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Legal Sidebar

"Tester" Lawsuits Under the Americans with Disabilities Act

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This term, the Supreme Court granted review in *Acheson Hotels, LLC v. Laufer*, a case asking whether "testers" (people who seek to identify legal violations but do not necessarily intend to patronize the business they are investigating) have standing to enforce a disability law regulation. On December 5, 2023, the Supreme Court issued an opinion dismissing the case as moot. Deborah Laufer sued a hotel in Maine for its failure to provide information about accessible hotel rooms on its website. Laufer argued that the hotel violated a regulation, the "Reservation Rule," enforcing the Americans with Disabilities Act (ADA). Laufer never intended to book a hotel room in Maine, and she sued hundreds of hotels for similar violations. Eventually, she singlehandedly generated a circuit split on whether someone who never plans to make a reservation has standing to enforce the Reservation Rule. The Supreme Court granted certiorari to resolve this issue, but because the Court dismissed the case as moot after Laufer withdrew her claims, the underlying legal question that triggered the circuit split remains unresolved.

Beyond the specific question presented in *Laufer*, the case highlights issues of continuing salience under the ADA as a whole, including who has standing to sue, the role of private litigants in enforcement, and the potential for misconduct in high-volume litigation. This Sidebar reviews the case, briefly discusses these broader issues, and identifies potential considerations for Congress.

The Americans with Disabilities Act and the "Reservation Rule"

The ADA requires businesses, nonprofits, and state and local governments to accommodate people with disabilities. The statute covers three major areas of public life: employment (Title I), public services by state and local governments (Title II), and public accommodations by businesses and nonprofits open to the public (Title III). Businesses open to the public must generally make reasonable changes in policies or procedures (such as allowing service animals inside) or modifications in the built environment (such as providing wheelchair ramps). Architectural barriers must be removed when access is "readily achievable." In addition, the ADA requires that new buildings be designed and constructed to meet accessibility standards. People denied access can bring lawsuits against covered entities. For public accommodations, private litigants may seek attorney's fees and injunctive relief (that is, changes to make a business accessible) but may not recover damages.

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To bring a lawsuit, a plaintiff must show standing, that is, an actual harm to the plaintiff that the court can fix. Since in an ADA Title III case a court can only protect a plaintiff from future harm (by ordering injunctive relief), litigants must show a likely impending injury, not only a past injury, to have standing. Often they do so by presenting evidence that they plan to return to the business and will likely face barriers there.

In *Acheson Hotels v. Laufer*, Laufer sued to enforce an ADA regulation, known as the "Reservation Rule," 28 C.F.R. § 36.302(e), requiring all hotels to provide accessibility information in connection with reservations. For example, hotels must post information about their accessibility on their reservation websites. The rule seeks to ensure that people with disabilities can shop for hotels and avoid reserving a room only to find, upon arrival, that they cannot use it or other features of the hotel. Although Laufer did not actually intend to book hotel rooms and was only visiting hotel websites to test compliance with the Reservation Rule, she argued that her plans to return to the *websites* gave her standing to enforce the rule.

Laufer's standing argument generated a circuit split. The Second, Fifth, and Tenth Circuits concluded that the Reservation Rule does not give rise to standing for website viewers who have no intention of shopping for hotel reservations. The U.S. Solicitor General, arguing as amicus before the Supreme Court, also took this position. The First, Fourth, and Eleventh Circuits, on the other hand, held that some litigants do have standing in such circumstances. At Laufer's request, the Supreme Court vacated the underlying First Circuit ruling. The Eleventh Circuit also vacated its opinion, after Laufer informed the court that the corporate defendant had been dissolved before that court's decision, rendering the case moot. Laufer dismissed her case in the Fourth Circuit, but the appellate opinion was not vacated. The circuit split remains unresolved.

ADA Standing, "Private Attorneys General," and "Testers"

Many civil rights statutes rely on some degree of private enforcement—in the Supreme Court's words, such statutes employ individuals as "'private attorney[s] general' [in] vindicating a policy that Congress considered to be of the highest priority." The ADA's Title III relies heavily on this feature. Laws governing certain other forms of discrimination, such as employment discrimination (enforced by the Equal Employment Opportunity Commission) and housing discrimination (enforced by the Department of Housing and Urban Development), create a robust role for administrative enforcement. In some cases they require every potential litigant to first file a complaint with an administrative agency, which the agency must investigate, before going to court.

Under Title III of the ADA, on the other hand, the U.S. Department of Justice (DOJ) takes complaints but does not investigate all of them. It may file suit only in cases raising a "pattern or practice" of discrimination or an "issue of general public importance." Title III is therefore enforced almost entirely by private litigants. As one district court observed, "Congress did not . . . create any sort of administrative process to ensure compliance with the ADA's public accommodation provisions."

Some plaintiffs, including Laufer, are "testers," that is, people who seek to identify violations but do not necessarily intend to patronize the business they are investigating. Focusing on the Reservation Rule, for instance, Laufer visited hotels' reservation websites looking for room accessibility information. Some testers file large numbers of cases. Laufer brought suit against hundreds of businesses she never patronized.

Reservation Rule testers like Laufer may be outliers, however. As a practical matter, ADA testers seeking to uncover *physical* accessibility barriers typically operate on a smaller scale, because generally they must show that they would visit the businesses they are testing, were they accessible. The standing issue Laufer raised under the Reservation Rule is unique in that she claimed that her intention to visit the hotel's website afforded standing, even if she had no intention of visiting the hotel. Outside of Reservation Rule cases like hers, general ADA standing for testers who visit local businesses has broader acceptance. For

example, the United States, as amicus in *Acheson Hotels*, argued that Laufer did not have standing, but declared that "private suits—including suits by testers—are an essential complement to the federal government's enforcement of Title III." Laufer's case nevertheless highlights the potential for private ADA suits by "serial plaintiffs," which have been a source of controversy over the years.

Some argue (as did several amici in *Acheson Hotels*) that testers play a necessary role in ADA enforcement. Commentators and judges in this camp contend that standing doctrine should not restrict testers because other patrons likely will not enforce the ADA. One cannot "expect[] every disabled person to use whatever spare time and energy they have to litigate each trip to the movies," as one observer put it. Many people with disabilities will simply move on to the next business if they find one inaccessible, leaving accessibility violations unresolved. If some plaintiffs file numerous suits, these advocates posit, it is because there are many outstanding ADA violations and the ADA is "widely under-enforced." Advocates also emphasize that violations are often easy to fix. For example, Acheson Hotels added information to its website that it had no accessible rooms.

Some make textual arguments to support standing for testers, at least under the ADA generally. Courts recognizing tester standing have observed that the ADA addresses the rights of "persons" and "individuals," rather than using terms like "patrons," "clients," or "customers." Accordingly, especially outside of Reservation Rule cases like Laufer's, courts have generally ruled that "so-called 'professional plaintiffs,' 'paid testers,' or 'serial litigants' can have tester standing to sue for Title III violations because a plaintiff's motive for going to a place of public accommodation is irrelevant to standing."

"Testers" work in other areas of antidiscrimination law, too. For example, the Supreme Court has recognized that a tester who is falsely told, because of her race, that an apartment is unavailable may bring suit under the Fair Housing Act. It does not matter if the tester does not actually seek to rent the apartment.

Yet some see ADA "tester" lawsuits like Laufer's as disingenuous or wasteful. As one judge opined in an Eleventh Circuit dissent, ADA testing, unlike testing aimed to root out unseen, discriminatory decisionmaking, identifies "shortcomings which are physically manifest for all who would see." Many point to the volume of ADA lawsuits as evidence of a problem.

Some have also raised concerns that serial litigants can seek out-of-court settlements without requiring accessibility fixes. When this happens, litigants are no longer helping enhance ADA compliance. The volume of disability suits may not be a product solely of federal law. Some state laws allow for damages federal law withholds, and these jurisdictions typically see higher volumes of disability suits, in which litigants combine ADA and state law claims.

Justice Thomas, in particular, has voiced concerns about private ADA enforcement. In his view, private parties lack the "enforcement discretion properly reserved" to government officials and have "none of the corresponding accountability." As he sees it, a system where private plaintiffs can settle cases if a defendant "pays up" results in financial penalties "far beyond the role that Congress envisioned for private plaintiffs under the ADA."

Serial Litigants and Litigation Abuses

Filing many "tester" lawsuits does not mean a litigant has acted unethically or that his or her suits lack merit. As the Ninth Circuit has held, "district courts cannot use the doctrine of standing to keep meritorious ADA cases out of federal courts simply because they are brought by serial litigants." Nevertheless, some litigants, including some high-volume litigants or their lawyers, may engage in abuses such as frivolous filings, misrepresentations, fraud, client neglect, or causing unnecessary litigation expense. The *Acheson Hotels* case provides an illustration. While the case was pending before the Supreme Court, Maryland suspended one of Laufer's lawyers in another case for defrauding hotels by

lying in fee petitions and during settlement negotiations. He reportedly demanded $10,000 in attorney's fees for multiple cases using "boilerplate complaints." The lawyer also faced accusations of failing to communicate with clients. These revelations prompted Laufer to dismiss her pending suits and seek dismissal before the Supreme Court.

Courts address abuses in various ways. A repeat plaintiff runs the risk of being declared a "vexatious litigant." Even courts that recognize the value of tester litigants acknowledge that "serial litigation can become vexatious" if it involves "factual allegations that are contrived, exaggerated, and defy common sense." This discretionary, court-imposed status, given to those who file repeated, frivolous claims, can bar a litigant from filing new claims absent court permission.

There are additional consequences for attorneys, too. An attorney who files abusive lawsuits seeking fees well beyond the time that could have been expended, or who does not adequately represent a plaintiff's interests, can face discipline from a judge or the bar. Courts can also address excessive billing in their fee awards by awarding only amounts the court finds reasonable.

Considerations for Congress

With respect to the legal issues raised in the *Acheson Hotels* case itself, Congress may consider amending the ADA or direct implementing agencies to amend regulations like the Reservation Rule. Congress could, if it chose, specify ADA requirements for hotel reservation systems.

Congress may also act more broadly to change ADA enforcement. In recent years, there have been several proposals to limit ADA Title III private enforcement. One strategy would require that a plaintiff notify a noncompliant business and allow them a grace period to remedy accessibility issues before filing suit. Proposals include the ACCESS Act, H.R. 241, from the 118th Congress, and the ADA Lawsuit Clarification Act of 2017, H.R. 1493, from the 115th Congress. Other proposals have included placing limits on attorney's fees or requiring DOJ to review claims before suit. Congress could also limit the enforceability of settlements that end a case without requiring accessibility compliance. Judicial reforms might include standardizing courts' use of a vexatious litigant designation.

Reforms could impact ADA enforcement broadly or only in certain factual scenarios. Congress may take into account concerns that notice requirements or other measures could undermine enforcement and compliance. For example, Congress could require additional steps before litigants sue small businesses, or it could designate some ADA violations as minor and limit suits over these violations. Congress could create a system for voluntary ADA compliance certification combined with litigation limits, such as a notice period or fee cap available to certified businesses.

Constitutional constraints limit Congress's ability to grant plaintiffs ADA standing. All litigants must show a concrete, redressable injury for access to court. That said, Congress could also approach disability accessibility from a compliance, rather than enforcement, perspective. It could, for example, consider expanding tax benefits for accessibility upgrades or increasing mediation services and technical support (advising on compliance) that DOJ currently offers.

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