Preserving Protections

Curbing ADA Litigation Abuse

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Contents

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Executive Summary

Chapter

01

The Americans with Disabilities Act (ADA) was enacted in 1990 to mandate that individuals with disabilities are provided the same opportunities as others to gain employment, participate in state and local government programs, and purchase goods and services.

Among its provisions, Title III of the ADA prohibits discrimination by places of public accommodation—almost every business or facility open to the public. The ADA and its implementing regulations create several requirements for businesses to ensure that individuals are not excluded or denied services. By complying, businesses can ensure that they are accessible to the approximately one in four American adults living with some type of disability.[1]

More than 30 years after the ADA's enactment, the state of Title III litigation bears little resemblance to its important, accessibility-focused purpose. Rather, a small group of plaintiffs' firms is exploiting the ADA by filing thousands of boilerplate lawsuits of questionable merit, driven by the prospect of attorneys' fees. These attorneys, and the individual plaintiffs they use to file these cases, now account for the vast majority of all Title III cases. The possibility of expensive litigation, and damages where state law allows, pushes most defendants—frequently small businesses—to settle in order to avoid bankruptcy. Yet, some fight. And in these fights, they have exposed questionable behavior by this new cottage industry. Some attorneys admit to driving around neighborhoods looking for targets to sue. Others have been accused by courts and prosecutors of filing false affidavits.

Although these few plaintiffs' firms are blatantly exploiting an otherwise well-intended law, their abuses have proven difficult to curtail. State-level reforms have been helpful—but the plaintiffs' firms have found ways to circumvent the obstacles by pairing state and federal claims and filing in federal court. To more effectively rein in the abusive ADA litigation, state legislation must be met with parallel reforms at the federal level. This paper explores the state of play in ADA litigation and offers solutions to restore the ADA to its accessibility-focused intent and prevent a litigation cottage industry from weaponizing disability protections for its own profit. These solutions include federal and state implementation of notice-and-cure provisions, heightened pleading standards, and broader enactment of safe harbor provisions. Additionally, ADA litigation abuse can be curbed through clearer regulations and more strict judicial enforcement of Article III's personal, concrete injury requirement.

Introduction

Chapter

02

The ADA was the result of a long process to develop "comprehensive legislation to ban discrimination against persons with disabilities" and to "open up all aspects of American life to individuals with disabilities."[2]

Through the ADA, Congress expressed its intent "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" and also "ensure that the Federal Government plays a central role in enforcing" these standards "on behalf of individuals with disabilities."[3] Congress also declared its intent to "invoke the sweep of congressional authority," including under the Fourteenth Amendment and the commerce power, to address the discrimination disabled people face "day-to-day."[4]

Because the ADA seeks to prevent discrimination in all areas of life, its several titles are expansive. Title I prohibits discrimination in employment opportunities.[5] Title II prohibits discrimination by all state and local government entities and requires them to provide disabled persons with equal access to programs and services.[6] Title III prohibits discrimination by places of public accommodation and requires them to make goods and services accessible to disabled patrons.[7] And Title IV requires telecommunications companies to ensure that people with disabilities have access to equivalent communication services.[8]

The ADA is also expansive in terms of whom it protects. After U.S. Supreme Court decisions read the definition of disability narrowly, Congress amended the ADA in 2008 to broaden the definition to include individuals with a physical or mental impairment that substantially limits one or more major life activities, such as hearing, seeing, walking, or bending.[9] The government has recently estimated that more than 60 million Americans (one out of every four adults) have some type of disability.[10]

Title III

The focus of this paper is Title III of the ADA, which mandates that "[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."[11] The "places of public accommodation" covered by Title III are facilities that are "operated by a private entity, whose operations affect commerce" and that fall within at least one of twelve enumerated public accommodation categories, including hotels, restaurants, grocery stores, banks, gas stations, barber shops, entertainment venues, museums, and

places of recreation.[12] This expansive definition means that "[v]irtually every privately operated business or facility open to the public" is subject to Title III.[13]

Title III defines various acts that constitute unlawful discrimination by places of public accommodation. General prohibitions include denying disabled patrons the opportunity to participate or providing access to only unequal or separate benefits.[14] Title III also provides several categories of acts and omissions that constitute discrimination against disabled patrons.

These include:

- failing to make "reasonable modification[s]" to policies, practices, or procedures necessary to provide access to businesses; and
- failing to take "steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[15]

Such actions are required unless they would fundamentally alter the nature of the business or pose an undue burden. Businesses are also obligated to take steps to make their facilities physically accessible, including removing architectural and communication barriers from existing facilities where such removal is readily achievable, and designing new facilities so they are readily accessible, unless doing so would be "structurally impracticable."[16]

As instructed by Congress, the U.S. Department of Justice (DOJ) has issued several regulations to implement Title III. These regulations include the DOJ's "Standards for Accessible Design," which contain detailed specifications covering all aspects of design.[17] The DOJ has also issued guidance, including an "ADA Title III Technical Assistance Manual," that attempts to explain Title III and its regulations in an understandable manner to promote compliance.[18] As an example of the breadth of these standards, "a single bathroom must meet at least 95 different

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standards from the height of the toilet paper dispenser to the exact placement of hand rails."[19] While some standards are highly detailed, observers have described other standards as vague and open to disagreement.[20] These vague regulations in particular have frustrated business owners who want to know what steps they must take to comply, but receive different answers from consultants, inspectors, and attorneys.[21]

Congress authorized two avenues to enforce Title III: (1) a private right of action, and (2) a right of action by the U.S. attorney general.[22] For actions by private individuals, prevailing plaintiffs are entitled to injunctive relief as well as attorneys' fees and costs.[23] The ADA does not allow these individuals to recover monetary damages absent personal injury.

State and Local Disability Laws

Many state and local governments have their own civil rights laws that supplement and overlap with the ADA and require businesses to make their facilities accessible to disabled patrons. Some, like California's Unruh Civil Rights Act, provide that a violation of the ADA is automatically a violation of state law.[24] Others provide more expansive protections. For example, the Illinois Human Rights Act, New York State Human Rights Law, and New York City Human Rights Law protect individuals with impairments and do not require that a disability "substantially limit" one or more major life activities.[25] Another major difference between the ADA and state disability laws is the availability of damages. While the ADA does not provide for damages absent physical injury, many states permit a plaintiff to sue for damages without this requirement. Some, like New York, allow for actual damages, and others, like California's Unruh Act, set a minimum damage amount of $4,000 per violation.[26] Other states, including Florida and Pennsylvania, set maximum damages amounts for violations of their anti-discrimination laws.[27] The practical consequence of this situation is that a plaintiff in states like California that authorize damages may obtain "a damages remedy that is not available under the ADA" when they file in federal court.[28]

The Landscape: A Litigation Cottage Industry

Chapter

03

The ADA and its state counterparts have been the catalyst for accessibility improvements across the country. Businesses nationwide support the ADA's anti-discrimination principle. Yet, this well-intentioned law has created unintended consequences.

Three decades after its enactment, much ADA litigation has nothing to do with accessibility, but rather has become characterized by abusive lawsuits run by a small group of lawyers and law firms that enlist repeat "tester plaintiffs" and seek automatic attorneys' fees.[29] Because many matters settle upon receipt of a threatening demand letter and before a case is actually filed, there are actually more examples of this practice than can be tracked through the court system.

Explosion of ADA Cases

The number of federal lawsuits under Title III of the ADA has exploded in recent years. According to Lexis' Lex Machina database, in 2013, there were 3,535 ADA lawsuits filed.[30] By 2016, that number doubled to 7,519. In 2017, there were 8,699 such suits. And, from 2018 through 2022, there were more than 11,000 ADA lawsuits filed each year. Notably, 2021 saw a staggering 12,298 filings—a 349 percent increase over just nine years. While new ADA case filings slowed somewhat in 2022 to 9,529, as shown in Figure 1, new cases in 2023 are yet again set to surpass the 10,000 mark.[31] The Administrative Office of the U.S. Courts has independently confirmed the expansion of ADA litigation. It calculated a 395 percent increase in ADA case filings between 2005 and 2017.[32] Thus, it seems reasonably clear that there has been a three- to four-fold increase in ADA litigation in recent years—an increase that is placing significant burdens on the court system and on small businesses.

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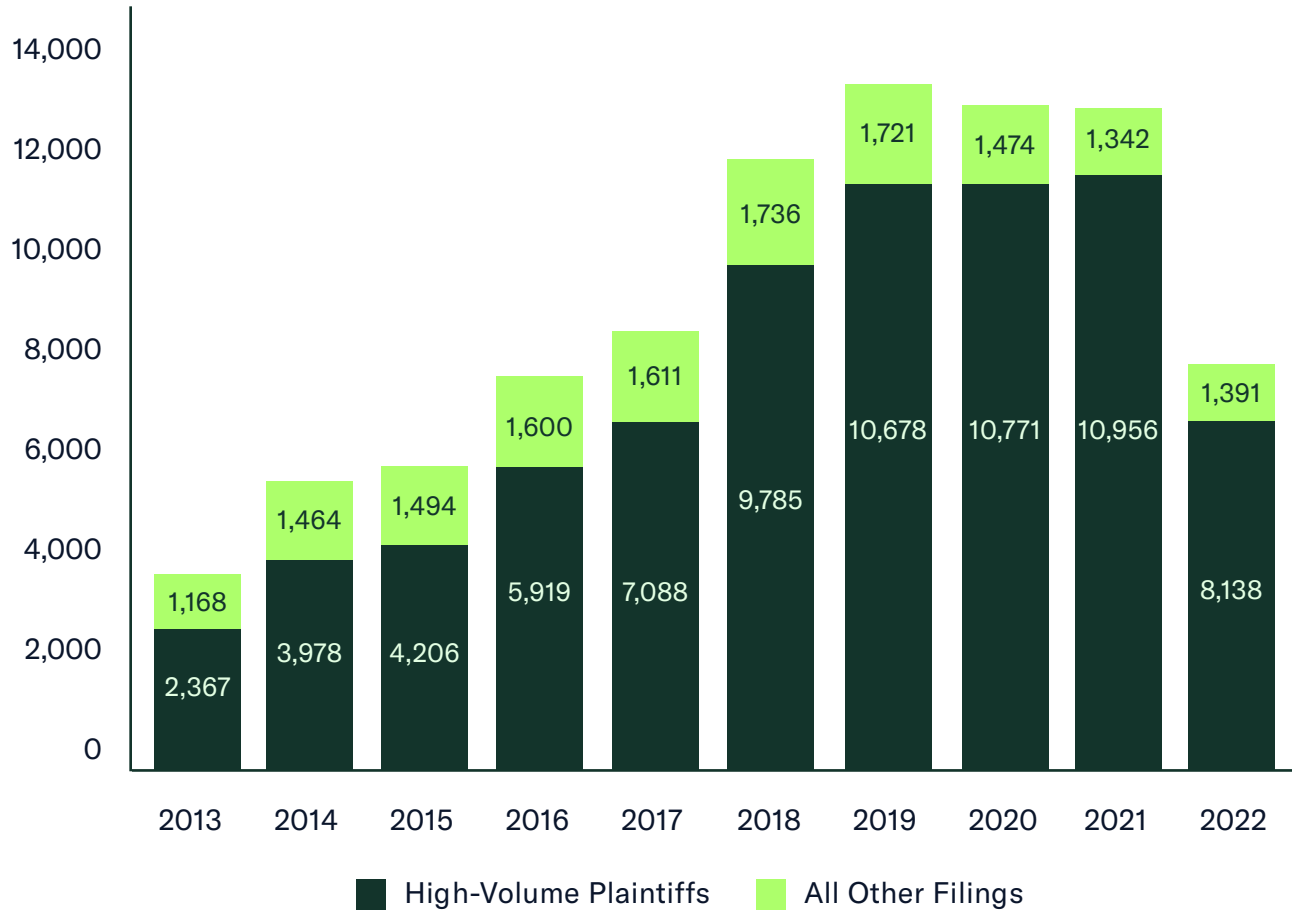
more than 80 percent of all ADA cases have been brought on behalf of "high-volume plaintiffs"—those who file at least eight cases in a year.[33] These serial filers account for an even greater percentage of all filings (more than 86 percent) over the past five years. Interestingly, from 2013 through 2022, the number of cases filed by non-serial filers has stayed relatively consistent, between a low of 1,168 and a high of 1,736. Conversely, the number of cases brought by serial plaintiffs (and their lawyers) more than quadrupled during this time.

The relatively small number of plaintiffs' firms responsible for this litigation explosion have

Figure 1: ADA Case Filings (2013-2022)



had an outsized impact on courts and businesses alike. Between January 1, 2009, and April 21, 2023, 18 firms each filed more than 1,000 ADA lawsuits. Six firms accounted for more than 2,000 suits each. The largest filing volume by far—with 13,340 lawsuits—came from California-based Potter Handy. Together, these 18 firms with more than 1,000 lawsuits each accounted for a total of 44,976 cases, or 44 percent of all ADA case filings over the period. The next tranche of firms—the 27 firms that filed between 500 and 999 ADA cases—accounted for 20,150 cases, or 19 percent of all ADA cases. A final group of 109 firms filed between 100-499 cases each, accounting for 22,906 new filings, or 22 percent of all ADA cases during the study period.

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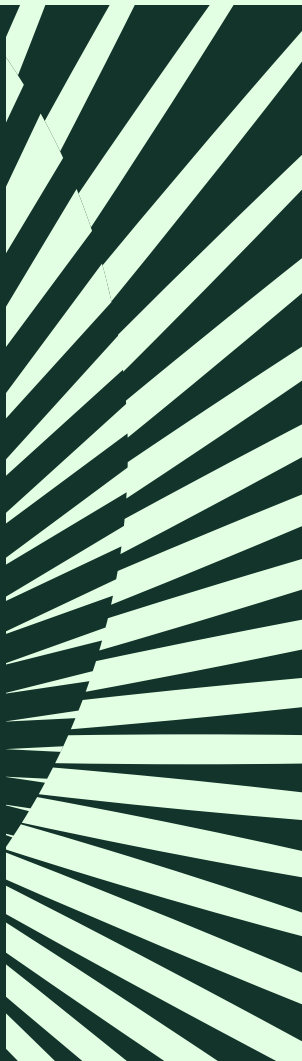
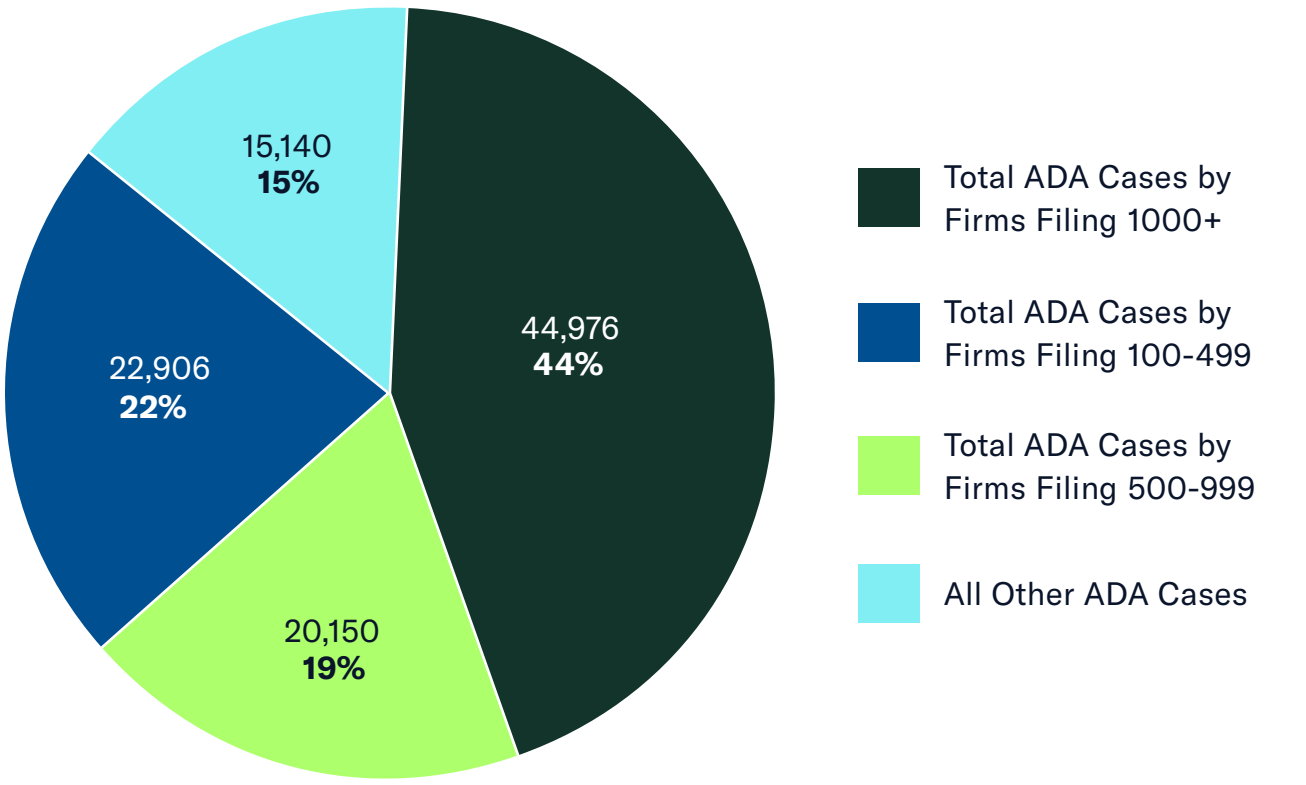


The pace at which these firms file new cases is staggering. Between January 1, 2023, and April 21, 2023—a period of 110 days—three firms filed more than one case per day. So. Cal. Equal Access Group, with 371 cases, averaged nearly 3.5 cases per day. Mars Khaimov Law (212 cases) and Stein Saks (146) likewise far exceeded one case a day. Three other firms filed nearly 100 cases in this short period.

These plaintiffs' firms typically file in only a few jurisdictions, causing a geographic imbalance. California, New York, and Florida account for the vast majority of these suits. Of the 103,172 ADA cases

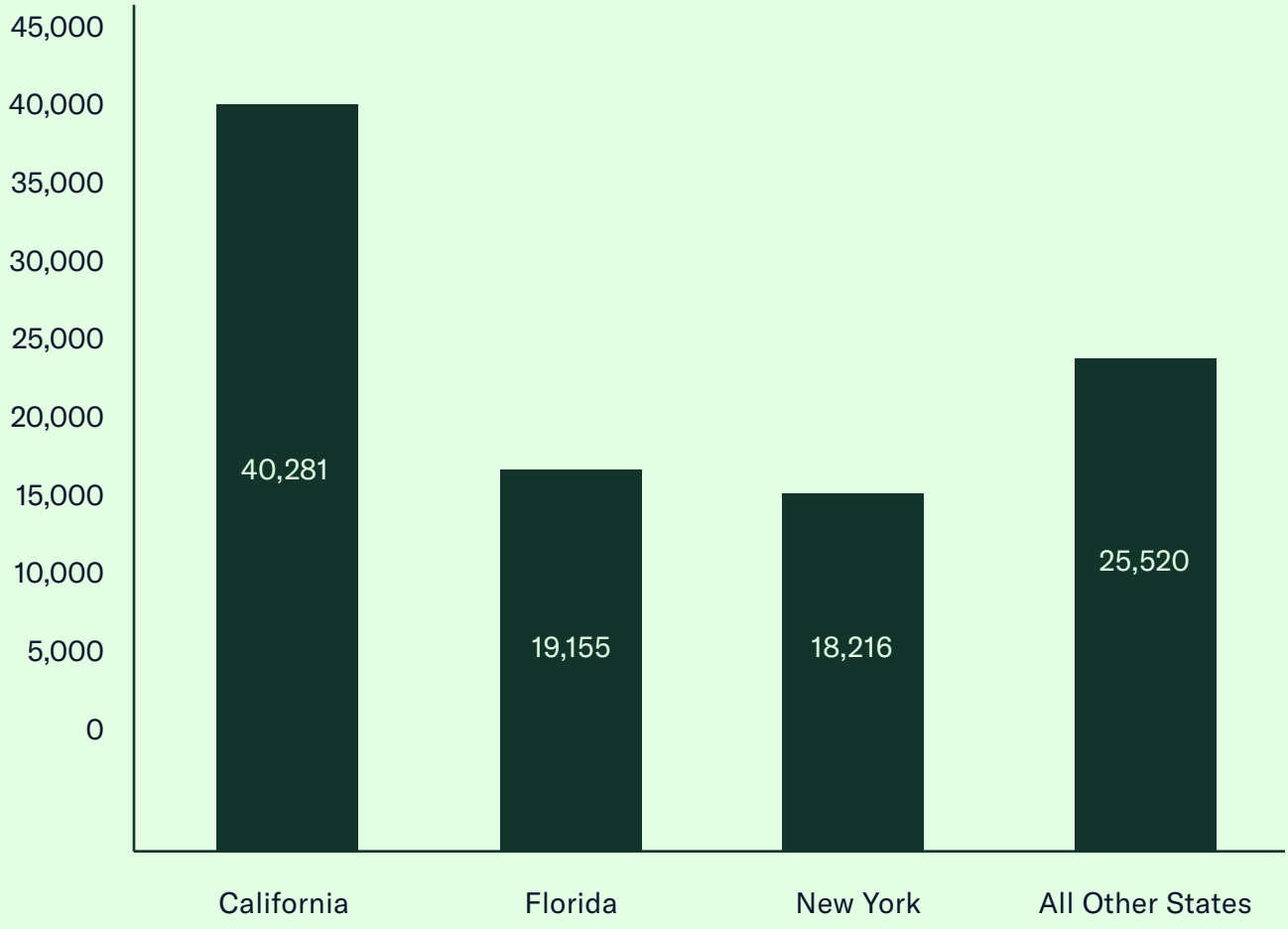
Figure 2: Frequent Filing Firms – ADA Filings By Law Firm (Jan. 1, 2009 – April 21, 2023)



filed since 2009, nearly 75 percent were filed in one of those three states. The percentage of ADA filings in these states has been even higher in recent years, at 77 percent in 2022 and 82.7 percent in 2021.

The high volume and concentration of filings predictably places a great burden on district court dockets in these jurisdictions. In 2022, these serial filers accounted for 12 percent of all civil cases filed in the Southern District of Florida, 12.7 percent of all civil cases filed in the Central District of California, and 20.8 percent of all civil cases filed in the Southern District of New York.[34]

Figure 3: Federal Court ADA Filings (Jan. 1, 2009 – April 21, 2023)



Private Enforcement Has Invited Abuses, Despite ADA's Laudable Goals

Chapter

04

These cases are notable not only for their sheer volume, but also for the questionable tactics of some of the attorneys pursuing them—tactics that prosecutors, litigants, courts, and the news media have exposed.

"Drive-By" Lawsuits

The first well-documented phenomenon common in these serial cases is the "drive-by" lawsuit. This tactic involves attorneys, joined by tester plaintiffs or consultants, who simply drive around town looking for violations, without ever getting out of their cars.[35] These drive-by lawsuits are particularly problematic because the disabled plaintiffs do not necessarily encounter any physical barriers themselves.[36]

A *60 Minutes* investigation exposed an even more egregious litigation approach, in which some attorneys do not even "drive by" the location.[37] Rather, as the investigation revealed, some attorneys targeted businesses from their own home or office using applications like Google Earth and Google Maps to view characteristics of the target property, such as the absence of a pool lift. A South Florida hotel owner reported that the attorney who sued his business for failing to have a pool lift had filed 60 lawsuits in 50 days based on the same online research.[38]

These cookie-cutter complaints generate significant attorneys' fees, and plaintiffs' firms often seek tens of thousands of dollars for even a "straightforward" ADA case with "boilerplate pleadings" and "minimal legal complexity."[39] These firms' litigation mills are so profitable that the same *60 Minutes* story reported that one firm had offered $1,000 per lawsuit to recruit a tester plaintiff, and promised that that individual alone could make $100,000 or more per year.[40]

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False Allegations

Media and prosecutor inquiries have exposed that many complaints contain demonstrably false allegations. One of the most prominent investigations was jointly conducted by the Los Angeles and San Francisco district attorneys. As a result of the investigation, the prosecutors in April 2022 filed a 410-page unfair competition lawsuit against Potter Handy and several of its attorneys, alleging that "Potter Handy uses ADA/Unruh lawsuits to shake down hundreds or

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even thousands of small businesses to pay it cash settlements, regardless of whether the businesses actually violate the ADA."[41] The complaint detailed many instances of allegations for which prosecutors claimed the attorneys "used false standing to obtain federal court jurisdiction of lawsuits targeting the smallest businesses."[42] For instance, counsel in one case alleged that the plaintiff had visited a Chinese restaurant in March 2021 and encountered a "lack of sufficient knee or toe clearance under the outside dining surfaces for wheelchair users"—despite the fact that the restaurant had no outdoor dining.[43] The firm had also sued the Chinese restaurant's neighbor for the same violation, despite the fact that it had only been open for takeout in March 2021. In another case, the complaint noted that counsel alleged that a tattoo shop had an un-ramped step that prevented access, but the plaintiff could not have encountered the barrier because the shop was open by appointment only and the plaintiff had never made an appointment. Moreover, the shop had a removable wheelchair ramp available to those who did make an appointment. In yet another example, counsel alleged that the plaintiff planned to return to a tavern he had sued despite either knowing or being "willfully blind to the fact that this was false," because the business had closed.[44] As the court in that case observed, "at the very least, this amounts to a fraud on the Court."[45]

Prosecutors also took issue with Potter Handy's selection of certain defendants. It explained that Potter Handy filed many of these suits in 2021, as the business community attempted to recover from COVID-19, and often targeted businesses owned by Asian Americans.[46] And, "[d]espite Potter Handy's suits being based on false standing allegations and thus frivolous, most of these businesses were forced to settle, further damaging their economic viability."[47]

The Potter Handy complaint followed an earlier unfair competition lawsuit filed by the Riverside district attorney against two serial plaintiffs, two law firms (Hashemi Law and Manning Law), and four attorneys for allegedly filing 120 fraudulent ADA lawsuits to extort settlements.[48] This earlier complaint claimed that the lawsuits filed by Hashemi Law and Manning Law contained the "same boilerplate allegations," but that the attorneys were in fact aware that the plaintiffs lacked standing and that the tester plaintiffs visited the businesses "if at all, for the sole purpose of initiating a subsequent federal ADA lawsuit against those businesses."[49]

While both district attorney-led lawsuits detailed the firms' unscrupulous tactics, the courts dismissed both cases, holding that the claims were not actionable because the attorneys' conduct fell within the litigation privilege.[50] The ruling in the Potter Handy case is now on appeal.[51]

However, not all such efforts have failed. In 2017, the Arizona attorney general entered into a settlement agreement that barred a "serial litigant organization" from filing frivolous ADA lawsuits in Arizona and required the plaintiffs' attorneys to pay attorneys' fees.[52] More recently, a court in Arizona labeled one attorney representing himself in hundreds of disability lawsuits a "vexatious litigant" and limited his ability to file additional lawsuits.[53] In Nevada, the state attorney general successfully intervened in an ADA case where the same plaintiff had sued 184 businesses.[54] The court explained that several defendants had settled given the legal costs required to challenge the plaintiff's standing.[55] For this reason, the court held that intervention was warranted to protect the public interest so the state could challenge the plaintiff's standing and allow the court to determine whether the plaintiff was "engaging in abusive litigation conduct."[56]

False "Expert" Consultant Declarations

To bolster claims in litigation or demand letters, some plaintiffs' firms retain ADA compliance examiners to "substantiate" the existence of alleged violations. Yet, investigations into some of these examiners suggest that attorneys have misstated the credentials of their examiners in an effort to coerce settlements. After a California-based restaurant was forced to close as the result of a lawsuit brought by a frequently-filing plaintiffs' firm, that business owner filed a lawsuit in federal court against the attorney and firm.[57] That lawsuit claimed that the firm, its attorneys, and its "roster of frequent ADA plaintiffs" was operating as a Racketeer Influenced and Corrupt Organizations Act (RICO) criminal enterprise. The plaintiff restaurant owner claimed that the firm's inspector (the son of one of the attorneys) had lied about having the necessary work qualifications to obtain a California Certified Access Specialist license, which he was using to file declarations in support of the firm's ADA complaints. During the course of the RICO litigation, a witness testified that he was asked to falsely corroborate that work history and was told before deposition that he did not "have to answer any questions at all" and could "just sit there."[58] At a hearing regarding this conduct, the judge sanctioned the inspector and another attorney for "serious witness tampering."[59] Despite this scrutiny, the law

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firm continued to file more ADA lawsuits and the RICO litigation settled.

Pushing the Bounds of Standing Doctrine

This cottage industry also routinely pushes the bounds of Article III standing doctrine. Under Article III, to have standing, courts require that the plaintiff suffer an "injury in fact" which is concrete, particularized, and actual or imminent, not hypothetical.[60] To obtain injunctive relief in a Title III case, the plaintiff must demonstrate a "real and immediate threat of future injury" by having either "attempted to return" to the property or "intend[ing] to do so in the future."[61]

Plaintiffs' lawyers frequently make vague, boilerplate assertions that their client intends to return to the property in an effort to meet these Article III standing requirements. Yet, courts have often found these allegations incredible as the plaintiffs often sue businesses located hundreds of miles away from their homes, the businesses do not offer a product the tester plaintiffs are actually interested in, or the court determines the allegations are inherently implausible given the number of businesses the tester plaintiffs claim they intend to return to. For example, one plaintiff represented by Potter Handy sued a check cashing store, alleging it failed to maintain a lowered transaction counter when

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he visited in August 2020 (during the height of the COVID-19 pandemic).[62] After a bench trial, the court held that the plaintiff lacked standing because his allegations that he intended to return were not credible. Notably, the court explained the plaintiff needed to travel for 90 minutes, take two trains and a bus, and pass many check cashing stores and banks on the way (some of which he had previously sued). The court also found that the plaintiff lacked credibility because he had sued 78 stores in August 2020, but could not recall the types of businesses he sued. In another case, the Eleventh Circuit agreed that a plaintiff did not face likely future injury because she had visited a hotel only once, did not stay overnight, and could not recall if she ever stayed in a particular city.[63] Other courts have relied on the frequency of filing, finding it implausible that a plaintiff would intend to return to each of the many dozen properties he sued.[64]

In other cases, attorneys have filed claims on behalf of tester plaintiffs that do not intend to visit the defendant's property. In these cases, plaintiffs allege violations of the "reservations rule" that requires owners of "hotels and guest rooms" to provide "enough detail to reasonably permit" disabled individuals to "assess independently whether a given hotel or guest room meets his or her accessibility needs."[65] To support standing, the attorneys, rather than claim an intent to visit, instead claim that the plaintiffs experienced an injury by being deprived of information to which they were entitled, causing emotional harm. Appeals courts have split 3-3 as to whether such individuals have Article III standing to maintain a suit. The Second, Fifth, and Tenth Circuits have all held that such an individual lacks standing.[66] The First, Fourth, and Eleventh Circuits have each held that these allegations suffice for standing, though they disagree about whether the cognizable Article III injury is the lack of information or the emotional harm.[67] The Supreme Court has granted *certiorari* to resolve this deep circuit split, with argument expected in the fall of 2023.[68]

Automatic Attorneys' Fees, Not Disability Access, Drive Much Abusive ADA Litigation

The proliferation of ADA lawsuits has not been good for anyone—other than the relatively small number of opportunistic plaintiffs' attorneys who file hundreds of these lawsuits on behalf of tester plaintiffs. Courts, government officials, commentators, news media, and affected businesses have repeatedly suggested that the impetus of these serial lawsuits is not to benefit disabled patrons who actually intend to frequent the targeted businesses. Rather, the "current ADA lawsuit binge is driven by the economics of attorney's fees."[69]

One-Way Fee Shifting

Under the ADA's statutory fee-shifting structure, the court has discretion to award

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reasonable attorneys' fees to the "prevailing party."[70] For the plaintiff, prevailing means obtaining a judgment on the merits or a consent decree—i.e., a court-approved settlement—even if the defendant does not admit to liability.[71] By contrast, courts have also interpreted the fee-shifting provision to mean that the defendant is entitled to attorneys' fees, not just if it obtains dismissal, but only if the court also "finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[72] The economic balance is thus heavily in favor of the plaintiffs' firms, who have a substantial likelihood of obtaining fees because of the high chance of settlement. At the same time, they face a low risk of paying fees, even in losing cases, because of the difficult showing that the defendant needs to make.

As the U.S. Chamber of Commerce Institute for Legal Reform has previously reported, this fee-shifting structure encourages litigation and pushes business owners to settle because they are faced with onerous legal costs.[73] In states like California, the pressure is even greater because potentially large statutory damage awards can put many establishments out of business.[74] In an amendment of the state Unruh Act, the California Legislature observed that small businesses were targeted for "quick cash settlements" instead of accessibility improvements.[75] Courts have lamented that the result of the scheme is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)."[76] And, the serial plaintiffs themselves serve as "professional pawn[s] in an ongoing scheme to bilk attorney's fees."[77]

Outsized Fees

Courts commonly criticize the amount of attorneys' fees prevailing plaintiffs request that businesses be ordered to pay. This includes criticism of excessive hours spent on what tend to be boilerplate complaints and pleadings and refusing to accept reasonable settlements in order to incur higher attorneys' fees.[78] In one example from 2022, the Eleventh Circuit criticized a firm for unnecessarily litigating after the defendant offered to fix the identified ADA violations.[79] This, again, suggests that for at least some of the plaintiffs' firms involved in high-frequency ADA litigation, fees have replaced accessibility as the true objective.

Importantly, the actions of these attorneys harm not only the businesses they target but also disabled people and those who represent them. As one judge explained: "The Act was never intended to turn a lofty and salutary mission into a fee-generating mill for some lawyers to exploit the statutory scheme to see how many billable hours they could cram into a case before it is either tried or settled. They do a disservice to the disabled, and to the vast majority of lawyers who carry out their duties under the ADA with skill, dedication, and professionalism."[80]

ADA Litigation Abuse Has Harmed Small Businesses

Small businesses are disproportionately harmed by these litigation tactics.[81] Small businesses are frequent targets, in part because they are "more likely to operate in older buildings and facilities" constructed before the enactment of the ADA, and because the DOJ Standards for Accessible Design are numerous and technical, meaning that many small business owners are unable to understand the requirements and their relation to state and local building codes.[82] Small business owners also often learn of alleged non-compliance not from a notice of violation with opportunity to cure, but rather from service of a lawsuit by a tester plaintiff. But—as plaintiffs' firms are aware—the owners often lack the time and resources necessary to defend a fact-intensive litigation and, accordingly, quickly pay to settle these cases. Small business owners thus settle lawsuits of even questionable merit to avoid litigation expenses,

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and also to avoid negative publicity and potentially a large judgment that would throw them into bankruptcy.[83] This phenomenon, however, creates a repeating cycle responsible for the proliferation of this litigation.

The exact cost of abusive ADA litigation on businesses is difficult to quantify, particularly where many settlements are confidential (and an unknown number of cases are settled in response to a demand letter). The lawsuit against Potter Handy alone estimated that, based on an assumed average settlement figure of just $10,000, Potter Handy's lawsuits have "drained tens of millions of dollars from California's small businesses."[84] This $10,000 figure is likely low, as businesses that choose not to settle immediately face the prospect of paying both their own legal fees and those of the plaintiff, which can quickly reach $50,000 or even $100,000.[85] A March 2023 op-ed by U.S. Rep. Ken Calvert (R-CA) estimated that the cost of ADA abuse in California alone is $4.3 billion, and explained that this loss has had an impact on job creation, business expansion, and productivity.[86]

Destructive Impact

News reports also attribute the closures of many businesses specifically to these serial ADA lawsuits. For example, Jason's Café in Menlo Park, CA closed in May 2019 after 11 years of operation. The owner reported that the 80-year-old building was expensive to remodel, and it was also "very expensive to fight" the multiple ADA lawsuits that had been brought against it.[87] Notably, while Title III does not require remodeling where such steps are not readily achievable, the court's determination about whether a particular modification is readily achievable is not likely to occur until after much litigation cost. Similarly, Panda Dumpling in San Carlos, CA closed in December 2021 after 20 years of operation. The owner remarked that he was unable to both make improvements to the building and pay the plaintiffs' attorneys' fees, illustrating the problem of a system that incentivizes litigation rather than voluntary compliance through a notice-and-cure period.[88] The impact of these ADA lawsuits has been especially acute in recent years, given the unprecedented challenges small businesses have faced during the COVID-19 pandemic.[89]

Despite Worthy State Reforms, Abusive Lawsuits Find Federal Path

Chapter

05

The problem of abusive litigation claiming violations of the ADA or similar state laws is not new. All branches of government at both the state and federal level have grappled with this issue.

Several states have recently enacted legislation intended to curb abusive litigation under the ADA's Title III. For example, Arizona has enacted notice-and-cure requirements, allowing business owners a period of time to remedy alleged violations before a plaintiff may file suit.[90] And in 2017, Florida enacted a procedure allowing business owners to hire a qualified expert to provide a certificate of conformity or, if the facility does not comply, develop a remediation plan.[91] That law provides that the filing of a certificate of conformity "serves as a notice to the public that the place of public accommodation is in compliance with Title III of the Americans with Disabilities Act or that such place of public accommodation is making reasonable efforts to comply with such act." It also requires courts to consider the filed remediation plan or certificate of conformity when determining if the "plaintiff's complaint was filed in good faith and if the plaintiff is entitled to attorney fees and costs."[92] Other states continue to develop novel approaches to protect businesses operating in good faith from excessive litigation.[93]

Despite these laudable state-level reforms, plaintiffs' firms are still filing high-volume, abusive lawsuits—likely because they can still exploit the federal statutory scheme and procedure, and avoid the state-imposed hurdles, by filing dual state and federal claims in federal court. Accordingly, these state-level reforms must be paired with changes to federal law and policy if they are to succeed in curbing abusive lawsuits overall, not just in state forums.

California's Instructive Unruh Experience

California provides an illustrative example. The California Legislature amended the Unruh Act in 2008, 2012, and 2015, each time with the goal of resolving unnecessary litigation. In 2008, Section 7 of the Construction-Related Accessibility Standards Compliance Act created the Certified Access Specialist program (CASp) through which a business

"Despite these laudable state-level reforms, plaintiffs' firms are still filing high-volume, abusive lawsuits—likely because they can still exploit the federal statutory scheme and procedure, and avoid the state-imposed hurdles, by filing dual state and federal claims in federal court."

could voluntarily hire a CASp inspector to evaluate compliance.[94] If sued for violating the Unruh Act, those businesses with a CASp inspection could apply for an Early Evaluation Conference and stay of litigation, and also reduce the potential damage exposure from $4,000 to $1,000.[95]

In 2012, the California Legislature also attempted to solve the problem of abusive attorneys who were sending pre-litigation demand letters that the legislature found were used "to scare businesses into paying quick settlements that only financially enrich the attorney and claimant and do not promote accessibility either for the claimant or the disability community as a whole."[96] As part of Senate Bill 1186, the California Legislature prohibited such demand letters (Cal. Civ. Code, § 55.31(b)), and also implemented heightened pleading requirements, obliging the attorney to allege specific access barriers in more detail (Cal. Code Civ. Proc., § 425.50(a)) and file a verified complaint under penalty of perjury (Cal Code Civ. Proc., § 425.50(b)).

The Unruh Act was again amended in 2015 with further efforts to stop abusive litigation. The California Legislature made several findings, including that "more than one-half, or 54 percent, of all construction-related accessibility complaints filed between 2012 and 2014 were filed by two law firms," and that "these lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than correction of the accessibility violation."[97] These 2015 amendments added additional pleading requirements for "high-frequency litigants" who filed 10 or more construction-related accessibility lawsuits in a year; required plaintiffs' attorneys to certify that the complaints were not being presented for the purpose of harassing or increasing litigation cost, and that the allegations had evidentiary support (Cal. Code Civ. Proc., § 425.50); and added an additional $1,000 filing fee.[98]

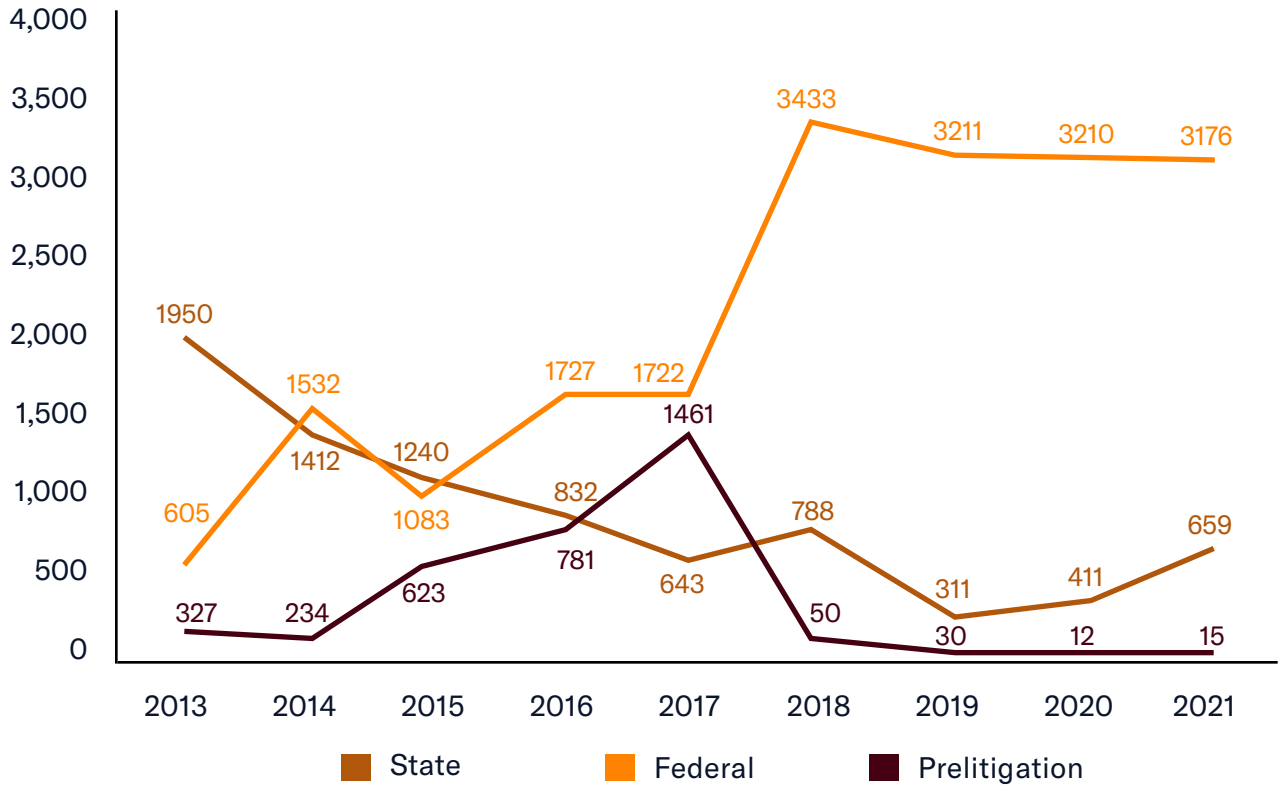
While these reforms appear to have successfully mitigated abusive practices in state courts, plaintiffs' attorneys have continued to exploit the federal statutory scheme by "pairing the Unruh Act claim with a parallel federal ADA claim and then filing the suit in federal court."[99] The tactic is effective because a violation of the ADA is automatically deemed a violation of the Unruh Act, and so a federal forum is "readily available" to exercise supplemental jurisdiction.[100] This gives firms the benefit of the state statutory damages provision, without the additional procedural burdens or higher filing fees for frequent filers—procedural strictures that have not yet been applied in federal court.[101]

Likewise, the CASp program is a procedural defense, such that defendants in federal court cannot seek the procedural protection of the Early Evaluation Conference.[102] As one court explained, this allows serial ADA litigants to "duck[ ] the burdens of state law but still reap[ ] its benefits … [and]

significantly undermines California's efforts to reform Unruh Act litigation."[103] The San Francisco and Los Angeles district attorneys' data in the Potter Handy action illustrated this unintended effect: from 2013 to 2021, federal case filings reported to the California Commission for Disability Access asserting violations of the Unruh Act tripled, while state cases and pre-litigation demand letters decreased, as shown in Figure 4.[104]

In other words, the state-level reforms appear to be effective in one sense: they are driving plaintiffs' firms away from state courts, where the reforms seem to be working.[106] The problem is that the firms can still take advantage of the current federal procedures (and avoid the state requirements) by filing paired state- and federal-law claims in federal court. Thus, to the extent the state policy is to protect local businesses from voluminous, abusive, and costly litigation, that policy cannot be attained until the federal government undertakes similar reforms.

Figure 4: Unruh Act Complaints and Prelitigation Letters Reported to the California Commission on Disability Access (2013-2021)[105]



Proposals for Reform

Chapter

06

The current Title III litigation landscape is a major departure from the accessibility-focused promises of clear, consistent, enforceable standards to address disability discrimination and the "central role" of the federal government in enforcing those standards.[107] Again, states have made worthwhile efforts to curb abusive ADA litigation, but these reform efforts have not reduced the number of ADA lawsuits nationwide because they have not yet been paired with federal reforms.

Accordingly, the time has come for comprehensive reform at all levels of government to refocus ADA compliance on its laudable goal of accessibility for individuals living with disabilities in all aspects of their lives.

Federal Legislation

Courts and commentators have bluntly stated that the current system for resolving Title III disputes "cries out" for a legislative solution. Nonetheless, Congress has not addressed reforms or amended the ADA since 2008.[108]

Notice-and-Cure Provisions

In 2018, the U.S. House of Representatives passed the ADA Education and Reform Act (H.R. 620), which would have imposed a requirement on private plaintiffs to give businesses notice of ADA violations and an opportunity to cure.[109] The proposed amendment would have provided 60 days for the business to respond with an action plan for how it would remove the barrier and an additional 120 days to make "substantial progress" in removing the barrier. The private plaintiff could not file a lawsuit until either (1) the business failed to respond after 60 days or (2) the barrier was not removed or "substantial progress" was not made after 180 days from the initial notice. While the bill passed the House in February 2018, it ultimately did not receive a vote in the Senate.

Congress should revisit these proposed amendments. The notice-and-cure proposals, if enacted, would reduce "drive-by" lawsuits and provide business owners with opportunities to make their facilities accessible on a defined timeline. Money that would otherwise be spent in a settlement to plaintiffs' attorneys could be spent on what the ADA actually envisions: improved accessibility. Notice-and-cure provisions are already familiar to states and their citizens. Notably, states such as Arizona already have notice-and-cure provisions in their own disability laws, and similar provisions are also common in landlord-tenant law.[110]

"Money that would otherwise be spent in a settlement to plaintiffs' attorneys could be spent on what the ADA actually envisions: improved accessibility. Notice-and-cure provisions are already familiar to states and their citizens."

Heightened Pleading Requirements

Congress should also consider resolving problems with drive-by lawsuits and questionable, boilerplate allegations by imposing heightened pleading requirements similar to those for pleading fraud under Federal Rule of Civil Procedure 9(b). Congress could mandate that plaintiffs provide more information to substantiate that they actually patronized the business and will return. These additional pleading burdens would help weed out questionable cases, and even discourage their filing because of the additional time needed to make specific, detailed allegations for each visit. Such pleading requirements could also achieve the same goal as notice-and-cure provisions: they would put the business owner on notice of an actual problem and incentivize them to fix it before the litigation got under way. Conversely, the requirement would not be too onerous for a patron who personally experiences discrimination in his or her daily life. Congress should also borrow from the 2015 California Unruh Act pleading amendments—including by requiring certified pleadings and raising the filing fee for frequent filers—to weed out meritless and abusive lawsuits.

Voluntary Compliance Inspections

The federal government should also look to other state-level reforms. For example, Congress could follow California's CASp program and encourage voluntary compliance by incentivizing businesses to obtain and comply with inspections in exchange for a stay of litigation if filed and early evaluation conferences to resolve disputes quickly.

Compliance Safe Harbor

Congress should also consider enacting broader safe harbor provisions. Currently, the ADA provides that the state or local governments may apply to the attorney general for a certification that a state law or building code "that establishes accessibility requirements meets or exceeds the minimum requirements" of the ADA.[111] Litigants may use this certification as rebuttable evidence that compliance with the state or local ordinance does meet or exceed the requirements of the ADA. Businesses would benefit from greater certainty and expansion of this provision to provide for a safe harbor from ADA lawsuits provided that they have approval from certified ADA inspectors that their facilities comply with ADA standards. This would incentivize compliance with the ADA and encourage businesses to proactively

engage certified inspectors and make accessibility improvements. It would also resolve concerns about uncertainty over how the voluminous ADA regulations apply to a particular business.

Federal Regulation

As noted above, business owners frequently point out that, while detailed in some respects, the DOJ's Title III implementing regulations are also vague—or, sometimes, there are no regulations to clarify the underlying requirements of the statute. Plaintiffs' attorneys then seize on those vague provisions and regulatory voids, which in turn causes a surge in litigation. Because this ADA litigation is driven in part by uncertainty and vagueness of certain regulations, defendants would benefit from greater clarity in these regulations. Greater clarity would likewise reduce the burden of these cases on the courts.

A specific example of regulatory uncertainty precipitating a flood of litigation relates to Title III cases based on website accessibility. Since the ADA was enacted before the advent of the internet, there is no explicit language addressing the accessibility of websites. Title III has been applied to websites by inferring or transferring rights from physical access to online access, such as when a retailer operates a website as an extension of their physical retail locations. In March 2022, the DOJ issued non-binding guidance on website accessibility and the ADA, which described how public accommodations can make sure that "their websites are accessible to people with disabilities as required by the [ADA]."[112] Yet, the DOJ has not issued implementing regulations to establish accessibility standards, conceivably due to the absence of statutory language.[113] This leaves countless businesses subject to vague standards and without authoritative regulations to follow. The current situation is unacceptable, as well-intentioned businesses are left without guidance as to what changes, if any, they need to make to their websites. These businesses thus remain vulnerable to demand letters and abusive lawsuits—which can be filed from anywhere given the ubiquitous access to the internet.

Moreover, courts have split on the issue of whether websites are "places of public accommodation" under Title III in the first place. The U.S. Chamber of Commerce, joined by several other organizations, has argued that websites are not "places of public accommodation" under Title III.[114] That position was adopted by the Eleventh Circuit in *Gil v. Winn-Dixie Stores, Inc.,* but later vacated on procedural grounds.[115] The Supreme Court has not yet resolved this split. Without an answer on these important questions, businesses face continued threats of litigation. Plaintiffs' attorneys have, again, capitalized on uncertainty as litigation has exploded.

Website accessibility lawsuits hit a new record in 2022, with 3,255 claims—a 12 percent increase from 2021 and a 400 percent increase compared to just five years earlier.[116]

The Courts

Decisions by the federal courts may also help stem ADA litigation abuse. First, the Supreme Court has granted *certiorari* for its Fall 2023 term in *Acheson Hotels, LLC v. Laufer*, in which it will consider Article III standing requirements for tester plaintiffs.[117] This decision will likely clarify the standard of pleading necessary for individuals like the plaintiff there, who claimed to have Article III standing based on alleged informational and emotional injuries arising from her lack of access to a hotel reservations website, despite not intending to ever book a room.

Another recent decision has signaled a new avenue for courts and defense attorneys to explore to cut back on the ADA serial filing industry.

Because this ADA litigation is driven in part by uncertainty and vagueness of certain regulations, defendants would benefit from greater clarity in these regulations. Greater clarity would likewise reduce the burden of these cases on the courts.

"As noted above ... parallel reforms at the federal level are also needed to curb abusive ADA litigation and protect small businesses. Comprehensive state- and federal-level reforms would promote voluntary compliance with disability law and improve outcomes for businesses and their disabled patrons alike."

In April 2023, Judge Kevin Newsom of the Eleventh Circuit detailed a plaintiff's "litigation program," noting that she and others "all conspicuously represented by the same lawyers" had filed more than 1,000 website-related ADA lawsuits against hotels in just a few years.[118] Judge Newsom colorfully remarked that the "whole thing stinks to high heaven."[119] While he found himself constrained to hold that the individual plaintiff had Article III standing, he suggested that the cottage industry may violate Article II because such tester plaintiffs' and their lawyers' "proactive exercise of enforcement discretion—selecting [ ] targets, willingly suffering the necessary injury, and then suing—'constitute[s] an impermissible exercise of "executive Power" in violation of Article II.'"[120] This potential avenue for challenging the actions of serial plaintiffs and their attorneys has largely been unexplored in the courts, but may provide a solution to eliminate abusive ADA serial litigation.

State Action

State governments should also consider the reforms implemented by other states. Notice-and-cure provisions, like in Arizona,[121] and procedures like in California and Florida, which incentivize ADA compliance by allowing for certification by a qualified expert,[122] serve the dual purpose of promoting accessibility while reducing abusive litigation. As noted above, however, parallel reforms at the federal level are also needed to curb abusive ADA litigation and protect small businesses. Comprehensive state- and federal-level reforms would promote voluntary compliance with disability law and improve outcomes for businesses and their disabled patrons alike.

Conclusion

Chapter

07

The well-intentioned Title III of the ADA exists to prevent discrimination and ensure that people with disabilities have access to businesses and facilities nationwide.

Unfortunately, a small group of plaintiffs' firms have seized on mandatory attorneys' fees, extensive (and sometimes confusing) regulations, and other factors to distort ADA litigation from its original goal.

The Title III litigation boom shows no signs of stopping. Past reforms have solved some of the problem—but, like water on pavement, the plaintiffs' firms have found the cracks. Experience has proven that state-level reforms, while often well-designed and generally effective, cannot fully curb abusive ADA litigation without complementary federal legislation, regulation, or intervention from Article III courts. The time has come for additional reforms at every level of government.

Endnotes

[1] CDC, Disability Impacts All of Us, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

[2] Signing Statement of President George H.W. Bush, July 26, 1990, available at: https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037493-statement-by-the-president-americans-with-disabilities-act-of-1990.html.

[3] 42 U.S.C. § 12101(b).

[4] *Id*.

[5] 42 U.S.C. § 12111.

[6] 42 U.S.C. § 12131. Section 504 of the Rehabilitation Act of 1973 imposes similar prohibitions on disability discrimination by the federal executive branch. *See* 29 U.S.C. § 701.

[7] 42 U.S.C. § 12181.

[8] *Phillips v. City of New York*, 884 N.Y.S.2d 369, 373 (App. Div. 2009); N.Y. Exec. Law § 292(21).

[9] ADA Amendments Act of 2008, PL 110-325 (S. 3406).

[10] CDC, Disability Impacts All of Us, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html; Proclamation No. 10426, 87 Fed. Reg. 45233 (July 25, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/25/proclamation-on-the-anniversary-of-the-americans-with-disabilities-act/.

[11] 42 U.S.C. § 12182(a).

[12] 28 C.F.R. § 36.104.

[13] Bradford W. Coupe, J.D., et al., *The Department of Justice's Final Regulations Implementing Title III of the Americans with Disabilities Act*, 71 Ed. Law Rep. 353 (1992).

[14] 42 U.S.C. § 12182(b)(1).

[15] 42 U.S.C. § 12182(b)(2).

[16] 42 U.S.C. §§ 12182(b)(2), 12183(a).

[17] 28 C.F.R. pt. 36, app. A.

[18] https://archive.ada.gov/taman3.html.

[19] H.R. REP. 115-539, 3 (citation omitted).

[20] Litigating the Americans with Disabilities Act, Hearing Before the Subcomm. on Rural Enterprise, Ag., & Tech. of the H. Comm. On Small Bus., 108th Cong. 57 (2003) (statement of Branden Flanagan, Dir. of Leg. Aff., National Restaurant Assoc.) ("One consequence is that it created confusion among businesses that must make sure the business is in compliance. The primary difficulty is that parts of the law are vague and open to interpretation. The concern I hear regularly from members [of the National Restaurant Association] is that 'they just want to know what [sic] is they are supposed to do, so that they can do it.' The problem, they say, is that, depending on who you ask, you can sometimes get different answers . . . In many cases, it can be difficult for even the ADA consultants, local inspectors and private attorneys to agree.").

[21] U.S. Chamber of Commerce Institute for Legal Reform, *How Small Businesses Are Targeted With Abusive ADA Lawsuits*, (Oct. 12, 2022), https://instituteforlegalreform.com/blog/small-businesses-targeted-with-ada-lawsuits/.

[22] 42 U.S.C. § 12188(b).

[23] 42 U.S.C. § 12205.

[24] Cal. Civ. Code § 51(f).

[25] *Phillips*, 884 N.Y.S.2d at 373 ("The State HRL provides protections broader than the Americans With Disabilities Act (ADA), and the City HRL is broader still"); N.Y. Exec. Law § 292(21); New York City Administrative Code § 8-101; 775 Ill. Comp. Stat. Ann. 5/1-103(I).

[26] Cal. Civ. Code § 52(a); N.Y. Exec. Law § 297(9).

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

[28] *Arroyo v. Rosas*, 19 F.4th 1202, 1206 (9th Cir. 2021).

[29] *See, e.g., Shayler v. 1310 PCH, LLC*, 51 F.4th 1015, 1017 (9th Cir. 2022) ("The ADA satisfied the need for meaningful legislation for the protection of individuals with disabilities; however, one of the unforeseen consequences of this statute was the widespread abuse taking form due to the actions of serial ADA plaintiffs.") (citation omitted).

[30] Lex Machina is available at law.lexmachina.com. Lex Machina contains all civil federal district court cases in PACER, except Prisoner Petitions and Social Security cases, pending since 2009. Data in this section represents cases filed that were classified as "Civil Rights: ADA." Lex Machina excludes employment-related claims under Title I of the ADA from this data set. Unless otherwise noted, the time period for this research is data through April 21, 2023.

[31] The decrease in filings in 2022 coincides with a civil action filed in April 2022 by the San Francisco and Los Angeles district attorneys against Potter Handy, the firm that has filed the highest number of cases during the time period. *See* n.36, *infra*. It is likely that this government action played an important role in reducing the number of filings that year.

[32] *Just the Facts: Americans with Disabilities Act, U.S. Courts,* (July 12, 2018), https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act.

[33] *See* https://law.lexmachina.com/help/documentation/case-types/civil-rights.

[34] The number of high-volume plaintiff cases was calculated using Lex Machina. Because Lex Machina excludes Prisoner Petitions and Social Security cases from its database, the total number of civil case filings was calculated using data from the Administrative Office of U.S. Courts. See https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

[35] Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, The New York Times Magazine (July 21, 2021), https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html.

[36] *See* Complaint, *People v. Potter Handy, LLP, et al.*, No. CGC22599079 (Cal. Super. Ct. Apr. 11, 2022); Markham, supra n.35; Amy Kjose Anderson, *Drive-By Lawsuits and the Abuse of the Americans with Disabilities Act*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 24, 2017), https://www.alec.org/article/drive-by-lawsuits-and-the-abuse-of-the-americans-with-disabilities-act.

[37] CBS News, 60 Minutes, *What's a "drive-by lawsuit"?* (Dec. 4, 2016), https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/.

[38] H.R. REP. 115-539, 4-5.

[39] *Shayler*, 51 F.4th at 1021.

[40] CBS News, *supra* n.37.

[41] *People v. Potter Handy LLP*, *et al.*, Complaint.

[42] *Id*.

[43] *Id*.

[44] *Langer v. Badger Co., LLC*, 2020 WL 2522081, at *3 (S.D. Cal. May 15, 2020).

[45] *Id*.

[46] *People v. Potter Handy LLP, et al.*, Complaint.

[47] *Id*.

[48] *People v. Rutherford*, 2020 WL 7640848, at *1-2 (Cal. Ct. App. Dec. 23, 2020).

[49] Complaint, *People v. Rutherford, et al*., No. RIC-19-02577 (Cal. Super. Ct. Apr. 24, 2019).

[50] *Id*.; Jason Grant, Cal. Judge Throws Out Prosecutors' Suit Against Potter Handy Over Law Firm's Alleged "Fraudulent" ADA Suits, Law.com, Aug., 31, 2022, https://www.law.com/2022/08/31/california-judge-throws-out-prosecutors-suit-against-potter-handy-over-law-firms-alleged-fraudulent-ada-suits/.

[51] Press Release, San Francisco District Attorney Brook Jenkins Files Appeal of Court Ruling Granting Legal Immunity to Potter Handy's Scheme to Defraud Small Businesses (Oct. 20, 2022), https://www.sfdistrictattorney.org/press-release/district-attorney-brooke-jenkins-files-appeal-of-court-ruling-granting-legal-immunity-to-potter-handys-scheme-to-defraud-small-businesses.

[52] Press Release, Ariz. Attorney General, Serial Litigant Permanently Enjoined From Filing Frivolous ADA Lawsuits Against AZ Businesses (Nov. 9, 2017), https://www.azag.gov/press-release/serial-litigant-permanently-enjoined-filing-frivolous-ada-lawsuits-against-az.

[53] ABC News 15, *Disbarred Serial-Suer Peter Strojnik Blocked From Filing New Cases*, (Jan. 8, 2021), https://www.abc15.com/news/local-news/investigations/disbarred-serial-suer-peter-strojnik-blocked-from-filing-new-cases.

[54] *See* Order, *Zimmerman v. GJS Grp., Inc*., No. 2:17-cv-00304-GMN-GWF (D. Nev. Oct. 11, 2017), Dkt. 35.

[55] *Id*.

[56] *Id*.

[57] *See* Complaint, *Saniefar v. Moore*, 17-cv-00823 (E.D. Cal. June 20, 2017), ECF No. 1; Mark Noack, *Judge finds witness tampering in ADA lawsuit*, Mountain View Voice, July 7, 2019, https://www.almanacnews.com/news/2019/07/07/judge-finds-witness-tampering-in-ada-lawsuit.

[58] Noack, *supra* n.57.

[59] *Id*.

[60] *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).

[61] *Kennedy v. Floridian Hotel, Inc*., 998 F.3d 1221, 1233 (11th Cir. 2021) (citation omitted).

[62] *Garcia v. Alcocer*, 2021 WL 5760300, at *3 (C.D. Cal. Dec. 1, 2021).

[63] *Kennedy*, 998 F.3d at 1233.

[64] *Brother v. Tiger Partner, LLC,* 331 F. Supp. 2d 1368, 1374-75 (M.D. Fla. 2004) ("[Plaintiff] has professed an intent to return to all fifty-four of the properties he has sued. This is simply implausible."). A recent decision by the Ninth Circuit, however, calls some of this reasoning into question, as it held that courts cannot "question the 'legitimacy' of an ADA plaintiff's intent to return to a place of public

accommodation simply because the plaintiff is an ADA tester or serial litigant." *Langer v. Kiser*, 57 F.4th 1085, 1106 (9th Cir. 2023).

65 28 C.F.R. § 36.302(e)(1)(ii); *see also* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236-01, at 56275 (Sept. 15, 2010).

66 *Harty v. W. Point Realty, Inc*., 28 F.4th 435, 434-44 (2d Cir. 2022); *Laufer v. Looper*, 22 F.4th 871, 879-81 (10th Cir. 2022); *Laufer v. Mann Hospitality, LLC*, 996 F.3d 269, 273 (5th Cir. 2021).

67 *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 271 (1st Cir. 2022); *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 168 (4th Cir. 2023); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274-75 (11th Cir. 2020).

68 *See Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023). Weil represented the U.S. Chamber of Commerce and a coalition of other organizations in an amicus brief in support of the petition for *certiorari*. *See* Brief for the U.S. Chamber of Commerce, et al., *Acheson Hotels, LLC v. Laufer*, 2022 WL 17646174 (U.S.).

69 42 U.S.C. § 2000a-3(a)-(b); *Shayler*, 51 F.4th at 1018.

70 42 U.S.C. § 12205.

71 *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res*., 532 U.S. 598, 604 (2001).

72 *Garcia v. Alcocer*, No. 22-55183, 2022 WL 17538751, at *1 (9th Cir. Dec. 8, 2022) (quoting *Hughes v. Rowe*, 449 U.S. 5, 15 (1980)); *see also Parker v. Sony Pictures Ent., Inc*., 260 F.3d 100, 111 (2d Cir. 2001) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

73 *Supra* n.21.

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

75 Cal Civ. P. Code § 425.55(a)(2); *see also* H.R. REP. NO. 115-539, at 6 (2018) ("The potential for abuse of the ADA has been noted in numerous cases in federal courts throughout the country. For instance, one federal district court explained that the ADA's statutory scheme, which provides for a private right of action for injunctive relief, has resulted in an explosion of private ADA-related litigation that is primarily driven by the ADA's attorneys' fees provision.").

76 *Brother*, 331 F. Supp. 2d at 1375.

77 *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1285 (M.D. Fla. 2004).

78 *Brother v. Miami Hotel Invs., Ltd*., 341 F. Supp. 2d 1230, 1234 (S.D. Fla. 2004); *Caplan v. All Am. Auto Collision, Inc*., 36 F.4th 1083, 1092 (11th Cir. 2022); *Shayler*, 51 F.4th at 1023.

79 *Caplan*, 36 F.4th at 1092.

80 *Brother*, 341 F. Supp. 2d at 1233; see also Evelyn Clark, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 Wash. & Lee J. Civil Rts. & Soc. Just. 689, 725–26 (2020) ("Moreover, these lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than the correction of the accessibility violation. This practice unfairly taints the reputation of other innocent disabled customers who are merely trying to go about their daily lives.") (citation omitted).

81 Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, at 34515 (June 17, 2008) ("Small businesses are particularly vulnerable to Title III litigation and are often compelled to settle because they cannot afford the litigation costs involved in proving whether an action is readily achievable."); U.S. Chamber of Commerce, *supra* n.21.

82 73 Fed. Reg. 34508, at 34515.

83 *Molski*, 347 F. Supp. 2d at 863 (describing "cottage industry" of ADA litigants filing lawsuits "requesting damage awards" under state law "that would put many of the targeted establishments out of business") (citation omitted).

84 *People v. Potter Handy LLP, et al.*, Complaint.

85 *Id*.

86 Ken Calvert, *Stop lawsuit abuse taxation plaguing small businesses*, The Desert Sun (Mar. 1, 2023), https://www.desertsun.com/story/opinion/contributors/valley-voice/2023/03/01/lets-stop-lawsuit-abuse-taxation-plaguing-small-businesses/69951390007/.

87 Kate Bradshaw, *Jason's Café, a Menlo Park diner, shutters following ADA suits*, The Almanac (May 2, 2019), https://www.almanacnews.com/news/2019/05/02/jasons-cafe-a-menlo-park-diner-shutters-following-ada-suits; Emily Milbach, *Café closes after third ADA lawsuit*, Menlo Park Daily Post (May 1, 2019), https://padailypost.com/2019/05/01/cafe-closes-after-third-ada-lawsuit/.

88 Emily Milbach, *ADA lawsuit forces restaurant to close*, Palo Alto Daily Post (Jan. 2, 2022), https://padailypost.com/2022/01/09/ada-lawsuit-forces-restaurant-to-close/.

89 *People v. Potter Handy LLP, et al.*, Complaint.

90 Ariz. Stat. § 41-1492.08.

91 Fla. Stat. § 553.5141.

92 Fla. Stat. § 553.5141(3)-(5).

[93] In April 2023, Kansas enacted a statute authorizing a civil action for defendants in website accessibility violation lawsuits to file a separate action against the party or attorney that initiated the litigation for a "determination as to whether or not such litigation alleging a website access violation is abusive litigation." Kansas H.B. 2016 (2023). The new statute sets several criteria for determining whether such lawsuits are abusive, including the number of similar actions filed by plaintiffs or law firms and whether the parties had engaged in settlement discussions. *Id.*

[94] Act of Sept. 28, 2008, § 7, 2008 Cal Stats. ch. 549 codified at Cal. Gov't Code, § 8299; Cal. Civ. Code. §§ 55.53, 55.54.

[95] *Id*.

[96] Act of Sept. 19, 2012, § 24, 2012 Cal. Stats. ch. 383.

[97] Act of Oct. 10, 2015, § 6, 2015 Cal. Stats. ch. 755, codified at Code Civ. Proc., § 425.55.

[98] The California Legislature is currently considering additional procedural reforms that would prohibit construction-related accessibility claims against a defendant unless (1) the plaintiff served a demand letter specifying each alleged violation and (2) the defendant had not corrected the alleged violation within 120 days of service. *See* Cal. S.B. 585 (2023) (proposed).

[99] *Arroyo*, 19 F.4th at 1207.

[100] *Id*. at 1204-05, 1212.

[101] *Id*. at 1211-12 (describing California reforms as "special procedural requirements" that "apparently have not been applied in federal court").

[102] *Id*. at 1207.

[103] Order Declining to Exercise Supplemental Jurisdiction Over Plaintiff's Unruh Act Claim, *Whitaker v. La Conq, LLC*, No. 2:19-cv-07404 (C.D. Cal. Sept. 20, 2019), ECF No. 11.

[104] *People v. Potter Handy LLP, et al.*, Complaint. The data in this graph is derived from the California Commission on Disability Access' (CCDA) 2020 Annual Report to the California Legislature. *See* 2020 Annual Report to the Legislature, Appendix A, Cal. Com. on Disability Access (Jan. 31, 2021), https://www.dgs.ca.gov/Resources/Legislative-Reports. Because the Commission's dataset relies on attorney self-reporting, it is not complete.

[105] Data from 2015-2020 is taken from the CCDA's 2020 Annual Report to the California Legislature. Data for 2013 and 2014 is derived from the CCDA's 2017 Annual Report. *See* 2017 Annual Report to the Legislature, Appendix A, Cal. Com. on Disability Access (Jan. 31, 2018), https://www.dgs.ca.gov/Resources/Legislative-Reports. 2021 data is derived from the CCDA's 2021 Annual Report. *See* 2021 Annual Report to the Legislature, Appendix A, Cal. Com. on Disability Access (Jan. 31, 2022), https://www.dgs.ca.gov/Resources/Legislative-Reports.

[106] *Arroyo*, 19 F.4th at 1207 (California reforms made it "very unattractive to file such Unruh Act suits in state court but very attractive to file them in federal court").

[107] 42 U.S.C. § 12101(b).

[108] *Brother*, 331 F. Supp. 2d at 1375.

[109] H.R. 620, 115th Cong (2018).

[110] Arizona Stat. § 41-1492.08(E). As noted, California is considering similar notice-and-cure legislation. *See* n.97, *supra*.

[111] 42 U.S.C. § 12188(b).

[112] U.S. DOJ, Guidance Web Accessibility and the ADA, https://www.ada.gov/resources/web-guidance/.

[113] 42 U.S.C. § 12186(b); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 681-82 (2001).

[114] *Amicus Curiae* Brief of the Restaurant Law Center, et al., *Winn-Dixie Stores, Inc., v. Gil,* No. 17-13467 (11th Cir. Oct., 17, 2017), https://www.chamberlitigation.com/sites/default/files/cases/files/17171717/U.S.%20Chamber%2C%20et%20al.%20Amicus%20Brief%20--%20Winn-Dixie%20Stores%2C%20Inc.%20v.%20Gil%20%28Eleventh%20Circuit%29.pdf.

[115] *Gil v. Winn-Dixie Stores, Inc*., 993 F.3d 1266 (11th Cir. 2021), *opinion vacated on reh'g,* 21 F.4th 775 (11th Cir. 2021).

[116] Kristina M. Launey and Minh N. Vu, *Plaintiffs Set a New Record for Website Accessibility Lawsuit Filings in 2022,* ADA Title III Website (Jan. 23, 2023), https://www.adatitleiii.com/2023/01/plaintiffs-set-a-new-record-for-website-accessibility-lawsuit-filings-in-2022.

[117] *Acheson Hotels, LLC*, 143 S. Ct. 1053.

[118] *Laufer v. Arpan LLC*, 2023 WL 2910529, at *2 (11th Cir. Apr., 12, 2023) (Newsom, J., concurring in the denial of rehearing en banc) (citation omitted).

[119] *Id*.

[120] *Id*. (citation omitted).

[121] Arizona Stat. § 41-1492.08(E).

[122] Fla. Stat. § 553.5141; Act of Sept. 28, 2008, § 7, 2008 Cal Stats. ch. 549 codified at Cal. Gov't Code, § 8299; Cal. Civ. Code. §§ 55.53, 55.54.

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