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**Testimony of Andrew D. Levy on HR 3356,
the ADA Compliance for Customer Entry to Stores and Services Act of 2011
before the United States House of Representatives Committee on the Judiciary
Subcommittee on the Constitution**

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Mr. Chairman, and members of the Subcommittee:

Thank you for giving me the opportunity to testify on HR 3356, the "ADA Compliance for Customer Entry to Stores and Services Act of 2011." My name is Andrew D. Levy. I am a practicing trial lawyer based in Baltimore, Maryland. For thirty years I have represented a wide range of individuals and businesses – large and small, plaintiffs and defendants – in a variety of civil and criminal matters. Because I use a wheelchair as a result of a central nervous system infection I developed during my first semester of law school, the ADA has been important to me both personally and professionally.

I last had the privilege of testifying before this Committee in 2000 at a hearing on a bill that, like HR 3356, would have amended the ADA to require that individual defendants be sent a letter before they could be sued for violating the ADA, even if they had been violating it for years, and even if the nature of their violations were open and obvious to all. I believed then and I believe now that the proposed amendment will make enforcement of the ADA increasingly cumbersome and expensive. Worse, it will eliminate much of the existing incentive businesses have to attempt to comply with the law voluntarily. The net result of this is that there will be much <u>less</u> voluntary compliance with the law's requirement that places of public accommodation be accessible to all. The proposed amendment will give the overwhelming advantage to those who would choose to ignore the law, and in most cases will allow them to violate the law with impunity.

To understand why this seemingly modest notification provision would do such harm one needs to understand a very unusual aspect of Title III of the ADA: virtually alone among federal statutes, the law currently provides no damages for its violation. With respect to public accommodations there is only one true incentive built in to the law: the desire not to get sued and be required to pay a successful plaintiff's attorney's fees. If the proposed amendment becomes law, however, people will not have to even consider complying with the law until (and unless) they get a letter. Since there is no risk that they will have to pay damages as a result of not complying, the effect of prohibiting lawsuits unless they get at least 60 days notice is to allow – indeed, encourage – them to do nothing until they get a letter. Thus, the proposed amendment effectively creates a blanket, nationwide exemption to the ADA, a virtual "get-out-of-jail-free card," if you will.

Consider the practical consequences of adding a notice requirement to two statutes, one with a provision for damages, and one without. A statute providing for damages theoretically allows a person to wait to comply until he gets notice – but he would do so at his own risk, for if he is eventually sued, he faces the prospect of paying damages for his entire period of noncompliance (these laws typically provide that damages begin to accrue at the time the violation occurs). In a statute that requires violators to pay damages a rational actor does not wait until he gets notice before investigating what the law requires and complying with it.

On the other hand, if this amendment is passed, the combination of notice and no damages would cause a rational actor to act in precisely the opposite way. Since there are no damages for a violation, and he can't be sued until he gets notice, the rational actor needn't bother to ascertain the requirements of the ADA until he gets a letter. Once he gets a letter – <u>if</u> he gets one – he can comply without risking any sanction for all of the time he waited to comply. It has long been a fundamental principle of law that "a right without a

remedy is no right at all."[1] Similarly, a law that provides no sanction for years of violation is no law at all.

There is another important consideration, and it relates to the enforcement mechanism Congress built in to the ADA. Congress correctly recognized that the federal government does not have the resources to enforce the civil rights laws entirely on its own. While the Department of Justice plays a critical role, the ADA, like other civil rights statutes, relies primarily on private individuals for its enforcement. Congress created incentives for private individuals – acting as "private attorneys general" – to enforce the law. Usually these incentives take two forms: damages – both compensatory and punitive – that a wronged individual can obtain for the violation of his statutory rights, and the payment of the plaintiff's attorneys fees if he is successful. In the case of Title III, however, as a result of a bipartisan compromise Congress chose not to allow damages to private parties for public accommodation violations.

Although Congress did not provide for damages, it understood that if it was going to rely on private parties to enforce the ADA, it had to have some provision encouraging the private bar to take the cases. As a result, Congress provided that a successful plaintiff could ask the Court to order the defendant to pay him a reasonable attorney's fee.

Keep in mind, that there are important limitations on payment of attorney's fees. First, plaintiffs' attorneys are only entitled to be paid if they win. Thus, there is no incentive for bringing frivolous lawsuits, because if you do, you're going to end up having worked for free. And, federal court rules provide that the defendant can recover its own attorney's fees if the plaintiff's lawsuit was frivolous or brought in bad faith.

[1] "[A] maxim of equity states that '[e]quity suffers not a right to be without a remedy.'" *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1879 (2011) (Breyer, J.), quoting R. Francis, MAXIMS OF EQUITY 29 (1st Am. ed. 1823).

Second, even if you win, you are only entitled to a fee that the judge finds is "reasonable" – usually calculated by the lawyer's normal hourly rate (that is, the rate that his private clients in non civil rights cases pay) – multiplied by the number of hours the judge finds the case reasonably should have taken to litigate.

Professor Sam Bagenstos, in his masterful 2006 article, "The Perversity of Limited Civil Rights Remedies,"[2] aptly summarized the economic realities which greatly reduce the incentive of the private bar to represent individuals with disabilities – who have difficulty accessing legal services under the best of circumstances – in ADA cases:

> [B]ecause ADA public accommodations plaintiffs have no prospect of a monetary recovery out of which to carve a contingent fee, statutory attorneys' fees are likely to be the exclusive source of compensation for their lawyers. ... But under the Supreme Court's interpretation of the fee-shifting statutes, practitioners who rely on statutory attorneys' fees will always earn lower effective hourly rates than similarly credentialed practitioners with fee-paying clients. The Court has held that statutory attorneys' fees must be calculated by determining the number of hours plaintiff's counsel reasonably expended and multiplying that number by a "reasonable hourly rate" for counsel's services. ... The Court specifically rejected a rule that would enhance the lodestar to compensate for risk of loss and of consequent nonpayment. As a result, plaintiffs' lawyers in statutory fee cases, who get paid only for hours expended in cases they win, are paid for those hours at the same hourly rate as lawyers with fee-paying clients, who get paid for all of the hours they work, win or lose.[3]

[2]Samuel R. Bagenstos, "The Perversity of Limited Civil Rights Remedies: The Case of 'Abusive' ADA Litigation," 54 U.C.L.A. L. REV. 1 (2006).

[3]*Id.* at 11.

Finally, as Professor Bagenstos also points out, there is the Supreme Court's *Buckhannon* decision,[4] which allows a defendant who makes no effort to comply with the ADA until after he is sued, to avoid paying the plaintiff's attorney's fees if he comes into compliance without waiting for the court to formally order it.

It's not a complicated arrangement nor is it a system calculated to make anyone rich. It's just basic economics. The greater the incentive, the greater the participation. Lawyers who bring ADA cases already assume the risk that they will lose and be paid nothing, with their only upside being that they simply get their normal hourly rate if they win, while defendants' attorneys get paid their hourly rate whether they win or lose. By making it even more difficult to get paid for enforcing the ADA, the amendment builds into the statute more disincentives to enforcement, resulting in less compliance and accessibility.

Much has been made of so-called "drive-by" lawsuits, which purportedly abuse the rights protected by the ADA and require action by this Congress to protect unjustly sued defendants. In truth, the vast majority of such lawsuits have been filed against defendants who are violating the ADA.

Efforts to address the perceived problem of vexatious ADA lawsuits by making it more difficult for all ADA plaintiffs to file lawsuits risk "throwing out the baby with the bath water." As the National Council on Disability has observed:

> Ultimately, it is not possible to draw a clean line between "good" litigants and serial litigants. The serial litigant is simply the attorney and/or plaintiff who has figured out a way to bring Title III actions despite all the roadblocks. Having figured that out, he or she has no reason not to continue, given the existence of such widespread noncompliance. ...

[4] *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 531 U.S. 1004 (2000).

> [I]f the Title III private right of action is weakened or restricted in a misguided attempt to control serial plaintiffs and attorneys, but no measures are taken to strengthen the ability of the average person with a disability to bring a private lawsuit, not only will physical accessibility among pubic accommodations come to a halt, but all the other nondiscrimination requirements of Title III will suffer as well.[5]

In the relatively rare case of defendants who are not violators and who have been sued without a reasonable investigation, the federal courts already enjoy powerful authority to sanction such conduct, authority which they have not been shy about using.[6]

The ADA is already a chronically *under*-enforced statute.[7] If Congress further reduces those incentives that do exist, the result will inevitably be less enforcement of the ADA. If you make enforcement of the ADA rely on charity, the ADA will die. Just as cutting a horse's hay with straw eventually kills the horse, continuing to water down the incentives for enforcing the ADA will kill the ADA.

There is a premise underlying this bill that I do not understand. It is the idea that people need a special invitation to comply with a law passed by Congress and signed by the President, a Republican President. Next month will mark 22 years since the ADA was passed. Anyone who truly cares about accessibility has had ample opportunity to find out

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[5]"Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success," National Council on Disabilities, July 26, 2007 at 192-193.

[6]*See, e.g., id.* at 193-196.

[7]*See, e.g.*, Michael Waterstone, "The Untold Story of the Rest of the Americans with Disabilities Act," 58 VAND. L. REV. 1807, 1854 (2005) (arguing that "[c]ombined with survey data and other social science research showing that people with disabilities are still at the margins of society in areas covered by Titles II and III, these low numbers demonstrate under-enforcement of these Titles ... [and] demonstrated noncompliance."); Ruth Colker, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (NYU Press 2005) at 188.

what the law requires and to conform their conduct to the law. Not only is ignorance of law no excuse, but in the case of the ADA there is no excuse for being ignorant of the law. Who by now has not heard of the ADA?

As with any law, there may be occasional ambiguities, but most of the violations I see are not ambiguous. It is as clear as can be that places with steps to get in, and bathrooms too narrow for a wheelchair to pass, are not accessible. You shouldn't need a letter informing you of the obvious.

Also, there is an abundance of free technical assistance available to the public on how to comply with Title III's requirements. The ADA itself expressly requires the Department of Justice, in consultation with other agencies, to assist small and large businesses alike in understanding Title III's requirements. The Department of Justice has developed a large number of publications on Title III's requirements, including a compliance manual, and it maintains a telephone information line to respond to public inquiries and operates a web site with a full complement of technical assistance materials. If there is a lack of understanding within the business community about the ADA's requirements, which is leading to non-compliance, the answer is to beef up the Government's technical assistance activities – not to diminish the rights of persons with disabilities through this notice requirement.

A second thing I don't understand is the assumption, implicit in this amendment, that most violators are genuinely unaware they are violating the ADA, that upon getting a letter they will immediately bring themselves into compliance, and yet they can't or won't take those same steps after they're sued – that once sued they're mired in the courts for years. In truth, this hypothetical violator, the one who would have complied if only someone had bothered to let him know there were a couple of steps preventing wheelchair access to his store – assuming he exists – can just as easily comply with the law after being sued, and under the *Buckhannon* precedent can do so without incurring liability for

attorney's fees. The notion that the epidemic of noncompliance with the ADA could easily be cured by sending a letter is quite simply a myth.

Particularly disappointing is the claim that this amendment is needed to help small businesses. To begin with, nothing in this bill is limited to "small" businesses. Large companies who routinely employ lawyers to advise them on what other federal statues require can certainly do the same with respect to the ADA.

As for small business, the ADA already has several provisions that protect small businesses from unreasonable requirements. Title III, for example does not require any action with respect to existing buildings that would cause an "undue burden"[8] or that is "not readily achievable,"[9] defined as "easily accomplishable and able to be carried out without much difficulty or expense."[10] This flexibility was purposely included in to the ADA so that businesses of different sizes and circumstances could be treated differently. But with flexibility comes responsibility. One cannot fairly complain that the law's requirements are vague and imprecise on the one hand, and not lift a finger to investigate what it requires, on the other.

It is also the case that the proposed notice requirement would have a particularly onerous impact where the violations pose a threat to one's health or deny access to critical services. Persons with disabilities must be able to invoke the jurisdiction of the courts to ensure their access to doctors' offices, hospitals and other medical services, and in some cases, requiring a six-month waiting period may place their health in jeopardy. Likewise, individuals with disabilities should not be required to wait up to six months before resorting to the enforcement power of the courts to ensure access to critical educational or

[8] 42 U.S.C. § 12182(b)(2)(A)(iii).

[9] 42 U.S.C. § 12182(b)(2)(A)(v).

[10] 42 U.S.C. § 12181(9).

financial services (*e.g.*, insurance and mortgage services). Indeed, this bill would effectively rob individuals of their right to seek a preliminary injunction (which the courts will grant when there is the risk of irreparable harm if the court does not act promptly). Depending on the type of violation involved, moreover, and the specific circumstances of the aggrieved party, many lawyers routinely provide notice in an effort to settle Title III actions voluntarily. In many cases, however (such as where there is a need for prompt injunctive relief), there is a need to dispense with long delays before proceeding to court. This option should not be denied in situations where the attorneys have determined that speed is of the essence.

The specifics of the proposed notice provision are troublesome on a technical level. For example, the bill requires "a written notice specific enough to allow" the owner "to identify [the] barrier." But a plaintiff often does not know the full nature of the violations until after he files suit, nor could he, since the defendant controls access to the premises. It is the defendant who is in the best position to know the extent of the problem, not the plaintiff.

Take the example of a hotel. If there are steps to get in, all a wheelchair user knows is that he can't get in. He obviously can't know anything about other violations (although he might suspect that they exist). Even if he gets in, he will likely only know the specifics of one room – the one he was in. As written, however, the law would prohibit a lawsuit to correct anything but the steps, or that one room. The law thus encourages piecemeal litigation, which wastes everybody's time, including the judge's and the defendant's. Courts have an interest in resolving all related matters at the same time. Once at least one violation exists, a plaintiff ought to be entitled to challenge all violations that he finds exist at the same location.

I do not question the motives of the people who are supporting this amendment. But I am positive that its passage will turn back the clock more than two decades, and continue the historic exclusion of people with disabilities from the mainstream of society.

Thank you.