CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Spring 2018

From the Desk of the Chairperson

Dear Civil Rights Members

It is my great honor and privilege to thank you for being a part of the Federal Bar Association's Civil Rights & Law Section. It has been one of my career's most incredible opportunities to be the Chairperson of this section for the past 18 months or so. We have grown in membership and we have grown in status. We organized and hosted a full day Civil Rights Etouffee law conference in April 2017 in one of this Country's great cities, New Orleans, Louisiana. In 2018, we have continued this new tradition of the Civil Rights Etouffee with four Etouffee's on the Road in Detroit (March 23), Salt Lake City (March 30), Boston (April 11) and NYC (May 5) www.etouffeelaw.com . We have others in planning stages in Philadelphia and Baltimore. We have an amazing Education Chair, Caryn Oberman, who is organizing a CLE as part of the ABA and Pennsylvania Bar meeting in June.

The Etouffee Conferences do more than just educate and keep us up to date on important, interesting and relevant legal issues. It brings us together as a community of lawyers involved in civil rights. Many of us work in small firms, and these opportunities to meet other similarly practicing attorneys, to make connections that can help us when we have a difficult case or argument to navigate, to hear war stories about victories, and to learn about the perils of some cases or some theories to avoid. I hope that when I finish practicing law, the Civil Rights Etouffee will continue, and its legacy will be one of the shining moments of my legal career and the FBA Civil Rights & Law Section history.

To that end, please consider bringing a Civil Rights Etouffee panel to your home jurisdiction. A 1-3 hour panel or panels is not overwhelming to organize,

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In this Issue:

Civil Rights Etouffee: Taking Our Talents On The Road

by Lindsey Rubinstein

The FBA Civil Rights Law Section has been steadily expanding its range of programming. Our big "kickoff" was the Etouffee CLE in The Big Easy in April of 2017. Together with attorneys at the cutting edge of their field (from both sides of the aisle), federal judges, police chiefs and politicos, dozens of lawyers and law students gathered together for a full-day CLE on pressing civil rights issues. Topics ranged from immigration to qualified immunity to LGBT rights to marijuana legalization to policing and so much more. Our weekend took place during the French Quarter Festival and the memories created will surely last a long time.

We are planning a trip back to NOLA at the end of 2018, and for now, we decided to take our Etouffee to the streets: the streets of Detroit, Salt Lake City, NYC, and Boston! We are putting together national credit-worthy programming for our civil rights base. If none of the events are happening in a city near you, but you'd like to see some more civil rights-oriented programming wherever you live, please reach out to Wylie Stecklow and student chair Lindsey Rubinstein at FBACivilRightsLaw@gmail.com to get the ball rolling! Below please find the details of each of our panels. Registration information can be found at etouffeelaw.com!

DETROIT: Friday, March 23, 2018!

Detroit "Rock City" was the kickoff site of our Etouffee on the Road series! Professor Alexander Reinert and Hon. Judith E. Levy (U.S. District Judge, E.D. Mich.) for The Art of Pleading: Civil Rights & Employment Law After Iqbal, during which they presented an interactive session for practitioners of all experience levels on both sides of the "v." They explored what it takes to survive—and prevail—on a motion for dismiss under the federal pleading standards established in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Prof. Reinert, who represented Javaid Iqbal in Iqbal, and moderator Robin Wagner, focused the discussion of pleading on civil rights and employment discrimination cases. There was ample time for a discussion with the audience and a reception to follow.

SALT LAKE CITY: Friday, March 30, 2018!

Our CLE in Salt Lake City, Let Them Speak Cake: Expansion of Speech Including Masterpiece Cake, covered a range of issues relating to First Amendment free speech rights. Together with Hon. David Nuffer (Chief U.S. District Judge, D. Utah), Colorado Solicitor General Fred Yarger, and other dedicated civil rights attorneys and judges, we briefly covered trends in qualified immunity post-Pearson and then moved into a riveting discussion of what qualifies as speech. Solicitor General Yarger presented his recent argument to the Supreme Court in Cakeshop and showed clips from the argument, before sharing his insights on how the Court may rule.

BOSTON: Wednesday, April 11, 2018!

Join us in Boston for a riveting conversation with presenters including Hon. Timothy S. Hillman (U.S. District Judge, D. Mass.) as we discuss qualified immunity: why plaintiffs see it as a plague, defendants cling to it, and whether it does what it's supposed to do. Professor Joanna Schwartz's article discussing these very topics and demonstrating that officers are indemnified in the overwhelming majority of cases in which they are found liable under § 1983 will be central to our CLE. As questions about the doctrine become more urgent in today's political climate, will the desire of Justice Thomas and several circuit judges around the country to reexamine the doctrine be carried out? If so, what would that mean?

NEW YORK CITY: Wednesday, May 2, 2018!

We are delighted to be joined in NYC by some attorneys doing fascinating work using (and challenging) New York's Freedom of Information Law! Robert Freeman, Gideon Oliver, David Roth, and David Thompson will be tackling topics on FOIL ranging from administration of FOIL requests, FOIL special counsel and how FOIL should be used in tandem with civil rights litigation, the Public Officers Law and timing of responses, and enforcement and remedies when an agency fails to comply with a court order. We will also be discussing best practices when it comes to using FOIL in your civil rights cases to have the most effective results.

We are looking forward to further expanding our range and availability of programming and are excited to see you at our next event. Together, we will pave the way forward for civil rights attorneys across the country nationally to make law that stands for rights and justice for all.■

Administrative Law as a Civil Rights Tool: Using the APA to Preserve and Advance Civil Rights Measures

by Rebecca Smullin, Public Citizen Litigation Group, Washington, DC

For civil rights practitioners, litigation often rests on the Constitution and civil rights statutes. But with the current administration's hostility toward regulation, administrative law can be crucial for litigators seeking to preserve or advance regulations or other federal government measures that are protective of civil rights.

One recent example is *Open Communities Alliance v. Carson*, a decision that forced the Department of Housing and Urban Development (HUD) to abandon its plan to delay a program aimed at providing low-income renters with greater housing opportunities.[1] The case involved HUD's Housing Choice Voucher program, which provides rental vouchers to low-income households.[2] In August 2017, HUD issued a memorandum purporting to suspend for two years an important new requirement: that certain metropolitan areas change how they calculate vouchers' value. This calculation is critical; if a voucher is worth more, a recipient can afford a greater range of housing options.[3] The prior year, HUD had used notice-and-comment rulemaking to change the value calculation, concluding that the new method would "provid[e] … a subsidy adequate to make such [high-opportunity, low-poverty] areas accessible and, consequently, help reduce the number of voucher families that reside in areas of high poverty concentration."[4] In other words, the 2016 rule would "transform[] the [value-calculation] methodology from one that contributes to racial segregation and concentrated poverty to one that helps combat it."[5]

The three *Open Communities Alliance* plaintiffs, two individuals and one nonprofit, challenged HUD's delay under the Administrative Procedure Act (APA).[6] They prevailed at the preliminary injunction stage, with the district court concluding that HUD's delay was arbitrary and capricious and issued without the required notice-and-comment procedures.[7] The preliminary injunction order largely brought the case to a close; shortly thereafter, the Court entered a stipulated judgment and order in plaintiffs' favor.[8]

The plaintiffs' success in reversing HUD's attempted delay rested on two key administrative law principles. First, notice-and-comment rulemaking is required for substantive changes, including implementation delays, to notice-and-comment rules. The court analyzed provisions in HUD's 2016 rule that allow suspension of or exemptions from the new calculation requirements and concluded that HUD's delay did not constitute one of those permitted exceptions. Thus, the court concluded, the delay was an amendment to the 2016 rule that could lawfully be accomplished only through a notice-and-comment process.[9] Second, arbitrary and capricious agency actions cannot stand. The court examined the report HUD cited to justify its attempted delay and concluded that the agency "relied on factors … which law had not intended it to consider and entirely failed to consider an important aspect of the problem."[10]

Another recent case illustrates how administrative law can be used to challenge agency *inaction* that implicates civil rights. *A Community Voice v. EPA* was brought by eight organizations, four of which had petitioned the Environmental Protection Agency (EPA) in 2009 for rulemaking to make the dust-lead hazard and lead-based paint standards more protective. The EPA granted the 2009 administrative petition but by August 2016, had not even issued a proposed rule. At that point, plaintiffs filed a mandamus petition.[11] The mandamus petition described the risks that lead hazards pose to children generally and explained that "lead exposure and poisoning disproportionately affect minority and low-income communities."[12] The Ninth Circuit granted the mandamus petition and ordered a rulemaking schedule for the EPA.[13]

In so ruling, the Ninth Circuit reached two important conclusions. The first is that the EPA had a duty to complete rulemaking both under the statutes regarding the EPA's authority over dust-lead hazard and lead-based paint standards and under the APA, which requires that an agency "conclude a matter presented to it" "within a reasonable time."[14] Second, under a well-established test for evaluating agency delays, the court deemed unreasonable the EPA's delay in concluding its rulemaking proceeding.[15] The 2009 administrative petition was important to both conclusions; the EPA's grant of that petition established the agency's APA duty to complete rulemaking and served as a marker for measuring the agency's delay.[16]

Administrative law actions may not be viable means for challenging every agency decision that reduces civil rights protections. For example, the APA can generally be used to challenge only final agency actions and to compel agency action that is "unlawfully withheld or unreasonably delayed."[17] Standing can be another hurdle for parties that oppose an agency's unlawful actions, as some courts require a particularly demanding showing of injury. Even absent litigation, however, administrative law provides tools that can advance civil rights goals. Notice-and-comment rulemaking, which agencies may use to create new rules or to change existing ones, is one such tool. A comment period is an important opportunity to influence the content of a rule as well as to ensure that the rulemaking record includes relevant evidence, which could then be referenced in any later litigation.[18] The Freedom of Information Act, which is part of the APA, is a crucial mechanism for advocates seeking to understand agency operations.[19] Advocates can also use petitions, like the one that led to *A Community Voice*, to press agencies for action.[20]

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Rebecca Smullin is an attorney with Public Citizen Litigation Group, which works on cases at all levels of the federal and state judiciaries, and specializes in cases involving regulation, consumer rights, access to the courts, open government, and the First Amendment. The

Litigation Group was co-counsel for the plaintiffs in Open Communities Alliance.

Endnotes:

[1]*See* --- F. Supp. 3d ---, 2017 WL 6558502 (D.D.C. Dec. 23, 2017).

[2]*Id.* at *1.

[3]*Id.* at *2-4, 6.

[4]*Id.* at *4 (alterations in original) (quoting 81 Fed. Reg. 80567, 80567 (2016)).

[5]Complaint at ¶ 6, *Open Cmtys. Alliance v. Carson*, --- F. Supp. 3d ---, 2017 WL 6558502 (D.D.C. Dec. 23, 2017) (No. 17-2192).

[6]2017 WL 6558502, at *7, 9.

[7]*Id.* at *10, 18; *Open Cmtys. Alliance v. Carson*, No. 17-2192 (D.D.C. Dec. 23, 2017) (order granting preliminary injunction).

[8]*Open Cmtys. Alliance v. Carson*, No. 17-2192 (D.D.C. Feb. 16, 2018) (Stipulated Judgment and Order).

[9]2017 WL 6558502, at *9-17; *see generally* 5 U.S.C. § 553.

[10]2017 WL 6558502, at *18 (internal quotation marks and brackets omitted); *see generally* 5 U.S.C. § 706(2)(A).

[11]*A Cmty. Voice v. EPA*, 878 F.3d 779, 782-83 (9th Cir. 2017).

[12]Petition for Writ of Mandamus at 5-6, *A Cmty. Voice v. EPA*, 878 F.3d 779 (9th Cir. 2017) (No. 16-72816).

[13]878 F.3d at 788.

[14]*Id.* at 784-86 (quoting 5 U.S.C. § 555(b)).

[15]*Id.* at 786-87.

[16]*Id.* at 785, 787.

[17]5 U.S.C. §§ 704, 706; *see also generally* 5 U.S.C. § 551(13) (defining "agency action" to include "failure to act").

[18]*See generally* 5 U.S.C. § 553.

[19]*See generally* 5 U.S.C. § 552.

[20]*See generally* 5 U.S.C. § 553(e).

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and we can help. We want to help you accomplish this very worthwhile goal. We have individual attorneys with experience in bringing these together. Robin Wagner (Detroit Etouffee on the Road) understood that there were Fed Talks which the local FBA Chapter had been sponsoring. She identified that as an opportunity and found a partner for the Detroit Etouffee on the Road. Joni Jones of the Utah Attorney General's Office, reached out about the national Civil Rights Etouffee. When contacted about a possible Etouffee on the Road in Salt Lake City, she was an enthusiastic producer of the 2 panel, 3.5 hour CLE of March 30, that will include the Colorado Solicitor General who argued the Masterpiece Cake case before the Supreme Court, the Chief Judge of Utah District Court, the head of Utah ACLU, law professors and members of her office. Our very own membership chair, Rob SInsheimer had never previously organized a CLE. The Massachusetts Etouffee on the Road features a Federal Judge (Timothy Hilman) and perhaps the most knowledgeable attorney/professor on Qualified immunity, Professor Karen Blum discussing whether QI has run its course.

The FBA Civil Rights & Law Section is committed to facilitate these events in your jurisdiction. We are here to help you create the topic, invite the judge, round out the panel, connect with your local FBA Chapter, and create another Civil Rights Etouffee on the Road. Please email us at FBACIVILRIGHTSLAW@gmail.com and ask us to help bring a Civil Rights Etouffee on the Road to your home jurisdiction!

Laissez L'Etouffee Rouler !
Wylie Stecklow

Call for Articles for the Civil Rights Insider

Appear in the Civil Rights Insider!

The editors of The Civil Rights Insider invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane of Relman, Dane & Colfax PLLC, at sdane@relmanlaw.com.

Are the Courts "Inherently Biased" Against People With Disabilities?

by Matthew W. Dietz, Litigation Director, Disability Independence Group

In *Alexander v. Choate*, when explaining disability, the U.S. Supreme Court stated that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect."[1] Over 30 years after *Alexander*, and despite the Americans with Disabilities Act, this concept of discrimination through "good intentioned" people remains inherent in our courthouses.

The difficulty in assessing when a matter reaches the scope of an actionable case is distinguishing between a microaggression and a deprivation of an opportunity to have an equal opportunity to enjoy or benefit from a program or service provided by a person or entity. Microaggressions are "brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership."[2] The speaker has no intention that they are causing harm, but are, in fact, subtle insults that affirm stereotypes about persons with disabilities. For the disability community, these can take the form of outdated ways of identifying persons with disabilities, like "wheelchair-bound," "deaf and dumb," "retarded," "deaf and mute," and many, many others. In addition, there are subtle ways to convey the same type of microaggressions by actions, such as yelling at a Deaf person, talking to a companion instead of a person with a disability. However, the good intention aspect often is used by courts to excuse (often as a matter of law) discriminatory behavior because of the lack of animus.

In my own practice, there are many times in which the lack of animus is used as a reason for the dismissal of a case, and is written in an opinion by the court. For example:

> The Court is compelled to point out that not every wrong committed in our society has a legal remedy attached to it. In this case, Defendant should have let Plaintiff accompany her son, with her service animal, down the hall to just outside the MRI scan room. Defendant has essentially admitted its mistake, without admitting any liability, in promulgating a detailed policy that would allow any patient with a service animal, or parent of a minor patient, to bring that service animal down the hall with them.[3]

Or here again:

> It's often said that the path to perdition is paved with good intentions. It might also be said that sometimes the road to the courthouse is littered with the efforts of well-meaning people who never thought they'd be taking the trip. This is one of those kind of cases.
>
> …
>
> Because D.F. is deaf and mute, the staff at both hospitals took steps to ensure that they were able to effectively communicate with him. They used written notes and visual aids, and they also relied on D.F.'s parents and deaf sister, who interpreted for D.F. using sign language. The staff believed that they had taken appropriate steps to communicate effectively with the child while he was hospitalized, but they did not provide him with a professionally trained sign language interpreter nor did they ask him or his parents whether they wanted one to be provided. The failure to do so led to this lawsuit.[4]

However, the passive discrimination and issues in trial are felt more within the statements made during trial or pre-trial orders that demonstrate to the litigant or their counsel that their federally protected rights are clogging up the court's dockets and not worth judicial time and resources that are expended on such cases.

Most notably, some courts have denigrated the Americans with Disabilities Act by referring to it as a "cottage industry" for lawyers seeking to enforce the rights of the people it was designed to protect.[5] Unlike other civil rights statutes, like the Fair Housing Act, the ADA does not have a provision for damages or an expedient administrative remedy in addition to a judicial remedy.[6] However, the vast majority of cases filed in court do not see the light of a courtroom, and are most often settled without any judicial intervention. Notwithstanding the Congressional mandate of the ADA, disability accommodation is still viewed by Courts and the public as a matter of charity and not as a matter of discrimination.

As a trial lawyer, I often encounter issues in the courthouse which force me to console my client with a disability:

1. Your case is important! On more than one occasion, I have met with district court judges, or magistrate judges in settlement conferences who explain the important cases that are held in their courtroom, from money laundering, terrorism, multinational business deals and other cases that are much more important and worthy of judicial resources than a disability case. I recently had one judge who asked why my client's case was not filed in a county court with jurisdiction for cases less than $15,000. In addition, the judge asked why we wanted a jury trial or right to appeal in any event.

When a District Court in the Southern District of Florida attempted to strip the Attorney General of its authority to enforce Title II of the ADA, the Court found that such action does not render the ADA unenforceable as victims have the right to serve as private attorney generals, who vindicate policies that Congress deemed of the highest priority.[7] However, many courts in Florida look askance at all cases filed by persons with disabilities as subverting Congressional

intent of the ADA, and additionally feel that it is within the court's equitable jurisdiction to derive Congressional intent, and whether such plaintiff's intent is similarly pure.[8]

2. Accommodations are required in a courtroom, and should not be part of the adversarial process! Courts are obligated to provide accommodations at the court's expense to afford the person with a disability an equal opportunity to participate in the proceedings. The use and expense of sign language interpreters are often the subject of adversarial proceedings.

To reduce potential of a request for accommodation to be subject to the adversarial process, I often ask the ADA coordinator of the Court for the accommodation.

3. Jurors with disabilities or family members of jurors with disabilities are often excluded. Preemptory challenges and for cause challenges are often used for jurors with disabilities and *Batson v. Kentucky* does not apply to disability as a class.[9] As such, most cases involving disability discrimination often involve educating the jurors about the basics of disability and dispelling myths about disability.

In most circumstances, whether an accommodation for a person with a disability is effective or is not is a matter of fact for the determination of the jury.[10] Further, the person with a disability is entitled to have an equal opportunity to use and enjoy the benefits of the facility.[11] The difficulty in this standard is to convey the understanding from the perspective of the person with a disability and not the typical and "reasonable person" without a disability.

As such (and with any discrimination case) the goal is to determine the disparate treatment between the person with a disability and without a disability and how the architectural barrier or communication barrier prevented a loss of opportunity. For example, in *Silva v. Baptist Health S. Fla., Inc*,[12] the Eleventh Circuit reversed the district court judge who focused on the adequacy of the information provided to Deaf patients at a hospital instead of the level of communication that was necessary in a hospital based environment to obtain an equal opportunity for these Deaf patents to have an equal experience as a hearing person. There is no question that doctors and nurses who are direct caregivers at hospitals are at the most part, good intentioned people. However intent or animus is irrelevant for purposes of the Americans with Disabilities Act.

Notwithstanding the mandate of the Americans with Disabilities Act, persons with disabilities are inherently disadvantaged when it comes to fulfilling the promises of this mandate. The assumptions and stereotypes regarding persons with disabilities are ingrained in our society, and until the judicial branch and bar is fully representative of persons with disabilities, there will be no understanding of disparate treatment and reasonable accommodation of persons with disabilities. Until this occurs, our duty in representing persons with disabilities is to continue to dispel myths and build adequate understanding of abilities with judges and juries. ■

Endnotes:

[1]*Alexander v. Choate*, 469 U.S. 287, 295, 105 S. Ct. 712, 717 (1985)

[2]Paludi, Michele A. (2012). *Managing Diversity in Today's Workplace: Strategies for Employees and Employers*

[3]*Sheely v. MRI Radiology Network, P.A.*, Case No. 05-61240-CV-JIC (S.D. Fla. 2006), reversed by, 505 F.3d 1173, 1177 (11th Cir. 2007)

[4]*McCullum v. Orlando Reg'l Healthcare Sys.*, 768 F.3d 1135, 1138 (11th Cir. 2014).

[5]*Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280 (M.D. Fla. 2004); *Phillips v. 180 Bklyn Livingston, LLC*, 2017 U.S. Dist. LEXIS 75154, at *8 (E.D.N.Y. May 16, 2017)

[6]ARTICLE: HOW CAN THE STATE OF FLORIDA IMPROVE ACCESSIBILITY FOR PERSONS WITH DISABILITIES AND BENEFIT THE BUSINESS COMMUNITY?, 15 Fl. Coastal L. Rev. 277 (Winter 2014)

[7]*C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1289 (S.D. Fla. 2016), appeal pending Case No.: 17-13572(11th Cir.)

[8]*Norkunas v. Seahorse NB, Ltd. Liab. Co.*, 720 F. Supp. 2d 1313, 1315 n.4 (M.D. Fla. 2010)

[9]*Dixon v. Rackley*, No. 1:14-cv-01149 AWI MJS (HC), 2017 U.S. Dist. LEXIS 58377, at *309-11 (E.D. Cal. Apr. 14, 2017)

[10]*Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 836 (11th Cir. 2017)

[11]*Id.* at 834.

[12]856 F.3d 824 (11th Cir. 2017)

H.R. 620: Turning Back the Clock on Disability Rights

by Amy Farr Robertson, Co-Executive Director, Civil Rights Education and Enforcement Center

Congress is currently considering a bill to amend Title III of the Americans with Disabilities Act (ADA) -- which prohibits disability discrimination by places of public accommodation such as stores, theaters, restaurants, arenas, professional offices, and the like -- to require all disabled people who are excluded from private businesses by physical barriers to send specific demand letters and wait four months for the business to remove the barriers (or, in some cases, to simply show "substantial progress" toward removing them).[1]

This bill – H.R. 620, dubbed the "ADA Education and Reform Act" – is based on distorted statistics and name-calling, and in the process demeans legitimate ADA civil rights enforcement by highlighting only the bad acts of a small minority of lawyers. It would not solve the problem it purports to address, and would remove all incentive for voluntary compliance, slowing or stopping the progress toward accessibility of the built environment that started when the ADA was signed 28 years ago. States and courts around the country are facing similar calls to make it harder to enforce the ADA, all based on the same flawed statistics and broad-brush insults of the legal profession.

Title III of the ADA

Title III prohibits disability discrimination by those who own, operate, lease, or lease to places of public accommodation, that is, most private businesses.[2] Title III specifically addresses discrimination against individuals with mobility disabilities in the form of architectural barriers and inaccessible facilities. It does this through a three-part standard, carefully calibrated to increase access while not burdening the business community:[3] Newly constructed buildings are required to be fully accessible;[4] alterations to existing facilities are required to be accessible to the maximum extent feasible;[5] and unaltered existing facilities are required to remove barriers where it is "readily achievable" to do so,[6] a standard that takes into account the cost of barrier removal and the resources of the business in question.[7]

The ADA was signed by Pres. George H.W. Bush in 1990, and became effective as to larger businesses in 1992 and smaller businesses in 1993.[8] On July 26, 1991, the Department of Justice published detailed regulations and design standards that have long served as both a guide and a safe harbor for design, alteration, and barrier removal.[9]

Title III does not have a damages remedy; people with disabilities who enforce their rights under this statute may seek an injunction requiring barrier removal[10] and, if successful, their attorneys' fees.[11] This "fee-shifting" is common in civil rights statutes. As the Supreme Court held, with respect to a similar provision in Title II of the Civil Rights Act of 1964 ("CRA"),[12] which prohibits discrimination in public accommodations on the basis of race, religion, and national origin):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. ***If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority***. . . . . Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[13]

Two Circuits have recognized that, by incorporating the remedial provisions of Title II of the CRA into Title III of the ADA, Congress similarly enlisted private litigants in the effort to enforce Title III.[14]

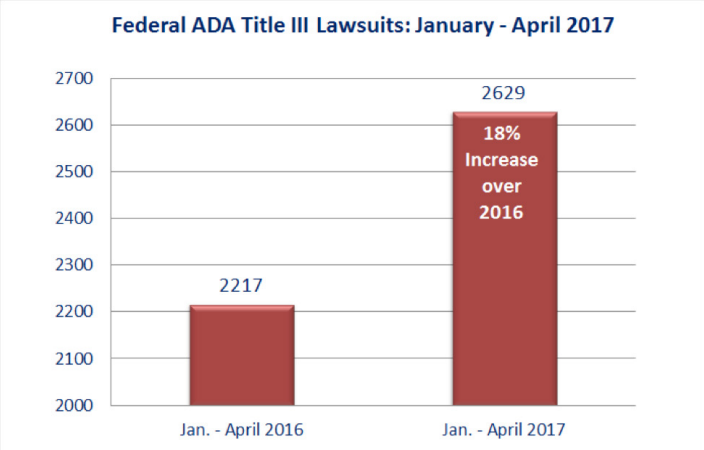
The Perceived Problem

Fast forward to 2018, and many businesses still have barriers that discriminate against disabled people including new (post-1993) buildings that should have been built in compliance and older buildings that have had 25 years to remove barriers. And, as intended, disabled people are bringing suit to challenge those barriers.

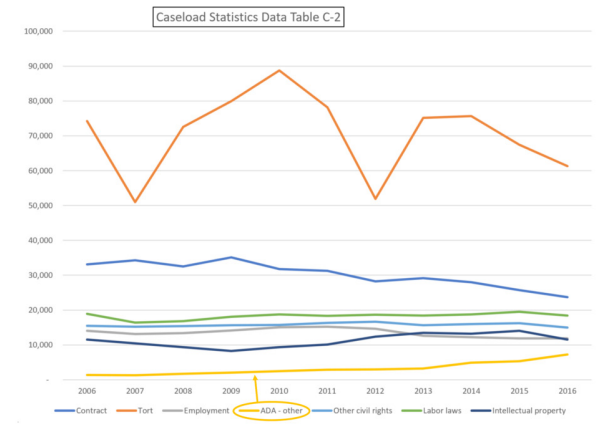
As many people with mobility disabilities will attest, though, it's never enough. They go about their day-to-day business encountering barriers, patronizing alternative businesses, or rearranging schedules and locations for personal and professional meetings to account for inaccessible facilities.

On the other hand, lawyers who defend noncompliant businesses argue that those serving as "private attorneys general" -- lawyers who represent people with disabilities seeking to enforce their rights -- engage in litigation abuse. They have come up with a series of insulting sound-bytes for ADA litigation, which now pepper many defense pleadings.[15] And they are pushing for H.R. 620 and similar state laws and court rules that would limit, impede, or curtail Title III litigation.

These efforts rely heavily on case-filing statistics. For example, the blog of one ADA defense firm announced that, "From January 1 through April 30, 2017, 2629 lawsuits were filed — 412 more than during the same period in 2016. That's a whopping 18 percent increase," and offered this bar graph -- the scale of which extends only from 2,000 to 2,700:[16]



Neither the cited post nor those lobbying for limits on Title III cases offer evidence that the cases lack merit. In addition, a bit of context reveals that the numbers above provide no cause for alarm. The chart below, based on statistics published on www.uscourts.gov by the Administrative Office of the U.S. Courts,[17] shows that the number of cases filed under Titles II and III of the ADA (PACER's "ADA - Other" category) have increased gradually but remain consistently very low in



Please email arobertson@creelaw.org for descriptions and data.

contrast to other types of cases.

From 2006 to 2016, the percentage of "ADA - Other" cases in the federal civil caseload has varied from less than one percent to 2.5 percent.[18]

H.R. 620 Would Not Solve the Problem

H.R. 620 would amend Title III to require a demand letter and then a four-month waiting period for the business to remove the barrier (or, in some cases, to simply show "substantial progress" toward removing it). This waiting period will apply equally to older buildings and to those built since 1993, which have had the benefit of the Department of Justice Standards for Accessible Design – promulgated in 1991 – since long before they were constructed.

As an initial matter, no other civil rights have a similar waiting period. Imagine if a business could pay its employees less than minimum wage and then, when called on it, take four months to remedy the situation with no obligation to repay the shortfall before or after the notice? Imagine a business with a "Whites Only" sign being permitted four months to revise that policy?

Because Title III has no damages remedy, H.R. 620 would remove any incentive for businesses to comply proactively with this 28-year-old law. Instead, they would be able to wait for a person with a disability to send a letter before even considering accessibility.

And because the demand letter is required to contain specified information, it would require a disabled person to retain an attorney to request access to an inaccessible business in a fashion that would ultimately be enforceable. Larger businesses with in-house legal departments -- that is, precisely the folks who are lobbying hardest for this bill -- know this, and know that if they receive a letter that fails to meet the standards in H.R. 620, they can continue to ignore their ADA obligations without consequence.

An unrepresented person with a disability could write, wait, and find that -- after four months -- the business's only response was that their letter was inadequate. This bill, rather than reducing the power of the plaintiff's ADA lawyers as its proponents would like, would instead effectively turn them into gatekeepers of accessibility. It would also be a boon to firms that defend ADA violations -- and will make Title III lawsuits longer and more expensive -- because the first motion to dismiss, with or without merit, will be based on the form of the demand letter. Lawyers already have too many tools to prolong litigation; this would provide yet another.

Endnotes:

[1]ADA Education and Reform Act of 2017, H.R. 620, § 3, 115th Cong. (as passed by the House of Representatives on Feb. 15, 2018).

[2]42 U.S.C. § 12181(7) (definition of "place of public accommodation"); *id.* § 12182(a) (prohibition on disability discrimination).

[3]*See, e.g.*, H.R. Rep. No. 101-485, pt. 2, at 98-99, 109 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 381-82, 392.

[4]42 U.S.C. § 12183(a)(1).

[5]*Id.* § 12183(a)(2).

[6]42 U.S.C. § 12182(b)(2)(A)(iv).

[7]*Id.* § 12181(9).

[8]Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 310, 104 Stat. 327 (1990).

[9]Nondiscrimination on the Basis of Disabilities by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544 (Jul. 26, 1991).

[10]42 U.S.C. § 12188(a).

[11]*Id.* § 12205.

[12]*Id.* §§ 2000a (prohibition on discrimination); 2000a-3 (remedies and attorneys' fees).

[13]*Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968) (emphasis added).

[14]*See Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 457 (4th Cir. 2017); *Dudley v. Hannaford Bros. Co.*, 333 F.3d

299, 307 (1st Cir. 2003).

[15]A search in Westlaw's "Trial Court Documents - Civil Trial Documents" database for pleadings filed in Title III cases since 2002 found over 1,200 pleadings that used one or more of the following terms: "vexatious;" "shakedown;" "abusive;" "serial;" "bilk;" "cottage;" "extort!;" or "drive-by."

[16]Minh N. Vu *et al., 2017 Federal ADA Title III Lawsuit Numbers 18% Higher than 2016*, Seyfarth Shaw: ADA Title III: News and Insights (May 9, 2017), https://www.adatitleiii.com/2017/05/2017-federal-ada-title-iii-lawsuit-numbers-18-higher-than-2016/. An earlier post from which these statistics were derived warned that the analysis "may not be bullet proof." *See* Mihn Vu *et al., 2014 May Be a Banner Year for ADA Title III Lawsuit Filings*, Seyfarth Shaw: ADA Title III: News and Insights (Aug. 5, 2014), https://www.adatitleiii.com/2014/08/2014-may-be-a-banner-year-for-ada-title-iii-lawsuit-filings/.

[17]U.S. Courts Caseload Statistics Data Table C-2 for the period ending December 31 of each of the years in the chart. http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=c-2&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D= (last visited Jan. 11, 2018). Table C-2 compiles statistics for the number of various types of cases filed in federal court. These statistics only separately identified the category "ADA - Other" starting in 2006.

[18]*Id.*

MEMBER HIGHLIGHT

MARILYN TOBOCMAN, CLEVELAND, OHIO

The first word of Marilyn Tobocman's obituary was "fierce;" it modified the next word, "advocate." Those two words perfectly define a respected attorney with a passion for civil rights and justice who died early this year and was a member of the Federal Bar Association's Civil Rights Law Section.

Marilyn was 47 when she enrolled at Cleveland-Marshall College of Law, but her later than typical start did not diminish her impact. Before law school Marilyn was a "professional citizen" who volunteered with the League of Women Voters and advocated for access to educational rights for people with disabilities. Marilyn remarked that one of the most rewarding aspects of her advocacy was helping others find their own voice. She made that possible in providing access to justice for people who were traditionally excluded from the justice system, including women, people with disabilities, and people of different races and nationalities.

From 1993 until her untimely death at 83, Marilyn carried a full work load as Principal Attorney/Senior Litigator in the Civil Rights Section of the Ohio Attorney General's office. In representing the Ohio Civil Rights Commission, one of the State of Ohio's clients, Marilyn provided counsel day in and day out on civil right cases. Marilyn prevailed in a case against a country club where women were not allowed to be full members. But it was in housing discrimination litigation that Marilyn's mark was most clearly seen.

One of the biggest cases of Marilyn's career with the Ohio attorney general's office came in 2003 when she was a member of the legal team that won a $4.3 million settlement against Farmers Insurance, which had been accused of red-lining, or discriminating, against the owners of older homes in select neighborhoods in the Toledo area. That case led to changes in company policy and affected the way homeowners insurance was provided across the country. She also had much success in having buildings that were not accessible be retrofitted and allow access to people using wheelchairs or assistive devices.

Marilyn's drive to make the world and her community a better place and her beautiful spirit and grace will be sorely missed by all who knew her. ■

Diane Citrino, Giffen & Kaminski, LLC, Cleveland, Ohio, contributed to this Member Highlight