Seton Hall University
eRepository @ Seton Hall

Law School Student Scholarship | Seton Hall Law

5-1-2013

Franchisor Liability in ADA Construction Compliance

Matthew Edward Frisch

Follow this and additional works at: http://scholarship.shu.edu/student_scholarship

Recommended Citation

Frisch, Matthew Edward, "Franchisor Liability in ADA Construction Compliance" (2013). *Law School Student Scholarship*. Paper 224.
http://scholarship.shu.edu/student_scholarship/224

Franchisor Liability in ADA Construction Compliance

Written by Matthew Frisch[1]

I. Introduction

After a long day of travel, it is a relief to open up the door to a hotel room and finally take refuge in a comfortable room. While many people take these brief moments for granted, some Americans do not always open a door to an accommodating room. People with physical disabilities may face substantial frustration when arriving at some nationally prominent hotels, which confirmed the availability of a handicap-accessible room on the phone but fail to offer such accommodation when the patron is tired and ready for sleep.[2]

This is a harsh reality for citizens such as the plaintiffs in *Equal Rights Center v. Hilton Hotels Corp*.[3] In this case, one plaintiff could not reserve a room in a Hilton Hotel because there were none available with necessary handicap access.[4] A second plaintiff reserved and confirmed an accessible room, but no such room was available upon arrival.[5] The third plaintiff discovered during his stay at another Hilton hotel that there were no roll-in showers.[6] These three cases exemplify how facilities that do not comply with the Americans with Disabilities Act ("ADA") harm disabled citizens. To prevent these types of harm, Congress enacted the ADA along with enforcement mechanisms.[7]

The primary enforcement mechanism involves placing liability on the shoulders of whomever is in charge of the underlying facility. A significant problem arises when the

---

1 Seton Hall University School of Law J.D. candidate 2013.
2 Equal Rights Ctr. v. Hilton Hotels Corp., Civ. A. No. 07-1528 (JR) 2009 WL 6067336, *1 (D.D.C. Mar. 25, 2009).
3 *Id*.
4 *Id*.
5 *Id*.
6 *Id*.
7 *See* discussion *infra* Part II A.

language of the statute does not clearly delineate the liable party. If a court determines that a franchisee with limited financial means is responsible, there is a possibility that the franchisee is judgment proof.[8] If the responsible party is judgment proof, this will frustrate the enforcement mechanism of the ADA, because "[w]hen liability accrues only against judgment-proof entities, the effect is much the same is if there had been no liability at all."[9] Meanwhile, the franchisor corporation that possesses the means to satisfy the judgment, may avoid liability altogether. Thus, it is important to determine whether the franchisor or franchisee is the appropriate liable party for violations of the ADA.

Section 303 of the ADA states that it is a violation to design and construct new facilities that do not provide proper access to the disabled.[10] The statute states in plain language that it is an act of discrimination for places of public accommodations and commercial facilities built after 1990 not to comply with the accessibility requirements enumerated under section 302 of the ADA.[11] A significant problem arises with the enforcement of this statute, because this section is unclear on which party a franchise relationship is to be liable when there is non-compliance.[12]

While in many cases it is clear who exerts dominion over a facility and is therefore liable for an ADA violation, franchise facilities present a more complex question for liability.[13] Often, businesses have hierarchies that lend themselves to easy identification of the owner and operator of the facilities, and thus there is no significant question of ADA liability. Likewise, no significant question arises when a franchisor is an owner or operator of a franchise, because their

---

[8] Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1106 (2002) (discussing how a judgment may not be collected against a debtor who has already encumbered all or most of their assets).
[9] *Id*. at 1107.
[10] 42 U.S.C. § 12183 (2012).
[11] *Id.*
[12] *Id.*
[13] William L. Killion & Gregory Merz, *Franchisor Liability for Failure by Franchisees to Comply with the American's with Disabilities Act Uncertain State of the Law*, 19 FRANCHISE L.J. 141 (2000).

responsibilities under the ADA are clear.[14] In both of these situations, Title III makes clear that the owner and operator must comply or risk facing penalties.[15] The primary problem, over which there is a current circuit split amongst the Eighth and Ninth Circuits, occurs when the franchisor does not own or lease the property in question. In such instances, it is unclear whether the franchisor or the owner-lessor is liable for section 303 violations of the ADA.[16] The Eighth Circuit decision, *United States v. Days Inns of America, Inc.*[17] established a "significant degree of control test" which allows for people other than owners, operators, lessees, and lessors to be found liable.[18] The Ninth Circuit took a more restrictive approach in *Lanberg v. Sanborn Theaters,*[19] which established a "parallel" test that limits liability only to owners, operators, lessors, and lessees.[20]

This split presents a significant problem because there is a potential set of circumstances in which there is an appropriate and able party to bear liability but the facility remains inaccessible to disabled people due to the court finding a judgment-proof party liable. Where neither the franchisee nor the franchisor owns the building because it is leased, and the lessor has contracted his liability to the lessee then there is no clearly identifiable owner for the purposes of this section of the ADA. So the next step is to determine who would be the operator of the facility. If ever there are circumstances that liability cannot be properly assigned to any party due to contractual relationships, then there is a significant threat to the purpose of the ADA and section 303 in particular. The problem is also significant because in franchise relationships, the franchisor often maintains a significant degree of control and should therefore properly assume

---

[14] 42 U.S.C. § 12181 (1990).
[15] *Id.*
[16] Harty v. Denny's, Inc., Civil No. 3:10-cv- 350, 2010 WL 4791897 at *2 (W.D.N.C. Nov. 18, 2010).
[17] United States v. Days Inns of Am., Inc., 151 F.3d 822, 825 (8th Cir. 1998).
[18] *Id.* at 825.
[19] Lonberg v. Sanborn Theaters, Inc., 259 F.3d 1029, 1034 (9th Cir. 2001).
[20] *Id.*

liability for building in compliance with the ADA. To allow the experienced trademark owner to guide the building of a new facility, and then not hold them liable for non-compliance with the ADA creates a significant problem in that it unjustly burdens the franchisee.

This split identifies an important issue for franchises and those protected under the ADA because compliance with the ADA has significant value to the public, and the party ultimately responsible will bear additional costs in either obedience with the law or in fines and damages for failing to obey. While in most cases, there will be a party liable for compliance with the statute, and the plaintiff will be entitled to relief, the question of whether the franchisor or the franchisee should carry the burden of complying with the statute is one of equity and public policy. Because of the ADA's remedial purposes,[21] it is important to clearly define the scope of applicability of its injunctive relief and damages provisions. These provisions are the tools of enforcement; without a clearly-identifiable liable party, they are rendered less effective.

The resolution of this dispute would clarify the law for both parties in the franchise relationship so that they may take appropriate action. If the franchisor is on notice from the start that it will be liable for ADA compliance, then it may factor this into its business plan with such steps as raising the price of the trademark licensing fees to the franchisee. The franchisee would also benefit from a bright line resolution of liability, because this would enable the franchisee to take steps to ensure compliance in the initial stages or even bargain for a reduced licensing fee since it would bare the additional costs. Regardless of where liability ultimately resides, the party bearing such a burden ought to be on notice so that the incentive of compliance is given full force. Notice may also allow the responsible party to make more informed business decisions concerning trademark premiums and insurance policies.

---

[21] *See* discussion *infra* Part II A.

This comment will explore the issue of whether the franchisor or the franchisee should be liable for compliance with the ADA in cases where the franchisor does not own or lease the realty for the underlying business operation. The Comment will begin by discussing the key provisions of Title III of the ADA, concentrating primarily on section 303. This overview will include interpretations of the language and legislative history concerning the Act. Next, a brief discussion of franchise relationships will provide background for relevant agency concerns. This Comment will then summarize and analyze the Eighth Circuit opinion in *United States v. Days Inns of Am.,* and the Ninth Circuit decision in *Longberg v. Sanborn Theaters*. This Comment will argue that the decision of the Eighth Circuit is the better one, but the holding of that court still leaves gaps, which the solution in this Comment aims to fill. In the modified Eighth Circuit approach, franchisors would be liable when they possess significant control over the design and construction of franchise facilities, or when they have significant and pervasive control over the daily operations of the franchisee's business plus actual notice of ADA violations.[22] The franchisee should bare responsibility when the franchisor lacks requisite control of the design and build or when the franchisor has pervasive control but no actual notice of ADA violations.

II. Background

The significant issue explored in this Comment is the extent of liability placed on franchisors that do not own or lease property within the context of section 303 of the ADA. This background section will introduce the aspects of the ADA and franchised business relationships that are pertinent to this comment. First, this section will explain the underlying purpose of the ADA, before addressing the specific sections at issue, 302 and 303. Then, this section will discuss franchise relationships in general and how liability affects this form of business.

A. Overview of Americans with Disabilities Act

[22] *See Days Inns,* 151 F.3d at 825

The enactment of the ADA is one of the greatest steps towards social equality in the United States' history. In section 2 of the ADA, Congress stated its findings and purpose for passing legislation that aims to create equal opportunity for individuals with disabilities.[23] The ADA was intended to combat a long history of pervasive discrimination against people with disabilities and provide a legal recourse against such discrimination.[24] Congress has further noted in section 2 of the ADA that the nation should provide equal opportunity to individuals with disabilities.[25] The main purposes of the ADA are: "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities."[26] The ADA does not merely ensure equal treatment of individuals with disabilities; it creates a positive set of laws to empower the disabled when certain facilities discriminate against this disadvantaged group.[27] The Act creates legally enforceable duties for public and private parties so that Americans with disabilities can participate meaningfully in society.[28]

Title III of the ADA regulates privately owned commercial facilities.[29] It protects disabled patrons–actual or potential–from discrimination[30] by mandating features to facilitate

[23] 42 U.S.C. § 12101 (2012) (listing what Congress has identified as the historical discrimination against individuals with disabilities and then listing how the ADA will attempt to rectify this harm).
[24] *Id*.
[25] *Id*.
[26] *Id.*
[27] Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 180 (1994).
[28] *Id*.
[29] *Id. at 208*
[30] Discrimination for the purposes of Title III of the ADA includes: imposing criteria that screen out individuals with disabilities, the failure to make modifications to afford accommodation to those with disabilities, the failure to takes steps as necessary to ensure that no individual with a disability is excluded or segregated, or the failure to remove architectural, communication, or transportation barriers in existing facilities. *See* 42 U.S.C. § 12182 (1990).

accessibility.[31] Title III mandates that places of public accommodation are designed and built, or altered, to allow for the access of individuals with disabilities.[32]

A commercial facility, as defined in the ADA, is a "facility intended for non-residential use."[33] The statute also defines a public accommodation as a private facility with operations that affect commerce. The statute provides several examples, including hotels, restaurants, theaters, grocery stores, shopping centers, professional offices, and private schools.[34]

While the Act enumerates specific public accommodations subject to regulation, the scope of Title III includes most commercial facilities.[35] Section 302 addresses facilities first occupied prior to January 26, 1993; these are termed "existing facilities."[36] The language of section 302 relevant to this note includes:

> General rule: No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[37]

This section then continues by stating that discrimination includes the failure to remove architectural barriers in existing facilities where such removal is readily achievable.[38] The purpose of this section is to encourage activity that provides easier access by the physically disabled through the creation of a legally enforceable right, which does not acquiesce to the stale

---

[31] *Id*.
[32] *Id.*
[33] 42 U.S.C. § 12181 (1990).
[34] *Id.*
[35] Mullen, *supra* note 27, at 209.
[36] Killon. *supra* note 13, at 148.
[37] 42 U.S.C. § 12182 (1990).
[38] *Id*.

pre-ADA norms of public discrimination.[39] Section 303 then goes on to address newer construction, facilities that were built or altered after January 26, 1993.[40]

The pertinent aspects of section 303 include the following language: "as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) includes–(a) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable."[41] Note that the general rule in section 302 does not contain the phrase "commercial facility," nor does it mention owners, operators or lessees. This omission is the crux of the controversy surrounding the proper interpretation of section 303. The language of the statute is passive, saying that a party is liable for failing to design and construct, but failing to clearly identify who is liable in that instance.

The last section of Title III of the ADA provides the means for enforcement.[42] The primary means of enforcement is to provide injunctive relief, whereby accessibility for people with disabilities is properly facilitated.[43] The Attorney General (and therefore also the DOJ), have power to investigate and bring actions for violations of the act.[44] This statute does not provide for punitive damages, and money damages of $50,000 for a first violation and $100,000 for a second are only awarded when the Attorney General brings the action.[45] There is a private right of action, but the remedy for a private action is limited to injunctive relief.[46]

---

[39] Mullen, *supra* note 27, at 180.
[40] 42 U.S.C. § 12183 (2012).
[41] *Id*.
[42] 42 U.S.C.A § 12188 (2012).
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.

B. Franchise Relationships

A franchise is a business relationship in which franchisees distribute goods and services, sometimes also producing them, on behalf of the franchisor.[47] This symbiotic business structure allows for the franchisor to maintain multiple outlets of distribution without incurring expenses of operating the retail directly. The franchisee derives a benefit from the ability to operate on a small scale with limited capital, while enjoying the advantages of the reputation of a well-established business name.[48] The key to this relationship is that the franchisor licenses the use of its trademark to the franchisee, and, in exchange, the franchisee must pay fees and accept certain duties and restrictions.[49]

The franchise relationship raises significant agency concerns, which potentially raise liability risks for the franchisor. Prior to the 1950s, the liability of franchisors in connection with franchisee legal violations or wrongdoing was not a significant problem, because the business format of franchises was exceedingly rare other than for bottling plants.[50] Now, franchises are so common that a new one opens "in the United States every eight minutes."[51] The law regarding franchisor liability, however, has not similarly grown at a rapid pace, and the law is still relatively unclear and unpredictable due to the fact-specific nature of the issue.[52] The law regarding franchisor liability for statutory violations is especially unclear; however, the principles of vicarious tort liability for franchisors may elucidate the future direction of this area of law

---

[47] 39 Am. Jur. 2d *Franchisor's Liability For Acts of Franchisee* § 1 (1984).
[48] *Id*.
[49] *Id.*
[50] Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 90 (1993).
[51] Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of their Franchisees*, 2005 WASH. & LEE L. REV. 417, 419 (2005).
[52] *Id*.

There are a variety of theories under which a franchisor may be liable for the actions of a franchisee.[53] A franchisor could face direct liability for "negligently design[ing] the layout or structure of the franchised unit."[54] Most tort claims against franchisors, however, are based in vicarious liability.[55] Vicarious liability has three requirements: (1) a legally sufficient relationship between the tortfeasor and the vicariously liable defendant; (2) the tortfeasor must have been acting tortuously; and (3) the tortfeasor's conduct must have occurred within the scope of the legally sufficient relationship.[56]

The first element of vicarious liability, a legally sufficient relationship, can be met by showing that there is an employee-employer relationship, or actual agency, or apparent agency.[57] Due to the public's perception that an individual franchised location may owned by the franchisor, apparent agency is an important concern for liability in franchise relationships.[58] In fact, "[t]he apparent agency doctrine is the theory that poses the biggest threat of vicarious liability to franchisors."[59]

When looking for apparent or actual agency relationship, a court will examine the authority of one party to control the actions of the other.[60] Often the authority need not actually be acted upon; rather, the ability to exercise control alone will suffice to find a legally sufficient relationship for the imposition of vicarious liability.[61] In franchise relationships, the key element is the licensing and protection of the franchisor's trademark.[62] When the franchise agreement transcends this basic function as to essentially deprive the franchisee of any freedom

---

[53]*Id*. at 425.
[54]*Id*.
[55]*Id*.
[56]*Id*. at 429.
[57]King, *supra* note 51, at 428.
[58]*Id*.
[59] *Id*. at 439.
[60] Flynn, *supra* note 50, at 90.
[61] *Id*., *see also* King, *supra* note, 51 at 430.
[62] Flynn, *supra* note 50, at 90.

to make its own business decisions, then courts may find that an agency relationship is present.[63] A franchise agreement that contains language specifically denouncing the existence of an agency relationship will not immunize the franchisor from liability to third parties; however, the court will give weight to this language as one of the factors in its fact-sensitive inquiry.[64] Another important factor may be the franchisor taking reasonable steps to assure that the franchised location prominently displays notice that the franchisee manages and operates a particular unit.[65]

III. The Circuit Split

This issue of franchisor liability was at the core of two circuit court decisions, which addressed franchisor responsibility for ADA violations. The Eighth and Ninth Circuits have a split on the interpretation of liability under section 303 of Title III of the ADA. The central issue in each case was whether to extend liability to a party that is not an owner, operator, lessor, or lessee for the "design and build" of a facility that did not comply with the ADA. The Eighth Circuit decision, *United States v. Days Inns of America, Inc.*[66] established a "significant degree of control test," which allows for people other than owners, operators, lessees, and lessors to be found liable.[67] The Ninth Circuit took a more restrictive approach in *Lanberg v. Sanborn Theaters,*[68] which established a "parallel" test that limits liability only to owners, operators, lessors, and lessees.[69] There is also a relevant case from the Fifth Circuit, *Neff v. Am. Dairy Queen Corp,*[70] which addresses franchisor liability under the ADA. This case will briefly be

[63] *Id*.
[64] 39 Am. Jur. 2d *Franchisor's Liability For Acts of Franchisee* § 3 (1984).
[65] King, *supra* note 51 at 428.
[66] *Days Inns of Am.*, 151 F.3d at 825.
[67] *Id.* at 825.
[68] *Lonberg*, 259 F.3d at 1034.
[69] *Id.* at 1034.
[70] Neff v. Am. Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995).

discussed for the sake of completeness; however, the holding presents a narrow and unworkable standard that does not resolve the issue presented in this comment.

A. *United States. v. Days Inns of America, Inc.*

On behalf of the United States, the DOJ brought an action against the hotel franchisor Days Inns of America, Inc ("Days Inn") alleging a violation of the ADA.[71] The DOJ asserted that Days Inn failed to design and construct the Wall, South Dakota Days Inn Hotel within the accessibility requirements of the ADA.[72] The district court held that Days Inn could not be held accountable under section 303 of the ADA because, "[it] did not design or construct Wall Days Inn and did not serve as the owner, lessor or operator of the hotel."[73] At issue on appeal before the Eighth Circuit was whether Days Inn designed and constructed the facility within the language of section 303 of the ADA.[74]

A Days Inn franchise representative referred Richard and Karla Hauck, the franchisees, to a specific architect and building contractor who both had previously participated in the design and build of other Days Inns.[75] The Haucks entered into a detailed licensing agreement with Days Inn and then failed to comply with its terms.[76] Instead of filing detailed architectural plans with Days Inn as required, the Haucks sent only four pages of preliminary plans.[77] After the architect finalized the plans, he did not have them approved by the Days Inn design and construct department, nor did the Haucks or the architect send the amended plans to Days Inn at any point during the construction of the hotel.[78] Days Inn had a detailed planning and design manual that

[71] *Days Inns,* 151 F.3d at 823.
[72] *Id.*
[73] *Id*. at 824.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Days Inns,* 151 F.3d at 824.
[78] *Id.*

included a specific section requiring the franchisee to comply with the ADA. This hotel was built in 1992 and therefore qualifies as newly constructed facility within the scope of 303.[79]

In its argument to the Eighth Circuit, Days Inn proposed interpreting section 303 in conjunction with a reading of section 302.[80] Thus, it asserted that, "any person who owns, leases (or leases to), or operates [a noncompliant facility]," is liable under section 302 and therefore should also be the only parties able to bear liability under section 303.[81] Days Inn argued that with this interpretation the court must find it not liable, because it is a franchisor that did not own, lease, or operate the underlying property in violation of the ADA.[82] The court rejected this argument, because Days Inn's reading would limit the applicability of this section only to places of public accommodation and therefore not include other newly constructed commercial facilities.[83] The court reasoned that the effect of this proposed interpretation would create a gap, which leaves no party liable, "for violations of new construction accessibility standards for buildings which are commercial facilities only."[84] The court noted that this clearly defies the intent of Congress in drafting the statute, and they resolved the dispute by asserting a plain language interpretation of the section.[85]

The court first noted that statutes must be interpreted so as to give meaning to each term, and that Congress did not intend to create gaps in the ADA.[86] The court reasoned that Days Inn's interpretation would create a gap and therefore is an incorrect interpretation.[87] The court

---

[79] *See* 42 U.S.C. § 12183 (1990); *Days Inns,*151 F.3d at 824.
[80] *Days Inn* at 825.
[81] *Id.*
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Days Inns* at 825.
[87] *Id*.

further noted that this resolution would not give effect to the plain language in the ADA.[88] Thus, the court concluded that section 303 does not apply only to owners, operators, lessors, or lessees of a facility.[89]

The court next turned to interpreting the meaning of "design and construct" within section 303.[90] The court utilized the DOJ's Technical Assistance Manual for clarification on which parties may be liable for failure to design and construct in accordance with the ADA.[91] The court resolved this issue by giving deference to legitimate interpretation of the agency empowered to enforce the statute, in this case the DOJ.[92] The court concluded, "that to bear responsibility for an inaccessible facility under section 303, a party must possess a significant degree of control over the final design and construction of a facility."[93]

The court applied its reasoning to the facts at hand, and decided that Days Inn had extensive and pervasive authority to control the design and build process.[94] This was evident in the language of the franchise agreement.[95] Days Inn did not exercise this authority, and they did not have notice of the facility's lack of compliance.[96] Thus the court opined that the franchisor in this case could not be liable.[97] Rather in order to find liability, a franchisor must either exercise its control over the design and build process, or have the authority to exercise this control plus actual knowledge of the facility's lack of ADA compliance.[98] The case was remanded to find the extent of knowledge possessed by Days Inn.[99]

---

[88] *Id.*
[89] *Id*
[90] *Id.*
[91] *Id* at 826.
[92] *Days Inns* at 826.
[93] *Id.*
[94] *Id*.
[95] *Id*.
[96] *Id*. at 827.
[97] *Id*.
[98] *Days Inns* at 827.
[99] *Id.*

B. *Lonberg v. Sanborn Theaters*

In *Lonberg v. Sanborn Theaters*, the complaint was not brought against a franchisor; the core issue in the case, however, is directly relevant to this comment. The primary issue of *Lonberg* is whether a party who is not an owner, operator, lessor or lessee can be held liable for noncompliance with the ADA.[100] Here individuals bound to wheelchairs brought a private action against the architect of a theater that did not provide accessibility in accordance with the ADA.[101]

The facility in this dispute was a movie theater, which was operated by Mr. Sanborn, owned by West Coast Realty, and designed by an architectural firm.[102] All three of these parties were defendants in the case; however, the architect, Salts, Troutman & Kaneshiro, Inc. ("STK"), was the sole defendant in this appeal of partial summary judgment.[103] The plaintiffs, Lonberg and Goldkorn, were disabled, in wheelchairs, and required special access to public facilities.[104] The plaintiffs alleged six separate ADA violations in the design and construction of the movie theater. The court narrowly framed the issue as, "whether [Salts, Troutman & Kaneshiro, Inc.] can be liable for 'design and construct' discrimination even though it is not one of the entities–owners, leassees, lessors, or operators—to whom liability is extended by the '[g]eneral rule' under § 12182(a)."[105]

The plaintiffs argued that the limitation of liability under the general rule of section 302 should not also limit the parties liable for "design and construct" discrimination under 303.[106] The plaintiffs asserted a theory that is akin to the "significant degree of control test" from *United*

[100] *Lonberg* at 1030.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*. at 1033.
[106] *Lonberg* at 1033.

States v. Days Inns of America, Inc.[107] The defendants argued that Congress used the phrase "public accommodation" in the general provision, but then Congress drafted section 303 with the language, "as applied to public accommodations *and commercial facilities,* discrimination . . . includes . . . a failure to design and construct compliant buildings."[108] The phrase "commercial facilities" is defined within Title III of the ADA as having a scope that exceeds public accommodations.[109] The plaintiffs argued that section 302 already applies liability to owners, operators, lessees, and lessors of public accommodation, and Congress must have intended section 303 to extend liability to parties who design and control commercial facilities; otherwise the language would create a gap and have no substantial effect.[110] The court noted that this argument implicitly suggested that the architect had the most control over the design and build of the facility.[111]

The court determined that the plaintiff's reading of the ADA is overly expansive and "create[s] a category of liability found nowhere in the text or legislative history of the ADA."[112] STK argued that the court should adopt a "parallel" interpretation of the language in section 303, meaning that the liable parties under section 303 should mirror those potentially liable entities enumerated in section 302.[113] The court opined that, although lacking much evidentiary support, this "parallel" interpretation is more consistent with the text of the ADA.[114] The court explained: "[section 303] reads: *as applied to* public accommodations and *commercial facilities*, discrimination for the purposes of [section 302] of this title includes . . . ."[115] Without much

---

[107] *Id.*; *See* discussion *supra* Part III B.
[108] 42 U.S.C. § 12182, 12183 (1990); *Lonberg*, at 1034 (internal citations and quotation marks omitted).
[109] *See* 42 U.S.C. § 12181 (1990).
[110] *Lonberg* at 1034.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] 42 U.S.C. § 12183(a) (1990) (emphasis added) (internal quotation marks omitted).

explanation, the court concluded that Congress likely intended to limit liability only to the listed parties in section 302, because section 303 does not make a separate list of potentially liable parties.[116] The court ultimately rejected the "significant degree of control" approach because it "created a category of liability found nowhere in the text or legislative history of the ADA."[117]

The court additionally preferred the "parallel" approach to the "significant degree of control" approach because it is more consistent with other titles of the ADA.[118] The court explained that each title of the ADA initially describes a general rule of liability, and then each following subsection just describes what amounts to discrimination.[119] Finally, the court noted that the main remedy in Title III claims is injunctive relief, and only a person who is in current control of the building has authority to provide this remedy.[120] Therefore, the placement of liability on an architect, builder, or subcontractor who lacks ability to provide the statutory relief is a misinterpretation that gives no effect to the purpose of the section.[121] The court accordingly held that only an owner, operator, lessor, or lessee can be liable for violations of Title III of the ADA.[122]

C. *Neff v. Am. Dairy Queen Corp*

A Disabled customer brought an action against the restaurant franchisor in *Neff v. Am. Dairy Queen*.[123] In this case, Margo Neff required the use of wheelchair, and she alleged that the Nacogdoches Dairy Queen retail store posed several accessibility barriers to the disabled.[124] American Dairy Queen Corporation ("ADQ") owns the trademark "Dairy Queen", and they

---

[116] *Lonberg* at 1034.
[117] *Id*
[118] *Id.*
[119] *Id.* at 1036.
[120] *Id.*
[121] *Id.*
[122] *Lonberg* at 1036.
[123] Neff v. Am. Dairy Queen Corp., 58 F.3d 1063, 1064 (5th Cir. 1995).
[124] *Id.*

licensed this trademark to the underlying Nacogdoches location.[125] Neff argued that the inaccessibility to the restaurant was a violation of section 302 of the ADA, and furthermore that ADQ as the franchisor ought to be liable.[126] The district court granted ADQ summary judgment, based on a ruling that they did not "operate" the store within the meaning of section 302.[127]

Upon appeal, the Fifth Circuit defined the issue of the case as, "whether a franchisor with limited control over a franchisee's store 'operates a place of public accommodation' within the meaning of section 302(a)."[128] The court concluded that ADQ had pervasive control of the Nacogdoches location that extended to accounting, uniforms, and the use of the trademark.[129] Despite this control, the court ultimately found that these factors were irrelevant to the question of whether ADQ "operates" the facility for purposes of the ADA.[130] The Fifth Circuit opined that the determination of the franchisor's liability ought to rest solely on the terms of the franchise agreement, and the franchise agreement in that case only provided for a veto power on structural changes.[131] The court further determined that this veto power did not amount to ADQ operating the facility, because ADQ could only have utilized this power prior to the building of the existing facility.[132] The ADA has no retroactive effect and was not in effect at the time this facility was built, so the court concludes that ADQ cannot be liable.[133]

This case is not discussed throughout the note because the Fifth Circuit concentrates the term "operates" under section 302, which only concerns pre-existing facilities. The Eighth and Ninth Circuit cases focus on section 303, which is just new construction. The Fifth Circuit's

---

[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id*. at 1066.
[129] *Neff* at 1067.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 1068.
[133] *Id.*

holding also is narrower than the Ninth Circuit's, and therefore any criticisms about to the "parallel" approach will also identify flaws in the Fifth Circuit approach. The case was nonetheless mentioned, because it was the first case to address the issue of whether franchisors should be liable for franchise facilities failing to comply with the ADA.

IV. Analysis

The Eighth Circuit approach provides the better interpretation of section 303 of the ADA, because it reflects legislative intent and gives greater force to the overall intent of the ADA. The "significant degree of control" interpretation is consistent with congressional intent, promotes public policy considerations, and is economically efficient. The holding of the Ninth Circuit too broadly rejected the parties that may be held liable under section 303. Although the Ninth Circuit's decision in *Lonberg*–which denied liability to the architect–may have been correct, the holding of that case also denies the potential for liability of any franchisor regardless of how instrumental a player they are in the design and build of the facility. Thus the Eighth Circuit approach provides the superior interpretation. First the Eighth Circuit approach gives the most effect to congressional intent by means of the DOJ's interpretation of the statute. Second, the expansive liability created by the Eighth Circuit's interpretation of section 303 is more cost effective than the interpretation given by the Ninth Circuit.

As a result, the most useful interpretation of section 303 is one that reflects the Eighth Circuit's interpretation, but focuses less on the notice requirement when there is a strong degree of control. This solution, the modified Eighth Circuit approach, would embrace the holding of the Eighth Circuit, but widen the coverage of liability for franchisors. Finally, a brief discussion

on general agency and franchisor liability under section 303 will serve to complete the picture of the appropriate level of franchisor liability with respect to ADA compliance.

A. Statutory Interpretation

This circuit split here arises out of the Eighth and Ninth Circuit's divergent interpretations of section 303. The first step of assessing the scope of a statute is to look to the plain language and give each word its ordinary meaning, unless it is defined otherwise.[134] The United States Supreme Court established a principle of statutory interpretation that a court should, "give effect, if possible, to every clause and word of the statute."[135] This presumes that Congress does not draft a statute without intent to give significance to every word. One must remember that all meaning is contextual.[136] Thus, while the meaning of each individual word may be clear, an ambiguity may arise from syntax—the interrelationship of the "living words."[137] A reader perceives a meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used."[138] Therefore, the overall meaning of a statute–however artfully written–may nonetheless be ambiguous in its application, as perfectly exemplified by the current circuit split.

Ambiguity, however, is not the only guidepost of statutory interpretation and is not a prerequisite to utilizing extrinsic interpretive aids.[139] Under some circumstances, a court will

---

[134] Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.")
[135] Moskal v. United States, 498 U.S. 103, 111 (1990).
[136] Steven Wisotsky, *How to Interpret Statutes-or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 342 (2009).
[137] *Id.*
[138] *See* NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.); *See also* William L. Killion & Gregory Merz, *Franchisor Liability for Failure by Franchisees to Comply with the American's with Disabilities Act Uncertain State of the Law*, 19 FRANCHISE L.J. 141 (2000).
[139] 2A Sutherland Statutory Construction § 48:1 (7th ed.).

look beyond the language of the statute.[140] If a literal reading of a statute "produces an outcome that is demonstrably at odds with clearly expressed congressional intent to the contrary, or results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common sense, then we can look beyond an unambiguous statute and consult legislative history to divine its meaning."[141]

Furthermore, if a governmental agency is charged with enforcing and interpreting the statute, the Supreme Court has held that the agency ultimately has authority to reasonably fill in gaps in the applicability of the statute.[142] "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[143] In *Chevron*, the court reasoned that the agencies charged with enforcement of a specific statute are better equipped than the courts to discern policy questions regarding the interpretation of that statute.[144] The DOJ has enforcement authority for Title III of the ADA.[145] The Eighth Circuit gives deference to the DOJ's interpretation, while the Ninth Circuit relies solely on the courts own policy for statutory interpretation.[146]

B. Public Policy

The modified Eighth Circuit approach is bolstered by important public policy considerations. According to the results of the 2000 Census, there were close to fifty million people with severe disabilities living in the United States. This number represents approximately

[140] United States v. Crabtree, 565 F.3d 887, 889 (4th Cir. 2009).
[141] *Id*.
[142] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).
[143] *Id.*
[144] *Id.*
[145] *See supra* note 23.
[146] *See supra* note 85.

twenty percent of the total population.[147] A significant number of disabled Americans find it difficult to gain access to a number of services and activities that should otherwise be available to them due to discrimination or ignorance on the part of others.[148] Historically, society has tended to isolate and segregate individuals with disabilities and even today, the discrimination against such individuals persists in areas of housing, employment, public accommodation, and transportation, to name a few.[149] In passing the ADA, Congress was motivated by worthy principles. Among them was the idea that physical or mental disability should in no way diminish a person's right to fully participate in all aspects of society.[150] In addition, unlike individuals who have experienced discrimination on the basis of race, sex, national origin or age, Americans with disabilities did not–prior to the passage of the ADA–have any access to a meaningful recourse to redress such discrimination.[151] The nation's goal regarding people with disabilities is to assure equality of opportunity and full participation in our society.[152] Congress believed that this laudable objective would best be obtained by providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.[153] As a part of this objective, Congress allowed for a private right of action in cases of ADA discrimination. Recognizing the need to expand liability to parties who take an active role in designing and constructing facilities, the DOJ sought to impose liability not only on the owners of the premises but also on construction companies and architects.[154] In spite of that

---

[147] US Department of Commerce: Economics and Statistics Administration, US CENSUS BUREAU, *available at* http://www.census.gov/prod/2003pubs/c2kbr-17.pdf.
[148] Robert F. Rich et. al., *Critical Legal and Policy Issues for People with Disabilities*, 6 DEPAUL J. HEALTH CARE L. 1,6 (2002).
[149] 42 U.S.C. § 12101 (1990).
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *See* Department Of Justice, Technical Assistance Manual § III-5.1000 (Jan.1993).

effort, the ADA remains under-enforced.[155] The DOJ has the authority to certify that state and local accessibility requirements, frequently established through the building codes, meet or exceed the ADA's accessibility requirements. If a particular state has acquired such certification and an entity has complied with it, this would serve as rebuttable evidence of compliance with the ADA. In 2005 only five states took advantage of this program.[156] One conclusion to be drawn from these facts is that states are hesitant in policing compliance with the ADA.[157] The modified Eighth Circuit approach would allow for an additional avenue for recovery, thus encouraging plaintiffs and their attorneys to bring ADA cases.

On the other hand, interpreting the term "operates" narrowly will adversely affect the ability of plaintiffs and government to successfully enforce compliance with the Act.[158] The categories of facilities of "public accommodations" subject to the ADA are frequently operated through franchise agreements, e.g. hotels, fast food chains, movie theaters.[159] Inability to reach franchisors that have the power to dictate how the stores are built and how they operate substantially frustrates the Congressional aim to end discrimination against Americans with disabilities in day-to-day life.

The modified Eighth Circuit approach is a fair test that will allow for furtherance of this important public policy by expanding liability to all those individuals who actively participate in both construction of the facilities and the day-to-day operation of the business. Holding franchisors liable would allow for greater recourse for individuals with disabilities and would help ensure compliance. This test is fair because it limits liability of compliance to parties with a financial stake in the business that is conducted at the noncompliant facility.

---

[155] Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1858-59 (2005).
[156] *Id.*
[157] *Id.*
[158] *Dairy Queen*, 58 F.3d at 1066.
[159] *Id.*

C. Incorporating Tort-Like Principles with Franchisor Liability Under the ADA.

A similar debate has developed in cases of franchisor's liability for franchisee's tortious conduct.[160] A parallel between tortious conduct and statutory compliance is a useful one. Franchisors may be held vicariously liable for the torts of their for the acts of its franchisee if the "tortious acts were performed within the franchise relationship and the franchisor had a right to control the acts of the franchise, or if the injured party reasonably believed that the franchisor exercised control over the franchisee and detrimentally relied on that belief."[161] Thus, a tort victim may have two avenues to pursue: 1) the theory of respondeat superior and 2) the theory of apparent authority.[162] To encourage ADA compliance, a similar legal theory should be adopted in determining who should be held to account under section 302 of the statute. When one intends to stay at a Days Inn and the nationally run, franchisor-operated website provides that the facility would accommodate one with disabilities, then equity should provide compensation to a plaintiff who detrimentally relied on such representation. Thus, the theory of apparent authority should be applied in cases of ADA compliance, as it is applied in cases of tort victims.

In instances of passive trademarking, however, the law becomes murkier. Passive trademarking occurs when the franchisor licenses the trademark to the franchisee, but does not facilitate uniform standards of practice, supervise customer engagements, or play a role in day-to-day management.[163] In cases of passive trademarks, the trademark owners can shield themselves from tort liability caused to their consumers by franchisors.[164] For example, in *Mobil Oil v. Bransford*, Mobil was able to avoid liability to consumer who was severely beaten by a

[160] LoPucki, *supra* note 8, at 1101-02 (2002).
[161] Philip F. Zeidman, *Franchising And Other Methods of Distribution: Regulatory Pattern and Judicial Trends,* 1648 PLI 473, 717 (2008).
[162] *Id.*
[163] LoPucki, *supra* note 8, at 1102
[164] *Id.* at 1101-02.

Mobil Mart employee.[165] Thus, passive trademarking allows for the operation of the business that offers many benefits with few drawbacks.[166] The trademark holder, or the franchisor, is able to reap all the benefits of public recognition and the goodwill of the brand while carrying no responsibility in ensuring the safety and quality of their products or compliance with the ADA.[167] The primary drawback to this is that, "[m]ost customers assume they are dealing with the trademark owner, and even those who realize they are not lack information necessary to contract meaningfully with the entities that operate behind the trademark's mask."[168] This approach is severely flawed, and it has been proposed that holders of the trademark, even if passive, be jointly and severally liable for damages sustained by tort victims.[169] The arguments presented for this proposition also support the imposition of liability in cases of non-compliance with the ADA.

First, trademark and license holders as opposed to the customer should monitor trademark users.[170] Business "display trademark in order to reassure their customers."[171] Thus, when purchasing a trademark, a lay consumer will reasonably expect that the business will stand behind their product. Instead, the law presumes that "customer has contracted for the liability of whatever entity is doing business under the trademark."[172] This is simply a legal fiction that cannot be reconciled with reality.[173] This legal presumption is irreconcilable with most commercial legal theories that aim to honor reasonable expectations of the parties in a bargaining process.[174] Similarly, reasonable expectations of being able to obtain service in the areas of public accommodations for the individuals covered by the ADA should be fulfilled.

---

[165] *Id.* at 1102.
[166] *Id.*
[167] *Id.* at 1103
[168] *Id*
[169] LoPucki, *supra* note 8 at 1103.
[170] *Id.* at 1114
[171] Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1114 (2002).
[172] *Id.*
[173] *Id.*
[174] *See* UCC § 1-103 comment 1.

D. Eight Circuit Approach Promotes Economic Efficiency.

Requiring the franchisors to bear the cost of ADA compliance will allow for greater economic efficiency through cost shifting. Most licensing agreements already require "financial responsibility and indemnification from their licensees"[175] in cases of tortious conduct. Placing the burden of ADA compliance on the franchisors will as well allow the franchisors and the franchisees to contractually allocate the cost of such compliance amongst each other. The prospect of potential liability will ensure that the franchisor takes the most cost effective measures of compliance, such as close inspections of the building sites prior to the completion of the construction.

Furthermore, anticipating potential liability for noncompliance, the franchisor will be able to pass the cost of compliance to its franchisees through the increased franchisee fees, and ultimately, to the end consumer through the increased prices; thereby, requiring the society as a whole to carry the burden of the compliance with the ADA, which is in accord with the Congressional intent.[176]

E. Proposed Solution: The Modified Eighth Circuit Approach

As discussed above, the Eighth circuit approach is superior to the holding from the 9th circuit; however, the holding in the in the Eighth could still be improved. In *United States v. Days Inns of America, Inc*., the defendant franchisor was found not to be liable unless the plaintiff could show that DIA had actual knowledge of the lack of ADA compliance in the facility. The court claimed essentially that a franchisor with authority to control the design and

[175] LoPucki, *supra* note 8, at 1116.
[176] *See* discussion on Congressional intent in Part III B *supra*.

build of a facility could still escape liability. The franchisor could simply choose not to exercise its authority to control during the design and build phase, and then subsequently not make itself aware of the lack of compliance in the franchisee's facility. This result presents a risk of encouraging bad-faith players to intentionally act just as DIA did; a franchisor could maintain significant control over the franchisee in its day-to-day business and suggest ADA compliance in manuals, but then never actually assure compliance by exerting that authority or obtaining notice of the final state of the facility.

The modified Eighth Circuit approach does not allow for what amounts to a loophole for the franchisors. It presents a clear rule that if franchisors possess the authority to control the design and build of a facility, then they will be liable under section 303 for the resulting building albeit owned and operated by the franchisee. Although this expands the scope of liability under the Eighth Circuit's holding, it only does this with respect to franchisors and not with parties such as architects or contractors.

To complete the scope of franchisor liability under section 303, this section will discuss when the authority to control design and build of a facility should be imputed upon a franchisor. Applying general agency standards, if the franchisor is determined to have a pervasive control over the day-to-day activities of the franchisee, then courts may find an existence of a principal-agent relationship. Under this relationship the acts of the franchisee within the scope of the franchise relationship will be for the benefit of the franchisor, and the two parties will not be acting as autonomous business entities. Therefore the franchisor that does not specifically claim authority over the design and build of the franchisee's facility, may still maintain this authority since it has a general control over the business actions of the franchisee. This agency relationship has the effect of burdening the franchisor with liability under section 303, because it

imputes the authority to control the design and build of the facility, which is all that is really necessary under the modified Eighth Circuit approach. It is important to note, however, that in franchise agreement retaining control over the construction and ensuring common design of buildings is of great importance.[177] Thus, the Eight Circuit decision will present a franchisor with an ultimatum: 1). he can relinquish all control over the design and built, or 2). he will have to serve as an insurer of ADA compliance.[178] Typically the franchisor's first option would result in an inability to promote their brand, and therefore it is likely that they will choose to avoid being subjected to ADA violations and the penalties associated therewith.

V. Conclusion

Upon first glance, having two parties potentially liable for ADA violations may seem like a benefit that makes compliance twice as likely. Currently there is a problem with the lack Title III ADA compliance, however, and having two parties who both think the other is liable serves to exacerbate this problem. The Congressional intent of the ADA is not primarily to force the DOJ into the realm of business operation; rather, the ADA serves to protect disabled Americans. The intent of the ADA in section 303 is to reduce and eliminate physical barriers, and the franchise business structure ought not detract from the force of the ADA by making compliance less likely. Franchisors create their business structure as to avoid certain types of daily operational responsibilities and liabilities. Contracting for the avoidance of specific torts does not offend public policy where there is still a responsible party. Liability for noncompliance with ADA construction specifications is a different type of issue. The Eighth Circuit's interpretation offers a solution that does not necessitate increased cost to the franchisor; instead it

[177] *See* Killion, *supra* note 13, at 145.
[178] *Id.*

promotes a motivating factor for the franchisor to create a system that ensures ADA compliance. The costs of construction for compliance can always be passed to the franchisee on the front end, but the courts are just making sure that the costs of liability cannot also be passed to the franchisee. When the courts can give fill a gap of statutory interpretation, choosing the option that more effectively produces the intent of the overall statute seems to be the better choice. Here, we have two Circuit Courts providing reasonable interpretations, but the Eighth Circuit approach should facilitate a franchisor to be more responsible in regards to the ADA. Since the franchisor is typically involved many facilities nationwide, it is not unreasonable for the courts to interpret that they ought to include sound ADA knowledge within their own breadth of expertise. As of now the fines that could be imposed by the DOJ are not too onerous, and the franchisor maintains the ability to force the franchisee to pay for the construction that is required for compliance. The result of the Eighth Circuit's interpretation should really only serve to create a bright line rule that encourages franchisors to monitor the construction of the franchisee's facilities. As an additional benefit, when the underlying facility is fully ADA compliant, the franchisor will avoid damage to the goodwill of their trademark.