The ADA Litigation Monster

Mark Pulliam

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The Americans with Disabilities Act, which President George H. W. Bush signed into law in 1990, was noble in intention. "Let the shameful wall of exclusion finally come tumbling down," Bush declared, invoking the rhetoric of civil rights to describe America's disabled as "victims of segregation and discrimination." Bush dismissed opponents' "fears that the ADA is too vague or too costly and will lead to an explosion of litigation"; the statute, he assured, was "carefully crafted" to provide clear guidance to the business community.

Hindsight reckons otherwise. The ADA's laudable objectives were to ban employment discrimination against the disabled and eliminate unnecessary physical barriers to access in commercial and government buildings. But in the ensuing quarter-century, the measure has spawned countless unintended consequences—mutating definitions of what constitutes a physical or mental "disability," senseless mandates, abusive litigation, and astronomical compliance costs. Having vanquished common sense in the workplace and unleashed greedy trial lawyers to sue unsuspecting firms for "accessibility" violations, the ADA's next—and potentially most destructive—campaign is "fixing" e-commerce, which few people think is broken.

Bush's estimate of the number of disabled Americans—43 million, or 16 percent of the U.S. population in 1990—was absurdly high. The actual number of "traditionally" disabled—the blind, the deaf, and wheelchair users—totaled fewer than 3 million two and a half decades ago. The president's comparison of the ADA with 1960s-era civil rights legislation was wide of the mark, too. Businesses never posted signs saying, "No Wheelchairs Allowed"; the disabled never found themselves shunted off to separate lunch counters or denied employment opportunities because of a general unwillingness to associate with them; our society has never demonstrated animus toward the disabled per se. After all, Founding Father Gouverneur Morris was an amputee. Lake Powell is named after John Wesley Powell, the one-armed Civil War veteran who explored the Grand Canyon. Thomas Edison was deaf. Senator Bob Dole, a disabled World War II veteran, served as Senate minority leader and was the GOP nominee for vice president (1976) and president (1996). Helen Keller was revered as a role model for overcoming her multiple challenges. Stevie Wonder, Ray Charles, José Feliciano, and Ronnie Milsap—all have had

enormously successful careers as blind musicians in different genres. Charles Krauthammer, a paraplegic, is a respected television commentator, columnist, and best-selling author.

Previous discrimination bans sought to eliminate artificial distinctions between people of equal ability due solely to their race or sex; the ADA tried to overcome clear disadvantages imposed by nature. Radical proponents of rights for the handicapped contend that disabled people aren't oppressed by their physical limitations so much as by society's unwillingness to cater to those limits. The ADA sought to right this perceived wrong by mandating that employers, businesses, and governmental entities make the adjustments needed to ameliorate the physical limitations of the disabled. Disability activists, such as University of California at Berkeley law professor Linda Hamilton Krieger, concede that the ADA, unlike earlier civil rights statutes, requires that disabled individuals "be treated differently, arguably better [than the nondisabled], to achieve an equal effect."

The ADA has produced tangible benefits to our society, such as curb cuts on public sidewalks and wheelchair ramps at government buildings, which improve accessibility for the relatively small number of wheelchair users. But at what—and whose—expense? As it happens, the ADA's mandates are largely oblivious to cost—oblivious even to the notion of cost-effectiveness. Employers and businesses must pick up the tab for the required accommodations. That bill has grown larger every year. Yet with few legislators willing to appear insensitive, the statute has thus far remained impervious to reform efforts.

The notion that the ADA would not "lead endlessly to litigation" was also wrong. (See "The ADA Shakedown Racket," Winter 2004.) ADA claims against employers filed with the Equal Employment Opportunity Commission (EEOC), now numbering more than 26,000 per year, have become as common as sex-discrimination claims. And the volume keeps rising, as does the number of ADA lawsuits against employers filed in federal court yearly. Indeed, one of the ADA's primary flaws is its reliance on private litigation, rather than agency action, as an enforcement mechanism. Litigation under the ADA was not only inevitable; it was intended. (Investigative journalist James Bovard jokingly suggests that the acronym ADA really stands for "Attorneys' Dreams Answered.") Worse, the ADA (like most other civil rights statutes) allows plaintiffs to recover their attorneys' fees if they prevail in litigation but denies the reciprocal right to prevailing defendants, a perverse incentive to the filing of meritless lawsuits.

Attention has often focused on the growing volume of employment and workplace claims under Title I of the ADA, which has become an employer's nightmare. The malleable definition of "disability" requiring accommodation by employers has swollen to include obesity, depression, mood disorders (and other "mental illnesses"), alcoholism, gambling addictions, asthma, back problems, narcolepsy, ADD/ADHD, allergies, sleep apnea, phobias, and similar common ailments—even correctable impairments of hearing and vision familiar to many middle-aged workers. Almost any physical or mental condition can invoke ADA coverage.

Though forbidden to inquire about disabilities in job interviews, or to demand preemployment physicals before a job offer is made (once a matter-of-fact requirement), employers must "reasonably accommodate" their workers for any disabilities they manifest after they've been

hired, even if there's a host of them. "Accommodation" sounds innocuous, but it can be—and often is—a costly, disruptive, and time-consuming undertaking. Employers are expected, generally at their own expense, to "equalize" the workplace, so that a disabled employee can perform as if he weren't disabled. This can mean restructuring job duties, granting leaves, providing technological support, hiring assistants, granting reassignments, making "individualized determinations," and entering into "interactive dialogues," all while ignoring "discriminatory customer preferences" and, of course, "traditional stereotypes."

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Under Title I, employers must ignore the economic burdens imposed by disability accommodations unless they constitute an "undue hardship," an amorphous standard that most medium-size to large firms will rarely be able to satisfy. To comply with the ADA, or to avoid the risk of litigation, employers often must make personnel decisions that diminish efficiency, and sometimes go so far as to jeopardize public safety. As Title I leads employers to relax hiring and performance standards, examples abound of one-armed public-safety officers, alcoholic pilots and truck drivers, deaf lifeguards, one-eyed and one-legged firefighters, and un-fireable drug-addicted employees. Accommodation trumps merit.

The exact price tag of employers' compliance with the ADA's accommodation requirements—in terms of out-of-pocket expenditures and lost productivity—is unknown but undeniably substantial. More visible is the degree to which the ADA's nebulous provisions get exploited by underperforming employees invoking a torrent of excuses, a subject that Walter Olson explored in his late 1990s book *The Excuse Factory*. Alas, most performance deficiencies—sleeping on the job, tardiness, absenteeism, customer complaints, conflicts with coworkers, lack of productivity, and inattention to detail—can easily be blamed on an ADA-protected condition.

Disciplining and terminating employees for doing unsatisfactory work has become a form of legal roulette, in which the employer may routinely find its business judgment second-guessed in a costly lawsuit, governed by unpredictable rules and the one-sided recovery of attorneys' fees. An employer who guesses wrong and inadvertently violates the ADA can be liable to the employee for back pay, lost future earnings (so-called front pay), emotional-distress damages, punitive damages, and two sets of attorneys' fees.

In many cases, the ADA's Title I has short-circuited common sense and, in the process, become the ultimate refuge of mediocre employees and predatory litigants. Thankfully, Title I covers only those firms with 15 or more workers; small businesses are exempt. Moreover, employers generally face exposure under the ADA only if an employee has made an accommodation request and been refused. Even then, before bringing a lawsuit under Title I's enforcement scheme, employment claimants must first file an administrative charge with the EEOC, which investigates and tries informally to resolve the situation. These matters, numbering more than 400,000 to date, currently account for about 30 percent of the EEOC's overall administrative caseload. Most employment claims get resolved administratively and don't result in litigation. In about 60 percent of all ADA claims filed with the EEOC, the agency determines that there's "no

reasonable cause" to believe that discrimination occurred, and another 15 percent to 18 percent wind up closed administratively for reasons such as the charging party's failure to cooperate.

Despite this winnowing of approximately 75 percent of EEOC charges under the ADA, an overwhelming percentage of Title I lawsuits are unsuccessful. For example, an American Bar Association study found that employers prevailed in a staggering 92 percent of Title I cases filed in court. While this strongly suggests that most ADA lawsuits are unmeritorious, many Title I cases are nonetheless settled out of court by employers wishing to avoid the considerable expense (often exceeding $100,000) and disruption of litigation, the risk of an unpredictable damage award, and the fear of being ordered to pay the plaintiff's attorneys' fees.

The "accessibility" provisions of ADA's Title III encourage even greater abuse than does Title I. Title III deals with physical accessibility to the disabled in "public accommodations and commercial facilities"—which covers virtually every business and public entity in America, including hotels, restaurants, retail establishments, museums, auditoriums, and exercise facilities. And Title III doesn't have a 15-employee coverage threshold. By some estimates, 6 million privately owned businesses are subject to Title III, many times the number of employers subject to Title I.

Several factors are responsible for the greater extent of predatory litigation under Title III. First, Title III requires no advance review of claims by the EEOC, so plaintiffs can proceed directly to court. Second, Title III requires no prior warning to, or "interactive dialogue" with, the business to trigger a violation—plaintiffs can simply ambush an unsuspecting business with a lawsuit. Finally, in contrast to Title I, which limits claims to actual employees and applicants for employment, courts have held that any member of the public can bring Title III claims, including "testers" who aren't even patrons of the allegedly noncompliant businesses.

Title III does have one thing in common with Title I: it, too, awards attorneys' fees to prevailing plaintiffs but not to prevailing defendants, incentivizing litigation and settlements. Unsurprisingly, thousands of Title III lawsuits get filed each year, and countless more are threatened in pre-litigation "demand letters" from ADA lawyers. Tom Scott, executive director for the California office of the National Federation of Independent Business, an advocate for small business, estimates that pre-litigation threats result in several times as many settlements as those resulting from filed lawsuits.

The technical requirements for Title III, set forth in voluminous federal regulations, resemble a labyrinthine building code, specifying in overwhelming detail every aspect of how facilities and infrastructure must conform: the size and location of handicapped parking spaces, width of doorways, placement of elevator buttons, height of paper-towel dispensers and mirrors, layout of restrooms, and so on. The U.S. Department of Justice, a federal agency not generally known for its expertise in architecture or engineering, promulgates these regulations. Critics have charged that the DOJ's "Technical Assistance Manual," intended to guide businesses, is confusing and filled with conflicting provisions.

Few small businesses are even aware of these arcane rules, and fewer still fully comply. A Phoenix plaintiffs' lawyer quoted in *The Economist* estimated that only 5 percent of Arizona

businesses were in full compliance with the DOJ's "overwhelming" accessibility requirements, leaving the other 95 percent fair game for lawsuits. Violations require no intent, good faith is no defense, and no prior notice of violation is required before someone can sue. No grace period exists; fixing a defect after a lawsuit is filed is not a defense for the violation. Accordingly, suing businesses for not having the "correct" size, number, and location of handicapped parking places; improperly configured restrooms; inexactly located (or missing) signage; poorly designed (or missing) wheelchair ramps; and similar technical violations have all become a cottage industry for lawyers specializing in ADA claims.

Finding violators is like shooting fish in a barrel. ADA plaintiffs and their lawyers often troll for noncompliant businesses by driving around and noting violations (such as misplaced handicapped parking spaces) visible from their car at strip malls, gas stations, convenience stores, nail salons, and similar mom-and-pop retail establishments. Some claims, such as for missing grab rails and insufficiently capacious stalls in restrooms, do require a personal visit, but no actual "harm"—or even demonstrated lack of access—to a disabled person is required. Businesses that have never had a disabled customer can be sued under the ADA if their facilities don't conform perfectly to the latest technical standards.

Money damages aren't available under Title III for accessibility claims, but plaintiffs can recover their "costs" and "reasonable attorneys' fees" if they prevail (and merely proving technical noncompliance is sufficient to win). A noncompliant business, if sued, will be liable for the plaintiff's attorneys' fees, even if it quickly remedies the violation. Perversely, defending the case only increases the amount of the plaintiff's legal fees, so a strong incentive exists for the business to capitulate promptly. Unlike the medium-size and large employers subject to Title I, which are well capitalized and accustomed to litigation, the small businesses that Title III targets tend to be unsophisticated, averse to litigation, and unable to afford a lawyer, in any event. A disproportionate number of small retail firms are owned by ethnic minorities, who can feel intimidated by an unfamiliar legal system. Facing a federal court lawsuit, or the threat of one, they typically settle out of court.

Exploiting this dynamic, ADA lawyers often bring cookie-cutter lawsuits against small businesses, which frequently will pay a few thousand dollars to make the suits go away. While a few thousand dollars in a settlement may seem inconsequential, it's not a bad payday for serial litigants filing a template complaint with boilerplate allegations. "Lawsuit mills" handling these cases depend on volume, filing hundreds of ADA lawsuits each year, or even more. The rewards are sufficient to generate a growing docket of ADA claims.

Some states—notably, California, Florida, and New York—have enacted laws piggybacking on the ADA that *do* allow the recovery of money damages for Title III violations. For example, California's Unruh Act provides for a recovery of at least $4,000 (reduced to $1,000 in certain circumstances, due to 2012 reform legislation). Because of the increased potential liability, the "settlement value" of ADA claims is increased for California businesses—up to $20,000 per case instead of a norm elsewhere of $3,500 to $7,500. The volume of ADA litigation is predictably higher in California than in any other state, accounting, by some estimates, for 42 percent of all such lawsuits nationwide.

A handful of lawyers (some representing themselves as clients) file most of the Title III lawsuits. The most active "frequent filers" account for thousands of cases each. When laws create a rent-seeking racket, unsavory elements are invariably attracted. One serial ADA litigant from California, Dan Allen Jones, was shot while attempting a robbery, rendering him paraplegic. Prolific ADA litigants rarely face sanctions for unleashing a blizzard of lawsuits, and even when they are punished, enterprising lawyers will just find another disabled client to represent. California attorney Thomas Franko- vich netted an estimated $10 million from hundreds of ADA cases he filed on behalf of Jarek Molski, before courts curbed his litigious client. Similar patterns of ADA abuse are now emerging in New York.

The mass filing of Title III lawsuits—widely reported by local news outlets as well as major national (and even international) media—has become a dreary spectacle, generating substantial negative public reaction and a judicial backlash. Frustrated federal judges have disparagingly characterized mass-produced ADA lawsuits as a "sham" and "an ongoing scheme to bilk attorneys' fees from the defendant." ADA reform activist David Warren Peters, a San Diego attorney, thinks that "we're the laughingstock of the world. Other countries don't use lawsuits to get businesses to comply."

Advocates for the disabled shrug away the horror stories by noting that businesses should just comply—then the problem goes away. Not everyone is so sanguine, however. Widespread criticism of Title III litigation has prompted even liberal stalwarts such as Senator Dianne Feinstein (D-CA) to demand reforms of state law to prevent "shakedown tactics" threatening the viability of small businesses.

Sadly, these litigation abuses, though widely condemned, have not led to any reforms of the ADA. Critics of "shakedown" accessibility suits have long advocated a notification requirement, or grace period, prior to suing under Title III, but influential disability groups oppose such reforms. When Congress has amended the ADA, it has made the statute even worse, as it did in 2008 when it overrode sensible Supreme Court decisions that declined to recognize as disabilities impairments (such as poor eyesight) correctable through medication or technology. Politicians of both parties—unwilling to incur the wrath of advocates for the disabled—refuse to challenge the assumptions and structure of the ADA.

The most troubling wave of ADA litigation is just beginning to crest. The ADA's next frontier—and next target of litigation—is the most innovative segment of the domestic economy: e-commerce. The latest trend in ADA litigation is suing commercial websites that aren't sufficiently accessible to the disabled—because, for instance, they lack assistive technologies for the blind or hearing-impaired. Even though the ADA was enacted before websites became ubiquitous, many courts have interpreted the term "public accommodation" in Title III to encompass the Internet, and will entertain suits applying to it.

In 2008, Target paid $6 million to settle a class-action suit brought by the National Federation of the Blind charging that the retailer's website was allegedly insufficiently accessible to blind customers. Target also paid nearly $4 million in costs and attorneys' fees to the plaintiffs. Why would Target pay $10 million to settle a case when the law is *un*settled and its culpability far

from certain? Class-action lawsuits are particularly expensive to defend, and because the potential liability is aggregated to reflect the entire class (all blind consumers, in this example), the financial exposure for a firm if it loses in court presents an unacceptable risk to most corporate defendants.

In fact, upon their certification, virtually all class actions are settled, for a sum approximating the defendant's anticipated defense costs and the risk-adjusted amount of its potential exposure—typically tens of millions of dollars. Plus, an image-conscious national retailer like Target presumably wanted to avoid the unfavorable publicity of getting sued by disabled customers. The plaintiffs' bar understands this dynamic—and exploits it. Bank of America signed the first web-accessibility settlement agreement in 2000. Prior to Target, other large firms entering into web-access settlements included Safeway and Charles Schwab.

The courts are divided about whether *all* commercial websites are subject to the ADA, or just those associated with a brick-and-mortar business. The Department of Justice under President Obama took the broader position, but it didn't issue any actual regulations providing specific guidance to businesses—those are slated for 2018. Meantime, millions of businesses with websites have the worst of both worlds: mandates without directions. As one law firm explained, with conflicting appellate precedents, statutory silence, and no DOJ regulations, businesses with websites "are left to try and figure out how to avoid the onslaught of future DOJ enforcement litigation and private-sector litigation in this quickly evolving area." Walter Olson, a leading observer of the legal system, calls the DOJ's rudderless campaign against websites "the single most underreported and alarming regulation that I know of in the federal pipeline."

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Similar accessibility litigation has also been brought against universities providing free online courses on the grounds that the content isn't captioned for deaf users, and against ride-sharing services because their smartphone apps lack "text-to-speech" capability for blind users.

To be considered accessible, at least according to the demands of disabled users, websites must, among other things, use fewer pictures, employ text in a format compatible with text-reading software, and utilize designs that allow for simpler navigation. Determining the "correct" solution to demands for accessibility generates Hobson's choices among technical alternatives, each bound to be objectionable to someone. Designing features to aid certain disabled groups, in other words, may make a website more difficult or less efficient for other users. Consider bank websites. They often use timers that will shut down an online session for security reasons if a particular time period is exceeded. Such "timeouts" could present problems for some disabled users. But eliminating them in the interest of accessibility could impair security for all. Some businesses, fearing litigation, may suspend their websites entirely, inconveniencing everyone.

Questions proliferate. Do color combinations on websites violate the ADA because they confound the colorblind? Are certain layouts "inaccessible" if they're confusing to users with a limited field of vision? Do the accessibility requirements apply only to the websites themselves, or also to "web content," such as advertising on a third party's website? Will website hosts be

responsible for compliance by third-party sites that are linked? Will the accessibility rules apply prospectively, or must archived web content be revised to comply? What standards represent a "safe harbor"? Are mobile apps covered? Are temporary technical bugs in an otherwise compliant website a violation of the ADA? Will the same rules apply to all websites, regardless of size? Will U.S. users be blocked from accessing offshore websites that don't meet ADA standards? What physical and mental conditions will require accommodation? So far, the litigated cases have focused on vision and hearing impairments, but future cases could include dyslexia, ADD/ADHD, narcolepsy, cognitive impairments, paralysis, and many other conditions. Will all this be determined on a case-by-case basis?

Further, guidelines that make sense for a Fortune 500 company aren't necessarily appropriate for a small or medium-size business. Reconfiguring—or even auditing—a website using a knowledgeable consultant could be prohibitively expensive for many small businesses. Merely reviewing a website's coding and metadata to determine its compatibility with a blind user's screen-reading software can cost $50,000.

Applying Title III to websites (and online content generally) is obviously highly problematic. Unlike individualized workplace modifications or structural requirements for the millions of individual business premises throughout the United States, websites constitute the universal portal to the global economy. An employer accommodation generally affects just the disabled employee and possibly a discrete group of coworkers. Accessibility requirements for buildings do not generally alter the functionality for nondisabled customers, as they easily could with websites.

Regulating the format and content of websites to ensure that certain categories of disabled consumers—say, the visually impaired and deaf—can use them, if it is to happen, is also a technologically sophisticated mission, better suited to enforcement by a specialized agency, following formal rule-making, in which affected stakeholders receive advance notice and have an opportunity to comment. It is essential that any regulations be specific, reasonable, prospective in application, and cost-effective. The private-litigation model that has developed under Title III of the ADA is a proven disaster and one that should not be inflicted on the burgeoning digital economy.

Unhindered by government regulation, technology has shown a nearly miraculous capacity for innovation, aiding all of society, including the disabled. Stephen Hawking extols the benefits of technology, which permit him to synthesize speech, deliver talks, and write books and papers (including the best-selling physics book of all time)—all without the dictates of the ADA. The prospect of inhibiting further technological advance through litigation and regulation should be preposterous in a free society. Does anyone seriously believe that the federal government—or our legal system—can micromanage the Internet to produce better outcomes than the free market would deliver?

More than 26 years after its passage, critics of the ADA—and there are many—must resign themselves to the fact that the law is here to stay. In addition to requiring the now-ubiquitous curb cuts, wheelchair ramps, and designated parking places, the ADA has undeniably increased

societal awareness of the challenges that many Americans struggle to overcome every day. But good intentions don't guarantee sound public policy. Sympathy for the less fortunate is no substitute for common sense, and society cannot ameliorate every disadvantage. The ADA's beneficent legacy is being threatened by the sleazy, quasi-extortionate model of private litigation that it has given rise to.

Lawmakers and regulators need to recognize that predatory litigation under Title III of the ADA accomplishes nothing except the enrichment of a small number of opportunist plaintiffs' lawyers and their serial clients. Title III should be amended to provide for administrative enforcement instead of relying on mercenary private litigation; or, at a minimum, accessibility claimants should be required to provide notice of alleged violations and give businesses a reasonable opportunity to comply, prior to bringing a lawsuit. Advocates for the disabled will oppose such reforms, but responsible legislators must not cower before vocal special-interest groups when the public good is at stake.

The issue of online accessibility calls for bolder action. Congress should act, either to exempt websites and related content from the requirements of the ADA entirely, or to enact detailed guidelines regarding the precise accommodations that the law requires. If Congress won't act, the DOJ (or another federal agency) should promulgate reasonable regulations for accessibility. In the interim, courts should hold in abeyance all lawsuits under the ADA based on allegedly noncompliant websites. Exposing businesses to potentially ruinous litigation in the absence of specific rules is an affront to the rule of law. And regardless of who develops the rules, or what those rules (if any) turn out to be, enforcement should be administrative in nature. If a quarter-century's worth of experience under the ADA teaches us anything, it is that Title III's private-litigation model is an abject failure.

The well-intentioned Americans with Disabilities Act has produced endless litigation, at astronomical cost. The record of lawsuit abuse under the ADA is indisputable. And we cannot allow our most innovative form of technology—e-commerce—to be sacrificed on the same altar of wishful thinking. The statute could use some "accommodation" of its own.