain the top two states for disability litigation, with 2,751 in California and 1,488 in Florida in 2017.⁸⁰ More than one in every five federal disabled-access lawsuits in 2013 originated in the Southern District of Florida.⁸¹ Between 2009 and 2014, disabled-access lawsuits in South Florida increased by 500 percent.⁸²

D. Repeat Plaintiffs Filing "Boilerplate" Complaints

Accessibility lawsuits tend to be brought by repeat plaintiffs and counsel, who are sometimes working with a disability rights organization.⁸³ Many courts have flippantly referred to these

74. 43 PA. CONS. STAT. § 959 (proposed).

75. FLA. STAT. § 760.11(5) (2015).

76. *Id.*

77. *See* Launey et al., *supra* note 61 (analyzing the increase in litigation and which states received the most complaints).

78. *See id.* (analyzing the increase in litigation and which states received the most complaints); *see also* Vu et al., *supra* note 60 (noting an increase from 2,495 lawsuits in 2012 to 2,719 lawsuits in 2013).

79. Vu et al., *supra* note 60.

80. *Id.*

81. Shipley & Maines, *supra* note 12.

82. *Id.*

83. *See* Norkunas v. RNA LLC, No. 3-11-0281, 2013 U.S. Dist. LEXIS 45456, *3 (M.D. Tenn. Mar. 29, 2013) (noting that the plaintiff and her counsel

litigants as “vexatious.”⁸⁴ A vexatious suit is defined as a “lawsuit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued.”⁸⁵ Five hundred and seventy-nine cases were filed by only five organizations (and a few of their associated members) in Florida’s Middle District.⁸⁶ Numerous anecdotal cases support the assertion that ADA litigation tends to be brought by repeat attorneys or law firms.⁸⁷ Typically, attorneys work with one or

had filed 43 ADA cases throughout the country); *see also* Rodriguez v. Investco, LLC, 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004) (noting the plaintiff’s 200 lawsuits over “the past few years” along with the same counsel); *see also* Access 4 All, Inc. v. HI 57 Hotel, LLC, No. 04 Civ. 6620 (GBD)(FM), 2006 U.S. Dist. LEXIS 2695, at *8 (S.D.N.Y. 2006) (noting that plaintiff in the present case had commenced more than seventy-five actions alleging ADA violations in the Southern and Eastern Districts of New York); *see also* Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 926 (C.D. Cal. 2005) (stating that the plaintiff had filed more than 400 federal lawsuits alleging violations of the ADA); *see also* John D. Meer & Myra B. Villamor, *Denying Serial ADA Plaintiffs Access to Your Pocketbooks: The Case for Fighting: A Success Story*, LEXOLOGY (May 29, 2012), <https://www.lexology.com/library/detail.aspx?g=b930b3a3-b5bd-4582-a59d-c3a588b06c87> (last visited Mar. 25, 2020) (noting that the plaintiff in *Martinez v. Columbia Sportswear USA Corp.*, 553 F. App’x 760 (9th Cir. 2013) had filed over 160 similar lawsuits with the same attorney)[<https://perma.cc/SJV3-KWUM>]; *see also* Olson, *supra* note 11 (noting that in Pennsylvania between late May and the Winter of 2004, one firm filed more than one hundred ADA suits on behalf of two complainants).

84. *See* Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 925 (C.D. Cal. 2005) (declaring the plaintiff a “vexatious litigant”).

85. *Vexatious Suit*, BLACK’S LAW DICTIONARY (11th ed. 2019).

86. *See* Rodriguez v. Investco, LLC, 305 F. Supp. 2d 1278, 1281 (M.D. Fla. 2004) (citing the five organizations as Access 4 All, Inc.; Access Now, Inc.; Association for Disabled Americans, Inc.; Access for America, Inc.; and Access for Disabled, Inc.).

87. *See* Disabled Patriots of Am., Inc. v. Taylor Inn Enters., Inc., 424 F. Supp. 2d 962, 967 (E.D. Mich. 2006) (noting that the law firm of Fuller, Fuller & Associates in the present case had pursued numerous ADA actions: at least forty-one in the Eastern District of Michigan and dozens of actions against various hotels throughout New York, New Jersey, Massachusetts, and D.C.); Access 4 All, Inc. v. HI 57 Hotel, LLC, No. 04 Civ. 6620 (GBD)(FM), 2006 U.S. Dist. LEXIS 2695, at *8 (S.D.N.Y. 2006) (stating that Fuller, Fuller & Associates had represented plaintiffs in at least ninety-two ADA actions in the Southern and Eastern Districts of New York between 2004 and 2006); Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 926 (C.D. Cal. 2005) (stating

two plaintiffs to bring numerous ADA suits.⁸⁸ “Just five attorneys and a handful of plaintiffs brought almost two thirds of the nearly 700 disabled-access suits in Florida’s southern district in 2013.”⁸⁹

These statistics give rise to the term “career plaintiffs,” alleging that many litigants make their living from suing businesses under the ADA and its state counterparts.⁹⁰ One attorney indicated at a hearing that her client traveled the southeastern United States looking for establishments that fail to satisfy ADA requirements.⁹¹ The client then contacted Accessibility Disability Consultants and obtained counsel to file suit.⁹² In that case, the court was left with the “inescapable conclusion” that plaintiff and his counsel were “engaging in legalized extortion.”⁹³ The court also noted, “[I]t seems unlikely that Congress intended the ADA to be used as a hammer with which to extort fees and costs from non-compliant establishments.”⁹⁴

The widespread practice of filing large numbers of suits under ADA’s Title III and then joining state law claims for damages has drawn the notice and commentary of a number of courts.⁹⁵ Courts that chastise repeat plaintiffs point to their

that the counsel in the present case had filed at least 223 ADA violation lawsuits).

88. See *Disabled Patriots of Am., Inc.*, 424 F. Supp. 2d at 967 (asserting that the law firm in the present case was counsel of record in at least forty-one ADA cases filed in the Eastern District of Michigan and of those, at least thirty were brought by the same plaintiffs).

89. Shipley & Maines, *supra* note 12.

90. See Glass, *supra* note 13 (interviewing one plaintiff who “has no other job” than filing ADA suits).

91. See *Hoewischer v. Mardini*, No. 3:12-cv-3-J-20JRK, 2012 U.S. Dist. LEXIS 186558, at *10–11 (M.D. Fla. Sept. 28, 2012) (“At the hearing, Counsel indicated that her client, Norman Hoewischer, travels the southeastern United States looking for establishments which fail to satisfy ADA requirements.”).

92. *Id.* at *10–11.

93. *Id.* at *10.

94. See *id.* at *11 (expressing concern that the plaintiff’s main motivation for filing these lawsuits was to line his pockets and those of his attorney).

95. See, e.g., *Harris v. Stonecrest Care Auto Ctr.*, 472 F. Supp. 2d 1208, 1214–15 (S.D. Cal. 2007) (stating that the plaintiff in the case had “filed many

alleged motives of obtaining monetary damages or attorney's fees instead of increasing accessibility.⁹⁶ Some courts specifically state their doubt in plaintiffs' pure intentions while others merely allude to bad motives.⁹⁷

E. Who Benefits from Repeat Filing?

"Drive-by" lawsuits brought solely to recover attorney's fees or statutory damages undoubtedly harm business and business owners—but who reaps the benefits?⁹⁸ Plaintiffs filing in states that grant monetary awards certainly benefit from collecting damages. Even when states do not allow for monetary awards, observers express speculation of plaintiff-attorney "schemes," alleging that the relationship may be financially beneficial for the plaintiff once the attorney has recovered for fees and costs.⁹⁹

Title III lawsuits—indeed, more than he can remember," and comparing this to the pattern of vexatious plaintiffs in similar lawsuits); *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005) (asserting that the ADA has been distorted to generate attorney's fees and given rise to "a cottage industry"); *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004) (including a section in the opinion entitled "A Cottage Industry is Born," asserting that the ADA has become a scheme to recover attorney's fees instead of a way to promote accessibility).

96. See, e.g., *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) ("Serial plaintiffs, like Molski, serve as 'professional pawns in an ongoing scheme to bilk attorney's fees.' It is a 'type of shotgun litigation [that] undermines both the spirit and purpose of the ADA.'").

97. Compare *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 925 (C.D. Cal. 2005) (declaring the plaintiff a "vexatious litigant" and requiring him to obtain leave of court before filing any further ADA claims in the district); with *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004) (detailing plaintiff's financial situation of being unemployed and supporting his family on social security and food stamps while also frequently traveling throughout Florida, which has resulted in at least fifty-four accessibility lawsuits, and questioning routes plaintiff took in his travels).

98. See Amy Kjose Anderson, *Drive-By Lawsuits and the Abuse of the Americans with Disabilities Act*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 24, 2017), <https://www.alec.org/article/drive-by-lawsuits-and-the-abuse-of-the-americans-with-disabilities-act/> (last visited Mar. 25, 2020) (describing how "drive-by" lawsuits harm businesses and business owners) [<https://perma.cc/2ZQD-QW3V>].

99. See Olson, *supra* note 11 (referencing the common "cozy relationships" between complainants and their counsel engaged in serial ADA

Although unscrupulous plaintiffs may benefit financially, litigation should ultimately bring about accessibility, benefitting all disabled Americans.¹⁰⁰ Accessibility non-profits that are engaged in repeat litigation state that lawsuits are the only way achieve this goal.¹⁰¹ Bob Cohen, head of Access for the Disabled, a non-profit in Florida, expressed his frustration:

The properties ignore the law. They are aware of it, but they do nothing until a lawsuit is brought up. We tried for five years nothing but letters and personal phone contacts with restaurants and hotels, and we get no place We got extremely frustrated with the lack of cooperation.¹⁰²

On the other hand, some established activists and groups disagree.¹⁰³ Individual activists and disability organizations have expressed their disdain for the “ADA shakedown racket.”¹⁰⁴ One disability advocate noted that “you catch more flies with honey than vinegar” when discussing his advocacy philosophy.¹⁰⁵ He focuses on positive advocacy methods like educating communities and consulting with business owners on accessibility.¹⁰⁶ Activists have formed organizations and consulting businesses to encourage private facility owners to engage in voluntary compliance, convincing businesses that

litigation and noting that several prominent ADA attorneys bring numerous suits on behalf of disabled family members).

100. See Anderson, *supra* note 98 (“Lawsuits aiming to bring about compliance with an important equal rights law like the ADA are important in advancing the cause, but some of the serial litigators are doing more to rake in damages than increase accessibility.”).

101. See Shipley & Maines, *supra* note 12 (quoting disability advocates explaining that letters and personal phone calls did not have any effect of accessibility enforcement).

102. *Id.*

103. See *infra* notes 104–108 (explaining the views expressed by these activist groups).

104. See Olson, *supra* note 11 (quoting one veteran activist saying he was appalled by the “grind-’em-out restaurant lawsuits”).

105. Matthew Shapiro, *6 Wheels Consulting Disability Podcast—Episode 18* (Nov. 13, 2018), <https://www.6wheelsconsulting.com/> (last visited Apr. 24, 2020) [<https://perma.cc/36E9-XUUU>].

106. See *id.* (“I usually try to go the education route.”).

being accessible to *all* consumers is beneficial for their business model and the entire community.¹⁰⁷ “Nearly all the established activist groups say they try to work with business owners to fix violations before running off to court. Many are emphatic that they view litigation as a last resort.”¹⁰⁸

1. Repeat Plaintiffs’ Response to Criticism

Repeat filers continue to emphasize that lawsuits are necessary to force reluctant business owners to meet accommodation standards of the ADA.¹⁰⁹ Thomas B. Bacon, who has represented plaintiffs in more than 300 disabled-access cases, notes that the only people who enforce the ADA are the few repeat plaintiffs and their attorneys.¹¹⁰ This is true. Congress intended for the ADA to be enforced through private citizens initiating litigation.¹¹¹

Although the U.S. Government occasionally files suit against noncompliant business owners, the ADA was designed to empower private citizens to bring claims.¹¹² Congress authorized courts to award attorney’s fees in order to incentivize private attorneys to represent disabled individuals in Title III lawsuits.¹¹³ Private suits brought by members of the public

107. See *id.* (discussing Matthew Shapiro’s business, “6 Wheels Consulting, LLC,” and “Access Mob” in Pittsburgh, PA).

108. Olson, *supra* note 11; see also Shapiro, *supra* note 105 (describing activists’ use of positive reinforcement by explaining to businesses that promoting accessibility enhances their clientele).

109. See Lean, *supra* note 29 (making the comparison of lawsuits for disability discrimination to racial discrimination and noting that the public would not object to filings of the former).

110. See Shipley & Maines, *supra* note 12. (“The only people who enforce the ADA are these few plaintiffs and their attorneys,” said Thomas B. Bacon, a Cooper City attorney who has represented plaintiffs in more than 300 disabled-access cases.”).

111. See *supra* notes 52–56 and accompanying text (discussing the congressional intent to put enforcement in the hands of private citizens).

112. See *supra* notes 52–56 and accompanying text (discussing the limited remedies under the ADA and the need for private citizens to bring suits in order to enforce ADA compliance).

113. See 28 C.F.R. § 36.505 (2015) (allowing the prevailing party to recover a reasonable attorney’s fee, including litigation expenses and costs).

relieve the burden on the Department of Justice from inspecting every business that could potentially be committing an ADA violation.¹¹⁴ Private suits are the primary tool used to enforce the ADA due to the minimal role played by the Attorney General¹¹⁵

Alternatively, private litigation may no longer be an effective method of enforcement.¹¹⁶ Many cases settle before making it to court because most businesses opt to mediate “when faced with costly litigation and a potentially drastic judgment against them.”¹¹⁷ Abusive plaintiffs use the threat of lawsuits and money damages as an effective inducement to settle quickly.¹¹⁸ Owners often see the choice to settle as a

114. See Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J.L. & PUB. POL’Y 71, 77–78 (2016) (“Recognizing the inability of the U.S. government to adequately address the myriad of accessibility violations that may emerge throughout the country, Congress also encouraged private enforcement under Title III.”); see also Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 9 (2006) (noting the Department of Justice has devoted a small amount of lawyers to disability rights enforcement and those lawyers are responsible for enforcing the ADA against state and local governments as well as private entities).

115. See Adam A. Milani, *Wheelchair Users Who Lack “Standing”: Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 108–13 (2004) (noting that the DOJ’s Disability Rights Section only has “a small cadre of lawyers to bring actions and enforce” multiple sections of the ADA and initiated fewer cases in 2002 than 2001).

116. See *infra* notes 117–127 (explaining why private litigation may no longer be an effective method of enforcement).

117. See *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005) (vacated on grounds of denial of attorney’s fees); see also Denise Johnson, *Why Claims Under the Americans with Disabilities Act are Rising*, INS. J. (Oct. 7, 2016), <https://www.insurancejournal.com/news/national/2016/10/07/428774.htm> (last visited Mar. 25, 2020) (explaining how claims are rising because, in part, lawyers are finding it a lucrative practice) [<https://perma.cc/XA9T-THFH>].

118. See *Wilson v. Kayo Oil Co.*, 535 F. Supp. 2d 1063, 1071 (S.D. Cal. 2007) (reinforcing that the ADA could be used for the illegitimate purpose of “preying on businesses across the country in hopes of extorting quick settlements”).

business decision.¹¹⁹ Mediation is highly incentivized since it may cost three times more to file a motion to dismiss than to settle the suit out of court.¹²⁰ Technical violations of the ADA are easy to prove and plaintiffs usually win.¹²¹ An unsuccessful defense could render a business owner liable for paying two sets of attorneys in addition to the damage costs imposed by a court.¹²² In Florida, some sources place the average settlements at \$16,000, “while the cost of fighting the case can easily land in the hundreds of thousands of dollars.”¹²³ One California bar owner decided to fight an ADA lawsuit and had to declare bankruptcy after he was ordered to pay \$145,000 to compensate his opponent’s lawyers.¹²⁴ Although anecdotal evidence points to

119. See Johnson, *supra* note 117 (explaining that mediation is much cheaper than going to court).

120. See, e.g., O’Campo v. Ghoman, No. 2:08-cv-1624, 2017 U.S. Dist. LEXIS 120027, at *27 (E.D. Cal. July 28, 2017) (awarding plaintiff \$12,000 in statutory damages and awarding plaintiffs’ attorneys \$86,000 in fees and costs, all at cost to the defendant business owner); Moore v. Millennium Acquisitions, LLC, No. 1:14-cv-01401-DAD-SAB, 2017 U.S. Dist. LEXIS 40722, *29 (E.D. Cal. Mar. 21, 2017) (awarding the plaintiff \$65,928.03 in attorney’s fees and litigation expenses); Fortson v. Marriott Int’l, Inc., No. CV 11-01454 LB, 2013 U.S. Dist. LEXIS 62496, *31 (N.D. Cal. May 1, 2013) (awarding plaintiff \$155,944.27 in attorney’s fees and costs); see also Johnson, *supra* note 117 (explaining how lawyers are finding ADA suits lucrative).

121. See George King, *ADA Violations: What to Do If You Are Sued*, LANG & KLAIN (Feb. 17, 2017), <https://www.lang-klain.com/blog/ada-lawsuits> (last visited on Apr. 8, 2020) (“Typically, the property owner is sued for technical violations of ADA standards for handicapped parking signs. These signs were often compliant when installed, but are now non-compliant because the standards were changed in 2010.”) [<https://perma.cc/DS9T-ULMP>]; Mark Pulliam, *The ADA Litigation Monster*, CITY J. (Spring 2017), <https://www.city-journal.org/html/ada-litigation-monster-15128.html> (last visited Apr. 8, 2020) (“[P]laintiffs can recover their ‘costs’ and ‘reasonable attorneys’ fees’ if they prevail (and merely proving technical noncompliance is sufficient to win).”) [<https://perma.cc/X9QU-9Z5D>].

122. See Hull, *supra* note 114 (discussing the disincentive for attorneys to settle for corrective action instead of money and the incentive for businesses to settle rather than risk litigation).

123. Evan Gibbs, *Stopping Drive-By Lawsuits*, ABOVE THE L. (Oct. 2, 2017), <https://abovethelaw.com/2017/10/stopping-drive-by-lawsuits> (last visited on Mar. 25, 2020) [<https://perma.cc/EJ3E-V2KR>].

124. See Olson, *supra* note 11 (“River City Brewing, a popular downtown Sacramento bar, decided to fight an ADA lawsuit and eventually had to

an average settlement of \$45,000 in California, this high average pales in comparison to cases where defendant business owners have fought the claims in court.¹²⁵ Plaintiffs in California lawsuits have been awarded upwards of \$155,000 in attorney's fees and costs, which does not account for the attorney's fees and litigation costs incurred by the business owner's counsel.¹²⁶ As a result, cases end in hasty payouts that fail to correct the violations they are supposed to address.¹²⁷

Plaintiffs who file suit with the goal of settling are not furthering the ADA's mission of compliance.¹²⁸ There is little, if any, enforcement of compliance once a settlement has been reached.¹²⁹ Even though filing a lawsuit and ultimately reaching a settlement may draw attention to the noncompliance, it does little to remedy the barrier for future

declare bankruptcy, after a court ordered it to pay \$145,000 to compensate the disabled complainant's lawyers.”).

125. See Hull, *supra* note 114 (“One California lawyer who specializes in disability-access suits said the average settlement for ADA lawsuits in California was \$45,000 in 2013.”).

126. See *Fortson v. Marriott Int'l, Inc.*, No. CV 11-01454 LB, 2013 U.S. Dist. LEXIS 62496, at *31 (N.D. Cal. May 1, 2013) (awarding plaintiff \$155,944.27 in attorney's fees and costs).

127. See Shipley & Maines, *supra* note 12 (explaining the negative effects of the rise of ADA litigation); see also *O'Campo v. Ghoman*, No. 2:08-cv-1624, 2017 U.S. Dist. LEXIS 120027, at *23 (E.D. Cal. July 28, 2017) (“Much of the difference between this action and routine ADA cases that proceed to a motion for default judgment can be explained by the fact that the defendants in this action initially appeared and defended, forcing plaintiff's counsel to expend time conducting discovery, conferring with defense counsel, etc.”).

128. See Leslie Lee, *Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL'Y & L 319, 343 (showing why settling does not further the goal of the ADA).

129. See *id.* (“When an ADA lawsuit ends in settlement, monetary awards are paid directly to plaintiffs and their attorneys, and not expended on removing barriers to access.”); see also *ADA Notification Act: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 106 Cong. 49 (2000) (quoting Representative Charles Canady as stating, “The lure of large attorney's fees is so great that attorneys may even settle cases for attractive sums for themselves by agreeing to terms by which a property would not even be fully accessible under the requirements of the ADA.”).

disabled customers.¹³⁰ Currently, “there is no effective means to [e]nsure that these private actions actually result in changes that provide increased access to individuals with disabilities.”¹³¹ One code enforcement officer in Florida stated that claimants do not care whether the violation is fixed once a business pays a settlement and the lawsuit disappears.¹³² Courts have alleged that “a plaintiff files suit, extracts a cash settlement, and loses all interest in the defendant’s future compliance with the ADA.”¹³³ One restaurant owner in Florida stated that he agreed to pay more than \$12,000 in plaintiff’s attorney’s fees in settlement, but did not have enough money to fix the violations of his establishment after the payout.¹³⁴ He stated that so far, no one has come back to check.¹³⁵

Business owners assert they would voluntarily spend the money to come into compliance if they were aware of the violations, but advocates disagree.¹³⁶ Leaders in the disability law community of Florida assert that letter-writing campaigns

130. See Bagenstos, *supra* note 114, at 33 (arguing that the mere filing of a settlement would alert other potential plaintiffs, giving the business “every incentive to make its premises accessible”).

131. Hull, *supra* note 114.

132. See Shipley & Maines, *supra* note 12 (quoting a Delray Beach code enforcement officer stating that businesses “pay between \$5,000 and \$12,000 and it goes away People are taking complete advantage. It’s a moneymaker. It has nothing to do with compliance.”).

133. See *Harris v. Stonecrest Care Auto Ctr.*, 472 F. Supp. 2d 1208, 1215 (S.D. Cal. 2007) (noting that because the plaintiff is focused on a short-term reward, the ADA lawsuit provides little, if any, long-term assistance to disabled persons generally); see also *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 866 (C.D. Cal. 2004) (questioning the plaintiff’s good faith and intention of actually litigating the suit on the merits and asserting that “Molski’s m.o. is clear: sue, settle, and move on to the next suit.”).

134. See Shipley & Maines, *supra* note 12 (“One Palm Beach restaurant owner confided to the Sun Sentinel that he agreed in a settlement to pay more than \$12,000 in plaintiff’s attorney’s fees, but didn’t have enough cash after forking over those costs to fix all of the violations in his establishment.”).

135. See *id.* (“So far, he said, nobody’s come back to check [if he fixed the violations.”]).

136. See *supra* Part II.E (discussing advocates’ assertions that businesses do not come into compliance without lawsuits).

and personal phone calls do not work.¹³⁷ Established activist groups say they try to work with business owners to fix violations before filing suit, but businesses only come into compliance when faced with litigation.¹³⁸ Advocates point out that businesses have had since 1990 to learn the standards set forth in the ADA.¹³⁹

It has therefore become clear that while some litigants may be fighting for compliance among business owners, this may not be the case for all.¹⁴⁰ Courts discuss the tactics of insincere plaintiffs whose goals are to win monetary damages instead of compliance.¹⁴¹ Some repeat plaintiffs are well known in their respected districts as serial filers who “target small businesses that default or settle.”¹⁴²

137. See *supra* Part II.E (illustrating attempts and varied methodology to encourage businesses to comply with the ADA).

138. Olson, *supra* note 11 (suggesting litigation is the only method to drive businesses toward compliance).

139. See *id.* (noting advocates’ opposition to proposed notification requirements since it would provide a safe-harbor period, which businesses had when the ADA was enacted).

140. See *Phillips v. 180 Bklyn Livingston, LLC*, No. 17 Civ. 325 (BMC), 2017 U.S. Dist. LEXIS 75154, at *8 (E.D.N.Y. May 16, 2017) (“This is not a case to vindicate a disabled person’s rights; it is a case brought to extract a money settlement from a restaurant in Brooklyn, with plaintiff exploiting the ADA’s jurisdictional hook to achieve that goal.”).

141. See *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004) (noting that the same plaintiffs filed “hundreds of lawsuits against establishments they purportedly visit regularly” and this type of “shotgun litigation undermines both the spirit and the purpose of the ADA.”); see also *Young v. Mahasager*, No. 03-6443 (MJD/JGL), 2005 U.S. Dist. LEXIS 48896, at *9–10 (S.D. Ohio Aug. 4, 2005) (recognizing the plaintiff’s disingenuous motive evidenced by the plaintiff’s thirteen pending suits against hotels in the same area and expressing skepticism that plaintiff was genuine in his desire to return to all thirteen hotels).

142. See *Cankat v. 41st Ave. Rest. Corp.*, No. 15 CV 4963 (SJ) (MDG), 2016 U.S. Dist. LEXIS 171406, at *1–2 (E.D.N.Y. Dec. 8, 2016) (referencing the forty-three ADA cases in the same district with nearly identical claims and that future filings by serial filers should be strictly scrutinized); *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 926 (C.D. Cal. 2005) (noting that while plaintiff had filed hundreds of identical suits, not one had been litigated on the merits).

It is difficult to combat abusive litigation when some plaintiffs are working toward a more accessible United States while others use the law for personal gain. One serial litigant who filed at least 500 ADA lawsuits in California considered expanding his operations to Las Vegas.¹⁴³ He ultimately decided against expanding, since Nevada “does not have damage provisions’ for access violations.”¹⁴⁴ In the past, this plaintiff has informed the businesses he has sued “that they can settle out of court for \$10,700 or so,” compared to the hundreds of thousands they might incur in a lengthy court battle.¹⁴⁵

Under the ADA, plaintiffs’ damages are limited to injunctive relief and attorney’s fees.¹⁴⁶ Therefore, notifying businesses of their non-compliance and achieving voluntary compliance may be a more rational solution for the good-faith plaintiff.¹⁴⁷ Courts argue that rational plaintiffs who are genuinely working for accessibility would inform the business of their violations instead of immediately filing suit.¹⁴⁸ Courts have noted, however, that vexatious litigation is additionally beneficial to attorneys specializing in ADA litigation.¹⁴⁹

143. See Olson, *supra* note 11 (describing a man who “has filed at least 500 lawsuits against a wide variety of firms—from Sears, Blockbuster Video, and McDonald’s to small mom-and-pop proprietorships”).

144. *Id.*

145. *Id.*

146. See *supra* notes 38–47 and accompanying discussion (outlining the remedies for private plaintiffs as injunctive relief remedying the violation and attorney’s fees and costs).

147. See *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1281–82 (M.D. Fla. 2004) (arguing that plaintiffs irrationally rush to file suit because pre-suit settlements do not vest plaintiffs’ counsel with an entitlement to attorney’s fees and “the current ADA lawsuit binge is, therefore, essentially driven by economics—that is, the economics of attorney’s fees”).

148. See *id.* at 1281 (noting that “conciliation and voluntary compliance” would be “a more rational solution” than “rush[ing] to file suit”).

149. See *id.* at 1281–82 (noting that “pre-suit settlements do not vest plaintiffs’ counsel with an entitlement to attorney’s fees”).

2. Attorneys Benefitting from Vexatious Litigation

Countless courts have chastised abusive litigants' counsel for turning the ADA into "a fee-generating mill for [] lawyers to exploit the statutory scheme to see how many billable hours they [can] cram into a case."¹⁵⁰ "Courts throughout the country have raised concerns about this type of serial ADA litigation to take advantage of the statute's attorney's fees provision."¹⁵¹ When considering why a plaintiff would not attempt to engage the business owner in voluntary compliance, one court stated:

Why would an individual like Plaintiff be in such a rush to file suit when only injunctive relief is available? Wouldn't conciliation and voluntary compliance be a 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 forbears and attempts pre-litigation resolution, someone else may come along and sue first. The current ADA lawsuit binge is, therefore, essentially driven by economics—that is, the economics of attorney's fees.¹⁵²

Under the Supreme Court's interpretation of fee-shifting statutes, practitioners who rely on statutory attorney's fees will typically earn lower hourly rates than their counterparts with fee-paying clients.¹⁵³ Statutory attorney's fees are calculated by the number of hours plaintiff's counsel reasonably expended, multiplied by a "reasonable hourly rate" for counsel's services.¹⁵⁴ Some attorneys may take advantage of the fees provision by

150. See *Brother v. Miami Hotel Invs., Ltd.*, 341 F. Supp. 2d 1230, 1233 (S.D. Fla. 2004) (stating that these lawyers do a disservice to the disabled and the lawyers who carry out their duties under the ADA with professionalism).

151. See *Shariff v. Beach 90th St. Realty Corp.*, No. 11 CV 2551 (ENV)(LB), 2013 U.S. Dist. LEXIS 180185, at *17 (E.D.N.Y. Nov. 8, 2013); see also *Phillips v. 180 Bklyn Livingston, LLC*, No. 17 Civ. 325 (BMC), 2017 U.S. Dist. LEXIS 75154, at *8 ("Courts across the country have long recognized the 'cottage industry' of ADA lawyers who bring a large number of ADA suits to extract attorney's fees, which is authorized under the ADA.").

152. *Rodriguez*, 305 F. Supp. 2d at 1281–82.

153. See *Astrue v. Ratliff*, 560 U.S. 586, 602 (2010) (explaining the lodestar method of calculating fees).

154. See *id.* (explaining the lodestar method of calculating fees).

attempting to recover for outlandish fees.¹⁵⁵ Courts have frequently pointed to attorneys' use of identical complaints and attempting to recover fees and costs for redundant work.¹⁵⁶

III. Attempted Solutions

Opponents of abusive ADA litigation have attempted in various ways to eradicate abuse. Judges have exercised their discretion to curb abusive litigants, and both state and federal legislatures have attempted to pass legislation targeted at limiting abuse.¹⁵⁷ Although there is no empirical data for how successful these attempts have been, this Note analyzes these efforts in order to understand what may be the most effective solutions to implement in the future.

A. Judicial Discretion

1. Limiting Attorney's Fees

Judges have the narrow discretion to reduce attorney's fees in cases of vexatious litigation.¹⁵⁸ Courts have stated that when

155. See, e.g., *Shariff*, 2013 U.S. Dist. LEXIS 180185, at *16–18 (discussing the “unwarranted” attorney’s fees sought by plaintiff).

156. See *id.* (noting the growing concern for the “cottage industry” of using ADA litigation to recover attorney’s fees and the plaintiff’s similar seventeen cases in the same district alone using the same “boilerplate language” for all claims, therefore reducing the attorney’s award of fees); *Access 4 All, Inc. v. Grandview Hotel Ltd. P’ship*, No. CV 04-4368 (TCP) (MLO), 2006 U.S. Dist. LEXIS 15603, at *10 (E.D.N.Y. Mar. 6, 2006) (stating that the plaintiffs and their attorneys had pursued dozens of Title III actions against hotels in the area and because the cases involved “identical legal issues and similar factual issues,” the duplicitous nature of the litigation warranted a reduction in the law firm’s award).

157. See, e.g., *Deck v. Am. Haw. Cruises*, 121 F. Supp. 2d 1292, 1298 (D. Haw. 2000) (outlining in great detail the numerous district court cases in which ADA claimants failed to show immediate threat of injury); ARIZ. REV. STAT. § 41-1492.08(E) (2017) (stating that, under Arizona’s version of the ADA, a plaintiff cannot file suit until she has notified the business of a violation then given the business thirty days to remedy the issue).

158. See cases cited *supra* note 156 (discussing cases in which a judge decided to reduce attorney’s fees for plaintiffs who had filed many similar suits).

attorneys file virtually identical “cookie-cutter” Title III complaints, they should be able to litigate similar cases in an efficient and formulaic manner.¹⁵⁹ In such cases, attorneys cannot request unnecessary expenses, and courts have limited their recovery accordingly.¹⁶⁰

Courts assign attorney’s fees by calculating (1) the reasonable number of hours expended, and (2) the reasonable hourly rate for each participating attorney; however, courts may also consider extraneous factors to determine whether to adjust this figure accordingly.¹⁶¹ Repeat litigants often file identical “boilerplate complaints” for their suits, which a court may decide warrants a downward adjustment.¹⁶² A court may also adjust attorney’s fees downward when “the majority of the law in each motion is identical, thus rendering much of the legal research largely unnecessary.”¹⁶³ Several courts have taken this

159. See *Brother v. Miami Hotels Invs., Ltd.*, 341 F. Supp. 2d 1230, 1236–38 (S.D. Fla. 2004) (noting that many of the plaintiff’s attorney’s hours were “redundant or of such an assembly-line nature based on the similarity of the tasks . . . to the many other cases filed by counsel” and could have easily been “spit out by a word processing program”).

160. See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (giving courts the power to adjust attorney’s fees “upward or downward” accordingly); see also *Brother*, 341 F. Supp. 2d at 1236–38 (reducing the plaintiff’s attorney’s hours reasonably expended from 76.1 to 33, 51.3 to 25, and 20 to 25 to 12 due to the duplicitous nature of the “boilerplate” complaints identical to previous ones filed by the attorneys); *Kennedy v. Spiegel*, No. 15-81621-CV-Rosenberg/Hopkins, 2016 U.S. Dist. LEXIS 163155, at *7–9 (S.D. Fla. Nov. 23, 2016) (noting that plaintiff’s attorney had represented plaintiff in at least seventy-five other ADA cases in the same district and reducing the attorney’s hourly rate from the requested \$420 to \$300 and his hours expended from 37.3 to 27.3 due to the duplicitous nature of the suit).

161. See *Johnson v. Ga. Highway Express, Inc.* 488 F.2d 714, 717–19 (5th Cir. 1974) (stating twelve factors to be considered in whether to adjust the lodestar calculation upward or downward); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting the twelve *Johnson* factors for the Ninth Circuit).

162. See *Gilmore v. Elmwood S., LLC*, No. 6:11-md-2299, 2015 U.S. Dist. LEXIS 33584, at *12–15 (E.D. La. Mar. 18, 2015) (noting that the lawyers would essentially “cut-and-paste” complaints, diminishing the lawyers’ claim of time and labor required and need for legal research).

163. *Id.*

approach, whether their intent is to discourage repeat litigants or simply reduce attorney's fees to a reasonable amount.¹⁶⁴

2. Imposing More Strenuous Standing Requirements on Plaintiffs

Additionally, courts may dismiss a complaint for a plaintiff's lack of standing.¹⁶⁵ To satisfy Article III's standing requirements, a plaintiff must satisfy three factors.¹⁶⁶ First, a plaintiff must show she has suffered an injury in fact that is

164. See *Langer v. San Pedro St. Props., LLC*, No. 2:17-cv-08780-ODW(AFM), 2018 U.S. Dist. LEXIS 191511, at *13 (C.D. Cal. Nov. 8, 2018) (reducing \$6,035.50 in fees to \$600 after considering that the attorney had filed over 600 cases in the central district of California with nearly identical complaints and subsequent filings); *Love v. Gutierrez*, No. CV 18-0872 DSF KS, 2018 U.S. Dist. LEXIS 186716, at *10 (C.D. Cal. Oct. 29, 2018) (reducing the attorneys' time spent by fifty percent after considering "his repeated representation of Plaintiff in countless nearly identical ADA cases before this Court"); *Vogel v. Dolanotto, LLC*, No. 2:16-CV-02488-ODW-KSx, 2018 U.S. Dist. LEXIS 58442, at *12-17 (C.D. Cal. Apr. 5, 2018) (reducing attorneys' requested fees from \$32,211.25 to \$6,425.88 because plaintiff and his attorney had filed at least 622 ADA cases in the central district of California and the attorneys had litigated ADA claims on behalf of Martin Vogel "in hundreds, if not thousands, of cases"); *Kennedy v. Satya Grp., LLC*, No. 2:17-CV-14393-ROSENBERG/MAYNARD, 2018 U.S. Dist. LEXIS 1667, at *8-9 (S.D. Fla. Jan. 3, 2018) (reducing attorney's fees because plaintiff's counsel had filed multiple identical complaints on the same plaintiff's behalf); *Houston v. South Bay Investors #101, LLC*, No. 13-80193-CV-HURLEY/HOPKINS, 2013 U.S. Dist. LEXIS 104281, at *4-5 (S.D. Fla. July 25, 2013) (reducing attorney's fees by thirty-five percent due to the identical complaints submitted by counsel for the same plaintiff); *Access for the Disabled, Inc. v. Mo. Mart, Inc.*, No. 8:05-cv-392-T-23MSS, 2006 U.S. Dist. LEXIS 101125, at *7 (M.D. Fla. Nov. 3, 2006) (reducing attorney's fees and considering the eight other identical cases filed by plaintiff on the same day, also noting that plaintiffs filed a complaint nearly identical, including typos, in another case); *Disabled Patriots of Am., Inc. v. Taylor Inn Enters., Inc.*, 424 F. Supp. 2d 962, 967-68 (E.D. Mich. 2006) (noting that the law firm was counsel of record in at least forty-one ADA cases in the same district and of those, thirty were brought by the same plaintiffs and with boilerplate complaints, resulting in a reduced fee).

165. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that plaintiffs lacked standing and thus the Court of Appeals had erred in failing to grant the defendant's motion for summary judgment).

166. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing the factors detailed in *Lujan*).

concrete and particularized and actual or imminent.¹⁶⁷ Second, the injury must be traceable to the challenged action of the defendant.¹⁶⁸ Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁶⁹

Many ADA claims have been dismissed for a lack of standing when the plaintiff has failed to show a real or immediate threat of injury.¹⁷⁰ For example, if a plaintiff states that she may “someday” return to the noncompliant establishment, she has only alleged a *speculative* injury (as opposed to a “real and immediate” injury).¹⁷¹ Courts have considered a multitude of factors when determining the validity of a plaintiff’s injury including (1) plaintiff’s personal history of use of the facility, (2) whether the plaintiff can demonstrate that she would need to utilize the facility in the future, (3) the distance between the plaintiff’s home and the defendant facility, (4) if the alleged barriers are related to plaintiff’s respective disabilities, and (5) whether the plaintiff actually experienced a barrier or merely observed one from afar.¹⁷² A plaintiff’s

167. *Id.* at 180.

168. *Id.*

169. *Id.* at 181.

170. *See Deck v. Am. Haw. Cruises*, 121 F. Supp. 2d 1292, 1298 (D. Haw. 2000) (outlining in great detail the numerous district court cases which have denied standing for claims for lack of immediate threat of injury).

171. *See id.* at 1299 (determining that standing did not exist when plaintiff stated that she would “look into” another trip on defendant cruise line).

172. *See Access Now, Inc. v. S. Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1365 (S.D. Fla. 2001) (holding that a personal history of use of a facility and continued residence in the area supported plaintiff’s contention that he would likely patronize the facility in the future); *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1079–80 (D. Haw. 2000) (considering the reasonable distance between the franchise and plaintiff’s residence to establish standing); *but see Brother v. CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1368–69 (S.D. Fla. 2004) (determining that the plaintiff did not have standing because he merely observed the barriers at a hotel and did not stay the night therefore he did not suffer an “injury in fact”); *Steger v. Franco*, 228 F.3d 889, 893 (8th Cir. 2000) (holding that plaintiffs cannot seek relief for all ADA violations, including those unrelated to his disability); *Hoepfl v. Barlow*, 906 F. Supp. 317, 320 (E.D. Va. 1995) (determining that standing did not exist when the plaintiff moved to a different state from the discriminating establishment); *Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329, 1333–34 (N.D. Cal. 1994) (holding that

litigious history may also be weighed to determine standing.¹⁷³ This discretion is more powerful in cases when plaintiffs have filed numerous identical suits.¹⁷⁴

This attempt to deter vexatious claims, however, may not be a long-term fix. One court granted the defendant's motion for summary judgment for a lack of standing, stating that "in view of his extensive litigation history, [Plaintiff's] professed intent to return to the property is insufficient."¹⁷⁵ The court then highlighted that "if history is any guide, then [Counsel] and his clients will adjust to this ruling so that their future filings satisfy Article III's standing requirements."¹⁷⁶

One court used plaintiffs' lack of standing to dismiss approximately 1,700 lawsuits filed by a disability-rights organization, Advocates for Individuals with Disabilities.¹⁷⁷ Judge Talamante granted the Attorney General of Arizona's motion to dismiss the organization's accessibility cases in 2017, which was followed by a settlement between AID and the Attorney General permanently barring the group "from filing frivolous disability lawsuits against Arizona businesses."¹⁷⁸ The Attorney General's motion to dismiss alleged a lack of standing for the following reasons: (1) plaintiffs failed to allege that they

standing did not exist when the plaintiff could not show that she would need to use the facility again).

173. See *Brother v. CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004) ("In light of his extensive litigation, the fact that he never stayed at the hotel, and his testimony about why he did not keep a subsequent reservation, the Court does not credit Mr. Brother's allegation that he intended to patronize the hotel.") (emphasis added).

174. See *id.* at 1369 (observing that the plaintiff had filed more than fifty other identical ADA suits in Florida in the last year).

175. *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004).

176. *Id.*

177. See Press Release, Off. of Ariz. Attorney Gen. Mark Brnovich, Serial Litigant Permanently Enjoined from Filing Frivolous ADA Lawsuits Against AZ Businesses (Nov. 9, 2017), <https://www.azag.gov/press-release/serial-litigant-permanently-enjoined-filing-frivolous-ada-lawsuits-against-az> (last visited Mar. 7, 2020) (outlining the judge's granting of the Attorney General's motion to dismiss and the concessions made by the advocacy group) [<https://perma.cc/Y2ZM-P5S6>].

178. *Id.*

patronized the businesses they sued, (2) plaintiffs failed to allege an actual barrier to their access, (3) plaintiffs failed to sufficiently allege denial of access based upon their particular identified disability, (4) Arizona does not recognize a “deterrence” theory of standing, and (5) plaintiffs failed to provide prior notice or an opportunity to remedy alleged violations, which is an additional standing requirement for injunctive relief.¹⁷⁹ The ensuing settlement led to AID, their affiliates, and successors being permanently enjoined from filing any new actions in Arizona state courts under either the ADA or the Arizonans with Disabilities Act, agreeing to have judgment entered against them for reasonable attorney’s fees and costs in each case in which they were a party, and paying \$25,000 to the Arizona Attorney General’s Office to be used to educate businesses regarding ADA compliance.¹⁸⁰ This extreme measure of barring a disability-rights organization from bringing suit was seen as a “victory for Arizona consumers and small businesses.”¹⁸¹ This was not, however, a victory for disabled consumers.

In addition to heightened standing requirements, some courts have used their jurisdictional power to deter the recovery of monetary damages. In *Phillips v. 180 Bklyn Livingston*,¹⁸² the court refused to allow the plaintiff to pursue state money damages through the court’s federal jurisdiction, citing Congress’s conscious decision to not permit money damages

179. See Kathryn Palamountain, *Arizona Attorney General Secures Dismissal of 1,700 Lawsuits By Serial Plaintiffs*, SEYFARTH SHAW LLP (Feb. 28, 2017), <https://www.adatitleiii.com/2017/02/arizona-attorney-general-secures-dismissal-of-1700-lawsuits-by-serial-plaintiffs/> (last visited Mar. 7, 2020) (noting the lack of a written decision laying out the Court’s reasoning, so it is unclear which of the arguments persuaded the court to issue the decision) [<https://perma.cc/GQ8M-JTZD>].

180. See Press Release, Off. of Ariz. Attorney Gen. Mark Brnovich, *supra* note 177 (describing the concessions made by AID which also included dropping their appeal of the order dismissing the cases).

181. *Id.* (quoting Attorney General Mark Brnovich).

182. See *Phillips v. 180 Bklyn Livingston, LLC*, No. 17 Civ. 325 (BMC), 2017 U.S. Dist. LEXIS 75154, at *9 (E.D.N.Y. May 16, 2017) (refusing to grant supplemental jurisdiction to a plaintiff who sought to “misuse” the ADA).

through litigation under the ADA.¹⁸³ The court accused plaintiffs of exploiting the ADA's jurisdictional hook to extract a money settlement from the restaurant.¹⁸⁴ "Thus, the compelling reason to decline supplemental jurisdiction as presented by this case is the prevention of the misuse and exploitation of the ADA in a way that directly contravenes congressional intent and the remedial nature of the ADA."¹⁸⁵

3. Sanctioning Abusive Litigants and Their Counsel

Courts have the discretion and authority to impose sanctions on litigants engaged in abusive litigation or attorneys who engage in the unethical practice of law.¹⁸⁶ Judges may impose pre-filing requirements compelling a plaintiff or law firm to seek leave of court before filing additional ADA claims when such sanctions may be warranted by "ethical violations, attorney or plaintiff malfeasance, or the filing of non-meritorious claims."¹⁸⁷ Courts have begun to impose sanctions on serial plaintiffs more frequently in recent years. One such case, *Molski v. Evergreen Dynasty Corp.*,¹⁸⁸ the court declared the plaintiff a vexatious litigant and ordered that he and his counsel obtain leave of court before filing any more Title

183. See *id.* at *4 (alleging plaintiffs' motive to pursue money damages as "sidestepping" the intent of the ADA in not creating a private right of action for compensatory damages).

184. See *id.* at *8 ("This is not a case to vindicate a disabled person's rights; it is a case brought to extract a money settlement from a restaurant in Brooklyn, with plaintiff exploiting the ADA's jurisdictional hook to achieve that goal.").

185. *Id.* at *9.

186. See 28 U.S.C. § 1927 (2018) (stating that persons who multiply proceedings "in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct").

187. *Raetano v. Kally K'S, Inc.*, No. 8:08-cv-02104-T-17-TGW, 2009 U.S. Dist. LEXIS 25088, at *24-25 (M.D. Fla. Mar. 12, 2009) (citing *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 924 (C.D. Cal. 2005), *aff'd*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008)).

188. See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (finding Molski's history of factual allegations to be contrived and exaggerated, necessitating pre-filing review of future claims).

III claims.¹⁸⁹ *Molski* was upheld by the Ninth Circuit Court of Appeals and subsequently followed in district courts in the Fifth and Eleventh Circuits, respectively.¹⁹⁰ One district court in New York, comparing counsel’s ADA litigation tactics to that of *Molski*, stated that the conduct of counsel would not be tolerated and “the Court [would] not be shy about informing the appropriate state bar authorities and chief judges across the country should [counsel] unadvisedly continue to litigate in this fashion.”¹⁹¹ Although courts often issue opinions speaking harshly about serial plaintiffs, they are likely reluctant to issue sanctions since repeat filing under the ADA is not illegal or unethical *per se*.

B. Legislative Action

Countless courts, legal scholars, businessmen, politicians, and even disability advocates have expressed the desire for a legislative solution to abusive ADA litigation. The Honorable Anne C. Conway has stated that “the system for adjudicating disputes under the ADA cries out for a legislative solution.”¹⁹² She has argued that the means for enforcing the ADA—attorney’s fees—have become more important than the end goal of accessibility, and only Congress can respond to vexatious litigation tactics.¹⁹³ Individual businesses and business associations continue to lobby for state and federal

189. *Id.*

190. *See* *Mayes v. PTP Invs.*, No. 13-5475 LLC, 2014 U.S. Dist. LEXIS 70369, at *13 (E.D. La. May 21, 2014) (citing *Molski* but determining that it was not controlling in the instant case); *Segal v. Rickey’s Rest. & Lounge, Inc.*, No. 11-61766-CIV-MARRA/HOPKINS, 2012 U.S. Dist. LEXIS 87379, at *19–20 (S.D. Fla. June 25, 2012) (same).

191. *See* *Costello v. Flatman, LLC*, No. 11-CV-287 (SJ)(VVP), 2013 U.S. Dist. LEXIS 45860, at *26 (E.D.N.Y. Mar. 28, 2013) (citing *United States v. Morales* as evidence of the court’s willingness to sanction attorneys in the past) (citing *United States v. Morales*, No. 07 CR 460 (SJ), 2010 U.S. Dist. LEXIS 57924 (E.D.N.Y. June 11, 2010)).

192. *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004).

193. *See id.* (“Moreover, the means for enforcing the ADA (attorney’s fees) have become more important and desirable than the end (accessibility for disabled individuals.”).

legislation.¹⁹⁴ For decades, the business community has demanded a notice-and-cure provision in accessibility legislation.¹⁹⁵ Some elected officials agree. Governor Arnold Schwarzenegger vetoed a bill standardizing damage awards for disability discrimination because he believed it did not go far enough.¹⁹⁶ His veto message asserted he would “welcome legislation that would provide an avenue for businesses . . . to correct potential violations prior to being subjected to fines or civil liability.”¹⁹⁷ Ultimately, many legislative solutions have been proposed on the state and federal level, with some bills being passed in state legislatures.

194. See Mary Johnson, *Business Strikes Back: California Firms Press State Bills to Stop Access Lawsuits*, RAGGED EDGE ONLINE (May 2, 2005), <http://www.raggededgemagazine.com/focus/notifact0505.html> (last visited Mar. 7, 2020) (noting that a proposed Senate bill implementing a four-month notice-and-cure period was supported by the California Association of Independent Businesses, the California Chamber of Commerce, and the California Business Properties Association) [<https://perma.cc/K4MS-4UWM>]; see also Mike DeBonis, *House Passes Changes to Americans With Disabilities Act Over Activists’ Objections*, WASH. POST (Feb. 15, 2018), https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81_story.html?utm_term=.2f9751c3fcbc (last visited Mar. 7, 2020) (citing the International Council of Shopping Centers and the National Federation of Independent Businesses as supporting legislation to stop drive-by lawsuits) [<https://perma.cc/R5ED-W22K>].

195. See William Adams, *California AB 1521 Now Law: Strongest Measure Yet to Curb ADA Abuse*, ADA DEF. L. (Jan. 7, 2016), <https://adadefense.net/2016/01/07/california-curb-ada-abuse-ab-1521/> (last visited Mar. 7, 2020) (describing a recently passed California law condemning high-frequency litigants that failed to implement a notice-and-cure provision for businesses) [<https://perma.cc/G87N-8K7L>].

196. See Kevin G. Baker, *AB1707 Judiciary !!VETOED!! Disability Access Denial Penalty*, CDR-LEGISLATIVE COMMENTS (Aug. 24, 2004), <http://cdr-leg.blogspot.com/2004/08/ab1707-judiciary-vetoed-disability.html> (last visited Mar. 7, 2020) (stating that the Governor vetoed AB1707 and including the Governor’s veto message) [<https://perma.cc/5WUH-M5A8>].

197. See *id.* (noting the hopeful public policy goal of ensuring facilities are open to persons with disabilities and not to penalize businesses financially for “unintended violations that can easily be corrected”).

1. State Legislation

States with the most accessibility litigation face heightened pressure to pass legislation. Some have successfully enacted legislation aimed at deterring abusive litigants.¹⁹⁸ Arizona’s legislature recently amended their state accessibility law to protect businesses from “drive-by lawsuits” following Attorney General Mark Brnovich’s intervention in 1,000 consolidated accessibility cases brought by one advocacy organization.¹⁹⁹ The Phoenix-based advocacy group, Advocates for Individuals with Disabilities, argued that their “seven-month blitz” of lawsuits was the only effective method to enforce accessibility requirements on business owners.²⁰⁰ The Attorney General’s office disagreed and requested an expedited ruling, calling the lawsuits “a concerted effort to improperly use the judicial system for (AID’s) own enrichment.”²⁰¹

Following the legal battle, Arizona amended their state legislation to protect businesses from “drive-by lawsuits” under the Arizonans with Disabilities Act (AzDA).²⁰² Under the new AzDA, an aggrieved party must provide the noncompliant

198. See generally ARIZ. REV. STAT. § 41-1492.08(E) (2017); CAL. CIV. PROC. CODE § 425.55(a)(2) (2015); CAL. CIV. CODE § 55.56(e) (2015).

199. See Caroline Larsen, *Arizona Amends State Disabilities Act to Protect Businesses from Drive-by Lawsuits*, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C. (Apr. 20, 2017), <https://ogletree.com/insights/2017-04-20/arizona-amends-state-disabilities-act-to-protect-businesses-from-drive-by-lawsuits/> (last visited Mar. 7, 2020) (“Arizona Governor Doug Ducey just signed into law an amendment to the Arizonans with Disabilities Act (AzDA) designed to make it more difficult to bring lawsuits against businesses based on claims that they are not accessible to individuals with disabilities.”). [<https://perma.cc/Z458-96D8>].

200. See Maria Polletta, *Arizona Attorney General Intervenes in Flood of Lawsuits Over Compliance with the Americans with Disabilities Act*, ARIZ. CENT. (Aug. 24, 2016, 6:49 PM), <https://www.azcentral.com/story/news/local/phoenix/2016/08/24/arizona-attorney-general-intervenes-flood-lawsuits-over-compliance-americans-disabilities-act/89309208/> (last visited Mar. 7, 2020) (quoting Advocates for Individuals with Disabilities as stating that lawsuits were the “only effective method to wake up business owners” who continued to ignore federal accessibility requirements, particularly in parking lots) [<https://perma.cc/HE3A-3ZTT>].

201. *Id.*

202. Larsen, *supra* note 199.

business with written notice of the violation and allow for thirty days to cure the violation or comply with the law.²⁰³ Only after satisfying the notice and waiting period can the aggrieved party file a civil action if the business has not cured the violation.²⁰⁴ If the private entity is required to obtain a building permit or government approval to make the changes, they must provide the aggrieved party with the corrective action they plan to pursue.²⁰⁵ The business is then allowed an additional sixty days to make the correction.²⁰⁶ The statute also contains a provision allowing any party to motion for the court to stay an action in order to determine whether the plaintiff or their attorney is a vexatious litigant.²⁰⁷ While plaintiffs are now required to provide notice before suing under the state law, these notice requirements have no effect on litigation under the ADA.²⁰⁸

California, the leading state in accessibility litigation, has also attempted to curb abusive plaintiffs. Senate Bill 1186, enacted in 2012, requires an attorney to provide notice to “a building owner or tenant with each demand for money or complaint for any construction-related accessibility claim.”²⁰⁹ The purpose is to provide the potential defendant with sufficient facts to identify the basis for the claim.²¹⁰ Unlike Arizona, the law does not require a waiting period to allow the business in violation to cure the violation.²¹¹ The most recent version of California’s S.B. 1186, Assembly Bill 1521, extended S.B. 1186

203. ARIZ. REV. STAT. § 41-1492.08(E) (2017).

204. *Id.*

205. *Id.* § 41-1492.08(F).

206. *Id.*

207. *Id.* § 41-1492.08(I).

208. *See, e.g.*, H.R. 3765., 114th Cong. (2015) (failing to implement a notice requirement under the ADA).

209. S.B. 1186, 2012 S., Reg. Sess. (Cal. 2012).

210. *See id.* (“The bill would require an allegation of a construction-related accessibility claim in a demand letter or complaint to state facts sufficient to allow a reasonable person to identify the basis for the claim.”).

211. *Compare id.* (requiring pre-suit notice to defendants), *with* ARIZ. REV. STAT. § 41-1492.08(E) (2017) (requiring a thirty-day period between providing notice and filing a complaint to allow noncompliant businesses to fix their violations).

to 2018 and created additional requirements for suits filed by high-frequency litigants.²¹² Now, serial plaintiffs must state “whether the complaint is filed by, or on behalf of, a high-frequency litigant, the number of complaints . . . filed during the 12 months prior to filing the complaint, and the reason why the individual visited the place of public accommodation.”²¹³

The California legislature also amended its California Code of Civil Procedure to define “high-frequency litigant.”²¹⁴ The act of defining a “high-frequency litigant” in a state’s Code of Civil Procedure may seem innocuous, but the legislature drafted this definition to directly target accessibility claims:

According to information from the California Commission on Disability Access, more than one-half, or 54 percent, of all construction-related accessibility complaints filed between 2012 and 2014 were filed by two law firms. Forty-six of all complaints were filed by a total of 14 parties. Therefore, a very small number of plaintiffs have filed a disproportionately large number of construction-related accessibility claims in the state, from 70 to 300 lawsuits each year. Moreover, these lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than the correction of the accessibility violation. This practice unfairly taints the reputation of other innocent disabled customers who are merely trying to go about their daily lives²¹⁵

While the new law condemning high-frequency litigants does not create a legal or procedural hurdle, “it is sure to play a role in judicial decisions.”²¹⁶ The section defines a “high-frequency litigant” as a person “who utilizes court resources in actions arising from alleged construction-related access violations at such a high level that it is appropriate that

212. A.B. 1521, 2015 Assemb., Reg. Sess. (Cal. 2015).

213. *Id.*

214. CAL. CIV. PROC. CODE § 425.55(a)(2) (2015).

215. *Id.*

216. *See Adams, supra* note 195 (noting the significance of this new code and that “[n]ever before has the same state law that created the incentive for high-frequency litigants also condemned their tactics”).

additional safeguards apply so as to ensure that the claims are warranted.”²¹⁷ The statute does not say what additional safeguards judges should apply or how to apply them, but it significantly empowers judges to apply a higher level of scrutiny for high-frequency litigants of construction-related accessibility claims.²¹⁸ The law provides a low threshold, specifying that a high-frequency litigant is a plaintiff who has filed ten or more complaints alleging an accessibility violation within a twelve-month period or an attorney who has represented ten or more high-frequency litigant plaintiffs.²¹⁹ In addition to empowering judges to apply additional safeguards, the law implements “a ‘supplemental’ filing fee for high-frequency litigants of \$1,000 per lawsuit.”²²⁰ This may be in response to high-frequency litigants often controversially filing as “paupers” to avoid paying basic filing fees.²²¹

Florida, another hot bed of accessibility litigation, enacted House Bill 727 in response to the growing number of Title III cases filed in the state.²²² House Bill 727 allows businesses to hire an accessibility expert to evaluate their premises for ADA compliance and subsequently file a certificate of conformity or a remediation plan with the Florida Department of Business and Professional Regulation.²²³ The law then requires courts to “consider any remediation plan or certificate of conformity” in actions alleging a Title III violation.²²⁴ The remediation plan or certification would be considered when the court “determines if

217. CAL. CIV. PROC. CODE § 425.55(b) (2015).

218. *See id.* (noting that “additional safeguards” are appropriate to ensure that a high-frequency litigant’s “claims are warranted”).

219. *Id.*

220. Adams, *supra* note 195.

221. *See id.* (arguing that filing as “paupers” is controversial “since given the settlement amounts and volume, it would appear that high frequency litigants are involved in a very lucrative endeavor”).

222. *See* Gibbs, *supra* note 123 (describing Florida’s efforts to curb Title III lawsuits and arguing that federal legislation is necessary “to effectively curb serial filers and their attorneys”).

223. H.B. 727, 2017 Leg., 119th Reg. Sess. (Fla. 2017).

224. *Id.*

the plaintiff's complaint was filed in good faith and if the plaintiff is entitled to attorney fees and costs."²²⁵

2. Attempted Federal Legislation

Federal legislators have repeatedly introduced bills aimed at curbing private litigation under the ADA, to no avail. As one article notes

[In 2013], two U.S. representatives from California introduced legislation with the goal of amending the [ADA] to impose notice and compliance opportunities for defendants before they are hit with lawsuits. But as was the case with more than a dozen similar pieces of legislation introduced since 2000 . . . the bills stalled.²²⁶

The ADA Education and Reform Act of 2015 sought to amend the ADA and add a notice-and-cure period before commencing a private civil action to curb "unfair and deceptive acts."²²⁷ The ADA Education and Reform Act of 2017 passed in the House in 2018 but failed in the Senate shortly thereafter.²²⁸ Versions of the bill had been "introduced five times altogether over the last several years," but this was the first time it had "reached the U.S. House floor."²²⁹ Other bills, such as the Correcting Obstructions to Mediate, Prevent, and Limit Inaccessibility Act (114 H.R. 4719) and the ADA Notification Acts of 2000, 2001, 2003, 2005, 2007, 2009, 2011, and 2013, have yet to make it past the introduction phase of the legislative process.²³⁰

225. *Id.*

226. Shipley & Maines, *supra* note 12.

227. H.R. 3765, 114th Cong. § 3 (2015).

228. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2017).

229. See Dave Biscobing, *Bill that Would Try and Stop Drive-by ADA Lawsuits Passes US House*, ABC15.COM (Feb. 16, 2018, 6:10 PM), <https://www.abc15.com/news/local-news/investigations/bill-that-would-try-and-stop-drive-by-ada-lawsuits-passes-us-house> (last visited Mar. 7, 2020) (citing the bill's author, Rep. Ted Poe (R-Texas)) [<https://perma.cc/D83E-ZFFL>].

230. H.R. 3590, 106th Cong. (2000); H.R. 914, 107th Cong. (2001); H.R. 728, 108th Cong. (2003); H.R. 2804, 109th Cong. (2005); H.R. 3479, 110th

3. Potential Problems with Legislative Solutions

Some individuals with disabilities, and even advocates, support adding a notice-and-cure requirement to the ADA.²³¹ Specifics of such requirements, though, are hotly debated.²³² How long should a notice-and-cure period last: thirty days, sixty days, four months? What exactly should the “cure” be: a written plan to improve accessibility, merely an attempt to resolve the inaccessibility, or completing construction to remove the barrier?²³³

One failed piece of federal legislation, the “ADA Education and Reform Act of 2015,” proposed a sixty-day window for owners to identify the barrier and provide aggrieved individuals “a written description outlining improvements that will be made to remove the barrier.”²³⁴ The failed “Correcting Obstructions to Mediate, Prevent, and Limit Inaccessibility Act” proposed a notice-and-compliance opportunity of ninety days for an owner or operator to remove the barrier and correct the violation before

Cong. (2007); H.R. 2397, 111th Cong. (2009); H.R. 881, 112th Cong. (2011); H.R. 777, 113th Cong. (2013).

231. See, e.g., Gordon, Rees, Scully, Mansukhani, LLP, *California’s Legislation to Curb Abusive ADA Lawsuits* (2012), <https://www.grsm.com/publications/2012/california-s-legislation-to-curb-abusive-ada-lawsuits> (last visited Mar. 28, 2020) (“There is no right-to-cure language in the revised bill, but Disability Rights California advocacy director Margaret Johnson called for a 30-day notice requirement because the purported violations are ‘a substantial infringement on the civil rights of people with disabilities.’”) [<https://perma.cc/7DC2-3DTQ>].

232. See Heather Ansley, Jennifer Mathis, Vania Leveille, *Myths and Truths About the “ADA Education and Reform Act”* (H.R. 620), ACLU.ORG, https://www.aclu.org/sites/default/files/field_document/myths_and_truths_about_the_ada_education_and_reform_act_-_updated_2-13-18.pdf (last visited Mar. 28, 2020) (discussing the potential harm to individuals with disabilities when enforcing a notice-and-cure requirement) [<https://perma.cc/F67B-YWR5>].

233. *Id.* (analyzing the difference between fixing a barrier and making “substantial progress” in removing a barrier); see also U.S. DEP’T OF JUSTICE, THE CIVIL RIGHTS DIVISION’S COMMENTS ON THE “ADA EDUCATION AND REFORM ACT OF 2017” (H.R. 620) (2017) (explaining the concerns of the Civil Rights Division, which administers and enforces the ADA, with substantial “cure” times delaying individuals’ rights to accommodations).

234. H.R. 3765., 114th Cong. (2015).

a civil action could be brought.²³⁵ Alternatively, if an owner of a noncompliant business demonstrated a “good faith effort” to remove the barrier but was not able to do so within ninety days, he or she would be entitled to an additional thirty days to comply with accessibility requirements.²³⁶

Most recently, the failed “ADA Education and Reform Act of 2017,” also known commonly as H.R. 620, suggested a sixty-day period for the owner to provide the aggrieved person “with a written description outlining improvements that [would] be made to remove the barrier.”²³⁷ The owner would then be required to remove the barrier or “make substantial progress in removing the barrier” at the end of a 120-day period beginning on the date the owner received notice.²³⁸ Requiring a building owner to make “substantial progress” in fixing a barrier again raises concerns over the subjective nature of the “cure” part of “notice and cure” bills. What exactly is “substantial progress”?

4. Advocates’ Response to Legislative “Fixes”

The Disability Rights Education and Defense Fund (DREDF) outlined eight of the disability community’s main concerns with the recently proposed H.R. 620 and similar bills.²³⁹ First, DREDF noted that these types of bills remove incentives for businesses to become accessible and encourage businesses to not make changes until they receive “notice” from potential plaintiffs.²⁴⁰ Second, DREDF emphasized the discrimination that individuals with disabilities face every day

235. H.R. 4719., 114th Cong. (2016).

236. *Id.*

237. H.R. 620, 115th Cong. (2017).

238. *Id.*

239. See *Overview of Concerns with H.R. 620, the ADA Education and Reform Act of 2017, and Similar Bills*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/hr620/overview-of-concerns-with-h-r-620/> (last visited Mar. 8, 2020) (arguing that H.R. 620 and similar bills significantly weaken the impact of the ADA) [<https://perma.cc/X9VL-JT5V>].

240. See *id.* (pointing out that today, businesses have an obligation to become accessible and H.R. 620 would remove these immediate consequences).

when they are not able to access public accommodations.²⁴¹ Third, DREDF noted that these bills place the heavy burden on individuals with disabilities to send a detailed written notice.²⁴² For example, H.R. 620 would require a person encountering an access barrier to “send a written notice specifying in detail the circumstances under which access was denied, including the property address, whether a request for assistance was made, and whether the barrier is permanent or temporary.”²⁴³ Importantly, “no other civil rights law permits businesses to discriminate without consequence unless and until the victims of discrimination notify the business that it has violated the law.”²⁴⁴

Fourth, DREDF pointed out that these bills would not fix business’s concerns of monetary damage awards since these have “nothing to do with the ADA.”²⁴⁵ The ADA does not permit recovery of monetary damages through private litigation; the only remedies are injunctive relief and attorney’s fees.²⁴⁶ Statutes awarding plaintiffs monetary damages are state law and therefore not affected by federal legislation like H.R. 620.²⁴⁷ Fifth, DREDF argued that courts already have the power “to address the few unscrupulous attorneys” who may file frivolous

241. *See id.* (“The ADA is the difference between participation and exclusion on a daily basis. Why should a wheelchair user be unable to join her family at a restaurant, just because the owner has resisted installing a ramp for 28 years?”).

242. *See id.* (“H.R. 620 requires a person with a disability who encounters an access barrier to send a written notice specifying in detail the circumstances under which access was denied, including the property address, whether a request for assistance was made, and whether the barrier is permanent or temporary.”).

243. *Id.*

244. *Id.*

245. *See id.* (noting that the ADA does not allow for money damages).

246. *See id.* (noting that supporters of the bill cite monetary damage awards as a concern regarding Title III litigation).

247. *See id.* (explaining that a congressional amendment to the ADA “will do nothing to prevent damage awards under state laws”).

lawsuits.²⁴⁸ DREDF acknowledges the growing concern over frivolous lawsuits, but argues the disability community should not be burdened in order for Congress to remedy the problem of abusive litigation.²⁴⁹ Advocates question why courts and state bar associations cannot sanction abusive litigation when they “already have extensive power to deal with any frivolous litigants or their attorneys.”²⁵⁰ They argue the “existing legal mechanisms” should be used to combat abusive litigation instead of “deny[ing] the civil rights established by the ADA.”²⁵¹

Sixth, DREDF noted that “[t]he ADA is already very carefully crafted to take the needs of business owners into account.”²⁵² Seventh, it noted that there are already “extensive federal efforts to assist business compliance,” such as the “in-depth DOJ ADA website [], the DOJ ADA hotline, extensive DOJ technical assistance materials, and the ten federally-funded regional ADA Centers” that provide resources and training.²⁵³ Lastly, DREDF emphasized the importance of ADA standards as not merely “minor details or picky rules, but rather” essential accessibility standards to ensure access for all citizens, including individuals with disabilities.²⁵⁴

IV. Recommendations

Solving “abusive” ADA litigation is inherently challenging because repeat litigants are not doing anything illegal. This is how the ADA was designed to enforce accessibility. Filing a claim against an unassuming business owner for technical violations (like a disabled access sign being the improper size or

248. *See id.* (“For the rare few who may file fraudulent claims or engage in unscrupulous practices, state courts and state bar associations already have extensive power to deal with any frivolous litigants or their attorneys.”).

249. *See id.* (acknowledging “concerns about frivolous lawsuits or serial litigants” but arguing that these concerns should be addressed in a way that does not “deny the civil rights established by the ADA”).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

a mirror being hung 1.5 inches too high) may seem unfair and feel intrinsically wrong, but the ADA does not contain provisions to protect against “frivolous suits” for what some may see as “minor technicalities.”²⁵⁵ Additionally, it can be difficult and dangerous to distinguish between “good” litigants and “vexatious” litigants. A technical violation may seem insignificant to most able-bodied individuals, but it could be a very real obstacle for someone who uses a wheelchair or is mobility impaired. How, then, can we separate and eliminate abusive litigation in order to protect businesses while also defending disabled individuals’ rights? There is no easy solution to satisfy all parties, but compromise may be manageable. A multi-tier approach engaging the various parties involved can be instituted through (1) judicial discretion, (2) mandatory court approval of settlements, (3) notice-and-cure legislation, and (4) lawyers’ tools of self-regulation.

A. Empower Courts to Exercise Meaningful Judicial Discretion

As demonstrated in the Introduction of this Note, courts do not shy away from chastising those they view as abusive litigants, but they have slowly begun to implement punishments for that perceived (or concrete) exploitation.²⁵⁶ Recently, one court went so far as to order the plaintiff and his attorney to return all fees and costs they had received back to the defendant.²⁵⁷ The court further enjoined the plaintiff and his

255. See Vicky Nguyen, Jeremy Carroll & Kevin Nious, *California Outpaces Other States in ADA Lawsuits*, NBC BAY AREA (Feb. 19, 2014), <https://www.nbcbayarea.com/investigations/California-Outpaces-Other-States-in-ADA-Lawsuits-disability-act-246193931.html> (last visited Mar. 8, 2020) (distinguishing claims of true embarrassment and inequality, e.g. a disabled individual having to use the restroom with the door open because her wheelchair could not fit in the stall, from “technical violations”) [<https://perma.cc/3KT9-36X7>].

256. See *Johnson v. Ocaris Mgmt. Group*, No. 18-CV-24586-PCH, 2019 U.S. Dist. LEXIS 144773, at *27–28 (S.D. Fla. Aug 23, 2019) (sanctioning the plaintiff’s attorney and ordering plaintiff to return all fees and costs back to the defendant).

257. See *id.* (“Johnson and Dindin shall disgorge all fees and costs recovered in each of the gas pump cases.”).

counsel from “filing any ADA complaint in any federal or state court in Florida or any court outside of Florida without first obtaining written permission” from the court.²⁵⁸ The attorney was then referred to the “Ad Hoc Committee on Attorney Admissions, Peer Review and Attorney Grievance for investigation of his actions.” A news article on the court’s decision quoted a local municipal attorney as saying: “Oh, he is in deep trouble,” and that the attorney in the case “is personally looking at potential disbarment.”²⁵⁹

While such sanctions may curb abusive litigants, the Ninth Circuit issued a rightful warning to courts taking this kind of action.²⁶⁰ Because the ADA is designed to be enforced by private litigation and does not allow for damages,

most ADA suits are brought by a small number of private plaintiffs who view themselves as champions of the disabled. District courts *should not condemn such serial litigation as vexatious* as a matter of course. For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be complaint with the ADA.²⁶¹

Courts should heed this warning and exercise caution when penalizing vexatious ADA litigants, but they should also use their judicial discretion as a non-legislative deterrent of truly abusive litigation.

“Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their

258. *Id.*

259. See Casmira Harrison, *Federal Judge Deals Body Blow to Attorney at Center of Serial ADA Lawsuits*, THE DAYTONA BEACH NEWS-J. (Aug. 29, 2019), <https://www.news-journalonline.com/news/20190828/federal-judge-deals-body-blow-to-attorney-at-center-of-serial-ada-lawsuits> (last visited Apr. 12, 2020) (describing the court’s ruling to sanction the attorney and return all money received) [<https://perma.cc/GGM7-4CG8>].

260. See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (urging courts to refrain from presuming that serial litigation is necessarily vexatious).

261. *Id.* (emphasis added) (citations omitted).

lawful mandates”²⁶² “These powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’”²⁶³ Courts are granted the discretion and authority to impose sanctions on litigants who bring abusive litigation or attorneys who engage in the unethical practice of law.²⁶⁴ Federal courts hold the power to control admission to the federal bar and discipline attorneys who appear before them.²⁶⁵ Although the Supreme Court cautions that this power ought to be exercised with great caution, it is nevertheless available to all courts.²⁶⁶

Judge Talamante’s dismissal of over 1,000 accessibility complaints demonstrates the potential danger of judicial discretion.²⁶⁷ Increasing judicial power may harm advocates attempting to enforce accessibility. Courts should be wary in making standing requirements more strenuous for ADA plaintiffs. Requiring disabled individuals to demonstrate real injuries at a heightened standard could create real hurdles for disabled individuals attempting to force compliance.²⁶⁸ Certain

262. *Anderson v. Dunn*, 19 U.S. 204, 227 (1821).

263. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962)).

264. *See* 28 U.S.C. § 1927 (2018) (stating that persons who multiply proceedings “in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct”).

265. *See Ex parte Burr*, 22 U.S. 529, 531 (1824) (stating that the power to discipline attorneys is incidental to all courts and necessary for the preservation of decorum and the respectability of the profession).

266. *See Chambers*, 501 U.S. at 50 (discussing a court’s “inherent power to impose attorney’s fees as a sanction for bad-faith conduct” and stating that a court must “exercise caution in invoking” that power).

267. *See* Press Release, Off. of Ariz. Attorney Gen. Mark Brnovich, *supra* note 177 (noting that Judge Talamante “dismissed more than 1,000 lawsuits filed by Advocates for Individuals with Disabilities”).

268. *See* Vanita Gupta, *Oppose the “ADA Education and Reform Act of 2017” (H.R. 620)*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Feb. 14, 2018), <http://civilrightsdocs.info/pdf/policy/letters/2018/oppose-hr-620-ada-education-reform.pdf>. (“H.R. 620 would impose a burdensome process before people with disabilities could file a civil action for an accessibility violation in a public accommodation case.”) [<https://perma.cc/5PNU-SQP6>].

barriers may not be seen as “real and concrete” injuries when considered by able-bodied judges who have not had the experience of navigating the world in a disabled body. A judge may view a “barrier” as merely a minor technical violation, but even something minor can bar an individual with a lack of mobility from navigating a business.

Alternatively, judges should turn their heightened discretion to attorneys. Several courts have begun to consider whether attorney’s fees should be withheld if no advance notice and opportunity to cure was given to the defendant.²⁶⁹ One court in California attempted to require a pre-litigation notice before allowing attorney’s fees in ADA cases, but this attempt at discretion was vacated by the Ninth Circuit.²⁷⁰ Still, courts continue to discuss whether plaintiffs provided notice to the defendant when deciding to grant judgment for the defendant or reduce attorney’s fees.²⁷¹

B. Court Approval of Settlements

Congress can amend the ADA to mandate judicial approval of out-of-court settlements. New legislation could deter abusive litigants whose sole motives are to obtain monetary settlements

269. See *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1032 (C.D. Cal. 2005) (denying attorney’s fees “when a pre-suit letter to the Defendant would have achieved the same result” (citing *Macort v. Checker Drive-In Rests., Inc.*, No. 8:03-cv-1328-T-30EAJ 2005 U.S. Dist. LEXIS 2437, at *1 (M.D. Fla. Jan. 28, 2005))).

270. See *Doran v. Del Taco, Inc.*, 237 F. App’x 148, 149 (9th Cir. 2007) (stating that the district court should have either set a reasonable fee award or given specific, valid reasons for its denial of fees but “instead it denied fees by subjecting Doran to a requirement not found in the ADA or the case law”).

271. See *Doran*, 373 F. Supp. 2d at 1032 (“This court is not inclined to award attorney’s fees for prosecuting a lawsuit when a pre-suit letter to the Defendant would have achieved the same result.”); *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1281 (M.D. Fla. 2004) (“There was 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.”); *Brother v. Miami Hotel Invs., Ltd.*, 341 F. Supp. 2d 1230, 1233 (S.D. Fla. 2004) (“No effort was made to communicate with Defendant and seek compliance before suit, despite the fact that the only remedy in the act is injunctive relief. That is, aside from attorney’s fees . . .”).

instead of fixing the business's inaccessibility. Generally, "[f]ederal courts are not vested with a general power to review and approve settlements of suits between private parties,' although a number of exceptions exist by both statute and rule."²⁷² There are several circumstances which warrant judicial approval of a settlement, including: (1) cases involving minors or wrongful death,²⁷³ (2) class action suits,²⁷⁴ and (3) when required by law, for example, in Fair Labor Standards Act or False Claims Act cases. These circumstances warrant judicial approval in order to protect the public interest.

State law governs the judicial approval of settlements involving minors, parties who are incompetent or otherwise lack the capacity to waive rights knowingly and intelligently, and wrongful death cases.²⁷⁵ While states may vary on their policy, the root concern for courts is to protect the interest of minors and others unable to advocate for their interest.²⁷⁶ The public

272. *Kanu v. Toyota Motor Sales, USA, Inc.*, No. DKC 15-3445, 2016 U.S. Dist. LEXIS 89166, at *10–11 (D. Md. July 11, 2016) (quoting *Estate of Sa'Adoon v. Prince*, 660 F. Supp. 2d 723, 724–25 (E.D. Va. 2009)).

273. *See generally* *Reed ex rel. Reed v. United States*, 891 F.2d 878, 881 n.3 (11th Cir. 1990) ("Florida law requires court approval of all settlements involving a minor for the settlement to be effective."); *Goesel v. Boley Int'l (H.K.) Ltd.*, 9-6 F.3d 414, 419 (7th Cir. 2015) ("We join our colleagues in other federal courts in characterizing judicial approval of settlements involving minors as a matter of substantive law.").

274. *See* FED. R. CIV. P. 23(e) (requiring court approval for settlements of class actions).

275. *Compare Kanu*, 2016 U.S. Dist. LEXIS 89166, at *10–11 (identifying Maryland law which determines the federal court does not have authority to approve settlements involving minors unless both parents are deceased and the next friend is not in loco parentis), *with* *Unum Life Ins. Co. v. Lowman*, No. 5:01-CV-891-BO(3), 2003 U.S. Dist. LEXIS 29328, at *3 (E.D.N.C. Feb. 5, 2003) ("However, in a settlement involving minors, Local Civil Rule 17.1(b) requires the parties to prepare and submit a proposed Order of Approval . . ."); *see also* *Allianz Ins. Co. v. Garrett*, 153 F.R.D. 89, 98 n. 4 (E.D. Va. 1994) ("New Jersey law requires court approval of settlements of infants' claims The same is true in Virginia.").

276. *See* *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 464 (C.D. Cal. 1978) ("On the other hand, where minors are involved, the Court, whose root concern and responsibility is with protecting their interests, simply cannot ignore the difficulty this poses to its efforts to grapple with the fees question.").

has an interest in protecting those who cannot speak for themselves in litigation. Similarly, it is in the public interest to enforce accessibility and protect businesses from abusive litigation meant to extract cash settlements.

Second, ADA lawsuits can be thought of as a type of class action. A class action is “a lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group.”²⁷⁷ Private lawsuits to enforce the ADA represent the interests of all individuals with disabilities and society’s interest in fair and equal treatment of all under the law. Class actions are governed under Federal Rule of Civil Procedure (FRCP) 23.²⁷⁸ FRCP 23(e) regulates settlements of class action suits.²⁷⁹ After the parties have notified all members of the class of the proposed settlement, the court may approve the settlement “only after a hearing and only on a finding that it is fair, reasonable, and adequate.”²⁸⁰ By treating ADA settlements similarly to class action suits, courts can act as a safeguard to ensure proposed ADA settlements (1) are not a windfall for abusive litigants, (2) fix the litigated barrier, and (3) promote the interests of the ADA.

Lastly, settlements under certain federal statutes, like the Fair Labor Standards Act (FLSA) and False Claims Act, must be approved for fairness by a district court.²⁸¹ “The congressional purpose of the FLSA and the public’s interest in the transparency of the judicial process decisively inform both the procedure and the standard applicable to a district court’s review of an FLSA settlement.”²⁸² This statement applies

277. *Class Action*, BLACK’S LAW DICTIONARY (11th ed. 2019).

278. FED. R. CIV. P. 23.

279. *See id.* (providing the requirements of a class action suit).

280. FED. R. CIV. P. 23(e)(2).

281. *See Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 605 (E.D. Va. 1999) (“In accordance with the common law requirement that settlement of an FLSA claim be approved for fairness by a district court . . .” (citing *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982))); *United States ex rel. Pratt v. Alliant Techsystems*, 50 F. Supp. 2d 942, 947 (C.D. Cal. 1999) (reviewing a settlement agreement under the False Claims Act for whether it was “fair and reasonable”).

282. *Dees v. Hydradry*, 706 F. Supp. 2d 1227, 1231 (M.D. Fla. 2010).

perfectly to the need for court approval of ADA settlements. Similarly, “where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy with which it was designed to effectuate.”²⁸³ Courts should bear the responsibility of ensuring that disability rights, which are upheld through private suits, continue to protect public interests.

C. Notice-and-Cure Legislative Action

Ultimately, the legal profession and courts are limited in their ability to limit abusive ADA litigation. The ADA is functioning exactly as Congress intended.²⁸⁴ Without legislative action, abusive litigants will continue to exploit the legal system for monetary gain at the expense of business owners. The determination must be whether legislation should be passed on the state or federal level as well as what measures will protect business interests while safeguarding disability rights. Vexatious ADA litigation is arguably a state issue since accessibility lawsuits vary by state and correlate to states’ legislation; however, enacting uniform federal regulations may provide a more sensible and longer-lasting solution.

Adding a notice-and-cure provision to the ADA will allow the “honest but unfortunate” business owner to act in good faith and fix their violations before being subject to costly litigation. Congress must determine (1) the requirements of the notice given to business owners, (2) the length of the cure period, and (3) the definition of a “cure.” To limit the burden on disabled individuals, the notice should only require “sufficient enough detail” for the business owner to identify the barrier or violation. The notice should not require additional burdens such as citing the specific code, explaining how the barrier prevented the

283. See *Rogan v. Essex Cty. News Co.*, 65 F. Supp. 82, 83 (D.N.J. 1946) (refusing to approve a private settlement which had been negotiated without knowledge of the court, in absence of clear showing that statutory requirements had been met).

284. See *supra* notes 52–56 and accompanying text (discussing the congressional intent to put enforcement in the hands of private citizens).

individual's access, or whether the barrier is temporary or permanent.²⁸⁵

How long, then, should business owners be allowed to “cure” their noncompliance? Disability advocates argue passionately against long “cure” periods since, in theory, they prescribe a set amount of time the disabled individual will not be able to access the facility. Cure periods have been proposed for thirty, sixty, and ninety days.²⁸⁶ Sixty or ninety days may seem like a long period of time, but the alternative solution—litigation—is a lengthy and extensive process which can take months or years. After litigation has concluded, the judge will then order the business to satisfy the injunctive relief of fixing the barrier within a certain amount of time. Litigation significantly prolongs the remedy of the violation. A defined period of thirty days to fix a barrier will incentivize business owners to comply quickly and avoid litigation.

Suggested “cures” have included many options from fully eliminating the barrier to merely notifying the complainant of what the owner *plans* to do in the future.²⁸⁷ Violations which are fixable in thirty days should be completely cured as such. If the barrier requires construction work for removal, the owner shall obtain the proper permits, hire the appropriate renovator, and begin construction within thirty days. Owners should notify the complainant of the progress he has made and may have an additional thirty or sixty days depending on the appropriate amount of time to fully eliminate the barrier. Courts should be allowed the opportunity to consider extenuating circumstances of construction-related barriers in subsequent litigation.

285. *But see* H.R. 620, 115th Cong. (2017) (requiring a person encountering an access barrier to send written notice specifying in detail the circumstances under which access was denied, the property address, whether a request for assistance was made, and whether the barrier is permanent or temporary).

286. *See supra* notes 234–237 (discussing proposed notice requirements and cure periods).

287. *See supra* notes 234–238 (discussing various proposed threshold requirements of business owners' mitigation efforts).

D. Encourage Lawyers to Self-Regulate

As a last resort, judges can look to the legal community to self-regulate and sanction attorneys abusing the system.²⁸⁸ The Model Rules of Professional Conduct direct attorneys to act ethically and professionally.²⁸⁹ The legal profession carries the burden of self-governance to keep attorneys accountable.²⁹⁰ To maintain the integrity of the profession, a lawyer who knows of misconduct by a fellow attorney “shall inform the appropriate professional authority.”²⁹¹ Violating the Rules of Professional Conduct is professional misconduct.²⁹² Under Rule 3.1, “[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous”²⁹³ If an attorney’s repeat litigation of ADA claims rises to the level of being frivolous, a fellow attorney may report him to the state bar.²⁹⁴

It is also professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”²⁹⁵ An attorney abusing his power to bring ADA litigation for the purpose of attorney’s fees or hefty settlements may rise to the level of being prejudicial to the administration of justice.²⁹⁶

288. See *supra* notes 256–259 (discussing one case in which the court sanctioned counsel for frivolous litigation).

289. See generally MODEL RULES OF PROF’L CONDUCT, PREAMBLE AND SCOPE (AM. BAR ASS’N 1983).

290. See *id.* (explaining the importance of self-governance among members of the legal profession).

291. MODEL RULES OF PROF’L CONDUCT r. 8.3 (AM. BAR ASS’N 2016).

292. See *id.* r. 8.4(a) (providing that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct”).

293. *Id.* r. 3.1.

294. See *id.* r. 8.3 (providing for peer reporting).

295. *Id.* r. 8.4(d).

296. See MODEL RULES OF PROF’L CONDUCT r. 8.4 COMMENT (AM. BAR ASS’N 2016) (discussing offenses that interfere with the administration of justice and stating that “[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”); *Phillips v. 180 Bklyn Livingston, LLC*, No. 17 Civ. 325 (BMC), 2017 U.S. Dist. LEXIS 75154, at *8 (E.D.N.Y. May 16, 2017) (“This is not a case to vindicate a disabled person’s rights; it is a case brought to extract a money settlement

State bars are in place to maintain the integrity of the legal profession. Attorneys should be disciplined for exploiting the ADA solely for the benefit of attorney's fees or monetary settlements that do not fix the litigated barriers.²⁹⁷ The legal profession has the means to penalize attorneys who take advantage of disabled individuals within legislative boundaries and should penalize those attorneys accordingly.

V. Conclusion

Abusive ADA litigation negatively affects not only business owners but the disability community and legal profession as well. The need for reform is apparent but should not come at the cost of equal rights for all Americans. The entire legal system must work together to eliminate unscrupulous plaintiffs' ability to profit off unsuspecting businesses without placing further burdens the disability community and hindering their right to equal access.

from a restaurant in Brooklyn, with plaintiff exploiting the ADA's jurisdictional hook to achieve that goal.”).

297. *See id.* (reading the Model Rules of Professional Conduct to disavow this as behavior that would be prejudicial to the administration of justice).