



International Council of Shopping Centers

**UNITED STATES
HOUSE OF REPRESENTATIVES**

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
THE CONSTITUTION AND CIVIL RIGHTS**

**EXAMINING LEGISLATION TO PROMOTE THE EFFECTIVE
ENFORCEMENT OF THE ADA'S PUBLIC ACCOMMODATION
PROVISIONS**

**STATEMENT OF
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**ON BEHALF OF
THE INTERNATIONAL COUNCIL
OF SHOPPING CENTERS**

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TESTIMONY OF DAVID E. WEISS

Good morning, Mr. Chairman and Ranking Member Cohen. My name is David E. Weiss. I am Executive Vice President and General Counsel of DDR Corp. I have been practicing law for almost 30 years, first as a partner in private practice and then subsequently at DDR which I joined nearly 17 years ago. I have served as General Counsel since 2003. DDR Corp. is a NYSE-publicly traded, fully-integrated real estate investment trust that owns and manages value-oriented, open-air retail shopping centers (or "power centers") in 37 states and the Commonwealth of Puerto Rico. The company was founded in 1965 and is based in Beachwood, Ohio, an eastern suburb of Cleveland. We have over 550 employees and operate more than 350 shopping centers in a portfolio covering 113 million square feet of retail space. Our tenants include some of the most recognizable retailers such as Walmart, Target, Ross, TJ Maxx, Ulta, Michaels, PetSmart, Bed Bath & Beyond, and Kohl's, to name a few. I would add that DDR has the privilege of owning shopping centers located in several subcommittee members' districts, including Arrowhead Crossing and Deer Valley Towne Center in Phoenix, Arizona; Willowbrook Plaza and Greenway Commons in Houston, Texas; and Village Square at Golf, Boynton Beach, Florida.

I am pleased and honored to testify today on behalf of the International Council of Shopping Centers (ICSC). Founded in 1957, ICSC is the global trade association for the shopping center industry. Its more than 70,000 members in over 100 countries include

shopping center owners, developers, managers, investors, lenders, retailers and other professionals, as well as academics and public officials.

Let me say at the outset that ICSC vigorously supports both the letter and the spirit of the Americans with Disabilities Act (ADA). We recognize the tremendous positive impact that the ADA has had on our society. ICSC also strongly supports Congressman Poe's bill, H.R. 3765, to improve the law and ensure that its primary purpose - - to improve access - - is strengthened. ICSC believes that Congressman Poe's legislation is a reasonable and appropriate response to address an unintended consequence of a provision of the ADA which has developed over time. This unintended result causes persons who aspire to comply with the ADA to spend an inordinate amount of time and money defending lawsuits.

The ADA was the first comprehensive civil rights law enacted to protect disabled persons from discrimination because of their disability. The broad reform of the ADA prohibits discrimination by employers, public entities and private organizations that provide public accommodations and other industry segments through five Titles. Title I is aimed at preventing discrimination in the employment sector; Title II prohibits discrimination by public or governmental entities; Title III prohibits discrimination by private entities that provide public accommodation; Title IV regulates telecommunication services; and Title V contains various miscellaneous provisions for the implementation of the other Titles. Titles I, II and III are the main provisions of the ADA. I am here today to testify regarding Title III, which applies to the private sector and has - - literally and

figuratively - - been opening doors for the disabled community since its enactment more than 25 years ago. One aspect of the enforcement of the ADA provides advocates for those with disabilities the opportunity to bring lawsuits to compel compliance and to recover attorneys' fees and expenses in the event of even the most minor technical violations. While this remedy was intended to provide a private cause of action, this right - - in practice - - has had the unintended effect of fostering the proliferation of costly litigation focused on minor and technical deviations from the standards and lawsuits that are brought only in the hopes of forcing a monetary settlement without regard to improving accessibility which is at the heart of the ADA. These suits have become the scourge of Title III and all too often create a negative impression about the goals of this important law.

The ADA removes both physical and societal barriers by providing equal access and opportunity to those with disabilities. Title III accomplishes this goal by requiring that "no qualified individual with a disability shall be discriminated against in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations by any person who owns, leases, leases to, or operates a place of public accommodation." A place of public accommodation is a privately-owned place which is open to members of the public and affects commerce. Title III lists 12 broad categories of places of public accommodation covering hotels, shopping centers, museums, movie theaters, restaurants, grocery stores, hardware stores, banks, and amusement parks, etc. Title III eliminates discrimination by requiring existing places of public accommodation to remove physical barriers to access where it is readily achievable to do so and by requiring all new or

altered places of public accommodation to meet certain standards to ensure access by individuals with disabilities. Title III also requires property owners and others to make reasonable modifications to their policies, practices and procedures to ensure access by persons with disabilities.

To provide property owners and other persons subject to Title III with guidance on how to design and construct facilities or remove barriers in facilities, the Department of Justice promulgates technical and scoping standards. The original technical and scoping requirements were known as the 1991 ADA Standards for Accessible Design. The 1991 Standards underwent a sweeping change through an administrative rule-making process in September 2010. The most recent standards are known as the 2010 Standards for Accessible Design. The 2010 Standards contain approximately 250 pages of detailed technical literature, dimensions, and diagrams describing in exacting technical detail how components, such as parking lots, curbs, restrooms, stairways, elevators, ramps, telephones, dressing rooms and other parts of a building should be designed and constructed. The technical and scoping requirements of the ADA are very similar to a building code. In addition to the standards, the Department of Justice has published supplemental materials providing guidance on how these standards should be interpreted and implemented. Furthermore, experts in the industry publish books and articles to provide supplemental technical guidance or interpretation on various issues where additional clarification is needed. Consultation with the Code of Federal Regulations, the Federal Register and other secondary materials is routine and common practice to properly understand and implement the highly technical requirements of the ADA. In

addition to federal regulations, many states and localities have adopted their own access requirements.

Complying with the technical and scoping requirements of the ADA is challenging, to say the least. Properties which constitute places of public accommodation, for various reasons, are always in a state of change. For example, hotels and motels are often on routine rehabilitation schedules and shopping centers are regularly remodeled, modified or redeveloped. Properties often change over time without the intentional act of any person. Foundations settle, or a wet summer season or freeze/thaw cycles during winter can cause a parking lot or sidewalk to shift, move or change. These natural occurrences are constant, even if they are undetectable to the naked eye without resorting to measuring devices. Paint for parking spaces fades from year to year and newly placed concrete is chipped by weather, delivery trucks, snow plows or parking lot sweepers. Each and every one of these normal happenings potentially lays the groundwork for a lawsuit claiming a technical violation of the ADA standards.

Additional challenges are found in the regulations themselves. For example, until the 2010 Standards came into effect, all of the required dimensions were subject to conventional industry tolerances, which meant that each of the myriad required dimensions potentially had some acceptable deviation from the standards which would not cause them to be a violation of the ADA. The standards did not, however, indicate what tolerances apply. While the 2010 Standards clarified this point, they still left

hundreds of measurements subject to conventional industry tolerances without indicating what the tolerances were or how they are applied to the standards. For example, asphalt in a parking lot is typically placed with heavy machinery, yet the slope in some areas is not permitted to exceed a mere 2%. Achieving this type of precision with the traditional means and methods of installation is nearly impossible. Given the non-static nature of our properties, the shopping center industry is constantly working to inspect, analyze and, when necessary, modify its properties to ensure ongoing compliance with the ADA building standards.

The problem that the private sector faces is an increasing number of lawsuits, typically brought by a few plaintiffs in various jurisdictions and often by the same lawyers, for very technical and usually minor violations. It has become all too common for property owners to settle these cases as it is less expensive to settle than to defend them, even if the property owner is compliant. It is often too costly to prove that a property owner is doing what is right or required; therefore, the property owner makes a rational business decision, commonly resulting in settlement.

These plaintiffs and their lawyers rarely, if ever, give adequate notice of the underlying issues or concerns to the responsible property owner or operator because there is no incentive to do so – in fact the incentive is just the opposite. The ability to recover attorneys' fees under the ADA has made it more likely that a member of a well-known group of attorneys will identify a willing plaintiff and commence litigation immediately in order to take advantage of the legal fee recovery provision. My experience has been

that on the infrequent occasion that a notice is given, most owners, including DDR, will promptly evaluate and address issues brought to their attention without the need for a lawsuit. Certain plaintiffs and their lawyers know this but the law encourages the filing of a suit first rather than providing advance notice. ICSC believes providing pre-suit notice to property owners would also likely result in a quicker resolution of alleged non-compliance issues. The time period during which a plaintiff files a suit, serves the complaint, the defendant responds and the parties negotiate a settlement is longer than if the plaintiff sent a notice with enough specificity to allow the property owner to correct an issue of non-compliance. The private sector has every incentive to address and remove any claimed barriers to access – the more individuals that can gain access to places of public accommodation the better, because this means that more people and potential customers will visit our properties.

In the vast majority of cases, the first notice of a claimed violation is upon the filing of a lawsuit. These lawsuits seek injunctive relief requiring the defendant to fix alleged violations of the ADA, plus pay attorneys' fees, expert fees and costs. These lawsuits typically allege generic violations, such as "Plaintiff encountered inaccessible parking throughout the property" or "inaccessible curb cuts throughout the property." Attempts to have the plaintiffs plead more detail are usually unsuccessful (not to mention that they drive up the cost of litigation in any event). Often, given the size or nature of the property, this leaves the defendants in the lawsuit unable to determine who owns the property, where the alleged issue is located, or what the problem is with the building component. Almost always, the settlement demand is not commensurate with the work

devoted to the case or the nature of the relief sought. When a party does decide to defend these claims and discovery is taken, a majority of the violations are based upon technical or de minimis violations for issues requiring a modification as little as 1/4th or 1/8th of an inch.

Litigation decisions are driven by the ADA rather than the facts. This means that if a plaintiff finds a violation, no matter how technical, they have the right to recover attorneys' fees. Conversely, if the defendant prevails, he or she only recovers attorneys' fees if it is determined that the case is frivolous. Since there are literally thousands of components to a commercial property and technical measurements at issue, it is the exception, not the norm, when a court awards a defendant its attorneys' fees. The defendant has no incentive to seek attorneys' fees. This leaves the plaintiffs and their counsel with a significant incentive to file suits.

The number of ADA lawsuits has continued to rise at alarming levels. Title III ADA lawsuits filed nationally in 2014 increased by 63% from the previous year. It is worth noting that the majority of these lawsuits are being filed by the same plaintiffs. Of the more than 4,700 Title III lawsuits filed in 2015, over 1,400 were filed by just eight plaintiffs. The states with the greatest number of suits filed in federal court were:

California	-	1,659	Texas	-	277
Florida	-	1,338	Arizona	-	207
New York	-	366			

The above cases represent 80% of the federal ADA lawsuits filed in 2015.

Some states had significant increases in the percent of federal ADA law suits filed between 2014 and 2015.

New York	73% Increase
Illinois	190% Increase
Texas	204% Increase
Georgia	380% Increase
Arizona	2,488% Increase

ICSC also recently surveyed its members regarding ADA litigation and found the following:

- Of approximately 1,500 ADA survey respondents, more than half have been sued for alleged violations of the ADA.
- 65% of those respondents who indicated that they have been sued under the ADA did not receive a notice of an alleged violation prior to receiving notification of a lawsuit or demand letter.
- Of those respondents who indicated that they have been sued under the ADA, 75% chose to settle with the plaintiff out of court.
- Following the conclusion of either a settlement or legal proceedings, the respondents estimated that, more than 71% of the time, there was never any attempt made by the plaintiff or the representative of the plaintiff to visit the property to confirm that the alleged violations were corrected.
- Of those respondents who have been sued under the ADA, almost half have been sued by the same plaintiff or law firm more than once.
- Nearly half of the respondents who have been sued under the ADA indicated that the complaints filed in the lawsuit or demand letter did not contain sufficient detail to identify the specific alleged violation(s).

For these reasons, ICSC supports H.R. 3765, common-sense legislation that would restore necessary balance to Title III ADA litigation. H.R. 3765 does not overturn or preempt state versions of the ADA; it does not take away the right to sue under the ADA; it does not undermine the fee recovery provisions that exist in the ADA. This proposal will facilitate access to public accommodations for the disabled by freeing up resources for compliance with the ADA and improving accessibility rather than needlessly defending lawsuits. H.R. 3765 addresses the abusive actions of a few without altering the fundamental purpose and intent of the ADA.

Section 2 of the bill directs the Disability Rights Section of the Department of Justice to provide educational and training grants to Certified Access Specialists to provide guidance to property owners in order to facilitate compliance with the public accommodations portion of the ADA. ICSC supports this and other efforts to educate property owners regarding the highly technical compliance issues that arise under Title III of the ADA.

ICSC also supports Section 3 of the bill, which permits a fine to be levied if a demand letter alleging Title III violations is found to be overly vague or misleading. If the goal of the ADA is to promote access, property owners should be given specific notice of alleged deficiencies. A lack of specificity and clarity only delays resolution.

Section 4 of H.R. 3765 creates a temporary pause in litigation of up to 120 days to allow property owners to remediate ADA public access violations. Under this section, a

property owner may pause litigation if, within 60 days of notice of an alleged violation, the property owner provides a written description of how the owner will remove any barrier to access that violates the ADA. This temporary pause will allow property owners, after being put on specific notice as to possible ADA violations, to remove - at their own expense - barriers to accessing public accommodations, or make substantial progress in doing so.

Finally, Section 5 of the bill directs the federal courts, in consultation with property owners and representatives of the disability rights community, to use alternative dispute resolution mechanisms to resolve ADA violations for public accommodations. The goal of the model program is to promote access quickly and efficiently without the need for costly litigation.

In conclusion, H.R. 3765 is a “win-win” for all legitimate stakeholders. Simply having notice of claimed violations with a sufficient level of detail and the opportunity to cure prior to filing a lawsuit will eliminate the abusive tactics which have become commonplace. Barriers to access will be removed more quickly. Property owners can re-direct resources from costly litigation to actual remediation of ADA violations. Therefore, ICSC respectfully requests that the Judiciary Committee report the bill as soon as possible.

Thank you for this opportunity to express our views regarding this very important legislation. I look forward to answering any questions you or other members of the

Subcommittee may have. I have several attachments to my statement and I would respectfully request that these materials be included in the record.