

## VEXATIOUS LITIGANTS AND THE ADA: STRATEGIES TO FAIRLY ADDRESS THE NEED TO IMPROVE ACCESS FOR INDIVIDUALS WITH DISABILITIES

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*The Americans with Disabilities Act (“ADA”) is recognized as one of the most significant pieces of civil rights legislation in American history and is aimed at protecting the rights of individuals with disabilities. Unfortunately, as the ADA has developed, some attorneys have exposed methods of exploiting the provisions of the ADA for personal, pecuniary benefits—fee-driven lawsuits for violations of plaintiff-friendly provisions of Title III of the ADA. As a result of this exploitation, record numbers of Title III disability cases are being filed by a small group of plaintiffs and attorneys who have created a lucrative “cottage industry” of vexatious and profitable lawsuits that do little to protect individuals with disabilities or promote the spirit and purpose of the ADA.*

*Vexatious ADA litigation frequently occurs under the guise of a meritorious suit ostensibly brought on behalf of an individual with a disability who is seeking equal access to public accommodations. However, once the lawsuit is filed it quickly devolves into a hunt for vulnerable small businesses that are not in full compliance with the ADA. By exploiting small businesses that are likely to settle quickly instead of engaging in lengthy, costly litigation, lawyers bringing these cases are able to quickly recover attorney’s fees. The profitability and ease with which these lawsuits can be brought has prompted some attorneys to find and file as many ADA violation suits as possible. While the attorneys generate high profits from these lawsuits, money is diverted away from the real need—correcting the underlying violation that justified the lawsuit and providing the disabled plaintiff with equality and accessibility.*

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*This Article addresses the need to reform the ADA to prevent vexatious litigation and to promote the underlying goals of the Act. Part I of this Article introduces the topic of vexatious litigation and the importance of remedying the effects of exploitation of the ADA. Part II provides an overview of the ADA and its efforts to increase accessibility to individuals with disabilities, emphasizing the provisions of the Act that create incentives to engage in vexatious litigation. Part III examines and analyzes the judiciary’s response to vexatious litigation under the ADA, and sanctions that have been issued to limit exploitation. Finally, Part IV provides recommendations to reform the ADA and state disability law counterparts, suggests corrective actions to address vexatious litigation, and identifies methods to promote equality for individuals with disabilities.*

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INTRODUCTION

*“At his best, man is the noblest of all the animals; separated from law and justice he is the worst.”<sup>1</sup>*

On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act (ADA).<sup>2</sup> The Act was intended to provide equal opportunities for people with disabilities to participate in mainstream American life.<sup>3</sup> Today, the ADA is recognized as one of the most significant pieces of civil rights legislation in American history.<sup>4</sup> The Act prohibits discrimination and guarantees that individuals with

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<sup>1</sup> RICHARD ALAN KRIEGER, CIVILIZATION’S QUOTATIONS: LIFE’S IDEAL 255 (2002).

<sup>2</sup> *Introduction to the ADA*, ADA.GOV, [http://www.ada.gov/ada\\_intro.htm](http://www.ada.gov/ada_intro.htm) (last visited Apr. 18, 2016).

<sup>3</sup> See 42 U.S.C. § 12101 (2012) (“The purpose of the ADA is to: 1) provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”).

<sup>4</sup> ADA.GOV, *supra* note 2.

disabilities are treated equally in the areas of employment, public accommodations, state and local government services, and telecommunications.<sup>5</sup> Passage of the ADA was made possible through the efforts of countless contributors to the disabilities rights movement whose collective actions made individuals with disabilities, and the injustices they faced, more visible to society.<sup>6</sup>

Attorneys played a critical role in developing the ADA and many of the rights now enjoyed by individuals with disabilities.<sup>7</sup> Today, however, some attorneys are exploiting provisions within the ADA, and related laws, for personal monetary gain by filing self-serving, fee-driven lawsuits that often do not advance the rights of individuals with disabilities.<sup>8</sup> This is particularly true for lawsuits brought for violations of the more plaintiff-friendly provisions of Title III of the ADA.<sup>9</sup> In recent years, record numbers of Title III ADA disability access cases have been filed by a small group of plaintiffs and lawyers who have collaborated to create a profitable “cottage industry” of fee-driven lawsuits that do little to improve accessibility for individuals with disabilities.<sup>10</sup> In the most egregious schemes, a litigious, disabled plaintiff collaborates with an unscrupulous lawyer or law firm to aggressively seek out ADA violations at public accommodations.<sup>11</sup> Then, without ever informing the business of the ADA violations, or attempting to remedy the matter through conciliation and voluntary compliance, the lawyer files suit on behalf of the disabled plaintiff requesting damages for each identified violation.<sup>12</sup> Threatened with costly litigation that could potentially force targeted establishments out of business, many businesses quickly settle the matter.<sup>13</sup>

In 2014, there was a sixty-three percent increase in the number of ADA Title III lawsuits (4436) filed, most filed by the same plaintiffs

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<sup>5</sup> 28 C.F.R. § 35 (2015); ADA.GOV, *supra* note 2; *see also* 42 U.S.C. § 12182(a) (2012) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

<sup>6</sup> ADA.GOV, *supra* note 2.

<sup>7</sup> *See id.*

<sup>8</sup> Amy Shipley & John Maines, *South Florida Leads Nation in Controversial Disability Lawsuits*, SUN SENTINEL (Jan. 11, 2014), [http://articles.sun-sentinel.com/2014-01-11/news/fl-disability-lawsuits-strike-sf-20140112\\_1\\_plaintiffs-attorneys-lawsuits](http://articles.sun-sentinel.com/2014-01-11/news/fl-disability-lawsuits-strike-sf-20140112_1_plaintiffs-attorneys-lawsuits).

<sup>9</sup> Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1826–27 (2005) (“According to an ABA study in 2003, Title I cases had defendants win 97.3% of the time. Titles II and III appear to be more pro-plaintiff.”).

<sup>10</sup> Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1280–82 (M.D. Fla. 2004); *see also* Shipley & Maines, *supra* note 8.

<sup>11</sup> Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 862–63 (C.D. Cal. 2004).

<sup>12</sup> *Id.* at 862 (citing *Investco*, 305 F. Supp. 2d at 1280–81).

<sup>13</sup> *Id.* at 862–63.

using the same attorneys.<sup>14</sup> Plaintiffs continued to file large numbers of lawsuits in 2015.<sup>15</sup> In California, Florida, New York, Texas, and Arizona alone, plaintiffs filed 3,847 ADA Title III lawsuits.<sup>16</sup> These lawsuits are brought under the guise of serving individuals with disabilities by forcing reluctant business owners to meet accommodation standards required under the ADA. However, increasingly the lawsuits are driven by the availability of attorney's fees and the ease of obtaining such fees from entities being sued.<sup>17</sup> Often, attorneys bringing the lawsuits are paid fees and costs while the underlying ADA violation that gave rise to the suit is left uncorrected.<sup>18</sup> For some businesses, these lawsuits take away the money needed to correct the underlying violation that justified the lawsuit.<sup>19</sup>

The increase in filing of ADA Title III cases has caused some courts to consider whose interests are really being served by the lawsuits: the client's or the attorney's. In some instances, the misuse of the ADA or related state disability laws for monetary gain, has been so egregious that judges have responded by entering orders restricting an individual's or attorney's right to bring a legal action for an alleged violation of the ADA. This Article provides insight into the troubling misuse of the ADA for personal monetary gain, and offers recommendations that will help minimize abuse of existing law while promoting accessibility for individuals with disabilities. Section I provides a brief overview of goals of the ADA and select state disability laws, with emphasis on the statutory framework within each for an award of attorney's fees and costs that creates an incentive to engage in vexatious, serial litigation. Section II examines judicial responses to abusive ADA litigation practices, and sanctions that have been imposed to curb the abuse. Section III provides recommendations for corrective actions to address vexatious litigants and the lawyers who facilitate the misuse of the ADA, as well as steps that

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<sup>14</sup> Minh N. Vu & Susan Ryan, *ADA Title III Lawsuits Surge by More than 63%, to Over 4400, In 2014*, SEYFARTH SHAW (Apr. 9, 2015), <http://www.adatitleiii.com/2015/04/ada-title-iii-lawsuits-surge-by-more-than-63-to-over-4400-in-2014/>.

<sup>15</sup> Minh Vu et al., *ADA Title III Lawsuit Numbers Hold Steady for First Half of 2015*, SEYFARTH SHAW (Nov. 6, 2015), <http://www.adatitleiii.com/2015/11/ada-title-iii-lawsuit-numbers-hold-steady-for-first-half-of-2015/>.

<sup>16</sup> *Id.*

<sup>17</sup> Shipley & Maines, *supra* note 8.

<sup>18</sup> *Id.* (“‘About 80 percent of the [businesses] don’t ever do the changes or do a minimal amount of changes, and that defeats the whole purpose of the ADA,’ said Bob Cohen, the head of Access for the Disabled, a not-for-profit in Coral Springs that has been a party in more than 375 such lawsuits.”).

<sup>19</sup> *Id.* (“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. The owner declined to be named. So far, he said, nobody’s come back to check.”).

may be taken to promote equality of opportunity for individuals with disabilities.

### I. ADA: INCREASING ACCESSIBILITY TO INDIVIDUALS WITH DISABILITIES

In promulgating the ADA in 1990, Congress noted that over 43 million Americans suffered from a disability and that this number was expected to increase as the population expands.<sup>20</sup> Today, roughly one in five Americans have a disability.<sup>21</sup> Under Title III of the ADA, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operated a place of public accommodation.”<sup>22</sup> Title III prohibits discrimination on the basis of disability by a (1) public accommodation,<sup>23</sup> (2) commercial facility,<sup>24</sup> or (3)

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<sup>20</sup> Americans with Disabilities Act of 1990, 101 P.L. 336.

<sup>21</sup> *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

<sup>22</sup> 42 U.S.C. § 12182(a) (2012).

<sup>23</sup> See 28 C.F.R. § 36.104 (2015) (“Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories (1) Place of lodging, except for an establishment located within a facility that contains not more than five rooms for rent or hire and that actually is occupied by the proprietor of the establishment as the residence of the proprietor. For purposes of this part, a facility is a ‘place of lodging’ if it is – (i) An inn, hotel, or motel; or (ii) A facility that – (A) Provides guest rooms for sleeping for stays that primarily are short-term in nature (generally 30 days or less) where the occupant does not have the right to return to a specific room or unit after the conclusion of his or her stay; and (B) Provides guest rooms under conditions and with amenities similar to a hotel, motel, or inn, including the following – (1) On- or off-site management and reservations service; (2) Rooms available on a walk-up or call-in basis; (3) Availability of housekeeping or linen service; and (4) Acceptance of reservations for a guest room type without guaranteeing a particular unit or room until check-in, and without a prior lease or security deposit. (2) A restaurant, bar, or other establishment serving food or drink; (3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (4) An auditorium, convention center, lecture hall, or other place of public gathering; (5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (7) A terminal, depot, or other station used for specified public transportation; (8) A museum, library, gallery, or other place of public display or collection; (9) A park, zoo, amusement park, or other place of recreation; (10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.”).

<sup>24</sup> See *id.* (noting that commercial facilities means facilities: “(1) Whose operations will affect commerce; (2) That are intended for nonresidential use by a private entity; and (3) That are not – (i) Facilities that are covered or expressly exempted from coverage under the Fair

private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.<sup>25</sup>

Public accommodations are required to make “reasonable modifications” to their policies, practices, and procedures unless such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.<sup>26</sup> The ADA requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established under the Act.<sup>27</sup> A public accommodation is required to remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable.<sup>28</sup> If such removal is not readily achievable, the public accommodation is required to provide goods and services through “alternative methods,” if such methods are themselves readily achievable.<sup>29</sup> Title III of the ADA ensures that the access needs of individuals with disabilities are addressed, but the broad scope of its provisions makes it easy to find violations, particularly minor violations, that subject businesses to costly litigation.

Congress granted authority to the U.S. Department of Justice (DOJ) to investigate and prosecute administrative complaints alleging violations of Title III of the ADA.<sup>30</sup> However, unless complaints show a “pattern and practice” of repeat violations, the DOJ generally declines to investigate alleged violations.<sup>31</sup> 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.<sup>32</sup> While providing both a private right of action and a public right of action for the Attorney General, Congress

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Housing Act of 1968, as amended (42 U.S.C. §§ 3601–3631); (ii) Aircraft; or (iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way”).

<sup>25</sup> See *id.* (A private entity means a person or entity other than a public entity); see also 28 C.F.R. § 36.102 (2016).

<sup>26</sup> 28 C.F.R. § 36.302 (2015).

<sup>27</sup> 42 U.S.C. § 12181 (2012).

<sup>28</sup> See 28 C.F.R. § 36.304(a) (2015).

<sup>29</sup> 28 C.F.R. § 36.305 (2015).

<sup>30</sup> *Id.*

<sup>31</sup> See Ruth Colker, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 192* (New York University Press 2005) (finding that the Department of Justice, an agency charged with national enforcement of the ADA, reached only 107 public accommodations settlements in ten years—less than one settlement a month).

<sup>32</sup> Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Legislation*, 54 *UCLA L. REV.* 1, 8–10 (noting that there are only a “small cadre of lawyers” enforcing the ADA).

elected to limit available remedies.<sup>33</sup> Only the Attorney General may seek monetary damages on behalf of an aggrieved party.<sup>34</sup> For a private litigant, the only remedies available are injunctive relief and the recovery of attorneys' fees and costs.<sup>35</sup> This public/private distinction demonstrates a clear Congressional intent to prohibit private plaintiffs from recovering monetary damages under the ADA.<sup>36</sup> To incentivize private attorneys to take Title III cases, Congress authorized courts, in their discretion, to award reasonable attorneys' fees, including litigation expenses and costs to the prevailing party.<sup>37</sup> As currently interpreted by courts, attorneys' fees may be awarded to plaintiffs who obtain a judgment on the merits or a court-ordered consent decree,<sup>38</sup> a preliminary injunction,<sup>39</sup> or a private settlement agreement.<sup>40</sup>

The ADA affords standing to any person who is being subjected to discrimination on the basis of disability or who has reasonable grounds for believing he or she is about to be subjected to discrimination prohibited under the Act to institute a private civil action for relief.<sup>41</sup> To succeed under Title III of the ADA in a private lawsuit, a non-employee plaintiff must show that he or she is disabled; the defendant is a private entity that owns, leases, or operates a place of public accommodation; and the plaintiff was denied public accommodations by the defendant because of the plaintiff's disability.<sup>42</sup> Plaintiffs typically employ private attorneys to seek injunctive relief under the ADA to force entities to make facilities readily accessible and usable by individuals with disabilities; and then tack on state law claims to recover damages.<sup>43</sup> However, currently there is no effective means to insure that these private actions

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<sup>33</sup> 42 U.S.C. § 12188(a)–(b) (2012).

<sup>34</sup> *Id.* § 12188(b)(2)(B).

<sup>35</sup> *Id.* § 12188(a)(1); 42 U.S.C. § 2000a-3(a) (2012).

<sup>36</sup> *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000).

<sup>37</sup> *See* 28 C.F.R. § 36.505 (2015) (“In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.”).

<sup>38</sup> *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 605 (2001).

<sup>39</sup> *Watson v. Cnty. of Riverside*, 300 F.3d 1092, 1095–96 (9th Cir. 2002).

<sup>40</sup> *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134 (9th Cir. 2002).

<sup>41</sup> *See* 28 C.F.R. § 36.501(a) (2015).

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* § 36.501(b) (“Injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.”); *see also infra* notes 49–52, 55–56, and accompanying text.

actually result in changes that provide increased access to individuals with disabilities.

Title III of the ADA does not require a litigant to provide notice to the alleged violator prior to filing suit in federal court.<sup>44</sup> Lawyers filing ADA Title III claims often fail to provide pre-suit notice to defendants because doing so provides opportunity for alleged violators to take steps to remedy the violation, render the case moot, and avoid having to pay attorneys' fees and costs.<sup>45</sup> The attorney fee structure, and the relative ease with which attorneys can extract payment through settlement agreements with entities found in violation of the ADA has led to increased litigation under Title III of the ADA.

Between 2012 and 2014, the number of ADA Title III cases filed increased dramatically in California (1886); Florida (1553); New York (212); and Pennsylvania (135).<sup>46</sup> One reason for the rise of cases in these states is the opportunity provided under each state's laws to obtain additional fees and costs. California has led the country in ADA Title III litigation, primarily because of its plaintiff-friendly state disability laws that, unlike the ADA, provide for monetary damages.<sup>47</sup>

California law incorporates ADA standards to strengthen state disability laws; and in some circumstances, provides greater protection for individuals with disabilities than provided under the ADA.<sup>48</sup> Under the California's Unruh Civil Rights Act (UCRA), "all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever."<sup>49</sup> The Act creates a private right of action against anyone who "denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the Act]."<sup>50</sup> Section 51(f) of the Unruh Act provides that, "[a] violation of the right of any individual under the [ADA] shall also constitute a violation of this section."<sup>51</sup> The Unruh Act permits

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<sup>44</sup> *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000).

<sup>45</sup> *Bagenstos*, *supra* note 32, at 14.

<sup>46</sup> *Vu & Ryan*, *supra* note 14.

<sup>47</sup> Vicky Nguyen et al., *California Outpaces Other States in ADA Lawsuits*, NBC BAY AREA (Feb. 19, 2014), <http://www.nbcbayarea.com/investigations/California-Outpaces-Other-States-in-ADA-Lawsuits-disability-act-246193931.html>.

<sup>48</sup> *Id.* at 673; *see* *Munson v. Del Taco, Inc.*, 208 P.3d 623 (Cal. 2009) ("The general intent of the [Unruh Act] legislation was . . . to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 . . . and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.").

<sup>49</sup> CAL. CIV. CODE § 51(b) (2016).

<sup>50</sup> *Id.* § 52(a).

<sup>51</sup> *Id.* § 51(f).



a successful plaintiff to collect “actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than \$4,000,” as well as attorney’s fees.<sup>52</sup> This is true even where the violation is seemingly trivial.<sup>53</sup> The Act has been interpreted to allow for an award of attorney fees to either the plaintiff or the defendant.<sup>54</sup>

Under California’s Disabled Persons Act (DPA), “individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations . . . places of public accommodation, amusement, or resort, and other places to which the general public is invited . . .”<sup>55</sup> Under the DPA, a successful plaintiff can collect damages in the amount of three times the amount of actual damages, with a minimum award of \$1,000 for each and every offense.<sup>56</sup> Under California law, a violation of the ADA also constitutes a violation of both the UCRA and the CDPA.<sup>57</sup> However, a successful plaintiff may not collect awards under both state statutes for the same case.<sup>58</sup> Claimants are allowed to multiply the damage amounts by the number of violations at a property.<sup>59</sup>

In California, overlapping and inconsistent state and federal laws, coupled with limited continuing education for building inspectors and architects, as well as inconsistent adjudications of disability laws have made it particularly difficult for businesses to accurately assess compliance with disability-access standards.<sup>60</sup> This reality has created opportunities for aggressive plaintiffs and attorneys to identify entities that have violated the technical requirements of the disability laws and that are unlikely to aggressively defend against claims. Many of the ADA Title III lawsuits filed in California have targeted small businesses with minor violations, such as not having a disability sign, which render the case meritorious on technical grounds.<sup>61</sup> As a result, these businesses are forced to pay cash settlements to the litigants without ever having a

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<sup>52</sup> *Id.* § 52(a).

<sup>53</sup> Frank W. Chen, *Advising Clients Regarding ADA Accessibility Lawsuits in California*, LAW OFFICES OF FRANK W. CHEN (Feb. 2016), <http://www.sgvba.org/articles/ADA.pdf>.

<sup>54</sup> *See* Jankey v. Lee, 290 P.3d 187, 196 (Cal. 2012).

<sup>55</sup> CAL. CIV. CODE §54.1(a)(1) (2016).

<sup>56</sup> *Id.* § 54.3(a).

<sup>57</sup> Stevens v. Optimum Health Inst.–San Diego Eyeglasses, 810 F. Supp. 2d 1074, 1097 (S.D. Cal. 2011).

<sup>58</sup> Bruno W. Katz, *Defending a Title III ADA Accessibility Claim*, CAL. RESTAURANT ASS’N, <http://www.calrest.org/defending-a-title-iii-ada-accessibility-claim.html> (last visited August 2, 2016).

<sup>59</sup> *See id.* at 1085.

<sup>60</sup> Chen, *supra* note 53.

<sup>61</sup> Ramona Giwargis, *Another Valley Lawmaker Joins Fight Against Predatory ADA Lawsuits*, MERCED SUN-STAR (Jan. 14, 2015), <http://www.mercedsunstar.com/news/local/article6589254.html>.

meaningful opportunity to correct the violation.<sup>62</sup> Anecdotal evidence exists suggesting that some plaintiffs involved in these lawsuits never even attempted to enter the establishments they later claimed in their lawsuits violated their right to access.<sup>63</sup> A large majority of the ADA Title III cases have been brought on behalf of a small number of individual plaintiffs by a handful of attorneys. One report revealed that of 649 ADA lawsuits filed by two California attorneys working for the same firm between 2009 and 2013, 518 cases were brought in the names of just eight clients—an average of approximately sixty-five cases per client.<sup>64</sup> One California lawyer who specializes in disability-access suits said the average settlement for ADA lawsuits in California was \$45,000 in 2013.<sup>65</sup> This troubling pattern has led one California court to opine that, “the means for enforcing the ADA (attorney’s fees) have become more important and desirable than the end (accessibility for disabled individuals).”<sup>66</sup> The California Legislature has responded to this problem by introducing bills that would provide businesses with pre-suit demand letters and set periods of time within which to cure the violation before being liable, but in absence of these and other limitations on actions, the problem persists.<sup>67</sup>

Like California, Florida law contains provisions allowing for compensatory damages, including but not limited to, damages for mental anguish, loss of dignity, other intangible injuries, and punitive damages.<sup>68</sup> As a result, Florida, and particularly South Florida, has become a hotbed for ADA Title III access cases.<sup>69</sup> One investigation revealed that a majority of these claims end in settlements that provide payment to the attorneys, but fail to correct the violations that supported the underlying legal claim.<sup>70</sup> Approximately two-thirds of the roughly 700 ADA disabled-access suits filed in Florida in 2013 were brought by a small num-

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<sup>62</sup> *Id.*

<sup>63</sup> Thom Jensen, *Americans with Disabilities Lawsuits Investigated*, NEWS10 (Nov. 26, 2013), <http://host-37.242.54.159.gannett.com/news/article/264475/2/Americans-with-Disabilities-Act-lawsuits-investigated> (reporting that the plaintiffs involved in a lawsuit rarely went to the business that they filed suit against, but merely drove by them, taking pictures and measurements looking for ADA violations); see also *ADA Title III Drive-By Lawsuits*, MIAMI LOCAL 10 NEWS (Feb. 29, 2016), <http://www.adatitleiii.com/2016/02/miami-local-10-news-reports-on-ada-title-iii-drive-by-lawsuits/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004).

<sup>67</sup> Linda Mumma, *Lawmakers Band Together to Fight Drive-By ADA Lawsuits*, KCRA NEWS (Feb. 26, 2015), <http://www.kcra.com/news/lawmakers-band-together-to-fight-drive-by-ada-lawsuits/31511266>; Katz, *supra* note 58.

<sup>68</sup> FLA. STAT. §760.11(5) (2016).

<sup>69</sup> Shipley & Maines, *supra* note 8.

<sup>70</sup> *Id.*

ber of plaintiffs who were represented by only a few attorneys.<sup>71</sup> Some of these lawsuits show abuse of the legal system. For example, one Florida lawsuit targeted a wheelchair store, owned by a disabled couple.<sup>72</sup> In another, a Florida attorney filed suit against a pawn shop, liquor store, and a swimming-pool supply shop on behalf of a twelve year-old girl, alleging violations of the ADA.<sup>73</sup> The lawsuit was filed even though the young girl would not likely frequent any of these establishments considering her age, and the fact that her family did not have a pool.<sup>74</sup> One Florida attorney filed over 700 ADA lawsuits over a four-year period and settled most of those cases for \$3,000 to \$5,000 per case in attorney's fees and agreements by the businesses to become ADA compliant.<sup>75</sup> However, once the lawsuit was settled, the incentive to follow up to ensure compliance disappeared.

Title III of the ADA has been described as “massively under-enforced” due in large part to the limitations on remedies for violations.<sup>76</sup> Access to attorney's fees for the prevailing party encourages litigants to address violations of the ADA and is necessary to ensure enforcement, but it is subject to abuse. In some cases, however, the primary motivation to bring a lawsuit shifts from a desire to eliminate a violation to a desire to obtain plaintiff's attorney fees, costs and expenses.<sup>77</sup> The relative ease with which attorneys can identify violations of the ADA creates a disincentive for those attorneys to quickly settle cases in return for guarantees of corrective action. The availability of fees and costs to the prevailing party also acts as a disincentive for businesses to defend lawsuits because technical violations of the ADA are often easy to prove.<sup>78</sup> Because an unsuccessful defense renders the business owner potentially liable for paying the bills for two sets of attorneys, businesses are often motivated to settle rather than risk litigation.<sup>79</sup> This, in turn, renders some businesses vulnerable to abusive, serial litigation.<sup>80</sup> Because there is no effective mechanism to insure the violations of the Act have been cured as a result of the litigation, the current format often leads to an odd result that

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<sup>71</sup> *Id.*

<sup>72</sup> Walter Olson, *The ADA Shakedown Racket*, CITY JOURNAL (2004), <http://www.city-journal.org/html/ada-shakedown-racket-12494.html>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Casey L. Raymond, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Title II and III*, 18 TEX. J. ON C.L. & C.R. 235, 254 (2013).

<sup>76</sup> Bagenstos, *supra* note 32, at 6.

<sup>77</sup> See *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004); see Shipley and Maines, *supra* note 8.

<sup>78</sup> See Shipley and Maines, *supra* note 8.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

rewards an attorney for successfully “enforcing” the ADA even though the underlying violation persists.<sup>81</sup> The problem can be particularly acute for small business owners forced to choose between paying attorneys’ fees and investing money to correct the violation to increase access for disabled individuals.<sup>82</sup> The current format creates a disincentive to litigate for the benefit of disabled individuals. Courts have started to push back against abusive Title III litigation, but the impacts of restricting litigants from bringing action under the ADA must be balanced against the remedial goals of the ADA.

## II. JUDICIAL RESPONSE TO VEXATIOUS ADA LITIGATION

Serial ADA access litigation is troubling and threatens to set back advancements made in the societal perspective of individuals with disabilities and the enforcement of their rights under the ADA. Courts have responded to the “cottage industry” that has developed around ADA Title III access cases flooding the courts and have started to recognize that in many cases the plaintiff’s real motivation for bringing the action is to extract money from the defendant through settlement.<sup>83</sup>

In *Rodriguez v. Investco, L.L.C.*, the plaintiff, a quadriplegic confined to a wheelchair, had previously filed over 200 ADA lawsuits and was represented by the same attorney for most of those cases.<sup>84</sup> The defendant was a Florida hotel, which consisted of two eighteen-floor towers.<sup>85</sup> At the time of the case, Tower 1 was being renovated while Tower 2 was vacant and not involved in the dispute.<sup>86</sup> Shortly after the acquisition of the hotel, the Defendant hired an architect to renovate the hotel, and also hired an ADA consultant to assist with ADA compliance.<sup>87</sup> The plaintiff stayed at the facility in May of 2002, before Defendant actually acquired the property.<sup>88</sup> Plaintiff planned to stay two nights, but only stayed one, claiming he was not able to enjoy the facility because of the barriers.<sup>89</sup> The plaintiff advised his attorney of the barriers in the facility,

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<sup>81</sup> *Id.* (“‘About 80 percent of the [businesses] don’t ever do the changes or do a minimal amount of changes, and that defeats the whole purpose of the ADA,’ said Bob Cohen, the head of Access for the Disabled, a not-for-profit in Coral Springs that has been a party in more than 375 such lawsuits.”).

<sup>82</sup> *Id.* (“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. The owner declined to be named. So far, he said, nobody has come back to check.”).

<sup>83</sup> See *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d. 1278, 1280–81 (M.D. Fla. 2004).

<sup>84</sup> *Id.* at 1279.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1280.

the attorney inspected the facility, and the attorney told the plaintiff the facility was not ADA compliant.<sup>90</sup> The attorney then filed a suit only four days later.<sup>91</sup> Plaintiff stated that he made plans to return to the facility, but he had made the reservations just two days prior to trial.<sup>92</sup> He could not explain why he wanted to return and stay at the facility rather than stay at a nearby hotel that was fully compliant.<sup>93</sup> The defendant introduced evidence showing that a majority of the hotel was ADA compliant, and that the remainder would become ADA compliant shortly.<sup>94</sup> The defendant's expert opined that all the deficiencies were capable of correction and that the renovation plans would achieve the result of being compliant with the ADA.<sup>95</sup> The court acknowledged that in promulgating the ADA, Congress did not create an administrative process for entities to follow to show compliance under the ADA, and that Congress left it to aggrieved individuals to file a private right of action to address violations.<sup>96</sup> The court noted that although remedies under the ADA are limited to injunctive relief, Congress authorized an award of attorney's fees to the prevailing party to encourage individuals to seek compliance.<sup>97</sup> The court added that despite the increased number of ADA lawsuits filed in the court, there were relatively few plaintiffs willing to assume the role of "private attorneys general."<sup>98</sup> However, the court recognized the troubling reality that most of the lawsuits were filed by the same attorneys representing the same clients, and questioned the real motives behind the lawsuits.<sup>99</sup> The court admonished the plaintiff's attorney for filing the lawsuit less than a week after learning of the ADA deficiencies, for his failure to encourage voluntary compliance, or to encourage remedial measures.<sup>100</sup> In the court's view, a plaintiff motivated by a desire to improve access for disabled individuals would logically seek to obtain the violator's conciliation and voluntary compliance before bringing a legal action against the entity under Title III of the ADA.<sup>101</sup> However,

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1281.

<sup>97</sup> *Id.* (citing 42 U.S.C. § 12205, which provides, "In any action . . . commenced pursuant to this chapter, the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs . . .").

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1281.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1281–82 ("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.").

the court noted that the structure of the ADA itself creates a disincentive for plaintiffs to seek compliance because “pre-suit settlements do not vest plaintiff’s counsel with an entitlement to attorney’s fees.”<sup>102</sup> The court opined that “[t]he current ADA lawsuit binge is, therefore, essentially driven by economics – that is, the economics of attorneys’ fees.”<sup>103</sup> After holding that the plaintiff in *Rodriguez* failed to establish any basis for relief under the ADA, the court opined that the plaintiff was “merely a professional pawn in an ongoing scheme to bilk attorney’s fees from the Defendant.”<sup>104</sup>

In *Jones v. Eagle-North Hills Shopping Centre, L.P.*,<sup>105</sup> the plaintiff alleged violations of the ADA which included: “lack of proper signage at the accessible parking spaces; cross slopes too steep in various accessible parking spaces; improper access aisles at various accessible parking spaces; entry doors at various locations with panel-type pull handles; and, . . . a public telephone lacking proper floor clearance (trash in the way).”<sup>106</sup> Prior to filing suit, the only notice plaintiff provided of the violations was a verbal statement to a construction worker that the property had barriers to access.<sup>107</sup> Shortly thereafter, the parties filed a joint stipulation of voluntary dismissal without prejudice dismissing the claims.<sup>108</sup> The plaintiffs then requested \$14,235.58 in attorney’s fees.<sup>109</sup> The defendant argued that the fees were excessive, unreasonable, and that the fees requested were outside the scope allowable under federal law.<sup>110</sup> The court recognized that plaintiff’s attorney was entitled to an award of reasonable attorney’s fees and costs, and employed the Lodestar Method to identify an appropriate award.<sup>111</sup> More importantly, the court reduced the fee based on the plaintiff’s failure to provide advanced

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<sup>102</sup> *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 605 (2001)).

<sup>103</sup> *Id.* at 1282.

<sup>104</sup> *Id.* at 1285.

<sup>105</sup> 478 F. Supp. 2d 1321 (E.D. Okla. 2007).

<sup>106</sup> *Id.* at 1324.

<sup>107</sup> *Id.* at 1331.

<sup>108</sup> *Id.* at 1325.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1325–26; *see also* 42 U.S.C. § 12205 (2012) (“In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.”); *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992) (holding that a plaintiff becomes a “prevailing party” if “actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff”); *Case v. United Sch. Dist. No. 233*, 157 F.3d 1243, 1249 (10th Cir. 1998) (using “Lodestar Method” to identify an appropriate award by which a reasonable hourly rate is multiplied by the reasonable number of hours worked on the case).

notice of the violation to the defendant and opportunity to cure.<sup>112</sup> The court acknowledged that there is no notice requirement under the ADA, and that previous efforts by Congress to amend the ADA to require pre-suit notice had failed, but found the complete lack of effort by the plaintiff to address the violation outside of litigation to be problematic.<sup>113</sup> It noted that in considering an award of attorney fees, a district court retains the inherent power to consider whether litigation is frivolous, and “whether the plaintiff’s failure to ask for or to accept voluntary compliance prior to suit indicates that the plaintiff has acted in bad faith, has been unduly litigious, or has caused unnecessary trouble and expense.”<sup>114</sup> Recognizing that generally the failure of a plaintiff to provide pre-suit notice does not compel the court to reduce the fee award, the court noted that where there is evidence showing the plaintiff filed or maintained the suit unnecessarily, the court may factor that into its consideration when determining the amount of fees that should be awarded.<sup>115</sup> The court then reduced the award of attorney’s fees by ten percent based on the plaintiff’s failure to take adequate steps to notify the defendant of the ADA violation before filing the lawsuit.<sup>116</sup> Collectively, these decisions reduced the award from the requested \$14,235.58 to \$6,616.89.<sup>117</sup> While such a reduction works fairness into the process, this may be lost when the same plaintiff engages in serial litigation in multiple courts before different judges.

In *Molski v. Mandarin Touch Restaurant (Molski I)*, a federal district court granted a motion to declare the plaintiff a vexatious litigant and to impose pre-filing restrictions on the plaintiff and his attorney.<sup>118</sup> The plaintiff, a physically disabled individual who used a wheelchair, alleged that he had dinner at the defendant’s establishment and attempted to use the restroom, but found that there was not enough clear space in the stall to permit him to access the toilet from his wheelchair.<sup>119</sup> He alleged that while he attempted to leave the restroom, his hand became caught in the exterior door, causing trauma to his hand.<sup>120</sup> Molski asked for injunctive relief to remedy the accessibility issues and damages not less than \$4,000 per day, for each day after his visit until such time as the restaurant was made fully accessible.<sup>121</sup> Evidence revealed that Molski

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<sup>112</sup> *Jones*, 478 F. Supp. 2d. at 1331–33.

<sup>113</sup> *Id.* at 1331.

<sup>114</sup> *Id.* at. 1332 (citing *Ass’n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F.3d 1357, 1360 (11th Cir. 2006)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1332–33.

<sup>117</sup> *Id.*

<sup>118</sup> *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 868 (C.D. Cal. 2004).

<sup>119</sup> *Id.* at 862.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

had previously filed hundreds of ADA access lawsuits in federal courts throughout the state of California.<sup>122</sup> Those cases were nearly identical in terms of the facts alleged, the claims presented, and the damages requested.<sup>123</sup>

After discussing how Congress clearly intended to prevent plaintiffs from recovering damages in private Title III actions, the court provided its own perspective on the rationale behind such damage award requests.<sup>124</sup> The court opined that some attorneys and enterprising plaintiffs had “found a way to circumvent the will of Congress [to allow only injunctive relief] by seeking money damages while retaining federal jurisdiction.”<sup>125</sup> The court explained that plaintiffs were able to accomplish this in California “[b]ecause a violation of the ADA also constitutes a violation of California’s Unruh Civil Rights Act, Cal. Civ. Code § 51(f), and the California Disabled Persons Act (“CDPA”), Cal. Civ. Code § 54(c).”<sup>126</sup> Therefore, “[p]laintiffs 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.”<sup>127</sup> The court asserted that the current framework encouraged plaintiffs to engage in “shotgun litigation [that] undermines both the spirit and purpose of the ADA.”<sup>128</sup>

Although Molski’s complaint appeared credible standing alone, the court noted that its validity was undermined when viewed alongside Molski’s other complaints.<sup>129</sup> Based on Molski’s extensive litigation history, the court considered whether it should invoke its inherent power to levy sanctions in response to abusive litigation practices.<sup>130</sup> The court used five factors to determine whether the litigation was vexatious: (1) the litigant’s history of litigation, and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.<sup>131</sup>

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<sup>122</sup> *Id.* at 861 n.2. The evidence showed Mr. Molski filed between 334 and 400 lawsuits in the federal courts since 1998. *Id.*

<sup>123</sup> *Id.* at 861.

<sup>124</sup> *Id.* at 862–63.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 863 (citing *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004)).

<sup>129</sup> *Id.* at 864.

<sup>130</sup> *Id.* at 863.

<sup>131</sup> *Id.* at 864 (citing *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 23 (2d Cir. 1986)).



Considering the first factor, the court found that Molski had filed numerous other claims alleging nearly identical injuries, on the exact same day, and also filed “boilerplate complaints.”<sup>132</sup> Based on the facts, the court found that Molski had a history of vexatious litigation and an intent to harass.<sup>133</sup> The court noted that even if the businesses sued by Molski had violated the ADA, these facts were outweighed by the fact Molski acted in bad faith and for the improper purpose of extorting a settlement.<sup>134</sup> In addressing the second factor, Molski claimed that he filed his lawsuits to “obtain injunctive relief, and that the funds recovered were largely used to offset his legal expenses.”<sup>135</sup> The court was not persuaded by Molski’s purported benevolent intent to seek only injunctive relief.<sup>136</sup> The court opined:

If Molski’s motivation was genuinely to obtain injunctive relief and recover his legal costs, he could sue entirely under the ADA. But he does not do that. Instead, Molski almost always raises additional state law claims under the CDPA, California Health & Safety Code, the Unruh Civil Rights Act, and California Bus. & Prof. Code § 17200, which allow for the recovery of money damages.<sup>137</sup>

The fact that Molski was represented by counsel in every lawsuit weighed against him as to the third factor.<sup>138</sup> The court noted that, as to the fourth factor, Molski’s actions showed that he filed a countless number of vexatious claims, unnecessarily burdening the courts.<sup>139</sup>

Based on the fact that each individual claim Molski had filed was meritorious, yet vexatious when viewed in the aggregate, the court subjected Molski to a pre-filing notice requirement that required him to file a motion for leave to file each subsequent ADA Title III complaint.<sup>140</sup> The court added that the restriction on filing acts to shield the Court and defendants from vexatious litigation, and protects the “purpose and spirit of the ADA.”<sup>141</sup> The court believed that the restriction was appropriate because it did not “limit the right of a legitimately aggrieved disabled individual to seek legal relief under the ADA.”<sup>142</sup> Rather it was narrowly

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 865.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 866.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* at 866–67.

<sup>141</sup> *Id.* at 868.

<sup>142</sup> *Id.*

tailored to prevent abuse of that law by “professional plaintiffs” and lawyers motivated by financial gain.”<sup>143</sup>

The court examined the actions of Molski’s attorney in *Molski v. Mandarin Touch Restaurant (Molski II)*, and required counsel to explain why he and his law firm should not also be required to seek leave of court before filing future complaints alleging violations of the ADA.<sup>144</sup> The court examined the firm’s filing history and discovered that The Frankovich Group had filed at least 223 ADA lawsuits.<sup>145</sup> The 223 complaints were nearly identical in form and substance.<sup>146</sup> Of those, 156 (70%) were filed on behalf of Molski.<sup>147</sup> The evidence showed a common pattern that the court found troubling.<sup>148</sup> After filing each ADA lawsuit, the Frankovich Group sent a copy of the complaint directly to each defendant, along with a letter, which counseled the unrepresented defendant against hiring his own lawyer.<sup>149</sup> The letter claimed that “the ‘vast majority’ of defense attorneys simply ‘embark on a billing expedition’ when hired, rather than looking out for their client’s best interest.<sup>150</sup> ‘Simply put,’ the letter continues, ‘defense attorneys want to sufficiently ‘bill it’ before they get realistic about the settlement.’”<sup>151</sup> Accordingly, the letter stated, the money required to retain a defense attorney “could be better spent on the remedial work and settlement of the action.”<sup>152</sup> The letter further advised the defendants that their insurance policy might cover the ADA claim, and went on to describe, in considerable detail, what provisions of a general liability policy might provide coverage, including separate discussions of bodily injury, advertising, and wrongful eviction coverage.<sup>153</sup> The Frankovich Group even offered to represent the defendants in a suit against their insurer, should the insurer refuse to provide coverage.<sup>154</sup> Finally, the letter advised the defendants that they did not “have any bona fide defense” to the lawsuit, and recommended that they quickly settle the matter, rather than “waste [their] money on needless litigation.”<sup>155</sup> The court was notably appalled by the actions taken by the Frankovich Group.<sup>156</sup> The court reminded the parties that

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<sup>143</sup> *Id.* at 867 (citing 42 U.S.C. § 12101(b)(1) (2012)).

<sup>144</sup> *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 925 (C.D. Cal. 2005).

<sup>145</sup> *Id.* at 926.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 926–28.

<sup>149</sup> *Id.* at 928.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 934.

“[t]he District Court has the inherent power to levy sanctions in response to abusive litigation practices.”<sup>157</sup> This power extends to protect the administration of justice from vexatious litigation.<sup>158</sup> The court found that the Frankovich Group violated Model Rule of Professional Conduct 4.3, which states, “[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.”<sup>159</sup> According to the court, the Frankovich Group violated the rule when: (1) it advised an unrepresented party against obtaining counsel, when it may only advise the opposite; (2) it provided a considerable amount of legal advice on pursuing a claim against the defendant’s insurance company; and (3) it advised the unrepresented party that it does not “have any bona fide defense” to the lawsuit and recommended that it quickly settle the matter, rather than “waste [its] money on needless litigation.”<sup>160</sup> The court found these actions to be egregious because they appeared to be aimed at coercing a quick and uninformed decision to settle.<sup>161</sup> The court concluded that the Frankovich Group engaged in a pattern of unethical behavior designed ultimately to extort money from businesses and their insurers, and requested that the state bar investigate the matter further and consider suspension or disbarment of the lawyers constituting the Frankovich Group.<sup>162</sup> While that matter was pending, the court entered a pre-filing order that required “[t]he Frankovich Group . . . to seek leave of court before filing a complaint alleging violations of the Americans with Disabilities Act.”<sup>163</sup> Unfortunately, the ethical violations raised in *Molski* are not restricted to that case.<sup>164</sup>

These abuses of the ADA may foreshadow a larger problem as courts utilize broader interpretations of the term “public accommodation” that will subject more entities to liability under federal and state disability laws. In 2016, a California court became the first in the nation to hold that a retailer’s online website violated the ADA because it was inaccessible to individuals with vision-related disabilities.<sup>165</sup> That court held that the plaintiff, an individual with a visual impairment, showed a sufficient

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<sup>157</sup> *Id.* at 928 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765–66 (1980)).

<sup>158</sup> *Id.* at 929 (citing *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984)).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 929–30.

<sup>161</sup> *Id.* at 930.

<sup>162</sup> *Id.* at 934.

<sup>163</sup> *Id.*

<sup>164</sup> *See, e.g.*, *Yates v. Belli Deli*, No. C 07-01405 WHA, 2007 U.S. Dist. LEXIS 61431, at \*16–17 (N.D. Cal. Aug. 13, 2007). Interestingly, the Frankovich Law Group also represented the plaintiff in *Yates*.

<sup>165</sup> *See* *Davis v. BMI/BNB Travelware Co.*, No. CIVDS1504682, 2016 WL 2935496, at \*1 (Cal. Apr. 15, 2016) (granting plaintiff’s motion for summary judgment); Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication at 1, *Davis v. BMI/BNB Travelware Co.*, No. CIVDS1504682 (Cal. Apr. 15, 2016).

connection between the defendant's physical retail store and its website for the ADA to apply, and showed that he had been denied the "full and equal enjoyment of the goods, services, privileges, and accommodations offered by defendant because of his disability."<sup>166</sup> The court awarded the plaintiff damages of \$4,000 under California's Unruh Act.<sup>167</sup> The court refused to find that repeated attempts to access the website constituted additional violations under the Act, but it did issue an injunction requiring the retailer to take sufficient steps to either make its website accessible and useable to the visually impaired or terminate its website.<sup>168</sup> This ruling is particularly interesting given the fact that courts have split on whether web-only based business are public accommodations under Title III of the ADA.<sup>169</sup>

In *Cullen v. Netflix, Inc.*, a deaf consumer filed suit against Netflix, Inc., a provider of on-demand video streaming programming over the Internet and disc rental by mail services, alleging violations of California's Unruh Civil Rights Act and Disabled Persons Act (DPA) for failing to provide full and equal access to its services.<sup>170</sup> The court found that Netflix's web site was not a public accommodation.<sup>171</sup> In *National Federation of the Blind v. Scribd Inc.*, the national association of blind persons and one of its members alleged Scribd Inc., violated the ADA because its web-only business was inaccessible to the blind.<sup>172</sup> The court found that the defendant's digital library website and mobile applications were places of public accommodation under Title III of the ADA.<sup>173</sup> The uncertainty surrounding website accessibility and liability under Title III has been exacerbated by the DOJ's reluctance to issue clear public accommodations regulations for websites.<sup>174</sup> In view of the uncertainty, courts have shown reluctance to dismiss website accessibility cases early,

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<sup>166</sup> See *Davis*, 2016 WL 2935496, at \*1; Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication, *supra* note 165, at 1–2, 5.

<sup>167</sup> See *Davis*, 2016 WL 2935496, at \*1 (granting monetary damages); Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication, *supra* note 165, at 2, 18 (asserting that the plaintiff was entitled to monetary damages under the Unruh Act).

<sup>168</sup> The fact that the Unruh Act grants \$4000 in damages for each instance of discrimination, coupled with the fact that the court only awarded \$4000 in damages to the plaintiff, indicates that the court only found a single instance of discrimination. See *Davis*, 2016 WL 2935496, at \*1; Memorandum of Points and Authorities in Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication, *supra* note 165, at 18; see also *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023 (N.D. Cal. 2012).

<sup>169</sup> See *Cullen*, 880 F. Supp. 2d at 1023.

<sup>170</sup> *Id.* at 1021.

<sup>171</sup> *Id.* at 1024.

<sup>172</sup> Nat'l Fed'n of the Blind v. Scribd, Inc., 97 F. Supp. 3d 565, 566–67 (D. Vt. 2015).

<sup>173</sup> See *id.* at 576.

<sup>174</sup> See Minh N. Vu & Kristina Launey, *Justice Department Delays Web Accessibility Regulations for at Least Three More Years, Leaving Businesses in Turmoil*, SEYFARTH SHAW

which could cause businesses to incur significant defense costs. Not surprisingly, litigation related to allegedly inaccessible websites has surged in the first part of 2016.<sup>175</sup> Given the number of web-based businesses, and the fact that individuals could identify a Title III violation with a click of the computer mouse without leaving the comfort of their own homes, the potential for increased litigation in this area appears very high.<sup>176</sup>

In a currently pending case, the National Federation of the Blind of California (“NFBC”) and several individual blind members with guide dogs, filed a lawsuit against Uber Technologies, Inc. (“Uber”) alleging that Uber drivers discriminated against blind individuals by refusing to transport blind riders and their service animals.<sup>177</sup> Uber filed a motion to dismiss, asserting that it was not a public accommodation subject to Title III.<sup>178</sup> The court denied the motion, ordered Uber to answer the complaint, and held that additional facts were needed to determine whether Uber is subject to the ADA as a public accommodation.<sup>179</sup>

As the courts wrestle with the scope of Title III and attempt to clarify which entities are public accommodations subject to the ADA, some plaintiffs and attorneys will likely continue to exploit the uncertainty to extort quick settlements from businesses to obtain attorneys’ fees that do little to improve conditions for individuals with disabilities. More is needed to balance the rights of aggrieved individuals with the need to protect the courts and members of the public from abusive litigation practices that do little to advance the goals of the ADA.

### III. RECOMMENDATIONS

Despite the significant role attorneys have played in developing laws that benefit society, the public perception of attorneys has always suffered from the acts of a limited number of bad actors that cast the profession in a bad light.<sup>180</sup> In 2013, Americans ranked lawyers last

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(Nov. 23, 2015), <http://www.adatitleiii.com/2015/11/justice-department-delays-web-accessibility-regulations-for-at-least-three-more-years-leaving-businesses-in-turmoil/>.

<sup>175</sup> Minh Vu, *Nine U.S. Senators Urge Obama Administration to Issue Title III Website Regulations ASAP*, SEYFARTH SHAW (Jan. 11, 2016), <http://www.adatitleiii.com/2016/01/nine-u-s-senators-urge-obama-administration-to-issue-title-iii-website-regulations-asap/>.

<sup>176</sup> According to the U.S. Census Bureau, there were 102,728 e-commerce retailers in the United States in 2013. Mikal E. Belicove, *How Many U.S.-Based Retail Stores are on the Internet?*, FORBES (Sept. 18, 2013), <http://www.forbes.com/sites/mikalbelicove/2013/09/18/how-many-u-s-based-online-retail-stores-are-on-the-internet/#41dc3cd143da>.

<sup>177</sup> Nat’l Fed’n of the Blind v. Uber Tech., Inc., 103 F. Supp. 3d 1073, 1076 (C.D. Cal 2015) (denying motion to dismiss).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1083–84.

<sup>180</sup> Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1408 (1999) (discussing the long history of public perception issues suffered by members of the legal community).

among ten other groups of professionals with regard to their contribution to society.<sup>181</sup> Today, there are websites available that warn society of the “10 ways lawyers rip off clients,” which exacerbate the negative stereotypes of the profession.<sup>182</sup> Much of the negative public opinion of attorneys is based on fundamental misunderstandings of the role of lawyers in the adversary system, misguided media portrayals, or limited knowledge of the positive aspects of the legal profession.<sup>183</sup> However, some of the negative perception is justified based on improper, self-serving actions taken by a small number of unscrupulous attorneys to the detriment of the consuming public.<sup>184</sup> Allowing vexatious ADA access litigation to continue will only serve to increase the public’s negative perception of lawyers.

Through the majority of this country’s history, individuals with disabilities were ostracized from mainstream society and remained largely invisible under the laws of the nation.<sup>185</sup> After nearly two hundred years, attorneys, together with other advocates, succeeded in crafting a comprehensive civil rights law that guaranteed equality of access for all individuals with disabilities.<sup>186</sup> As a result of the ADA, the invisible became visible, and society was forced to take note of the problems with unequal accessibility.<sup>187</sup> Over the last several decades since passage of the ADA, society has acquiesced in the advancement of disability rights through litigation aimed at forcing compliance with the ADA. Fee-driven lawsuits that do not serve to ensure compliance with the ADA will add to the declining public perception of lawyers, and threaten to undermine the significant advancements made through the disability rights movements. The legal profession, including the courts, must address these concerns and hold attorneys more accountable for their harmful actions. The

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<sup>181</sup> Debra Cassens Weiss, *How Much Do People Think Lawyers Contribute to Society? Less than 9 Other Professions, Survey Says*, ABA J. (Jul. 22, 2013, 12:53 PM), [http://www.abajournal.com/news/article/how\\_much\\_do\\_lawyers\\_contribute\\_to\\_society\\_less\\_than\\_nine\\_other\\_professions\\_/](http://www.abajournal.com/news/article/how_much_do_lawyers_contribute_to_society_less_than_nine_other_professions_/); see also *Public Esteem for Military Still High*, PEW RESEARCH CTR. (Jul. 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/>.

<sup>182</sup> *10 Ways Lawyers Rip Off Clients*, BUSINESS INSIDER (Jul. 10, 2013, 11:56 AM), <http://www.businessinsider.com/10-ways-lawyers-rip-off-clients-2013-7>.

<sup>183</sup> See Wm. T. Robinson III, *Lawyers Do Well by Doing Good*, ABA J. (Oct. 1, 2011, 9:40 AM), [http://www.abajournal.com/mobile/mag\\_article/lawyers\\_do\\_well\\_by\\_doing\\_good/](http://www.abajournal.com/mobile/mag_article/lawyers_do_well_by_doing_good/) (describing the positive aspects of pro bono work); Randall Ryder, *What Have You Done to Improve Lawyers Public Image?*, LAWYERIST.COM (Jul. 1, 2011), <https://lawyerist.com/29458/improve-lawyers-public-image/> (describing ways in which lawyers can work to change negative public opinion); see also Gross, *supra* note 180, at 1421–22.

<sup>184</sup> Gross, *supra* note 180, at 1422.

<sup>185</sup> Wendy Taormina-Weiss, *The Cost of Marginalizing People with Disabilities*, DISABLED WORLD (Feb. 24, 2012), <http://www.disabled-world.com/editorials/marginalizing.php>.

<sup>186</sup> See generally 42 U.S.C. § 12101 (2012) (describing the purpose of the ADA, which seeks to end discrimination against individuals with disabilities).

<sup>187</sup> See Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <http://dredf.org/news/publications/the-history-of-the-ada/>.

Model Rules of Professional Conduct provide some guidance for courts and the Bar, but other steps must be taken to amend the ADA to limit its misuse in cases that fail to advance the goals of the Act.

*A. Impose Pre-Filing Restrictions for Abusive Litigation*

The increase in vexatious ADA Title III litigation is problematic for individuals with disabilities and harms the public's perception of the legal community. Although the ADA encourages use of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, and arbitration, to resolve disputes arising under the Act,<sup>188</sup> today some attorneys motivated by personal gain bypass this approach in favor of direct litigation to obtain attorneys' fees and costs. Because the larger community has allowed the legal profession the right of self-regulation,<sup>189</sup> the legal community should take action to address these abusive litigation practices that often do little to advance the law.

The preamble to the ABA Model Rules of Professional Conduct ("Model Rules") provides, "The legal profession's relative autonomy carries with it special responsibilities of self-government.<sup>190</sup> The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."<sup>191</sup> The Model Rules add that "[a] lawyer should strive to . . . improve the law and the legal profession and to exemplify the legal profession's ideals of public service."<sup>192</sup> Subsection 5 of the Preamble states: "[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."<sup>193</sup>

These rules bind the lawyers who bring cases as well as members of the judiciary charged with evaluating the cases and determining whether attorneys' fees are warranted. Lawyers who engage in the serial filing of ADA Title III access cases may not violate the letter of these rules where each individual case standing alone has merit. However, where the same attorney routinely brings nearly identical claims against parties under the ADA and adds state law claims seeking damages, fees and costs, courts should be required to evaluate the attorney's litigation history more

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<sup>188</sup> See, e.g., U.S. DEP'T JUST., *ADA Mediation Program: Questions and Answers*, ADA.GOV (Jan. 3, 2014), [http://www.ada.gov/mediation\\_docs/mediation-q-a.htm](http://www.ada.gov/mediation_docs/mediation-q-a.htm).

<sup>189</sup> See William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 458, 488 (1995).

<sup>190</sup> MODEL RULES OF PROF'L CONDUCT Preamble & Scope (AM. BAR ASS'N 1983).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

closely to determine whether the lawyer is abusing the process. The Model Rules support such judicial intervention as a means of regulating attorney behavior that may be prejudicial to the administration of justice. However, courts must balance this right to regulate members of the legal community with an individual's fundamental constitutional right of access to the courts.<sup>194</sup>

The All Writs Act authorizes the United States federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>195</sup> This Act has been interpreted to provide federal courts with the inherent power to regulate activities of abusive litigants through imposition of carefully tailored pre-filing restrictions when appropriate.<sup>196</sup> More courts should consider the appropriateness of this action when reviewing the records of those individuals who repeatedly file ADA Title III access cases. Courts have found that limited pre-filing restrictions may be appropriate where: (1) the court provides the litigant with notice and an opportunity to oppose the pre-filing order before it is entered; (2) the court compiles an adequate record for appellate review, including "a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed"; (3) the court makes substantive findings of frivolousness or harassment; and (4) the court narrowly tailors the pre-filing "to closely fit the specific vice encountered."<sup>197</sup> The last two factors are useful to identify a vexatious litigant and steps needed to stop abusive practices.

Federal courts utilize a five-step process to identify vexatious litigants and to determine whether to impose a pre-filing order.<sup>198</sup> These include: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.<sup>199</sup> The last factor is important be-

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<sup>194</sup> See *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998); *Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990).

<sup>195</sup> 28 U.S.C. § 1651 (2012).

<sup>196</sup> See *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990) (noting that Federal courts can "regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances") (citing *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989)).

<sup>197</sup> *Id.* at 1147–48.

<sup>198</sup> *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986).

<sup>199</sup> *Id.*



cause it suggests that steps short of pre-filing restrictions should be taken if possible. For the ADA Title III access cases, this raises a complex issue because often the underlying individual claims are meritorious. It is relatively easy to identify a violation of the ADA.<sup>200</sup> Thus, courts may be particularly reluctant to restrict access where a litigant can argue that the underlying claims are meritorious. Instead, courts should look beyond the merits of the case to determine the true purpose of the litigation. Courts have recognized that individually, the fact that a federal plaintiff has filed a large number of complaints or that the complaints are factually similar does not warrant designating a litigant as “vexatious” and imposing pre-filing orders restricting access to the court.<sup>201</sup> However, evidence of an attorney’s willful abuse of judicial process, bad faith conduct during litigation, or filing of frivolous papers justify imposing limited sanctions against an attorney that do not have the effect of making it impossible for the attorney to pursue meritorious ADA litigation in district court.<sup>202</sup>

### B. *Impose a Notice Requirement*

Title III of the ADA was patterned after Title VII of the Civil Rights Act of 1964 (“Title VII”). Title III provides that “[t]he remedies and procedures set forth in section 2000a-3(a) of [Title VII] are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability . . . .”<sup>203</sup> Title VII includes the requirement that a plaintiff refer a complaint to a state agency for resolution and wait thirty days before filing suit in federal court where the state has enacted laws prohibiting the discriminatory conduct.<sup>204</sup> However, courts have held that Title III of the ADA does not require a plaintiff to exhaust administrative remedies or to provide notice prior to bringing a claim for injunctive relief against a private entity.<sup>205</sup> Thus, unlike other laws, Title III of the ADA does not require a litigant to provide notice to the alleged violator prior to filing suit in federal court.<sup>206</sup> This is advantageous to litigants because it provides little opportunity for alleged violators to take steps to remedy the violation and

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<sup>200</sup> See Tiffany Carlson, *10 Infuriating and All Too Common ADA Violations that Need to Stop. Now.*, HUFFINGTON POST (Oct. 8, 2013, 11:48 AM), [http://www.huffingtonpost.com/2013/10/08/ada-violations\\_n\\_4064270.html](http://www.huffingtonpost.com/2013/10/08/ada-violations_n_4064270.html).

<sup>201</sup> See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1059 (9th Cir. 2007).

<sup>202</sup> See generally Model Rules of Prof'l Conduct r. 8.4 (AM. BAR ASS'N 1983) (stating that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct).

<sup>203</sup> 42 U.S.C. § 12188(a)(1) (2012).

<sup>204</sup> See *id.* § 2000a-3(c).

<sup>205</sup> See *Bercovitch v. Baldwin Sch.*, 964 F. Supp. 597, 605 (D. P.R. 1997), *rev'd on other grounds by Bercovitch v. Baldwin Sch.*, 133 F.3d 141 (1st Cir. 1998).

<sup>206</sup> See *id.*; see also *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000).

render the case moot. Congress has considered and rejected attempts to impose a notification requirement to avoid this problem, in part, because such a requirement may create a disincentive for businesses to take steps to comply with the ADA until they receive notice.<sup>207</sup> In 2000, Bill H.R.3590, the ADA Notification Act, was introduced into the House of Representatives.<sup>208</sup> The Bill sought to amend Title III of the ADA by denying jurisdiction to a court in a civil action for remedies for disability discrimination in public accommodations unless the plaintiff first provided notice of the alleged violation and provided the defendant with a ninety-day period to take corrective action.<sup>209</sup> The Bill allowed for the imposition of an appropriate sanction upon attorneys who filed a claim without providing proper notice, and prohibited an award of attorneys' fees (including litigation expenses) or costs if the sanctioned attorney subsequently brought the action.<sup>210</sup>

When H.R.3590 was brought to the floor for debate, Chairman Charles T. Canady acknowledged that "the progress brought about by the ADA is being threatened by a growing number of lawyers who are generating large sums in legal fees for pointing out often simple fixes that would bring properties into compliance with the ADA."<sup>211</sup> He opined that the "litigation abuse" was due to the absence of a notice proviso in the ADA.<sup>212</sup> He added,

This gap in the law now poses a danger that attorneys will continue to exploit it and needlessly foment ill will between the disabled community and small property owners who would in good faith bring properties into compliance with the ADA if only they were alerted to the law's requirements.<sup>213</sup>

The Bill's sponsor, Congressman Foley asserted, "the ADA is being used by some attorneys to shake down thousands of businesses from Florida to California. And they're doing so at the expense of people with disabilities."<sup>214</sup> In advocating for the addition of a notice requirement, Foley argued,

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<sup>207</sup> See generally Adam A. Milani, *Go Ahead. Make My 90 Days: Should Plaintiffs Be Required to Provide Notice to Defendants Before Filing Suit Under Title III Of The Americans with Disabilities Act?* 2001 WIS. L. REV. 107, 131–32 (2001) (discussing the risks of including and removing the notice requirement from Title III).

<sup>208</sup> H.R. 3590, 106th Cong. (2d Sess. 2000).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *The ADA Notification Act: Hearing on H.R. 3590 Before Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 2000 (2000) (statement of Chairman Charles T. Canady).

<sup>212</sup> *Id.* at 9.

<sup>213</sup> *Id.*

<sup>214</sup> *Hearing on H.R. 3590* at 15 (statement of Rep. Mark Foley).

[M]ost of the businesses that had been sued had no idea they were violating the ADA. And most didn't need a lawsuit to force them to make simple corrections, like adding parking signs or repainting old ones. A simple notice telling them they were out of compliance and vulnerable to a lawsuit would have probably done the trick.<sup>215</sup>

Disability rights advocates argued against imposing a notice requirement on Title III plaintiffs. Christine Griffin, then Executive Director of the Disability Law Center, asserted that imposing a notice requirement would harm individuals with disabilities without making any of the public accommodations comply with the law.<sup>216</sup> She added that amending the ADA to add a notification requirement would “remove the primary incentive for businesses to take the initiative to ensure access to their goods and services . . . [because] the primary economic motivation to voluntarily comply with the law is the prospect of paying attorneys’ fees to plaintiff’s counsel if a Title III violation is proven.”<sup>217</sup> Another disability lawyer opined that adoption of a notice requirement would create a disincentive for people to “consider complying with the law until (and unless) they get a letter.”<sup>218</sup> The net result, he said, would be “less voluntary compliance” with the ADA’s accessibility requirements.<sup>219</sup> However, these justifications may not be as strong in 2016 as they were in 2000. States have supplemented the ADA through their own state disability laws to allow for damages, which provide additional incentives for plaintiffs and attorneys to bring suit today and for businesses to comply with the law.<sup>220</sup>

The disability lawyer then added that the ADA had been in existence for a decade, and “[a]nyone who truly cares about accessibility has had ample opportunity to find out what the law requires and to conform their conduct to the law.”<sup>221</sup> The Bill was never enacted into law. Similar bills have been introduced in subsequent years and have met the same fate.<sup>222</sup>

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<sup>215</sup> *Id.* at 21.

<sup>216</sup> *Hearing on H.R. 3590* at 61–62 (statement of Christine Griffin).

<sup>217</sup> *Id.* at 62.

<sup>218</sup> *Hearing on H.R. 3590* at 94 (statement of Andrew D. Levy).

<sup>219</sup> *Id.*

<sup>220</sup> See Stephen A. Rosenbaum, *Disability Rights and Public Accommodations: State-by-State*, 2000 SE. ADA CTR. 1, 10, 16, 24, [http://adasoutheast.org/publications/ada/public\\_accommodations\\_disability\\_rights\\_state-by-state\\_Final.pdf](http://adasoutheast.org/publications/ada/public_accommodations_disability_rights_state-by-state_Final.pdf).

<sup>221</sup> *Hearing on H.R. 3590* at 97.

<sup>222</sup> H.R. 3479, 110th Cong. (1st Sess. 2007); H.R. 2397, 111th Cong. (1st Sess. 2009); H.R. 881, 112th Cong. (1st Sess. 2011); H.R. 777, 113th Cong. (1st Sess. 2013).

The broad coverage provided under the ADA resulted from a “fragile compromise” reached that limited the remedies under ADA Title III to injunctive relief.<sup>223</sup> Congress agreed to increase the scope of coverage in return for eliminating damage awards for private actions.<sup>224</sup> The compromise was made, in part, based on concerns raised by Attorney General Thornburgh that,

(1) businesses could not make accurate predictions of the types of modifications required because the ‘readily achievable’ compliance standard was not well defined . . . (2) the remedies for violations of ADA Title III should parallel the pre-existing remedies already present under CRA Title II, rather than the broader remedies existing in the FHA, and (3) the scope of businesses covered by ADA Title III should be narrowed so as not to impose undue hardship on small businesses.<sup>225</sup>

In the years immediately following the passage of the ADA, the limited scope of relief available under Title III served as a disincentive to litigate such claims. Although it was then recognized that “plaintiffs have a somewhat easier time prevailing under ADA Title III than ADA Title I,” plaintiffs were “not very inclined even to attempt litigation under ADA Title III.”<sup>226</sup> From 1992 to 1998, one study showed that 475 cases were litigated under ADA Title I (the employment title), but only twenty-five Title III appellate decisions were rendered during the same time period.<sup>227</sup> The limited scope of relief available under Title III served to protect businesses just as the Attorney General and others had hoped, but that has changed. Today, most ADA claims are brought under Title III due to the implementation of certain state disability laws.

As states such as California and Florida acted to fill remedial gaps under the ADA, new opportunities to obtain damage awards in Title III litigation followed. Today, a growing number of businesses are subjected to ADA Title III suits.<sup>228</sup> This increase might be considered desirable if it were clear that: (1) the businesses sued were aware of the ADA violations, had adequate time to correct the issue, but failed to do so; and (2) the litigation was brought on behalf of an aggrieved individual for the primary purpose of fulfilling the goals of the ADA. In many instances,

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<sup>223</sup> Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. 377, 377–78 (2000).

<sup>224</sup> *See id.* at 378.

<sup>225</sup> *Id.* at 384.

<sup>226</sup> *Id.* at 400.

<sup>227</sup> *See id.*

<sup>228</sup> See Cory Iannacone, *Follow Up: ADA Litigation Abuse Under Title III of the Americans with Disabilities Act (“ADA”)*, RHOADS & SINON LLP (Apr. 2012), <http://www.rhoadssinon.com/updates-62.html>.

one or both of these justifications are absent.<sup>229</sup> Although some businesses intentionally disregard clear violations of the ADA on their premises, others unintentionally run afoul of the Act.<sup>230</sup> This is because the broad scope of the ADA raises an almost incomprehensible number of ways in which a plaintiff may show that the statute has been violated. In fact, the problem is so profound that California created a new state agency charged with providing certification training for individuals to become state Certification Access Specialists (“CAS”).<sup>231</sup> Because full compliance with the ADA and state disability laws can be difficult for businesses to achieve, some businesses hire Certified Access Specialists to conduct an audit of its place of public accommodation and certify that it is compliant with the ADA, as well as applicable state laws and regulations.<sup>232</sup> The development of, and need for, this specialized field demonstrates that many businesses may not even be aware of violations on their premises.

Opponents to the imposition of a Title III notice requirement assert requiring a plaintiff to provide notice of a violation will serve to insulate businesses from lawsuits and provide no corresponding benefit to aggrieved parties. Some have argued that the only meaningful way to promote compliance with the ADA is to encourage private lawsuits that seek attorney’s fees, and that requiring notice will discourage private action.<sup>233</sup> Proponents of a notice requirement assert that the current scheme unfairly and unnecessarily increases litigation. Both arguments have merit, but the current wave of fee-driven, “shotgun” Title III litigation supports amending Title III to add a notice requirement for several reasons.

Requiring a plaintiff to provide pre-suit notice under the ADA provides businesses acting in good faith, but in violation of the ADA, with an opportunity to remedy the violation before being subjected to costly litigation that, in the end, may make it impossible for the business to pay for the changes needed to become compliant. Shotgun litigation practices do little to ensure compliance or to cure accessibility issues. If a plaintiff’s true goal is to affect changes that lead to greater accessibility for disabled individuals, a short notice requirement (30 days as is similar to Title VII, not 90 days as suggested by previous proponents) imposes a minimal hardship in view of the potential benefits that could be obtained.

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<sup>229</sup> See *id.*

<sup>230</sup> See SoCal CASp, <http://socalcasp.com/> (last visited Apr. 22, 2016).

<sup>231</sup> See CAL. CIV. CODE § 55.52(a)(3) (2016); see also Frank W. Chen, *Advising Clients Regarding ADA Accessibility Lawsuits in California*, SAN GABRIEL VALLEY BAR ASS’N (Feb. 1, 2016), <http://www.sgvba.org/articles/ADA.pdf>.

<sup>232</sup> See Div. of the State Architect, <http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx> (last visited Apr. 22, 2016).

<sup>233</sup> See *Colker*, *supra* note 223, at 400.

Given that the ADA has been in effect since 1990, businesses acting in good faith should already be in compliance with most ADA requirements. Providing businesses with a thirty-day notice period to correct unknown violations will help ensure that effective action is taken to increase accessibility in public accommodations.

Requiring an aggrieved party to wait thirty days before filing a lawsuit imposes a burden on the individual, but provides at least three significant benefits that should be considered. First, serving notice gives many businesses the opportunity to redirect money that would be spent in litigation toward correcting the accessibility issues identified. Second, courts that have experienced the abusive serial ADA litigation in the past may be less likely to dismiss such cases prematurely where there is evidence the plaintiff is acting in good faith by providing notice and an opportunity to cure. Third, because courts retain discretion to award attorney's fees and costs,<sup>234</sup> courts may issue higher awards against businesses that fail to take corrective action after being properly notified of a violation. A thirty-day notice period would also help limit any potential backlash against individuals with disabilities that might occur if abusive litigation is wrongly brought under the guise of helping the disabled. The impact these types of suits will have on the general societal perspective of individuals with disabilities is unclear, but worthy of consideration given the long history of discrimination against the disabled community.

Thus, requiring plaintiffs to provide pre-suit notice to businesses that are not in compliance with the ADA can serve to limit serial litigation and protect businesses from vexatious lawsuits while advancing the underlying goals of the ADA.

#### CONCLUSION

The ability to profit off of the ADA and state disability laws is troubling, but it is made worse by the reality that there is no effective mechanism in place to ensure that the ADA violations underlying these lawsuits are ever cured. Individuals with disabilities, and the attorneys that represent them, must work together with public accommodations to live up to both the letter and the spirit of the ADA.

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<sup>234</sup> See *Moriarty v. Svec*, 233 F.3d 955, 964 (7th Cir. 2000).