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LITIGATING THE AMERICANS WITH DISABILITIES ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON RURAL ENTERPRISE, AGRICULTURE, & TECHNOLOGY

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

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LITIGATING THE AMERICANS WITH DISABILITIES ACT

TUESDAY, APRIL 8, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON RURAL ENTERPRISE, AGRICULTURE AND TECHNOLOGY
COMMITTEE ON SMALL BUSINESS
Washington, D.C.

The Subcommittee met, pursuant to call, at 2:06 p.m. in Room 2172, Rayburn House Office Building, Hon. Sam Graves [chairman of the Subcommittee] presiding.

Present: Representatives Graves, Ballance, Shuster, Christensen, Case, and Foley.

Chairman GRAVES. We will call this hearing to order, and I would like thank everybody for being here today and welcome everyone. This is the first hearing of the 108th Congress for the Rural Enterprise, Agriculture and Technology Subcommittee of the House Committee on Small Business, and like other members of the Committee, I share a passion for the advance of small business across the country.

The future of this Subcommittee is what we, as I see it at least, what we as the members of the Committee make of it. In the upcoming months this Subcommittee is going to address a variety of issues as they pertain to small business, including agriculture, telecommunications and education.

Although the ADA has brought about some improvements, today we are here to shed some light on a very pressing issue, written in very broad, general terms the implementation of the Americans with Disabilities Act has opened small countless businesses to excessive litigation. It has been estimated that 95 percent of the Title I cases brought under ADA have been decided for the employer regardless on the average it costs small businesses nearly $25,000 a piece just to try a case.

Currently, the Supreme Court has decided to hear Raytheon v. Hernandez, and in this case Mr. Hernandez was allowed to resign from Raytheon instead of being fired for illegal drug use and breaking workplace rules. After rehabilitation Mr. Hernandez has demanded his job back, saying that he has a automatic right to a second chance because of ADA protections.

In another case the employees of Exxon filed an ADA complaint with the EEOC because in the aftermath of the Exxon Valdez tragedy the company implemented a policy that anyone who has undergone substance abuse treatment could not captain a ship. The Fifth Circuit Court found for Exxon and upheld their policy.

Title III of ADA has become a quagmire of frivolous litigation like that, for minor infractions, particularly of ADA building regulations. Most of the businesses that are targeted are mom and pop businesses that believe themselves to be fully in compliance with ADA, but who cannot sustain the expensive legal costs.

The Americans with Disabilities Act does not allow plaintiffs to receive damages whatsoever. The only money changing hands is continued collection of legal fees at small businesses expense.

I would now like to recognize the ranking member, Frank Ballance, and express my excitement to work with you on this Subcommittee, and I appreciate very much being a part of this.

[Mr. Graves' statement may be found in the appendix.]

Mr. BALLANCE. Thank you, Mr. Chairman, and greetings.

The purpose of today's hearing will be to review the effect of litigation of the Americans with Disabilities Act on small businesses, and to discuss the ADA Notification Act introduced by Representative Foley.

Mr. Chairman, as you know or you may know, I practiced law for more than 35 years before being elected to Congress, and I strongly believe that attorneys not only have a responsibility to defend the law of the American system of justice, but they also have a responsibility to ensure that they are implemented in a fair and just manner.

With that in mind, the ADA is landmark legislation that was enacted in 1990 to provide protection to individuals with disabilities when facing discrimination in employment, transportation and public services, and accommodations.

By expanding community access, career opportunities and financial self-sufficiency, the ADA has helped the disabled community make enormous strides in establishing independence. Our nation has also greatly benefited from the ADA, as previously untapped skills and talents of disabled Americans are put to good use.

Therefore, any changes to the law should be made only in egregious situations, and should ensure that ADA safeguards and benefits are not harmed.

The ADA was intended to balance the accessibility needs of the disabled community with interests of businesses--particularly taking into account the limited resources of many small businesses. New and newly reconstructed businesses must be accessible. However, modifications are required to existing buildings that are only readily achievable, which is defined as 'easily accomplished and able to be carried out without much difficulty or expense.'

In addition, there is an annual tax deduction of up to $15,000 for all businesses and tax credits of up to $5,000 annually specifically for small businesses for costs associated with ADA compliance.

The ADA includes numerous safeguards to ensure that businesses have adequate notice of their obligations and ample time to comply with the law. Following the enactment of the ADA, the IRS notified each year for seven years, over 6 million businesses of their ADA responsibilities. States include information on the ADA requirements with all new business license and renewals.

The ADA established an unprecedented technical assistance program. Educational packets were sent to approximately 6,000 Chambers of Commerce, and placed in 15,000 public libraries. Ex-

tensive material is available online including the EEOC's ADA Small Business Primer. There is a toll free hotline, a fax on demand system, and free small business workshops.

The Justice Department has provided funding to trade organizations to develop and distribute industry-specific guides to their members. Most recently, on February 4, the EEOC offered a National Satellite Technical Assistance Seminar. This interactive television broadcast provided ADA information to small and mid-sized businesses at over 65 businesses nationwide.

This outreach has worked. According to the Department of Justice, which oversees ADA enforcement. There has been a surprisingly small number of lawsuits. The fact that there were only 650 ADA lawsuits over five years, that is 130 per year according to my math, when compared to 6 million businesses, 666,000 public and private employers, and 80,000 state and local governments that comply with the ADA, this certainly speaks volumes.

However, we are not here today because everything is working fine with small business compliance with ADA. As has been widely reported in the media, there have been a rash of ADA lawsuits by a handful of attorneys in Florida, and a few other communities. I am sure we will hear a lot today about these actions and the tactics employed in pursuing them.

The question I have is whether this is a symptomatic problem requiring Congressional relief, or an isolated situation involving a few lawyers that would be better dealt with by the courts or local bar associations.

And Mr. Chairman, I will stop at that point.

[Mr. Ballance's statement may be found in the appendix.]

Chairman GRAVES. Thanks Mr. Ballance.

Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. I would like to thank Mr. Foley for him bringing this piece of legislation before us. As a small business owner, I have great concern when the federal government, the Congress creates laws that because they are vague causes confusion and allows for some attorneys out there to abuse them. I think there are many cases across this country where people have been taken to court because of not understanding what they were supposed to do, or not getting in compliance as quickly as the attorneys thought they should, but I know people are out there making good faith efforts to correct the problems.

Again, this is not about eliminating this law; it is about making corrections to it, and I even know that there is cases out there where this law can be applied to people who have drug and alcohol addictions. And as a small business owner, there were cases where I had employees that I went to great lengths to try to help, help them with their problems, and to find out that it is the potential for somebody to come back and sue you after you have spent time and effort trying to help them is just wrong. It is not what this law was set up to do.

So again, I just thank Congressman Foley for bringing this legislation to us, and look forward to hearing your testimony.

I yield back my time.

Chairman GRAVES. Thank you, Mr. Shuster.

At this time I would like to welcome our first witness on our first panel at least, Congressman Mark Foley who is a five-term congressman from Florida, and he has introduced H.R. 728, the ADA Notification Act, and what it would do is basically allow businesses a 90-day grace period to correct deficiencies and become ADA compliant before a civil lawsuit can be filed.

Representative Foley, I will go ahead and let you explain.

STATEMENT OF HON. MARK FOLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA.

Mr. FOLEY. Thank you very much, Mr. Chairman, Mr. Ballance and Mr. Shuster for giving me the opportunity to testify on H.R. 728.

Let me first mention I was a small business owner myself, and I also have worked very tirelessly in the areas of disability. I was chairman of Gulf Stream Goodwill Industries.

Let me also note for the record that in 2000, there were 3,013 suit the Justice Department was tracking, 3,085 in 2001 alone.

If we have done such a good job as a federal government informing the small business community of the requirements of the ADA, then we must not have good enough job to the very people in this room that have helped pass the ADA. This door, for instance, is not compliant with the Americans with Disabilities Act. A round knob is not compliant. Yet we passed the law and assume every small business will find the necessary information to comply with this important law.

Back in 1978, as a Lakeworth commissioner, I led the drive to make our library user friendly for those disabled. We had a multiple stairs in a very historic building. A good friend of mine who had been confined to a wheelchair since birth came to me and said it is not fair that our citizens not be able to read from the same books you and I take for granted.

So we modified a historic building to make it ADA or at least at that time it was not required, we made it compliant for those with disability.

So I have had a history of working for people with disabilities, but I must say this law has provided unintended consequences.

Now, most small businesses when they apply for a business license or a certificate of occupancy assume they are being told all the rules, regulations, both federal, state and local. And when they receive that piece of paper they would assume they are in full compliance with the laws required of this land.

Regrettably, we have done a very poor job of federal government enforcing, informing and educating those small businesses as to the requirement.

Now, what troubles me more is that in a recent series of litigation California they had to go to my home town of Stuart, Florida to find a lawyer to take the case. Numbers of suits filed in Carmel, California just recently by a Stuart attorney on behalf of a firm or group called Access Now, Inc. from Miami.

It is ironic that a group that advocates for the disabled had to find a group in Florida to press the case in Carmel, California, 3,000 miles away, using an attorney based in Florida.

I have written testimony, and I would probably be better off spending time talking about that testimony, but having done a lot of research and a lot of inquiry into this practice, what is more troubling than anything else is the very attorneys that bring these cases, the very attorneys that bring these case fail to even go back and check whether the work was ever done.

When some of the business owners who have been confronted by these letters alleging deficiencies and claiming they are being sued joyfully once they are made known of the deficiencies fix them with minimal or small dollars. Ask the attorneys to come by and look at the improvements. Oftentimes the attorneys have said, we do not want to look at the improvements, we just want our check.

One of the lead attorneys in Florida was investigated by the Sun Sentinel. Woe is us when they looked at his own business location, he had none of the requirements of the ADA.

Paul Ryan, who filed thousands of suits in California, including suing actor Clint Eastwood, who testified here on Congress on this very bill, himself gave a seminar at the gathering the Association of Trial Lawyers of America. The name of his lecture was "Opportunities for Public Interest Work and For Attorneys' Fees." Ryan himself was later sued by the head of the Oakland-based Americans with Disability Advocates who said that the restroom facilities in Mr. Ryan's office were not ADA compliant.

They are suing others but yet they are not in compliance themselves, and this has been a repeated, a repeated series of issues.

The ADA is a phenomenal law. I do not take away from that. The ADA has provided access, and yes, there are those in our society who have failed when properly notified to improve the conditions of their places, and those people should be brought to trial. Those people should be sued. But if they are unaware of this problem and if it is brought to their attention, and for a few hundred dollars they can make the necessary corrections, why on God's earth do we need to have them levied a $5,000 or $10,000 legal bill?

Two people who came to testify before the Committees last year, Donna and David Batelin have been my friends since my earliest days in politics. Donna and David Batelin opened a store in Lakeworth, Access Mobility, which provided handicap equipment for vans, for homes, for businesses.

Because they are both in wheelchairs, they decided that every space in their lot would be handicapped equipped in size and scope. What they chose not to do is paint it with the blue indicia of the handicap label because they felt that since everyone coming to their business was disabled there was no need to call special attention to two spaces as required by law since every space they had was compliant with the law.

Well, during a slew of drive-by litigations by this same law firm in Miami, they were told they were being sued because they did not provide two blue painted spots in their lot. Realizing maybe technically they were in violation, they immediately hired somebody for $200 to paint the blue spaces. They get a bill from the attorneys for $2,000.

Now, I understand we need lawyers to help ensure that the law is carried out, but much like a city, as I was a city commissioner,

if you have a code violation, you are given time to correct the deficiency before they start dunning you a daily fee for noncompliance. If you are pulled over driving, speeding, you have a chance to present yourself, and you are not immediately hauled off to jail simply because you exceeded the law. You are given due process and due right.

Only in this bill did we fail to provide some remedy that balances the rights of both parties. Yes, I appreciate the fact that those in the disabled community tell me that these businesses have had 12 years to comply. Yes, I respect and appreciate that they have had 12 years to comply. Then that begs the question why the very people who designed this law cannot get our acts together and fix the doors in our own building. If it is so good for small businesses that are going to week to week struggling to make ends meet, how is it fair that we who print money by the barrel and print it in deficit form cannot fix a door for the disabled to get into a building or a room?

That is the question that begs answering.

Mr. Ballance, I have tried to go to the Florida Bar. I first called Attorney General Reno, who was from Florida, when she was Attorney General for Mr. Clinton, and asked her to inquire as to the conduct of some lawyers. They told me, sorry, we cannot and do not keep statistics on that even though we are required to enforce the law. Check with your Florida Bar. We checked with the Florida Bar, and got a similar response. Not every lawyer practicing in ADA compliance is bad nor is every business owner who is not in compliance. What my bill would simply do is give a 90-day period in which to make the corrections before they have to pay onerous lawsuits. To some of these small businesses, it is the difference between keeping the lights on or going out of business.

I would much prefer, as I am sure every member of this Committee, that if they were given a choice between a $5,000 legal bill and a $200 paint striping project, where would you rather see the money go? To help make that business compliance, or to watch them shutter their doors because they cannot simply afford to pay that $5,000 bill? Of course, the lawyers offer a discount if you pay within 48 hours.

The other point I want to make is those who have challenged the law because they were offered a settlement go to the court, and the court says, well, we will reduce the charge to $2500, but by this time you have now engaged your own lawyers. Case law has been on our side, Buckhannon Board and Care Home v. West Virginia. The courts have ruled substantially that there needs to be some remedy within this law to give some guidance.

I have met with disability groups urging them to negotiate, to discuss with some of our own colleagues to no avail. People do not want the law touched, and I understand why. They are worried that if Congress opens the ADA, will we open it up to destroy it. And I have assured every group my intention here is not to weaken the provisions of ADA but to make them fair and balanced.

I have offered to make certain that we bring it on special order so that we do not have any ways in which to change the rules, only simply look at this provision.

I am willing to listen to this Committee's guidance on this issue. This has been a five-year effort on my behalf, and it started after some 300 paper lawsuits were filed one day. One particular instance was quite interesting because it was a 17-year-old girl who sued a liquor store, a pawn shop, a swimming pool company, all in the same shopping center, all on the same day. None of the merchants remembered her coming.

Some wondered why she was going to a liquor store since she was under the required age of 21. When they investigated the child's home they found she had no pool, so they did not understand why she would be in a pool supply company to begin with. And the final one was the pawn shop, which they had no explanation for why she would be going there either.

So in these cases we have seen repeated efforts by some to use those who have disabilities, to put the hammer down on small businesses who are only trying to what they thought was part of their responsibility.

Had the cities not granted occupational license and building permits and certificates of occupancy, I would understand that these people may have gone afoul of the law intentionally. But in virtually every case I have looked at the person owning the business has tried their best to comply with all of the mandates of law. Simply unaware, it may be no excuse, but until we get our acts together and until we get our Justice Department, until we get our communities informed of the requirements of the ADA in a more expeditious fashion, until we provide the funds to local building officials so they can train and teach their own inspectors in the field what is required, then how can we stand by and allow people to be sued under a law that is well intended, but poorly crafted?

None of us in life would trade places with those who have a disability. We in life who have struggled to make their lives better find some flaws with this law that need to be corrected. In no case and in no instance am I trying to make their access or their lives more difficult.

So I stand here ready today as I have been for five years to find common ground. But if you look at the compendium of evidence, if you look at case law, if you look at some of the stories, including the last, and I will stop: Last July a man who used a wheelchair used the Americans with Disabilities Act to sue a strip club in West Palm Beach, Florida because he could not get a personal lap dance from the private strippers. The room typically used for lap dances apparently could only be reached by stairs. He also complained that the club violated his ADA rights because he could only enjoy a—he could not enjoy a good view of the stage.

Now, I am not sure that is what we had in mind when we did the ADA, nor do I care what he does in his personal life. But in these particular cases cited, and I can provide multiple cases, it seems to not be the intention to make remedy, but to make money, and therein lies the fault of the law.

Thank you, Mr. Chairman.

[Mr. Foley's statement may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Foley, and your point is very well taken. This hearing is not an effort to in any way harm the Americans with Disabilities Act. It is simply an effort to find out

if we can find a way to enforce ADA without the excessive frivolous litigation that is so rampant in the system.

We are going to go with questions now, which I do have a question right off the bat. Of the lawsuits being filed against businesses, is it a random process, or do you see any effort, organized effort, and is this something across the country too? Is it an organized effort to file these lawsuits?

Mr. FOLEY. Well, I think from the evidence gathered by the U.S. Department of Justice, it seems to be somewhat organized because it started very aggressively in Florida, California, and Hawaii. In fact, interestingly enough, my co-sponsor in the Senate is none other than Senator Daniel Inouye, at least he had filed it last year for us, a disabled American lost his arm in World War II, was one of the authors of the ADA, he found in his own state egregious behavior of lawyers.

In California, there are 512 non-employment ADA cases, 31 employment cases. In Florida, where most of the activity has started, and as you can see spreading from some Florida-based firms, we had 1,027 non-employment cases, 153 employment cases.

These are just numbers though of those that actually went to trial. Regrettably, oftentimes the ones you do not hear about are the ones that are settled quickly because of the fear of publication of their name. So I think these numbers pale in comparison to the true amount that is going on.

I mentioned the American Bar Association's seminar on teaching people how to profit from the ADA. It seems to me that there is an organized effort to utilize the law not for its intended purposes, but to seek monetary compensation.

Chairman GRAVES. Mr. Ballance.

Mr. BALLANCE. Thank you, Mr. Chairman, and Mr. Foley, thank you.

I have in my own experience come across some situations that sometimes you think may be a burden, but when you get to the end of the row you realize that compliance is what is necessary.

Now, I am not in favor of frivolity anywhere and there are some lawyers that we know who will take advantage of a situation. I do not understand though, and maybe you can help me out, how it is that these frivolous lawsuits—in North Carolina, we have a rule known as Rule 11, and if a lawyer files a frivolous lawsuit, he is sanctioned by the court, and required to pay the court costs. I do not know how they get away with frivolous lawsuits in Florida, and I do have a friend down there that I can call, Willy Garen, maybe you can help me out.

Mr. FOLEY. I know Willy.

Mr. BALLANCE. But tell me about what you think about that.

Mr. FOLEY. Well, they are not frivolous in the sense of they are legal, and that is a question we posed to the bar and to the Justice Department, because the way the law is written, because of the vagueness of the law, that they are not considered frivolous. That may be my terminology and people may not appreciate the frivolousness of the lawsuit. But when you have investigated so many of these cases and found that they are merely looking for the money, when they will not even come and check if you have made

true compliance. That seems to me to be—it should be about achieving the goal, not just achieving the paycheck.

So maybe my frivolous terminology would not hold up to the bar.

Mr. BALLANCE. Mr. Chairman, I think—if I can cut in, I think the blue line lawsuit would be frivolous, and I do not see how a judge would award an attorney's fee in a case like that, and he could not under the Buckhannon case, do you agree?

Mr. FOLEY. I would agree. I would agree. But the problem is you have to get to court to prove yourself. I mean, the Buckhannon said basically if a business is issued for ADA violation, but voluntarily fixes these violations before the court becomes actively involved in the case, you would not owe any legal fees.

Mr. BALLANCE. Right.

Mr. FOLEY. But who knows that? The problem is you automatically have to retain a lawyer in order to fight the charges. If you get to go to court, you probably have spent $8,000 or $10,000 in defending yourself, whereby if we gave a 90-day provision to correct before they would go to court, you would remedy that exact same situation.

I mean, I am certain as I sit here that the attorneys filing these cases are not handing out Buckhannon Board versus in order to fully enlighten the prospective defendant of the court's rulings in these cases.

If you do get to court, I think a lot of them—in fact, several cases in Florida where the larger corporations have chosen to defend themselves show up at court only to be found sitting alone because the plaintiff realizes they could not fight the court based on these prior decisions. They were just hoping for a settlement out of court, to send a check along the way, proceeds to be distributed who knows how. Therein lies the problem.

It is not that I am trying to protect these businesses that are in noncompliance. It is just trying to find a balance.

Mr. BALLANCE. Well, I have, Mr. Chairman, if I may continue. Let me know when my time expires. I have a similar interest. I mean, I consider myself a small businessperson. I was a lawyer in rural North Carolina, and I had to have an handicap access ramp at my office. And so I am concerned about small businesspeople, believe me, on that. But I cannot believe that—by the way, did the blue line lawsuit defendant have to pay those $2,000?

Mr. FOLEY. Yes.

Mr. BALLANCE. Well, I do not know what the judges in Florida are doing, but I do not think the judges in North Carolina would allow that to——.

Mr. FOLEY. Let me correct, because it did not get to trial. They had sent in their money because they did not want to fight the case. They decided, all right, technically we are probably in violation. You used me now. For me to get a lawyer it is going to cost me $5,000.

Mr. BALLANCE. Okay.

Mr. FOLEY. Now I have spent $7,000. So there is a point where some of these businesses just throw up their hands and either settle quickly so they do not or are not exposed to media portrayals of them being mean-spirited.

Mr. BALLANCE. Let me follow up. Your numbers and mine are vastly different. I think I said there was 650 lawsuits over five years, and your figures sound like 3,000 in one year. Are we talking about the same kind of case?

Mr. FOLEY. These are the cases that we have from the U.S. Department of Justice, and these are the both ADA non-employment cases, that would be an access issue; or an ADA employment case where somebody was fired for the wrong reasons, because of disability.

Mr. BALLANCE. Well, Mr. Chairman, I am going to have counsel reconcile those figures, because the information I received came from our staff, that there were 650 cases, and this is a vast difference, and I would like to know which figures are correct.

Mr. FOLEY. Well, I think if you get this 2002 and 2003 figures, they are even going to be more startling because, again, this is growing exponentially, and I have all of this for the record that I would like to make a part with the Chair's consent.

Chairman GRAVES. Yes. In fact, I want to make sure that all of the members' statements are adopted in the record too.

Mr. Shuster.

Mr. SHUSTER. Again, I just want to thank Mr. Foley for introducing this legislation, and I agree with your motivation. It is not to eliminate or significantly change the ADA laws; it is to improve it, knock out the abuses.

I know firsthand my grandmother was confined to a wheelchair, and I remember taking that wheelchair through doors that were barely big enough to get them through, and up and down stairs, and that was 30 years ago, and there has been vast improvement, and it is largely due to the ADA legislation. So what we need to do here is strengthen it, and I think that is what your bill does.

My question to you is, do you think that 90 days is long enough for that period, because of the fact that we are going to have some significant design and construction on some buildings? I know it is probably not the vast majority of them. But what is your thoughts on that?

Mr. FOLEY. Well, we thought about that, and we carefully wanted to decide how we constructed the law. Would that mean substantial compliance? Because you do not want to give people more of a window to just simply avoid the law.

I was hard-pressed to get 90 days, believe me. They did not want more than 15. But when Senator Inouye became the prime sponsor in the Senate, the disability groups came, can we negotiate the number.

I am willing to look at any and all of those circumstances, but I do think you have to say substantial compliance, because as you clearly point out, if I am a business owner that needs to make quite a remedy here, that requires a permit. I have to get an architect to draw plans. They have to submit plans to building officials for review. They have to then get a building permit issued. Then you have to not only begin construction, which would include possibly getting bids. Then to the commencement of construction. Then to inspections. Then to CO, which could be a period anywhere from 120 days to 200 and whatever.

But as long as somebody was making a genuine attempt and could document that the city was in fact pursuing and following up on the completion, then I think that would be reasonable.

But my point is within that 90-day window they best demonstrate a commitment to replace, repair, fix or remedy or let the suits begin, therein lies the answer. If after 91 days they have not even budged, have at it. Take them to court. Do what you need to do.

Mr. SHUSTER. Thank you very much. Yield back.

Chairman GRAVES. Any other questions, Mr. Ballance?

Mr. BALLANCE. Well, I do have one other question. In your bill, does it cover employment issues?

Mr. FOLEY. We are only talking access issues. This is where——.

Mr. BALLANCE. Does the ADA cover employment issues?

Mr. FOLEY. Yes, it does.

Mr. BALLANCE. Okay.

Mr. FOLEY. Yes, it does.

Chairman GRAVES. Thank you. Mr. Foley, thank you again, a point well taken too that if we cannot have the capital ADA compliant, how are small businesses supposed to know if they are in compliance. But I appreciate your testimony.

Now we will seat the second panel.

Mr. BALLANCE. Thank you very much.

Mr. FOLEY. Thank you, Mr. Chairman. Thank you, members.

Chairman GRAVES. All right, we will go ahead and get started with the second panel. What I am going to ask is since we have so many testifying that we limit testimony to five minutes. Then we will limit our question too. And I will explain the light system real quick.

On the five minutes you have a green light, and then the yellow light will come on at four minutes, which leaves you about a minute left before the red light comes on after that. We are not going to rush anybody off and remove them if you go over a little bit, but let us try to get through this in a timely manner. We will try to limit it to five minutes.

And the way I am going to introduce the panelists is by how they came into us, that testimony came into us, and we are going to start out with Ron Richard.

Ron is a Missouri state representative, and he is owner an operator of Carl Richard Bowling Center in Joplin, Missouri, and I appreciate, Ron, you being here today and traveling so far to be with us. Why do you not go ahead and get started.

STATEMENT OF HON. RON RICHARD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI, CARL RICHARD BOWLING CENTERS, THE BOWLING PROPRIETORS ASSOCIATION OF AMERICA

Mr. RICHARD. Thank you, Mr. Chairman, and members of the Committee, Representatives, I appreciate your time.

Chairman GRAVES. Go ahead and use the microphone there.

Mr. RICHARD. My name is Ron Richard, and for 60 years my family has owned and operated as many as five bowling centers in the State of Missouri and Arkansas. Also, I was recently elected to

serve as the representative of the Missouri General Assembly. I am testifying in support of H.R. 728, the ADA Notification Act, as both a business owner and a lawmaker.

Legitimate businesspeople want to comply with federal and state regulations. In the case of bowling centers, we are in the business of providing hospitality, enjoyment and entertainment to our communities, and want to extend to all members of our community, including the disabled.

I know that many bowling proprietors have already worked to become compliant with the provisions of ADA. Many who have already completed significant capital improvements to make sure that entrance ways provided the appropriate access, renovated restrooms so that they are complaints, and made other adjustments to their bowling centers that would help all customers enjoy our establishments.

However, despite their efforts, bowling centers and other retail businesses have been, in many cases and systematically, targeted for a quick buck. In Florida, one group of lawyers was responsible for 700 lawsuits against businesses across the state. And as the gentleman, the representative's comment a second go, that quote is from an article in the Tampa Tribune, 23 October 2001.

A Web site for a local activist group in the state on a lookout for new plaintiff reads: "If you use or have used the services of any of the hospitals in your area, you could conceivably be a plaintiff in one of our hospital cases. In addition, you could conceivably be a plaintiff in any hospital to which you would most likely be taken in case of the 911 call. If you shop in any department store or regional or national chain store, or if you frequent fast-food stores, or if you attend movie theaters, if you stay in a hotel or motel, if you like to take cruises, etcetera, etcetera, you could conceivably be a plaintiff. The possibilities are almost endless, as unfortunately, there are so many places which are not obeying the ADA laws and which are therefore creating a variety of inaccessibility problems for lots of people."

In California, a former repeat felon, imprisoned for numerous crimes of robbery and grad theft, has been responsible for hundreds of lawsuits against everything from banks to bowling centers, and now wineries, filing what you have heard others speakers refer to as "drive-by" lawsuits against whatever business fit the criteria.

Surely this exploitation was not the intention of Congress when they passed this groundbreaking legislation 11 years ago.

That said, too many experts, Congress's intentions and the legislation that came out of the debate over giving access to all Americans is very vague, and a lot of the struggles with the act over the last decade certainly prove that point. The ADA is well intended, but not particularly well written.

In a recent Supreme Court case on the ADA—in a unanimous decision that concluded employers do not have to hire a person with a disability if they believe that person's health and safety would put a risk by performing the job—Justice Souter repeatedly expressed confusion over Congress's intent. Other Justices have openly expressed frustration with the confused legislative intent of the ADA.

If the most accomplished legal minds in our country have argued that ADA's clarity is lacking, should we be surprised that it is so easy to exploit? H.R. 728 is one very good opportunity that his Congress has to reform the positive aims of the ADA, while putting in some control for its rampant abuses.

I have worked hard to make my business compliance. But with the number of the agencies a business owner has to consult, not to mention contractors hired to bring a building up to code, it is very common for an owner to think he or she has already done the right thing and still be subjected to a lawsuit.

For example, in California, one of my colleagues had been licensed by the lottery commission to sell lottery tickets. One of the criteria for being licensed by the commission was that the location be ADA complaint. Without giving reason to believe that he was not complying with the ADA regulations, he wound up being one of the victims of a drive-by lawsuit, without ever have the opportunity to fix what he did not know was broken.

The reality is that very few of these lawsuits are about expanding access for the disabled, but instead are designed to target the business to make the owner pay. In fact in some cases lawsuits are filed not because the business has not yet installed a ramp but because of a few degrees difference in ramp angle. All that H.R. 728 hopes to accomplish is to allow businesspeople like me and others the opportunity to try to fix a problem before the lawsuit starts.

As a lawmaker, I am proud of Missouri's work to assist the disabled. But despite our efforts, there will still be those individuals who want to use the ADA for personal gain and exploit a law that has good intentions and that has promoted good outcomes. As a lawmaker, I would prefer to enact legislation that would more strongly limit the types of frivolous lawsuits that can be filed. But because this is a federal law and the business communities that is governed by it, I cannot pass the necessary regulation in my own state.

I do have some additional comments. I know my time is out. I just—I will make this testimony to the Committee and I appreciate your questions at later time, thank you, Mr. Chairman.

[Mr. Richard's statement may be found in the appendix.]

Chairman GRAVES. We will submit it to the record.

We are going to take testimony from everybody before we start asking questions.

We will now hear from Mr. Robert Fleckenstein, who is President of Summit Contractors, Incorporated, in Jacksonville, Florida. And I appreciate you being here today and traveling so far also.

STATEMENT OF ROBERT L. FLECKENSTEIN, PRESIDENT, SUMMIT CONTRACTORS, INC., ASSOCIATED BUILDERS AND CONTRACTORS

Mr. FLECKENSTEIN. Good afternoon, Mr. Chairman, and members of the Committee. My name is Robert Fleckenstein. I am the principal of Summit Contractors, a commercial construction company based in Jacksonville, Florida.

On behalf of the Associated Builders and Contractors, I would like to thank Chairman Graves and the members of the Subcommittee on Rural Enterprise, Agriculture and Technology for this

opportunity to address ABC's concerns regarding the interpretation of the Americans with Disabilities Act.

Summit Contractors was founded in 1989. We specialize in both commercial and multi-family residential construction. We are actively involved in the construction industry and have been a member of ABC's Florida First Coast Chapter since 1991. ABC, who I am representing today, is a national trade association, representing more than 23,000 merit shop contractors, subcontractors, material suppliers, and construction-related firms within a network of 80 chapters throughout the United States and Guam.

Before I begin my testimony, I think it is important that I state that I fully support the objectives of the Americans with Disabilities Act. Americans with disabilities have my full respect, and should be provided with accessible buildings and living units. In fact, the additional cost to comply with the ADA minimal is very inexpensive if it is done during the construction process.

For the last 10 years, my firm has specialized in the construction of multi-family residential units throughout the United States. We build an average of 3500 units for developers each year. We do not build for ourselves. We build for third party owners. We do not perform any design functions, and we do not have designers on staff.

Instead, project developers that we work for provide my company with a design, and we build the units according to that plan furnished by the design professionals.

The problem we face, however, is ambiguous statutory language that exposes my company to liability for any elements of a developer-provided design that are not in compliance with ADA. Section 303(a) of the ADA states that discrimination under the act includes a failure to design and construct facilities that are readily accessible to and usable by individuals with disabilities.

Federal agencies, as well as some courts, have interpreted "design and construct" to mean design or construct. Under this interpretation, contractors who simply build according to the plan that they are provided are liable for the defects in that plan. As a consequence, contractors face the enormous cost of rebuilding projects that the owner and his design professionals design incorrectly. Contractors must also pay the considerable cost associated with defending against lawsuits brought by the Department of Justice.

We disagree with the interpretations of the ADA holding or stating that a contractor that does not own or operate the facility, and is not involved in the project design, can be held liable for violations when the contractor simply constructed the project in accordance with the plans and specifications furnished by the owner and its design professional.

We feel that Congress should clearly state that only those parties who have significant control over design and construction of a project could be held liable for any violations. In our case, this would be the owner of that project that through its agents designed and constructed the facility.

To illustrate why my company relies on design professionals and therefore should not be exposed to liability under the ADA, I would like to discuss the design of the exterior entrances to multiple buildings.

Due to the interdependence of drainage features, water and sewer elevations, manholes, curbs, and required elevations for building floors, it is imperative that all the design requirements for the various systems be coordinated. Part of this coordination involves assuring that the design is in compliance with ADA, including the ADA's requirement as to slopes and cross slopes. Only qualified engineers can successfully design all these systems. Contractors are not licensed to perform this work, nor are we qualified to verify that an engineer has done his work correctly.

Traditionally, an owner contracts with design professionals to design a project that complies with all applicable building codes, both local and national. Design professionals are educated, trained, and compensated to do this. Owners, building officials, and inspectors all rely on the design professionals to furnish design documents to comply with all applicable codes. Contractors traditionally are not responsible for design. The contractor's responsibility is to build the project in accordance with the drawings and specifications.

The reason this issue is of such concern to me that my company is now a defendant, along with the developer, owner, and an architect and engineers, in a lawsuit where it is alleged that two projects, completed in 1995, were noncompliant. I can attest to you these two door knobs do not meet code.

I built 200 apartment units and put round knobs in lieu of the levers because that was what the building department had approved, that is what the architect had designed, and that is what I had bid, and that is what I had in my cost to furnish, and that is what I installed.

I am now involved in a lawsuit brought on by the Department of Justice that is suing me for in excess of a million dollars plus a victim's compensation fund of $750,000 on each project, and there have been no victims, I might add.

We have had mediation and are in settlement negotiations, so I cannot provide details or identify the projects. But this experience has made me acutely aware of the threat to small business contractors. This threat is significant. If my company is held liable for these violations, we will be forced out of business.

I thank you for this opportunity to be here today, and I welcome any questions.

[Mr. Fleckenstein's statement may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Fleckenstein. Thank you very much.

We are now going to hear from Brendan Flanagan with the national Restaurant Association. Brendan.

STATEMENT OF BRENDAN FLANAGAN, NATIONAL RESTAURANT ASSOCIATION

Mr. FLANAGAN. Thank you, Mr. Chairman. Chairman Graves and members of the Committee, my name is Brendan Flanagan, and I am Director of Legislative Affairs for the National Restaurant Association.

The National Restaurant Association is the leading business association for the restaurant industry. Together with the National Restaurant Association Education Foundation, our mission is to represent, educate and promote our rapidly growing industry.

Our nation's restaurant industry is the cornerstone of the economy, careers and community involvement. It is comprised of over 870,000 locations and we employ over 11.7 million people in the country. And every one dollar spent in a restaurant creates an additional $2.13 in the sales for other industries throughout the economy.

Operating a restaurant can provide many people a great way to earn a good living and to serve the public. With that comes a great deal of responsibility and rightfully so. Part of that responsibility includes adhering the Americans with Disabilities Act. This is a responsibility our small business owners take very seriously. For them, it is a matter of fairness, and it is also makes good business sense. The disabled should be reasonably accommodated—whether they wish to be served in our business or work in our business.

As mentioned earlier, unfortunately, as with other laws, the ADA has created some unintended consequences. One consequence is that it has created confusion among businesses that must make sure the business is in compliance. The primary difficulty is that parts of the law are vague and open to interpretation.

The concern I hear regularly from members is that "they just don't know what it is they are supposed to do so that they can do it." The problem, they say, is that depending on who you ask, you can sometimes get different answers. In many cases, it can be difficult for even the ADA consultants, local inspectors and private attorneys to agree.

Today, a small business owner can call two different ADA consultants with a removable barrier question, and conceivably get two different answers. That same owner could also pay thousands of dollars to hire a consultant, pay thousands more to make necessary structural compliance changes, and still have a local inspector tell them later that they are not in compliance.

In an even more disturbing scenario, they could hire a consultant, make changes, and face a lawsuit because an attorney believes that they are not in compliance. In fact, while ADA compliance has been a source of some frustration for many small businesses, it has been a tremendous opportunity for some attorneys.

Another intended consequence is that some attorneys across a growing number of states are exploiting the ADA for their own personal benefit. Unfortunately, litigation is becoming a first step to resolving accessibility issues. In many cases, a restaurant is first made aware of an alleged ADA violation when they receive notice they are being sued. In some part of the country, 20 to 30 businesses in a single town have been sued by the same attorney in the same week. The lawsuits often target small mom and pop businesses that are unaware of the alleged violations. Other suits include businesses that have already gone through considerable expense to comply with ADA. In other case, businesses incur unnecessary legal costs and the courts are unnecessarily burdened.

Litigation does not further the cause of access. Costly lawsuits only divert valuable resources and attention away from finding a solution. A cooperative approach like Mr. Foley's bill allows business owners to make corrections in their operations if such corrections are needed before a lawsuit is filed.

No one is suggesting, however, that employers should never be sued under the ADA. In some cases lawsuits may be warranted. However, in those cases where a business owner is willing to make appropriate compliance changes, he or she should be provided an opportunity to do so before being sued. Litigation should not be the first option.

Thank you.

[Mr. Flanagan's statement may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Flanagan. I appreciate very much.

Now we are going to hear from Kevin Maher with the American Hotel and Lodging Association. Kevin.

STATEMENT OF KEVIN MAHER, AMERICAN HOTEL AND LODGING ASSOCIATION

Mr. MAHER. Thank you, Mr. Chairman and the Committee. I appreciate the opportunity to testify before the Subcommittee this afternoon on an issue of great importance to the small businesses that make up the lodging industry.

I applaud the leadership of the Subcommittee on Rural Enterprise, Agriculture and Technology for addressing this important issue.

I am Kevin Maher, Vice President of Governmental Affairs for the American Hotel and Lodging Association. AH&LA, founded in 1910, is a federation of state and local lodging associations representing the nation's lodging industry. There are over 53,000 hotels, lodging properties, and more than 4.2 million rooms, and have 1.9 million employees in the United States. Our annual sales exceed $103 billion.

The AH&LA's membership ranges from the smallest mom and pop roadside independent properties to large convention hotels. The lodging industry is one of small businesses. Eighty-five percent of properties in the United States have less than 150 rooms, 52 percent have less than 75 rooms. Forty-five percent of the properties charge less than $60 a nine, 21 percent charge less than $45 a night.

The 12-year-old Americans with Disabilities Act is a good law. AH&LA supports the goals of this landmark law. The lodging industry is about accommodating the customer and our members have spent millions to comply with the ADA. Our members want and need this significant and growing market.

We are not here today to defend or ask for leniency for those operators that willfully ignore the requirements under the ADA. The lodging operators that have ignored the ADA for 12 years will suffer their self-created fate.

However, a few unscrupulous attorneys seeking to wage economic retribution upon businesses using the guise of well-intentioned civil rights laws and place our members in a difficult position.

Unfortunately, it is not the goal of these few attorneys to improve accessibility for the disabled traveler but to extract financial punishment through lawsuits. The disproportional cost of these lawsuits fall upon the small business element of the lodging industry. These are the members that cannot afford to litigate.

Our members have long been frustrated with the inability to get clarity and compliance with the ADA. When a hotel operator wants to open a new property, an architect will be hired, zoning permits obtained, operating licenses acquired from the proper local and state offices, these various boards, commissions, government entities will perform their duties, but at no point will anyone check for compliance with the ADA. There is no entity that will give an ADA certificate, informing the business that they comply with ADA.

This in no way mitigates one's obligation under the law, nor should it. However, when our members suffer from numerous drive-by lawsuits focused on the vagaries or the easily corrected aspects of the ADA, one is forced to ask what is the goal of the ADA, to litigate or accommodate.

Significant issues related to the ADA have been and will be in the future considered by the courts as high as the United States Supreme Court. Recent cases have dealt with such fundamental issues as what is a disability, what is an accommodation, who can be sued under the ADA. As federal courts continue to struggle with a basic understanding of the ADA, so too do our members and our ability to assist our members.

This is where H.R. 728, the ADA Notification Act comes in. Congressman Mark Foley's legislation will help our members work with the disabled community to correct minor violations and improve accessibility for the disabled traveler. In effect, the passage of this legislation will tip the balance back to the accessibility and back to the disabled traveler. This is a common sense approach to inadvertent noncompliance.

The ADA Notification Act will not help a hotel operator that builds a new 500-room hotel without accessible rooms, properly configured wheelchair ramps, or the proper number of accessible showers. These operators that willfully ignore the requirements of the ADA will suffer the consequences.

The ADA Notification Act will focus precious resources where they should be focused—on improving accommodations. Rather than spend time and money on court costs, the hotel operator will spend time and money on correcting these minor violations.

A.H.&.L.A. believes that passage of the ADA notification Act will allow our members to more fully participate in a significant and growing market segment. We know according to surveys that 54 million Americans, approximately 20 percent of the U.S. population, have some disability, and these numbers are growing. Travelers with disabilities spend $3 billion annually. One recent study from the Open Doors Foundation estimated the potential market for this community could grow as high as $27 billion.

This is a significant market, one the lodging industry cannot afford to ignore. Operators that ignore or fail to recognize the growing market risk losing out on a lucrative business, one our industry can ill afford to miss out on a post-September 11 economy.

The lodging industry is one of service and accommodation. We pride ourselves in this. We must seize opportunities to employ our resources to expand accessibility to all market segments if we are about our revenues, and we do.

Mr. Chairman, I would argue that it was the goal of the landmark ADA for the lodging industry to increase accessibility. It is

in the interest of all parties to work together to achieve accessibility. H.R. 728, the ADA Notification Act will help achieve this.

Again, Mr. Chairman, I thank you for the opportunity, and I will be pleased to answer your question.

[Mr. Maher's statement may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Maher.

We are now going to hear from Dr. Steven Rattner. Dr. Rattner is a dentist in College Park, Maryland. Doctor, I appreciate your being here today. Thank you.

STATEMENT OF STEVEN RATTNER, DDS, P.A. AND ASSOCIATES, COLLEGE PARK, MD

Dr. RATTNER. Good afternoon, Mr. Chairman, and members of the Committee. My name is Dr. Rattner. Currently, I am resident of Potomac, Maryland. I have been deaf since birth. Now I am the president of a dental practice in general dentistry that was started in 1986. Presently, I have 13 employees and two other dentists working for me. My dental offices are located in College Park and Rockville, Maryland.

I first opened the College Park office in 1986. That was before the ADA law. In 1992, due to the rapid growth of my dental practice, I decided to renovate my office to meet our needs. In order to do this, I relied on the Department of Justice technical assistance guidelines and the ADA Accessibility Handbook to make appropriate modifications. These services were available to me at no charge. As you are aware, the technical assistance guidance can easily be accessed through the Internet.

I also made several requests to the condominium association where my office is to make the common area and the lobby accessible for my patients. The board of the association finally approved my request and implemented the modifications with minimal cost. These modifications included making the public restroom and the sidewalk ramp accessible to people with disabilities. I am proud that the condominium and my business are complying with the AD Act.

I have patients with all types of disabilities such as wheelchair user, deaf and/or blind persons, who are able to access to my office and use my valuable service.

Compliance with the ADA is not a difficult thing for my business. It is my responsibility to make my business to be accessible to everyone, and it is the disabled person's right to freely say who to do business with. The costs of modifying my office was minimal. I am sure you are aware of the federal tax credit available to business that make renovations to meet the requirements of ADA. The tax credit was a benefit for my business as it is for many others who are trying to meet the requirement of ADA.

Adding the notice provision to this law is a threat to my future as a deaf person who may request an interpreter for continuing education in dentistry, as well as for other activities. For instance, several years ago, a large reputable dental software company was offering a class on enhancement of the dental software that my office is currently using. The company denied my request for a sign language interpreter for the class that I signed up for. The company officers were unfamiliar with ADA.

After much discussion, the officer realized that they were wrong and approved my request. However, it was too late to arrange for an interpreter for the course that I want to take, and I had to wait six more months to the next course.

Now, if you pass this bill, you will create unnecessary obstacles in my professional development. The companies I depend on for professional opportunities could deny me the services in violation of the ADA, and be completely off the hook if they agree to right their unfair practices within 90 days after I complain. I would then be behind with what is happening in my dental profession, and be uninformed to the latest developments. As a result, my business and my customers will be penalized by the ADA Notification Act.

I still take continuing education and seminars. Yet, these days I rarely encounter the ignorance that I experienced a few years ago with ADA and my need for interpreters. I do not see a need for this proposed provision.

I believe that this provision is not needed because the ADA is 13 years old and functionally protecting people with disabilities. Adding this notice would be like saying ignorance of the law is no longer an acceptable excuse. In running my business I am required to comply with many laws and regulations. For example, disposal of biological waste, tax codes, license requirements, many requirements. As a business owner in America, I am expected to operate my business in full compliance with these laws and regulations from the very first day I open my doors to the public.

These laws and regulations do not have a 90-day period to excuse a violator after a business owner has been caught. There is no reason why we should make an exception for ADA.

Adding this notice provision, H.R. 728, would be like opening a can of worms, especially for deaf people who request sign language interpreters and other necessary services to meet their needs.

In conclusion, the ADA as it now stands is good for business, good for customers, and good for a strong economy in America. It provides the means to carry out Congress and President Bush's promises that the ADA would serve as the "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

The ADA Notification Act would be a serious and sever setback of the nation's promise.

Thank you.

[Mr. Rattner's statement may be found in the appendix.]

Chairman GRAVES. Thank you, Dr. Rattner. I appreciate your testimony. I would like to speak to you sometimes about the shortage of dental students in our country too, but I will save that for another hearing and another day.

Dr. RATTNER. Thank you.

Chairman GRAVES. At this time I would like to introduce John Garber, who is founder of Garber & Associates. Mr. Garber is an expert on improving organizational performance by focusing on the human element of the workplace. His testimony is going to examine the provisions in Title I of ADA. Mr. Garber.

STATEMENT OF JOHN E. GARBER, CSP, PRESIDENT & CEO, GARBER & ASSOCIATES, LLC, SOCIETY OF HUMAN RESOURCE MANAGEMENT

Mr. GARBER. Thank you. Mr. Chairman, Ranking Member Ballance, and Committee members. I appreciate the opportunity to appear before the Subcommittee today to discuss the liability small business face when complying with the Americans with Disabilities Act.

As a member of the Society of Human Resource Management, I come before you to testify as a small business owner, human resource professional, and consultant specializing in employer risk management and occupational health and safety.

In today's competitive global economy, small business owners are challenged to operate more efficiently and effectively than ever. Profit margins are thin and the cost of doing business increases as each insurance renewal date approaches, and with each new emerging trend in employment litigation.

Business, in general, is experiencing an exponential increase in workplace litigation, and added costs that can in many circumstances financially ruin a small business when especially gray and troublesome area is compliance with the Americans with Disabilities Act

Many companies with safety-sensitive jobs may have various problems with employee alcoholism and drug abuse, a trend recognized in industries across the board. This baffling and frustrating problem seems to yield little to company-sponsored education, surveillance, checks of bodily fluids, offers of assistance and rehabilitation problems, the failure of most companies to manage the risks that workplace drugs and alcohol presents raises fundamental questions of whether the strategies being used by companies to combat such abuse are in fact effective.

In an effort to effectively and consistently manage the workplace, many employers choose to develop and implement employment policies to address such subjects as compensation benefits, workplace rules and regulations, safety standards and job performance requirements. Company policies are developed and implemented to comply with a host of federal and state employment laws, including such laws as the Family Medical Leave Act and the ADA.

As you know, the ADA protects individuals with disabilities from discrimination in the workplace. Under the ADA, a recovering or rehabilitated drug or alcohol abuser is covered as an individual with a record of impairment, and thus protected. However, the current use of alcohol or illegal drugs is not. Organizations therefore can have policies that prohibit the possession of drugs and alcohol in the workplace.

The ADA also allows the prohibition of on-duty drug or alcohol use, or being under the influence of drugs or alcohol at work. The ADA permits employers to have a substance abuse testing policy, yet such tests are required to use correct testing samples and to be confidential. Pre-employment drug tests are not considered medical tests under the ADA, and therefore are viable. Individuals who test positive for drug use can be denied positions because applicants who test positive for illegal drugs are not covered by the ADA.

Moreover, organizations may drug test to determine that an employee is no longer engaging in drug use without violating the ADA.

Hiring practices and policies expose employers to enormous responsibility and liability. Litigation is costly even if the claim is unfounded. For small business, this exposure can be debilitating, and in an effort to avoided excessive litigation fees some small companies often forego pre-employment drug tests and drug screening, and thereby operating their businesses at higher risk of losses.

A recent government study determined that about 12 percent of full-time employees acknowledged either having used an illicit drug or having had five or more drinks at a time, five or more times, or both in the previous month. This illegal drug use and excessive drinking is drug and alcohol abuse.

Independent studies have shown that people tend to underreport their illegal drug use by about 50 percent. Analysis of insurance claims by the Rand Corporation found that among employees with company-provided behavioral health care benefits a mere 0.3 percent of workers file claims for substance abuse treatment on an annual basis. Assuming a workforce of 1,000 employees and the rate of serious substance abuse of 12 percent, this means that 120 employees should be getting professional help but only three actually are. Even if the number of employees needing treatment is only a very conservative three percent of the total employee population, only one worker out of 10 is getting appropriate care.

Substance abuse issues raise some interesting concerns, especially for small business where fewer employees and smaller budgets are duly burdened. For example, an employer who implements and assumes the cost of a substance abuse program may find itself covering attorney and consultant fees, as well as lab fees for each drug and alcohol test performed. Then there are the indirect costs associated with each time the employee in the substance abuse program takes out of his or her day to report to the clinic to have the sample taken, not to mention the lost productivity.

An employer who opts to implement a drug abuse program may also face a variety of lawsuits, including claims of discrimination, privacy violations, unreasonable search and seizure, due process violations, and negligence. Further, an employer could be faced with violations of collective bargaining agreements as well as possible wrongful termination claims if an employer takes action against the employee whose drug or alcohol test was positive.

The annual combined cost of alcoholism and drug addiction to U.S. businesses is approximately $120 billion, which is more than productivity loss attributable to heart disease, diabetes and stroke combined.

In some states workers' compensation carriers may decline coverage for work-related injury if the results of a drug test from a post accident drug test are positive, and it is determined that there is a causal relationship of the drug or alcohol to the accident that resulted in the injury.

I have one particular client who does not conduct post accident drug testing for fear that the employee violated the substance abuse program, and as a result they terminated the employee, they would be responsible for the workers' compensation claim. It is

often difficult to close a workers' compensation case once the employee is terminated because the employer forfeits its ability to control the costs of the claim under such programs as light duty, and early return to work.

Under the ADA, an employer may not inquire about a job applicant's disability or workers' compensation claim history before making a conditional offer of employment. This means that an employer may not exclude an applicant whose employment may cause an increase in workers' compensation premiums, and potentially these workplace actions could cause harm to other employees.

Similarly, an employer may not ask an applicant about prior drug or alcohol problems. As discussed before, employers may face—may require drug tests and they may require a medical exam and condition employment on passing the exam, but only if all applicants are required to take the medical exam.

There are some areas where employers can be proactive in trying to hire safe and responsible workers, yet many legal barriers remain. There is much confusion for employers trying to comply with the state and federal employment laws, much of which concerns the intersections of various laws and a myriad of legal remedies available to disgruntled employees.

When an employer attempts to protect someone's ADA rights, he or she could very well, yet unsuspectantly, be trampling on the rights of another employee, inviting various legal claims and opening him or herself to liability.

Mr. Chairman, Committee members, thank you for the opportunity today to share some of my thoughts and opinions. I look forward to working with you to address this issue, and would be more than happy to answer any questions you may have.

[Mr. Garber's statement may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Garber. You bring up an interesting point, and really the rub or at least part of it with ADA, and that is the small business shouldering the burden of costs associated with employees who use illegal substances, and I do not think anybody intended for ADA to do that.

We are going to open it up for questions now, and we will try to get members, or we will try to limit our questions to five minutes, and my first one is for you, Mr. Garber.

You mention—you brought up in your testimony the excessive litigation, and what it costs small business. I brought up that, just briefly mentioned what it costs, particularly for illegal substance abusers. Mr. Foley, in testimony for his bill, brought it up too.

But in your opinion, what is it—you know, what can we do when it comes to at least testing, you know, drug testing and all in the workplace? What is it we can do to change ADA so at least the small employers are not leery or scared to death of implementing those sorts of provisions for potential employees?

Mr. GARBER. Well, thank you for that question. I think what can be done about it is, first of all, there is a fear of litigation and a fear of being sued when wanting to implement a drug testing policy. I think the confusion is, and I allude to this as the Bermuda Triangle of employment litigation issues, when you want to develop a drug abuse program, a substance abuse program, and you are

trying to navigate through ADA, FMLA, and workers' compensation.

I think one of the things that can be done is perhaps having a similar waiting period before somebody has a knee-jerk reaction to suing somebody over wanting to do a substance abuse test.

I can relate this back to a particular issue I have right now with a client that has concerns over the use of prescription medications for people who operate their limousines who are not subject to DoT drug testing. And the concern is with the aging population of that workforce they know and they have reason to believe they are taking prescription medications, but you cannot inquire as to what they are taking for fear that they are inquiring about any potential disabilities.

In my opinion what needs to be done is to clarify a little more clearly as to what an employer can and cannot do.

Most of my clients want to do the right thing under ADA. They just do not know what to do, and they have the fear of litigation. They feel that whatever step they take, there could be three or four steps backwards as a result of a lawsuit.

Chairman GRAVES. Thank you.

Mr. Ballance.

Mr. BALLANCE. Thank you, Mr. Chairman. Just a couple of general statements.

First of all, I want to thank each of you for coming to testify, and I appreciate your testimonies, and all of the small business people, particularly Dr. Rattner, your testimony about your particular business, I congratulate each of you.

What has been the experience—maybe I should point somebody out, but if someone will volunteer for this—of using all of the technical assistance that ADA has available through the Chambers of Commerce and public libraries, the Small Business Primer, toll free hotlines, fax on demand? Have any of you had an opportunity to use those services and make sure that you comply with ADA?

Mr. Fleckenstein, let me ask you that question.

Mr. FLECKENSTEIN. Yes, sir. In the construction business, we rely so much on the design professionals to interpret the codes, but since my experience, yes, we very much are aware now of what those requirements are, and we try to make those changes if they do not comply on the drawings.

The problem is that contractors are not licensed designers, and when we get into items that have to interpret engineering, we are in violation of our license in each state. Each state, we are licensed separately. So we have a real conflict of trying to change drawings that we think are worthy of being changed, but then we are in violation of our license, and we can lose our license for trying to design.

We can indeed notify the engineering professionals to make those changes, but that is really up to the owner of the project to direct the architect to do that.

Mr. BALLANCE. Let me ask you a follow-up question if I may. Can you not in your contract state or require the builder, you are the builder—the owner of what you are building to comply with ADA?

Mr. FLECKENSTEIN. Yes, sir. Indeed, we do that. But the Department of Justice, they do not really look at our contract. They look at the language, and they say that everybody is responsible, and obviously they go, usually end up going to the deeper pockets.

Mr. BALLANCE. Well, they should not do that.

Mr. FLECKENSTEIN. No.

Mr. BALLANCE. Doctor, let me just ask you again. I heard your testimony about your experiences. What are some of the benefits that you have seen in complying with this Act as you have testified that you have made a special effort to comply?

Dr. RATTNER. Well, interestingly because I am deaf so I know what the needs are, we complied before it became a law because we have a lot of patients with wheelchairs.

When we applied for a building permit, and one of the people in my office had the ramp, and my architect drew a ramp, made it like—for every inch that you elevate the ramp, it had to be a foot long. But my architect drew eight to one, and the county permit office caught that error, that it had to be 12 to one. So the county had the responsibility informing us.

The county was doing their job, telling us what are the codes are, so like with what this builder said, I cannot blame him. You have to blame the county office who reviewed the plan. They are the one who knows the law. They are the one who reads the blueprint, and whether to approve the plan or not. It should not be blamed back to the builder. It is to be blamed back to the architect or the owner who is applying for the permit.

Mr. BALLANCE. Mr. Chairman, one other question to the Restaurant Association, Mr. Flanagan.

Currently, if a visually impaired person would go into a restaurant with a guide dog, and the restauranteur would turn them away. Under this bill, you would have to wait 90 days.

Do you think that is reasonable? Now he could go and get an injunction if he had to, and go back the next day. In fact, the mere publicity is usually all it takes to have the restauranteur to turn around, and I am sure you guys send out all kinds of information to your clients informing them that they should not discriminate in this way.

But the point is that under this bill it would take away his immediate right to get relief. Do you agree with that?

Mr. FLANAGAN. Well, I think the bottom line is the goal is compliance. And if that restauranteur is going to comply without a lawsuit, that is the most attractive option, obviously. But if that restauranteur or any other business for that matter is not compliant with any provision of the ADA and all other means have been explored, then clearly a lawsuit would be or could be necessary.

Mr. BALLANCE. All right. I have some more questions, but I will wait.

Chairman GRAVES. Mr. Case.

Mr. CASE. Thank you, Mr. Chairman. Thank you for holding this hearing. This is a problem that I think there is no easy answer to, and it certainly has been an issue in my home state of Hawaii, as some of the information here notes.

Mr. Fleckenstein, let me just ask you because I think you are the right person to ask, and I ask you the question because in one of

my prior lives I was a construction lawyer who advised clients on ADA compliance, so I have got some personal knowledge of how this actually works out there in the field, and my clients were contractors and design professionals,

My observation, I have a couple of observations on ADA and the problem here. The first observation is that I agree that the ADA can sometimes be quite ambiguous. It takes judgment calls to comply. It is not a—you know, it is an exact science, and that is good for attorneys, I guess, because we get to analyze and go through all of the—but it is not so good for anybody else.

Second, my observation and experience is that where a design professional errs on the side of safety, they are almost always going to be safe. It is where they cut corners because they are trying to save expenses that they expose themselves to ADA lawsuits.

Third, in my experience most beneficiaries of ADA and the attorneys that represent them do in fact give warning in advance. It is a rare attorney that just wants to kind of blind side everybody all the time.

And fourth, I guess my observation is in those cases where you have got a situation where an attorney just does come out of nowhere, and if there is immediate compliance or the promise of compliance, the chances are the courts are not going to proceed with that lawsuit. That is my own experience out there representing your side of the street on this.

And my question really is, are we in this proposal overreacting? I guess that is the best way to put it. Are we trying to solve a specific problem that is fairly isolated and really making things worse?

Because I think the last thing that any of us want to do, and I think you would agree with this, we do not want to make it so hard to bring these lawsuits, at least I do not. Messing around with the jurisdiction of courts in such a way that you disincentivize contractors, design professionals and the attorneys that represent them from playing safe when you advise your clients on how to build.

So my question to you is, is there another way to solve this short of this particular proposal? Because, you know, I have asked you the question and I will give you my observation. I think this is kind of going too far to the other end, and I am afraid of the consequences from the perspective of the community that we are trying to protect.

Mr. FLECKENSTEIN. Thank you for your question, Mr. Chase.

From the construction side, I believe the problems are extremely simple. I do not believe the ADA complies requirements as it pertains to contractors is very serious or very expensive to correct. Most of the item that are required inside of units to make them accessible in a typical apartment unit probably would not cost $40 or $50 to do. It is extremely inexpensive.

Where the problem is is on the exterior of the buildings in the design of the various civil issues. ADA requires that access ramps never exceed two percent. This is where the problems lie. With the code the way it is written, you cannot coordinate all the various—the water, the sewer, the storm, the curbs, the streets, and the elevations of the buildings, it just cannot be done by the contractor. We are just not qualified and that is——.

Mr. CASE. Would that not exist regardless? I mean, the building—when these lawsuits are initiated the building is built.

Mr. FLECKENSTEIN. Yes, sir.

Mr. CASE. The question is not, you know, what we are going to do about it. The question is whether you give 90 days notice. I mean, the building is up already and the question is whether you are going to take corrective action or not. Maybe the question is how can we get farther back into the process to find some safe harbors. I think that has always been my observation of the problem with ADA. How do you get a safe harbor? How do you get somebody to say, okay, it is all right what you are doing?

Mr. FLECKENSTEIN. Well, one of the problems that we have the local building officials are not qualified to determine if the project meets the codes. That is—if they were qualified to review drawings, and say that, hey, this is not in compliance, then that would go a long way in solving the problem. But unfortunately, they take the word of the engineering and design professional. They are the ones that are licensed, so the building inspectors, they assume they know what they are doing, and the approve the drawings as approved. They come out at the completion of the project and they certify that I have built it like the drawings call for.

So I guess compliance could start at the building official level when the building permits are issued, or COs are issued.

In the particular project that I was involved in, it was HUD financed, so the HUD, the federal government approved these drawings and approved all the details before I started construction, and accepted the project when it was finished.

It was eight years later that the Department of Justice decided to make a field trip to my particular project, and saw these violations, and they were violations, no question about it. And if the violations had been shown on the drawings and I did not put a light receptacle at 48 inches when it was shown that, then I should have been sued, and I am responsible for that.

Mr. CASE. Thank you. My time is up but I think that is perhaps where we need to go is back a little earlier on.

Mr. FLECKENSTEIN. Yes, I agree with you.

Chairman GRAVES. Representative Richard, I do have a question.

Getting back to H.R. 728, if that were implemented and businesses had an 90-day grace period in which to implement their changes or they are subject to suit, which in that case the disabled will continue to be protected, the only person it seems to me that is going to suffer under this is the attorneys who are not going to be able to collect their fees.

But my question to you is, what is the immediate effects to business if these quickie lawsuits continue to be filed and pushed forward? You know, what is the future of small business under that scenario.

Mr. RICHARD. Well, Mr. Chairman, of course, it is monetary. That is obvious. However, in the industry that I belong to, the bowling industry, 50 to 60 million people a year go through our doors whether you are a little four- or six-lane bowling center in Iowa or you are a 50-lane bowling center that I have. We have numerous events with all kinds of people, all ages with disabilities and not disabilities, and it is good business in our industry to do

business with those that have disabilities because they are good customers. We look, we seek those customers.

If we have a frivolous lawsuit, and for some reason the press picks that up as we are not a good community citizen, the damage may be irreparable.

Now, we are, in my view, bowling, whether you—in my opinion, everyone has been in a center or at least bowled once while you were in high school, bowling or what have you. The ability for us to have low cost entertainment and try and do the right thing for business reasons is important to us as business owners, of course, Mr. Chairman.

But the damage that you make reference to is beyond the dollar. It may be irreparable because we are in every community a source of community involvement, regardless of your background, regardless of your income, and it is an equal playing field, and we are proud of that.

I would say to your question on the 90-day notice that we do not believe it will trigger massive change to ADA. I think it just gives owners a 90-day notice. They just ask for only the mildest restrictions on the current application.

I do believe there is some alternatives. The bill could require that initial complaints could be sent to the Department of Justice ADA mediation program. I believe the bill could release from liability business owners that have started but not fully completed capital improvements. Or the bill could ask for a six-month period of notice. I do believe there is room for agreement, and I look forward to your Committee's work. Thank you.

Chairman GRAVES. I do have one quick one too again for Mr. Garber, and this was not really alluded to. But violence in the workplace can be associated with substance abuse, which seems to be a bigger problem with ADA than anything else, and yet some individuals obviously they could be in treatment under ADA restrictions, but yet many businesses have a zero violence policy.

So which direction does a business go in that situation?

Mr. GARBER. My quick answer to that would be whoever has the biggest stick, and at this point you are correct, the ADA protects those people who are being rehabilitated and on medication which is managing their behavior.

I really do not know what specific direction to advise a client in terms of where to go specifically other than the fact to have a clearly defined substance abuse program, and if you can link that in with any type of workplace violence protocols and procedures.

The workplace violence prevention policy that is zero tolerance, the concern is that if this person chooses to come off their medication, and they start exhibiting violent behavior in the workplace, can that supervisor or manager now talk to the employee and start inquiring as to what is happening, where are we at with the treatment, are you coming off your medications? I know some of my clients are very hesitant and very concerned there. So what do they do? They possibly send the person home for the day. They may—some supervisors who are not well qualified or trained may make a knee-jerk reaction and go ahead and send them for a reasonable suspicion test, thinking that they have taken a drug that is illegal,

whereas they may have come off their behavior modification treatment from a psychiatrist.

Chairman GRAVES. Mr. Ballance. Do you want to go with—Ms. Christensen.

Ms. CHRISTENSEN. Thank you, and I apologize for being late here. I had a hearing at the Subcommittee at which I am ranking. But I am glad that the hearing is still going on because I wanted to come by and at least register my position on it. It would be inappropriate, I think, for me to ask questions. I have not heard the testimony, and I am sure many of the questions I might have asked have already been asked.

But I just wanted to go on record as saying that as a strong supporter of small business, having been on this Committee now for six years, but also a strong advocate on behalf of people with disabilities, I can see no reason for the provisions of this bill, or anything that would weaken ADA.

We are, I think currently on the floor today we have some legislation that deals with assisting small businesses and dealing with regulations and paper work and so forth, and I think this is the wrong way to go. The way to go is to see what we can do to help small businesses come in compliance.

Now, I think it is two years ago I went to the 10-year anniversary of ADA, so we are coming on to 13 years now. To come at this late stage after the enactment of the bill to put people who are already at a disadvantage at further disadvantage, and so I just wanted to say that for the record. And we are willing to work with you on other ways to address the difficulties that small businesses might have in meeting the requirements of ADA, but not to weaken ADAS.

Thank you, Mr. Chairman.

[Applause.]

Mr. BALLANCE. Thank you, Mr. Chairman. I do have a couple of other questions.

My second question, which I will come back to, this way you will think about it, many of you have said that there are no inspections for ADA compliance. Is there anyone who thinks that there should be ADA inspectors?

Then I would like to ask Mr. Garber, how does this bill impact the issue that you have raised at all? And would there be any solution to those issues in this bill?

Mr. GARBER. Not as it is currently structured to address Title III. If it were to include Title I, and I envision if it did include Title I, it would be very similar to legislating an ADR policy, an alternative dispute resolution, where most employers take it upon themselves to structure an alternative dispute resolution procedure requiring an employee to seek a resolution to their problems before going outside of that and filing legal action through EEOC.

If this bill were to go ahead and incorporate Title I, it would almost, in essence, legislate that and provide legislative protection rather than have the employer adopt that as a matter of a proactive individualized policy. I think that is how it can reach into that and get involved in Title I that way.

Mr. BALLANCE. Is there anyone who feels that there ought to be some ADA inspectors out there going around and checking these

buildings, or restaurants, or hotels to see if there is compliance? Anyone?

Mr. FLANAGAN. Mr. Ballance, I can see——.

Mr. BALLANCE. We will go to the doctor first and then come back to you.

Mr. FLANAGAN. Sure. Sure.

Dr. RATTNER. You already have food inspectors. I think that is more than enough.

Mr. BALLANCE. Enough.

Dr. RATTNER. Perhaps the food inspectors be checking what is acceptable besides food, so they do not have duplicating people coming back to his restaurant.

Mr. BALLANCE. On the government payroll. All right.

Mr. FLANAGAN. I was just going to add that in some local jurisdictions restaurant owners tell us that the local health departments are taking upon themselves for right or wrong to point out what they feel are inconsistencies in compliance issues.

Mr. BALLANCE. All right.

Mr. FLANAGAN. So in some local jurisdictions that does happen.

Mr. BALLANCE. Mr. Chairman, and I asked Mr. Foley about this, it seems that the—I believe it is the Buckhannon case, essentially puts us where this bill is trying to get us. As I understand the case, it says if you comply before the judge rules, then you do not pay attorney's fees, and maybe what we ought to be trying to do is just make that the law. It is already case law, and we can make it statutory law.

And would that solve the problem in anybody's opinion? Because I think if you—I do not believe you ought to take people off the hook to just wait until there is a 90-day letter and then we can go and solve the issue. I think businesses who had—as someone pointed out, as we point out—12 years or 13 years or 11 years, whatever the number is, 1990, when the statute was passed, went into effect in '92, and the statute specifically outlined what it was trying to do. So there has been notice.

And I understand that people go in and out of business so they are not necessarily looking at this, but would saying that if you are in fact in compliance prior to a judge ruling on your case, then there can be no attorney's fees, would that be a solution?

Chairman GRAVES. All right.

Mr. FLANAGAN. I would say that the recent case that you are citing, I do not think it completely solves the problem that we are all here to talk about today from the business side, but I think it does remove one of the incentives for the attorneys that we are talking about to pursue these types of cases because, as you point out, what it does is in those cases where there is a settlement negotiated before you your trial, that attorney is not permitted to receive attorney's fees. What it does not do is it does not block that type of lawsuit from being filed to begin with.

And so I think it does remove one of the incentives for these suits, but it does not solve it.

Mr. BALLANCE. Well, if I can cut in on you. Mr. Chairman, pardon me for doing it this way, but the allegation seems to be that there are lawyers out there who only bring these cases because they can get attorney fees. That seems to be the general allegation.

I would suspect that there are people out there who go to these lawyers on a legitimate basis and say, I have been denied my rights, and I want to bring this lawsuit.

And so if you take away the frivolous opportunities, and there may be some, then it seems to me that we have got the essence of the problem. People ought to be able to sue if they have a legitimate claim. There should not be an impediment to their lawsuit. But if the only basis or the primary basis is so that an attorney can collect an attorney's fee, then I do not mind cutting off that angle.

Chairman GRAVES. Mr. Maher or Mr. Flanagan, you might be able to answer this, but Mr. Rattner brought up an interesting point with food inspectors.

Do not restaurants have several weeks to comply with health violations when they are found to be violating or out of compliance, whatever the case may be?

Mr. FLANAGAN. The answer to your question is yes. They are, generally speaking, depending on the nature of whatever violation, is given a period with which they can come into compliance before they face what you would call, you know, stiffer penalties.

Chairman GRAVES. Very similar to what is being proposed in 798.

Mr. FLANAGAN. Right.

Chairman GRAVES. Ms. Christensen.

Ms. CHRISTENSEN. Well, I probably have one question that I am not sure, that seems as though it may not have been asked.

The passage of the notification requirement would, in essence, remove the primary element of ADA, which is voluntary compliance as I understand it, because businesses would wait until they receive a notification before complying, that it would allow them to do that, removing the incentive for businesses to take the initiative to ensure good access—ensure access to goods and services.

And what that does then is it shifts the burden to the disabled individual to prove noncompliance as I read it.

So do you not agree that this bill would put the burden of proof in disabled people requiring that they become experts in ADA and be able to identify when small businesses are not complying? Anybody?

Mr. FLANAGAN. I guess I will jump in again.

Ms. CHRISTENSEN. Because it seems to put the burden on them, on the disabled person to identify when you are not compliant and takes away your voluntary compliance that is required under the law.

Mr. FLANAGAN. I guess, to answer your question, I would disagree with that in terms of what we believe the bill does. What we think the bill does is it attempts to provide where necessary additional opportunities for a business to come into further compliance without the need for litigation.

Ms. CHRISTENSEN. Anybody else? But this could allow—I mean, not every disabled person is going to be aware—I mean, they may, they may have access, they may not be aware of what is available to bring a complaint, and therefore businesses may go on being noncompliant for years and years unless a person who is an ag-

grieved person brings a complaint. And where does the change take place? I am missing something.

Mr. FLANAGAN. As I testified earlier, in those cases where a business owner does not come into compliance after being notified of some alleged violations, and when all other options have been explored, and that person has been given a reasonable amount of time to come into compliance, then perhaps litigation is necessary.

Ms. CHRISTENSEN. But it seems to me that 13 years is a reasonable amount of time to come into compliance.

Mr. FLANAGAN. Thirteen years is part of the problem with the law, and I think, as we have all testified, as other legislation, it is imperfect and it was not drafted in a way that makes compliance easy. Certainly 13 years is a long time, but I think that points back to some of the problems that are in the law.

Ms. CHRISTENSEN. Well, the language seems to really make it relatively easy to be accommodating. Title I requires the businesses provide—with 15 or more employees provide reasonable accommodation, reasonable accommodation, and Title III, barriers to service must be removed if readily achievable. Am I reading that correctly?

That seems to be extremely fair.

Mr. FLECKENSTEIN. Representative, in our business, and as many of us, try to take the initiative on as you recommended to be in compliant. But what happens to those, as I stated in some other testimony, when you have a ramp and you have those that put a level on it and you are one degree off, and there is a lawsuit that you are not in compliant, whether you are going into a restaurant, or a bowling center or what have you? Would you not agree that you should have the ability to become compliance when you originally thought that you were?

I think that is my claim, my plea to you all. If we do take the extra step and follow the bill, and there is a mistake, all we are asking for is 90 days to be compliant.

Ms. CHRISTENSEN. I tend to agree with my colleague, Attorney Ballance, the ranking member here, that that is already taken care of. The Supreme Court's decision in Buckhannon says that as long as you comply—and to me, in 13 years, everybody should have complied—before a case is brought before the judge, no legal fees are awarded to the attorneys. And so I think that responds to the question that you have.

Mr. FLECKENSTEIN. But if you agree that the plaintiff is winning in 80 or 90 percent of the cases, that is still 10 percent of the cases where it is not working.

Ms. CHRISTENSEN. My understanding is that in almost 13 years there has been about 650 cases, is that right? There has been 650 in five years, and that is looking at 6 million business, 660,000 public and private employers, 80,000 units of state and local government that have to comply, and 54 million disabled people that could potentially file, and it is only 650.

I do not find that there—I do not know how many have been won or how many have been lost, but that is really a handful of cases, and I do not see creating a law that would weaken what we worked so hard to pass back in 1990 for what is really a handful of cases, and I really cannot tell how they have been adjudicated, but it is not a large number.

Mr. FLECKENSTEIN. Representative, your point is well taken. However, lawsuits in our industry ranged from 50, 60, 70 thousand to half a million dollars.

Now, in our industry that is devastating, even though as you recognize, it may be a small percentage, but the fact that the lawsuits are of such magnitude that it is devastating to our industry.

Ms. CHRISTENSEN. Do you have any idea of how many cases have been filed under Title III, for example?

Mr. FLECKENSTEIN. John, do you?

Ms. CHRISTENSEN. In your state?

Mr. FLECKENSTEIN. No, I do not.

Ms. CHRISTENSEN. Well, I tend to agree with you, Ranking Member, that the necessary flexibility is there in the law, and that the case has really pretty much provided what the law—this bill says it seeks to do, and I do not find it a necessary piece of legislation.

Chairman GRAVES. We are going to have to get the figures reconciled because the information we are getting from the Justice Department is in 2000 alone we have got over 3,000 cases being tracked. So we are going to have to figure out, with the staffs working together, where the discrepancy is on that.

Mr. Ballance.

Mr. BALLANCE. Yes, I have one final question, and Mr. Richard, I will go back to you. You talked about this lawyer in Florida. Of course, let me say this, I do not bash lawyers, but I do not defend lawyers who bring frivolous lawsuits. And as I said earlier, the judge has the responsibility to deal with lawyers who bring frivolous lawsuits.

This lawyer in Florida that was named John Mallah brought 700 lawsuits. I think what is happening, when I went into practice a lot of years ago, I was a general practitioner. Whatever walked in the office, if I thought I could handle it, I did. Now lawyers specialize, and I assume that this lawyer that is the only work he does is in these, and he is an expert. So he ought to recognize a lawsuit when he has one and when he does not.

But I just want to point out, and see if you are aware that in March of last year a federal judge ruled in a case filed by Mr. Mallah, the judge cited the U.S. Supreme Court case that we have been referring to, and so Mr. Mallah, he was not entitled to attorney's fees because apparently the defendant made the necessary changes before the judge ruled, and that ought to be the situation. There ought not to be—and the lawyer ought to be aware based on that case if his client—and so you send a letter because he is just saving himself expenses. If he sends a letter to the defendant, potential defendant and says I am going to sue you if you do not repair that ramp on your restaurant, and then if it is repaired, that is the end of that potential lawsuit.

If he goes ahead and files a lawsuit and the ramp is repaired, that still is the end of that lawsuit and he still does not get any money. So it seems to me that that ought to be a solution.

Do you agree or disagree?

Mr. RICHARD. Would you allow me—my executive director of our association is an attorney, and he can respond to that for a second?

Mr. BALLANCE. Well, yes, I will redirect the question to you, Mr. Chairman, if that is okay.

Mr. BERGLUND. Thank you, Mr. Chairman.

Chairman GRAVES. Could you state your name for the record?

Mr. BERGLUND. My name is John Berglund, B-E-R-G-L-U-N-D, executive director and counsel for The Bowling Proprietors Association of America.

With due respect, no, the lawsuit does not go away. All it means is that the attorney does not collect fees should they go to court if repairs are made. Where it is being missed here is that the lawsuit is filed, filed against small business owner. The small business owner cannot afford $25,000–$30,000 to go to a full court file, so they make a settlement, and the attorney gets their fees in the settlement. That is prearranged in the contingency settlement or the fee, and that is how the attorney makes the money.

So the fact that there was a case that says if the businessman makes repairs during the lawsuit, there would be no attorney fees is really irrelevant to this proposal.

Mr. BALLANCE. Well, let me follow you up. Suppose we put that in the law?

Mr. BERGLUND. Put what in the law?

Mr. BALLANCE. The lawsuit, we codify the——.

Mr. BERGLUND. That does not solve the problem. If you could put in the law that if the repairs are made, the lawsuit goes away in the entirety, then that makes sense. But if you just say the attorney fees go away does not solve the problem because most cases do not go through the entire court system. The small business owner has to settle in advance, then the attorneys get their money.

Mr. BALLANCE. Well, I do not agree, but anyway we will not debate it further.

Chairman GRAVES. One final, Mr. Garber. Out if curiosity, getting back to the substance abuse problems with ADA, and you get into drug testing and medical questionnaires and that sort of thing, what other areas of federal law as far as the evasion of privacy, does that create some potential problems there?

Mr. GARBER. Yes, there is a lot of problems there because the common law protections for employees who feel that there is an invasion of privacy if that information got out, for example, for a false positive drug test, and it got out, and it was published. Obviously people within the work place see that discharge a claim can come against that employer for the invasion of privacy unreasonable search, and you know, they will just keep going on and on. So that is a liability that the small business owner faces, and actually it is because of those fears that they choose not to even do the program at all. They would rather just roll the dice, and just forego it rather than try to do the things that they can do to try to control costs within their business.

Chairman GRAVES. Before we finish up, I would ask unanimous consent that all members' comments be included in the record. Seeing no objections.

I would like thank everyone here today who testified. I know some of you have come a long ways to do this. This is obviously very, very enlightening. ADA, although very well intentioned, I think, unfortunately, has some problems with it.

Congressman Foley's legislation, H.R. 728, would give small businesses, I think, a fair chance to comply with very complicated man-

dates before legal action is taken against him, and 728 has been referred to the Judiciary Committee. I am going to be sending a letter to Chairman Sensenbrenner to take favorable action on this bill. It is a first step at least in airing out some of these problems. I have signed on a co-sponsor, and I would encourage anyone else to.

But I hope to see everybody here tomorrow at the full Committee hearing, and again thank you very much.

The Committee is adjourned.

[Whereupon, at 3:59 p.m., the Subcommittee was adjourned.]

House Committee on Small Business

"Litigating the Americans with Disabilities Act"

April 8, 2003

Opening Statement of Subcommittee Chairman Sam Graves

GOOD AFTERNOON AND WELCOME TO THE FIRST HEARING OF THE 108TH CONGRESS FOR THE RURAL ENTERPRISE, AGRICULTURE, AND TECHNOLOGY SUBCOMMITTEE OF THE HOUSE COMMITTEE ON SMALL BUSINESS. LIKE OTHER MEMBERS OF THE COMMITTEE, I SHARE A PASSION FOR THE ADVANCEMENT OF SMALL BUSINESS ACROSS THE COUNTRY. THE FUTURE OF THIS SUBCOMMITTEE IS WHAT WE, AS ITS MEMBERS, MAKE OF IT. IN THE UPCOMING MONTHS, THIS SUBCOMMITTEE WILL ADDRESS A VARIETY OF ISSUES, AS THEY PERTAIN TO SMALL BUSINESS, INCLUDING: AGRICULTURE, TELECOMMUNICATIONS, AND EDUCATION. ALTHOUGH THE ADA HAS BROUGHT ABOUT SOME IMPROVEMTENTS, TODAY WE ARE HERE TO SHED LIGHT ON A VERY PRESSING ISSUE: WRITTEN IN BROAD, GENERAL TERMS, THE IMPLIMENTATION OF THE AMERICANS WITH DISABILITIES ACT (ADA) HAS OPENED COUNTLESS SMALL BUSINESSES TO EXCESSIVE LITIGATION.

IT HAS BEEN ESTIMATED THAT NINETY-FIVE PERCENT OF THE TITLE I CASES BROUGHT UNDER ADA HAVE BEEN DECIDED FOR THE EMPLOYER. REGARDLESS, ON AVERAGE IT COSTS A SMALL BUSINESS NEARLY $25 THOUSAND JUST TO TRY A CASE.

CURRENTLY, THE SUPREME COURT HAS DECIDED TO HEAR RAYTHEON V HERNANDEZ. IN THIS CASE, MR. HERNANDEZ WAS ALLOWED TO RESIGN FROM RAYTHEON INSTEAD OF BEING FIRED FOR ILLEGAL DRUG USE AND BREAKING WORK PLACE RULES. AFTER REHABILITATION, MR. HERNANDEZ HAS DEMANDED HIS JOB BACK SAYING THAT HE HAS AN AUTOMATIC RIGHT TO A SECOND CHANCE BECAUSE OF ADA PROTECTIONS.

IN ANOTHER CASE, EMPLOYEES OF EXXON FILED AN ADA COMPLAINT WITH EEOC BECAUSE, IN THE AFTERMATH OF THE EXXON VALDEZ TRAGEDY, THE COMPANY IMPLEMENTED A POLICY THAT ANYONE WHO HAD UNDERGONE SUBSTANCE ABUSE TREATMENT COULD NOT CAPTAIN A SHIP. THE 5TH CIRCUIT COURT FOUND FOR EXXON AND UPHELD THEIR POLICY.

TITLE III OF ADA HAS BECOME A WINDFALL FOR UNSCRUPULOUS TRIAL LAWYERS TO FILE LAWSUITS FOR MINOR INFRACTIONS OF ADA BUILDING REGULATIONS. MOST

OF THE BUSINESSES THAT ARE TARGETED ARE "MOM AND POP" BUSINESSES THAT BELIEVED THEMSELVES TO BE FULLY IN COMPLIANCE WITH ADA, AND WHO CANNOT SUSTAIN EXPENSIVE LEGAL COST.

MOREOVER, FLORIDA, CALIFORNIA AND SEVERAL OTHER STATES HAVE SUFFERED A RASH OF LAWSUITS FROM UNSCRUPULOUS TRIAL LAWYERS WHO HAVE FILED LAWSUITS. THE AMERICANS WITH DISABILITIES ACT DOES NOT ALLOW PLAINTIFFS TO RECEIVE DAMAGE, BUT IT DOES ALLOW FOR TRIAL LAWYERS TO RECEIVE LEGAL FEES. ATTORNEYS CAN FILE SUITS IN THE NAME OF A DISABLED-PLAINTIFF AND THEN MAKE $5000 TO $10,000 PER SUIT.

I NOW WOULD LIKE TO RECOGNIZE THE RANKING MEMBER, FRANK BALANCE, AND EXPRESS MY EXCITEMENT TO WORK WITH YOU ON THIS SUBCOMMITTEE.

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House Committee on Small Business

"Litigating the Americans with Disabilities Act"

April 8, 2003

Opening Statement of Subcommittee Ranking Member Frank W. Ballance, Jr.

Thank you, Mr. Chairman. The purpose of today=s hearing will be to review the effect of litigation of the Americans with Disabilities Act on small businesses, and to discuss the ADA Notification Act introduced by Mr. Foley.

As you know, Mr. Chairman, I practiced law for more than 35 years before being elected to Congress -- and I strongly believe that attorneys not only have a responsibility to defend the laws of the American system of justice, but also to ensure that they are implemented in a fair and just manner.

With that in mind, the ADA is landmark legislation that was enacted in 1990 to provide protections to individuals with disabilities when facing discrimination in employment, transportation, and public services and accommodations. By expanding community access, career opportunities, and financial self-sufficiency, the ADA has helped the disabled community make enormous strides in establishing independence. Our nation has also greatly benefitted from the ADA, as previously untapped skills and talents of disabled Americans are put to good use. Therefore, any changes to the law should be made only in egregious situations, and should ensure that ADA safeguards and benefits are not harmed.

The ADA was intended to balance the accessibility needs of the disabled community with interests of businesses B particularly taking into account the limited resources of many small businesses. New and newly reconstructed buildings must be accessible. However, modifications are required to existing buildings that are only readily achievable, which is defined as Aeasily accomplished and able to be carried out without much difficulty or expense@. In addition, there is annual tax deduction of up to $15,000 for all businesses, and tax credit up to $5,000 annually specifically for small businesses for costs associated with ADA compliance.

The ADA includes numerous safeguards to ensure that businesses have adequate notice of their obligations and ample time to comply with the law. Following the enactment of the ADA, the IRS notified each year, for seven years, over 6 million businesses of their ADA responsibilities. States include information on ADA requirements with all new business licenses and renewals.

The ADA established an unprecedented technical assistance program. Educational packets were sent to approximately 6,000 Chambers of Commerce, and placed in 15,000 public libraries. Extensive material is available online, including the EEOC=s ADA Small Business Primer. There=s a toll-free hotline, a fax-on-demand-system, and free small business workshops. The Justice Department has provided funding to trade organizations to develop and distribute industry specific guides to their members. Most recently, on February 4, the EEOC offered a National Satellite Technical Assistance Seminar, this interactive television broadcast provided ADA information to small and mid-size businesses at over 65 locations nationwide.

This outreach has worked. According to the Department of Justice, which oversees ADA enforcement, there have been a surprisingly small number of lawsuits. The fact that there have been only 650 ADA lawsuits over 5 years, when compared with the 6 million businesses, 666,000 public and private employers, and 80,000 state and local governments that comply with the ADA B certainly speaks volumes.

However, you are not here today because everything is working fine with small business compliance to the ADA. As has been widely reported in the media, there have been a rash of ADA lawsuits by a handful of attorneys in Florida and a few other communities. I=m sure we will hear a lot today about these actions and the tactics employed in pursuing them. The question I have is whether this is a symptomatic problem requiring Congressional relief, or an isolated situation involving a few lawyers that would be better dealt with by the courts or local bar associations.

As I have stated, the ADA already provides numerous programs help businesses comply with the law. H.R. 728 will only delay the compliance process by encouraging court filings and litigation, placing the onus on the disabled person rather than rightfully with the business owner. Existing programs available to businesses are the best way to help ensure ADA compliance and we should continue to put our support behind those programs.

The ADA is landmark legislation that has helped tap the skills and abilities of all Americans -- creating a new workforce that benefits employers as much as employees. Its protections result in enormous benefits for the disabled community and small businesses, while helping to bolster the economy and strengthen our nation. Since the ADA was first enacted almost 13 years ago we have made substantial progress. It is my hope that we continue to make great strides and not stumble backward.

Thank you Mr. Foley for taking the time to be here today. I look forward hearing your thoughts on this matter, as well as the opinions of the

witnesses offering testimony today.

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CONGRESSWOMAN DONNA M. CHRISTENSEN'S STATEMENT BEFORE THE SMALL BUSINESS SUBCOMMITTEE ON RURAL ENTERPRISE, AGRICULTURE AND TECHNOLOGY

April 8, 2003

Thank you Chairman Schrock and Ranking Member Balance for holding this hearing on litigation surrounding the Americans with Disabilities Act (ADA).

The Americans with Disabilities Act is the law that protects the civil rights of persons with disabilities. It has been in force for ten years, and the requirements of the ADA provisions are well documented. I believe that the proposed ADA Notification Act would severely curb the enforcement of ADA by undermining voluntary compliance with Title III, which requires businesses to make their goods and services accessible to persons with disabilities. This amendment to the ADA would prohibit individuals from bringing lawsuits to enforce Title III without first providing notice of the alleged violation to the defendant and then waiting 90 days for the defendant to take corrective action.

Since ADA provisions do not award damages for violations, the threat of litigation is the sole deterrent to non-compliance. Violations to accessibility pose health risks and safety hazards. Requiring 90 days to elapse before action can be taken is tantamount to negligence. This amendment, could possibly weaken the ADA and discriminates against the individuals the ADA was designed to protect.

As member of the this committee, I recognize and have worked along side my colleagues to address the issue of the burden of federal regulations on small businesses. As such, I recognize the financial burden of that compliance can have on small businesses, especially the cost of litigation. However, we need to find a balance between keeping the cost of compliance to small businesses down and the rights of individuals with disabilities. I believe that we can possibly achieve this balance through a combination of education and client/technical assistance. Perhaps, the we can examine whether there currently exists a dialogue between the Department of Justice and SBA on this issue and, if not, why? We are currently working on passing legislation on providing assistance to small businesses on understanding and complying with federal regulations. ADA would be among them.

I would like to welcome our panelists and look forward to your testimony.

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Testimony of
The Honorable Mark Foley

H.R. 728, the ADA Notification Act
The House Committee on Small Business
Subcommittee on Rural Enterprises, Agriculture and Technology

April 8, 2003

Thank you, Mr. Chairman -- and my thanks to all the Subcommittee members -- for holding this hearing on the effects of litigation on America's small businesses.

Small businesses are the backbone of our economy, but even during normal times they have an uphill fight to survive. I know that all too well. Before getting involved in public service, I was a small businessman myself. I owned and operated a small restaurant in Lake Worth, Florida. Fortunately, it was successful -- but no thanks to the myriad of governmental red tape and obstacles that small businesses have to contend with.

These days, those obstacles have been complicated by the ever-increasing presence and costs of litigation and insurance. **And unfortunately, one of the laws that we ourselves created for all the *right* reasons is creating a nightmare for many small businesses in our country for all the *wrong* reasons.**

The Americans with Disabilities Act is a landmark civil rights law enacted in 1990 to protect Americans with disabilities from employment discrimination as well as access discrimination. It is a critical law that was long needed and has helped thousands upon thousands of disabled Americans.

Unfortunately, vagueness and enforcement problems associated with Title III of the law -- which governs the removal of physical barriers -- has turned the ADA into a vehicle for a growing number of attorneys who are more concerned with collecting attorneys' fees than in ensuring compliance with the law. And they have let loose a barrage of lawsuits over the past few years that are costly to the businesses being sued and, in some cases, mind boggling to the rest of us.

- Take the case of the lap dance, for instance:

Last July, a man who uses a wheelchair used the Americans with Disabilities Act to sue a strip club in West Palm Beach, Florida, because he couldn't get a personal lap dance from the strippers in private. The room typically used for lap dances apparently could only be reached by stairs. He also complained that the club violated his ADA rights because he couldn't enjoy a good view of the stage where the strippers disrobe from his wheelchair.

- Or take the case of the Cottage of Sweets in Carmel, California:

This historic little shop was among a half-dozen recently sued by a Florida lawyer on behalf of a former Florida resident who complained that, on a visit to Carmel last year, he encountered physical barriers in these stores. The man who sued doesn't live in Carmel nor, to anyone's knowledge, has any intention of going back. But rather than tell the Cottage of Sweets or the historic Pine Inn or the other businesses involved that they had problems, he sued.

Mr. Chairman, the ADA has lent itself to lawsuit fodder primarily for two reasons.

First, Title III, which governs physical access, requires that buildings and other places of "public accommodation" built prior to the enactment of the ADA be accessible to those with disabilities as much as is "readily achievable." But "readily achievable" is in the eye of the beholder. What's readily achievable without going bankrupt to one business may be very different to another business.

The second, more serious problem is ignorance.

Title III and its subsequent regulations effectively amount to a national building code. But Congress couldn't impose those requirements directly on states because of constitutional questions, so it didn't. As a result, most state and local building codes are not ADA compliant. And that means that when businesses rely on local code inspectors to make sure their buildings comply with all applicable laws, they are not inspected for ADA compliance nor, in many cases, even told of their obligations under the ADA.

The consequences of that are significant.

Without knowing what their exact obligations are under the ADA – and that includes some very specific things like the width of a doorway or the height of a restroom toilet paper dispenser – businesses cannot achieve what the ADA envisioned: a barrier-free world for the disabled. Moreover -- and this is why we are here today -- ignorance has left countless American businesses vulnerable to ADA-related lawsuits.

Some of these lawsuits are well intended, Mr. Chairman. They are brought by attorneys and plaintiffs who have tried to get businesses to fix accessibility problems to no avail.

Others, however, are being brought by attorneys who, I have no doubt, care little about ADA compliance but care a whole lot about the sizeable attorneys' fees they are getting out of the businesses they sue. They are brought against businesses without first telling them they have a problem. In many cases, they are what I call "drive-by" lawsuits – complaints brought against businesses in which no one has actually been harmed. They are based on someone having driven by the business, noticing a lack of signage or an absence of a ramp, and filing suit without any attempt to actually contact the business.

Mr. Chairman, most civil rights laws -- and other sections of the ADA itself -- require some type of notice or mediation before a lawsuit is filed. Notification is a way of resolving the ignorance factor and allowing problems to get cleared up without clogging the courts.

But Title III of the ADA doesn't require notice. It's a federal law that requires local compliance without any real way of letting local people know what they are supposed to comply with. And the main enforcement tool is a private lawsuit. **That scenario is an ambulance-chaser's dream.**

I introduced the ADA Notification Act three years ago to overcome this problem. The bill does not take away anyone's right to sue under Title 111 of the ADA, nor does it let businesses off the hook having to comply with the law. It just ensures that, before costly litigation starts, businesses that have ADA violations know about the violations and have a chance to correct them.

Notification is the norm for legitimate ADA attorneys and this bill just codifies what most attorneys already do in practice. In doing so, I believe it would put the brakes on a growing number of attorneys who are using the ADA to shake down thousands of businesses from Florida to California and Hawaii.

Before closing, I would just like to note that in May of 2001, the U.S. Supreme Court handed down a ruling that I thought would resolve this problem. The case was ***Buckhannon Board & Care Home, Inc., et al. versus West Virginia Department of Health and Human Resources.*** In its ruling, the court basically said that if a business is sued for ADA violations but voluntarily fixes those violations before the courts become actively involved in the case -- such as through a court-sanctioned settlement, for example -- then the business does not automatically have to pay attorneys' fees to the attorney representing the plaintiff.

That decision should have helped stop abuses of the ADA. But unhappily, it has not. The number of drive-by lawsuits being filed against businesses without any kind of prior notice or warning seems only to have increased. I can only assume that the attorneys filing these lawsuits are betting that a small business that doesn't know its obligations under the ADA sure won't know what the Supreme Court is saying.

Mr. Chairman, no one disputes that ADA access violations exist. They are rampant, despite the fact the ADA has been the law of the land for more than a decade now. But most of the small businesses being sued out of the blue have no idea they are violating the ADA. And most don't need a lawsuit to force them to make simple corrections, like adding parking signs or repainting old ones. A simple notice telling them they are out of compliance and vulnerable to a lawsuit would probably do the trick. And that's all the ADA Notification Act does.

I know there are many Americans with disabilities who have become angry and frustrated at the lack of ADA compliance. I know that. But having a bunch of rogue attorneys using their law to reap attorneys fees does no one any service but the lawyers.

The ADA was intended to ensure equal opportunities and access for Americans with disabilities. It was ***not*** intended as an equal opportunities employment program for lawyers. And I honestly think that if you know of violations and tell businesses about them, you may have far fewer lawsuits but a whole lot more compliance. And that, I think, is what all of us want.

Thank you.

STATEMENT OF

THE HONORABLE RON RICHARD

BOWLING CENTER PROPRIETOR

AND

STATE REPRESENTATIVE FROM MISSOURI

PUBLIC HEARING ON

LITIGATING THE AMERICANS WITH DISABILITIES ACT

US HOUSE OF REPRESENTATIVES

COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON RURAL ENTERPRISE, AGRICULTURE, AND TECHNOLOGY

APRIL 8, 2002

Office of the Honorable Ron Richard (R-129)
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Testimony of Rep. Ron Richard

Good afternoon, Members of the Committee. My name is Ron Richard, and, for 60 years, my family has owned and operated as many as 5 bowling centers in the state of Missouri and Arkansas. Also, I was recently elected to serve as a Representative in the Missouri General Assembly. I am testifying in support of HR 728, the ADA Notification Act, as both a business owner and a lawmaker.

Legitimate businesspeople want to comply with federal and state regulations. In the case of bowling centers, we are in the business of providing hospitality, enjoyment and entertainment to our communities – and want to extend that to all members of our community, including the disabled. I know that many bowling proprietors have already worked to become compliant with the provisions of the ADA. Many who have already completed significant capital improvements to make sure that entrance ways provided the appropriate access, renovated restrooms so that they were compliant and made other adjustments to their bowling centers that would help all customers enjoy their establishment.

However, despite their efforts, bowling centers and other retail businesses have been (in many cases, systematically) targeted for a quick buck. In Florida, one group of lawyers was responsible for over 700 lawsuits against businesses across the state.[1] A website for a local activist group in that state on the lookout for new plaintiffs reads,

> If you use or have used the services of any of the hospitals in your area you could conceivably be a Plaintiff in one of our hospital cases. In addition, you could conceivably be a Plaintiff in any hospital to which you would most likely be taken in case of a 911 call

[1] "Judge Grills Lawyer about 740 Disability Access Suits," *Tampa Tribune*, 23 October 2001.

> (obviously, we would hope that you would never be in need of that kind of emergency care!)
>
> If you shop at any department store or regional or national chain store, or if you frequent fast-food stores, or if you attend movie theaters, if you stay at a hotel or motel, if you like to take cruises, etc., etc., etc., you could conceivably be a Plaintiff. The possibilities are almost endless, as unfortunately, there are so many places which are not obeying the A.D.A. laws and which are therefore creating a variety of inaccessibility problems for lots of people! [2]

In California, a former repeat felon, imprisoned for numerous crimes of robbery and grand theft, has been responsible for hundreds of lawsuits against everything from banks to bowling centers and now wineries, filing what you've heard other speakers refer to as "drive-by" lawsuits against whatever business fits his criteria[3]. Surely, this exploitation was not the intention of the Congress when they passed this groundbreaking legislation 11 years ago.

That said, to many experts, Congress's intentions and the legislation that came out of the debate over giving access to all Americans is very vague, and a lot of the struggles with the act over the last decade certainly prove that point. The ADA is well intended, but not particularly well written. In a recent Supreme Court case on the ADA (in a unanimous decision that concluded employers do not have to hire a person with a disability if they believe that person's health or safety would be put at risk by performing the job)[4], Justice Souter repeatedly expressed confusion over Congress's intent. Other Justices have openly expressed frustration with the confused legislative intent of the ADA[5]. If the most accomplished legal minds in our country have argued that ADA's

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[2] Access Now, Inc. Website, accessed 4 April 2003.

[3] "Active ADA Advocate Files 28 More Suits," *Sacramento Business Journal*, Volume 18, Number 46, 25 January 2002, p. 1.

[4] *Chevron U.S.A. Inc. v. Echazabal 536 U.S. _____ (2002), No. 00-1406.*

[5] "Speaking at a conference of attorneys, Justice Sandra Day O'Connor blamed Congress for the recent rulings limiting the ADA. According to O'onnor, the sponsors of the ADA were 'so eager to get something passed,' they didn't draft the law with proper attention to detail. As a result, O'Connor continued, the

clarity is lacking, should we be surprised that it is so easy to exploit? HR 728 is one very good opportunity that this Congress has to reaffirm the positive aims of the ADA, while putting in some control for its rampant abuses.

I have worked hard to make my businesses compliant. But with the number of agencies a business owner has to consult, not to mention contractors hired to bring a building up to code, it is very common for an owner to think he or she has already done the right thing and still be subjected to a lawsuit. For example, in California, one of my colleagues had been licensed by the lottery commission to sell lottery tickets. One of the criteria for being licensed by the commission was that the location be ADA compliant. Without having reason to believe that he was not complying with the ADA regulations, he wound up being one of the victims of a drive-by lawsuit, without ever having an opportunity to fix what he did not know was "broken." The reality is that very few of these lawsuits are about expanding access for the disabled, but instead are designed to target the business to make the owner pay. In fact in some cases, lawsuits are filed not because the business has not yet installed a ramp but because of a few degree difference in ramp angle. All that HR 728 hopes to accomplish is to allow business people like me and others the opportunity to try to fix a problem before the lawsuit starts.

As a lawmaker, I am proud of Missouri's work to assist the disabled. But despite our efforts, there will still be those individuals who want to use the ADA for personal gain and exploit a law that has good intentions and that has promoted good outcomes. As a lawmaker, I would prefer to enact legislation that would more strongly limit the types of frivolous lawsuits that can be filed. But because this is a federal law that the business

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legislative intent is unclear." *Missouri Employment Law Letter*, Volume 12, Issue 4, M. Lee Smith Publishers & Printers, June 2002.

community is governed by, I can't pass the necessary legislation in my own state. And so I am joining all these other speakers in hoping that you will very seriously consider HR 728 and do all you can to put this into action.

It is also not my hope that the disabled community views ADA notification as an attack on the last 11 years of work to reduce the barriers to integration of the disabled community. In fact, HR 728 does very little to change the ADA. The 90-day notice period will not trigger massive changes to the ADA (although as I previously stated, the current vagueness of the law should probably be considered). By simply giving business owners and operators 90 days notice, the bill asks for only the mildest restrictions on the current application of the ADA. The business community does not really benefit from this bill. Those owners who do not act and do the right thing quickly are still subject to a lawsuit (legitimate or not). In fact, the bill could require that initial complaints could be sent to the Department of Justice's ADA Mediation program instead of allowing litigation to proceed immediately upon the business-owner not complying within the 90-day notice period. The bill could release from liability business owners who have started – but not fully completed – the capital improvements necessary to be compliant within the 90-day period. Given the fact that many improvements can take more than three months to complete, the bill could ask for a six-month notice period. Rep. Foley's proposal most definitely is not designed to prevent the disabled community from seeking redress under the ADA; it simply allows business owners who truly want to offer the right level of access the ability to do so.

The teeth of the lawsuit isn't in the waiting period, but in the limits on awarding attorney's fees to lawyers who are using this law to line their pockets. Section C of the

legislation will help make the ADA less attractive to unscrupulous lawyers while still preserving the real cases of non-compliance to continue. I urge the Subcommittee and Congress to work on passing ADA notification and continue the process of clarifying one of the most important laws in recent history.

Statement of Associated Builders and Contractors

LITIGATING THE AMERICANS WITH DISIBILITIES ACT

Before the
House Committee on Small Business
Subcommittee on Rural Enterprise, Agriculture and Technology
United States House of Representatives

March 8, 2003

Speaking for the Merit Shop

Robert Fleckenstein
Summit Contractors, Inc.
Jacksonville, FL

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Good afternoon, Mr. Chairman and members of the Committee. My name is Robert Fleckenstein and I am the principal of Summit Contractors, Inc., a commercial construction company based in Jacksonville, Florida. On behalf of the Associated Builders and Contractors (ABC), I would like to thank Chairman Graves and members of the Subcommittee on Rural Enterprises, Agriculture and Technology for this opportunity to address ABC's concerns regarding the interpretation of the Americans with Disabilities Act (ADA).

Summit Contractors, founded in 1989, specializes in both commercial and multi-unit residential construction. This gives us the ability to service a versatile client base on a variety of new construction projects that include multi-family, student housing, senior/assisted living facilities, office buildings, distribution and flex space facilities, retail centers, educational facilities, and hotel/resort complexes. We are actively involved in the construction industry and have been a member of ABC's Florida First Coast Chapter since 1991.

ABC, who I am representing today, is a national trade association representing more than 23,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 80 chapters throughout the United States and Guam. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, nondiscrimination based on labor affiliation, and the award of construction contracts to the lowest responsible bidder through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Before I begin my testimony, I think it is important to state that I fully support the objectives of the Americans with Disabilities Act. Americans with disabilities should be provided with accessible buildings and living units. In fact, the additional cost to comply with the ADA is minimal when it is done during initial construction.

For the last 10 years, my firm has specialized in the construction of multi-family, residential units throughout the United States, building an average of 3,500 units per year for developers. We do not build for ourselves – we build for third party owners. We do not perform any design functions and we do not have designers on staff. Instead, site developers provide my company with a design and we build the units according to that plan.

The problem we face, however, is ambiguous statutory language that exposes my company to liability for any elements of the developer-provided design that are not in compliance with the ADA. Section 303(a) of the ADA states that discrimination under the act includes "a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities . . ." (emphasis added). Federal agencies, as well as some courts, have interpreted "design and construct" to mean "design or construct." Under this interpretation, contractors who simply build according to the plan they are provided are liable for the defects in that plan. As a consequence, contractors face the enormous cost of rebuilding units and sites that the owner and his design professionals designed incorrectly. Contractors must also pay the considerable costs associated with defending against lawsuits brought by the Department of Justice.

We disagree with interpretations of the ADA holding or stating that a contractor that does not own or operate the facility, and is not involved in the site design, can be

held liable for violations when the contractor simply constructed the site in accordance with the plans and specifications furnished by the owner and its design professionals. And, we feel that Congress should clearly state that only those parties who have significant control over the design and construction of a site could be held liable for any violations. In our case, this would be the owner of the site that, through its agents, designed and constructed the facility.

To illustrate why my company relies on design professionals and therefore should not be exposed to liability under the ADA, I would like to discuss the design of exterior entrances to multiple buildings. Due to the interdependence of drainage features, water and sewer elevations, manholes, curbs, and required elevations for building floors, it is imperative that all the design requirements for the various systems be coordinated. Part of this coordination involves assuring that the design is in compliance with the ADA, including the ADA's requirements as to slopes and cross slopes. Only qualified engineers can successfully design all these systems. Contractors are not licensed to perform this task, nor are we qualified to verify that an engineer has done his work correctly.

Traditionally, an owner contracts with design professionals to design a project that complies with all applicable building codes, both local and national. Design professionals are educated, trained, and compensated to do this. Owners, building officials, and inspectors all rely on the design professionals to furnish design documents to comply with all applicable codes. Contractors traditionally are not responsible for design. The Contractor's responsibility is to build the project in accordance with the drawings and specifications. Thus, the responsibility of meeting ADA requirements

should be the responsibility of the owner and design professional, just as it is for an engineer to design the electrical, mechanical, and the structural systems of buildings.

The reason this issue is of such concern to me is that my company is now a defendant, along with the developer, owner, architects and engineers, in a lawsuit where it is alleged that two projects, completed in 1994-95, were noncompliant. The government seeks retrofit costs exceeding one million dollars and a victim's compensation fund of $750,000. We have had mediation and are in settlement negotiations now, so I cannot provide details or identify the projects. But, this experience has made me acutely aware of the threat to small business contractors. This threat is significant. If my company is held liable for these violations we may be forced out of business.

I thank you for this opportunity to be here today and I welcome any questions that the committee may have.

Representing, Educating and Promoting the Restaurant/Hospitality Industry

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NATIONAL RESTAURANT ASSOCIATION®

Statement of
Brendan Flanagan
on behalf of the
National Restaurant Association
before the
Subcommittee on Rural Enterprises, Agriculture and Technology
of the
House Small Business Committee
April 8, 2003

Thank you, Mr. Chairman. Chairman Graves and members of the Committee, my name is Brendan Flanagan and I am Director of Legislative Affairs for the National Restaurant Association. The National Restaurant Association is the leading business association for the restaurant industry. Together with the National Restaurant Association Educational Foundation, the Association's mission is to represent, educate, and promote a rapidly growing industry.

Our nation's restaurant industry is the cornerstone of the economy, careers and community involvement. It is comprised of 870,000 restaurant and foodservice outlets employing 11.7 million people around the country. And every one dollar spent in a restaurant creates an additional $2.13 in sales for other industries throughout the economy.

Operating a restaurant can provide many people a great way to earn a good living and to serve the public. With that comes a great deal of responsibility and

rightfully so. A part of that responsibility includes adhering to the Americans With Disabilities Act. This is a responsibility our small business owners take very seriously. For them, it is a matter of fairness, and it also makes good business sense. The disabled should be reasonably accommodated - whether they wish to be served in our business or work in our businesses.

Unfortunately, as with other laws, the ADA has created some unintended consequences. One consequence is that it has created confusion among businesses that must make sure the business is in compliance. The primary difficulty is that parts of the law are vague and open to interpretation. The concern I hear regularly from members is that 'they just want to know what is they are supposed to do, so that they can do it.' The problem, they say, is that, depending on who you ask, you can sometimes get different answers. How tall should my countertops be? How wide should my doorway be? How wide should my handicap parking spaces be? In many cases, it can be difficult for even the ADA consultants, local inspectors and private attorneys to agree.

Today, a small business owner can call two different ADA consultants with a removable barrier question, and conceivably get two different answers. That owner could also pay thousands of dollars to hire a consultant, pay thousands more to make necessary structural compliance changes, and still have a local inspector tell them later that they are not in compliance. In an even more disturbing scenario, they could hire a consultant, make comprehensive changes, and face a

lawsuit because an attorney believes they are not in compliance. In fact, while ADA compliance has been a source of some frustration for many small businesses, it has been a tremendous opportunity for some attorneys.

Another unintended consequence is that some attorneys across a growing number of states are exploiting the ADA for their own personal benefit. Unfortunately, litigation is becoming a first step to resolving accessibility issues. In many cases, a restaurant is first made aware of an alleged ADA violation when they receive notice they are being sued. In some parts of the country, 20-30 businesses in a single town have been sued by the same attorney in the same week. The lawsuits often target small mom and pop businesses that are unaware of the alleged violations. Other suits include businesses that have already gone through considerable expense to comply with ADA. In either case, businesses incur unnecessary legal costs and the courts are unnecessarily burdened.

Litigation does not further the cause of access. Costly lawsuits only divert valuable resources and attention away from finding a solution. A cooperative approach such as Rep. Mark Foley's (R-FL) H.R. 728, the ADA Notification Act, allows business owners to make corrections in their operations, if such corrections are needed, before a lawsuit is filed.

This legislation provides a 90 day window to review the problem and, if necessary, make corrections, before a lawsuit can be filed under the ADA. This helps to

provide a solution beneficial to both business owners and individuals with disabilities.

No one is suggesting that employers should never be sued under the ADA. In some cases lawsuits may be warranted. However, in those cases where a business owner is willing to make appropriate compliance changes, he or she should be provided an opportunity to do so BEFORE being sued. Litigation should not be the first option.

Thank you for the opportunity to speak before you this afternoon.

Litigating the Americans with Disabilities Act

Testimony of
Kevin Maher
American Hotel & Lodging Association

Before the
Subcommittee on Rural Enterprises,
Agriculture, and Technology

The Honorable Sam Graves
Chairman

April 8, 2003

Thank you very much Mr. Chairman, Ranking Member Udall and Committee members. I appreciate the opportunity to testify before your subcommittee this afternoon on an issue of great importance to many of the small businesses that make up the lodging industry. I applaud the leadership of the House Small Business Committee and in particular the Subcommittee on Rural Enterprises, Agriculture and Technology for addressing this important issue.

I am Kevin Maher, vice president of governmental affairs for the American Hotel & Lodging Association.

The American Hotel & Lodging Association (AH&LA), founded in 1910, is a federation of state and local lodging associations, representing the nation's hotel and motel industry. Over 53,000 lodging properties with more than 4.2 million rooms and over 1.9 million employees exist in the United States. Our industry's annual sales exceed $103 billion. AH&LA's membership ranges from the smallest mom-and-pop independent properties to the largest convention hotels. Most significant is that the majority of the 53,000 hotels in this country are small independent properties. There is a high degree of franchising in our industry and many properties with chain identification are also independently owned and operated.

The lodging industry is largely one of small businesses.

- 85 percent of properties in the United States have less than 150 rooms.
- 52 percent of properties have less than 75 rooms.
- 45 percent of properties charge less than $60 a night.
- 21 percent of properties charge less than $45 a night.

For a typical 100-room hotel, with a $79 average rate, a $5 million loan, and a 60 % occupancy rate, the property could expect $1.9 million in revenue. However, once taxes, legal fees, salary and operating expenses are paid, the final profit would be $180,000, to be divided among all investors and reinvestment in the property.

The 12-year-old Americans with Disabilities Act is a good law. AH&LA supports the goals of this landmark civil rights law. The lodging industry is about accommodating the customer and our members have spent millions to comply with the ADA. Our members want and need this significant and growing market. We are not here today to defend or ask for leniency for those operators that willfully ignore their requirement under the ADA. Those lodging operators that have ignored the ADA for 12 years will suffer their self-created fate. We are here for those members that have taken the initiative, yet their noncompliance is inadvertent, technical, and easily remedied.

A few unscrupulous attorneys seeking to wage economic retribution upon businesses using the guise of a well-intentioned civil rights law place our members in a difficult position. Unfortunately, it is not the goal of these few attorneys to improve accessibility for the disabled traveler, but to exact financial punishment through lawsuits. The disproportional costs of these lawsuits fall upon the small business element of the lodging industry. These members cannot afford to litigate and must seek a quick, often costly, resolution to these lawsuits.

This is a problem that continues to spread. Although the vast majority of these drive-by lawsuits have occurred in Florida, California, Hawaii, and Texas, we have seen a number of similar lawsuits filed in states such as North Carolina, Tennessee and Oregon.

It is a significant barrier to compliance with the law that the ADA is a highly detailed, yet highly vague law, unlike other laws and regulations. Our members know, for example, that under OSHA regulations, compressed air cannot be used for cleaning purposes except where the pressure has been reduced to less than 30 pounds per square inch and then only when effective chip-guarding and personal protective equipment is provided. Under the Hotel & Motel Fire Safety Act of 1990, our members know that if they are a five-story hotel and wish to receive federal travelers, they must have hard-wired smoke detectors and be fully sprinkelered. But while these specific legal details are clear and helpful, this clarity is absent from much of the ADA.

Our members have long been frustrated with the inability to get clarity in compliance with the ADA. When a hotel operator wants to open a new property, an architect will be hired, zoning permits will be obtained from the local zoning boards, operating licenses will be obtained from the proper local and state offices. These various boards, commissions and government entities will perform their duties, but at no point will anyone check for compliance with the ADA. There is no entity that will give an ADA certificate informing a business that they comply with this law. This in no way mitigates ones obligations under the law, nor should it. However when our members suffer from numerous drive-by lawsuits focused on the vagaries or easily corrected aspects of the ADA, one is forced to ask what is the goal of the ADA: to litigate or to accommodate?

I hear almost daily from lodging operators that are dealing with these lawsuits. While some of these lawsuits deal with minor and easily corrected violations, often these lawsuits are of incredulous nature. For example, one hotelier told me of a lawsuit against his property that cited improper access to a pool—yet the property did not have a pool. Often I hear of lawsuits that cite violations that the owner knows to have been corrected long before the lawsuit was filed.

Significant issues related to the ADA have been, and will be in the future, considered by courts as high as the United States Supreme Court. Recent cases have dealt with such fundamental issues as: what is a disability? What is an accommodation? And, who can be sued under the ADA? As Federal courts continue to struggle with basic understandings of the ADA, so do our members, and my ability to assist my members. I am particularly worried with the future confusion that will be generated, and likely more litigation

spawned by new and changing ADA regulations to cover recreation facilities, public rights of way, and accessibility guidelines for public accommodation.

This is where H.R. 728, the ADA Notification Act, comes in. Congressman Foley's legislation will help our members work with the disabled community to correct minor violations and improve accessibility for the disabled traveler. In effect, passage of this legislation will tip the balance back to accessibility and back to the disabled traveler.

Mr. Chairman, the details of the ADA Notification have been eloquently outlined by Congressman Mark Foley. It is a simple law. All this law says is that a court will have no jurisdiction in a civil action filed under the ADA *unless: 1)* The plaintiff, before filing the complaint, notifies the defendant of the alleged violation in person or by registered mail at least 90 days before a lawsuit is filed; 2) The notice identifies the specific alleged violation, including its location and the date it occurred, and informs the defendant that a lawsuit may be filed after 90 days; 3) That the lawsuit itself, once filed, states that the defendant, as of the date the lawsuit is filed, has not corrected the alleged violation.

If the conditions are not met, a court has no jurisdiction over the lawsuit even if it is filed. Lawyers who ignore the conditions and file a lawsuit anyway can be subject to court sanctions (such as a written reprimand or fine) and potentially not have their attorneys' fees covered later on, should they subsequently meet the conditions and proceed with the action.

The ADA Notification Act will not help a hotel operator that builds a new 500 room hotel without accessible rooms, properly configured wheelchair ramps, or the proper number of accessible showers. Nor will the ADA Notification Act help an operator that spends $5 million to renovate their property without considering achievable ADA modifications. AH&LA will not offer any explanations for these violations. These operators that ignore, willfully or otherwise, the requirements of the ADA will suffer the consequences. This legislation is not designed to address these major violations.

The ADA Notification Act will focus precious resources where they should be focused: on improving accommodations. Rather than spend time and money on court costs, the hotel operator, with passage of the ADA Notification Act, will spend time and money on correcting these minor violations.

AH&LA believes that passage of the ADA Notification Act will allow our members to more fully participate in a significant and growing market segment.

We know, according to surveys, that 54 million Americans have some disability, approximately 20 percent of the U.S. population, and these numbers are growing. Travelers with disabilities spend $3 billion annually on travel. One recent study from the Open Doors Foundation estimates the potential market for this community could grow as high as $27 billion.

That is a significant market, one the lodging industry cannot afford to ignore. Operators that ignore, or fail to recognize this growing market risk losing out on a lucrative business. One our industry can ill afford to miss out on in the post September 11th economy.

And, I would add, if a lodging operator ignores the disability community, and their obligations under the ADA, they would find themselves in more trouble.

The lodging industry is one of service and accommodation. We pride ourselves in this. We must seize opportunities to employ our resources to expand accessibility to all market segments if we care about our revenues. And we do.

To quote a recent article from the Dallas Morning News: "Vacations are part of the American Dream. But are they a realistic option for people who use wheelchairs, canes or walkers, or for those who can't walk far without being winded? The answer is a qualified yes. Barrier-free travel takes more planning and research, but it is possible."

Mr. Chairman, I would argue that it was the goal of the landmark ADA, for the lodging industry, to increase accessibility. It is in the interest of all parties to work together to achieve accessibility. H.R. 728, the ADA Notification Act will help achieve this.

Again, Mr. Chairman, I thank you for the opportunity to address this issue before your subcommittee today. I would be pleased to answer your questions.

STATEMENT OF STEVEN RATTNER, COLLEGE PARK, MD

Good afternoon, Mr. Chairman and members of the committee. My name is Dr. Steven Rattner. Currently, I am a resident of Potomac, Maryland. I have been deaf since birth. Now I am the president of a dental practice in general dentistry that was started in 1986. Presently, I have thirteen employees and two other dentists working for me. My dental offices are located in College Park and Rockville, Maryland,

I first opened the College Park office in 1986. In 1992, due to the rapid growth of my practice, I decided to renovate my office to meet our needs. In order to do this, I relied on Department of Justice technical assistance guidelines and the ADA Accessibility Guidelines to make appropriate modifications. These services were available to me at no charge. As you are aware, the technical assistance guidance can easily be accessed through the Internet.

I also made several requests to the condominium association to make the common area and lobby accessible. The board of the association finally approved my request and implemented the modifications with minimal cost. These modifications included making the public restroom and the sidewalk ramp accessible to people with disabilities. I am proud that the condominium and my business are complying with the Americans with Disabilities Act.

I have patients with all types of disabilities who are able to come in and use my services, especially because the office is accessible to them. These patients, from wheelchair users to blind and deaf, valued our service with a lot of appreciation.

Compliance with the ADA is not a difficult thing for my business. It is my responsibility to make my business accessible for everyone, and it is the disabled person's right to freely say who to do business with. The cost of modifying my office was minimal. I'm sure you are aware of the Federal tax credit available to businesses that make renovations to meet the requirements of the ADA. The tax credit was a benefit for my business as it is for many others trying to meet the requirements of the ADA.

Adding the notice provision to this law is a threat to my future as a deaf person who may request an interpreter for continuing education in dentistry, as well as for other activities. For instance, several years ago, a large reputable dental software company was offering a class on enhancement of the dental software that my office is currently using. The company denied my request for a sign language interpreter for the class that I signed up for. The company officers were unfamiliar with the ADA. After much discussion, the officers realized that they were wrong and approved my request. However, it was too late to arrange for an interpreter for the course and I had to wait 6 months for

the next session.

Now, if you pass this bill, you will create unnecessary obstacles in my professional development. The companies I depend on for professional opportunities could deny me the services in violation of the ADA, and be completely off the hook if they agree to right their unfair practices within 90 days after I complain. I would then be behind with what is happening in my medical profession, and be uninformed as to the latest developments and, as a result, my business and customers will also be penalized by the ADA Notification Act.

I still take continuing education and seminars. Yet, these days I rarely encounter the ignorance I experienced a few years ago about the ADA and my need for interpreters. I don't see a need for this proposed provision.

I believe that this provision is not needed because the ADA is 13 years old and functionally protecting people with disabilities. Adding this notice - ignorance of the law is no longer an acceptable excuse. In running my business I am required to comply with many laws and regulations; for example, disposal of biological waste, tax codes, license requirements. As a business owner in America, I am expected to operate my business in full compliance with these laws and regulations from the very first day I open my doors to the public.

These laws and regulations do not have a 90-day period to excuse a violator after a business owner has been caught. There is no reason why we should make an exception for the ADA.

Adding this notice provision (H.R. 728 – Foley) would be like opening a can of worms, especially for deaf people who request for sign language interpreters and other necessary services to meet their needs.

In conclusion, the ADA as it now stands is good for businesses, good for customers, and good for a strong economy in America in that it provides the means to carry out Congress and President Bush's promises that the ADA would serve as the "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The ADA Notification Act would be a serious and severe roll back of the Nation's promise.

Thank you.

House Committee on Small Business

"Litigating the Americans with Disabilities Act"

April 8, 2003

Prepared Remarks of Mr. John E. Garber, CSP, President and CEO, Garber and Associates, LLC, Society of Human Resource Management

Mr. Chairman, Ranking Member Ballance, and Committee members, I appreciate the opportunity to appear before the Subcommittee today to discuss the liabilities small businesses face when complying with the American with Disabilities Act (ADA). As a member of the Society for Human Resource Management, I come before you to testify as a small business owner, human resource professional, and consultant specializing in employer risk management and occupational health and safety.

In today's competitive global economy small business owners are challenged to operate more efficiently and effectively than ever. Profit margins are thin and the cost of doing business increases as each insurance renewal date approaches and with each new emerging trend in employment litigation. Business, in general, is experiencing an exponential increase in workplace litigation, an added cost that can in many circumstances financially ruin a small business. One especially gray and troublesome area is compliance with the American with Disabilities Act.

Many companies with safety-sensitive jobs may have various problems with employee alcoholism and drug abuse, a trend recognized in industries across the board. These baffling and frustrating problems seem to yield little to company-sponsored education, surveillance, checks of bodily fluids, offers of assistance and rehabilitation programs. The failure of most companies to manage the risks that workplace drugs and alcohol present raises fundamental questions of whether the strategies being used by companies to combat such abuse are, in fact, effective.

In an effort to effectively and consistently manage the workplace, many employers chose to develop and implement employment policies to address subjects as compensation, benefits, workplace rules and regulations, safety standards, and job performance requirements. Company policies are developed and implemented to comply with a host of federal and state employment laws, including such laws as the Family and Medical Leave Act (FMLA) and the ADA.

As you know, the ADA protects individuals with disabilities from discrimination in the workplace. Under the ADA, a recovering or

rehabilitated drug or alcohol abuser is covered as an individual with a record of impairment, and thus protected; however, the current use of alcohol or illegal drugs is not. Organizations, therefore, can have policies that prohibit the possession of drugs and alcohol in workplace. The ADA also allows the prohibition of on-duty drug or alcohol use, or being under the influence of drugs or alcohol at work. The ADA permits employers to have a substance abuse testing policies, yet such tests are required to use correct testing samples and to be confidential. Pre-employment drug tests are not considered medical tests under the ADA and therefore are viable. Individuals who test positive for drug use can be denied positions, because applicants who test positive for illegal drugs are not covered by the ADA. Moreover, organizations may drug test to determine that an employee is no longer engaging in drug use without violating the ADA.

Hiring practices and policies expose employers to enormous responsibility and liability. Litigation is costly even if the claim unfounded. For small business this exposure can be debilitating and in an effort to avoid excessive litigation fees some small companies opt to forgo pre-employment drug tests and drug screening and thereby operating their business at higher risks of losses.

A recent government study determined that about 12 percent of full-time employees acknowledged either having used an illicit drug or having had five or more drinks at a time five or more times, or both, in the previous month. This illegal drug use and excessive drinking is drug and alcohol abuse. Independent studies have shown that people tend to underreport their illegal drug use by about 50 percent. Analysis of insurance claims by The RAND Corporation found that among employees with company-provided behavioral health care benefits, a mere 0.3 percent of workers filed claims for substance abuse treatment on an annual basis. Assuming a workforce of 1,000 employees and a rate of serious substance abuse of 12 percent, this means that 120 employees should be getting professional help, but only three actually are. Even if the number of employees needing treatment is only a very conservative three percent of the total employee population, only one worker out of 10 is getting appropriate care.

Substance abuse issues raise some interesting concerns especially for small business where fewer employees and smaller budgets are duly burdened. For example, an employer who implements and assumes the cost of a substance abuse program may find itself covering attorney and consultant fees, as well as lab fees for each drug and alcohol test performed. Then there are the indirect costs associated with the time each employee in the substance abuse program takes out of his or her day to report to the clinic to have the sample taken, not to mention the lost productivity. An employer who opts to implement a drug abuse program may also face a variety of lawsuits including claims of discrimination, privacy violations, unreasonable search and seizure, due

process violations, and negligence. Further, an employer could be faced with violations of collective bargaining agreements, as well as possible wrongful termination claims, if an employer takes action against the employee whose drug or alcohol test was positive. The annual combined cost of alcoholism and drug addiction to U.S. businesses is approximately $120 billion, which is more than the productivity loss attributable to heart disease, diabetes and stroke combined.

In some states, a workers' compensation carrier may decline coverage for a work related injury if the results of a drug test from a post accident drug test are positive and it is determined that there is a causal relationship of the drug, or alcohol, to the accident that resulted in the injury. I have one particular client who does not conduct post-accident drug testing for fear that if the employee violated the substance abuse program and as a result they terminate the employee, they would be responsible for the workers' compensation claim. It is often very difficult to close a workers' compensation case once the employee has been terminated, because the employer forfeits its ability to control the costs of the claim under such programs as light duty and early return to work.

Under the ADA, an employer may not inquire about a job applicant's disability or workers' compensation claim history before making a conditional offer of employment. This means that an employer may not exclude an applicant whose employment may cause an increase in workers' compensation premiums and potentially whose workplace actions could cause harm to other employees. Similarly, an employer may not ask and applicant about prior drug or alcohol problems. As discussed before, employers may require drug tests and they may require a medical exam and condition employment on passing the exam, but only if all applicants are required to take the medical exam.

There are some areas where employers can be proactive in trying to hire safe and responsible workers, yet many legal barriers remain. There is much confusion for employers trying to comply with state and federal employment laws; much of which concerns the intersection of various laws and the myriad legal remedies available to disgruntled employees. When an employer attempts to protect one employee's ADA rights, he or she could very well, yet unsuspectingly, be trammeling the rights of another employee inviting various legal claims and opening him or herself to liability.

Mr. Chairman, Committee members, thank you for the opportunity today to share some of my thoughts and opinions. I look forward to working with you to address this issue and would be more than happy to answer any questions you may have.

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Committee on Small Business
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Position Statement: ADA Notification and Litigation

Prepared for U.S. House Hearing:
"Small Businesses and Compliance with the ADA"

April 8, 2003

As Congress and this Subcommittee address the issue of the ADA Notification Act and the burgeoning litigation surrounding the issue, another perspective on this issue is that, while the possibility of amending Title III of the ADA needs to be carefully considered, there are proactive solutions to the access issue that all parties must be aware of and that there is another way.

Small business owners are undoubtedly frustrated with what they perceive a frivolous litigation on the issue of access. They believe that these cases saddle them with costs and obligations they don't believe they can meet. Advocates and people with disabilities are likewise frustrated that, almost 13 years after the passage of the ADA, many small businesses have not become accessible to them nor made any effort whatsoever to do so.

These positions have fueled a maelstrom of litigation, hostility, and mutual disrespect between the business community and the disability community. The effect has been pernicious. Congress wrote Title III of the ADA so as not to unreasonably burden businesses with costs. Yet these cases have done just that. Congress wrote Title III to increase the participation of people with disabilities in all parts of society. Yet these lawsuits have further created a rift between business owners and this community – the exact opposite of the law's intent. Indeed, Title III of the law has disintegrated from a law designed to provide reasonable access into a hypertechnical building code often abused as a litigation tool. While some Title III litigation is undoubtedly justified and appropriate, the drive-by lawsuits and contentious litigation against small businesses often is not. Coupled with the unwillingness of parties such as the Department of Justice to truly define "readily achievable", the situation today is unfortunate.

But there is another option. The original intent of Title III – meaningful inclusion of people with disabilities <u>without</u> imposing excessive costs on businesses must be realized. This means compromise on both sides from the current situation. People with disabilities must realize that "perfect" access with solutions such as permanent ramps, automated doors, and hypertechnical compliance with ADAAG in existing facilities cannot always be met. Likewise, businesses must understand that they <u>do</u> have an obligation to make some accommodation for customers with disabilities and that they cannot ignore this issue until they receive a complaint.

As this committee considers the problems of rampant litigation, a lack of access and the prospect of modification of Title III of the ADA, it is important that businesses, advocates and people with disabilities become aware that there are solutions consistent with the original intent of the law.

I've worked with people with disabilities for 12 years creating relationships and I've worked with businesses for 8 years to solve access issues. I urge everyone to take a step back and realize that solutions must account for both the need for access for America's 60 million people with disabilities but also the very real cost concerns that America's small business community faces.

Respectfully Submitted,

Patrick Hughes
President, Inclusion Solutions
Founder, Natural Ties
1-866-232-5467

April 8, 2003

I am writing to ask you to not support House Bill HR 728, which is being heard on Tuesday April 8, 2003 by the Small Business Committee's Subcommittee on Rural Enterprises, Agriculture, and Technology. I am an attorney who represents individuals with disabilities (many of whom are members of the advocacy group Access Now, Inc.) in approximately ten states in enforcing their civil rights when denied access to public accommodations. It was not my intention to speak out with respect to this bill, however, after some of the comments by Congressman Foley, the bill sponsor, regarding some of my clients, I feel it necessary to share some of my thoughts and experience.

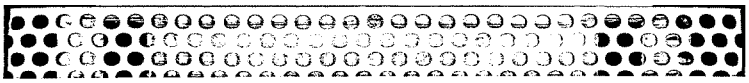
I am the managing partner of the law firm of Schwartz Zweben & Associates, L.L.P.. As a firm, our main and most significant purpose is to defend and enforce the rights of individuals of disabilities. It is our mission statement and it is our passion. We originally started out doing work in the State of Florida, however, have been asked by many individuals with disabilities in many different states to do work in their areas to make their communities more accessible to them. Neither my firm nor Access Now solicits individuals to be Plaintiffs in ADA related cases. My clients, and Access Now's members, come to us unsolicited to ask us to assist them in making their daily lives more livable, and generally only after they have become frustrated and fed up with many years of trying to convince facilities to voluntarily come into compliance with the ADA.

My firm recently began representing an individual in California who is a member of Access Now, Inc. and who was denied access to a number of businesses in Carmel, California due to barriers to access which existed, such as steps into the door. Upon filing lawsuits on this individual's behalf, along with the membership of Access Now, a local paper published a story about the recent litigation. I was astonished to read a quote attributed to Congressman Foley's office. It said:

"But a congressman from Florida, Mark Foley, disagrees. The Miami group backing Tacl, Access Now, has one sole purpose, "to sue and make money," said the congressman's spokesman, Chris Paulitz. "They want money in their pockets . . . that's all they're there for," he said."

My firm has represented Access Now for over six years. Access Now has been at the forefront of some of the most significant and meaningful ADA litigation in the country during that timeframe. Access Now has been successful in requiring certain cruise ship operators to bring each of their ships into compliance with the ADA. They have further successfully brought a number of cases and class action lawsuits against some of the largest hospital and retail chains in the country which has resulted in each and every one of their hospitals and stores being made fully accessible. A number of corporations have voluntarily come to Access Now and asked for their assistance in bringing their facilities into compliance. This does not begin to scrape the surface of the meaningful change which Access Now and its members have brought about for individuals with disabilities. For all of these efforts, Access Now does not receive damages, they do not receive legal fees, they do not receive any proceeds at all. They rely on donations to support their organization.

Access Now seeks damages on behalf of their members, and I on behalf of my clients, less than one percent of the time we are involved in litigation. The individuals who are a part of Access Now are advocates and are enforcing their rights to obtain access, not to make money. I spend all of my time working on a contingency basis for individuals who cannot afford attorney's and who are told by other attorney's around the country that without a retainer and an hourly fee, they will not assist them in enforcing their rights. At the



end of every case, my fees become a point of negotiation, and I always accept less for my time than I could have made by representing my corporate clients. Edward and Phyllis Resnick, the founders of Access Now, Inc. work tirelessly and without pay to assist individuals with disabilities around the country with issues which are brought to them. The Resnicks have found themselves spending 6 days and 80 hours a week in their retirement years working free of charge to help individuals with disabilities live a better life. On only one occasion has Access Now received damages. It was a case where a business owner failed to comply with a Settlement Agreement. Access Now donated its damages to a hospital.

Access Now and my firm have made significant and meaningful strides over the past six years in improving the lives of individuals with disabilities who have sought our assistance. We are committed to accessibility. Litigation is only as expensive as a business owner wants it to be. We seek to bring facilities into compliance as quickly and inexpensively as possible, and only when a Defendant actively litigates a case does it become expensive. The ability to bring litigation to enforce one's civil rights is imperative in order to end the discrimination that so many individuals with disabilities face every day.

I hope that you will consider the foregoing, and understand that there are many other sides to this story than the one Congressman Foley is telling. On behalf of my clients, I urge you to not support this bill.

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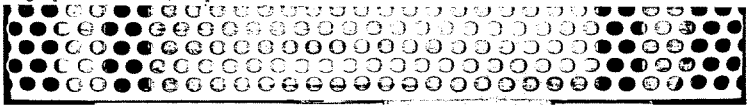

Dear Chairman Graves and Members of the Subcommittee on Rural Enterprise, Agriculture, and Technology of the House of Representatives Small Business Committee:

On Tuesday afternoon (April 8) you are holding a hearing on HR 728, the ADA Notification Act. This is an unneeded bill that will do great harm to the civil rights of people with disabilities. I strongly request that you oppose this bill along with millions of people with disabilities. If this bill was to become law we would see people with disabilities loosing their civil rights granted by Congress in 1990 through the passage of the ADA.

Congressman Foley, the sponsor of this bill, will tell you that small businesses are being abused by money hungry plaintiffs and equally money hungry lawyers. He will tell you that businesses are being sued across the country by people who simply want money. Congressman Foley will tell you that this nationwide problem can only be solved by Congress passing his bill. While there are a handful of lawyers who are abusing the intent of the ADA, there is no nationwide problem and there is no problem of the size that would require an Act of Congress.

This bill was first filed by Congressman Foley more than 3 years ago. It was the result of two lawyers, just two, that angered some business owners in Mr. Foley's district. One lawyer sued the owners of a wheelchair store for not having parking spaces for people with disabilities. This store also lacked an entrance door that people with disabilities using wheelchairs could open independently and it lacked a restroom that was usable by people with disabilities. The owners of this store, both wheelchair users, had made their store accessible to themselves and did not bother to comply with the ADA so that others with disabilities would have equal access to their store. But it makes for good press when you can attack a lawyer for suing the owners of a wheelchair store.

The other lawyer who gave Mr. Foley cause to file this bill is a person who filed over 40 ADA lawsuits in one day. These lawsuits were clearly abusive in that the plaintiff had never been to most of the businesses that were sued. In fact this 12 year old plaintiff sued a liquor store for equal access. While these abusive lawsuits resulted in some media attention, and the filing of the ADA Notification Act, any of the business owners who insisted on the court setting the legal fees found themselves only paying about $500 in plaintiff fees and costs. The lawsuits were abusive, the lawyer lacked ethics, but the violations of the ADA identified in the lawsuits were real. In that context paying $500 in legal fees for violating a federal civil rights law for 8 years is not bad. The lawyer who filed all of those cases has not been active in ADA litigation since he found himself being paid only $500 per case.

This bill was heard before the Constitution Subcommittee of the House Judiciary Committee after Mr. Clint Eastwood joined the battle against the ADA. Mr. Eastwood's hotel, in Carmel California, was sued for ADA violations. He felt abused and picked on resulting in him joining Congressman Foley in wanting to deny people with disabilities our ability to enforce our civil rights. While Mr. Eastwood spoke against the ADA and in favor of Mr. Foley's bill he did not tell the whole story. He did not tell Congress that the high legal fees in his case were due to his absolute refusal to remove architectural barriers, the removal of which is required

under the ADA and under California law. Three years ago I brought with me to Congress the foot and a half high pile of papers that were Mr. Eastwood's pleadings in that case. His pleading and his motions, each of which required a plaintiff response, was the driving force behind the high fees in that case. Had he simply agreed to make his hotel accessible to people with disabilities the legal fees in that case would have been minimal.

Since Mr. Eastwood has made himself the 'poster child' for the movement to weaken the ADA it is worth noting that he has still failed to remove the architectural barriers at his hotel. I have personally been a paying guest at his hotel three times. As of last fall there still were no wheelchair accessible tables in the restaurant, I still could not get to the fitness center, I still could not get to most of the recreational amities on the site, I still could not get safely from my room to the hotel office or restaurant without having to use my car due to the lack of an accessible route. I still could not use the restroom at the restaurant when I had dinner there. How much more notice does a small business need than to be sent two letters before being sued, and then being sued and receiving a long report identifying all of the ADA violations on the property? With more than three years of 'notification' Mr. Eastwood has yet to bring his hotel into compliance with the minimum requirements of the ADA. Instead he tells other business owners to not agree to settle ADA lawsuits.

In the last month or two a number of businesses in Carmel have been sued for violations of the ADA. A local newspaper just quoted Mr. Eastwood telling those business owners to not agree to settle these cases by complying with the ADA. He stated, '"If you do, they'll just go after everybody in town. And they'll be back at your door later." Yet, every store that was sued received notice prior to being sued, as did Mr. Eastwood when he was sued. I was at the side of the plaintiff who was told by an art gallery owner that he should buy a wheelchair that can climb steps, as she had no intention of replacing the step at the front door of the gallery with a ramp. I was at the knife store when the owner said that the 25% slope ramp at his front door had been approved by the city and he did not care what federal law said. I stayed at the hotel were I had to register in the driveway and had to skip breakfast as the office and dinning rooms were inaccessible to me in my wheelchair. The hotel owner told me that I should stay elsewhere when I next visit Carmel.

The lack of ADA compliance throughout Carmel is the perfect example of what happens when businesses believe they are exempt from litigation until they receive notice. No community in America has had as much information about the ADA published in their local newspapers as Carmel. Because of the war that Mr. Eastwood waged over being sued there is no business person in Carmel who is not aware of the ADA and of the requirements of this civil rights law. The years of litigation, and Mr. Eastwood's many public statements, including his testimony before Congress, has left the business owners in Carmel as the best informed and best 'noticed' of any business community in the nation. But all of this information and all of this notice has not resulted in any improved ADA compliance. Instead each business has learned to do nothing about removing barriers that limit the access of people with disabilities until they receive a notice of impending litigation. Mr. Eastwood has convinced them that if they are sued without notice they can win in court. Since he has sold them that bill of goods no voluntary ADA compliance work has been done in Carmel. The businesses of this city have proven that if a lawsuit must be preceded by notice then businesses will continue to violate the ADA until they receive a pre litigation notice.

When many of us were working with Congress on the ADA it was made clear to us that there would be little money going to the Department of Justice to enforce the ADA. Congress therefore made sure that there was an alternate way of enforcing the ADA other than action by D.O.J. The enforcement section of the ADA allows individuals with disabilities to file private lawsuits in federal court to enforce our rights as provided by the ADA. So that such litigation would be about access and not about money Congress did not include any provision for payment of damages to plaintiffs in such cases.

The only time a plaintiff can receive damages from a business for ADA violations is when the U.S. Department of Justice is a party to the case. While Congressman Foley is now often heard stating that ADA lawsuits are all about money for the plaintiffs, the fact is that the ADA does not provide for any payment of damages to plaintiffs in private lawsuits.

Mr. Foley also states that this bill is needed because of all of the lawyers who are abusing businesses by filing lawsuits simply so that the lawyers can get rich off of the legal fees. However, with no damages that can provide a large fee, all the plaintiff lawyers are able to charge is their hourly fee for the hours worked on the case. Lawyers who work for corporations, local and state governments, and for small businesses, all charge an hourly fee for the hours worked, Many of the lawyers defending corporations against ADA lawsuits charge much higher hourly fees than those charged by the ADA plaintiff lawyers. It seems that this bill has been filed from a belief that businesses should not have to pay anything for violating the civil rights of people with disabilities. The ADA was passed almost 13 years ago and required the removal of architectural barriers by the end of July 1992. Now that businesses have been in violation of this civil rights law for almost 11 years you are being asked to save these businesses the legal costs associated with their violations of law and their discrimination against people with disabilities.

If HR 728 becomes law the rights of people with disabilities to equal access will be relegated to the trash heap. As Carmel California has demonstrated, no ADA compliance work would be done until a notice was given. Of course most people with disabilities are not experts on the technical requirements of the ADA Accessibility Guidelines. The fact that a person using a wheelchair cannot get up a ramp at a business entrance does not mean that that person knows and understands the 19 different requirements for the design and construction of ramps. Yet, without specific knowledge of the requirements of the ADA and the technical requirements of the ADA Accessibility Guidelines the individual would not be able to give the notice required by this bill. Unless Congress allocates funds for the mass training of people with disabilities as to their civil rights under the ADA and the technical requirements of the ADA Accessibility Guidelines this bill would end most ADA compliance work.

One very important part of Title III of the ADA is that it does not require a person with a disability to make a futile effort prior to engaging in ADA enforcement through litigation. HR 728 would remove that language from the ADA. That means that if I come to your place of business and find that you do not have a door wide enough for me to get in using my wheelchair I can only address the ADA violation of the too narrow door. If, after I provide ninety days notice to this business, they widen their door then I can try to be a customer there again. However, regardless of whether they widened the door in response to my notice or in response to being sued, if this bill was law, I would have been unable to address any other barriers within the facility. So, if I got inside only to find counters too high for me to use, aisles too narrow for my wheelchair, tables with no wheelchair accessible seating, and restrooms that were not accessible, I would have to start all over again with notice and possibly with litigation. If I entered the business, found that I could not get around, and left, then things like the restrooms would have to wait even longer until the interior barriers were fixed and I could try to be a customer once again, possibly getting as far as the restrooms then.

The removal of the futile effort provisions of Title III of the ADA would make most ADA enforcement almost impossible. By breaking down ADA enforcement to only that which a person directly experiences, can identify as a violation, and provide technical details in a written notice, most architectural barriers will remain as a future burden to individuals with disabilities. An all to true picture will be the business that receives notice from a woman of the restroom being inaccessible resulting in the women's restroom being altered but the men's restroom being untouched until a man with a disability is confronted by the un-removed architectural barriers that prevent him from using the restroom. Equally concerning would

be the inability to sue for ADA violations based on construction drawings. When an arena costing hundreds of millions of dollars was sued for ADA violations before it was built the owner of that facility saved millions of dollars. What was inexpensive to fix in a not yet constructed building would have been extremely costly after the building construction was completed. HR 728 would have forced us to sit back until construction was completed and until we were confronted with the design errors before the violations of the ADA could have been addressed.

The entire concept of giving notice to businesses before people with disabilities can enforce our civil rights flies in the face of our nation's historical posture concerning the enforcement of civil rights. Had the apartment and housing 'testers' utilized by the NAACP been required to give notice before filing litigation we would not have seen the residential integration that has occurred in the last 40 years. If businesses had to be given notice before enforcement action concerning gender discrimination was allowed it is unlikely that we would have seen many improvements concerning equal opportunity and equal pay for women. This bill actually serves to reward those business owners who have ignored the requirements of the ADA for more than a decade.

A small business that needs to do $25,000 in alteration work in order to comply with the ADA might have some difficulty coming up with that money at one time. But that same business could have put aside just $2,500 per year for the first 10 years since the ADA was signed into law. Had that been done then the alteration work could have been completed almost 3 years ago. Does Congress really want to reward the business owner who has ignored this law by providing protection from litigation? Is there really any excuse for a business owner not providing a single parking space usable by people with disabilities or building a simple ramp where there is a step at the front door? This level of accessibility has been required for 11 years there is no excuse. In Florida a notice of ADA compliance responsibility was sent out with the corporate renewals to all corporations in the state. The same notice was included in the occupational license mailings of every county. With all of that notice provided by the State of Florida one would think that most businesses have done their required ADA compliance work. That is not the case. The providing of this notice did not result in any increased voluntary ADA compliance work.

Medium and large businesses would also benefit from HR 728. Mr. Foley says that this bill is to protect small businesses but he has failed to respond to numerous requests to modify this bill so that it only applies to small businesses. As written, this bill would protect from litigation the Fortune 500 company that owns 1,000 facilities and that has done no ADA compliance work over the last 13 years. One such company's CFO clearly stated to me that waiting to be sued before doing ADA compliance work was fiscally sound policy. The money required to do such alteration work was invested with the income yield over the past 13 years being far more than the cost of legal fees for ADA litigation, even if all 1,000 facilities eventually faced litigation. Since the ADA does not provide for damages, and this company is being sued one business location at a time, the CFO concluded that waiting to be sued was a far better business decision than doing the morally right thing and ending discrimination against people with disabilities. This immoral economy of size has not been shared by small and medium size businesses. However, the ADA Notification Act, if it was to become law, would give small and medium size businesses the same ability to profit by not removing architectural barriers. This bill would actually foster continuing discrimination against people with disabilities by the business community.

The damage that would be caused by this bill becoming law goes beyond the removal of architectural barriers. If a person with a disability with a service dog was denied access to a place of public accommodation a 90 day notice would be required before a lawsuit was possible. I am unable to count the number of taxi cab drivers who tell people 'no dogs in my taxi.' No promise of compliance in response to complaints or notice has ever worked in solving this problem. Once a lawsuit is filed and an equal access policy is

incorporated into a settlement or court injunction, then the problem is solved. How will a 90 day notice requirement help a person who is deaf and who is ill when faced with a physician who refuses to provide a sign language interpreter? When I paid $350 to spend a night in a new hotel only to find that the shower in my accessible guest room was unusable by a person using a wheelchair should I really have to wait 90 days to make this hotel comply with the law? With the statute of limitations running out would not the hotel prefer a prompt lawsuit when they have recourse against the architect who made the mistakes rather an a lawsuit being filed after the time for naming the architect as a defendant has expired?

The most committed supporters of this bill are not small businesses but the owners of hotels across America. In 1999 the president of the American Hotel and Motel Association told the World Congress on Travelers with Disabilities that his industry had gone from a 0 to a 3 on a ten point scale as far as hotel accessibility in the 7 years that Title III of the ADA had been in force. His comment was an admission that 70% of his industry was in violation of this civil rights law 7 years after compliance was required. Now, 11 years after compliance is required the primary business supporters of this bill are the members of the American Hotel and Lodging Association (formally the American Hotel and Motel Association). This is the industry that has failed, more than any other industry in America, to make their facilities, goods, and services equally accessible to individuals with disabilities. Two weeks ago I inspected a major branded hotel in a prime beachfront location, a very successful hotel. This hotel had no parking that met the minimum requirements of the ADA, no path of travel to an entrance door that was wheelchair accessible, no front desk or counter that could be used by people who use wheelchairs and not one hotel guest room that was accessible to people with disabilities. The ADA requires that this hotel have no less than 7 guest rooms that are wheelchair accessible. The owners of this hotel are members of the American Hotel and Lodging Association and they support HR 728. These are not small businesses. These are not business owners who do not know of the requirements of the ADA. These are not businesses that cannot afford to remove their architectural barriers. These are simply business owners that have willfully ignored the requirements of a federal civil rights law and are now seeking your protection from the consequences of their behavior.

Mr. Foley and the supporters of his bill will argue that the abuses of businesses by predatory lawyers is so huge a problem that this bill must be passed into law. I can agree with Mr. Foley that some predatory lawyers have abused some businesses. This is a small number of lawyers that do not represent the vast majority of dedicated attorneys who are representing individuals with disabilities facing daily discrimination. There are also predatory personal injury lawyers, predatory divorce lawyers, and predatory medical malpractice lawyers. Each of these lawyers is subject to the Rules of Civil Procedure, to the decisions of judges, and to the ethical standards of the Bar Association. Congress is not typically in the business of policing the conduct of individual lawyers. One judge in the Middle District of Florida became concerned over the billing of one ADA plaintiff lawyer, one of the predators that HR 728 is supposed to stop. The judge ordered the lawyer to bring in his years of billing history in ADA cases. Finding that the lawyer charges over and over for writing the same complaint and for writing the same settlement stipulation the court dramatically reduced the fees being paid to that lawyer. That is how businesses can be protected from predatory lawyers filing lawsuits under the ADA.

A lawyer in South Florida has become known within the community of people with disabilities as caring far more about his fees than about providing equal access through his litigation efforts. This lawyer has a single client with whom he has filed over 100 lawsuits. We, the disability rights advocates, decided to do something about the harm this lawyer is causing. We did not seek a new law or a change to the ADA. We simply used the decision of the Supreme Court of the United States, the Buckhannon decision, to deprive this lawyer of any fees. After this lawyer found himself receiving no fees, not even payment of the court filing fee, he has changed his approach to ADA litigation. In fact, when the Buckhannon decision was handed

down many disability rights advocates and lawyers felt that the problems being addressed in Mr. Foley's ADA Notification Act were resolved.

The Buckhannon decision established that there is no prevailing party in ADA litigation cases until a prevailing party is established through a ruling or decision of the court. Therefore an ADA Title III case where the architectural barriers were removed prior to the court having an opportunity to render a verdict or decision would not have a prevailing party. With the plaintiff not being the prevailing party there is no taxing of plaintiff fees and costs to the defendant. This decision was based on there being no reference to the 'catalyst theory' in the ADA.

Mr. Foley has stated that this bill is to protect small businesses from being sued for not painting the parking space for people with disabilities. If that is what this bill is all about then this bill is not needed. Any small business that simply has to paint a parking space can do so long before any judge would render a decision on an ADA lawsuit. As an ADA defense consultant I have helped small businesses build ramps, add accessible parking spaces, even reconstruct inaccessible restrooms, long before any decision was rendered by the court. In the many defense cases that have taken advantage of the opportunity to perform alterations before the court establishes a prevailing party no plaintiff legal fees or costs have been paid by the defendant. For cases addressing architectural barriers that are easy to remove, which is all that is required by the ADA, small businesses can respond to a lawsuit, fix their violations, and not have to pay any plaintiff fees or costs. Is that not just what HR 728 is supposed to accomplish? It has already been done through the opinion of the Supreme Court of the United States.

Just two months ago a predatory lawyer in Miami, Florida filed an ADA lawsuit against a small photo imaging company. The case was a classic set-up where a person using a wheelchair, who had never been a customer of this business and did not have the kind of business that would utilize their services, came to their inaccessible front door seeking entry. Of course the employees helped this person in and then told him that they do not do developing of film for individuals. That less than 5 minute encounter was simply so that the person could state that he had faced discrimination due to the step at the front door of this business. At this time there is no step at the front door. A new ramp has been constructed. This ramp should have been built 11 years ago and I offer no excuses for my client's violation of the ADA. However, since there are no longer any ADA violations at this place of business the ADA lawsuit will be dismissed with no prevailing party established by the court. My client will not pay one cent in plaintiff legal fees or costs. The plaintiff lawyer is out of pocket for his filing fees, whatever amount he paid to his consultant to identify the barriers at this facility under the requirements of Rule 11 of the court's Rules of Civil Procedure, the time the lawyer spent on this case, and the time the lawyer will spend attending the hearing on the defense's motion for summary judgment. If the goal is to stop predatory lawyers from taking advantage of small businesses then this is the way to do it. All HR 728 does is prevent people with disabilities from enforcing their civil rights under the ADA. The effective use of the Buckhannon decision does not block people with disabilities. Instead this method of responding to ADA lawsuits keeps predatory lawyers from earning any money or even recovering their costs while allowing them to work as hard as they want on behalf of individuals with disabilities.

Three years ago I told the members of the House Judiciary Committee that a problem with how lawyers are using the courts should be addressed by the courts and not by Congress. The Supreme Court of the United States has done just that. Any small business willing to make their facility accessible to people with disabilities in the face of an ADA lawsuit can do so and not have to pay any money to the plaintiff or the plaintiff's lawyers. If Mr. Eastwood decides to not follow the advice he has given to other business owners in Carmel and decided to make his hotel accessible then he will be able to save the hundreds of thousands of dollars he paid to the plaintiff lawyer in the prior ADA lawsuit when he is sued again for his failure to

remove architectural barriers at his hotel. It does not require an act of Congress to spare Mr. Eastwood this expense. It simply requires that Mr. Eastwood finally agree to comply with the minimum requirements of Title III of the ADA and with the minimum requirements of California Title 24.

Having been declined the opportunity to testify before you at the Subcommittee hearing on this bill I hope that you have been able to take the time to read what I would have said. I also hope that after reading these comments you will vote against HR 728

Sincerely yours,

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