

**WEAKENING TITLE III OF THE  
AMERICANS WITH DISABILITIES ACT: THE  
BUCKHANNON DECISION AND OTHER  
DEVELOPMENTS LIMITING PRIVATE  
ENFORCEMENT**

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*The Americans with Disabilities Act (ADA) holds special relevance for the nation's growing elderly population. As Americans age, the ranks of those qualifying as disabled under Title III are rapidly increasing, and more people are now relying on its protection against discriminatory barriers to public accommodations than ever before. However, just as circumstances would seem to invite its rigorous application, the enforcement provisions of Title III have been significantly weakened. In this Note, Michael W. Kelly examines the three main areas of assault on Title III: (1) the definition of the term "prevailing party" and its effect on awarding attorney's fees; (2) proposals to create a notification period before Title III suits could even be filed; and (3) the scope of liability for architects, owners, and constructors of public buildings. Mr. Kelly considers both sides of the debate on whether the ADA can provide sufficient incentives for private plaintiffs and attorneys to bring their claims without creating a "cottage industry" for frivolous lawsuits. He concludes that the recent backlash against the ADA must be ended by Congress or by the courts, if the goals of the Act are to be achieved. Restoring the influence of the ADA will require a strong recognition that Title III relies upon private attorneys for its enforcement and clearer guidance on the standards for compliance.*

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## I. Introduction

Congress passed the Americans with Disabilities Act (ADA) in part because the number of disabled people in America increases with the age of the population.<sup>1</sup> As of 1997, the U.S. Census Bureau reported that 32,064,000 people over the age of sixty-five are disabled.<sup>2</sup> The most recent census counted a total of 35,000,000 Americans aged sixty-five or older.<sup>3</sup> Assuming the data has not changed dramatically since 1997, a large portion of today's elderly population would likely qualify as disabled under Title III of the ADA.<sup>4</sup> In general, Title III protects the disabled from barriers preventing access to public accommodations.<sup>5</sup> The elderly population in America should be concerned about the limited effectiveness of Title III of the ADA and continual setbacks to an individual's ability to bring suit for a violation.

Although the Department of Justice (DOJ) enforces Title III, it does not, and cannot, monitor a large number of public accommodations.<sup>6</sup> The DOJ has limited resources,<sup>7</sup> which must be divided between the DOJ's goals of litigation and education.<sup>8</sup> Enforcement against small businesses and other public accommodations is left to private attorneys general.<sup>9</sup> Under Title III, however, a private attor-

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1. 42 U.S.C. § 12101(a)(1) (2000).

2. JACK MCNEIL, U.S. DEP'T OF COMMERCE, AMERICANS WITH DISABILITIES: HOUSEHOLD ECONOMIC STUDIES, CURRENT POPULATION REPORTS 10 tbl.1 (2001), available at <http://www.census.gov/prod/2001pubs/p70-73.pdf>. The U.S. Census Bureau uses the ADA and its terms as the criteria for labeling someone as "disabled." U.S. CENSUS BUREAU, DISABILITY: CENSUS BUREAU DATA ON DISABILITY, at <http://www.census.gov/hhes/www/disable/intro.html> (last revised Aug. 22, 2002) [hereinafter CENSUS BUREAU DATA ON DISABILITY].

3. LISA HETZEL & ANNETTA SMITH, THE 65 YEARS AND OVER POPULATION: 2000, CENSUS 2000 BRIEF 9 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf> (last visited Sept. 16, 2002).

4. See CENSUS BUREAU DATA ON DISABILITY, *supra* note 2. However, plaintiffs seeking relief under Title I, which applies to employment, must also be "qualified individual[s]" as well as "disabled." Compare 42 U.S.C. § 12102(2) (2000), with 42 U.S.C. § 12111(8) (2001) (incorporating the definition of disability into Title I's narrower definition of a "qualified individual with a disability"). "ADA Title III . . . applies to all individuals with disabilities, irrespective of whether they are sufficiently qualified to engage in employment." Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 377 (2000).

5. 42 U.S.C. § 12182 (2000).

6. Colker, *supra* note 4, at 404.

7. *Id.*

8. Paul V. Sullivan, Note, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1141-42 (1995).

9. *Id.*

ney general is limited to obtaining injunctive relief.<sup>10</sup> The only potential for money damages comes from underlying state laws, although many states lack such relief.<sup>11</sup> Absent any damages, attorney's fees, available under 42 U.S.C. § 12205,<sup>12</sup> provide the major incentive behind a lawyer's decision to file suit on behalf of the disabled.<sup>13</sup> Although these fees are awarded to enable private enforcement on behalf of a group that is "severely disadvantaged . . . economically,"<sup>14</sup> they are often targets of the media and public backlash that has plagued the ADA since its inception.<sup>15</sup>

The ability of an attorney to recover fees, and hence the likelihood that an attorney will file suit, faces three distinct threats: (1) the Supreme Court's recent limitation on the definition of a "prevailing party" in determining the availability of attorney's fees; (2) a possible notification period that would have to be met before filing suit; and (3) confusion over which people involved in the design or construction of public accommodations are liable for failing to meet the requirements of the statute. Part II of this Note examines the purposes and origins of Title III along with its development and effectiveness over the past ten years. Part III analyzes the three main issues concerning the collection of attorney's fees. Part IV looks to other statutes, in particular the Equal Access to Justice Act (EAJA) and the Internal Revenue Code (IRC), for possible solutions to the problem of fees and examines the potential impact of a notification period before initiating suits. The analysis ends with a suggested compromise for determining who should be liable for violations based on the remedies available under Title III.

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10. 42 U.S.C. § 12188(a)(2) (2000). However, when the DOJ files suit, it does have the power to seek additional damages. *Id.* § 12188(b)(2)(B).

11. Colker, *supra* note 4, at 405–06.

12. "In any action or administrative proceeding commenced pursuant to this Chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . ." 42 U.S.C. § 12205; *see also* 28 C.F.R. § 36.505 (2000) (allowing the award of attorney's fees specifically under Title III).

13. Adam A. Milani, *Go Ahead. Make My 90 Days: Should Plaintiffs be Required to Provide Notice to Defendants Before Filing Suit Under Title III of the Americans with Disabilities Act?*, 2001 WIS. L. REV. 107, 132–35 [hereinafter *Make My 90 Days*]; *see also* 42 U.S.C. § 12188(b)(2)(B) (limiting the award of monetary damages to requests by the Attorney General).

14. 42 U.S.C. § 12101(6).

15. *Make My 90 Days*, *supra* note 13, at 109–10.

## II. The Operation and Enforcement of Title III of the ADA

Title III of the ADA provides protection to the disabled by outlawing discrimination in the form of access to public accommodations.<sup>16</sup> This Title places an affirmative duty on employers “to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable,”<sup>17</sup> to build new facilities in accordance with the ADA,<sup>18</sup> and to construct any alterations of existing facilities so that, “to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities.”<sup>19</sup> This duty provides broad coverage of public facilities without requiring the disabled individual to be qualified for employment under Title I.<sup>20</sup>

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16. 42 U.S.C. § 12182(a). Under the statute, “public accommodations” covers the following categories:

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

(B) a restaurant, bar, or other establishment serving food or drink;

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

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

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

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

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

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

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education;

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

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

*Id.* § 12181(7). There is an additional requirement that the public accommodation “affect commerce.” *Id.*

17. *Id.* § 12182(b)(2)(A)(iv).

18. *Id.* § 12183(a)(1).

19. *Id.* § 12183(a)(2).

20. *Id.* § 12111(8); Colker, *supra* note 4, at 377. Similarly, “the obligation to remove barriers . . . does not extend to areas of a facility that are used exclusively

Generally, the duty to provide access and the duty to prevent and remove architectural barriers rest on the shoulders of the owners, operators, lessors, or lessees of public accommodations.<sup>21</sup> Originally, Congress feared that this duty would be too onerous a burden for the owners of small businesses, and it narrowed the removal of the barriers requirement by adopting a limited definition of the “readily achievable” standard as suggested by then U.S. Attorney General Thornburgh.<sup>22</sup> This standard is generally understood to protect small business owners from anything other than “modest expenditures . . . to provide access to existing facilities not otherwise being altered.”<sup>23</sup> The DOJ’s intent was to gear the ADA for the future, with “its goal being that, over time, access will be the rule rather than the exception.”<sup>24</sup> Where removal of a barrier is not readily achievable, the owner still must provide a “readily achievable” alternative.<sup>25</sup>

New facilities and existing facilities undergoing alterations are governed much more strictly by the ADA.<sup>26</sup> New facilities are expected to be in compliance with standards promulgated by the U.S. Attorney General’s Office.<sup>27</sup> However, discrimination in the form of an architectural barrier is defined as a failure to both “design *and* construct” the facilities in accordance with such standards.<sup>28</sup> This phrase has affected who can be held liable when new facilities contain barriers.<sup>29</sup> When an existing facility is renovated or remodeled, it must be altered in a way that provides accessibility to the “maximum extent feasible.”<sup>30</sup>

In exchange for broad coverage of public accommodations, the proponents of the ADA reached a “fragile compromise” and agreed to

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as employee work areas.” 28 C.F.R. § 36 app. B (1998), *available at* <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002).

21. 42 U.S.C. § 12182(a) (2000). Courts do not require the defendant to have a proprietary interest. Sullivan, *supra* note 8, at 1126.

22. Colker, *supra* note 4, at 384.

23. 28 C.F.R. § 36 app. B, *available at* <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002).

24. *Id.*

25. 42 U.S.C. § 12182(b)(2)(A)(v) (2000).

26. Compare 42 U.S.C. § 12182(b)(2)(A), *with id.* § 12183(a) (providing broader coverage and fewer exceptions for new construction).

27. 28 C.F.R. § 36.406, *available at* <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002). See generally 28 C.F.R. § 36 app. A (1998), *available at* <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002).

28. 42 U.S.C. § 12183(a)(1) (emphasis added).

29. See *infra* Part III.A.

30. 42 U.S.C. § 12183(a)(2).

limit the remedies available under the statute.<sup>31</sup> Although the first two drafts of the bill presented in 1988 and 1989 allowed for monetary damages based on a structure similar to the Federal Housing Act (FHA), the final version of the bill adopted a set of remedies and procedures modeled after Title II of the Civil Rights Act (CRA).<sup>32</sup> Under the CRA, Congress had seen favorable results with little need for monetary damages.<sup>33</sup> This compromise provided further protection to small business owners,<sup>34</sup> although Attorney General Thornburgh recognized that a cautious approach to such remedies would be necessary and the issue might have to be revisited.<sup>35</sup> As adopted, Title III of the ADA allows only injunctive relief for private suits.<sup>36</sup>

The remedies under Title III, when combined with the limited resources of the DOJ, have resulted in the DOJ focusing on providing big picture relief geared toward removing barriers over time.<sup>37</sup> In particular, the DOJ has issued regulations for newly constructed buildings and alterations to existing facilities.<sup>38</sup> The statute instructs the DOJ to institute suits where it has "reasonable cause" to believe there is a "pattern or practice of discrimination" or where an instance of discrimination raises an "issue of general public importance."<sup>39</sup> The

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31. Colker, *supra* note 4, at 385.

32. *Id.* at 382–86. The main difference between the enforcement procedures of the two drafts for the bills is that the first draft allowed for punitive damages, unlike Title II of the CRA and the draft of the ADA enacted in 1990. *Id.* at 383; *see also* H.R. 4498, 100th Cong. § 9(b) (1988). However, Title III of the ADA does allow the Attorney General to recover monetary, but not punitive damages. 42 U.S.C. § 12188(b)(2)(B).

33. Colker, *supra* note 4, at 389. Title II of the CRA is also used to combat racial discrimination in places of public accommodation, and Attorney General Thornburgh pointed out its success in his testimony before the Senate. *Id.* at 393; *see also* 135 CONG. REC. S4979-02 (1989) (statement of Senator Harkin). In her article, Professor Colker contends that the success of Title II of the CRA resulted from the combination of the following: federal injunctive relief, state remedies allowing for individual damages, and the extension of 42 U.S.C. § 1981 by some courts to allow monetary damages under Title II of the CRA. Colker, *supra* note 4, at 389–90.

34. *Make My 90 Days*, *supra* note 13, at 114. This is in addition to the delayed enforcement of the ADA to allow small businesses time to conform to regulations. *Id.* Furthermore, the definition of the "readily achievable" standard is limited for operators, owners, or lessors to remove barriers without making alterations or new construction. *See* Colker, *supra* note 4, at 383.

35. Colker, *supra* note 4, at 384.

36. 42 U.S.C. § 12188(a).

37. *See* 42 U.S.C. § 12188(b); 28 C.F.R. § 36 app. B (1998), available at <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002).

38. 28 C.F.R. § 36 app. A (1998), available at <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002).

39. 42 U.S.C. § 12188(b)(1)(B).

DOJ may also intervene in private suits for the same reasons where necessary.<sup>40</sup> As Professor Ruth Colker points out, the DOJ typically does a commendable job with its limited resources by going after settlements above and beyond the requirements of the statute.<sup>41</sup>

However, the main issue in this Note concerns the private suits instituted under Title III. Like other civil rights acts, the key components in the enforcement of the ADA are private attorneys general.<sup>42</sup> As Congress pointed out when it passed the ADA, part of the reason the disabled were subject to discrimination was their low economic status.<sup>43</sup> When combined with the lack of money damages available under this Title, the main incentive for an attorney to file suit under Title III, absent court appointment, is the attorney's fees available under 42 U.S.C. § 12205.<sup>44</sup> However, that section limits the recovery of fees to a "prevailing party."<sup>45</sup> Until recently, almost all of the federal circuits allowed a party to recover fees under the "catalyst theory,"<sup>46</sup> which allowed a court to award fees without requiring a judgment or judicially enforceable settlement.<sup>47</sup> Defendants may also recover fees, but only where the claim filed against them is frivolous.<sup>48</sup>

Title III remedies have been criticized for being extortionate on the one hand, and on the other for failing to provide the necessary means to move closer toward removing all barriers from public accommodations.<sup>49</sup> Those who advocate for an expansion of current remedies note the small number of cases filed nationwide.<sup>50</sup> In Professor Colker's article, *A Fragile Compromise*, she researched the number

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40. See Colker, *supra* note 4, at 378 nn.8–10.

41. *Id.* at 381. The DOJ makes all of its settlements available at its website, <http://www.usdoj.gov/crt/ada/reg3a.html>.

42. *Make My 90 Days*, *supra* note 13, at 115; see also 28 C.F.R. § 36.591(a) (2000).

43. 42 U.S.C. § 12101(a)(6).

44. See 28 C.F.R. § 36.505 (2000).

45. 42 U.S.C. § 12205.

46. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (pointing out that "most Courts of Appeals recognize[d] the 'catalyst theory,'" including the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

47. See *infra* Part III.C (explaining the "catalyst theory").

48. U.S. DEP'T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL § III-8.5000 (1993), available at <http://www.usdoj.gov/crt/ada/taman3.html> (last visited Oct. 25, 2002).

49. *Make My 90 Days*, *supra* note 13, at 110 (pointing out the successful lobby effort of the bus industry to delay regulations for its industry, the efforts to include the ADA in the "Contract with America's" ban on unfunded mandates, and the proposed ADA Notification Amendment as tangible signs of the backlash).

50. Colker, *supra* note 4, at 399–400.

of reported appellate cases under the ADA from June 1992 to July 1998.<sup>51</sup> Although she found 475 Title I decisions, she found only twenty-five Title III decisions.<sup>52</sup> Professor Colker also researched the number of verdicts reported nationwide by September 28, 1998, and located only sixteen Title III decisions, which made up sixteen percent of all ADA verdicts nationwide.<sup>53</sup> Importantly, all of these cases included a supplemental state law action for compensatory or punitive damages where available,<sup>54</sup> suggesting that the availability of damages provided the true incentive for an attorney to take the case.

As Professor Colker points out, what is missing from the picture of Title III litigation is the number of settlements reached by private parties.<sup>55</sup> The DOJ posts some of its settlements on its website,<sup>56</sup> but many of those reported come from cases that align with the larger policy goals of the DOJ.<sup>57</sup> Moreover, the largest number of settlements reached by the DOJ involved inaccessible facilities where accessibility was readily achievable.<sup>58</sup> This finding comports with John D. Mallah's statement in the *National Law Journal* that accessibility problems for existing facilities are numerous.<sup>59</sup>

Mr. Mallah is an attorney in South Florida and a participant in the ADA industry that has recently emerged in Florida, California, and Hawaii.<sup>60</sup> The profit of this industry comes from the accumulation of attorney's fees recovered after filing large numbers of Title III access suits.<sup>61</sup> According to the *National Law Journal*, the number of ADA suits in South Florida has increased by eight times since 1997,

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51. *Id.* at 400.

52. *Id.*

53. *Id.* at 401.

54. *Id.*

55. *See id.* at 403.

56. U.S. Dep't of Justice, *ADA Settlements and Consent Agreements*, available at <http://www.usdoj.gov/crt/ada/settlemt.htm> (last revised July 31, 2002).

57. *See generally* Colker, *supra* note 4, at 403–04.

58. *Id.* at 403.

59. Bob Van Voris, *South Florida's ADA Industry*, NAT'L L. J., July 16, 2001, at A1. "According to lawyers on both sides of the issue, noncompliant businesses—lacking anything from handicapped parking and bathrooms to access ramps—can be found everywhere." *Id.*

60. *Id.* The sponsors of the ADA Notification Amendment, Representative Mark Foley and Senator Daniel K. Inouye, hail from Florida and Hawaii respectively. *Id.*

61. *Id.*

with a total of 434 in the first half of 2001.<sup>62</sup> This amount is twelve times the number of cases filed in Chicago's federal courts and twenty-four times the number of cases filed in Manhattan and Philadelphia federal courts.<sup>63</sup>

Although Mallah and other attorneys point out that they are filling the enforcement gap by acting as private attorneys general, their methods are often condemned.<sup>64</sup> In particular, critics have focused on the creation of professional plaintiffs, noting that the attorney's fees are paid regardless of whether the access barriers are actually removed.<sup>65</sup> The outcry concerning professional plaintiffs stems from the tendency of Title III lawyers to sue on behalf of a plaintiff organization representing the disabled.<sup>66</sup>

In Mallah's case, the president of the organization he represents is his disabled uncle, although there is no indication that any of the fees make their way back to his uncle.<sup>67</sup> Although Mallah claims that he follows through on his cases, it is debatable whether all lawyers in this "industry" are so inclined.<sup>68</sup> The use of a so-called professional plaintiff may result in a lack of willingness (and perhaps awareness) on the part of nonprofessional plaintiffs. Violations appear to be numerous enough to support this cottage industry, but the number of plaintiffs appears to be small in comparison.<sup>69</sup> Furthermore, the practice has also exposed practitioners of the industry, and the ADA generally, to criticism from the government, small businesses, and the general population.<sup>70</sup>

Public backlash against the ADA is hardly a new phenomenon; in fact, it has plagued the Act since its inception. Almost as soon as it was signed into law, the ADA was targeted by Vice-President Quayle, and then again in 1994 by the Contract with America.<sup>71</sup> The Act has often been portrayed in both the media and popular culture as a free

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62. *Id.* "Since 1998, . . . [Mallah] and his partners have sued at least 740 businesses . . . claiming that they had failed to make their facilities accessible to the disabled . . ." *Id.*

63. *Id.*

64. *Id.*; see also *Make My 90 Days*, *supra* note 13, at 110–12.

65. Van Voris, *supra* note 59.

66. See *id.*; see also *Make My 90 Days*, *supra* note 13, at 110–12.

67. Van Voris, *supra* note 59.

68. *Id.*

69. *Id.*

70. *Make My 90 Days*, *supra* note 13, at 110.

71. *Id.*

ride, full of benefits and perks for the disabled.<sup>72</sup> For example, episodes of *The Simpsons* and *King of the Hill*, two animated television series on the FOX network, had characters abuse the ADA to gain perks at work.<sup>73</sup> These episodes reflect the problem with representations of the ADA in today's world: "[m]ost of the television and radio coverage about the ADA is about litigation."<sup>74</sup>

The focus on litigation, under any Title of the ADA, takes attention away from the discriminatory action and the need for both voluntary and involuntary compliance.<sup>75</sup> Negative representations hardly seem to have been discouraged by the judiciary, considering that "by 1996[,] many in the disability community were speaking of an emerging judicial backlash against the ADA."<sup>76</sup> This "judicial backlash" consisted mostly of narrow interpretations of the ADA. Each of the issues discussed below concerns decisions or proposed amendments that narrowed or attempted to narrow the scope of private enforcement under Title III.

### III. Three Issues Affecting Private Enforcement: Limited Availability of Attorney's Fees, Notice Requirements, and Limited Liability

#### A. The *Buckhannon* Decision's Limitation on Recovering Attorney's Fees

The Supreme Court's recent interpretation of "prevailing party" under the ADA and similar civil rights statutes greatly reduced the

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72. Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 227-31 (2000).

73. *Id.* at 228-29. The *Simpsons* episode is called *King-Sized Homer*, where Homer purposely overeats until he reaches a level of obesity that allows him to qualify as disabled under Title I. *Id.* The *King of the Hill* episode, entitled *Junkie Business*, involved Hank's inability to fire a lazy drug addict because of the ADA. *Id.*

74. *Id.* at 224.

75. *Id.* at 225.

76. Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 7 (2000) (citing Robert Burgdorf, "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 COLO. L. REV. 107 (1997); Arlene Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997)).

incentive for a lawyer to file a claim as a private attorney general under Title III.<sup>77</sup> The Court eliminated the “catalyst theory” as a method of determining whether a party had “prevailed” under the statute,<sup>78</sup> a requirement for recovering attorney’s fees.<sup>79</sup> This decision prevents courts from straying from the “American Rule” for attorney’s fees without a clear congressional mandate.<sup>80</sup> The problem with the Court’s interpretation is that it ignores the “fragile compromise” reached in providing broad coverage under Title III,<sup>81</sup> and it eliminates the enticement for lawyers to file suits based only on Title III claims.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,<sup>82</sup> the state attempted to shut down a nursing home for failing to meet the fire code.<sup>83</sup> A state law required all individuals living in residential facilities to be capable of “self-preservation,” a quality that many of the nursing home residents lacked.<sup>84</sup> The state legislature failed to provide any exceptions under the law, forcing the Buckhannon nursing home to sue or close its doors.<sup>85</sup> The state requested declaratory injunctive relief early in the proceedings, but before any decisions were reached on the issues of the case, the state legislature eliminated the “self-preservation” requirement.<sup>86</sup> As a result, the case was dismissed as moot, but the Buckhannon nursing home filed a motion to collect attorney’s fees under § 12205, based on the theory that its lawsuit had led to the change in state law.<sup>87</sup>

Until *Buckhannon*, almost all of the federal circuits allowed the award of attorney’s fees based on the “catalyst theory.”<sup>88</sup> Generally, the plaintiff could recover fees as a prevailing party if the lawsuit brought about a voluntary change in the defendant’s conduct.<sup>89</sup> Spe-

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77. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 635–36 (2001) (Ginsburg, J., dissenting).

78. *Id.* at 605.

79. *Id.* at 602.

80. *Id.* at 608. Under the “American Rule,” each party to a suit is responsible for its own legal fees. *Id.* at 602.

81. Colker, *supra* note 4, at 385.

82. 532 U.S. 598 (2001).

83. *Id.* at 600–01.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 602 n.3.

89. *Id.* at 601.

cifically, the plaintiff had to show: (1) a colorable claim; (2) the lawsuit was a substantial cause of the change in the defendant's conduct; and (3) the change in conduct was motivated by the threat of victory rather than to avoid expense.<sup>90</sup> Considering the number of noncompliant public accommodations,<sup>91</sup> as well as the general ease with which basic violations can be established,<sup>92</sup> it is easy to see how lawyers in south Florida, California, and Hawaii manage to make a decent living by filing Title III suits. According to Mr. Mallah, his suits yield an average of \$3,000 to \$5,000 in fees, although he does not claim to keep the entire amount.<sup>93</sup>

In *Buckhannon*, the Court rejected the "catalyst theory," preferring instead to avoid straying from the "American Rule" for attorney's fees without explicit instructions from Congress.<sup>94</sup> In doing so, the Court relied on the definition of "prevailing party" from *Black's Law Dictionary*.<sup>95</sup> Based on this definition and its own prior holdings, the Court limited the application of "prevailing party" to instances where the court awarded some form of damages, even if nominal, and to settlement agreements enforced through a consent decree.<sup>96</sup> The Court reasoned that only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."<sup>97</sup>

One justification for the Court's reasoning is that a limited definition of "prevailing party" provides a way to avoid secondary litigation over the award of fees.<sup>98</sup> As additional support, the Court pointed out that if a plaintiff has a cause of action for damages, a vol-

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90. *Id.* at 610.

91. Van Voris, *supra* note 59.

92. See 28 C.F.R. § 36 app. A (1998), available at <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002).

93. Van Voris, *supra* note 59.

94. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 608.

95. *Id.* at 603. To examine "prevailing party," the Court used the following definition: "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded in certain cases, the court will award attorney's fees to the prevailing party. Also termed *successful party*." *Id.* (citing BLACK'S LAW DICTIONARY 1145 (7th ed. 1999)).

96. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603-04.

97. *Id.* at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 7, 92-93 (1989)).

98. *Id.* at 609 (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 187 (2000)).

untary change of conduct would not necessarily moot the case.<sup>99</sup> A case may not be mooted unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”<sup>100</sup>

After *Buckhannon*, the obvious fear for a lawyer filing suit under Title III is that the defendant will fight the litigation and drive up expenses. Then, before reaching any settlement or agreement, the defendant could voluntarily change his conduct and moot the case.<sup>101</sup> In such circumstances, there is no incentive to settle because a settlement would likely attempt to cover the costs of litigation plus the costs of compliance.<sup>102</sup> If the plaintiff files suit, the defendant can avoid settlement by complying, thus avoiding fees. Unless a defendant wants to reach the merits of an issue, as Professor Colker contends was the case in *Bragdon v. Abbott*,<sup>103</sup> a defendant can avoid paying any fees whatsoever.<sup>104</sup> Most likely, the fear of a defendant running up excessive fees is improbable, except in unique cases.<sup>105</sup>

What the Court does not address in *Buckhannon* is that any incentive to settle is irrelevant where there is no incentive to ever file suit. The comfort that the Court finds in the toughness of the test for mootness fails in the context of a Title III suit to remove an architectural or physical barrier.<sup>106</sup> These types of problems, once fixed, will hardly ever be “reasonably . . . expected to recur” because the solutions to barriers are generally permanent in nature.<sup>107</sup> Out of the twenty-one examples of steps to remove “readily achievable” barriers, three suggest steps that may be reversible without an unreasonable amount of effort.<sup>108</sup> These include: (1) “[r]epositioning shelves;” (2) “[r]earranging tables, chairs, vending machines, display racks, and other furniture;” and (3) “[r]epositioning telephones.”<sup>109</sup> The rest of the examples are all of a much more permanent nature.<sup>110</sup> The pur-

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99. *Id.* at 608–09.

100. *Id.* at 609.

101. *Id.*

102. Colker, *supra* note 4, at 400.

103. 524 U.S. 624 (1998).

104. Colker, *supra* note 4, at 380–81.

105. See *Make My 90 Days*, *supra* note 13, at 111. Eastwood’s testimony indicated he fought the lawsuit in large part because he had the money to do so. *Id.*

106. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 639–40 (Ginsburg, J., dissenting).

107. See 28 C.F.R. § 36.304(b) (2000).

108. *Id.*

109. *Id.*

110. See *id.*

pose of the ADA is to protect a discrete and insular minority that will probably not be able to afford legal fees.<sup>111</sup> Without recovery of attorney's fees, the lack of an underlying state law with damages means there is no incentive to file suit.<sup>112</sup> The affirmative duty to remove architectural barriers "where readily achievable" becomes a hollow and unenforceable mandate.

#### B. The ADA Notification Act and Notice Under Title VII

Over the past two years, one of the biggest issues in the press concerning the ADA was whether the Act should require notice to be given to a potential defendant before filing suit under Title III.<sup>113</sup> This concern came to light in 2000, when actor Clint Eastwood testified before Congress about his experiences defending a Title III action.<sup>114</sup> Eastwood supported the ADA Notification Amendment Act, which would have required a ninety-day notice before any suit under Title III could be filed.<sup>115</sup> Unlike liability for design and construction, this issue affects both new construction and pre-ADA facilities.<sup>116</sup> The amendment failed in 2000 and was reintroduced in 2001,<sup>117</sup> but no vote has occurred yet.<sup>118</sup> As Professor Adam Milani pointed out in a recent article, some courts already require that notice be provided to a state or local agency based on Title III's adoption of CRA Title II.<sup>119</sup> This type of notice is more limited than the type that would be required under the amendment.<sup>120</sup>

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111. 42 U.S.C. § 12101(a)(7) (2000).

112. Colker, *supra* note 4, at 379–80.

113. Van Voris, *supra* note 59.

114. Jim VandeHei, *Clint Eastwood Saddles Up for Disability-Act Showdown*, WALL ST. J., May 9, 2000, at A27; *see also Make My 90 Days*, *supra* note 13, at 110–11. Actually, Eastwood referred to the lawyers that sued him as "sleazebag lawyers" who sued him "frivolously." *Make My 90 Days*, *supra* note 13, at 110–11. The trial court ruled that the suit was not frivolous. *Id.* at 178.

115. *Make My 90 Days*, *supra* note 13, at 107.

116. The amendment applies to the enforcement provision under § 12188 and does not make a distinction between new construction and alterations to existing facilities. *See* H.R. 914, 107th Cong. (2001); S. 782, 107th Cong. (2001).

117. Van Voris, *supra* note 59.

118. Bill Summary and Status for 107th Congress, 107 H.R. 914 (2001) and 107 S. 782 (2001), *available at* <http://www.thomas.loc.gov/bss/d107query.html> (last visited Oct. 25, 2002).

119. *Make My 90 Days*, *supra* note 13, at 118–25.

120. *Id.*

### 1. THE ADA NOTIFICATION AMENDMENT

Eastwood and the amendment's backers felt that notice requirements would slow or even reverse the growth of the cottage industry emerging from Title III claims.<sup>121</sup> Proponents of the bill argued that it is just as likely that the amendment would allow business owners the chance to remove any barriers in good faith or make any changes necessary to comply with the ADA.<sup>122</sup> Critics of the amendment argued that it would discourage suits on behalf of private plaintiffs by reducing incentives for attorneys to file suit.<sup>123</sup> Inherent in the objections to passing a broad notice requirement is the fear that any further weakening of the power of private attorneys general under Title III only further compromises the rights of the disabled.<sup>124</sup>

Congress made clear when it passed the ADA its desire to protect small businesses from too much legal liability for architectural barriers and discriminatory practices that barred individuals from access to services.<sup>125</sup> Not only did the Act adopt the "readily achievable" standard, which offers violators of the Act the opportunity to avoid bringing pre-ADA structures up to date,<sup>126</sup> but Congress also delayed the statute's effective date for new construction.<sup>127</sup> This provision allowed businesses time to become acquainted with the ADA and to take any steps necessary to achieve compliance.<sup>128</sup> Congress even offered tax breaks to business owners that spent money bringing their facilities into compliance with the ADA.<sup>129</sup> Although Congress made,

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121. *Id.* at 110–11. The proclaimed motive behind the Amendment is to protect small businesses. See *Make My 90 Days*, *supra* note 13, at 110; see also VandeHei, *supra* note 114.

122. *Make My 90 Days*, *supra* note 13, at 140.

123. VandeHei, *supra* note 114.

124. *Id.*

125. Colker, *supra* note 4, at 383–85.

126. *Make My 90 Days*, *supra* note 13, at 114.

[T]he ADA was drafted to "give the business community the flexibility to meet the requirements of the Act without incurring undue costs." More specifically, the "readily achievable" barrier removal requirement for existing facilities "allows for minimal investment with a potential return of profit from use by disabled patrons, often more than justifying the small expense."

*Id.* (internal citations omitted).

127. 42 U.S.C. § 12183(a)(1) (2000).

128. *Make My 90 Days*, *supra* note 13, at 114.

129. *Id.* at 182. The IRC allows deductions for "eligible access expenditures," which cover "reasonable and necessary" amounts spent on removing barriers to reach compliance with the ADA. *Id.* at 182 n.410; see also 26 U.S.C. § 44(a), (c)(2)(A) (1994). "These include the costs for 'removing architectural, communication, physical or transportation barriers which prevent a business from being accessible

and continues to make, incentives available to business owners, it also limited the available remedies for Title III violations.<sup>130</sup> Critics of the Amendment argued that a notification period provides a further incentive for owners to delay ADA compliance (even where readily achievable), despite the passing of the ADA's tenth anniversary in 2000.<sup>131</sup>

In contrast, proponents of a notification period claim the main purpose of the ADA Notification Amendment Act is not to avoid compliance, but to provide an opportunity for small business owners to reach compliance without having to bear the burden of legal fees.<sup>132</sup> Representative Mark Foley, the main sponsor of the amendment, claimed that notification is necessary to stop "the blizzard of lawsuits" and to prevent further "shakedowns" on businesses.<sup>133</sup> A similar desire prompted Eastwood to contact Foley and offer his support for the amendment.<sup>134</sup>

Eastwood wanted to testify because the film star and former Carmel, California, mayor claimed he was "extorted" in a case where the plaintiff's lawyers requested \$577,000 in fees under § 12205 and another \$25,000 for the plaintiff in damages under a California statute.<sup>135</sup> Although these amounts might seem exorbitant, the attorney's

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to, or usable by, individuals with disabilities.'" *Make My 90 Days*, *supra* note 13, at 182 n.410 (internal citations omitted). Examples of allowable deductions include:

- Removal of architectural barriers in facilities or vehicles (alterations must comply with applicable accessibility standards).
- Purchase of adaptive equipment.
- The production of accessible formats of printed materials (i.e., Braille, large print, audio tape, computer diskette).
- The provision of sign language interpreters.
- The provision of readers for customers or employees with visual disabilities.

42 U.S.C. § 44(c)(2)(A)–(E); *see also Make My 90 Days*, *supra* note 13, at 182 n.410.

130. *Make My 90 Days*, *supra* note 13, at 114–15.

131. *Id.* at 139–43.

132. *Id.* at 138–39.

133. *Id.* at 110 (internal quotations omitted); *see also The ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Rep. Mark Foley), *available at* 2000 WL 19303712.

134. *Make My 90 Days*, *supra* note 13, at 111.

135. *Id.* *See generally* CAL. CIV. CODE § 54(a) (West Supp. 2001) ("Individuals with disabilities . . . have the same right as the general public" to public accommodations.)

Plaintiffs who can prove they have been denied access can recover "actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars (\$1,000), and attorney's fees as may be determined by the court."

fees were for approximately 2000 hours of work.<sup>136</sup> The suit filed by Dianne zum Brunnen, a wheelchair user, alleged that Eastwood's Mission Ranch Hotel in California did not have a proper bathroom during her 1996 visit, and the hotel's only handicapped accessible room was \$225 per night, while other rooms were offered for as low as \$85 per night.<sup>137</sup>

Ironically, zum Brunnen claimed she sent Eastwood a letter to which he did not respond. He also later refused to accept a certified letter zum Brunnen sent as a follow-up.<sup>138</sup> As Professor Milani pointed out, Eastwood avoided the exact type of notification that would be required under the proposed bill.<sup>139</sup> Eastwood also testified that he refused to admit any liability because, unlike other small business owners, he could afford to fight the claims and would do so on behalf of those that could not.<sup>140</sup> This type of behavior is why critics of Title III's enforcement measures oppose any additional limitations on the power of private plaintiffs.<sup>141</sup>

## 2. NOTICE UNDER CRA TITLE II

The notification amendment would at least settle the current split among the courts as to whether notification is already required under the language of the statute.<sup>142</sup> Title III explicitly adopts the

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*Make My 90 Days*, *supra* note 13, at 111 n.14 (quoting CAL. CIV. CODE § 54.3(a) (West 2001)).

136. *Make My 90 Days*, *supra* note 13, at 179.

137. *Id.* at 179–80.

[Eastwood and his co-defendants] argued that Mission Ranch was in full compliance with federal accessibility requirements when it furnished an accessible bathroom in a 'catering barn' 200 feet from the hotel's restaurant, even though a bathroom for able-bodied patrons was located forty feet from the hotel in a 'recreation barn.' Eastwood and the other defendants argued that constructing accessible restrooms in the recreation barn would threaten the building's historical significance because it would involve removing a structural wall. Zum Brunnen's experts, however, stated that the restrooms could be built without destroying the site's historical significance. Accordingly, the court found there was an issue of material fact on the effect of installing the accessible bathrooms.

*Id.* at 179.

138. *Make My 90 Days*, *supra* note 13, at 180.

139. *Id.* at 181.

140. *Id.* at 111.

141. *Id.* at 139–41.

142. See generally *id.* at 118–27 (citing *Burkhart v. Asean Shopping Ctr., Inc.*, 55 F. Supp. 2d 1013, 1017–18 (D. Ariz. 1999) (requiring only thirty-day notice to state or local agency before filing suit); *Snyder v. San Diego Flowers*, 21 F. Supp. 2d 1207, 1210 (S.D. Cal. 1998) (requiring plaintiffs to exhaust administrative remedies

remedies available under section 2000(a)-3(a) of the CRA.<sup>143</sup> However, section 2000(a)-3(c), which refers to 3(a), requires the plaintiff to provide notice to a state or local agency where state law also prohibits discrimination.<sup>144</sup> Some courts have held that this language clearly adopts only 3(a), and its specific mention necessarily excludes the incorporation of another section.<sup>145</sup>

Other courts have found that the language of section 2000(a)-3(a) is ambiguous, and in light of the legislative history showing the intent to adopt the full remedies available under Title II of the CRA, they have concluded that notice and the exhaustion of any administrative remedies are required.<sup>146</sup> Still another court looked to the second sentence in § 12188(a)(1), which states that a “futile gesture” on the part of the plaintiff is not required.<sup>147</sup> This court interpreted the statement to mean that notice to a state or local agency is required, but an exhaustion of administrative remedies and direct notice are not.<sup>148</sup>

### C. Liability for New Construction Under Title III

Assuming a private attorney general under Title III of the ADA overcomes the potential obstacles of attorney’s fees and notice requirements, the next problem is determining who can be held responsible for removing barriers or potential barriers in new construction. For structures pre-dating the passage of the ADA, § 12182(a) clearly limits liability to the owners, operators, and lessors of public accommodations.<sup>149</sup> Those responsible for public accommodations generally receive plenty of time under Title III, as well as tax incentives, to bring their facilities into compliance.<sup>150</sup> However, a key factor in the long-term goal of eliminating discrimination against the disabled is preventing the construction of new facilities with discriminatory architec-

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before filing suit); *Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047 (S.D. Cal. 1998); *Mayes v. Allison*, 983 F. Supp. 923, 925 (D. Nev. 1997); *Doukas v. Metro Life Ins. Co.*, No. CIV 4-478-SD, 1997 WL 833134 (D.N.H. Oct. 21, 1997) (holding that courts did not require any notification).

143. 42 U.S.C. § 12188(a)(1) (2000).

144. *Id.* § 2000(a)-(3)(c).

145. *Make My 90 Days*, *supra* note 13, at 126–27 (discussing *Botosan*, 13 F. Supp. 2d 1047; *Doukas*, 1997 WL 833134).

146. *Id.* at 118–22 (discussing *Snyder*, 21 F. Supp. 2d 1207; *Mayes*, 983 F. Supp. 923).

147. *Id.* at 122–25 (discussing *Burkhart*, 55 F. Supp. 2d at 1017).

148. *Id.* at 123–24.

149. 42 U.S.C. § 12182(a); *id.* § 12182(b)(2)(A)(iv).

150. *See supra* note 129.

tural barriers.<sup>151</sup> As a result, the injunctive powers under § 12183(a), which covers new construction, include the ability to halt new construction to prevent the creation of a new barrier.<sup>152</sup> The question under § 12183(a) is whether the broader injunctive powers available against new constructions are accompanied with an expansion of liability beyond the owners, operators, lessors, and lessees. In terms of incentive for private attorneys, the answer to this question is relevant in light of the Supreme Court's recent reduction in a private attorney general's ability to collect attorney's fees.<sup>153</sup> Assuming Congress addresses the problem of attorney's fees, the definition of liability under Title III can guide Congress to the appropriate remedy.

#### 1. THE SUPPLEMENTAL APPROACH TO § 12183(A)

Although some courts found § 12183(a) to be unambiguous, plenty of disagreement exists over its interpretation.<sup>154</sup> The statute reads: “[A]s applied to public accommodations and commercial facilities, discrimination for purposes of § 12182(a) of this title includes—(a) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities.”<sup>155</sup>

This section identifies the failure to “design and construct” ADA compliant facilities as a type of discrimination, but fails to say: “those who design and construct non-compliant facilities can be held liable under the ADA.” Section 12183(a) also refers to § 12182(a), which only applies to public accommodations and generally refers to preexisting structures.<sup>156</sup> Section 12182(a) reads: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . facilities . . . of any place of public accommodation by any person who owns, leases (or leases to), or operates a place

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151. 28 C.F.R. § 36 app. B (1998), available at <http://www.usdoj.gov/crt/ada/reg3a.html> (last visited Oct. 25, 2002). Presumably, the best way to achieve the long-term goal of future compliance is by preventing new barriers from being erected, hence the stricter requirements for new construction. Additionally, the facilities covered under § 12183(a) include both public accommodations and commercial facilities, unlike § 12182(a), which only covers public accommodations.

152. *Make My 90 Days*, *supra* note 13, at 148 n.229.

153. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001).

154. *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1034 (9th Cir. 2001).

155. 42 U.S.C. § 12183(a) (2000).

156. *Id.* § 12182(a).

of public accommodation."<sup>157</sup> One key distinction is that responsibility for compliance with § 12182(a), which means exposure to liability, is clearly assigned to owners, operators, lessees, and lessors, and it only applies to public accommodations.<sup>158</sup>

The various interpretations of the potential interaction between § 12182(a) and § 12183(a) are divided on the issue of whether those who "design and construct" can be held liable under the ADA, regardless of whether they are owners, lessees, lessors, or operators.<sup>159</sup> In *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.*,<sup>160</sup> wheelchair users sued the architectural firm responsible for the design of a new stadium in the Washington, D.C. area.<sup>161</sup> The plaintiffs contended that the stadium violated the ADA by failing to provide comparable lines of sight.<sup>162</sup> Before the court could reach the merits of the case, however, the claim was dismissed because the district court gave limited effect to the phrase "a failure to design and construct."<sup>163</sup> Despite the argument by the plaintiffs, the court ruled that the architectural firm, by its nature, was only responsible for the design of the new facility.<sup>164</sup> More importantly, the court also interpreted the reference to § 12182(a) as an indication that owners, operators, lessees, or lessors remained the only parties subject to ADA liability.<sup>165</sup>

The Ninth Circuit, in *Lonberg v. Sanborn Theaters, Inc.*,<sup>166</sup> echoed the opinion of the district court in *Paralyzed Veterans of America*.<sup>167</sup> Relying on the structure of the ADA, the court in *Lonberg* explained: "The text of each title follows the same basic structure: each includes one provision which sets forth a rule of liability that prohibits 'discrimination' against the disabled by certain individuals, and each includes subsequent provisions which set forth what actions by these individuals constitute the prohibited 'discrimination.'"<sup>168</sup> Under this

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157. *Id.*

158. *Id.*

159. *Lonberg*, 259 F.3d at 1034.

160. *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs*, 945 F. Supp. 1 (D. Colo. 1996).

161. *Id.* at 1.

162. *Id.*

163. *Id.* at 2.

164. *Id.*

165. *Id.*

166. 259 F.3d 1029 (9th Cir. 2001).

167. *Paralyzed Veterans of Am.*, 945 F. Supp. 1.

168. *Lonberg*, 259 F.3d at 1032.

interpretation, § 12183(a) supplements § 12182(a)'s definition of "discrimination," depending on whether the construction is new or an alteration to an existing facility, by owners, operators, lessees, or lessors of such facilities.<sup>169</sup> Liability, then, which is assigned under the "general rule" of § 12182(a), is not affected by the supplement to the definition of discrimination.<sup>170</sup>

The Ninth Circuit admitted that "the evidence does not perfectly align in its favor,"<sup>171</sup> largely because of § 12183(a)'s coverage of commercial facilities, a term which encompasses more buildings than public accommodations.<sup>172</sup> However, the court chose to interpret § 12183(a) as a supplement to the coverage of facilities because it found this interpretation to be "more consistent with the text and structure of the statute."<sup>173</sup>

Under the supplemental approach outlined by the court in *Lonberg*, the basic fear that commercial facilities would be left uncovered is alleviated. Another problem emphasized by critics is that because § 12183(a) limits liability to those who both "design and construct" new facilities, owners will be able to insulate themselves from liability by hiring independent contractors.<sup>174</sup> Critics have worried that, as an issue of fact, plaintiffs will be unable to prove that owners are involved in both the "design and construction" of new facilities.<sup>175</sup>

Even with limited liability, however, architects and others might not necessarily be free from liability because of the interpretation of the phrase "to operate."<sup>176</sup> As one writer observed, "In *Howe v. Hull*, the United States District Court for the Northern District of Ohio interpreted the meaning of 'to operate' under Title III and determined

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169. 42 U.S.C. § 12183(a) (2000).

170. *Lonberg*, 259 F.3d at 1032.

171. *Id.* at 1035.

172. 42 U.S.C. § 12101.

173. *Lonberg*, 259 F.3d at 1035.

174. Adam A. Milani, "Oh, Say, Can I See—and Who Do I Sue If I Can't?": *Wheelchair Users, Sightlines over Standing Spectators, and Architect Liability Under the Americans with Disabilities Act*, 3 FLA. L. REV. 523, 593 (2000) [hereinafter *Who Do I Sue?*].

175. *Id.* This concern might be rooted in the blanket approach some courts take toward the definition of terms under the ADA. For instance, the court in *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers*, 945 F. Supp. 1 (D. Colo. 1996), narrowly applied the phrase "design and construct" without considering the factual issue of whether an architect could play a role in both the design and construction of a sports arena.

176. See 42 U.S.C. § 12182(a) (providing, "No individual shall be discriminated against on the basis of disability . . . by any person who . . . operates a place of public accommodation.").

that ‘to operate’ could apply to a doctor who claimed no proprietary interest in the hospital where he worked.”<sup>177</sup> Additionally, in *United States v. Days Inn of America, Inc.*,<sup>178</sup> the court held that a franchisor, through the exercise of a significant degree of control over the design and construction of a facility, could expose itself to liability.<sup>179</sup> Although the court did not adopt the supplemental approach to § 12183(a), it specifically agreed that a defendant with knowledge and authority could qualify as an “operator” through the exercise of a significant degree of control.<sup>180</sup>

## 2. THE BROAD APPROACH TO LIABILITY UNDER TITLE III

Unlike the supplemental approach to liability, other courts have refused to limit § 12183(a) to the restricted liability of § 12182(a). A Minnesota district court found that the phrase “a failure to design and construct” did not limit liability to owners, operators, lessees, and lessors.<sup>181</sup> Amazingly enough, the case also involved Ellerbe Becket Architects and Engineers, P.C. This time the suit was brought by the DOJ because another stadium allegedly failed to comply with the ADA and its applicable regulations concerning sightlines for spectators.<sup>182</sup>

In reaching this decision, the district court focused on the potential gap in coverage for new construction.<sup>183</sup> Under its reading, the court concluded that the supplemental approach would exempt commercial facilities from liability by relying on the canon of interpretation that “a statute should be interpreted to avoid rendering terms in the statute useless,” and it held that the architectural firm could be subject to liability.<sup>184</sup> The issue then became a question of fact as to whether or not the architects were responsible for both the design and construction of the facility.<sup>185</sup> The court also stated that limiting liabil-

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177. Sullivan, *supra* note 8, at 1126 (citing *Howe v. Hull*, 874 F. Supp. 779, 787–88 (N.D. Ohio 1994)).

178. 151 F.3d 822 (8th Cir. 1998).

179. *Id.* at 826.

180. *Id.* at 827.

181. *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1267–68 (D. Minn. 1997).

182. *Id.* at 1266.

183. *Id.* at 1266–68.

184. *Id.* at 1267.

185. *Id.* at 1268.

ity for failure to design and construct as a supplement to § 12182(a) would result in a gap of coverage for new construction.<sup>186</sup>

Under the broad liability approach, another interpretation of “design and construct” subjects anyone involved with either the design or control of new construction to potential liability.<sup>187</sup> The District Court for the Central District of Illinois found that a corporation was involved in the design and construction of new hotels that failed to comply with ADA standards.<sup>188</sup> The court read “design and construct” as a broad phrase, where a party involved with design is likely involved with the construction as well.<sup>189</sup> Unlike other courts, this court did not limit the phrase “design and construct” by relying upon the conjunctive use of the word “and.”<sup>190</sup>

The holding of the Illinois district court may be somewhat limited, however, because the owners, operators, and lessors were actually involved in both the design and construction of the hotels.<sup>191</sup> The corporation even had a “Design and Construction Manager” review all the construction plans.<sup>192</sup> The court rejected the idea that § 12183(a) was limited to the terms of § 12182(a).<sup>193</sup> Nevertheless, the court did not indicate what effect, if any, its approach to interpreting the use of the word “and” might have on the interpretation of the word “or” in the phrase “owns, operates, or leases (or leases to)” under § 12182(a).

#### **IV. Recommendations: Compromising to Recover Basic Incentives for Private Attorneys General**

##### **A. Award Attorney’s Fees Unless the Defense Is Substantially Justified in Law or Fact**

Senator Harkin, who sponsored the ADA in the Senate, described the exchange of broad coverage under Title III for limited remedies as a “fragile compromise.”<sup>194</sup> Although Professor Colker makes a strong argument for amending the ADA to allow damages

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186. *Id.*

187. *See* United States v. Days Inns of Am., Inc., 997 F. Supp. 1080, 1083–84 (C.D. Ill. 1998).

188. *Id.* at 1085.

189. *See id.* at 1083–84.

190. *Id.*

191. *Id.*

192. *Id.* at 1082.

193. *Id.* at 1084.

194. 135 CONG. REC. S10,708-01 (1989); Colker, *supra* note 4, at 385.

under a system similar to the Fair Housing Act (FHA),<sup>195</sup> it seems unlikely that this will happen. Adding new and tougher remedies would probably result in more backlash against ADA litigation.<sup>196</sup> Considering that the main focus of the latest proposed amendment to the ADA sought to further weaken those remedies,<sup>197</sup> it seems unlikely that Congress will do much to strengthen private enforcement. However, Congress should at least revisit the statute to restore the wide availability of attorney's fees, which remain the only incentive for a private attorney general to file suit on behalf of a plaintiff who cannot afford a retainer. When doing so, Congress should look to the fee provisions of the EAJA and the IRC<sup>198</sup> and require attorney's fees to be awarded unless the defense is substantially justified in law or fact.

Under Title III of the ADA, the main effect of *Buckhannon* is that the incentive to file suit for a violation disappears if the term "prevailing party" requires a judgment from a court. The easiest way for Congress to reverse the effect of *Buckhannon* is to codify the catalyst theory. However, other options exist that benefit both plaintiffs and defendants while overcoming the Court's criticisms of the catalyst theory in *Buckhannon*. The EAJA and the IRC, like the ADA, each use the term "prevailing party."<sup>199</sup> The EAJA provides, "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."<sup>200</sup> A position is "'substantially justified' if it 'has a reasonable basis in law and fact.'"<sup>201</sup> The IRC uses similar terms but different definitions.

The IRC defines "prevailing party" as a party that has "substantially prevailed with respect to the amount in controversy" or "substantially prevailed with respect to the most significant issue or set of issues presented."<sup>202</sup> The IRC also precludes the taxpayer from quali-

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195. See Colker, *supra* note 4, at 390-93.

196. See *Make My 90 Days*, *supra* note 13, at 110.

197. *Id.* at 139-40.

198. The attorney's fee provisions for the EAJA and the IRC are in 28 U.S.C. § 2412(d)(1) (2000) and 26 *id.* § 7430, respectively.

199. 28 U.S.C. § 2412(d)(1)(A); 26 *id.* § 7430(a).

200. 28 *id.* § 2412(d)(1)(A).

201. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 556 n.2 (1988)).

202. 26 U.S.C. § 7430(c)(4)(A).

fyng as a “prevailing party” if “the position of the United States in the proceeding was substantially justified.”<sup>203</sup> If the United States fails to follow published guidelines, its position is presumed unjustified.<sup>204</sup> In part, this determination turns upon whether the United States has lost on substantially similar issues in other circuits.<sup>205</sup> Neither the EAJA nor the IRC allow the award of attorney’s fees “to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.”<sup>206</sup> Additionally, both the EAJA and the IRC require a “final judgment” before fees can be awarded.<sup>207</sup> Although neither the EAJA nor the IRC bear any of the similarities to Title III of the ADA that the FHA does,<sup>208</sup> they still offer structures for the award of attorney’s fees that, with a little work, provide an incentive to sue without going so far as to provide damages.

To revise the attorney’s fees provision of the ADA and restore the incentive for private attorneys general, Congress needs to provide a more comprehensive definition of “prevailing party.” First, neither a “final judgment” nor a “material alteration in the legal relationship of the parties” should be required for a party to prevail. This limitation is the main obstacle erected by *Buckhannon*. Second, Congress should require that the nonprevailing party “shall” provide reasonable attorney’s fees (except against the United States),<sup>209</sup> unless its defense was “substantially justified” or “special circumstances” exist so as to make an award unjust. A defense should be “substantially justified” if a legitimate question of law or fact existed as to whether the defendant was in compliance with Title III. A determining factor could be other rulings within the same circuit. A defense should be “presumed unjustified” if the defendant was not in compliance with DOJ regulations. However, fees should be restricted “where a party has unreasonably protracted the litigation.”

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203. *Id.* § 7430(c)(4)(B)(i).

204. *Id.* § 7430(c)(4)(B)(ii).

205. *Id.* § 7430(c)(4)(B)(iii).

206. *Id.* § 2412(d)(2)(D); 26 *id.* § 7430(b)(3).

207. *Id.* § 7430(c)(4)(C) (allowing adjudicative body to determine a party’s status as a “prevailing party” only after a “final judgment” is reached); *Melkonyan v. Sullivan*, 501 U.S. 89, 94–95 (1991) (requiring a “final judgment” to recover fees under the EAJA).

208. Colker, *supra* note 4, at 378.

209. The United States is covered under Section 504 of the Rehabilitation Act of 1974. 29 U.S.C. § 794 (2000).

Using the word “shall” leaves little doubt that fees must be awarded to the plaintiff. Also, by applying the “substantially justified and special circumstances” exception to most defendants, the burden to avoid fees, like the burden to prove an accommodation is not readily achievable, lies with the defendant.<sup>210</sup> From a policy perspective, the financial cost of enforcement is squarely placed on those individuals that have violated Title III and the DOJ guidelines. Private attorneys general are benefited by reversing the burdens assigned under the catalyst theory,<sup>211</sup> but defendants also receive two benefits. First, defendants can avoid attorney’s fees in two different situations: (1) when there is a legitimate question of coverage or compliance<sup>212</sup> and (2) when special circumstances exist that would make an award unjust. This deterrent should discourage frivolous lawsuits feared by backers of the ADA Notification Act. The second benefit to defendants is that they maintain control over the additional attorney’s fees accrued by the plaintiff in the attempt to recover fees. If a dispute over fees is in the hands of a defendant, frivolous defenses to non-compliance are also discouraged.

Under the proposed attorney’s fees provision, the defendant who decides to change conduct and moot the case before a court can enter any judgment still must justify any original noncompliance. The Court of Federal Claims recently described the EAJA’s use of “prevailing party” as follows: “The ‘substantially justified’ requirement of the EAJA provides a safeguard to ensure that a plaintiff’s victory had the necessary legal merit to support an award of attorney’s fees.”<sup>213</sup> As used in this proposal, the attorney’s fees provision inquires into who would have won the lawsuit; therefore, it specifically contemplates awarding fees where there has been no judgment by the court. Based on this distinction, the plaintiff is only the “prevailing party” if the defendant’s claim was not substantially justified.<sup>214</sup> This distinction alleviates any fears that a defendant clearly in the wrong could voluntarily change conduct in an attempt to avoid fees or, in the case of a

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210. 42 *id.* § 12182(b)(2)(A)(iv)–(v).

211. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 610 (2001).

212. Protecting small businesses was the main concern of supporters of the Notification Amendment. *Make My 90 Days*, *supra* note 13, 137–39.

213. *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738, 747 (2001).

214. *Id.*

defendant like Mr. Eastwood, rack up litigation fees for three years before mooting the issue with a change in conduct.<sup>215</sup>

The proposed attorney's fees provision also avoids many of the problems the Court found with the catalyst theory in *Buckhannon*. The majority was particularly worried about lack of merit in the plaintiff's case.<sup>216</sup> The other main criticism of the catalyst theory is the belief that it creates secondary litigation to prove the reasons behind a change in conduct.<sup>217</sup> The proposed provision avoids both of these problems by requiring a court to examine the merits of the case as it would have been adjudicated instead of proving the causation of subsequent events.

#### **B. Under the EAJA, a Notice Requirement Does Not Remove the Incentive to File Suit**

Most likely, the ADA Notification Amendment Act will not be passed. Although the bill has acquired sixty-eight cosponsors in the House, there remain only three cosponsors of the bill in the Senate.<sup>218</sup> In 2001, the bill failed to gain the same level of attention it received in 2000.<sup>219</sup> However, assuming that Congress will act to restore the purpose attorney's fees serve, it is likely that members of Congress will be interested in providing some sort of notice to defendants.

A notice requirement is not unreasonable, especially if the EAJA and IRC language is incorporated into the statute, but the amendment should not be passed as it currently exists. First, it should be limited to architectural barriers in existing facilities. In terms of policy, a ninety-day delay plays a small role when it comes to a claim for denial of services. This tendency is especially true where a plaintiff seeks a claim for denial of medical services. Second, as Professor Milani points out, the notification should also be made to a local or state agency in addition to the defendant personally, because dual notifica-

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215. *Make My 90 Days*, *supra* note 13, at 139–40, 178.

216. *Buckhannon*, 532 U.S. at 603.

217. The Supreme Court has “avoided an interpretation of the fee-shifting statutes that would have ‘spawn[ed] a second litigation of significant dimension.’” *Id.* at 609 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)).

218. Bill Summary and Status for 107th Congress, H.R. 914, 107th Cong. (2001) and S. 782, 107th Cong. (2001), available at <http://www.thomas.loc.gov/bss/d107query.html> (last visited Oct. 25, 2002).

219. Van Voris, *supra* note 59.

tion would deprive a defendant of the ability to avoid notice in the way Mr. Eastwood did.<sup>220</sup>

For new facilities or alterations to existing buildings, a ninety-day limitation may only further any potential harm, considering the fact that many structures may be completed before the notification period runs its course. As a result, defendants might have to pay more to make facilities conform, and may be more likely to litigate to avoid the cost of repair. Additionally, Title III provides broad injunctive powers for new construction that will be narrowed if inhibited by a blanket notice requirement.<sup>221</sup>

Once constructed, a new accommodation does not have the protection offered by the "readily achievable" standard because it did not exist before the ADA was passed.<sup>222</sup> The business has a financial interest in preventing any Title III problems, and the disabled community has a large interest in preventing the emergence of new access problems. Although Congress offers a financial incentive for compliance,<sup>223</sup> Title III in turn shifts the economic burden of compliance onto those business owners that violate the ADA.

In terms of policy, any notification period runs into problems because of the broad scope of Title III. Title III prescribes an affirmative duty, which means that the business owner bears the burden of maintaining compliance.<sup>224</sup> Injunctive relief without a notice requirement provides a quick solution to a plaintiff whose rights were articulated more than ten years ago.<sup>225</sup> Additionally, access to public accommodations sometimes involves more than architectural barriers; for instance, access under Title III includes discrimination that prevents the disabled from participating in or enjoying the services offered by a public accommodation or a commercial facility.<sup>226</sup> By limiting the notice requirement to architectural barriers in existing facilities, the argument that a lawbreaker should not have notice is weakened. The overall goal of providing public accommodations that comply with the ADA is still satisfied, and another opportunity exists for owners to remove barriers that they may not have installed before being sub-

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220. *Make My 90 Days*, *supra* note 13, at 178.

221. *See id.* at 148 n.229.

222. 42 U.S.C. § 12183 (2000).

223. *See supra* note 129.

224. 42 U.S.C. § 12182(a).

225. The statute was formally entitled the Americans with Disabilities Act of 1990. *Id.* § 12101(a)(1).

226. *Id.* § 12182(b)(1)(A).

jected to fees. A notice requirement should not weaken the incentive to sue so long as fees are likely to be awarded.

### C. Determine Liability Based on the Remedies Available Under Title III

The solution to the problem of liability for new construction depends on the purpose of private attorneys general under Title III. Clearly, tougher enforcement measures were sacrificed in exchange for broader coverage of facilities.<sup>227</sup> Although Attorney General Thornburgh indicated in his testimony before the Senate that the issue of enforcement might need to be revisited,<sup>228</sup> as of yet it has not. Even the DOJ, whose powers include the ability to seek monetary damages in addition to injunctive relief,<sup>229</sup> lacks the power to seek punitive damages. If anything, the Court's decision in *Buckhannon* has made it less likely that a private attorney general will even file suit at all.<sup>230</sup> The limited power of private attorneys general, without diminishing their importance, provides the best evidence of their limited purpose. Without an amendment providing punitive damages, liability under § 12183(a) should be limited to owners, operators, lessees, and lessors.

Congress should adopt the supplemental approach outlined in *Lonberg v. Sanborn Theaters, Inc.*,<sup>231</sup> but only if it adopts the significant degree of control test to determine whether a party qualifies as an "operator" of a public accommodation or commercial facility. Where attorney's fees provide the only monetary incentive to file a Title III claim, the implied purpose of a private attorney general is simply to call attention to a violation and to prevent or fix the problem. A suit for an injunction or remedy under § 12183(a), without monetary or punitive damages, is useless if the party being sued does not own, operate, lease, or lease to another party. Under the supplemental approach to liability, a private suit provides notice of a problem to the person in control.

Liability, at least initially, should be borne by the person with the most control over the creation of the access barrier. Architects,

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227. Colker, *supra* note 4, at 385.

228. *Id.* at 393 (citing *Hearings Before the Comm. on Labor & Human Res. & Subcomm. of the Handicapped on S. 933*, 101st Cong. 209 (1989)).

229. 42 U.S.C. § 12188(b)(2)(B).

230. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

231. 259 F.3d 1029, 1032–35 (9th Cir. 2001).

who exercise a significant degree of control during construction, are clearly in a better position to prevent or identify potential access barriers.<sup>232</sup> When construction finishes, however, that is not the end of the case. At that point, control shifts, and someone else assumes responsibility. Title III prescribes an affirmative duty, not only to remove existing barriers,<sup>233</sup> but to maintain new construction free from any barriers.<sup>234</sup> The exceptions for existing facilities do not apply to new construction; hence, it makes sense to restrict liability for such a high level of duty to the role rather than to the specific individual.

Architects do not escape liability merely because they cease to operate a public accommodation under the significant degree of control test. They can still be brought into court because the definition of an operator allows the private attorney general to file a claim against whomever qualifies as one of the specific actors listed in § 12182(a).<sup>235</sup> Critics have argued that holding architects liable eliminates a step in the litigation and provides the best means of deterrence.<sup>236</sup> As long as architects are held liable for their mistakes, however, the level of deterrence remains the same. But perhaps more importantly, Congress has a chance to do the ADA a favor. By forcing the extra step in litigation, it may reduce the amount of the attorney's fee award. At the same time, architect liability shifts the attention from the private attorney general to whomever may be personally liable to the owner, operator, lessor, or lessee. If that were the case, maybe Clint Eastwood would have realized that his architects were the ones that left him holding the bag on his Title III violations.<sup>237</sup>

## V. Conclusion

Ten years after the passage of the ADA, access suits under Title III continue to present problems for the disabled. Private attorneys general play a vital role in the elimination of discrimination. If Congress decides to address the issue of the relatively small number of Title III cases, perhaps the ideal solution would be to amend Title III to

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232. *Who Do I Sue?*, *supra* note 174, at 591.

233. 42 U.S.C. § 12182(b)(2)(A)(iv).

234. *Id.* § 12183(a)(1).

235. *Who Do I Sue?*, *supra* note 174, at 595–96.

236. *Id.* at 594, 595.

237. See *Make My 90 Days*, *supra* note 13. Eastwood testified at trial that “he was not fully aware of the ADA’s requirements” and that he “delegated such tasks to contractors.” *Id.* at 179–80.

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allow for damages. Given the amount of backlash against the ADA, and against Title III specifically in the last few years, it is unlikely that the remedies will actually be strengthened. However, Congress should do what it can to ensure that the law is not weakened further. It can do this by including language from the EAJA and the IRC in a revision of § 12205. It can clearly assign liability for new construction to the same parties that are responsible for alterations to existing facilities, with the understanding that a party becomes an “operator” through the exercise of a significant degree of control. In addition, it can clarify the dispute over the requirement of notice by adopting the notification procedures under Title II of the CRA.