The Federal Courts and Disability Rights

Judicial Interpretation of Title III of the Americans with Disabilities Act

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In this article, the author presents an empirical analysis of litigation under Title III of the 1990 Americans with Disabilities Act, the section of the law prohibiting discrimination in public accommodations on the basis of disability. It represents the first systematic examination of all 247 reported federal district and appellate court decisions through December 2001 in which the court adjudicated a Title III claim. Reporting on the outcome of the litigation, the author assesses the degree to which the federal courts have helped effectuate the remedial purposes of the law by advancing the U.S. Congress's stated aim of guaranteeing the civil rights of people with disabilities in public accommodations. The analysis revealed that defendants succeeded in more than half the rulings in these cases (prevailing in 55% of the Title III decisions overall), with their success varying according to the type of claim and the level of the court deciding the case. The U.S. Supreme Court has not played a major role in providing guidance to the lower courts in adjudicating Title III cases, handing down only two Title III decisions, with neither addressing a major point of contention in the lower federal courts or resolving a widespread conflict among the circuits. The author concludes that the judiciary's constrained interpretation of the Act, based in part on Congress's decision to limit Title III remedies to injunctive relief only, accounted for a significant number of the defendants' legal victories.

The 1990 Americans with Disabilities Act (ADA) is the nation's most far-reaching attempt to combat discrimination on the basis of disabilities. Its aim is clearly stated at the outset: “It is the purpose of this Act . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The law defines a disability with a broad stroke, classifying “an individual with a disability” as a person with (a) “a physical or mental impairment that substantially limits one or more of the major life activities” or (b) “a record of such impairment” or who is (c) “regarded as having such an impairment.”

The ADA is wide ranging, banning discrimination on the basis of disabilities in employment (Title I); in the delivery of state and local government services, including public transportation (Title II); in public accommodations (Title III); and in telecommunications (Title IV). Title V consists of miscellaneous provisions, including attorneys' fees, alternative dispute resolution, retaliation, consistency with state laws, and insurance underwriting. At the time of its passage, the ADA was estimated to affect the lives of 43 million persons. By 2000, the number of people with disabilities in the United States had risen to almost 50 million (U.S. Bureau of the Census, 2000). During the ADA signing ceremony on the White House lawn on July 26, 1990, President George H. W. Bush proclaimed that “every man, woman, and child with a disability can now pass through once closed doors into a bright new era of equality, independence, and freedom” (Federal Information Systems Corporation, 1990). And on the date of its 1-year anniversary, the President called the Act “one of the most comprehensive civil rights bills in the history of this country” (Federal Information Systems Corporation, 1991; Tucker, 2001).

The ADA as a Civil Rights Law

In keeping with its traditional approach to civil rights laws, the U.S. Congress instituted a system of judicial review that established the courts as the final arbiter of rights and responsibilities under the ADA. Not surprisingly, members of the disability community soon turned to the courts to adjudicate their claims under the Act, seeking enforcement of the law. Traditionally, in such cases, civil rights plaintiffs urge the courts to follow the well-established principle of statutory construction and effectuate the remedial purpose of the law; they bolster their argument by citing the legislative history and intent of the Act, as expressed in floor debates and committee reports,
in addition to the statutory language. More recently, however, largely prompted by the “textualism” approach favored by U.S. Supreme Court Justice Antonin Scalia, the interpretative methodology has been altered, and according to Gregory (2002), “The search for a more elusive statutory purpose or intent has given way to a new emphasis on text” (p. 453). This shifting emphasis in interpretative principles has affected the outcome of litigation brought under newer civil rights statutes, such as the ADA (see Note 1).

Against the backdrop of these shifting standards of statutory interpretation, the courts are asked to vindicate plaintiffs’ rights under the law. Although ADA cases may be filed in state court, 90% of the litigation takes places in a federal forum (Colker, 1999; see Note 2).

The study reported herein focused on federal court litigation brought under Title III of the Act, a provision that, according to Colker (2000), “plays an enormously important role in the integration of individuals with disabilities into society” (p. 377) but has received relatively little attention from scholars. My goal in this article is to report on the outcome of Title III litigation and assess the degree to which the federal courts have helped effectuate the remedial purposes of the law by advancing Congress’s stated aim of guaranteeing the civil rights of people with disabilities.

Prohibiting Discrimination in Public Accommodations

Title III prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” Derived from Congress’s authority to regulate interstate commerce, Title III specifies 12 kinds of facilities considered public accommodations, including places of lodging, recreation, sales, education, and entertainment. Within each of these categories is a list of nonexclusive examples of covered establishments, such as hotels and inns; museums and libraries; restaurants and bars; parks and zoos; day care centers; homeless shelters; bowling alleys and golf courses; movie theaters and concert halls; grocery stores and shopping centers; laundromats and banks; and private schools. Although the number of categories is limited to 12, there is room for expansion within them. The operation of the listed establishments must affect commerce, and entities controlled by religious organizations and private clubs are outside the reach of Title III.

Owners or operators covered by the Act must make “reasonable modifications” in policies and practices to make goods, services, and accommodations available to people with disabilities unless the modification would “fundamentally alter” the nature of these policies and practices. They must also ensure that no person with disabilities is excluded or treated differently because of the absence of auxiliary aids and services unless providing such aids would “fundamentally alter” the nature of the goods and services or result in an “undue burden” (see Note 3).

Congress primarily modeled the ADA on two civil rights statutes: the 1973 Rehabilitation Act—the nation’s first major effort to counter discrimination on the basis of disability—and the 1964 Civil Rights Act (CRA), the historic legislation banning discrimination in places of public accommodation on the basis of race or national origin (see Note 4). Title III explicitly replicates Title II of the CRA. Prior to the ADA, the only laws explicitly prohibiting discrimination on the basis of disability in the private sector—the Fair Housing Act Amendments (FHAA) of 1988 and the Air Carrier Access Act of 1986—were restricted to the housing and airline industries (Hereman, 1994). Title III broke new ground by including a wide range of privately owned retail and service establishments and commercial facilities, such as factories and warehouses (see Note 5).

During legislative debate, some members of Congress predicted that the law would precipitate a flood of litigation—accompanied by demands for outrageous attorneys’ fees—against the owners of small businesses. They expressed apprehension over the law’s potential costs, noting that a damage award would add to the expense of compliance and drive small establishments out of business because, unlike larger enterprises, they would be unable to pass the costs onto consumers. Their fear was reflected in the remarks of Senator Orrin Hatch of Utah, who stressed that although the bill exempted the “mom-and-pop grocery store” from its employment discrimination provisions, it did not relieve even the smallest shop from accommodating customers with disabilities (see Note 6).

Evincing similar concerns, the George H. W. Bush administration argued that Title III should emulate the remedial framework of Title II of the 1964 CRA and disallow compensatory and punitive damages. Congress agreed, limiting prevailing plaintiffs to attorneys’ fees and litigation costs only (see Note 7). At the end of the day, support for Title III was obtained as the result of a legislative compromise that restricted the remedy to injunctive relief while extending coverage of the Act to retail and service establishments—unlike Title II of the 1964 CRA, which applies only to places of eating, lodging, and entertainment. As summed up by Weber (1995), “The absence of damages remedies under Title III has all the markings of a legislative compromise between business owners and persons with disabilities and their supporters” (p. 1132).

In addition to restricting the available remedies, Congress also shielded defendants from the potential costs of the law by requiring the removal of structural and communication barriers in any existing facility only when “such removal is readily achievable,” meaning “easily accomplishable and able to be carried out without much difficulty or expense” (see Note 8). According to the report by the Senate Committee on Labor and Human Resources, “readily achievable” was adopted as the middle ground between requiring the removal of all structural barriers in existing facilities or exempting such ex-
isting facilities from the reach of the law. The committee noted that it was easier for defendants to meet this standard than the “undue hardship” (Title I) or “undue burden” (Title II) tests, thus excusing owners of public accommodations from compliance with the law, even if the requisite changes would be less burdensome than an “undue burden” (see Note 9).

By specifying that courts must consider the defendant’s financial resources as well as the cost of the renovation in determining whether a structural modification is “readily achievable,” the law allows defendants to argue that the changes are too expensive (see Note 10). Consequently, in deciding whether to issue an injunction ordering the defendant to comply with the law, the courts engage in a cost–benefit analysis, a practice more akin to decision making in common law tort litigation than in civil rights law (see Note 11).

Studies of ADA Litigation

Stowe (2000) noted, “Laden with ambiguous new legal terms, the ADA has become a rich source of litigation in its short history” (p. 300). Despite the importance of disability policy, however, few empirical investigations of litigation concerning it have been conducted. Because most of the reported decisions involve claims of employment discrimination, most studies of ADA litigation focus on Title I. In addition, assessments of employment discrimination lawsuits, most of which are directed at private employers, have shown that employees rarely triumph in ADA suits: both private and public sector employers prevail in 80% to 90% of the cases (Colker, 1999, 2001; Parry, 1998, 2000).

Parry (1998) found that in the Title I decisions reported from 1992 to early 1998 in the Mental and Physical Disability Law Reporter, published by the American Bar Association (ABA), the defendant won in 92% of the cases. In a later analysis, Parry (2000) surveyed the results of the 434 Title I circuit court decisions reported in the 1999 Law Reporter and found that employees were even less successful than in previous years, winning only 4.3% of the cases decided in 1999. Even more disheartening for ADA plaintiffs, most of the 291 victories for employers (almost 90%) resulted from judicial rulings on procedural grounds, suggesting that most ADA litigants are unable to overcome the jurisdictional and definitional barriers erected by the courts. Parry (2000) also noted the steady decline in employees’ victories over the years—8.4% during the 5 years from 1992 to 1997, 5.6% in 1998, and 4.3% in 1999—and, not surprisingly, concluded that “it is very difficult for employees and job applicants with disabilities to prevail if they have a grievance under Title I” (p. 348).

Colker’s (1999) examination of employment discrimination cases decided between 1992 and July 1998 included suits against public and private employers. A total of 620 ADA cases were decided at the circuit court level; 76% (475) were Title I suits, 122 were nonemployment Title II cases, and 23 were Title III cases. Basing her analysis on the 475 employment discrimination rulings, Colker found that the defendants had a success rate of 84%, prevailing in 376 cases. Finally, relying on the data in the ABA trial court database, she assessed the success of employment discrimination claims against private employers in the federal district courts. Defendants fared even better, prevailing in 570 of the 615 decisions (a success rate of 93%).

Jones’s (1995) study investigated the degree to which the courts accepted the defendants’ “undue burden” defenses in Title II cases over 2 years. Jones found that the federal courts were generally unsympathetic to state and local governments in such cases, only siding with these defendants in 8 of 28 cases. More recently, a study by Mezey, Jordan, Thie, and Davis (2002) encompassed all reported federal district and appellate court opinions, a total of 327 Title II rulings. In these cases, the public entity defendants were moderately successful, prevailing in slightly more than half (54%) of the rulings. The success rate varied by the type of claim brought: Defendants won more frequently in cases involving education policies or the allocation of public welfare benefits and prevailed less frequently in cases centering on physical accessibility and integration of persons with mental disabilities into community living arrangements. In the only prior empirical study of Title III litigation, Colker (2000) found only 25 appellate court cases decided between June 1992 and July 1998, just 5% of all reported appellate ADA cases. Reporting only on the outcome of the cases, she noted that as in Title I cases, the Title III defendants were quite successful, prevailing at a rate of 72% in the circuit courts. Based on these results, as well as on the paucity of cases, Colker concluded that “plaintiffs have a somewhat easier time prevailing under ADA Title III than ADA Title I, but are not very inclined even to attempt litigation under ADA Title III” (p. 400).

Method

This study represents the first systematic examination of all reported district and appellate court decisions in which the court adjudicated a Title III claim. Based on federal court rulings handed down through December 2001, the data include opinions published in the printed court reporters as well as those reported only to the Lexis database.

A search of Lexis initially yielded 434 cases. After eliminating 152 cases that were unrelated to Title III, I also excluded 35 rulings on settlement agreements, statutes of limitations, discovery motions, attorneys’ fees, and class certification, as well as cases involving the state or federal government as the defendant. Thus, the analysis is based on 247 rulings—201 district court cases and 46 decided at the appellate level—in which a Title III claim was adjudicated. To enable a comparison between the district courts and appellate courts, I considered the ruling to be the unit of analysis, with cases at each court level counted as separate decisions.

All cases were content-analyzed to yield the following information: the prevailing party, the date of the decision, the
level of court, the type of claim, and, if the defendant was a business entity. The coding scheme, encompassing only the court’s Title III ruling, was straightforward, with the exception of the prevailing party variable. For this variable, I coded the cases differently, depending on the court level involved. At the district court level (with most cases consisting of a ruling on a defendant’s motion to dismiss or for summary judgment), the defendants were coded as the prevailing parties if their motions to dismiss or for summary judgment were granted, if they won at trial, or if the plaintiffs’ motions for summary judgment were denied. Conversely, plaintiffs were considered the prevailing parties if their motions for summary judgment were granted, if they won at trial, or if the defendants’ motions (for dismissal or for summary judgment) were denied. At the appellate level, the defendants were considered the prevailing parties if the plaintiffs took nothing on their claim, either because the appellate court upheld the lower court’s ruling in the defendants’ favor or reversed the lower court’s ruling in favor of the plaintiffs. The plaintiffs were coded as the prevailing parties if the appellate court (a) upheld the lower court ruling granting relief on one of their Title III claims or (b) reversed the lower court ruling for the defendants and remanded the case for further adjudication. In this coding scheme, plaintiffs were considered the prevailing parties when the case was remanded to the lower court because they would have another opportunity to prevail on remand or to enter into a settlement agreement with the defendant and achieve at least part of their demand.

This methodology intentionally presented a “best case scenario” for Title III plaintiffs and a “worst case scenario” for defendants to ensure that defendants’ victories were true victories. Thus, defendants were coded as losing if at least one plaintiff in the action succeeded in obtaining a favorable outcome on an element of the complaint, and they were only coded as winning if they succeeded in defeating the plaintiff’s claim entirely, not if the outcome was still indeterminate.

### Outcomes in Title III Cases

Under this coding scheme, defendants were successful in 55% of the Title III decisions overall. In terms of separate outcomes for the 201 district court cases versus the 46 appellate court cases, the Title III defendants prevailed in 52% of the rulings in the trial courts and in 70% of the rulings made by the appellate courts. This is despite the fact that the coding scheme described previously favored the plaintiff.

To determine whether the defendant’s success rate varied by the type of claim, I divided the cases into the following six categories:

1. **claims involving access to goods and services**
   brought by plaintiffs with contagious or disfiguring diseases, mental disabilities, or hearing impairments;

2. **claims brought by plaintiffs seeking waivers of athletic rules**;

3. **claims brought by plaintiffs for removal of structural barriers inhibiting the movement of people with disabilities, primarily individuals using wheelchairs and people with visual impairments**;

4. **education claims** brought by plaintiffs seeking admission (or readmission) primarily to graduate and professional schools;

5. **insurance claims** based on disparities between mental and physical disabilities in health insurance policies or exclusion from disability or life insurance policies; and

6. **“line-of-sight” claims**, a subset of the structural barriers cases, in which plaintiffs complained about unacceptable wheelchair seating sections in concert arenas or sports stadiums.

Figure 1 indicates the number of Title III rulings in each type of claim in the district and appellate courts. As Figure 1 shows, the cases divided into two main groupings in both courts: the first group of cases consisted of suits based on structural barriers in stores, restaurants, hotels, cruise ships, and medical facilities; suits seeking access to the goods and services of medical and dental offices, day care centers, beauty parlors, restaurants, and grocery stores; and suits against insurance carriers. Although the number of cases in these three categories differed slightly in the district courts versus the appellate courts, as a group they composed about three quarters of the Title III cases in the analysis in each court level. The second cluster, consisting of suits against graduate and professional schools or private educational testing services; suits against athletic and sports associations; and suits against sports arenas, movie theaters, and concert stadiums, accounted for about 25% of the cases.

The next step in the analysis was to determine whether the outcome of the case was related to the type of claim. Figure 2 shows the defendants’ success rate in each type of claim. Because of the disparity in the outcomes between the district courts and the circuit courts, the success rates were assessed separately according to the level of court.

As Figure 2 illustrates, the outcome of the case varied according to which court interpreted the law. The most successful defendants at the trial court level were sports associations that were defending their interpretation of the rules of eligibility or principles of competitive play; the least successful defendants were attempting to defend themselves against complaints about structural barriers in places of public accommodation. With the exception of these defendants and the defendants in the line-of-sight cases, the defendants in four of the six types of claims prevailed in more than half of the suits. At the appellate level, the most successful defendants were educational institutions or testing services, which prevailed in all appeals; the least successful were the defendants in the line-of-sight
cases. Aside from the defendants in the line-of-sight cases, the Title III defendants in the other five categories of claims prevailed in at least half their appeals.

To determine the extent of some Congress members’ concern about the financially debilitating effect of Title III litigation on small businesses, I coded the defendants as businesses, universities, and “other”; the last category contained predominantly sports associations. I then classified the business defendants on the basis of size to ascertain the number of small business owners involved in Title III suits. Although it was often difficult to gauge the size of the business from the facts of the case, when there was even a possibility that the business defendant was a mom-and-pop operation, I coded it as a small business. This coding scheme was adopted to maximize the number of claims against small businesses, that is, to present a worst-case scenario for small businesses named as Title III defendants. Notwithstanding this methodology, fewer than 10% of the rulings involved small business owners; most were sole-practitioner dentists and doctors, along with a few restaurants, a dry cleaner, and a beauty shop.

**Discussion**

Consistent with Colker’s (2000) study of Title III litigation in the circuit courts, the ADA defendants in this analysis fared very well at the appellate level—with a 70% success rate despite a coding scheme that maximized plaintiffs’ victories. These results suggest that defendants chose their appeals wisely, perhaps preferring to settle weaker cases rather than appeal to
a higher court when the plaintiffs won at the trial court level. The private sector defendants in this study, however, were not quite as successful as the defendants in the employment discrimination cases reported in the Parry (1998, 2000) and Colker (1999, 2000, 2001) studies. A possible explanation for the difference in outcomes may be that plaintiffs who complain of employment discrimination often lose because the courts hold that their impairment does not rise to the level of a disability (see Note 12). Only a few Title III actions were dismissed on these grounds, primarily in cases involving educational institutions and private testing services, where the court applied the definition of disability used in the Title I cases and dismissed the complaint on the grounds that the plaintiff was not disabled (see Note 13). Interestingly, this category, with a legal analysis most closely akin to Title I, contained the cases in which the defendants were most successful on appeal.

Most of the complaints received by the U.S. Department of Justice (DOJ) in the early years of the ADA sought the removal of structural barriers (Hermanek, 1994). During testimony before Congress to support passage of the bill, members of the disability community reported being segregated from society because of inaccessible stores, restaurants, and workplaces. According to a Louis Harris poll conducted at that time, a substantial number of respondents claimed they were limited by structural barriers or inaccessible transit systems (Shapiro, 1993). Congress’s commitment to removing such obstacles was evident from the outset, making it likely that judges would be sympathetic to the complaints of plaintiffs such as these. In addition, because individuals with physical disabilities,

FIGURE 2. Defendants’ success rate in Title III cases by type of claim: district and appellate courts.
especially persons who use wheelchairs, constitute a highly visible and vocal segment of the disability community, they are probably more likely to be able to capture media attention and to obtain access to legal resources to represent their claims in court (see Fleischer & Zames, 2001). Given the attention to this issue, and the ability of the disability community to mobilize around it, it was not surprising that this category of claims would be the largest one and that Title III plaintiffs would be most successful in such cases. The plaintiffs in the line-of-sight cases, primarily users of wheelchairs, were also aided by the fact that their legal arguments were supported by the DOJ line-of-sight guidelines.

It is interesting to note, however, that despite the plaintiffs’ advantages in the cases involving structural barriers, the defendants almost doubled their rate of success in these cases on appeal, winning more than half the rulings in the circuit courts, compared to less than a third in the lower courts. A closer examination of these cases, however, reveals that only two of the five rulings in the defendants’ column were decided on the merits. In two of the three cases decided on other grounds, defendants successfully argued they were not proper party defendants. In the third case, the court dismissed the action as moot. Finally, although it might have been expected that defendants would argue that the removal of barriers or renovation of facilities was not “readily achievable,” this defense was not a key factor in defendants’ victories at either the district or circuit court levels.

It is difficult to generalize about the claims involving access to goods and services, perhaps in part because in this category were a diverse lot of defendants—including restaurants, hotels, dentists, cable television companies, grocery stores, and day care centers—and plaintiffs with a variety of disabilities—including hearing and visual impairments, autism, asthma, and HIV/AIDS. As in the cases involving structural barriers, although these defendants did well, they frequently won on procedural or jurisdictional grounds rather than on the merits of their case. For example, a substantial number of cases were dismissed on the grounds that the plaintiff lacked standing or that the complaint failed to allege key elements of the law.

In regards to types of defendants, it appeared that contrary to the dire predictions in congressional deliberations about the devastating effect of the law on small businesses, such defendants were not targeted in Title III litigation, and the warnings about their likely demise from excessive litigation appear to have been misplaced. Although it is possible that plaintiffs hesitate to sue mom-and-pop businesses in their own neighborhood, or that such enterprises are more apt to comply with the law, the cases examined indicated that the vast majority of Title III cases are aimed at the large-scale corporation or company that barely received mention during congressional debate over the bill.

Notwithstanding the low number of Title III suits against small business owners, concern over the alleged abuse of Title III litigation against small businesses prompted the introduction in 2000 of the ADA Notification Act in the 106th Congress. Part of this backlash against the ADA had been provoked by media reports portraying ADA plaintiffs as undeserving opportunists who attempted to take advantage of the law by filing fraudulent claims, or at least claims outside the intended purpose of the law (see Colker, 1999; Fleischer & Zames, 2001; Percy, 2000). This Act would have required plaintiffs to provide a defendant with written notice of an ADA violation 90 days before filing a Title III suit. If a plaintiff failed to do so, the court could impose sanctions on the attorney; if the plaintiff provided notice after the suit was filed, no attorneys’ fees could be awarded (Miliani 2001).

The substantial number of cases involving insurance claims—and the defendants’ overwhelming rate of success in them—represents one of the most important unanticipated findings of this study. The extent to which Title III applies to insurance policies is one of the most significant unresolved questions in Title III case law.

As Figure 2 indicated, the defendants won most of the cases involving insurance claims in both district and appellate courts. In the main, plaintiffs in these cases charged that a company’s refusal to write a health or life insurance policy for persons with AIDS or other medical conditions or a company’s policy of differentiating between mental and physical disabilities in benefit plans was discriminatory. Plaintiffs pointed to the provision of the law that mandated that persons with disabilities be accorded the “full and equal enjoyment of the goods [and] services,” denying that it meant merely removing barriers to insurance company offices, as some defendants contended. Furthermore, plaintiffs asserted that Congress must have intended Title III to apply to insurance underwriting practices or the Act would not have included a “safe harbor” exception, (§501(c)), a provision allowing rate differentials that are based on “sound actuarial principles” or “reasonably anticipated experiences” (see Note 14).

These cases were decided on several legal grounds, and the courts’ primary concern was whether Congress intended Title III to apply to insurance underwriting. The majority of the circuit courts read the statute narrowly and, accepting the defendants’ position, held that Title III did not encompass insurance underwriting practices (see Note 15). The courts concluded that Title III was inapplicable to insurance underwriting practices and that the ADA did not regulate the content of services or products, such as insurance policies or benefit plans; a number of courts also held that Title III was only intended to ensure access to “places” of public accommodation, such as insurance offices. In a few cases, the courts held that Title III was applicable to the claim but concluded that the policy fell within §501(c).

The First and Second Circuits read the statute more broadly and held that the law does not merely ensure access to insurance offices as places of public accommodation (see Note 16). The proposed Mental Health Equitable Treatment Act, introduced in the Senate in March of 2001 (as S. B. 543) and in the House in March of 2002 (as H.R. 4066), would have aided
plaintiffs in such cases by prohibiting disparities between the coverage of mental health and medical–surgical benefits in certain employee group health plans or related insurance policies. Both versions were referred to committee, but no final action has been taken on either bill.

**Guidance From the Supreme Court**

Although the U.S. Supreme Court has played an important role in determining the contours of Title I policy, it has not played a major role in providing guidance to the lower courts in adjudicating Title III. The Court has handed down only two Title III decisions, neither addressing a major point of contention in the courts or resolving a widespread conflict among the circuits (see Note 17). The large volume of rulings involving insurance claims and the conflict among the circuits in these cases suggests that the Court should step in to resolve the conflict; however, despite several opportunities, the Court has refused to grant certiorari in cases involving Title III challenges to insurance underwriting practices.

The first Court opinion in a Title III case, and the second ruling it made on the ADA, was *Bragdon v. Abbott* (1998). The case arose in a challenge to a dentist in Bangor, Maine, who refused to provide routine dental care to a woman with asymptomatic HIV; he offered to treat her at the local hospital at no extra charge, but she would have been required to pay the hospital costs. This case did not address the issue of discrimination against people with active AIDS symptoms who were already fused to provide routine dental care to a woman with asymptomatic HIV; he offered to treat her at the local hospital at no extra charge, but she would have been required to pay the hospital costs. This case did not address the issue of discrimination against people with active AIDS symptoms who were already protected by the pre-ADA opinion in *School Board of Nassau County v. Arline* (1987), in which the Court held that discrimination on the basis of a contagious disease, in that case, tuberculosis, violated the 1973 Rehabilitation Act.

In a 5 to 4 ruling in *Abbott*, the Court held that the plaintiff, Sidney Abbott, was "disabled" because her HIV status was an impairment substantially limiting the "major life activity" of reproduction. Although the appeals court had decided the case on the merits and concluded that the dentist’s actions were discriminatory, the Court merely remanded the case to allow the lower court to determine whether the treatment constituted a “direct threat” to the dentist, an affirmative defense that would excuse him from conforming to the requirements of the Act (see Note 18). According to the Court, in ruling for Abbott, the appeals court had relied on professional guidelines only; it now needed to conduct a thorough analysis of the scientific evidence of risk to the health-care provider before concluding that there was discrimination under the ADA.

Although *Abbott* was a victory for individuals infected with HIV, the Court’s opinion was not groundbreaking because the Court merely followed the lead of the circuits, which had ruled in favor of the plaintiffs in most such cases. Moreover, the dentist’s actions contravened the policy guidelines of the Centers for Disease Control and Prevention, as well as those of the American Dental Association, regarding provision of dental care to persons with HIV or AIDS. Thus, although the ruling favored the disability rights community, largely because the Court held that reproduction was a major life activity, it seems unlikely that *Abbott* has appreciably broadened the reach of the law.

More recently, a Title III decision handed down in May of 2001 concerned the use of a motorized cart in tournament golf by professional golfer Casey Martin. The primary issue in the case was whether Martin’s request for a waiver of the “walking rule” during tournament play constituted a “fundamental alteration” of the game. The two circuits that ruled on this issue were split: the Seventh Circuit opinion, *Olinger v. U.S. Golf Association* (2000), upheld the sports association, whereas the Ninth Circuit, in *Martin v. PGA Tour* (2000), ruled in favor of the golfer.

The Court resolved the matter in *PGA Tour v. Martin* (2001) by affirming the Ninth Circuit in a 7 to 2 decision. Justice John Paul Stevens’s majority opinion noted that the purpose of the game was “shot-making,” not walking the course, and that permitting Martin to ride to the hole was a “reasonable modification” that did not “fundamentally alter” the tournament play. Clearly a victory for disability rights advocates, *Martin* expanded the scope of Title III coverage in at least two ways: First, it ruled that it applied to both public and private activities of a public accommodation, and second, it held that an independent contractor, such as Martin, was within the reach of the law (see Shannon, 2001). Despite the news headlines proclaiming that this decision would have a monumental impact on professional sports, it does not seem likely that it will greatly affect the interpretation of Title III law by the lower courts. Most observers also believe that the decision will not unduly encroach on the norms of professional sports activity, and even the Court stated that few individuals had sought this kind of waiver in professional golf since Martin’s initial inquiry. Although Shannon argued that *Martin* was an important case because it requires public accommodations to assess the individualized nature of a person’s disability in reacting to a request for an accommodation, it is not apparent how this mandate will be enforced in future cases.

**Legislative Intent and Judicial Enforcement**

The ADA attested to Congress’s strong condemnation of discrimination on the basis of disabilities, yet Title III contained a number of loopholes for the defense, undoubtedly as a result of the compromises needed to secure passage of the bill (Shapiro, 1993). Examples include the “fundamental alteration” defense that played a role in the education and athletic cases and the “readily achievable” defense that allowed the courts to engage in a cost–benefit analysis in the cases involving removable barriers and line-of-sight complaints.

Perhaps the most important legacy of the legislative process, however, and the one that ultimately created the largest loophole for defendants, involved the limitation on remedies.
According to Colker (2000), the problem with injunctive relief as the sole remedy is twofold: first, it limits plaintiffs’ incentives to file suit; second, because adherence to the law will probably require expense or at least some inconvenience to the owner, businesses are likely to be recalcitrant about compliance when the only punishment for noncompliance is an injunction that requires them to do what they should have done in the first place. Perhaps because of this, a few years after the Act had been in effect, Sullivan (1995) noted that “many private businesses have delayed Title III compliance, waiting to be challenged on their noncompliance before instituting change” (pp. 1142–1143).

Although these data do not indicate the degree to which the limited remedy served as a disincentive to litigants, it is clear that the sole recourse to injunctive relief played a role in the outcome of the cases—perhaps in a way that was unanticipated by Congress. The number of cases affected was not trivial: At the district court level, almost 25% of the decisions in which the defendants prevailed were dismissed on grounds stemming from the remedial framework of Title III, with almost 10% dismissed on this basis at the appellate level. The opinions were based on a variety of legal grounds. The courts variously ruled that the case was moot, the court lacked jurisdiction, or the plaintiff lacked standing and that despite proof of the defendants’ discriminatory conduct, injunctive relief was inappropriate under the circumstances (see Note 19).

Two kinds of cases were most affected by this approach to the law. One kind was complaints from persons with hearing impairments who claimed they were denied access to medical services because of the defendant’s failure to provide sign language assistance. The other consisted of challenges to sports organizations or associations concerning athletic rules barring individuals with disabilities from play. In the first instance, the courts ruled that the plaintiff was unlikely to seek the services of the defendant again and the injunction would not provide relief; in the second, the court found that even if the rules were waived, the plaintiff had used up playing eligibility and therefore an injunction would serve no purpose.

The plaintiffs’ difficulties in such cases stemmed in part from the courts’ strict interpretation in viewing the complaints. For example, if a plaintiff failed to allege that she would return to seek the services of the doctor who had refused to treat her or to eat in the restaurant that had barred her, the court dismissed the case. A California case, Aikins v. St. Helena Hospital (1994), illustrates the obstacles a plaintiff was forced to overcome. The district court dismissed a woman’s claim against a hospital that failed to provide her with sign language assistance because she had not alleged that she was “likely to use the hospital in the near future,” nor had she claimed that it would discriminate against her if she did. Whether one blames the courts, as Colker did, for this narrow interpretation of Title III jurisdiction, or Congress, for its refusal to allow compensatory damages in Title III, it is obvious that the remedial framework has hampered judicial enforcement of Title III.

Another problem caused by the courts’ narrow interpretation of the law involved the question of liability under the Act (Langer 1999/2000; Stowe, 2000). These situations arise when plaintiffs seek to hold a company responsible for ADA compliance and the company argues it is not the proper party in the suit, pointing to a franchising or licensing agreement with a corporation. The issue in these cases is whether the corporations are “owners or operators” within the meaning of the Act and therefore liable for the alleged ADA violations of their franchisees. A review of the number of cases affected by the court’s narrow reading of the law indicated that more than 10% of the defendants’ victories in the district courts were attributable to the judges’ rulings that the plaintiffs had named improper defendants; similarly, about 5% of the defendants’ victories in the circuit courts were based on these grounds.

Two cases illustrate the problem for the plaintiffs. First, in Neff v. American Dairy Queen (1994), the plaintiff argued that the American Dairy Queen (ADQ) Corporation was liable for the ADA violations at the San Antonio (Texas) Dairy Queen, pointing to a franchise agreement with R&S Dairy Queen, the operator of the San Antonio store, that required it to obtain approval from ADQ before making structural changes in the building. ADQ argued that it was not responsible under the ADA because the restaurant was operated by the R&S Dairy Queen, a “separate entity.” Because there was no evidence that the franchise agreement allowed ADQ to demand modifications of building alterations, only evidence that allowed it to veto them, the court found that ADQ was not an “operator” within the meaning of the ADA. Similarly, in Dahlberg v. Avis Rent A Car System (2000), the court held that the car rental company was not liable for the alleged discriminatory conditions at a Los Angeles facility because the day-to-day operations there were under the authority of an “independent licensee.”

Conclusion

The ADA was intended to send a clear message to society that discrimination on the basis of disabilities is unacceptable. In setting forth the purpose of the ADA, Congress stated that its intent was to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities [and] to ensure that the Federal government plays a central role in enforcing the standards established in this Act” (42 U.S.C. § 12101 (b)(2)(3)).

Colker (2000) concluded that “Title III has been less successful than was originally hoped” (p. 379). To assess the validity of this statement, in this study I examined the role of the federal courts in furthering the congressional mandate to end discrimination against people with disabilities. The data indicate that despite predictions of costly lawsuits against mom-and-pop store owners brought by “avaricious” lawyers, Title III litigation has lagged behind both Titles I and II in the number of cases filed in federal courts. In regards to the outcomes of cases that were filed, although Title III plaintiffs have been
more successful than Title I plaintiffs, the majority of the Title III litigants did not prevail in their suits to end the alleged discriminatory practices of private businesses.

The defendants’ success in these Title III cases varied by the type of claim brought and the level of the court making the decision. With the exception of the defendants in structural barriers cases, most Title III defendants prevailed at the trial court level. The success of defendants was most notable on appeal, however, where they prevailed at a rate of 70%, indicating that defendants who appealed were likely to be rewarded for their efforts. Defendants’ success at the appellate level is significant from both public policy and legal perspectives. With little prospect that the Supreme Court will accept a case on appeal, most Title III policymaking takes place in the circuit courts.

Analysis of these cases also indicated that Congress’s decision to limit available Title III remedies to injunctive relief accounted for a significant number of the defendants’ legal victories. During passage of the bill, virtually all members of Congress declared their commitment to the principle of ending discrimination on the basis of disability, but at the same time, a number of them expressed alarm about the cost of compliance for small business owners, fearing that the statute would lead to expensive and unnecessary litigation and far-reaching judicial interpretation of the law. The final version of the bill reflected these contradictory impulses: The law extended civil rights guarantees to people with disabilities and simultaneously safeguarded the interests of Congress’s small business constituency.

These data suggest that much of the responsibility for the defendants’ high rate of success is attributable to the judiciary’s constrained interpretation of the Act, exemplified by its position in cases involving insurance claims. The majority of circuit courts have held that Congress did not intend the law to bar discrimination on the basis of disability, but at the same time, a number of them expressed alarm about the cost of compliance for small business owners, fearing that the statute would lead to expensive and unnecessary litigation and far-reaching judicial interpretation of the law. The final version of the bill reflected these contradictory impulses: The law extended civil rights guarantees to people with disabilities and simultaneously safeguarded the interests of Congress’s small business constituency.

This study of Title III litigation has confirmed, as Sullivan (1995) has noted, that the courts have “interpreted its [Title III’s] provisions . . . with minimal adverse impact on pri-

 private organizations” (p. 1117). Although Congress must share some of the blame for the statute’s failure to live up to the lofty goals uttered at the time of its passage, these data indicate that the courts, in their constrained interpretation of Title III, have been a major hindrance in effectuating the remedial purposes of the statute.

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NOTES


2. Although this figure is based on employment discrimination cases in the ABA database, there is no reason to believe that Title III plaintiffs are more likely to prefer state courts over federal courts. Colker’s (2000) study of Title III litigation was based on federal court actions only. As she noted, in some of those cases, plaintiffs asked the federal court judge to exercise pendent jurisdiction over a state law claim, such as negligence, or, when available, a state disability law, to allow for the possibility of a compensatory or punitive damage award.

3. The “fundamental alteration” test derives from the Court’s opinion in Southeastern Community College v. Davis (1979), a decision based on the 1973 Rehabilitation Act in which the Court held that the defendant did not have to alter the requirements of its nursing program to accommodate the plaintiff’s hearing impairment.

4. Section 504 of the 1973 Rehabilitation Act states that “no otherwise qualified individual with a disability . . . shall, solely by reason of . . . disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Congress directed that the ADA follow the existing case law and regulations of § 504; see Katzman (1986) and Scotch (2001) for analysis of the 1973 Rehabilitation Act.

5. A commercial facility is a catch-all category that includes a wide range of nonresidential establishments that affect commerce and are not included within the 12 types of public accommodations (Moore, 1992).


7. The law allows individuals to ask the U.S. Attorney General to investigate any perceived discrimination and permits the Attorney General to sue in “practice and pattern” cases or if the discrimination “raises an issue of general importance.” When the Attorney General files suit, the court may award the injured party mone-
tary relief, excluding punitive damages, as well as assess civil penalties against the defendant. In determining the civil penalty, the court may weigh whether there was a “good faith” effort to comply with the Act. Colker (2000) argued that Title III should have adopted the remedial provisions of the FHAA, the law prohibiting discrimination on the basis of disability in the sale or rental of housing, including apartment rentals. It allows plaintiffs to recover compensatory and punitive damages and, in some cases, mandates the Attorney General to file suit. Percy (2000) provided data on settlement agreements in Title III suits initiated by the U.S. Department of Justice.

8. When owners cannot readily remove barriers in existing structures, the law requires them to make their goods and services available through “other readily achievable means.”

9. S. Rep. No. 101-116, at 65–66 (1989). The three main sections of the law provide opportunities for defendants to argue that the accommodations desired are too expensive or too difficult to achieve.

10. See, for example, Alford v. Bistro Restaurant (2000), in which the court assessed the defendant’s gross annual profit to determine whether it was “readily achievable” to remove the structural barriers.

11. Because of the de minimus cost of making new construction accessible, Congress imposed more immediate accessibility mandates on new and altered construction, which was required to conform, for the most part, to Department of Justice guidelines—issued in July of 1991—unless the owners are able to prove it is “structurally impracticable” to meet the guidelines, a rarely successful defense.

12. In the so-called trilogy of ADA cases—Sutton v. United Airlines, Inc. (1999), Murphy v. United Parcel Service (1999), and Albertsson v. Kirkingburg (1999)—the Court held that individuals with “treatable” impairments were not disabled within the meaning of the Act; see Feldblum (2000) for further discussion of the “definition of disability” cases.

13. Most of the requests for accommodations in testing come from individuals with attention-deficit disorder or dyslexia. According to the terms of a settlement, the Educational Testing Service agreed to cease its practice of “flagging” tests taken under special circumstances on the grounds that the conduct was “capable of repetition, yet evading review” because that should be reserved for unusual circumstances.

14. S. Rep. No. 101-116, at 65–66 (1989). The three main sections of the law provide opportunities for defendants to argue that the accommodations desired are too expensive or too difficult to achieve.

15. Most of the requests for accommodations in testing come from individuals with attention-deficit disorder or dyslexia. According to the terms of a settlement, the Educational Testing Service agreed to cease its practice of “flagging” tests taken under special conditions after September 2003 (New York Times, July 28, 2002).

16. The law provides that “Subchapters I through III . . . shall not be construed to prohibit or restrict . . . an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law” and this exception “shall not be used as a subterfuge to evade the purposes” of Titles I and III.


18. Under this provision, a court weighs the competing interests of prohibiting discrimination against preventing the spread of disease.

19. The standing issue is governed by the Court’s ruling in City of Los Angeles v. Lyons (1983) in which the high court dismissed the claim against the city for the actions of its police officers in using a “choke hold” on the plaintiff when arresting him during a traffic stop. The Court held that it was speculative that the plaintiff would be subject to the same treatment even if the practice continued and that it was unwilling to waive the mootness doctrine on the grounds that the conduct was “capable of repetition, yet evading review” because that should be reserved for unusual circumstances.

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