
Access Litigation in Texas Under the Americans with Disabilities Act and its Texas Companion

TEXANS FOR LAWSUIT REFORM FOUNDATION

March 1, 2017

Texans for Lawsuit Reform Foundation conducts and supports academically sound, impartial and non-partisan research, study, analysis, and writing related to the justice system in Texas. Research is conducted by lawyers, scholars, analysts, and professionals with experience and expertise in the areas being researched and reported. The Foundation's published research and reports are posted on its website and are available to the public. The purpose of the Foundation's activities is public education on matters concerning the Texas justice system, including its statutory and common law, its regulations and administrative agencies, and the organization and operation of its courts. The Foundation's publications do not necessarily reflect the opinions of its sponsors or of Texans for Lawsuit Reform.

© Copyright 2017 – TEXANS FOR LAWSUIT REFORM FOUNDATION

All rights reserved. No part of this paper may be reproduced by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without written permission from Texans for Lawsuit Reform Foundation.

TEXANS FOR LAWSUIT REFORM FOUNDATION

1701 Brun Street | Houston, Texas 77019

713.963.9363 | 713.963.9787

Access Litigation in Texas Under the Americans with Disabilities Act and its Texas Companion

TEXANS FOR LAWSUIT REFORM FOUNDATION

March 1, 2017

I. Introduction

The Americans with Disabilities Act (the ADA or Act) is an important federal law aimed at, among other things, ensuring that those with disabilities can access places of public accommodation by removing barriers to access. The ADA provides a private cause of action by which a disabled person who was denied access to a place of public accommodation may obtain a court order compelling remediation of the property so that the property complies with the ADA's architectural standards. Along with permitting injunctive relief, the ADA allows a prevailing plaintiff to recover attorney's fees from a defendant whose property was not ADA compliant.

Texas has a statute that, like the ADA, requires that places of public accommodation ensure access to disabled persons. Under the Texas statute, a person may recover a \$300 per violation civil penalty from a person whose property impedes disability access. Although this penalty is not significant, at least one Texas-based lawyer has, nonetheless, filed hundreds of civil actions against mostly small businesses in Texas, alleging violations of the ADA and seeking to recover civil penalties under the Texas statute and attorney's fees under the ADA. This attorney's litigation model is similar to a litigation model that has been used by numerous attorneys in California for many years, impeding the business climate in that state.

This type of ADA litigation is unnecessary and inappropriate. It will invite efforts to diminish the ADA's protections for disabled Americans and also will injure Texas businesses. The purpose of a civil action brought under the ADA is to require businesses to remediate barriers to access. The ADA does not provide a mechanism—or an incentive—for a disabled person, working with a plaintiff's lawyer, to search for businesses against whom to file lawsuits to recover damages, as is happening in California. To prevent a California-style lawsuit explosion, Texas's statute could be amended—in keeping with the ADA's goals—to require that a pre-suit notice be provided to a potential defendant by a person who identifies a barrier to accessing a place of public accommodation. Then, a lawsuit could be pursued only if the business fails to cure the access issue within a reasonable amount of time.

II. The American with Disabilities Act

A. An Overview of the ADA

Signed into law on July 26, 1990 by President George H.W. Bush,¹ the ADA was “the nation’s first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.”² The Act has four main provisions:

- Title I prohibits discrimination by any employer, employment agency, or labor organization against any qualified individual with a disability in job application procedures, hiring or discharge, compensation, advancement, training, and other terms, conditions, and privileges of employment.³
- Title II deals with public transportation, declaring that no qualified individual with a disability can be excluded from the participation in, denied the benefits of, or subjected to discrimination by a public entity (defined to include a state and an agency, political subdivision, or other instrumentality of a state).⁴
- Title III is addressed to public accommodations and services operated by private entities. It prohibits discrimination on the basis of disability in the enjoyment of any place of public accommodation.⁵
- Title IV deals with telecommunications, amending the Communications Act of 1934 to require telephone companies to provide the ability for an individual with a hearing or speech impairment to communicate by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have such an impairment.⁶

This paper addresses recent litigation filed in Texas against private companies and individuals under Title III of the ADA, the part of the Act prohibiting discrimination against persons with disabilities in places of public accommodation.

B. Title III Prohibits Discrimination in Access to Public Accommodations

Title III of the ADA provides that 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.⁷ Under the Act, the following private entities are considered public accommodations:

- (A) an inn, hotel, motel, or other place of lodging;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) 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;
- (G) a terminal, depot, or other station used for specified public transportation;

- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.⁸

Under Title III of the Act, unlawful discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable[.]”⁹ As to preexisting structures, “with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs” constitutes unlawful discrimination.¹⁰

Discrimination also includes “a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of [the Act].”¹¹

As originally enacted, the ADA directed the Architectural and Transportation Barriers Compliance Board to “issue minimum guidelines . . . [and] requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.”¹² These accessibility guidelines, known as the ADA Accessibility Guidelines (the Accessibility Guidelines), are now promulgated by the United States Access Board, which replaced the Barriers Compliance Board.¹³

The Accessibility Guidelines are used by the Department of Justice (DOJ) and the Department of Transportation (DOT) in setting enforceable standards that the public must follow.¹⁴ For the most part, the DOJ and DOT standards are similar, with DOJ’s ADA standards applying to all facilities except public transportation facilities, which are subject to DOT’s standards.¹⁵

DOJ’s and DOT’s ADA standards are not building codes.¹⁶ Instead, they are design and construction requirements issued under a civil rights law. They are enforced through investigations of complaints filed with federal agencies, or through litigation brought by private individuals or the federal government. There is no plan review or permitting process under the ADA, and local building regulators are not required or authorized by the ADA to enforce the ADA standards.¹⁷

The Accessibility Guidelines provide detailed specifications governing virtually every physical element of a place of public accommodation. As examples, the Accessibility Guidelines provide:

- Mirrors [in toilet and bathing rooms] located above lavatories or countertops shall be installed with the bottom edge of the reflecting surface 40 inches (1015 mm) maximum above the finish floor or ground. Mirrors not located above lavatories or countertops shall be installed with the bottom edge of the reflecting surface 35 inches

(890 mm) maximum above the finish floor or ground.¹⁸

- The water closet shall be positioned with a wall or partition to the rear and to one side. The centerline of the water closet shall be 16 inches (405 mm) minimum to 18 inches (455 mm) maximum from the side wall or partition, except that the water closet shall be 17 inches (430 mm) minimum and 19 inches (485 mm) maximum from the side wall or partition in the ambulatory *accessible* toilet compartment specified in 604.8.2. Water closets shall be arranged for a left-hand or right-hand approach.¹⁹
- Carpet or carpet tile shall be securely attached and shall have a firm cushion, pad, or backing or no cushion or pad. Carpet or carpet tile shall have a level loop, textured loop, level cut pile, or level cut/uncut pile texture. Pile height shall be ½ inch (13 mm) maximum. Exposed edges of carpet shall be fastened to floor surfaces and shall have trim on the entire length of the exposed edge.²⁰
- Car parking *spaces* shall be 96 inches (2440 mm) wide minimum and van parking *spaces* shall be 132 inches (3350 mm) wide minimum, shall be marked to define the width, and shall have an adjacent access aisle complying with [rule] 502.3.²¹
- Parking *space* identification signs shall include the International Symbol of *Accessibility* complying with [rule] 703.7.2.1. Signs identifying van parking *spaces* shall contain the designation “van accessible.” Signs shall be 60 inches (1525 mm) minimum above the finish floor or ground surface measured to the bottom of the sign.²²

The Act provides for enforcement through a private cause of action by any person “who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of” the Act’s public accommodations provisions.²³ Thus, when a particular architectural feature at a place of public accommodation is inconsistent—even if only minimally—with the Accessibility Guidelines, a plaintiff may pursue a civil action claiming that the feature constitutes a barrier that denies the plaintiff full and equal enjoyment of the premises, in violation of the ADA.²⁴

Under the Act, an aggrieved person may bring “a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against a person who has engaged, or is reasonably believed to be about to engage, in *any* act that violates the ADA.”²⁵ Where public accommodations are at issue, 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 this subchapter.”²⁶ The Act provides that a prevailing party may, in the court’s discretion, recover reasonable attorney’s fees.²⁷ Courts have explained that an award of attorney’s fees to a prevailing civil rights plaintiff is justified because the attorney served as Congress’s designated instrument for vindicating important federal rights (the “private attorney general” rationale) and because “when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.”²⁸

Thus, although Title III provides for the recovery of attorney’s fees by a prevailing party,²⁹ it does not provide for the recovery of damages.³⁰ Prevailing plaintiffs who challenge an alleged architectural barrier are limited to injunctive relief aimed at curing the violation, plus attorney’s fees and costs. As a consequence, unless an also-applicable state statute exists under which a plaintiff can recover damages for denial of access to a place of public accommodation, a disabled person does not obtain a financial reward under the Act; only her attorney does.

In *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, the United States Supreme Court has held that a Title III claim is moot if the alleged violations are corrected without a judicially sanctioned change in the legal relationship between the parties, *i.e.* the defendant voluntarily ceases the conduct that is the underlying basis for the complaint (known as the “voluntary cessation doctrine”).³¹ In applying *Buckhannon*, federal courts have held that if a defendant rectifies the alleged structural violations, she can move to dismiss the ADA case as moot.³² In such cases, courts have declined to award attorneys’ fees to plaintiffs who have pursued ADA claims after the defendant’s remediation has rendered the issues in the case moot.³³

The Supreme Court also has held that in civil rights cases the “plaintiff should not be assessed his opponent’s attorney’s fees unless a court finds that his claim was frivolous, unreasonable, groundless, or that the plaintiff continued to litigate after it clearly became so.”³⁴ Some federal courts have found lawsuits to be frivolous when pursued after the violation was corrected and have refused to award attorney’s fees to plaintiffs under the ADA, instead awarding attorney’s fees to the defendants who were forced to defend suits where the underlying barrier to access had been removed.³⁵ The rationale for such an award is that it is appropriate to assess a plaintiff (even a civil rights plaintiff, who typically is regarded as acting as a private attorney general), his opponent’s fees when the plaintiff or his counsel was advised that remedial action was taken, but nonetheless filed or continued to pursue a baseless suit.³⁶ Pursuit of such a suit no longer fulfills the goals of the ADA.

III. Analogous Texas Statute

Texas has enacted a statute that somewhat parallels the ADA. Chapter 121 of the Texas Human Resources Code provides that it is the policy of the State of Texas to encourage and enable persons with disabilities to participate fully in the social and economic life of the state, to achieve maximum personal independence, to become gainfully employed, and to otherwise fully enjoy and use all public facilities available within the state.³⁷ Persons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state.³⁸

As with Title III of the ADA, the Texas statute provides that no person with a disability may be denied admittance to any public facility in the state because of the person’s disability.³⁹ The discrimination prohibited by the Texas law “includes a refusal to allow a person with a disability to use or be admitted to any public facility, a ruse or subterfuge calculated to prevent or discourage a person with a disability from using or being admitted to a public facility, and a failure to . . . make reasonable accommodations in policies, practices, and procedures” or “provide auxiliary aids and services necessary to allow the full use and enjoyment of the public facility.”⁴⁰

The term “public facility” is defined broadly in Texas to include: a hotel, motel, or other place of lodging; a public building maintained by any unit or subdivision of government; a retail business, commercial establishment, or office building to which the general public is invited; a restaurant or other place where food is offered for sale to the public; and any other place of public accommodation, amusement, convenience, or resort to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited.⁴¹

A person who violates the Texas statute “is deemed to have deprived a person with a disability of his or her civil liberties. The person with a disability deprived of his or her civil liberties may maintain a cause of action for damages in a court of competent jurisdiction,

and there is a conclusive presumption of damages in the amount of at least \$300 to the person with a disability.”⁴² Because there is no provision in chapter 121 allowing the award of attorney’s fees and costs to successful plaintiffs, attorneys often attempt to obtain an award of fees by incorporating a Uniform Declaratory Judgment Act claim, or by drafting the public accommodation claims to seek injunctive relief and fees under the ADA and damages under the Texas law.

Although the courts have not had many opportunities to apply chapter 121’s damages provision, the courts that have interpreted it have largely imposed flat damages of \$300 rather than a penalty on a per violation or per day basis, as some other state statutes provide, except in egregious cases.⁴³ No case law interpreting the Texas statute in regard to whether remediation of the alleged violation moots the chapter 121 claim currently exists.

IV. Analogous California Statutes and the California Litigation Crisis

California’s Unruh Civil Rights Act broadly outlaws discrimination in public accommodations, based on sex, race, color, religion, ancestry, national origin, age, disability, medical condition, marital status, or sexual orientation.⁴⁴ In the disability context, the Unruh Act operates virtually identically to the ADA.⁴⁵ In fact, in 1992, the Unruh Act was amended to provide that “[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 . . . shall also constitute a violation of this section.”⁴⁶

When an Unruh Act lawsuit is based on an ADA violation, the plaintiff does not have to prove intentional discrimination.⁴⁷ Moreover, the Unruh Act allows for recovery of monetary damages, including automatic minimum penalties in the amount of \$4,000 per occurrence, and attorney’s fees as “may be determined by the court.”⁴⁸ Proof of actual damages is not required to recover statutory minimum damages under the Unruh Act.⁴⁹ And, a plaintiff is entitled to \$4,000 for each time he visits an establishment having architectural barriers that deny him full and equal enjoyment of the premises.⁵⁰

Because the Unruh Act provides for recovery of monetary damages, penalties, and attorney’s fees, and the standard for recovery is low, it is an often-used statute. In fact, California accounts for 42 percent of all ADA litigation nationwide.⁵¹ Some of the litigation has been determined to be abusive. For example, a federal district court in California recently described abusive ADA litigation as follows:

The ability to profit from ADA litigation has given birth to what one Court described as “a cottage industry.” *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280–81 (M.D. Fla. 2004). The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through “conciliation and voluntary compliance,” *id.* at 1281, a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter. The result of this 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).” *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004). Serial plaintiffs...serve as “professional pawn[s] in an ongoing scheme to bilk attorney’s fees.” *Rodriguez*, 305 F. Supp. 2d at 1285. It is a “type of shotgun litigation [that] undermines both the spirit and purpose of the ADA.” *Brother*, 331 F. Supp. 2d at 1375. ⁵²

In 2013, the California legislature passed a new law aimed at curtailing ADA litigation brought under the Unruh Act. Senate Bill 1186 became effective on January 1, 2013, and was “intended to provide protection for the owners and operators of public accommodations who are making a good faith effort to comply with the ADA.”⁵³ Among other things, Senate Bill 1186:

- Allows businesses that meet the definition of “small business” to request a stay of court proceedings and obtain an early evaluation conference, if their projects meet certain requirements, such as having been approved under the local building permit and inspection process or approved by a certified public building department inspector.⁵⁴
- Reduces the statutory damages from \$4,000 per offense to \$1,000 per offense with respect to defendants whose projects were approved under a local building permit and inspection process or approved by a certified public building department inspector, if all ADA violations identified in the lawsuit papers are remedied within 60 days after a business owner is served with the lawsuit.⁵⁵
- Reduces the statutory damages to \$2,000 per offense for small businesses if the violations are addressed within 30 days of service of the lawsuit, even if the small business's project was not approved under the local building permit and inspection process or approved by a certified public building department inspector.⁵⁶
- Requires that any court applying the Unruh Act consider the reasonableness of the plaintiff's conduct in connection with “stacked claims,” where a plaintiff visits the same property repeatedly to file multiple claims for the same violation; and provides that multiple claimed violations of the ADA may be considered to be a single violation, depending on the circumstances.⁵⁷
- Bans “pre-litigation demand letters” in which plaintiffs seek a specific amount of money without actually filing a lawsuit.⁵⁸
- Requires attorneys representing Unruh Act plaintiffs to provide a written advisory (which must include the attorney's State Bar license number) that includes sufficient detail to allow a reasonable business owner to identify the basis of the claim.⁵⁹

Whether these reforms will be sufficient to curtail ADA litigation in California is unknown at this time.

V. Does Texas Have a Problem with Abusive ADA-Related Lawsuits?

Given the limitation on damages and fees under chapter 121 of Texas's Human Resources Code, the potential for abuse of the Texas statute would seem remote (unless the attorney and client are engaged in an unlawful division of the attorney's fee).⁶⁰ Nonetheless, a rash of lawsuits brought under the ADA and chapter 121 was recently filed in Texas courts.

A single attorney filed at least 385 lawsuits in the United States District Court for the Western District of Texas on behalf of one plaintiff.⁶¹ The same attorney filed more than 45 lawsuits in the United States District Court for the Southern District of Texas on behalf of a second plaintiff.⁶² The lawsuits have largely targeted small- and medium-sized businesses in Austin, Texas, and allege both ADA and chapter 121 violations. The alleged violations appear somewhat technical in nature. For example, in *Deutsch v. Henry*, the plaintiff contends that the taqueria on the premises does not provide “adequate” ADA parking or an “adequate” entrance ramp, and that the threshold to the shop is more than one-half inch high.⁶³

The attorney's demand letter sent in several of the lawsuits he has filed show that the attorney conflates the ADA and chapter 121,⁶⁴ presumably so that the plaintiff can share in

any purported “damages” settlement.⁶⁵ The lawyer typically offers to settle for \$7,000 in each case, even though the damages available under the Texas law are significantly less than that. He does not ask any of the businesses to remedy the alleged violations.

The need for these lawsuits is particularly questionable when a business is willing to remedy the alleged violations. For example, in *Deutsch v. Crosley*, the intervenor defendants, who owned the subject property, testified that they engaged a contractor to perform the work needed to remedy the alleged ADA violation as soon as they learned about the suit from their tenant, who was sued.⁶⁶ They had purchased the building and did not know that it did not comply with the ADA’s requirements. Had the owners been contacted by the attorney or his client before a lawsuit was filed, they would have made the rather technical changes without the necessity of a suit.⁶⁷ Despite the fact that the owners immediately remediated the alleged violation, the plaintiff (or his attorney) refused to dismiss the case. Similarly, in the *Henry* case, the defendant business had already remedied the technical violations complained of by the plaintiff *before the plaintiff had even filed suit*, yet the plaintiff still refused to dismiss the case.⁶⁸

Several defendants in the mass ADA litigation filed in the Western District of Texas collectively retained the same attorney (who typically represents those seeking to assert their rights under the ADA) and vigorously contested the lawsuits. In response, the plaintiff’s attorney filed a plethora of pleadings making personal attacks on the defense attorney,⁶⁹ filed mandamus actions against nearly every district court and Magistrate Judge in the Western District of Texas’s Austin Division with the United States Fifth Circuit Court of Appeals,⁷⁰ and filed a judicial conduct complaint with the Fifth Circuit against a Magistrate Judge handling the cases.⁷¹

In August 2016, the United States Magistrate Judge held a hearing on the defendants’ motion to sanction the plaintiff and his attorney. At that hearing, the defendants’ attorney—a person with a long and impeccable record representing plaintiffs in civil rights matters⁷²—testified: “[I]n my view, [the plaintiff’s attorney and the plaintiff] are undermining the ADA. He will be a poster child of a congressional attempt to amend and weaken the ADA I’ve done a large number of ADA cases myself, but they have always been systemic cases, nothing like this just to make money. And the danger in my view . . . is that this sort of scheme and nonsense is going to lead to a very drastic weakening of the ADA.”⁷³

On December 7, 2016, the Magistrate Judge handed down a long and detailed opinion, imposing more than \$175,000 in sanctions against the plaintiff’s attorney for abusive conduct in ADA litigation.⁷⁴ According to the Magistrate Judge:

Normally, people resort to the court system to resolve grievances and discover the truth. In these six cases, however, [the plaintiff’s attorney] has used this system to create strife and perpetuate lies. He has defamed opposing counsel with false and abusive statements, attempted to derail the administration of justice with frivolous motions, and submitted fabricated evidence to subvert proceedings in this court. Throughout, his conduct has forced the Magistrate Court to feel more like a referee in a boxing match than an impartial arbiter of the law. Defendants’ sanctions motions catalogue almost a year’s worth of [the plaintiff’s attorney’s] bad behavior. Having reviewed the motions, the entire cases filings, and the relevant law, the undersigned finds that sanctions are not only warranted, but imperative to remedy the damage caused by [the plaintiff’s attorney’s] serious and pervasive misconduct in these causes.⁷⁵

It is conceivable that the court’s strong handling of the mass ADA litigation in the Western District of Texas will deter others from attempting to employ the same model in Texas.

VI. Conclusion

As noted, it is unknown whether Texas will see an explosion in ADA litigation like that which California has experienced for many years. Whether or not Texas experiences excessive or abusive litigation, the better public policy is to require that plaintiffs pursuing access litigation in Texas under the ADA and chapter 121 provide a pre-suit notice to the defendant. Then, if the defendant cures violations within a statutorily prescribed time, a lawsuit would not be cognizable. Requiring a pre-suit notice that triggers a right to cure is already found in other Texas statutes.⁷⁶

Another option would to require exhaustion of administrative remedies. Of those states that provide for a private right of action, many require exhaustion before a lawsuit can be filed.⁷⁷ Some states have also attempted to provide relief in the form of a reduction in damages, similar to California's Senate Bill 269.⁷⁸

Whatever Texas policymakers decide to do to prevent or deter abusive litigation related to the ADA and the related Texas statute, the abusive litigation described above is one more illustration of how statutory non-reciprocal awards of attorney's fees to prevailing plaintiffs provide an incentive to unscrupulous lawyers to manufacture litigation and should be avoided in future legislation. ■

ENDNOTES

- 1 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213).
- 2 *The Americans with Disabilities Act of 1990*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Dec. 20, 2016) (defining ADA as a civil rights act).
- 3 See 42 U.S.C. §§ 12111-12117. The Act allows, among other things: (1) actions by employers that are job related and consistent with business necessity, if performance cannot be accomplished by reasonable accommodation; (2) a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace; and (3) requirements that an individual be a member of and conform to the tenets of a religious entity employer. See *id.* § 12113.
The ADA, as originally passed, defined “disability” with respect to an individual as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” Americans with Disabilities Act, § 3(2)(A), 104 Stat. at 327. The Equal Employment Opportunity Commission (EEOC) is required to interpret and implement the Act in regard to employment discrimination. *Id.* Title I, § 106. Before 2009, the EEOC’s regulations under the Act defined a person’s impairment as one that “severely or significantly restricts” a major life activity. See *Fact Sheet on the EEOC’s Final Regulations Implementing the ADA*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm?renderforprint=1 (last visited Dec. 20, 2016). On September 25, 2008, President George W. Bush signed the ADA Amendments Act of 2008 (“ADAAA”) into law. Pub. L. No. 110-325, 122 Stat. 3554 (2008). In the ADAAA, Congress found that “the current Equal Employment Opportunity Commission ADA regulations defining the term ‘substantially limits’ as ‘significantly restricted’ are inconsistent with congressional intent, by expressing too high a standard.” 42 U.S.C. § 12101 note, at (a)(8). Congress therefore directed the EEOC to amend its regulations and replace “severely or significantly” with “substantially limits,” *id.* at (b)(6), which the EEOC has done. See 29 C.F.R. § 1630.2(g)(1)(i).
- 4 See 42 U.S.C. §§ 12131-12165.
- 5 See *id.* §§ 12181-12189.
- 6 See 47 U.S.C. § 225.
- 7 42 U.S.C. § 12182(a).
- 8 *Id.* § 12181(7).
- 9 *Id.* § 12182(b)(2)(A)(iv).
- 10 *Id.* § 12183(a)(2).
- 11 *Id.* § 12183(a)(1).
- 12 *Id.* § 12204(a), (b).
- 13 UNITED STATES ACCESS BOARD, <https://www.access-board.gov/> (last visited Dec. 20, 2016).
- 14 See *About the ADA Standards*, UNITED STATES ACCESS BOARD, <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards> (last visited Dec. 20, 2016) (hereafter “*About the ADA*”). As explained in the Accessibility Guidelines, “Guidelines are issued by the Board, standards by designated agencies such as DOJ and DOT. Standards are what the public must follow to comply with the laws; the guidelines are what these agencies must follow in setting or updating their standards. When the Board issues guidelines, it does not change compliance for the public until the standards are similarly changed and an effective date set.” See *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines, July 23, 2004 (Answers to Common Questions About the New ADA-ABA Guidelines)*, UNITED STATES ACCESS BOARD, available at <https://www.si.edu/Content/Accessibility/Americans-Disabilities-Act.pdf> (last visited Dec. 20, 2016) (hereafter “*Accessibility Guidelines*”).
- 15 See *About the ADA*, n. 13, *supra*. DOJ updated its ADA standards in 2010. Its standards are called the “2010 ADA Standards for Accessible Design.” These standards apply to all facilities covered by the ADA except public transit facilities and became mandatory for newly constructed and altered facilities as of March 15, 2012. DOT issued its current edition of ADA standards in 2006, which became effective on November 29, 2006. DOT’s standards apply to facilities used by state and local governments to provide public transportation. See *About this Guide*, UNITED STATES ACCESS BOARD, <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/guide-to-the-ada-standards/about-this-guide> (last visited Dec. 20, 2016).
- 16 See *Chapter 1: Using the ADA Standards*, UNITED STATES ACCESS BOARD, <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/guide-to-the-ada-standards/chapter-1-using-the-ada-standards> (last visited Dec. 20, 2016).
- 17 *Id.* “The ADA sets up a voluntary process through which a state code can be certified by DOJ as meeting or exceeding the ADA standards . . . Certification facilitates compliance by ensuring that state and local code requirements are consistent with the ADA accessible design requirements. This process, in effect, integrates the requirements for accessible design under the ADA into state or local code enforcement processes. Under a certified code, design errors are more likely to be caught and remedied before construction. Also, having a DOJ-certified code offers rebuttable evidence of compliance with title III of the ADA in response to a legal challenge under the law concerning accessible facility construction.” *Id.*
- 18 See *Accessibility Guidelines*, n. 13, *supra*, at 197.
- 19 *Id.* at 198 (emphasis original).
- 20 *Id.* at 141.

- 21 *Id.* at 186 (emphasis original).
- 22 *Id.* at 188 (emphasis original).
- 23 42 U.S.C. § 12188(a)(1). The Act does not “require a person with a disability to engage in a futile gesture, if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.” *Id.*
- 24 *See Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011) (citing 42 U.S.C. §§ 2000a-3(a), 12188(a)(2)).
- 25 42 U.S.C. § 2000a-3(a) (emphasis added).
- 26 *Id.* § 12188(a)(2).
- 27 *Id.* § 2000a-3(b).
- 28 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-19 (1978).
- 29 *See* 42 U.S.C. § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3).
- 30 *See, generally, id.*
- 31 *See Buckhannon Bd. & Care Home v. West Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001). As other courts have recognized, “ADA-architectural-barrier cases are a unique subset of voluntary cessation doctrine cases.” *Houston v. 7-Eleven, Inc.*, No. 13-60004-Civ., 2014 WL 351970, at *2 (S.D. Fla. Jan. 31, 2014).
- 32 *See, e.g., 7-Eleven, Inc.*, 2014 WL 351970, at *2 (“Several courts have found that where structural modifications have been undertaken to make the facility ADA compliant the case is moot. The fundamental rationale supporting these cases is that the alleged discrimination cannot reasonably be expected to recur since structural modifications permanently undo the offending conduct.”); *see also Kallen v. J.R. Eight, Inc.*, 775 F. Supp. 2d 1374, 1379 (S.D. Fla. 2011) (“Because . . . Defendant has remedied . . . the deficiencies alleged in the Amended Complaint, the Court finds that those . . . claims are rendered moot and subject to dismissal for lack of jurisdiction If an ADA plaintiff has already received everything to which he would be entitled, i.e., the challenged conditions have been remedied, then these particular claims are moot absent any basis for concluding that plaintiff will again be subjected to the same wrongful conduct by this defendant.”); *Access 4 All, Inc. v. Bamco VI, Inc.*, No. 11-610007-CIV, 2012 WL 33163, at *6 (S.D. Fla. Jan. 6, 2012) (“[F]ederal courts have found ADA claims moot when the alleged discrimination cannot reasonably be expected to recur because structural modifications are unlikely to be altered in the future.”) (internal quotation omitted); *Nat’l All. for Accessibility, Inc. v. Walgreen Co.*, No. 3:10-CV-780-J-32-TEM, 2011 WL 5975809, *3 (M.D. Fla. Nov. 28, 2011) (explaining that “federal courts have dismissed ADA claims as moot when the alleged violations have been remedied after the initial filing of a suit seeking injunctive relief,” and collecting cases). This stands in contrast to the “stringent” standard a defendant must meet to moot a case based on the defendant’s voluntary cessation of discriminatory conduct which violates the ADA. *See Bamco VI*, 2012 WL 33163, at *5 (*distinguishing Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1181–88 (11th Cir. 2007) on that basis). The mootness doctrine is especially applicable in the ADA context, as the alleged discrimination cannot reasonably be expected to recur, since structural modifications are unlikely to be altered in the future. *See Sharp v. Rosa Mexicano, D.C., LLC*, 496 F. Supp. 2d 93, 99 (D.D.C. 2007); *Kallen*, 775 F. Supp. 2d at 1379; *Access 4 All, Inc. v. Casa Marina Owner, LLC*, 458 F. Supp. 2d 1359, 1366 (S.D. Fla. 2006), *vacated on other grounds*, 264 Fed. Appx. 795 (11th Cir. 2008).
- 33 *See, e.g., Ass’n for Disabled Americans, Inc. v. Key Largo Bay Beach, LLC*, 407 F. Supp. 2d 1321, 1348 (S.D. Fla. 2005); *Casa Marina*, 458 F. Supp. 2d at 1366 (“The resort’s voluntary decision to remedy any alleged barrier to access does not entitle Plaintiff to attorneys’ fees.”); *Kallen*, 775 F. Supp. 2d at 1381 (denying award of fees to plaintiff where defendant voluntarily remedied violations upon filing of lawsuit) (citing *Buckhannon*, 532 U.S. at 610).
- 34 *Christiansburg*, 434 U.S. at 422 (1978); *Bruce v. City of Gainesville*, 177 F.3d 949, 951-52 (11th Cir. 1999) (holding that the *Christiansburg* standard applies under the ADA’s fee-shifting provision).
- 35 *Casa Marina*, 458 F. Supp. 2d at 1368 (lawsuit was “frivolous, unreasonable, and groundless” where plaintiff’s counsel had been specifically advised of remediation, yet case pursued, justifying award of fees to defendant); *Kallen*, 775 F. Supp. 2d at 1381 (plaintiff’s “insistence on proceeding with his claims after they were clearly rendered moot,” led to finding that lawsuit was “frivolous, unreasonable and groundless, subjecting Plaintiff to payment of Defendant’s attorneys’ fees and costs”).
- 36 *Kallen*, 775 F. Supp. 2d at 1380 (citing *Christiansburg*, 434 U.S. at 421, and *Casa Marina*, 458 F. Supp. 2d at 1367).
- 37 TEX. HUM. RES. CODE § 121.001.
- 38 *Id.* at § 121.003(a).
- 39 *Id.* at § 121.003(c).
- 40 *Id.* at § 121.003(d). *Compare with* 42 U.S.C. § 12182(b)(2)(A)(ii), (iii), (iv).
- 41 *Id.* at § 121.002(5).
- 42 *Id.* at § 121.004(b).
- 43 *See, e.g., Diaz v. Doneraki Rests., Inc.*, No. H-12-2238, 2014 WL 2332822, at *1 (S.D. Tex. May 29, 2014) (awarding statutory damages in the amount \$250 for each of three violations because of plaintiff’s repeated pleas to the restaurant to accommodate her disability and the restaurant’s repeated refusal to stop the discriminatory conduct); *Jones v. White*, No. H-03-2286, 2006 WL 3358646, at *4 (S.D. Tex. Nov. 17, 2006) (“this damages provision is closer to a nominal damages remedy used when constitutional or civil rights are violated but it is difficult to establish actual damages beyond the violation itself”); *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1998 WL 1048497, at *3 (W.D. Tex. Aug. 21, 1998) (awarding statutory damages of \$100 to each of five plaintiffs), *rev’d on other grounds*, 207 F.3d 783 (5th Cir. 2000); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1065 (5th Cir. 1997) (affirming trial court’s award of \$100 for violation).
- 44 CAL. CIV. CODE § 51; *Jankey v. Sung Koo Lee*, 290 P.3d 187, 195 (Cal. 2012).

- 45 *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007)
- 46 CAL. CIV. CODE § 51(f).
- 47 *Munson v. Del Taco, Inc.*, 208 P.3d 623, 634 (Cal. 2009).
- 48 CAL. CIV. CODE § 52.
- 49 *See, e.g., Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000).
- 50 *Feezor v. Del Taco, Inc.*, 431 F. Supp. 2d 1088, 1091 (S.D. Cal. 2005).
- 51 McNichol, Tom, *Targeting ADA Violators*, Cal. Lawyer (Cal. Bar Ass'n Jan, 2012), available at <https://ww2.callawyer.com/Clstory.cfm?eid=919801>.
- 52 *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004), *aff'd in part, dismissed in part sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007).
- 53 Sen. Bill. 1186, 2012 Cal. Legis. Serv. ch. 383; *see also Will California law changes discourage abusive ADA litigation? The jury is still out...*, JMBM GLOBAL HOSPITALITY GROUP, http://hotellaw.jmbm.com/finally_relief_from_abusive_ada.html (last visited Dec. 20, 2016).
- 54 CAL. CIV. CODE § 55.54(b)(1).
- 55 *Id.* § 55.56(g)(1).
- 56 *Id.* § 55.56(g)(2)(A).
- 57 *Id.* § 55.56(i).
- 58 *Id.* § 55.31(b)(1).
- 59 *Id.* § 55.32.
- 60 Deposition of Jon Deutsch at 22, *Deutsch v. Henry*, Civil Action No. 1:15-CV-490-LY (W.D. Tex. taken Feb. 18, 2016) (on file with Texans for Lawsuit Reform Foundation).
- 61 *See Deutsch v. Henry*, Civil Action No. A-15-CV-490-LY-ML, 2016 WL 7165993, at *2 (W.D. Tex. Dec. 7, 2016) (Opinion on Defendants' Motion for Sanctions, noting that the attorney had filed 385 ADA access lawsuits in the Western District of Texas since 2015); *see also* <http://kxan.com/2016/12/07/austin-ada-attorney-omar-w-rosales-slammed-with-sanctions-in-federal-court/> (reporting on ADA lawsuits in Austin, Texas).
- 62 *See* Attorney Civil Report, attorney Omar Rosales, from PACER system for U.S. District Court for the Southern District of Texas for Plaintiff Tovar (on file with Texans for Lawsuit Reform Foundation and available on Southern District's PACER system).
- 63 *See, e.g.,* Original Complaint, *Deutsch v. Henry*, Civil Action No. 1:15-CV-490-LY (W.D. Tex. June 5, 2015), ECF No. 1; Original Complaint, *Deutsch v. Phil's Icehouse*, Civil Action No. 1:15-CV-490-RP (W.D. Tex. Oct. 28, 2015) ECF No. 1; Original Complaint, *Deutsch v. Travis County Shoe Hosp.*, Civil Action No. 1:15-CV-1198-LY (W.D. Tex. Dec. 22, 2015) ECF No. 1.
- 64 Copy of a demand letter on file with Texans for Lawsuit Reform Foundation; *see also* email submitted as Exhibit 1 to Crosley's Motion to Dismiss [Doc. #30-1], filed January 18, 2016 in *Deutsch v. Crosley*, Civil Action No. 1:15-CV-743-SS (W.D. Tex.) (on file with Texans for Lawsuit Reform Foundation).
- 65 *See* Deposition of Jon Deutsch at 22, *Deutsch v. Henry*, Civil Action No. 1:15-CV-490-LY (W.D. Tex. taken Feb. 18, 2016) (on file with Texans for Lawsuit Reform Foundation).
- 66 *See* Declaration of Jan Mirkin-Earley at ¶¶ 8-10, *Deutsch, v. Crosley*, Civil Action No. 1:15-CV-743-SS (W.D. Tex. Dec. 4, 2015) (on file with Texans for Lawsuit Reform Foundation).
- 67 *Id.* at ¶ 4.
- 68 *See, passim*, pleadings filed in *Deutsch v. Henry*, publicly available on PACER.
- 69 *See Deutsch v. Henry*, Civil Action No. A-15-CV-490-LY-ML, 2016 WL 7165993, at *3-9 (W.D. Tex. Dec. 7, 2016) (Opinion on Defendants' Consolidated Motion for Sanctions on six cases) (summarizing conduct by counsel in six cases).
- 70 *See* Docket Report, Mandamus Petition against District Judge Lee Yeakel and Magistrate Mark Lane, *Per Curiam* Order Denying Mandamus, and *Per Curiam* Denial of Petition for Rehearing *en banc*, in *Deutsch v. Henry*, COA 16-50998, in the United States Court of Appeals for the Fifth Circuit (on file with Texans for Lawsuit Reform and publicly available on the Fifth Circuit's PACER system); Docket Report, Mandamus Petition against District Judge Robert Pitman, and *Per Curiam* Order Denying Mandamus, in *Deutsch v. Riverside Limited*, COA 16-51018, in the United States Court of Appeals for the Fifth Circuit (on file with Texans for Lawsuit Reform and publicly available on the Fifth Circuit's PACER system); Docket Report, Mandamus Petition against District Judge Lee Yeakel and Magistrate Mark Lane, and *Per Curiam* Order Denying Mandamus, in *Deutsch v. Henry*, COA 16-51101, in the United States Court of Appeals for the Fifth Circuit (on file with Texans for Lawsuit Reform and publicly available on the Fifth Circuit's PACER system); Docket Report, Mandamus Petition against District Judge Lee Yeakel and Magistrate Mark Lane, and *Per Curiam* Order Denying Mandamus, in *Deutsch v. Chiwawa*, COA 16-51118, in the United States Court of Appeals for the Fifth Circuit (on file with Texans for Lawsuit Reform and publicly available on the Fifth Circuit's PACER system); Docket Report, Mandamus Petition against District Judge Lee Yeakel and Magistrate Mark Lane, and *Per Curiam* Order Denying Mandamus, in *Deutsch v. Draker Enterprises*, COA 16-51119, in the United States Court of Appeals for the Fifth Circuit (on file with Texans for Lawsuit Reform and publicly available on the Fifth Circuit's PACER system); Docket Report, Mandamus Petition against District Judge Robert Pitman and Magistrate Mark Lane, and *Per Curiam* Order Denying Mandamus, in *Deutsch v. La Tierra De Simmons Familia Ltd.*, COA 16-51121, in the United States Court of Appeals for the Fifth Circuit (on file with Texans for Lawsuit Reform and publicly available on the Fifth Circuit's PACER system).

- 71 See Motion to Recuse in *Deutsch v. Henry*, Civil Action No. A-15-CV-490-LY-ML, 2016 WL 7165993, at *10 (W.D. Tex. Sept. 8, 2016) (“In addition, Plaintiff’s counsel has filed a complaint with the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States regarding Magistrate Lane and the Magistrate’s refusal to follow the reporting procedures regarding a racist email sent by the Defense counsel.”).
- 72 See *Deutsch v. Henry*, Civil Action No. A-15-CV-490-LY-ML, 2016 WL 7165993, at *10 (W.D. Tex. Dec. 7, 2016) (Opinion on Defendants’ Motion for Sanctions, summarizing testimony of Betty Balli Torres, the Executive Director of the Texas Access to Justice Foundation, the largest funder of civil legal aid to the poor in Texas).
- 73 See *id.*, at *12 (quoting attorney James C. Harrington, representing Defendants).
- 74 See *id.*, at *24.
- 75 See *id.*, at *1.
- 76 TEX. BUS. & COM. CODE § 17.505 (Texas Deceptive Trade Practices Act); TEX. INS. CODE § 541.154 (Texas Insurance Deceptive Trade Practices Act). The “ADA does not require any notice to a defendant prior to the filing of a lawsuit. Additionally, Congress has attempted on several occasions to amend the ADA to provide pre-suit notice. Those efforts have failed each time.” *Jones v. Eagle-North Hills Shopping Centre, L.P.*, 478 F. Supp. 2d 1321, 1331 (E.D. Okla. 2007); see also H.R. 241, 114th Congress (2015-2016), H.R. 2804, 109th Cong. (2005); H.R. 728, 108th Cong. (2003); H.R. 914, 107th Cong. (2001); S. 782, 107th Cong. (2001); H.R. 3590, 106th Cong. (2000); S. 3122, 106th Cong. (2000) (all attempts to amend the ADA to include a notice requirement); Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 U.C.L.A. L. Rev. 1, 16–20 (2006) (discussing and critiquing the political movement in favor of amending the ADA to include a notice requirement).
- 77 See ARIZ. REV. STAT. § 41-1471; CONN. GEN. STAT. § 46a-100; DEL. CODE tit. 6 § 4511; FL. STAT. § 760.11; IDAHO CODE § 67-5908(2); KAN. STAT. § 44-1005; ME. STAT. tit. 5 § 4622; MINN. STAT. § 363A.33; MONT. CODE § 49-2-512; NEB. REV. STAT. § 20-142; N.H. REV. STAT. § 354-A:22; WIS. STAT. § 106.52.
- 78 See COLO. REV. STAT. § 24-34-601(c)(i) (employer with 25 or fewer employees and no more than \$3,500,000 in annual gross income entitled to a 50 percent reduction in the statutory fine, but not actual damages, assessed if it corrects the accessibility violation within 30 days after the filing of the complaint, but not if the defendant knowingly or intentionally made or caused to have made the access barrier that caused the accessibility violation).

