

5-1-2013

The Americans with Disabilities Act: Who Pays for Loopholes in the ADA? A Look at the Responsibility of Successive Owners for Properties Built in Violation of the ADA

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**THE AMERICANS WITH DISABILITIES ACT: WHO PAYS
FOR LOOPHOLES IN THE ADA? A LOOK AT THE
RESPONSIBILITY OF SUCCESSIVE OWNERS FOR
PROPERTIES BUILT IN VIOLATION OF THE ADA**

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I. INTRODUCTION

“Future historians will come to view the Americans with Disabilities Act of 1990 as one of the most formative pieces of American social policy legislation in the 20th century.”¹

Imagine that Jack, a man using a wheelchair, is elated to be on a first date with Jill. His excitement quickly fades upon arriving at the movies, however, when he discovers the movie theater has no accessible seating. Because Jill starts to look uncomfortable, Jack attempts to keep things running smoothly and parks his wheelchair in the aisle. His wheelchair partially blocks the aisle, however, and people make rude comments as they struggle to get around him. Jack excuses himself to gain composure and to use the restroom. He discovers that the bathroom stalls are too small for his wheelchair and he cannot physically get to the toilets. Dejected, humiliated and soaked in urine, he returns to Jill wondering how to tell her about his predicament.

This is a modern movie theater built within the last decade. The theater should be wheelchair accessible, but it is not. Jack does not care about recovering money for this incident but since this is his neighborhood movie theater he wants to be able to visit it in the future and know that he will have full access to the facilities. After consulting with an attorney, to his dismay Jack learns that even though the theater was built in clear violation of the Americans with Disabilities Act² (“the ADA”), he may be out of luck because it was the previous owners who built it. In other words, despite the existence

1. JONATHAN M. YOUNG, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (National Council on Disability 1997) (quoting a joint statement in a forward by the National Council on Disability and the National Rehabilitation Hospital Research Center).

2. 42 U.S.C. § 12101 (2006).

of a blatant violation³ that continues to cause harm, courts' treatment of ambiguous phrasing in the text of the ADA may deny Jack the ability to seek a correction.

Under Title III of the ADA, two separate standards apply to a public accommodation⁴ based on when it was constructed or altered.⁵ The ADA lists out specific private entities affecting commerce that it considers public accommodations, such as hotels, restaurants, and movie theaters.⁶ A facility built or altered (remodeled or changed) before January 26, 1993 need only meet the "readily achievable" standards.⁷ The readily achievable standards require alterations which are "easily accomplishable and able to be carried out without much difficulty or expense."⁸ Facilities built or altered after January 26, 1993 must comply with "new construction" standards.⁹ New construction standards are stricter and involve complex and detailed specifications depending on the type of building.¹⁰ However, the statutory language is unclear about who can be held liable for new construction violations. Due to this lack of clarity, courts grapple with the interplay between section 12182 (general rule) and section 12183 (new construction), often concluding that the language is clear, and permitting buildings to remain noncompliant.¹¹ This judicially created

3. U.S. Dept. of Justice 2010 ADA Standards for Accessible Design, §§ 213 (public restrooms), 221 (movie theater), *available at* <http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf>.

4. This comment does not address the different opinions on how new construction discrimination applies to public accommodations versus commercial facilities. For an example, *see* *Lonberg v. Sanborn Theater, Inc.*, 259 F.3d 1029, 1033-1036 (9th Cir. 2001). For purposes of this comment the reader may assume that the term "public accommodation" encompasses commercial facilities. For definitions *see* 42 U.S.C. §§ 12181(2), (7) (2006); 28 C.F.R. § 36.104 (2012).

5. *See* 42 U.S.C. §§ 12182(b)(2)(A)(iv); 12183(a)(1) (2006).

6. 42 U.S.C. § 12181(7) (2006).

7. 42 U.S.C. § 12182(b)(2)(A)(iv) (2006).

8. 42 U.S.C. § 12181(9) (2006).

9. *See* 42 U.S.C. § 12183(a)(1) (2006); 28 C.F.R. § 36.406(a) (2011).

10. 28 C.F.R. § 36.406(a) (2011).

11. *See* *Lonberg v. Sanborn Theaters, Inc.*, 271 F.3d 953, 954 No. 99-56221 (9th Cir. 2001); *Laird v. Redwood Trust, LLC.*, 392 F.3d 661, 664 (4th Cir. 2004); *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-01115-CRB, 2011 WL 6141015, at *6 (N.D. Cal. Dec. 9, 2011) (order granting defendant's

loophole effectively allows both builders and purchasers to escape liability for inaccessible, discriminatory public facilities.

This loophole acts in derogation of the ADA's purpose, and is neither justified nor mandated by rules of statutory construction.¹² A public accommodation built in violation of the new construction standards must be brought into compliance.¹³ The Ninth Circuit held that the ADA must be "construed broadly" in order to effectuate its purpose, which is to prevent discrimination against the disabled.¹⁴ Where a term is ambiguous, a court must look to legislative intent and defer to the administrative agency Congress has charged with implementing the law.¹⁵ A conclusion that the new construction section is "clear on its face" is questionable, given the current rigorous debate amongst courts over the section's interpretation and the fact that these interpretations are avoiding the new construction standard entirely.¹⁶ Even where a statute is "clear on its face," if it leads to a result that is contrary to the statute's purpose, that interpretation should not be adopted.¹⁷ While interpretation of the ADA is confusing, its purpose, to eliminate discrimination against the disabled, could not be clearer.¹⁸ Judicial decisions finding no one liable for new construction violations run afoul of that purpose.

When a facility is built in violation of the new construction standards, and is subsequently sold, by continuing to offer a public

partial summary judgment and denying plaintiffs' motions for partial summary judgment).

12. See 42 U.S.C. § 12101(b) (2006) for the purpose of the ADA. See discussion *infra* Part III.B.2. for support for the statutory construction assertion.

13. See 28 C.F.R. § 36.101; 28 C.F.R. § 36.406(a)(5) (explanation of noncompliant "new construction"); 28 C.F.R. pt. 36, app. (stating that "new construction" can simultaneously be an "existing facility" but this does not "relieve the public accommodation of its obligations under the new construction requirements.").

14. *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002).

15. See *generally* *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000); *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

16. See *generally* *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011); *Lema v. Carson Hotel, LLC*, No. CV-10-07816 (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

17. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989).

18. 42 U.S.C. § 12101(b)(1) (2006).

accommodation not in compliance with the ADA, the new owner is discriminating against its disabled patrons. Thus, a current owner¹⁹ should be held liable for the noncompliant building he now owns, despite the fact that he was not involved in its design or construction. The current owner is the best-situated, and perhaps the only person, who can make changes to the non-compliant building.

The ADA, an essential and well-intentioned law, needs a band-aid. Recent court decisions have failed to impose “equal access” responsibility on current—as opposed to original—building owners and builders.²⁰ This judicially created loophole injures and weakens the ADA. This Comment analyzes how courts have come to that conclusion, examines the moral injustice the judicial loophole creates, and proposes a remedy for this problem.

Part II briefly summarizes the relevant sections of the ADA and the tools used for its interpretation. Part III discusses the problem in depth, exploring different reasons for the loophole. Part IV asserts that successive property owners can and should be held liable for the noncompliant facilities they purchase by proposing legislative action to make section 12183 explicit about who can be held liable for new construction violations, coupled with a defense for innocent purchasers. Absent legislative action, this Comment asserts that section 12183 is ambiguous and calls for proper judicial deference to congressional intent and the Department of Justice (“the DOJ”), as well as better front-end enforcement to minimize litigation. Part V concludes with a summary of the law, problems, and solutions.

19. 42 U.S.C. § 12182(a) (2006). This statute includes owners, operators, lessors and lessees. *Id.* This comment focuses on current owners, but does not necessarily exclude operators, lessors and lessees. Thus, when the author refers to “owners” it encompasses operators, lessors and lessees as well.

20. *See Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-0115-CRB, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011) (order granting defendant’s partial summary judgment and denying plaintiffs’ motions for partial summary judgment); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) (C.D. Cal. June 19, 2012) (order granting partial summary judgment); *Rodriguez v. Investco, LLC*, 305 F.Supp.2d 1278, 1283 (M.D. Fla. Feb. 24, 2004).

II. EXPLANATION OF THE LAW

A. *Statutory Provisions for Title III of the ADA*

In passing the ADA, Congress noted that the isolation and segregation of persons with disabilities due to the discriminatory effects of physical barriers are a “serious and pervasive social problem,” and there has been very little “legal recourse to redress such discrimination.”²¹ The ADA lists several purposes, one of which is “to provide clear, strong, consistent enforceable standards” as part of a mandate to eliminate such discrimination.²² The ADA is modeled after section 504 of the Rehabilitation Act of 1973.²³ A key difference is that while the Rehabilitation Act requires facilities that received federal funding to be accessible to persons with disabilities,²⁴ Title III of the ADA applies to places of public accommodation specified by the ADA, regardless of the receipt of federal funding.²⁵

The new construction’s “readily accessible” standard is met if the new construction or alteration is done in compliance with either the 1991 or the 2010 ADA Standards for Accessible Design.²⁶ These standards include detailed, lengthy and technical specifications.²⁷ In contrast, the “readily achievable” standard for existing facilities is met by making alterations that are “easily accomplishable and able to be carried out without much difficulty or expense.”²⁸

21. 42 U.S.C. § 12101(a) (2006).

22. 42 U.S.C. § 12101(b)(1) (2006).

23. *Compare* 42 U.S.C. § 12201(a) (2006 & Supp. II 2009) *with* U.S. Dep’t. of Justice, A Guide to Disability Rights Laws, 11-12 (2009), *available at* <http://www.ada.gov/cguide.htm>.

24. 45 C.F.R. § 84.1 (1973).

25. 42 U.S.C. § 12181(7) (2006).

26. 28 C.F.R. § 36.406(a) (2011).

27. 28 C.F.R. Pt. 36, App. D (2011) (1991 Standards for Accessible Design as Originally Published on July 26, 1991).

28. 42 U.S.C. § 12181(9) (2006).

B. Advisory and Technical Assistance Materials

After its passage, Congress charged the DOJ with implementing the ADA.²⁹ One of the DOJ's ongoing tasks, in partnership with the Federal Access Board, is to create regulations to provide guidance for the enforcement of the ADA.³⁰ Congress created the Federal Access Board in 1973 to ensure access to federally funded buildings, and it has become a "leading source of information on accessible design."³¹ The DOJ codifies the resulting regulations in the Code of Federal Regulations, and the appendices of that code further explain the regulations.³² In 1991, the Federal Access Board created the ADA Accessibility Guidelines ("the ADAAG").³³ The ADAAG were purely advisory to the DOJ and addressed new construction standards.³⁴ The DOJ then sought public comment on the ADAAG, made applicable changes based on those comments, and finally adopted and codified the ADAAG as the official standards for the ADA.³⁵ In 2010, the DOJ released a revised version, which became effective March 15, 2012 and extended the regulations to previously uncovered areas.³⁶

29. 42 U.S.C. §12206(a)(1) (2006).

30. 42 U.S.C. §12206(b) (2006).

31. U.S. ACCESS BOARD, <http://www.access-board.gov/about.htm> (last visited Feb. 4, 2013).

32. See 28 C.F.R. § 36.101 (2011) for an example of a codified regulation; 28 C.F.R. Pt. 36, App. A (2011) for an example of the appendix.

33. U.S. ACCESS BOARD, <http://www.access-board.gov/adaag/html/intro>; U.S. ACCESS BOARD, <http://access-board.gov/ada> (last visited Feb. 4, 2013).

34. U.S. ACCESS BOARD, <http://www.access-board.gov/ada> (last visited Feb. 4, 2013).

35. For example of seeking public commentary, see U.S. Dep't. of Justice, Advanced Notice of Proposed Rulemaking, AG Order No. 2736-2004 (2005) <http://www.ada.gov/archive/anprm04.htm>; for codified standards see 28 C.F.R. pt. 36, app. D (2011); The Access Board's version was called "ADAAG," and when the DOJ codified the ADAAG they were considered, "Standards," despite any continued reference to the ADAAG today. U.S. ACCESS BOARD, <http://www.access-board.gov/ada> (last visited Feb. 4, 2013).

36. U.S. Dep't. of Justice, 2010 ADA Standards for Accessible Design, 1, 1 (2010), http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards_prt.pdf.

The Technical Assistance Manual to Title III of the ADA exists “to assist individuals and entities in understanding their rights and duties under the [ADA].”³⁷ It requires: “All newly constructed places of public accommodation and commercial facilities must be readily accessible to and usable by individuals with disabilities to the extent that it is not structurally impracticable. . . . This means that facilities must be built in strict compliance with the [ADAAG].”³⁸ The manual explains that the “readily achievable” standard for existing facilities is a “lower” and “less demanding” standard than the standards for new construction or alteration, and specifies that there is no cost defense to the new construction requirements.³⁹

C. Explanation of ADA through Case Law

Courts have upheld the “two distinct systems for regulating building accessibility: one to apply to existing facilities (those designed and constructed for occupancy before January 26, 1993) and another to apply to later-constructed facilities.”⁴⁰ Pre-existing or “grandfathered facilities” only need remove easily removed barriers.⁴¹ In contrast to grandfathered facilities, new construction violations are indefensible, unless there is a structural impracticability.⁴² A structural impracticability exists when “unique characteristics . . . make accessibility unusually difficult to achieve.”⁴³ Apart from structural impracticability, courts have no authority to apply equitable discretion in excusing the violation.⁴⁴

It is easy to find further judicial support of the basic procedures under advisory and technical assistance materials. For instance, in the

37. U.S. Dep’t. of Justice, ADA Title III Technical Assistance Manual (1993), <http://www.ada.gov/taman3.html> (last visited Oct. 27, 2012).

38. U.S. Dep’t. of Justice, ADA Title III Technical Assistance Manual III-5.1000 (1993) at <http://www.ada.gov/taman3.html> (last visited Oct. 27, 2012).

39. U.S. Dep’t. of Justice, ADA Title III Technical Assistance Manual III-4.4200 (1993) at <http://www.ada.gov/taman3.html> (last visited Oct. 27, 2012).

40. *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001) (citing 42 U.S.C. §§ 12183(a)(1), 12182(b)(2)(A)(iv)(2006)).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

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case of newly constructed facilities, compliance with the ADA's antidiscrimination mandate requires that facilities be constructed in conformity with the ADAAG, which “. . . [l]ay out the technical structural requirements of places of public accommodation.”⁴⁵ In contrast, “[T]he ADA requires existing facilities to remove barriers to access so long as removal is readily achievable, regardless of whether the facility has been altered.”⁴⁶ This lower standard “. . . [w]as specifically drafted to protect existing businesses from undue hardship.”⁴⁷

Overall, statutes, advisory and technical assistance materials, and case law work as a team to contribute to a cohesive understanding of the ADA. When the team stops working together, confusion and injustice replace the hopes voiced by President George H.W. Bush, “[E]very man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom.”⁴⁸

III. CURRENT TREATMENT OF THE ISSUE

Unfortunately, the judicial system's current treatment of the issue is leading to discriminatory results.⁴⁹ While few cases directly address successor liability for new construction defects, several

45. *Chapman v. Pier 1 Imp. (U.S.) Inc.*, 631 F.3d 939, 945 (9th Cir. 2011).

46. *Californians for Disability Rights v. Mervyn's LLC*, 165 Cal. App. 4th 571, 586 (2008).

47. *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 588 (S.D. Cal. 1993).

48. Remarks on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC., 1162, 1163 (July 26, 1990).

49. See *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-0115-CRB, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011) (order granting defendant's partial summary judgment and denying plaintiffs' motions for partial summary judgment); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) (C.D. Cal. June 19, 2012) (order granting partial summary judgment); *Rodriguez v. Investco, LLC*, 305 F.Supp.2d 1278 (M.D. Fla. 2004). (In each of these cases, the Court found that the current owner of the public accommodation in question was not liable for the current and ongoing violation of “new construction” standards, despite owning and offering such a facility to the public. Thus, discrimination was allowed to exist and continue in the form of “new construction” violations.)

interpret sections 12182 and 12183 in different contexts.⁵⁰ When decisions from these different contexts are applied to successor liability, unjust results occur.⁵¹ Where the issue has been directly litigated, courts have concluded the statutory language is plain and have declined to look at congressional intent.⁵² In addition, the application of different canons of statutory construction with no uniform method leads to confusion because states across the nation are using different approaches to interpret a federal statute.⁵³ Lastly, rather than incorporating preventative measures, ADA enforcement occurs through a reactive system of litigation.⁵⁴ The result is a weakened federal law that allows discrimination to continue.

A. *Conflicting Judicial Interpretation and Case Law*

There are no appellate level decisions outlining which standards to apply in circumstances where the property was originally built in violation of the “new construction” Access Standards, and is now held by a new owner not involved in its design or construction. There are, however, two conflicting appellate court decisions that provide an interpretation of sections 12182 and 12183, as well as one that avoids

50. See *U.S. v. Days Inn of Am., Inc.*, 151 F.3d 822, 825 (8th Cir. 1998); *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1033 (9th Cir. 2001); *Laird v. Redwood Trust, LLC.*, 392 F.3d 661, 663 (4th Cir. 2004).

51. See *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-0115-CRB, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011) (order granting defendant’s partial summary judgment and denying plaintiffs’ motions for partial summary judgment); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) (C.D. Cal. June 19, 2012) (order granting partial summary judgment). (Both cases referred to *Lonberg* and in consequence found no liability for current owners, allowing discrimination to continue in the form of “new construction” violations.)

52. *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-0115-CRB, 2011 WL 6141015 at *5-6 (N.D. Cal. Dec. 9, 2011) (order granting defendant’s partial summary judgment and denying plaintiffs’ motions for partial summary judgment); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex), at *15-17 (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

53. NORMAN J. SINGER AND J.D. SHAMBIE SINGER, *Sutherland Statutes & Statutory construction* § 45:2 (7th ed. 2012).

54. See *infra* Part III. C.

the application of the standard entirely.⁵⁵ In addition, a handful of district court decisions take conflicting approaches.⁵⁶

1. Appellate Courts

In *U.S. v. Days Inn of America, Inc.*, the Eighth Circuit analyzed sections 12182 and 12183. There, the court decided whether a franchisor could be held liable for the new construction violations committed by its franchisee.⁵⁷ The franchisee had a Days Inn built by an architect suggested by the franchisor and the Inn violated the ADA “new construction” standards.⁵⁸ The franchisor argued that only current owners, lessors, lessees or operators could be held liable under section 12182(a).⁵⁹ The court rejected that argument to hold that liability is not limited to “persons who own, lease, or operate facilities.”⁶⁰ Rather, to be liable a party “must possess a significant degree of control over the final design and construction of the facility.”⁶¹

In *Lonberg v. Sanborn Theaters Inc.*, the Ninth Circuit addressed whether architects who designed a public accommodation in violation of the new construction standards could be held liable under section 12183.⁶² The court interpreted the statutory scheme to provide injunctive relief for complainants, holding that “[A]ctions under Title

55. For the conflicting appellate Court decisions see *U.S. v. Days Inn of Am., Inc.*, 151 F.3d 822, 825 (8th Cir. 1998); *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001). For the decision that avoids application of sections 12182 and 12183 liability via an exception see *Laird v. Redwood Trust, LLC.*, 392 F.3d 661, 664-65 (4th Cir. 2004).

56. Case law in this comment comes disproportionately from California and Florida. The ADA only provides for damages brought by the attorney general, not via private enforcement. However, certain states have enacted laws parallel to the ADA that allow for private recovery of damages. Thus we see a high volume of litigation in the states that have enacted such legislation, and virtually none coming from states that have no such statutes. See *Munson v. Del Taco*, 42 Cal.4th 661, 669 (2009) for an example.

57. *U.S. v. Days Inn of Am., Inc.*, 151 F.3d 822 (8th Cir. 1998).

58. *Id.* at 824.

59. *Id.* at 825.

60. *Id.*

61. *Id.* at 826.

62. *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1030 (9th Cir. 2001).

III are limited only to injunctive relief . . . after the noncompliant building has already been built . . . injunctive relief is only meaningful against the person currently in control of the building.”⁶³ The *Lonberg* court reasoned that if only the original persons involved in the “design and construction” failures are held responsible, they will often be “out of the picture” by the “time of suit” and this would “create liability in persons against whom there is no meaningful remedy provided by the statute.”⁶⁴ Declining to follow *Days Inn*, the court proceeded to hold the exact opposite. To avoid this unavailable-defendant conundrum, only current owners, lessors, lessees or operators can be held liable for new construction violations.⁶⁵ It rejected the idea that, “[A]nyone possessing a significant degree of control over the final design and construction of a facility is liable.”⁶⁶

In an amended opinion, the *Lonberg* court considered the disabled plaintiff’s request that it defer to the DOJ and find that architects should be held liable for new construction.⁶⁷ The *Lonberg* court declined, explaining that because the statute was unambiguous, it need not defer to the DOJ on architect liability.⁶⁸ Additionally, two subsequent California cases added an additional criterion to the Ninth Circuit’s holding in *Lonberg*, when they applied that holding directly to the issue of whether subsequent owners should be held liable for new construction defects.⁶⁹

Finally, in *Laird v. Redwood Trust, LLC*, the Fourth Circuit disagreed with the district court’s holding that the ADA’s language

63. *Id.* at 1036.

64. *Id.*

65. *Id.*

66. *Id.* at 1034-35 (citations omitted).

67. *Lonberg v. Sanborn Theaters, Inc.*, 271 F.3d 953, 954 (9th Cir. 2001).

68. *Id.*

69. *See Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-01115-CRB, 2011 WL 6141015 at *2-6 (N.D. Cal. Dec. 9, 2011) (order granting defendants’ motion for partial summary judgment and denying plaintiff’s motions for partial summary judgment); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) at *12-20 (C.D. Cal. June 19, 2012) (order granting partial summary judgment). These cases added the requirement that owners must participate in designing and constructing the facility for first occupancy onto *Lonberg*’s holding that only owners could be held liable.

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was ambiguous.⁷⁰ The defendant had recently purchased a building and made substantial alterations to it, including an added level. If the level was a “story” pursuant to the ADAAG, then the owners had violated the new construction standards by not including an elevator.⁷¹ Rather than construe the ADA broadly to encourage new construction compliance, the *Laird* court applied an exception for installing elevators by calling the added level a “mezzanine” rather than an additional “story.”⁷²

These decisions contradict one another and confuse lower courts. Based on the precedent in their respective appellate circuits, lower courts in the Fourth, Eighth, and Ninth Circuits are now required to interpret the ADA differently from one another,⁷³ and the precedent is troubling. In the Eighth Circuit, *Days Inn* directs lower courts to find persons who significantly contributed to the design or construction of a facility liable for new construction defects.⁷⁴ Yet, courts in the Ninth Circuit have *Lonberg* as precedent, which held that current owners should be held liable for new construction liability.⁷⁵ *Lonberg* also set the precedent that lower courts need not look to the DOJ or congressional intent when interpreting section 12183.⁷⁶ Lastly, in the Fourth Circuit, courts are left to their own interpretations because the *Laird* court did not directly address new construction liability for the current owner.⁷⁷ While the new owner in *Laird* was arguably the one who violated the new construction standards,⁷⁸ it was an example of another court that found section 12183 clear on its face. Together, these decisions illustrate a general judicial reluctance to impose new construction liability.

70. *Laird v. Redwood Trust, LLC.*, 392 F.3d 661, 664 (4th Cir. 2004).

71. *Id.* at 663-64.

72. *Id.* at 664-65.

73. See *U.S. v. Days Inn of Am., Inc.*, 151 F.3d 822 (8th Cir. 1998); *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029 (9th Cir. 2001); *Laird v. Redwood Trust, LLC.*, 392 F.3d 661 (4th Cir. 2004).

74. *U.S. v. Days Inn of Am., Inc.*, 151 F.3d 822, 825-26 (8th Cir. 1998).

75. *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001).

76. See *Lonberg v. Sanborn Theaters, Inc.*, 271 F.3d 953, 954 (9th Cir. 2001).

77. *Laird v. Redwood Trust, LLC.*, 392 F.3d 661, 664 (4th Cir. 2004).

78. See *id.* at 662-63.

2. Lower Courts

Among the handful of courts that have directly addressed this issue, none have engaged in a serious exploration. Arguments relating to the internal structure of the statutory scheme are not addressed. For example, none of the decisions to date have addressed liability of *current* owners for *current decisions* to buy property that comes with ADA obligations.⁷⁹ When an owner purchases a piece of property, there is a decision to be made about what that property is suitable for and how it should be utilized. If the property is defective in the sense that it is not built in compliance with the Access Standards, then it is a discriminatory decision by the new owner to use it as a place of public accommodation.

However, one lower court stands out from the rest, albeit via a parallel state law. In *Hodges v. El Torito Restaurants, Inc.*, the court construed a California scheme that parallels the ADA.⁸⁰ There, the court was presented with the key question, “[W]hether the current owner of a building can be held liable for the previous owner’s failure to make the restaurant accessible.”⁸¹ The *Hodges* court held that a new owner *could* be held liable and reasoned that otherwise, “businesses would be able to circumvent” the law through “sham sales and transfers” and that the “legislature did not intend to enact such a self-eviscerating law.”⁸²

The court decided differently in *Paulick v. Ritz-Carlton Hotel Co.*⁸³ crafting a general rule that “subsequent owners, lessees, lessors, and operators of a public accommodation who did not participate in designing and constructing the facility for first occupancy are not liable under the ADA for any of its design and construction defects.”⁸⁴

79. While opinions in *Paulick*, *Lema* and *Hodges* discuss successor liability for new construction defects, they do not discuss the buyer’s decision and subsequent responsibility in purchasing a non-compliant facility.

80. *Hodges v. El Torito Rest., Inc.*, No. C-96-2242-VRW, 1998 WL 95398 at *3 (N.D. Cal. Feb. 23, 1998).

81. *Id.*

82. *Id.* at *3-5.

83. *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011) (order granting defendants’ motion for partial summary judgment and denying plaintiff’s motions for partial summary judgment).

84. *Id.* at *2.

Additionally, in *Rodriguez v. Investco, L.L.C.*, despite the property consisting of new construction built in violation of the Access Standards, the court found the new owners “had no involvement in the original design or construction of the facility,” and found no liability.⁸⁵

3. In-Depth Analysis of Two On-Point Cases

It is useful to pause here and take a closer look at *Paulick*, and a connected case, *Lema v. Carson Hotel, LLC*.⁸⁶ Each ended in summary judgment and provided clear examples of judicial decisions that perpetuate the loophole that allows new construction violations to persist. The facts in both cases involve disabled hotel patrons suing to bring the hotels into compliance with the “new construction” standards.⁸⁷

In *Paulick*, the plaintiff argued against partial summary judgment stating that the DOJ itself had argued for the application of new construction successor liability in a similar case.⁸⁸ In addition, the plaintiff provided general support for the practice of liberally applying common law successor liability to federal civil rights actions.⁸⁹ The court admitted that the ADA appeared to require new owners to remove barriers under new construction standards, but stated that this issue was not before the court.⁹⁰ Instead, the court focused on whether

85. *Rodriguez v. Investco, LLC*, 305 F.Supp.2d 1278, 1283-85 (M.D. Fla. 2004).

86. *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

87. *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011) (order granting defendants’ motion for partial summary judgment and denying plaintiff’s motions for partial summary judgment); *Lema v. Carson Hotel, LLC*, No. CV-10-07816 (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

88. *Paulick v. Ritz-Carlton Hotel Co., LLC*, No. C-10-4107-CRB, at *3-4 (N.D. Cal. Dec. 2, 2011) (opposition to defendant’s motion for partial summary judgment).

89. *Id.* at *4.

90. *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-01115-CRB, 2011 WL 6141015, at *3 (N.D. Cal. Dec. 9, 2011) (order granting defendant’s partial summary judgment and denying plaintiffs’ motions for partial summary judgment).

the plain language of the ADA permits plaintiffs to *sue to enforce that requirement*.⁹¹ The court found the ADA did not permit such a suit, claiming the plain language of sections 12182(a) and 12183(a) led to a simple answer.⁹² The court stated section 12183 limited the definition of discrimination to a failure to design, construct or alter a facility under the new construction standards, so the defendant's failure to *provide* an accessible facility was not discrimination.⁹³ In essence, the court noted that there was likely a requirement for subsequent owners to bring their buildings into compliance with new construction standards, but ruled that plaintiffs have no way to enforce it.⁹⁴

Lema followed suit, but hesitation accompanied its decision. The court analyzed the *Paulick* decision, concluding it did not fully understand how the *Paulick* court applied a decision finding that an architect could not be liable for new construction noncompliance⁹⁵ to successive owners.⁹⁶ Despite this, the *Lema* court called the *Paulick* decision "the most plausible interpretation" and agreed with the plain meaning approach to find no liability for the current hotel owner.⁹⁷

Between the two cases, *Lema* addressed the plaintiff's arguments more directly. In his opposition to summary judgment, the plaintiff called for liberal application of successor liability to federal civil rights statutes. The *Lema* court did not disagree, but still declined to do so.⁹⁸ Instead, the *Lema* court compared clauses in the ADA to a proffered remedial statute, finding them too dissimilar to apply successor liability on that theory.⁹⁹ Next, the plaintiff voiced concerns about purposeful evasion of the new construction standards if current owners are not required to remove barriers.¹⁰⁰ Commercial real estate companies in the business of building and immediately selling

91. *Id.*

92. *Id.* at *5-6.

93. *Id.* at *5.

94. *Id.* at *3, *6.

95. *See id.* at *6.

96. *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex), at *16 (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

97. *Id.* at *17.

98. *Id.* at *17-18.

99. *Id.*

100. *Id.* at *18-19.

property could avoid complying with the new construction requirements, and avoid liability by selling to someone who could also avoid liability.¹⁰¹ There would be nothing in place to de-incentivize this practice. The court acknowledged this possibility as a serious one, but concluded plaintiffs in such situations would not be without redress because they would still have the lower “readily achievable” requirements for existing facilities.¹⁰² The court further acknowledged the unfairness of that conclusion, but avoided further comment by stating it was not at issue in the case.¹⁰³ *Lema* noted its interpretation would limit the number of actors who could be held liable, but included a *caveat* that the interpretation could be incorrect.¹⁰⁴

Thus, both cases found to directly address successor liability for new construction noncompliance take leave from *Lonberg*, an appellate level case that analyzes section 12183 for architectural liability.¹⁰⁵ Unjust results continue to abound, resulting in ignored new construction standards and ultimately, discrimination.

B. Unclear Statutory Construction

The relevant statutory language involves sections 12182 and 12183. Section 12182 is the “general rule” and states that no disabled person “shall be discriminated against” in the “full and equal enjoyment of . . . accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁰⁶ Section 12183(a) refers to section 12182 and states, “[A]s applied to public accommodations . . . discrimination for purposes of section 12182(a) of this title includes . . . a failure to design and construct facilities . . . and . . . a failure to make alterations . . . [that] are readily accessible . . .”¹⁰⁷

101. *Id.* at *19.

102. *Id.* at *18-20.

103. *Id.* at *19-20.

104. *Id.* at *20.

105. See *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1033-36 (9th Cir. 2001).

106. 42 U.S.C. § 12182(a) (2006).

107. 42 U.S.C. § 12183(a) (2006).

The language in section 12182 is broad, and is open to interpretation. Section 12183 only lists two types of discrimination as applied to new construction.¹⁰⁸ Some courts conclude the list in section 12183 is exhaustive, holding as a matter of law that an owner of a facility cannot discriminate unless he took part in the design, construction or alteration of that facility.¹⁰⁹ However, the word “includes” precedes the two listed types of discrimination in section 12183(a), suggesting the list is not exhaustive.¹¹⁰ “Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.”¹¹¹ It would seem, then, the statute is ambiguous.

1. *Deference to the Department of Justice*

As there is more than one plausible interpretation of section 12183, courts should not hold it to be clear on its face.¹¹² *Chevron U.S.A v. National Resources Defense Council* and its progeny together hold that when a statute is not clear on its face, a court will defer to an authorized, formal agency’s interpretation of the statute.¹¹³ The only time a prior judicial interpretation of a statute trumps an agency’s interpretation is when the federal court’s interpretation flows from an unambiguous reading of the statute.¹¹⁴ When found unambiguous, the standard set forth in *Chevron* does not apply and courts need not look

108. See 42 U.S.C. §§ 12182(a); 12183(a) (A failure to (1) construct or (2) alter facilities per new construction standards) .

109. See *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB and C-10-01115-CRB, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

110. 42 U.S.C. § 12183(a) (2006).

111. SINGER *supra* note 53.

112. See *Paulick v. Ritz-Carlton Hotel Co., LLC*, Nos. C-10-04107-CRB, C-10-01115-CRB, 2011 WL 6141015 (N.D. Cal. Dec. 9, 2011); *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex) (C.D. Cal. June 19, 2012) (order granting partial summary judgment). Both held § 12183 to be plain on its face.

113. See *generally* *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000); *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).

114. *Nat’l. Cable & Telecomm. Assn. v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005)

any further than the language itself.¹¹⁵ Even if *Chevron* does apply, courts can similarly avoid deference to the DOJ by deciding that the DOJ's interpretation is outside the "permissible construction" of the statute.¹¹⁶ However, "remedial statutes should be liberally construed in order to effectuate the remedial purpose for which [they were] enacted . . ."¹¹⁷ These competing interests in statutory interpretation contribute to the problem.

2. *Canons of Construction and Public Policy*

[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.¹¹⁸

Part of the interpretation problem comes from varying types of canons of construction with no set rule on uniform application for the ADA. Early in our country's history, the U.S. Supreme Court provided guidance, stating that where a statute is ambiguous, courts should consider the very problem that gave rise to the statute to determine how the words in question should be resolved.¹¹⁹ Getting caught up in tedious scrutiny over specific words can lead to an interpretation that goes against the statute's purpose, or what Justice Scalia refers to as an "absurd result."¹²⁰ Interpreting the ADA to impose liability on neither the original violator nor the successive purchaser allows the very discrimination the ADA aims to prevent. This interpretation contradicts congressional intent and renders an unjust result, if not an absurd one.

115. SINGER *supra* note 53.

116. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

117. SINGER *supra* note 53, § 60:1.

118. Steven Wisotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 345 (2009) (citing *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)).

119. *U.S. v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875).

120. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

In light of the confusing and sporadic application of canons, courts often fall into the trap of hyper-focusing on words. Congress has overridden a plethora of Supreme Court statutory interpretations.¹²¹ In 1999 and 2002, the Supreme Court weighed in on the definition of “disabled” under the ADA.¹²² In both cases, the Court ruled that certain disabilities were not covered under the ADA.¹²³ Congress wholeheartedly disagreed and in response overturned both Supreme Court decisions in an amendment to the ADA.¹²⁴ The Supreme Court had focused on the precise meaning of “disability” stating that “no agency was authorized to interpret the term,” leading it to conclude that certain persons should be excluded.¹²⁵ Congress responded that it “expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, [but] that expectation has not been fulfilled.”¹²⁶

Congress went on to say the Supreme Court had interpreted the terms of the ADA “to require a greater degree of limitation than was intended by Congress,” creating “too high a standard.”¹²⁷ The Supreme Court failed to consider that “the ADA must be construed broadly in order to effectively implement the ADA’s fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹²⁸

121. William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 337 (1991).

122. See generally *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

123. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 199 (2002).

124. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

125. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002).

126. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, § 2(a)(3) (2008).

127. *Id.* § 2(a)(3)-(8).

128. *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002) (internal quotations and cites removed).

Current trends may be to blame for the Court's lack of broad interpretation. In a recent in-depth analysis of trends in judicial statutory interpretation, the Congressional Research Service asserted, "[o]ne can search in vain for recent Supreme Court reliance on the canon that 'remedial statutes' should be 'liberally' or 'broadly construed.'"¹²⁹ It went on to explain the vague and disputed meaning of "broad construction" as well as Justices' individual preferences as the culprits.¹³⁰ The report suggests the simple solution that ambiguities in remedial statutes be resolved in favor of the people it was meant to protect.¹³¹ Finally the report concludes with the truism that, "categorizing a statute as 'remedial,' or even as a 'civil rights statute,' is no substitute for a more refined analysis of the purposes of the particular statute at issue."¹³²

C. Enforcement is Back-Ended and Sporadic

Lastly, the current system waits for a problem and fixes it through litigation.¹³³ There is no federal building code inspector or local official who has the authority to waive or enforce federal access standards.¹³⁴ In other words, "the ADA is not enforced by State or local building inspectors."¹³⁵ Instead, access standards are enforced through "litigation initiated by the DOJ and through litigation initiated

129. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, 29 (2008) (footnote omitted).

130. *Id.* at 30 n.169 (citing Antonin Scalia, *Assorted Canards of Legal Analysis*, 40 CASE W. RES. L. REV. 581, 586 (1989-90) ("Justice Scalia has inveighed against the maxim in a lecture reprinted as a law review article, calling it a 'prime example[] of lego-babble.' The rule, Justice Scalia concluded, 'is both of indeterminate coverage (since no one knows what a "remedial statute" is) and of indeterminate effect (since no one knows how liberal is a liberal construction).").

131. *Id.* at n.170. ("See, e.g., *Smith v. Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987) (Social Security Act 'is remedial, to be construed liberally . . . and not so as to withhold benefits in marginal cases')").

132. *Id.* at n.173.

133. See U.S. Dep't. of Justice, ADA Title III Technical Assistance Manual § III-7.1000(A) (1994 Supp.) available at <http://www.ada.gov/taman3.html> (last visited Oct. 27, 2012).

134. *Id.*

135. *Id.*

by private parties.”¹³⁶ Again, if compliance with the new construction standards is terminated upon the sale of the property, enforcement will be obstructed because “injunctive relief is only meaningful against the person currently in control of the building.”¹³⁷

IV. LIABILITY SHOULD BE IMPOSED ON CURRENT PROPERTY OWNERS DESPITE LACK OF INVOLVEMENT IN CONSTRUCTION OR DESIGN

Many judicial interpretations of section 12183 leave a gap of liability coverage that is irreconcilable with congressional intent. Originally, Congress authored sections 12182 and 12183 as one section, but in the final bill separated them to distinguish between public accommodations in section 12182 and commercial facilities in section 12183.¹³⁸ In separating them, “Congress gave no indication that it sought to make the parties who could be held liable for the discrimination described in § 12183(a) any different from the parties who could be held liable for the discrimination described in § 12182(b).”¹³⁹

Liability, at least initially, should be borne by the person with the most control over the creation of the access barrier. . . . When construction finishes, however, that is not the end of the case. At that point, control shifts, and someone else assumes responsibility. Title III prescribes an affirmative duty, not only to remove existing barriers, but also to maintain new construction free from any barriers. The exceptions for existing facilities do not apply to new construction; hence, it makes sense to restrict liability for such a high level of duty to the role rather than to the specific individual.¹⁴⁰

In 2011, the DOJ released a new definition of “existing facility,” which clarifies that while facilities subject to the new construction standards also become existing facilities when completed and sold,

136. *Id.*

137. *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001).

138. *Id.* at 1035, n.7.

139. *Id.*

140. Michael V. Kelly, *Weakening Title III of The Americans With Disabilities Act: The Buckhannon Decision and Other Developments Limited Private Enforcement*, 10 ELDER L.J. 361, 389-90 (2002).

this does not mean the facilities revert to the “readily achievable” standard.¹⁴¹ Indeed, “a newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction . . .”¹⁴² “The fact that the facility is also an existing facility does not relieve the public accommodation of its obligations under the new construction requirements of this part.”¹⁴³ Thus, the DOJ clarifies that its intent is for new construction liability to be linked with the public accommodation. This is consistent with applying liability to the current owner - whoever is in control of the public accommodation, regardless of involvement in its design or construction.

A. *Comparison to Other Remedial Statutes*

In *Lema*, the plaintiff offered a comparison between an employment anti-discrimination statute (Family Leave Medical Act (“the FMLA”)) and the ADA. In particular, the plaintiff asserted that in determining successor liability, the ADA should have the same multi-factor test as the FMLA.¹⁴⁴ *Lema’s* conclusion, that the ADA and the FMLA were too different to warrant the comparison, ignored the fact that “successor liability has widely been imposed in federal civil rights actions with great liberality.”¹⁴⁵ While the “great liberality” cited in the plaintiff’s opposition motion completely revolved around employment discrimination, other types of remedial statutes, including one for environmental protection, also impose successor liability.¹⁴⁶ Each statute has unique provisions and definitions, yet successor liability is permitted when an injured party

141. 28 C.F.R. pt. 36, app. A (2011).

142. *Id.*

143. *Id.*

144. *Lema v. Carson Hotel LLC*, CV-10-07816-MMM (Ex), at *17 (2012) (citing *Sullivan v. Dollar Tree Stores, Inc.* 623 F.3d 770 (9th Cir. 2010)).

145. *Id.* at *17-18 for *Lema’s* conclusion; Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment at *13 *Lema v. Carson Hotel, LLC*, No. CV10-7816-MMM (Ex) (2012) (citing *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1235-35 (7th Cir. 1986)).

146. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a)(2) (2006) for an example.

would experience an unjust result without it.¹⁴⁷ Applying successor liability for new construction standards is therefore warranted.

1. Comparing the ADA to CERCLA and its Innocent Landowner Defense

At first glance, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),¹⁴⁸ does not seem to draw parallel to the ADA.¹⁴⁹ Congress enacted this law on December 11, 1980, close in time to the ADA’s enactment.¹⁵⁰ CERCLA granted “broad Federal authority” to manage hazardous substances that “may endanger public health or the environment.”¹⁵¹ In addition, CERCLA directly addresses the successor liability issue by expressly providing that successive property owners are liable for the cleanup of hazardous waste.¹⁵² It does not matter that the current owner played no part in creating or depositing the hazardous waste and indeed is often the case.¹⁵³

In 1989, the Environmental Protection Agency (“the EPA”) parlayed its authority to issue settlements for *de minimis* landowners to create a defense against CERCLA liability for innocent landowners (“ILO”).¹⁵⁴ To qualify as an ILO, a landowner must conduct “all appropriate inquiries” to establish they “had no reason to know of the [liability].”¹⁵⁵ In 2002, the Brownfields Amendments partially amended the ILO defense by specifying requirements for “appropriate inquiries.”¹⁵⁶ The criteria the Brownfields Amendments set forth for

147. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985).

148. Also known as “Superfund.”

149. *See generally* CERCLA, 42 U.S.C. § 9607 (2006).

150. *CERCLA Overview*, United States Environmental Protective Agency, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Sept. 15, 2012).

151. *Id.*

152. 42 U.S.C. § 9607(a)(2) (2006).

153. *See generally* 42 U.S.C. § 9607(a)(1)-(4)(2006).

154. *Innocent Landowners*, United States Environmental Protective Agency, <http://www.epa.gov/compliance/cleanup/revitalization/ilo.html> (last visited Oct. 27, 2012).

155. 42 U.S.C. § 9601(35)(A)(i) (2006).

156. United States Environmental Protective Agency, <http://www.epa.gov/compliance/cleanup/revitalization/ilo.html> (last visited Oct. 27, 2012).

“appropriate inquiries” are extensive, requiring a buyer to obtain reports from an environmental professional, review federal, state and local records, search for environmental liens on the property, conduct visual inspections of the property and research the chain of title.¹⁵⁷

CERCLA’s construction is a good example of a remedial statute imposing successor liability. Public safety is important enough to impose liability on whoever currently owns the property, regardless of responsibility for the original violation. However, indirect responsibility is acknowledged in the ILO defense requirements by making qualification hinge on the buyer “doing their homework” on the property before purchase. Similarly, preventing or stopping discrimination based on disabilities is a highly moral and important purpose.¹⁵⁸ It follows that successor liability should also be imposed for new construction violations in the ADA.

2. Reason for Lack of Successor Interest Provision in Title III

CERCLA’s construction begs the question: why did the authors of the ADA fail to include such a provision? Legislative history reveals little guidance on this question. The ADA’s silence on successor liability can be interpreted as an intention to rule out a particular statutory application, an expectation that nothing more need be said to show legislative intent, or a lack of consideration for the issue at all.¹⁵⁹ However, “an inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.”¹⁶⁰

It is quite possible that the ADA’s authors simply did not think of successor liability. Given the clear mandate of the new construction standards, it is a weak argument to assert that Congress did not intend successor liability simply because they did not include it originally. “Because all future circumstances cannot be anticipated by even the most far-sighted legislator, the necessity for judicial interpretation can

157. 42 U.S.C. § 9601(35)(B)(iii)(I-X) (2006).

158. See Young, *supra* note 1, at xi. “[T]he ADA seeks to build a society which encourages and supports the efforts of each individual to live a productive life.”

159. Kim, *supra* note 129, at 16.

160. *Id.* (citing Burns v. United States, 501 U.S. 129, 136 (1991)).

never be completely eliminated.”¹⁶¹ Such an inference allows judges to circumvent the new construction standard, which is contrary to the ADA’s congressional intent.¹⁶²

Another possibility is that despite its strong bipartisan support,¹⁶³ strong opposition from big business led Congress to take a “just get it passed” attitude towards enacting the ADA. Both the Senate and House faced hurdles in passing the ADA:

[B]usiness organizations, who had deep concerns about the cost burden and the litigation potential of the ADA, lobbied vigorously by applying constituent pressure on members. The main issue in the House was the effect of the ADA on businesses and governments covered by the ADA’s provisions; many changes were made to make the ADA more acceptable to entities covered by the ADA.¹⁶⁴

Given the lack of legislative history specifically addressing successor liability, and the political landscape in which the ADA was passed, either of the above possibilities is likely. More importantly, it makes the assertion that silence was an intentional omission unlikely.

B. Legislative Action

A call for legislative resolution is warranted and within reach. In 2008, Congress passed a sweeping amendment to stop what it considered to be a judicial misinterpretation of “a disabled person” under the ADA.¹⁶⁵ The catalyst for the last major change to the ADA was Supreme Court misinterpretation. Making this change legislatively now prevents avoidable discrimination and avoids the lengthy delay a Supreme Court decision entails, and the possibility the Court will decide the issue incorrectly. Congress should amend section 12183, and in conjunction with that amendment, include a defense for innocent purchasers.

161. SINGER, *supra* note 53.

162. 42 U.S.C. § 12101(b)(2) (2006).

163. *See* Young, *supra* note 1, at xix. The Senate passed the ADA by a vote of 76 to 8 on September 7, 1989 and the House passed the ADA by a vote of 403 to 20, on May 22, 1990. *Id.*

164. *Id.* at xviii-xix.

165. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. § 12101 note (2008)).

1. Amendment to the ADA

Congress should amend section 12183 to expressly state:

New construction discrimination includes the offering and purchase of a facility that is already in violation of the ADA new construction standards. A subsequent owner must bring his facility into compliance with new construction standards, regardless of participation in the construction or design of the non-compliant facility.

This would make the section plain on its face. The amendment could closely mirror the Amendments Act of 2008.¹⁶⁶ Additional language in the amendment should address the conflicting judicial interpretations of section 12183 and state that such interpretations are leading to an unjust result, which allow the new construction standards to be circumvented. The similarities between the purposes of this amendment and the Amendments Act of 2008 would make passage more likely. Additionally, including a defense for innocent purchasers would make the amendment more attractive to both sides.

2. Innocent Purchaser Defense

State legislation can serve as a guide to the federal government to gauge how well a similar federal law might work.¹⁶⁷ State laws that parallel the ADA can serve as “laboratories” of change for the federal government.¹⁶⁸ In this case, one example is California Senate Bill 1186 (“SB1186”).¹⁶⁹ Among other things, SB1186 recognizes the issues successive owners and lessees have with respect to obtaining non-compliant property.¹⁷⁰ SB1186 requires certain disclosures in demand letters for construction-related lawsuits and by commercial property owners in lease agreements to indicate whether the property has met state-level certification for ADA compliance.¹⁷¹ Thus,

166. *Id.*

167. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

168. *Id.*

169. 2012 Cal. Legis. Serv. Ch. 383, 1 (S.B. 1186) (West).

170. *Id.*

171. *Id.*

SB1186 recognizes the issue of imposing liability on successive property owners and aims to protect them.

Understandable sympathy exists for a person who finds himself on the wrong side of a new construction violation by unknowingly purchasing a noncompliant building. Opponents (including judges) of imposing successor liability might feel they are protecting these innocent business owners. It is a difficult situation where the law dictates which “innocent” party to impose a penalty on.¹⁷² However, purchasing a building to use as a public accommodation is a sophisticated transaction, such that the buyer should know to check for potential liabilities.¹⁷³ In this sense, the purchaser is not “innocent.”

Nevertheless, a defense similar to the ILO defense would work well to protect truly innocent owners of public accommodations under the ADA. Congress could establish provisions similar to CERCLA’s ILO and apply them to the ADA regarding who could qualify as “innocent” as a matter of law. For example, Congress can require a buyer of a public accommodation to prove they conducted appropriate inquiries regarding ADA compliance. The key would lie in proving the timing of the inquiries. The buyer would need to show the inquiries took place prior to the final purchase to demonstrate that the required affirmative action to discover any ADA noncompliance was taken before purchasing the public accommodation. Appropriate inquiries could include: determining the date of construction to see if the new construction standards apply, getting a State-certified access specialist (if the State has one) to inspect and give a report on compliance, conducting visual inspections using the Technical Assistance Manual for laypersons, and researching title for previous liens or lawsuits related to the property.¹⁷⁴ If the inquiries yield a reasonable belief that the appropriate ADA standards were met but a subsequent lawsuit for noncompliance still arises, the ADA-ILO defense could act to protect the current owner.

172. See John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV., 91, 102-103 (2002). (Inconsistent conveyances of land are an example of another seemingly “unfair” situation. There the law dictates which of two innocent purchasers lose the land they believed to be rightfully theirs).

173. See *id.* at 102.

174. Adapted from 42 U.S.C. § 9601(35)(B)(iii)(I-X) (2006).

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Incorporating this defense into an amendment to impose successor liability would “soften the blow” and could make the amendment’s passage more likely. Such a defense would make explicit the currently implied responsibility to check for ADA violations before purchasing a public accommodation. Thus, with an express defense available, if a subsequent owner of a public accommodation finds themselves on the defense side of an ADA new construction violation, it would be their own fault because *ignorantia legis neminem excusat* (ignorance is no defense to the law).

C. Proper Judicial Interpretation

Courts must properly interpret the “new construction” sections of the ADA in a way that will carry out the ADA’s purposes under a remedial scheme, rather than diminish the capacity to enforce them.

1. The Supreme Court Should Call for Deferment to the Department of Justice in ADA Cases

In *Lema*, the court acknowledged the U.S. Supreme Court has not decided whether courts must defer to the DOJ in ADA cases.¹⁷⁵ *Lema* seemed tentative in its interpretation of sections 12182 and 12183, as evidenced by the statement, “The court notes further that, to the extent its interpretation of the statute is incorrect. . . .”¹⁷⁶ Of course, if the Supreme Court held that courts must defer to the DOJ, it would be declaring that the statute is ambiguous and thus deferment to the ADA would be proper under *Chevron*. Essentially, the Supreme Court would be issuing a standardized canon.

2. Clarification from the Department of Justice

It follows that the DOJ should issue an official regulation to strengthen the proper interpretation of section 12183. While the new definition of “existing facility” seems rather clear,¹⁷⁷ stating directly that section 12183 applies to current owners regardless of their

175. *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex), at *18 n.37 (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

176. *Id.* at *20.

177. 28 C.F.R. pt. 36 app. A (2011).

participation in their building's construction or design would leave no room for doubt. Urging the DOJ to put out an official regulation will have a large impact on the issue only if higher courts push/require lower courts to defer to the DOJ. While *more* courts would defer if the DOJ released something directly on point,¹⁷⁸ without a standardized canon, many would still find the statute clear on its face and avoid the DOJ altogether.

Lema is currently being appealed to the Ninth Circuit.¹⁷⁹ If the Supreme Court had already weighed in on deferment to the DOJ, and in turn the DOJ had clarified its stance on successor liability for new construction, the Ninth Circuit would be sure to reverse *Lema* and establish precedent to impose new construction liability on current owners. Because these things have not happened, the risk is high that this court might continue to reinforce discrimination through improper judicial interpretation.

D. Front-End Enforcement

Litigation reigns supreme as the main way to enforce ADA compliance.¹⁸⁰ Litigation means that a problem has already occurred. This approach assures continued violations, because enforcement is occurring on the back-end rather than the front. Lawsuits arise when a disabled person runs into a problem with inaccessible buildings long after a facility has been built.¹⁸¹ While facilities built before January 26, 1993 will continue to be litigated as "readily achievable" violations are encountered, litigation regarding new construction should be limited.¹⁸² More measures need to be employed to prevent

178. *Lema v. Carson Hotel, LLC*, No. CV-10-07816-MMM (Ex), at *18 n.37 (C.D. Cal. June 19, 2012) (order granting partial summary judgment).

179. Order for Extension of Time to File Opening Brief, *Lema v. Carson Hotel, LLC*, No. 12-56371 (9th Cir. April 15, 2013), ECF No. 11. Plaintiff has been granted an extension of time to file the appellate brief, due June 24, 2013. Defendant's answering brief is due July 24, 2013. *Id.*

180. U.S. Dep't. of Justice, ADA Title III Technical Assistance Manual § III-7.1000 (1994 Supp.), available at <http://www.ada.gov/taman3.html> (last visited Oct. 27, 2012).

181. *Id.*

182. See 42 U.S.C. §§ 12182(b)(2)(A)(iv); 12183(a)(1) (2006).

violations on the front end so that builders and buyers perpetuate less new construction violations, discrimination, and litigation.

Some states have programs to help meet ADA requirements on the design and construction end. One example is California's Certified Access Specialist program (CASP).¹⁸³ Created via Senate Bill 262 in 2003, it aims to provide the public with "experienced, trained, and tested individuals who can render opinions as to the compliance of buildings and sites . . . with the Americans with Disabilities Act . . ."¹⁸⁴ Both certification to become a specialist and obtaining the certification to show a facility complies with the ADA are voluntary.¹⁸⁵

Mandatory state certification for the construction of public accommodations would require a specialist to ensure new construction standards are met before a facility is deemed ready for use. Regardless of whether the builder immediately sells or not, the building would be ADA compliant. A side benefit to mandatory building certification would be an increase in employment, because state access specialists can charge for their services.¹⁸⁶ In turn, the state receives more money for the program through more application fees. For example, becoming a certified access specialist in California costs \$1600.¹⁸⁷ While separate from the successor liability issue, these benefits are noteworthy. Front-end enforcement prevents discrimination from occurring in the future, saving courts and owners of public accommodations money and headaches.

The Federal Assistant Attorney General is empowered to certify that state or local laws meet or exceed the minimum standards of the ADA."¹⁸⁸ State and local applications continue to fail to meet the higher federal standards of the ADA, and thus the DOJ does not

183. Voluntary Certified Access Specialist (CASP) program, DIVISION OF THE STATE ARCHITECT, www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx. (last visited Oct. 20th, 2012). (A recent change reduces the fee for architects, landscape architects, civil engineers and structural engineers to \$1,200).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. 28 C.F.R. § 36.602 (2011).

certify them.¹⁸⁹ States should legislate more effectively to earn the DOJ's certification. This would help prevent ADA litigation at the state level because certification acts as rebuttable evidence that the state law or ordinance meets or exceeds the minimum requirements of the ADA."¹⁹⁰

One attorney who specializes in representing hotels noted, "[T]he cost of preventing a potential [ADA] disaster is so small, the process so easy, the exposure so great, and the benefits so significant, that [one] simply cannot afford to overlook [ADA compliance]."¹⁹¹

V. CONCLUSION

Persons with disabilities have historically been treated unequally by society.¹⁹² Imagine the difficulty of losing the ability to walk.¹⁹³ When relegated to a wheelchair, a person, with the same strong mental abilities intact as before their disability would hope to re-enter society with dignity and self-respect. An encounter with a noncompliant building can rob one of these feelings, and instead create feelings of helplessness and reliance on others.

The ADA requires new buildings and alterations to meet certain requirements. Since January 26, 1993, new construction and alterations on public accommodations have been required to adhere to specific guidelines.¹⁹⁴ If not met, discrimination has occurred under the ADA.¹⁹⁵ In order to function as a dignified and independent person, a disabled person has the right to sue to bring these facilities

189. For an example of an application that was denied *see* Letter from Lawrence W. Roffee, Exec. Dir., U.S. Architectural & Transportation Barriers Compliance Board, to Michael J. Mankin, Chief, State of California, Department of General Services, Division of the State Architect (Sept. 30, 2004) *available at* http://www.documents.dgs.ca.gov/dsa/other/usdoj_coverletter_attach_a.pdf.

190. 28 C.F.R. § 36.602 (2011).

191. Jim Butler, *California Opens Door to More ADA Litigation, but also Offers Protection to the Well-Informed*, HOTEL NEWS RESOURCE, (Oct. 5, 2009), <http://www.hotelnewsresource.com/article41486.html>.

192. *See* 42 U.S.C. § 12101(a)(2) (2006).

193. 42 U.S.C. § 12102(2)(A) (2006 & Supp. II 2009) This is one example of many types of disabilities covered by the ADA.

194. 42 U.S.C. § 12182(b)(2)(A)(iv) (2006).

195. *Id.*

into compliance.¹⁹⁶ However, if courts interpret section 12183 to mean that the current owner does not have ADA liability, or that a plaintiff cannot sue, the disabled patron has no recourse and will find himself in a helpless situation that Congress never intended. Congress intended to give power to the disabled to stop discrimination.¹⁹⁷

This Comment proposes imposing new construction liability on current property owners, despite their lack of involvement in the facility's construction or design. Several approaches would effectuate this change. Congress could amend section 12183 to expressly address the current and inconsistent judicial interpretations, which have allowed new construction requirements to be ignored. A defense for innocent purchasers coupled with the amendment would balance what some may interpret as "more liability." Other remedial statutes that have already imposed successor liability and provided defenses would serve as good references.

Absent legislative action, courts must start interpreting section 12183 in a way that prevents discrimination, carrying out congressional intent and closing the loophole in ADA coverage. A clear opinion from the DOJ that section 12183 acts to impose liability on successive property owners, together with a ruling from the Supreme Court for courts to defer to the DOJ in relevant cases would ensure this occurs.

Lastly, an effort to limit lawsuits through stronger front-end enforcement would save money and prevent discrimination. One way to accomplish this is to encourage more states to create access programs under the DOJ and require new construction of public accommodations to be certified through those programs. Another way is for states to create stronger parallel laws to the ADA, which the DOJ would find worthy of certification. Together, these options would limit liability.

The ADA's statutory framework is unclear. Justice requires clarification concerning the rights and remedies available under the ADA with respect to the question of which standard to apply to new facilities held by successive owners. Absent legislative action, such clarity can only come by administrative action or by binding judicial interpretation. No matter who is first to tackle this issue, a call must

196. 42 U.S.C. § 12188(a) (2006).

197. 42 U.S.C. § 12101(b)(1-4) (2006).

be made. The result needs to ensure that disabled persons can exercise their civil rights under the ADA.

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