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Enforcing the ADA and Stopping Serial Litigants: How the Commercial Real Estate Industry Can Play This Key Role

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**ENFORCING THE ADA AND STOPPING SERIAL LITIGANTS: HOW
THE COMMERCIAL REAL ESTATE INDUSTRY CAN PLAY THIS KEY
ROLE**

By: R. Cameron Saenz[†]

ABSTRACT

This comment explores the evolution of Title III of the Americans with Disabilities Act (“ADA”) and argues for a new and more effective implementation of this important anti-discrimination law through the real estate industry. First, this comment discusses the intricacies of the ADA, including its revisions over time and impactful legislation it has spawned. Second, this comment addresses current practical and legal challenges to enforcement of Title III of the ADA, including commercial property owners’ lack of understanding ADA responsibilities, serial litigation, and standing in courts. Finally, this comment proposes a new emphasis on ADA enforcement within the real estate industry. Such focus would obviate the need for many private lawsuits, place responsibility for ADA enforcement on parties involved in commercial real estate transactions and result in more effective implementation of both the spirit and letter of the ADA.

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 (“ADA”) has been in effect for almost thirty years, yet the vulnerable class of American citizens it was designed to protect still faces barriers in spite of it.¹ Although it is designed to protect a class which comprises 26% of the adult American population, the ADA is under-enforced and under-prioritized, resulting in wide-spread and ongoing discrimination against the disabled.² The best example of discrimination that remains are the barriers to physical access that those with ambulatory disabilities face due to the inadequate enforcement of Title III of the ADA.³ Title III covers physical access to public accommodations.⁴ After all the years of ADA enforcement, the consistently high numbers of Title III lawsuits tend to show that businesses have not become more accessible.⁵ A closer assessment reveals problems with ADA enforcement that expose its weaknesses and vulnerability to being de-prioritized by judges in light of other issues.

Several inefficient aspects of ADA regulation limit the effectiveness of courts in applying and enforcing the ADA, which lead to frequent and questionable dismissals of Title III lawsuits on standing grounds. These aspects include a lack of understanding of ADA compliance responsibilities by owners of public accommodations, inconsistencies between state and local codes and the ADA, and a lack of incentives for business owners to spend money to accommodate the disabled.⁶ The government does not have

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

2. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited Sept. 23, 2018).

3. *Id.*

4. 42 U.S.C. §§ 12102–12213.

5. Minh N. Vu, Kristina M. Launey, & Susan Ryan, *Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000*, SEYFARTH SHAW (Jan. 22, 2019), <https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/>.

6. Samuel R. Bagenstos, Article, *The Perversity of Limited Civil Rights Remedies: The Case of Abusive ADA Litigation*, 54 UCLA L. REV. 1, 8–9 (2006).

sufficient resources to evaluate every public accommodation in the nation for ADA compliance and brings relatively few enforcement actions against public accommodations.⁷ The Department of Justice's Disability Rights Section, who implements and enforces the ADA, has only a small group of lawyers to address all ADA violations, including Title III violations.⁸ Therefore, ensuring compliance of facilities providing public accommodation with the ADA is a task largely left to the owners of these establishments.⁹ However, when owners are unaware of their responsibilities or simply choose not to comply with the law, a disabled plaintiff is authorized to bring suit to right the wrong.

The shift of enforcement responsibility to the impacted community through private lawsuits has spawned a judicial crisis: serial litigation of Title III issues.¹⁰ This battle unnecessarily pits advocates for businesses and advocates for disability rights against each other. However, the challenge is that serial litigants, under the guise of being disability rights advocates, are not always well intentioned and have found an opportunity to abuse due process to seek financial gain in the form of attorney's fees.¹¹ As a result, when a Title III case borders on frivolity, judges have found a way to dismiss these suits by ruling that the plaintiff is not sufficiently affected by the alleged lack of compliance and, as a result, does not have standing to bring the lawsuit.¹²

Title III needs to be enforced proactively rather than retroactively through private lawsuits. Given the limitations that exist in private party enforcement of Title III, a renewed emphasis should be placed on enforcing its laws in real estate transactions and construction. In particular, property owners should implement the ADA into the commercial real estate industry similar to how the Fair Housing Act has been implemented in the residential real estate industry.¹³ Implementation would require evaluating the issue of ADA compliance at the time commercial properties are being developed or

7. *Id.* at 9–10.

8. Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 112 (2004).

9. Bagenstos, *supra* note 7, at 10.

10. *Id.* at 12–13.

11. *Id.* at 33.

12. *Id.* at 26; *see also* *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1373 (M.D. Fla. 2004).

13. 42 U.S.C.S. § 3601 (2012).

transacted. If the real estate industry has a hand in ADA compliance during its thorough transactional process, Title III will have consistent contractual enforcement, rather than the current approach that relegates attempts at Title III enforcement to costlier and less resourceful private lawsuits.

II. OVERVIEW OF THE ADA'S TITLE III

Title III of the ADA governs “places of public accommodation” (public accommodations) and services operated by private entities.¹⁴ The definition of public accommodation is “a facility, operated by a private entity, whose operations affect commerce and whose operations fall within” one of twelve categories, such as restaurants, hotels, movie theaters, grocery stores, and many other common public places.¹⁵ The ADA has two standards that public accommodation owners must meet depending on when the premises were constructed: the *new construction* standard and the *readily achievable* standard.¹⁶ New construction standards apply to premises that are constructed after December 1992, and readily achievable standards apply to

14. 42 U.S.C.S. §§ 12102–12213 (2012).

15. The twelve categories are:

an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

a restaurant, bar, or other establishment serving food or drink;

a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

an auditorium, convention center, lecture hall, or other place of public gathering;

a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

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;

a terminal, depot, or other station used for specified public transportation;

a museum, library, gallery, or other place of public display or collection;

a park, zoo, amusement park, or other place of recreation;

a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

28 C.F.R. § 36.104 (2019).

16. See 42 U.S.C. §§ 12181, 12183 (2012).

premises constructed before 1991 and to subsequent owners of more recent construction.¹⁷

The Department of Justice (“DOJ”) has promulgated detailed regulations addressing technical requirements of the Act.¹⁸ The DOJ’s changing regulations have been a source of confusion but also a sign that the Department is increasingly expanding its awareness of disability needs.¹⁹ Currently, Title III regulations are found in the 2010 ADA Standards for Accessible Design, a 279-page comprehensive document that provides 2010 standards for (i) state and government facilities, (ii) public accommodations and commercial facilities, and (iii) the former regulation, the ADA Accessibility Guidelines.²⁰ Furthermore, in 2016 the Attorney General signed a final rule to revise the Title II and III regulations to implement the statutory requirements of the ADA Amendments Act of 2008 (“ADAAA”), which more clearly defines “disability” by specifying the impairments regarded as disabilities and expanding on the major life activities they affect.²¹

In 2001, President George W. Bush’s administration implemented the New Freedom Initiative with an aim of lowering the barriers to equality for disabled Americans.²² Part of this Initiative involved encouraging owners of public accommodations who are exempt from Title III to implement physical modifications and changes to operations that would increase access for the disabled.²³ This part of the Initiative proposed providing Federal matching grants to private clubs, religious organizations, and other ADA-exempt organizations to implement renovations and accommodations to improve accessibility.²⁴

17. *Readily achievable* means easily accomplishable and able to be carried out without much difficulty or expense. 42 U.S.C.S. § 12181(9).

18. 28 C.F.R. § 36.101 (2019).

19. *Justice Department Announces Proposed Amendment to Americans with Disabilities Act Regulations to Expand Access to Movie Theaters for Individuals with Hearing and Vision Disabilities*, U.S. DEP’T OF JUSTICE (July 25, 2014), <https://www.justice.gov/opa/pr/justice-department-announces-proposed-amendment-americans-disabilities-act-regulations-expand>.

20. *See id.*; 28 C.F.R. § 36.101.

21. 28 C.F.R. §§ 35.108, 36.105 (2019); *The Current ADA Regulations*, U.S. DEP’T OF JUSTICE, https://www.ada.gov/2010_regs.htm (last visited on Nov. 11, 2018).

22. President George W. Bush, *Foreword to NEW FREEDOM INITIATIVE*, EXEC. OFFICE OF THE PRESIDENT (2001), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a405329.pdf>.

23. *Id.* at 5.

24. *Id.* at 23.

Congress implemented the ADAAA as a way to counteract Supreme Court cases that narrowed the scope of the ADA.²⁵ One of the primary congressional purposes behind the ADAAA was to return ADA focus to issues of discrimination, rather than determining which disabilities were covered and when a plaintiff had valid standing.²⁶ An empirical study assessing whether the ADAAA was successful in furthering congressional intent showed that the Act succeeded in bringing more favorable outcomes for disabled plaintiffs, while at the same time refocusing the issues in these claims on qualification and reasonable accommodations.²⁷

III. IS PUBLIC ACCOMMODATION ACCESS STILL AN ISSUE?

Despite the pushes for Title III reform, we continue to see a lack of access for disabled citizens in public accommodations. While it is nearly impossible to measure the overall changes in public accommodation accessibility of the disabled in society without analyzing every public accommodation in America, the number of Title III lawsuits that are brought each year is a metric of overall compliance.²⁸ Lawsuits are brought against Title III-covered businesses by either the DOJ or private citizens.²⁹ Between 2015 and 2016, non-employment ADA lawsuits—claims of alleged discrimination in public accommodations, transportation, communications, and governmental activities—jumped 36.3% in federal district courts.³⁰ 2016 was a record year for ADA litigation, accounting for one in every four (24.7%) civil rights cases in federal district courts.³¹ In 2017, ADA suits comprised 27% of civil rights

25. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH & LEE L. REV. 2027, 2029 (2013).

26. 154 CONG. REC. S8342–01, S8347 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).

27. Befort, *supra* note 26, at 2071.

28. See generally Vu et al., *supra* note 6.

29. Matthew J. Aaronson & Ashley H. Story, *Public Accommodation ADA Suits on the Rise*, TROUTMAN SANDERS (Jan. 23, 2012), <https://www.troutman.com/public-accommodation-ada-suits-on-the-rise-01-23-2012/>.

30. *Americans with Disabilities Act Lawsuits Up 28 Percent in FY 2018*, TRAC REP. (Oct. 27, 2016), <http://trac.syr.edu/tracreports/civil/444/>.

31. *Id.*

cases.³² Florida, New York, and California are responsible for over 50% of the ADA suits in the nation.³³

However, further issues contribute to the steadily high, and increasing numbers in ADA litigation outside of Title III serial litigation.³⁴ First, there are new types of ADA lawsuits being filed, including suits alleging a lack of website accessibility by those who are disabled with blindness or dexterity issues.³⁵ Second, there has been an expansion of the class of people that are acknowledged as disabled, specifically after the implementation of the ADAAA.³⁶ Finally, specific states have different reasons for having high amounts of ADA litigation. For example, California state laws allow for monetary damages in ADA lawsuits, where most states limit recovery to injunctions and attorney's fees.³⁷ New York has a much older infrastructure that cannot be adapted for physical disabilities as easily as other cities, illustrated by the fact that only a quarter of the New York subway system is ADA accessible.³⁸ Unfortunately, despite these other causes, Title III serial litigation ultimately contributes to the high number of lawsuits in ADA compliance.³⁹

In light of understanding some of the other factors that have led to the increase in ADA litigation, and the problem of non-compliance with Title III, an analysis of the series of inefficiencies in the system exposing the dysfunctional enforcement framework is necessary.

A. Property Owner's Lack of Compliance, Willingly or Unintentionally

Title III of the ADA is complex, technical, and highly detailed in some areas while being confusingly vague in other areas. This is apparent by the variety of regulations needed to enforce and control it. Of all the civil rights laws, those prohibiting disability discrimination

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

33. *Id.*

34. Vu et al., *supra* note 6.

35. U.S. CTS., *supra* note 33; *see also* Vu et al., *supra* note 6.

36. Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last* 49, FED. LAW., Nov. 17, 2011, at 49.

37. U.S. CTS., *supra* note 33.

38. *Id.*; *see also* Jeanmarie Evelly, *28 Years After ADA's Passage, Subway Accessibility Still 'Disgraceful,' Experts Say*, CITYLIMITS.ORG (July 30, 2018), <https://citylimits.org/2018/07/30/28-years-after-adas-passage-subway-accessibility-still-disgraceful-experts-say/>.

39. U.S. CTS., *supra* note 33.

can be the most complex and least understood.⁴⁰ In complying with ADA requirements, real estate lawyers recommend a series of steps in ensuring that the disabled can access and enjoy a public accommodation owner's business.⁴¹ These steps include consulting with the architects and construction companies involved in new construction, referring to the ADA Accessibility Guidelines, reviewing how the business communicates with consumers to decide if hearing or visual auxiliary aids are necessary, completing surveys at the end of construction or alteration, and conducting regular accessibility reviews thereafter.⁴² Ultimately, businesses must understand that consumers with disabilities must be treated differently—with more accommodations than consumers at large.⁴³

To alleviate some of this responsibility of business owners, the DOJ has issued a comprehensive technical assistance manual and other documents and videos specific to different forms of accommodation.⁴⁴ Some of these resources include information on education, effective communication, physical access, and tax credits for accommodating businesses.⁴⁵

The existence of state and local codes that may have guidelines and rules that differ from the ADA is an additional source of confusion for business owners.⁴⁶ While state and local codes enforce their regulations through plan reviews and building inspections, the DOJ relies on the backwards “traditional method” of civil rights enforcement: litigation in federal courts.⁴⁷ The standard for compliance with state and local codes is that a regulation be equal to

40. *ADA and Public Accommodations*, EPSTEIN, BECKER, GREEN, <https://www.ebglaw.com/ada-and-public-accommodations/> (last visited on Jan. 19, 2019).

41. *ADA Public Accommodations*, FISHER & PHILLIPS, LLP, 20 (2017) https://www.fisherphillips.com/assets/htmldocuments/FP_ADA%20Public%20Accommodations.pdf, at 17.

42. *Id.*

43. *Id.*

44. *Title III: Resources for Businesses and People with Disabilities*, U.S. DEP'T OF JUSTICE, https://www.ada.gov/ta_titleiii.html (last visited on Nov. 10, 2018).

45. *Id.*

46. *Department of Justice ADA Responsibilities: ADA Certification of State and Local Accessibility Requirements*, U.S. DEP'T OF JUSTICE, <https://www.ada.gov/certcode.htm> (last visited Nov. 11, 2018); see also Joan W. Stein, *ADA Standards Differ from Building Codes*, FACILITIESNET (Aug. 20, 2013), <https://www.facilitiesnet.com/ada/article/ADA-Standards-Differ-From-Building-Codes-14268?source=part#>.

47. U.S. DEP'T OF JUSTICE, *supra* note 47.

or exceed the ADA requirements, which is not a low bar to meet.⁴⁸ For example, Florida's Accessibility Code for Building Construction strives to keep up with the ADA stringency, and even exceed it, and has been modified by the Florida legislature when it determined that it was not meeting the ADA level of regulation.⁴⁹ To assist in matching the state, local, and federal codes, the DOJ has the ability to certify state and local codes as ADA compliant.⁵⁰ Although certification by the DOJ does not eliminate a plaintiff's cause of action or transfer enforcement authority to the states, it provides other benefits such as giving new construction owners the confidence that their structure complies with the ADA and the presumption of compliance if a lawsuit is brought.⁵¹

Another question arising in issues regarding ADA compliance is who is liable for the non-compliance in a lease situation? The ADA places compliance liability on both landlords and tenants, leaving the allocation of compliance responsibilities to their lease contract or other contracts.⁵² In practice, landlords can contract away their compliance responsibilities but still be found liable for non-compliance.⁵³ Alternatively, tenants can find themselves potentially accepting significant modification costs in the form of commercial lease contracts that place all of the costs of compliance on the tenant.⁵⁴ In other situations, owners, landlords, and tenants can be found jointly and severally liable.⁵⁵ Contractual allocations of compliance responsibilities have no effect on third parties bringing claims against a landlord for lack of compliance, which would force landlords to seek indemnification from their tenants based on their contract, and

48. *Id.*

49. *Preface*, 2012 FLORIDA ACCESSIBILITY CODE FOR BLDG. CONSTR. (2012), http://www.floridabuilding.org/fbc/committees/accessibility/aac/Changes_to_Law/2012_Florida_Accessibility_Code_Final%20.pdf.

50. U.S. DEP'T OF JUSTICE, *supra* note 47.

51. *Id.*

52. 28 C.F.R. § 36.201 (2019).

53. *Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1055 (S.D. Cal. 1998).

54. *What Real Estate Lawyers Need to Know About the ADA*, PRYOR CASHMAN (June 22, 2017), <https://www.pryorcashman.com/news-and-insights/xx-3.html>.

55. C. Knox Withers, *What Landlords and Property Managers Need to Know About the Americans with Disabilities Act*, ARNALL, GOLDEN, GREGORY, LLP, Dec. 8, 2016, <https://www.agg.com/What-Landlords-and-Property-Managers-Need-to-Know-About-the-Americans-with-Disabilities-Act-12-08-2016/>; *see also Eames v. S. Univ. & Agric. & Mech. Coll.*, No. 09-56-JJB, 2009 U.S. Dist. LEXIS 97452, at *17-18 (M.D. La. Oct. 16, 2009).

sometimes even mandate the tenant to provide a lawyer for the landlord.⁵⁶

Furthermore, there are many other parties involved in the commercial real estate transactional process that could potentially be affected by ADA lawsuits.⁵⁷ Developers, licensees, and those involved in the design and construction of places of public accommodation, such as construction managers, general contractors, subcontractors, civil engineers, consultants, and interior designers, are all potential parties to commercial real estate transactions that could find themselves as defendants. Additionally, they could be impleaded in ADA lawsuits because the scope of their work touches upon ADA compliance.⁵⁸ For example, the Eighth Circuit has found that a party faces liability if their involvement in the design and construction of the project constituted “significant control.”⁵⁹ On the other hand, the Ninth Circuit has held that an architect cannot be held liable for ADA non-compliance through their role in design and construction.⁶⁰ Furthermore, even if a defendant is not successful in impleading or being indemnified by a third-party, they may also file suit against these parties for breach of contract.

Nonetheless, regardless of whether each of these areas of confusion are corrected, and property owners acquire full access to the proper guidelines for ADA compliance, other factors may prevent owners from complying. For example, business owners may feel that the cost of compliance is not justified based on its customer base.⁶¹ This makes them vulnerable to suits by both authentic victims and serial litigants. The ADA applies to all public accommodations because effective elimination of discrimination against the disabled means ensuring that businesses incorporate the cost of compliance into their financing

56. Kelly Stohs, *ADA Compliance: Landlords, You're on the Hook*, POLSINELLI (Sept. 2015) <https://sftp.polsinelli.com/publications/rel/upd0815rel.htm>.

57. *Disability, Accessibility, & Liability*, AIA TRUST, <http://www.theaiatrust.com/whitepapers/ada/ada-fha-compliance.php> (last visited on Feb. 17, 2019).

58. *Id.*; see also David W. Peters, *Who's Responsible for ADA Compliance—Landlords or Tenants?* 29 REAL EST. ISSUES 16, 22 (2004).

59. Kenneth A. Slavens, *Architects and “Design and Construct” Liability under the Americans With Disabilities Act*, IRMI (Dec. 2001), <https://www.irmi.com/articles/expert-commentary/architects-and-design-and-construct-liability-under-the-ada>.

60. *Id.*; see also *Lonberg v Sanborn Theaters, Inc., et al.*, 259 F.3d 1029, 1029 (9th Cir. 2001).

61. Bagenstos, *supra* note 7, at 8.

strategies and eliminate the stigma that disabled customers are second-class citizens.⁶²

B. *Serial Litigation Abuse Through the ADA*

Serial litigants are those pairings of plaintiffs and attorneys that file ADA lawsuits against multiple businesses, regardless of whether the plaintiff suffered actual harm, and incentivized by the fact that attorney's fees are awardable in ADA lawsuits.⁶³ For example, a common target of Title III serial litigation is parking lots with too few handicap parking spaces because this is a deficiency that is easy to see for a "drive-by" plaintiff.⁶⁴ Although all Title III lawsuits involve a real violation of the ADA, the difference is that serial lawsuits are brought by a person whose only injury was being exposed to an ADA violation, whereas genuine lawsuits are brought by a person who suffered a real inability to use the goods or services of a business. This problem results in Title III violation complaints lacking credibility in courts that are battling overcrowded dockets, and where the profit motives of attorneys distort the system in ways that are contrary to disability policy.⁶⁵ Unfortunately, Congress and courts have begun using inefficient methods to handle the issue.

Clint Eastwood, after receiving his own Title III compliance complaints, testified in legislative hearings (for the ADA Notification Act) and characterized serial litigants as damaging to the credibility of disability rights.⁶⁶ He criticized that serial litigant lawyers "come along and they end up driving off in a big Mercedes, and the disabled person ends up riding off in a wheelchair, and that is because they have collected all of the money."⁶⁷ Eastwood is among many critics that find that the "ADA lawsuit binge" is driven by an "economics of attorney's fees," in which serial litigant attorneys are only in it for the money and working under a guise of charity.⁶⁸ Opponents of this viewpoint argue that just because an attorney is to benefit from reasonable attorney's fees through fee-shifting statutes that provide

62. *Id.*

63. *Id.* at 15; *see also* 28 C.F.R. § 36.505 (2019).

64. Denise Johnson, *Why Claims Under Americans with Disabilities Act Are Rising*, INS. J. (Oct. 7, 2016), <https://www.insurancejournal.com/news/national/2016/10/07/428774.htm>.

65. Bagenstos, *supra* note 7, at 6.

66. *Id.* at 30–31.

67. *Id.*

68. *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004).

competitive compensation for civil rights attorneys, courts should not be ambivalent toward that attorney for fulfilling their duties.⁶⁹

Another concerning technique of serial litigants are “sweetheart agreements,” in which a plaintiff attorney substantially benefits through a financial settlement with the defendant business yet never seeks enforcement of the awarded injunction or barrier removal.⁷⁰ Therefore, the business, although it has been through the judicial system, remains subject to further lawsuits because the non-compliance stays uncorrected until the property owner takes the initiative to correct the violation.⁷¹ One suggested solution to this issue is to create a database in which settlements are recorded, giving the business owner an incentive to correct the compliance issue in order to avoid future plaintiffs from looking to this database as a source of potential lawsuits.⁷²

A situation in the Texas towns of Midland and Odessa illustrates the disease of ADA serial litigation.⁷³ Disabled locals contacted a Florida-based lawyer to file twenty-nine ADA lawsuits in these mid-size towns.⁷⁴ This led to the towns’ chambers of commerce getting involved by warning other local businesses before they were defendants of their own lawsuits.⁷⁵ The chambers of commerce expressed that it was not willful disobedience that caused these businesses to not comply with the ADA but a lack of awareness of how the law applied to them.⁷⁶ The defense attorney for four of the businesses said that he believed most of the plaintiffs were really just seeking settlements and would settle for much lower than what fighting the case would cost.⁷⁷ This story ended with the chambers hosting a free seminar for local small business led by a registered accessibility specialist, but not every story ends that nicely.⁷⁸

Courts have to strike a workable balance in places like Midland and Odessa that are facing the threat of serial litigants. Should there be

69. Bagenstos, *supra* note 7, at 31.

70. *Id.* at 32.

71. *Id.* at 33.

72. *Id.* at 33–34.

73. DeAnn Lopez, *Attorney Speaks Out After Filing 29 Lawsuits Against Businesses Not ADA Compliant*, CBS 7, <https://www.cbs7.com/content/news/Attorney-Speaks-Out-After-Filing-29-Lawsuits-Against-Businesses-not-ada-compliant-370600101.html>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

settlements for these seemingly exploitative plaintiffs involved in drive-by lawsuits? Or are they to be treated as purveyors of justice, even when they receive high settlements and may never visit that same business again? Regardless of the answer, the result of this test is that the existence of serial litigation takes the court's focus off of ADA enforcement, a civil rights issue, and places it on resisting frivolous lawsuits.

The United States Representative for the district that includes Midland and Odessa, Mike Conaway, expressed his concern that “predatory attorneys who often times don’t even live in the same state are using Google Earth to find minor ADA violations, and slapping devastating lawsuits on local small businesses who thought they were in compliance with the law without giving them an opportunity to fix the infraction.”⁷⁹ He and five other congressman from serial-litigation-riddled states such as Texas and California introduced the ADA Education and Reform Act of 2017.⁸⁰

Congress proposed the ADA Education and Reform Act to lessen the proliferation of serial ADA litigation by requiring notice and an opportunity for the business to address the suit.⁸¹ The House passed the bill with a vote of 225-192, and the Senate is now considering the bill.⁸² If passed, this statute will have a significant impact on the enforcement of the ADA. The bill requires written notice of a lawsuit by an aggrieved party to the potential defendant and a response by written outline of improvements by the non-compliant business before the aggrieved party can bring a civil lawsuit.⁸³ There is also an educational component of the bill, requiring the Disability Rights section of the DOJ to provide education and possible training on public accommodation access to state and local governments and property owners.⁸⁴

Supporters of the bill are those that would be the targets of such frivolous lawsuits and their trade associations, such as the International Council of Shopping Centers, the National Retail

79. Press Release, Congressman Mike Conaway, Conaway Introduces Legislation to Curb Abusive ADA Lawsuits and Improve the ADA (Jan. 25, 2017), <https://conaway.house.gov/news/documentsingle.aspx?DocumentID=398190>.

80. *Id.*

81. Vu et al., *supra* note 6.

82. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018) (as passed by House of Reps., Feb. 15, 2018).

83. *Id.*

84. *Id.*

Federation, and National Grocers Association.⁸⁵ The United States Chamber of Commerce supports the bill as well, expressing the need to remove the incentive of plaintiffs being paid by legal fees so that emphasis may be restored to compliance and improved access.⁸⁶

Critics of the bill argue that it makes it more difficult and time-intensive to force small businesses to make their properties ADA-compliant.⁸⁷ A coalition of forty-three Senators, led by Senator Duckworth, an Army veteran who lost both legs and suffers from paralysis, wrote in an opposition letter to the bill, “when supporters of the discriminatory H.R. 620 argue for its necessity by citing examples of alleged ‘minor’ accessibility infractions, they miss the point that this bill undermines the rights of people with disabilities, rather than protects them.”⁸⁸

While the bill may have good intentions of dealing with serial litigation, it detracts from the rights of a class of citizens who already face overwhelming barriers to equal treatment. Even the threat of small businesses facing litigation from exploitative plaintiffs and their attorneys should not intrude on the enforcement of civil rights. If passed, this bill would not be the landmark legislation to reform the ADA and enforce it effectively. This is not likely the type of regulation that the ADA was meant to foster when it was written.

The takeaway from the legislation should be the educational aspect of the bill. Effective ADA reform and enforcement should certainly involve educating public accommodation owners and participants about their responsibilities to accommodate all classes of society. At the very least, this should involve making certain that all public accommodations owners have access to a list of their statutory responsibilities. However, implementation of this practice likely

85. *Letters of Support*, ADA EDUCATION AND REFORM ACT, <https://www.adalawsuitreform.com/letters-of-support> (last visited Nov. 2, 2018).

86. *Key Vote Letter to the U.S. House of Representatives in Support of H.R. 620*, U.S. CHAMBER OF COMMERCE (Feb. 13, 2018, 9:00 AM), <https://www.uschamber.com/letter/key-vote-letter-the-us-house-of-representatives-support-of-hr-620-the-ada-education-and>.

87. Press Release, Senator Tammy Duckworth (Ill.), Duckworth & Senate Democrats Vow to Defeat House GOP-Led Effort to Curtail Civil Rights of Americans With Disabilities (Mar. 29, 2018), <https://www.duckworth.senate.gov/news/press-releases/duckworth-and-senate-democrats-vow-to-defeat-house-gop-led-effort-to-curtail-civil-rights-of-americans-with-disabilities>.

88. *Id.*; see also *About Tammy*, TAMMY DUCKWORTH U.S. SENATOR FOR ILLINOIS, <https://www.duckworth.senate.gov/about-tammy/biography> (last visited Sept. 13, 2019).

means driving up government expenditures, which is not an action always easily taken by Congress.

Other bills have been introduced to Congress that are very similar to the ADA Education and Reform Act. In 2000, the House and Senate passed concurrent bills that would require a plaintiff to provide notice to a potential defendant, specifying the violation and a period of ninety days thereafter before suit could be filed.⁸⁹ Called the ADA Notification Act, the bill stated that if the criteria were not met, plaintiffs' attorneys would receive sanctions, and if the civil action were to proceed, plaintiffs would not receive attorney's fees or costs.⁹⁰ The Senate bill was introduced by a Senator from Arkansas, and the House bill was introduced by a Representative from Florida with twenty-three co-sponsors. Neither of the bills made it past introduction.⁹¹ This bill was re-introduced in the 2007 110th Congress, again by a Representative from Florida, where it again did not pass introduction.⁹²

Serial litigation is a consequence of the domino effect that has been the inadequate enforcement of the ADA. Judges are aware of their duties to protect civil rights, but are at the same time cautious of unethical, serial plaintiff attorneys, and are desperate for legislative remedies that will help guide them to eliminating both of these issues while not sacrificing the victims of the other.⁹³ In states like Florida, where hundreds of lawsuits are filed against establishments that plaintiffs claim to visit regularly, judges face this type of "shotgun litigation" that "undermines both the spirit and purpose of the ADA" and beg for there to be better legislative guidance in these win-lose scenarios.⁹⁴

C. Standing as the Courts' Attempt to Control the Situation

An unfortunate result of the current enforcement methods of Title III is that courts appear to be working actively to prevent serial litigation in their courtrooms by dismissing ADA lawsuits because of

89. H.R. 3590, 106th Cong. (2000) (as referred to Subcomm. on the Constitution); S. 3122, 106th Cong. (2000) (as referred to Comm. on Health, Educ., Labor, & Pensions).

90. *Id.*

91. *Id.*

92. H.R. 3479, 110th Cong. (2007) (as referred to Subcomm. on the Constitution, Civil Rights, & Civil Liberties).

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

94. *Id.*

a lack of standing.⁹⁵ The Supreme Court has held that standing has a constitutional minimum.⁹⁶ First, the plaintiff must suffer an injury in fact, defined by the invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent.⁹⁷ Second, there is a causation requirement, which requires linking the defendant's actions to the injury.⁹⁸ Third, a favorable decision for the defendant must be likely, not speculatively, to redress the injury.⁹⁹

The Fifth Circuit has identified two tests for the constitutional standing requirement in Title III lawsuits.¹⁰⁰ First, in the "intent-to-return" approach, a judge finds standing when the defendant has an intent to return to the defendant's premises where the plaintiff faced non-compliance.¹⁰¹ This stems from Justice Scalia and the majority's opinion in *Lujan*, deciding that intentions of returning "someday" are not enough.¹⁰² Some courts find that this requires a "concrete, particularized, and plausible plan" to return to the non-compliant premises.¹⁰³

Second, the "deterrent-effect" approach focuses on the language of the ADA that states that it is not required that a disabled person "engage in a futile gesture if such person has actual notice that a person or organization does not intend to comply" with the statute.¹⁰⁴ Therefore, standing is met because the disabled individual suffers a cognizable injury when the premises are not in compliance with the law.¹⁰⁵ Certainly, these are not the only approaches that courts will take in deciding on standing in serial litigation situations, but they highlight the struggle that courts must face in dealing with this issue versus the issue of recognizing compliance with Title III.

An example of how this clash between serial litigation and dismissal for standing plays out is illustrated in a South Carolina case.¹⁰⁶ The

95. See *Van Winkle v. Houcon Partners, L.P.*, No. H-17-01875, 2018 U.S. Dist. LEXIS 122672 (S.D. Tex. July 3, 2018).

96. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

97. *Id.*

98. *Id.*

99. *Id.*

100. See *Van Winkle*, 2018 U.S. Dist. LEXIS 122672, at *7.

101. *Id.* at *18.; see also *Betancourt v. Federated Dep't Stores*, 732 F. Supp. 2d 693, 704 (W.D. Tex. 2010).

102. See *Lujan*, 504 U.S. at 565 (1992).

103. See *Ingram v. Crown Reef Resort, LLC*, No. 4:15-CV-03404-RBH, 2016 U.S. Dist. LEXIS 99189 (D.S.C. July 29, 2016).

104. See *Gilkinson*, 1 F. Supp. 3d at 583 (quoting 42 U.S. Code § 12188(a)(1) (2012)).

105. *Id.*

106. *Ingram v. Crown Reef Resort, Ltd. Liab. Co.*, Civil Action No. 4:15-CV-

wheelchair-bound plaintiff sought an injunction, attorney's fees, and a declaratory judgment from a defendant resort in Myrtle Beach, alleging architectural barriers that prevented him from navigating the premises, parking his car, entering certain spaces, and using certain restrooms and amenities.¹⁰⁷ The defendant pointed out to the court that, in serial litigant fashion, the plaintiff had filed other lawsuits alleging he was at other hotels during the same time frame he alleged to have visited the defendant's resort.¹⁰⁸ The court granted the defendant's motion to dismiss for lack of standing, analyzing the case through four considerations, including plaintiff's proximity to the defendant's premises, past patronage of the defendant's resort, the "definitiveness" of his plan to return, and his frequency of travel near the resort.¹⁰⁹ Ultimately finding the intent-to-return consideration to weigh heavily, the court found that the plaintiff had not "plausibly plead an intention to return in the future to [defendant's resort] and suffer future harm."¹¹⁰

This case demonstrates the need for a more efficient way to recognize the rights of the disabled without subjecting them to judges who have predilections for protecting the integrity of the justice system. The fact that a disabled plaintiff—notwithstanding his exploitative intentions—faces scrutiny for his vacation habits and intentions in order to have his civil rights protected is not a normal or acceptable handling of a civil rights issue. After all, just because a disabled person would not have the desire to return to a property with inadequate ADA compliance (understandably so, given the inconvenience) does not mean a court should find ways to refuse recognition of his civil rights to do so. Furthermore, the court should consider the likelihood that another disabled person may attempt to access the premises and be discriminatorily denied this access.¹¹¹

Some commentators have made the argument that "outside agitators," such as attorneys who go to small towns and work with disabled plaintiffs to bring multiple ADA lawsuits against small businesses, should not be allowed to invoke the ADA.¹¹² However, this argument ignores the significant disincentives that exist in bringing an ADA lawsuit, including the difficulty of filing any type of

03404-RBH, 2016 U.S. Dist. LEXIS 99189 (D.S.C. July 29, 2016).

107. *Id.* at *3–4.

108. *Id.* at *3.

109. *Id.* at *7–8.

110. *Id.* at 22.

111. Milani, *supra* note 9, at 119.

112. Bagenstos, *supra* note 7, at 29.

civil rights claim.¹¹³ When courts find that out-of-town attorneys are acting as agitators, and not purveyors of the law, they fail to consider the possibility that the ADA's inadequate remedies and enforcement actually cause attorneys to go to communities and bring multiple suits when the community has widespread non-compliance with Title III.¹¹⁴ All it takes is one disabled person in a small town to stir up a community, but this can be prevented through proactive enforcement.¹¹⁵

IV. PARALLELS WITH THE FAIR HOUSING ACT

The Fair Housing Act ("FHA") parallels the ADA in a variety of ways, and the enforcement of FHA statutes may be helpful in assessing the ways in which the ADA could be more effectively enforced. However, there are also ways in which the ADA should separate itself from the FHA and learn from its failures.

The FHA was first enacted in 1968, making discrimination on the basis of race, color, religion, or national origin in the sale, rental or financing of housing illegal.¹¹⁶ The Act was amended in 1988 to make it illegal to discriminate on the basis of disability in housing.¹¹⁷ Therefore, individuals who may be able to sue under both the ADA and FHA include disabled people, organizations representing the disabled, the Department of Housing and Urban Development ("HUD"), and the DOJ through its ADA and FHA arms.¹¹⁸ Indeed, litigation and governmental action often overlap due to the similar subject matter of the two federal laws.¹¹⁹

One advantage that the FHA has over the ADA is its expansion to more protected classes than just the disabled. While the FHA also covers the disabled, it prevents discrimination on the basis of race, sex, color, religion, and national origin.¹²⁰ Therefore, it also has the support of more local and national organizations who advocate for those protected classes. While the ADA protects the entire class of disabled Americans, the FHA protects all people who may face discrimination

113. *Id.*

114. *Id.* at 29–30.

115. *Id.* at 30.

116. 42 U.S.C. §§ 3601–3619 (2012).

117. *Id.*

118. *Disability, Accessibility, & Liability*, AIA TRUST, <http://www.theaiatrust.com/whitepapers/ada/ada-fha-compliance.php> (last visited on Feb. 17, 2019).

119. *Id.*

120. 42 U.S.C.S. §§ 3601–3619.

based on one of their inherent characteristics (as long as that characteristic is a protected class in the FHA). As a result, the ADA would benefit from having more advocacy in the enforcement of its protections. Real estate industry professionals can play a key role in this effort by ensuring that the transaction of commercial properties involve adequate checks on ADA compliance.

Furthermore, the FHA has better remedial coverage than Title III of the ADA.¹²¹ While the ADA has struggled to find enforcement of its laws with only the promise of injunctive relief for plaintiffs who are successful in a Title III complaint—notwithstanding the payoff of attorney’s fees—the FHA allows remedies of not only attorney’s fees, but also punitive damages and the forced rental of a violative landlord to an aggrieved tenant.¹²² Injunctive relief under Title III is an inadequate threat of punishment to small businesses that are concerned about reducing expenditures and is unhelpful for getting plaintiffs past judges who are skeptical of standing in close cases.¹²³

Despite the breadth of coverage and stronger remedies available, the FHA has been criticized as a failure.¹²⁴ HUD, DOJ, and advocacy groups have found that minority groups still face dishonesty about availability, steering when searching for a home, and disparate treatment in mortgages.¹²⁵ Many cities in the country reject their FHA responsibilities by blocking low-income housing and employing anti-density zoning practices.¹²⁶ These issues stem from problems in the enforcement of the FHA and legislative compromises that limit its effectiveness, making it struggle from the beginning.¹²⁷ Requiring victims to file complaints with HUD or sue in federal court has been an enforcement scheme that has failed for the FHA.¹²⁸

121. Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 394–95 (2000).

122. *Fair Housing Act*, A.B.A. (Sept. 23, 2016), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/everydaylaw/real_estate/renting_a_home/fair_housing_act/.

123. Colker, *supra* note 122.

124. Janell Ross, *A rundown of just how badly the Fair Housing Act has failed*, WASH. POST (July 10, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/10/a-look-at-just-how-badly-the-fair-housing-act-has-failed/?utm_term=.ef2e17a2cbe1.

125. *Id.*

126. *Id.*

127. Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (April 11, 2018), <https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act>.

128. *Id.*

Although the FHA has only a little over twenty extra years of enactment on the ADA, the ADA can grow from the FHA's experiences by expanding on its successes and learning from its failures. For example, the FHA places restrictions on real estate agents, brokerages, and other agents to a residential real estate transaction in the way that they advertise for their clients.¹²⁹ Therefore, it is illegal for realtors to facilitate the discrimination that the FHA was designed to prevent, even when they are not parties to the resulting contract.¹³⁰ Many parties can be sued because of the civil rights nature of the FHA, and the Supreme Court has held that limited vicarious liability rules apply.¹³¹ Although the real estate agent has no stake in the discriminatory aspects of a property they are an agent to, they can still violate the FHA. Therefore, the incentives for enforcement are placed on multiple actors.

In the same way that the FHA indirectly regulates the residential real estate industry, as a regulation that puts restrictions on the freedom of contract, the ADA should be proactively regulated in this way. In order to avoid the failed aspects of the FHA, the ADA should not rely on enforcement through victims of discrimination, but rather on the private industries that directly affect the disabled class of Americans.

V. THE COMMERCIAL REAL ESTATE INDUSTRY SHOULD BE INVOLVED IN ADA ENFORCEMENT

Effective ADA reform needs to address non-compliance issues before they are dealt with through private lawsuits because this current retroactive scheme of enforcement is not working. If different regulating entities implement policies to effectuate ADA enforcement before serial litigators can bring suit, then courts will be less burdened by these types of lawsuits and ADA complaints will be treated more efficiently. Serial litigation is a natural result of improper ADA enforcement, and disability rights should not be tampered with by judges.¹³²

129. Elizabeth Weintraub, *What a Real Estate Agent Can or Cannot Do for You*, BALANCE (last updated June 25, 2019), <https://www.thebalance.com/fair-housing-act-violation-1798892>.

130. *Id.*

131. Meyer v. Holley, 537 U.S. 280, 285 (2003).

132. Bagenstos, *supra* note 7, at 36.

A. Regulations for Contracts and Consultants

The commercial real estate industry is directly linked to the ADA because the law makes it illegal for public accommodations to have certain barriers to access. Therefore, it seems only logical that those who work in the industry would be stakeholders in ensuring that public accommodations meet compliance standards. For example, a shop owner who owns a small business that is open to the public but has non-compliant ADA access will eventually sell that property. When the owner does, brokers, realtors, a title company, a lender, an insurance company, and more will likely be involved in the transaction. Currently, these entities do not play a role in ADA enforcement other than bringing awareness of these responsibilities to property owners.

I propose that buyers and sellers be required to go through an ADA-compliance check of the property, whether it be through their contract, lender requirements, or state or federal law. This transactional phase would be the stage where ADA compliance is addressed for public accommodations. Ideally, over time, as commercial properties are exchanged, non-compliance with the ADA will begin to decrease. Additionally, this will supplement property owners' understanding of their ADA responsibilities.

Revisions of standard commercial real estate contracts in regard to ADA responsibilities would be a good starting point for the industry to begin recognizing and encouraging ADA compliance. While the real estate industry is aware of the changes to ADA compliance standards that were made in 2011, standard contracts have not been revised to address those changes.¹³³ Some of the areas in which industry contracts have not caught up are in "access routes and paths, parking, restroom, stairs, pools, areas of recreation, and ATMs," most of which are important, if not necessary areas for any person using a public building.¹³⁴ Furthermore, standard contracts that obligate one of the parties to pay for compliance remedies would force parties to negotiate, recognize, and account for the compliance costs.¹³⁵ This would involve sellers correcting ADA violations before the transaction, or negotiating a reduction in the purchase price of the

133. Stacy Bohm & Arlene Kline, *Construction Contract Tools for Building an ADA Compliant Project*, NAT'L REAL ESTATE INV'R (Sept. 11, 2012), <https://www.nreionline.com/blog/construction-contract-tools-building-ada-compliant-project>.

134. *Id.*

135. Withers, *supra* note 56.

property so that the buyer may bring the property to compliance at their own cost.¹³⁶ Negotiating ADA compliance at the time of closing is justified by the risk of costly private lawsuits that can occur down the line against the purchaser. Although these regulations should respect the freedom to contract by not being too invasive, they will promote the well-being of the parties by ensuring that they do not fall victim to ADA lawsuits.

Effective ADA reform through the real estate industry could also involve the employ of ADA compliance consultants, who are experienced and knowledgeable about the intricacies and ongoing changes that are made to ADA laws.¹³⁷ These consultants can help in many areas of ADA compliance, including advisement on many different disabilities and barriers, but especially with access to public accommodations if they are involved in a real estate transaction or have the ability to review building plans for new construction.

California recently amended its landlord-tenant law for commercial properties, providing that a lessor shall provide its tenant with a notice of whether or not the commercial property has undergone an inspection by a Certified Access Specialist (“CASp”).¹³⁸ These specialists are ADA experts certified by the state of California.¹³⁹ If a CASp has performed an inspection, the lessor shall provide the tenant with a copy of the inspection report prior to the execution of the lease agreement.¹⁴⁰ However, counterproductively, the law allows the lessor to provide a cop-out notice in the lease agreement to acknowledge that the premises have not been inspected by such a specialist.¹⁴¹ The law provides that the lessor shall accommodate the tenant only if the tenant requests such an inspection.¹⁴² Consequently, this has led to the concern that, although the purpose of the law is to encourage Title III compliance discussions between landlord and tenant during the lease

136. *Id.*

137. *Do I Need an ADA Compliance Consultant?*, ESSENTIAL ACCESSIBILITY (Feb. 10, 2017), <https://www.essentialaccessibility.com/blog/ada-compliance-consultant/>.

138. CAL. CIV. CODE § 1938 (Deering, Lexis Advance through Chapters 1-70, 72-136, 138-173, 175-185, 188-193, 195, 196, 198-200, 202-213, 215, and 217-222 of the 2019 Regular Session, including all legislation effective September 4, 2019 or earlier).

139. Jim Porter, *New ADA Notices Required in Commercial Leases*, PORTER SIMON (Feb. 2, 2017), <https://www.portersimon.com/new-ada-notices-required-commercial-leases/>.

140. CAL. CIV. CODE § 1938(c).

141. CAL. CIV. CODE § 1938(e).

142. *Id.*

negotiations and before a non-compliance suit is brought against either party, the acceptance of this type of cop-out notice will actually disincentivize the landlord from utilizing a CASp if all they have to do is acknowledge that they did not.¹⁴³

Although it is doubtful that this law will serve to promote ADA enforcement in California, at the very least, it illustrates the necessary relationship between the ADA and the real estate industry. That necessary relationship should be fostered through contracts and the proper use of consultants.

B. Possible Sources of Enforcement Regulations

Currently, real estate industry actors have minimal regulations for the enforcement of the ADA. Rather than advocating for regulations that would proactively enforce the ADA, organizations like the National Association of Realtors (“NAR”) advocate for the ADA Education and Reform Act, which prioritizes protecting businesses against serial litigants.¹⁴⁴ In regards to how disability rights fit into the ADA Education and Reform Act, NAR’s stated ADA policy indicates its disregard of disability rights issues: “NAR supports requiring prior notification of, with an opportunity to correct, alleged violations of the Americans with Disabilities Act before a lawsuit on that alleged violation can be filed, while reaffirming support for the Americans with Disabilities Act and programs that encourage compliance with ADA laws.”¹⁴⁵ This policy statement shows the industry’s prioritization of businesses over ADA enforcement because the NAR does not recognize any so-called “programs” that it advocates as effective.¹⁴⁶ Support of the ADA Education and Reform Act is not ADA enforcement reform, but more so a protection effort for businesses.

The federal government, state governments, trade organizations, and lending companies regulate real estate transactions.¹⁴⁷ Certainly, the most powerful source of an ADA enforcement regulation on the

143. Porter, *supra* note 140.

144. *Complying with the Americans with Disabilities Act (ADA)*, NAT’L ASS’N OF REALTORS, <https://www.nar.realtor/complying-with-the-americans-with-disabilities-act-ada#section-170207> (last visited on Nov. 8, 2018).

145. *Id.*

146. *Id.*

147. See Bob McWilliams & Donna McWilliams, *Realities of Real Estate: So Who Regulates Real Estate Agents?*, CAP. GAZETTE (Aug. 2, 2015), <https://www.capitalgazette.com/news/annapolis/ph-ac-housing-0802-20150802-story.html>.

real estate industry would be through the federal government, which could implement national laws that would require ADA clauses in commercial contracts or a consultant. However, the issue that exists in the DOJ's lack of enforcement personnel would still remain if the federal government were the source of this regulation because the issue is not in who is writing the regulation, but the effectiveness of the actors that are enforcing it. Current examples of federal regulations of the real estate industry include Title III of the Civil Rights Act (Fair Housing) and the Real Estate Settlement Procedures Act.¹⁴⁸

State governments perhaps play a more attendant role in regulating real estate, such as through the Texas Real Estate Commission ("TREC").¹⁴⁹ TREC oversees inspections necessary for real estate transactions, the regulation and enforcement of state and federal laws, and the promulgation of standard contracts.¹⁵⁰ Therefore, it would be logical for TREC to include ADA compliance policies in their contracts and inspections, which would put enforcement in the state's hands rather than the federal government.

Private entities, such as title companies and lenders, are also involved in the real estate transaction process and impose their own requirements. It would be very effective for a lender to require its borrower to negotiate ADA compliance in their contracts or consult a specialist, considering lender requirements must be satisfied before closing. This requirement for a commercial loan will help ensure that a borrower does not face an ADA lawsuit or civil penalty that will drive them to default on their loan. However, it seems unlikely that the commercial lending industry would want to be involved in the enforcement of civil rights laws given the liability that comes with enforcing those laws.

Therefore, it seems that state governments would be the best actor for enforcing stronger ADA compliance regulations through the real estate industry. However, the federal government could supplement the state regulation scheme by certifying that it is ADA compliant.¹⁵¹

148. Mark Chernoff, *Federal Regulations in Real Estate Transactions*, CHERNOFF LAW FIRM, PC (FEB. 12, 2018), <https://chernoff.law/federal-regulations-real-estate-transactions/>.

149. *About TREC*, TEX. REAL ESTATE COMM'N, <https://www.trec.texas.gov/agency-information/about-trec> (last visited on Jan. 20, 2019).

150. *Id.*

151. *Department of Justice ADA Responsibilities: ADA Certification of State and Local Accessibility Requirements*, U.S. DEP'T OF JUSTICE, <https://www.ada.gov/certcode.htm> (last visited Nov. 11, 2018).

C. Incentives for Enforcement

Advocates for prioritizing serial litigation prevention over ADA compliance should consider that although ADA compliance requirements may be costlier for commercial buyers and developers, it will offset the legal costs that will be suffered if their premises are not ADA compliant after the transaction is complete or the premises are built. The average ADA lawsuit settlement is \$12,000.¹⁵² The maximum civil penalty is \$75,000 and \$150,000 for each violation thereafter.¹⁵³ On the other hand, an ADA consultant inspection can be as little as a few thousand dollars.¹⁵⁴

Furthermore, getting the real estate industry involved in ADA enforcement will shift the responsibility of enforcement from disabled plaintiffs to business owners. The costs and responsibility of ADA compliance should be on a business owner who is legally obligated to accommodate disabled customers. This will take the burden off the disabled customer who will eventually face the violating barrier and seek to bring suit. Unscrupulous attorneys seeking to profit from serial litigation will lose their market. Instead, they should focus on taking their ADA compliance expertise to commercial transaction parties who can benefit from this knowledge and will have deeper pockets than a disabled plaintiff. Small business owners should feel confident that this system will benefit them, as they will be secure in their compliance if they are contractually obligated to comply with the ADA in order to purchase a property.

Opponents to these types of solutions may find that they burden the freedom to contract between private parties. However, commercial property owners have a responsibility to all members of society to protect their patronage from being discriminated against. We can see this responsibility derived from the function of the FHA as well. The FHA affects the ability of a residential property owner to engage in his or her business of selling, renting, or financing property. The FHA applies to private communities, whereas the ADA applies to places of

152. Brad Gaskins, *The Top 5 ADA Compliance Myths You Should Know*, The McIntosh Group, LLC (Feb. 23, 2016), <https://mcintoshtransforms.com/the-top-5-ada-compliance-myths-you-should-know/>.

153. *Americans with Disabilities Act*, TEX. REALTORS, <https://www.texasrealestate.com/members/legal-and-ethics/resources/legal-faq/americans-with-disabilities-act/> (last updated on Apr. 28, 2016).

154. Achonxjust, *How much should an ADA inspection cost*, ACCESSOLUTION, LLC (Mar. 14, 2011), <https://accessolutionllc.com/ada-pricing-guide-how-to-put-a-price-tag-on-your-ada-liability/>.

public accommodation.¹⁵⁵ Much like the FHA imposes on the freedom to contract, the ADA should be allowed to do so as well to prevent discrimination in access to public accommodations. It would seem that the commercial real estate industry should be more available to ADA regulations because places of public accommodation need to be available to all patrons, whereas the FHA focuses on only residential parties.

Much like the FHA's effect on the residential real estate industry, the ADA should be a form of indirect regulation on the commercial real estate industry through the required enforcement of ADA compliance consultations, inspections, and contingencies on commercial contracts. Commercial property owners are breaking the law when their premises are not accessible for disabled patrons, just as an owner of an apartment complex is breaking the law when they refuse to rent to a tenant on the basis of race or another protected class. In cases of FHA discrimination, it is at the initial transaction of the lease, sales contract, or other transactional instrument where the discrimination is prevented. This should be the same for disability discrimination on physical access, and commercial transaction parties should address any non-compliance issues at the time of closing.

VI. CONCLUSION

The ADA is not properly enforced and civil rights are denied as a result. Physical access to public accommodations is an issue that is exclusive to the disabled; no other civil rights involve that barrier in enforcement. Serial litigation issues are diseases of the judicial system and currently infect the United States through disability lawsuits. However, correcting that issue does not require an interference of disability rights. Instead of allowing lawsuits to be created through the non-compliance of businesses, the real estate industry can play a vital role in ADA enforcement by monitoring the transactions of commercial properties and ensuring that ADA compliance is met. In creating this responsibility on parties to a real estate transaction, they are proactively protecting themselves from future potential lawsuits that would be created by their lack of compliance. Therefore, it is not only in the best interests of the disabled, but also commercial property stakeholders themselves to make their premises compliant before they

155. Marla J. Diaz, *Understanding and Contrasting the ADA and FHA*, WHITEFORD, TAYLOR, PRESTON (Apr. 8, 2014), <https://www.wtplaw.com/news-events/understanding-and-contrasting-the-ada-and-fha>.

are forced into settlements with a plaintiff who may or may not care about the actual correction of the accommodation.

As the country works through all of the challenging civil rights issues we face, disability rights should not be forgotten. The disabled are amongst some of the most disadvantaged and vulnerable citizens in our society. It is not the disabled customer who should have to enforce their own civil rights, but the affluent and efficient commercial real estate industry that should bear the responsibility of protecting the disabled from discrimination.