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ADA INTRODUCTION

The ADA is the central civil rights law protecting people with disabilities, a group of Americans who are too often overlooked and undervalued. The ADA uses different means than other civil rights laws, but the purpose of the laws is the same: the eradication of discrimination. As one legal scholar explained: A single step in front of a store may not immediately call to mind images of Lester Maddox standing in the door of his restaurant to keep blacks out. But in a crucial respect they are the same, for a step can exclude a person who uses a wheelchair just as surely as a no-blacks-allowed rule can exclude a class of people. Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. Rev. 1, 23 (2006).

Title III of the ADA (42 U.S.C. § 12181) broadly protects the rights of individuals with disabilities to independently and equally access places of "public accommodation." It requires places of public accommodation to be readily accessible to, and independently usable by, individuals with disabilities. 42 U.S.C. § 1218. Title III's implementing regulations are found at 28 C.F.R. Part 36.

Though disability rights laws are supposed to prevent the continued isolation and segregation of people with disabilities in the same tradition as other civil rights laws, some appear to regard disability rights requirements – particularly those involving physical access requirements, such as ramps and hand rails – as different, and less important, than other civil rights. *Id*. at 24. Some also appear to assume that ADA cases are abusive or unnecessary drains on courts. But private enforcement is central to accomplishment of the ADA's rightful purposes and, as has been demonstrated repeatedly, compliance does not happen without the credible threat of private enforcement. *Id*. at 9.

1. WHY ADA TITLE III IS IMPORTANT.

The significance Title III was highlighted in hearings preceding the ADA's passage when the National Council on Disability reported to Congress that: "The survey results dealing with the social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue … The extent of non-participation of individuals with disabilities in social

and recreational activities is alarming." (S. Rep. No. 116, 101st Cong., 1st Sess. 10-11 (1989)).

The Supplementary Information of 28 C.F.R. § 36 provides, among other things, as follows: "Some of the most frequently cited qualitative benefits of increased access are the increase in one's personal sense of dignity that arises from increased access and the decrease in possibly humiliating incidents due to accessibility barriers. Struggling [to use a non-accessible facility] all negatively affect[s] a person's sense of independence and can lead to humiliating accidents, derisive comments, or embarrassment. These humiliations, together with feelings of being stigmatized as different or inferior from being relegated to use other, less comfortable or pleasant elements of a facility (such as a bathroom instead of a kitchen sink for rinsing a coffee mug at work), all have a negative impact on persons with disabilities." "… persons who use side or parallel transfer methods from their wheelchairs are faced with a stark choice at establishments with [bathrooms that are not ADA compliant] i.e., patronize the establishment but run the risk of needing assistance when using the restroom, travel with someone who would be able to provide assistance in toileting, or forego the visit entirely ..."

Without a properly striped parking lot including accessible parking and an accompanying access isle, disabled individuals face the threat that another may park so close to the vehicle he or she is travelling in that he or she will be unable to access that vehicle until the car parked beside it is moved, or without excessive struggle and risk of injury.

Without an accessible entrance, disabled individuals are excluded from independent access to the premises.

2. <u>ADA TITLE III REQUIREMENTS ARE NOT, AND CANNOT BY LAW BE, UNDULY ONEROUS FOR EXISTING BUSINESSES.</u>

Existing businesses are not required to remove barriers to access unless it is "readily achievable" for the business to do so. Factors to be considered in determining what is readily achievable include the nature and cost of the action needed and the overall financial resources of the business. 42 U.S.C. § 12181, and 28 C.F.R. § 36.104.

3. <u>ADA TITLE III REQUIREMENTS ARE NOT OVERLY COMPLEX, AND INFORMATION AND ASSITANCE WITH COMPLIANCE IS AVAILABLE – AT NO COST.</u>

The Department of Justice has promulgated rules implementing Title III of the ADA, including the 1991 and the subsequent 2010 Standards for Accessible Design. The Standards set forth clear guidance for places of public accommodation under Title III to follow in order to make their facilities independently accessible to persons with disabilities. These standards may be found on-line. In addition, there is a great deal of assistance available for business owners, including the ADA Primer for Small Business, an ADA information line, and a host of other materials that can easily be found at ada.gov. As is evident from Primer, the requirements are not complex, and are based on common sense. Certainly, the requirements regarding an accessible parking lot, entrance, and bathroom are not complex, yet these are the most common violations we see.

5. THE VAST MAJORITY OF ADA VIOLATIONS CAN BE CORRECTED AT MINIMAL COST.

The most common ADA Title III violations include the failure to properly stripe accessible parking, step-up entries, and failure to install grab bars in toilet rooms. Correcting these violations is not complicated and does not involve significant expense. In addition, Section 44 of the IRS Code allows a Disabled Access tax credit for small businesses with 30 or fewer full-time employees or with total revenues of $1 million or less, which is intended to offset the cost of undertaking barrier removal and alterations to improve accessibility. Section 190 of the IRS Code provides a tax deduction for businesses of all sizes for costs incurred in removing architectural barriers, up to $15,000. See ADA Update: http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm#tax.

6. THE IMPORTANCE OF PRIVATE ENFORCEMENT.

The United States' Congress encouraged individuals to enforce its mandates by providing a private right of action and allowing prevailing plaintiffs to recover their attorneys' fees. 42 U.S.C. §§ 12188(a), 12205. "[I]n civil rights cases . . . as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act.'" *Doran*, 524 F.3d at 1039 (quoting *Trafficante*, 409 U.S. at 209).

The United States' Supreme Court has acknowledged that civil rights laws like the ADA are structured so that prevailing individual plaintiffs vindicate the law's objectives for the benefit of all similarly situated individuals. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 600 (1983) (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401-02 (1968)); *see also Walker v. Carnival Cruise Lines*, 107 F. Supp. 2d 1135, 1143 (N.D. Cal. 2000) (describing how Title III relief "redound[s] not only to the plaintiffs themselves, but to similarly situated disabled persons, and the entire society at large.").

While it is true that the Department of Justice (DOJ) has the authority to engage in litigation to enforce Title III, that authority is limited to cases in which there is a "pattern or practice of discrimination" or the "discrimination raises an issue of general public importance." 42 U.S.C. § 12188(b)(1)(B) (2006 & 2010 Supp.); *see also* Nat'l Council on Disability, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* (2000) (hereinafter "*Promises*"), *available at*: http://www.ncd.gov/newsroom/publications/2000/pdf/promises.pdf. Even among those cases, the Civil Rights Division of the DOJ has emphasized in its own budgetary statements that it faces challenges in carrying out its duties with respect to the ADA. *See* U.S. Dep't of Justice, Civil Rights Div., *FY 2012 Performance Budget,* 4-5 (2011), *available at*: http://www.justice.gov/jmd/2012justification/pdf/fy12-crt-justification.pdf. One review showed that the Department of Justice reached 107 public accommodation settlements in 10 years of enforcing the ADA – "less than one settlement a month by an agency charged with nationwide enforcement." *See* Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act,* 192 (2005).

The National Council on Disability, an independent federal agency under 29 U.S.C. § 780a (2006), has reported that effective enforcement of the ADA is hampered by "insufficient government enforcement of compliance obligations among small businesses in particular . . . ." *See* Nat'l Council on Disability, *Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success,* 166, 167-68 (2007) (hereinafter "Implementation") ("When the [DOJ's] limited human and financial resources are added into the mix, it is not surprising that the DOJ's enforcement record focuses on large, high-profile commercial defendants."), http://www.ncd.gov/newsroom/publications/2007/pdf/implementation 07-26-07.pdf. Because small businesses make up the vast majority of all U.S. businesses, the enforcement gap for Title III is very substantial. The U.S. Census has calculated that there are over 6.6 million business establishments employing fewer than 20 employees, which represents 86% of all U.S. business establishments. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2011,* at 500 tbl. 757, *available at*: http://www.census.gov/ compendia/statab/2011/tables/11s0757.pdf.

Unfortunately, even now – more than 27 years after passage of the ADA – persons with disabilities still face ubiquitous and gratuitous barriers to access throughout Minnesota and the country. Non-compliance is rampant. A recent law review article reported an estimate that "less than 2 percent of public buildings in the United States fully comply with Title III." *See* Kelly Johnson, Note, *Testers Standing Up for Title III of the ADA*, 59 Case W. Res. L. Rev. 683 (2009) at 707.

7. SERIAL ADA ATTORNEYS AND CLIENTS.

As discussed above, the Federal Government's limited resources mean that the burden falls, in very large part, on private litigants to enforce the ADA's Title III. But private litigants suing to remedy these violations and their attorneys face great expense and little promise of reward in pursuing such claims. Plaintiff's bringing ADA Title III claims are unable to recover monetary damages, so their sole legal remedy is injunctive relief and an award of reasonable attorney's fees. See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 Vand. L. Rev. 1807, 1825 & n.95 (2005) (citing 42 U.S.C. § 12188(a) (2002) (permitting only injunctive relief)). This situation has precipitated the development of a specialized bar and a class of ideologically motivated plaintiffs who understand the law and can effectively manage the risk of ADA enforcement. *See* Bagenstos, *supra*, at 12-14. As the National Council on Disability has noted:

> Title III enforcement requires the availability of a private bar that has the incentive to acquire ADA expertise and is willing to take on Title III compliance cases … Individuals with disabilities who encounter barriers under Title III are forced to rely purely on a public accommodation's good will in responding to informal complaints or are left to seek out those few attorneys who have found ways to manage their risk when bringing Title III actions. See Nat'l Council on Disability, *Implementation* at 169; *see also id.* at 168, 177.

This explains why so many Title III suits are brought by the same attorney or law firm, and the same disabled individuals -- who are often advocates for this cause. Consistent with these

precepts, courts have rejected efforts by non-compliant defendants to avoid liability on a particular ADA claim by seeking to divert attention from their failure to comply with claims that a particular plaintiff is a "serial litigant" or by using the derisive term "drive-by lawsuits. *See, e.g. Kittok v. Leslie's Poolmart, Inc.*, 687 F.Supp.2d 953, 958-59 (C.D. Ca. 2009), where the court stated:

> "These arguments are representative of a troubling trend in which disability access defendants attack the motives of plaintiffs and their counsel in nearly every case brought to enforce the right to equal access guaranteed by the ADA…Inasmuch as defendant seems to suggest that plaintiff's meritorious claim is annoying, difficult for business, or otherwise objectionable, that is an argument for the legislature, not the courts…. The persistence of plaintiffs in bringing multiple lawsuits alleging unequal access to places of public accommodation does not demonstrate wrongdoing by plaintiffs anymore than it shows a hesitation of businesses to comply with the law."

8. THE PRE-SUIT NOTICE ISSUE.

Many businesses complain because they were sued without having first been given individualized notice that they were violating the ADA. Placing the burden on the disabled community to investigate and identify non-compliant businesses, and then educate the business on the requirements of federal law, all at no cost to the business is unfair. Businesses, like everyone else, are required to know the law. It is also unfair to single out the disabled as having to provide pre-suit notice of unlawful discrimination when other minorities protected under civil rights acts are not required to do so.

It should also be noted that where there is no ability to recover attorney's fees associated with the effort to investigate, identify and inform non-compliant businesses through pre-suit notice, it is not possible for lawyers to devote the time and expense necessary to develop expertise in this area and provide quality assistance to disabled individuals, who cannot afford to pay the attorney themselves. Pre-suit notice provisions that would provide for the recovery of reasonable attorney's fees would not impact private enforcement, but pre-suit notice provisions without any provision for an award of attorney's fees (like that adopted by the Minnesota legislature) slam the court house doors shut to the disabled; and encourage businesses to ignore the ADA's requirements until someone does the work for them and provides them with notice.

9. MERITLESS CLAIMS AND EXTORTION.

Pursuit of a valid civil rights action under a federal statute that expressly provides for the recovery of attorney's fees is not extortion, yet many non-compliant business owners use that derogatory term in an effort to divert attention from their responsibilities under the ADA. Also, claims that ADA Title III suits might be fabricated could be advanced as an argument against any case: thus a business could fabricate a claim that it had a contract, or an individual could fabricate a claim he or she was injured, and so on. The system has a strong remedy for any such attempts, which can include severe sanctions and even the disbarment of an attorney. Further, unlike many claims, ADA Title III violations are typically not subject to debate and are easily proven by photographic evidence showing, for example, no grab bars in a toilet room. Thus the

prospect of meritless ADA Title III claims is low. Our firm is not aware of even one ADA Title III case, anywhere in the country, that has been found, by any court, to be frivolous.