

**HOW CAN THE STATE OF FLORIDA IMPROVE ACCESSIBILITY FOR  
PERSONS WITH DISABILITIES AND BENEFIT THE BUSINESS  
COMMUNITY?**

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**I. INTRODUCTION**

For the past twenty years, actions have been filed to remove architectural barriers under the Americans with Disabilities Act (the “ADA”).<sup>1</sup> Because the ADA does not require administrative preconditions,<sup>2</sup> thousands of cases have been filed in Florida,<sup>3</sup> and the only relief obtained by the aggrieved party has been the removal of architectural barriers and attorneys’ fees and costs.<sup>4</sup> As most cases filed are against small commercial properties, the barrier removal is far less costly than the attorneys’ fees and costs expended to litigate the case.<sup>5</sup>

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<sup>1</sup> See 42 U.S.C. § 12182(b)(2)(A)(iv) (2006) (classifying the failure to remove architectural barriers as a form of discrimination); see, e.g., *Kallen v. J.R. Eight, Inc.*, 775 F. Supp. 2d 1374, 1376 (S.D. Fla. 2011); *Wilson v. Haria & Gogri Corp.*, 479 F. Supp. 2d 1127, 1129 (E.D. Cal. 2007); *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622, 625-27 (D. Md. 2002); *Access Now, Inc. v. S. Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1360 (S.D. Fla. 2001); *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1068 (D. Haw. 2000).

<sup>2</sup> *McInerney v. Renssalaer Polytechnic Inst.*, 505 F.3d 135, 138-39 (2d Cir. 2007).

<sup>3</sup> See, e.g., *Southern District of Florida ADA Cases/Subject Property Addresses (2004-Present)*, U.S. DIST. CT. FOR THE S.D. FLA., <http://www.flsd.uscourts.gov/wp-content/uploads/2012/01/ADAPropertyListings.pdf> (last updated Feb. 20, 2014) (providing a list of properties involved in ADA disputes).

<sup>4</sup> See 42 U.S.C. § 12188(a)(1)-(2) (2006) (providing that “injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities”); 42 U.S.C. § 12205 (2006) (allowing the prevailing party to claim attorneys’ fees).

<sup>5</sup> Richard M. Hunt, *Practical Responses to Accessibility Litigation*, DALL. BAR ASS’N 1, 6 (2012), [http://www.dallasbar.org/system/files/practical\\_responses\\_to\\_accessibility\\_litigation\\_by\\_richard\\_m.\\_hunt\\_0.pdf](http://www.dallasbar.org/system/files/practical_responses_to_accessibility_litigation_by_richard_m._hunt_0.pdf).

The availability of an administrative remedy would serve to drive costly litigation down and allow the creation of an inexpensive solution.

Since 2004, there have been over two thousand cases involving public accommodations regarding disability discrimination filed in the U.S. District Court for the Southern District of Florida alone.<sup>6</sup> Due to the proliferation of such cases in the U.S. District Court for the Middle District of Florida, U.S. District Court Judge Gregory Presnell stated that the ADA is a cottage industry for plaintiffs' lawyers.<sup>7</sup> Recently, in *Houston v. Marod Supermarkets, Inc.*, the Eleventh Circuit held that a plaintiff with a disability has standing to be able to sue multiple public accommodations as a "tester" to accomplish the goals of the ADA and rid public accommodations of architectural barriers to access.<sup>8</sup> However, the dissent discussed the paradoxical difficulty of ending discrimination against persons with disabilities due to the frustration, expense, and judicial effort required to obtain such a result:

The Americans with Disabilities Act . . . is counted among the most salutary remedial laws ever passed by a well-intended Congress. Because of its commendable purpose, its provisions are liberally construed. The district court, mindful of its obligations under the law, approached this case with circumspection, obedient to Congress'[s] intent and the mandate of the ADA.

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The Plaintiff is a serial litigator. The misfortune of his disability does not make him less so. The Plaintiff has been a party in 170 cases in the Southern District of Florida and 101 in the Middle District. His travels up, down, and across the byways of South Florida, doggedly in search of a grievance to call his own, are worthy of a Carl Hiassen plot. Seeking injunctions, costs in every variety, and monetary grist for the mills of his attorneys'

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<sup>6</sup> *Southern District of Florida ADA Cases/Subject Property Addresses (2004-Present)*, *supra* note 3.

<sup>7</sup> *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1279-82 (M.D. Fla. 2004).

<sup>8</sup> *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332-34 (11th Cir. 2013).

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offices (the wheels of which surely grind exceeding expensive), this plaintiff is doubtless a force with which many a small business will reckon.<sup>9</sup>

Finally, the dissenting judge added, “It should be noted that, unless he has been allowed some remission or reduction thereof, Plaintiff’s filing fees alone in these cases would amount to \$108,000.00 at today’s rates in the two districts.”<sup>10</sup>

Since 1992, the State of Florida has included protections for persons with disabilities in the Florida Civil Rights Act (the “FCRA”).<sup>11</sup> Unlike the ADA, prior to filing suit in court, complainants under the FCRA must first go through an administrative procedure where the Florida Commission on Human Relations (the “Commission”) must attempt to conciliate the case and then investigate before finding whether there is cause to sue.<sup>12</sup> A complainant may use this process without needing to retain a lawyer.<sup>13</sup> However, in exchange for complying with conditions precedent, the complainant can obtain injunctive relief to remedy the discriminatory practices as well as damages and attorneys’ fees and costs.<sup>14</sup>

While the Commission’s current investigative and conciliation process serves to vet frivolous claims and permits businesses to resolve claims without costly litigation, the process is not used for the thousands of barrier-removal claims.<sup>15</sup> In fact, only two percent of the over twelve hundred cases filed annually with the Commission are cases involving public accommodations of all classes protected under the FCRA.<sup>16</sup>

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<sup>9</sup> *Id.* at 1341 (Bowen, J., dissenting) (citations and footnote omitted).

<sup>10</sup> *Id.* at n.1.

<sup>11</sup> FLA. STAT. §§ 760.01-.11 (2013).

<sup>12</sup> § 760.11.

<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See Annual Report 2010-2011*, FLA. COMM’N ON HUMAN RELATIONS 4-5 (2010-11),

<http://fchr.state.fl.us/fchr/content/download/6755/38075/file/FCHR%20Annual%20Report%202010-2011.pdf>. The FCHR claims that it saves Florida businesses over twelve million dollars in litigation expenses per year. *Id.* at 6.

<sup>16</sup> *See id.* at 4-5. The protected classes include “race, color, religion, gender, national

Common sense would easily dictate that the use of administrative preconditions would be a benefit to owners and operators of public accommodations as well as disability advocates who can get quick relief and damages without the need for a lawyer. Such a remedy would save millions of dollars in litigation expenses and allow disability advocates to achieve the goals of creating a world free of architectural barriers. In light of these benefits, the reason why the FCRA has not been used as a remedy is the Commission's refusal to accept jurisdiction of disability-discrimination cases involving the removal of architectural barriers and the FCRA's narrow definition of "public accommodation."<sup>17</sup>

## II. THE EXISTENCE OF PHYSICAL BARRIERS TO ACCESS IS ONE OF THE CORNERSTONES TO CIVIL RIGHTS FOR PERSONS WITH DISABILITIES

The existence of physical barriers that prevent community integration is one of the cornerstones of the ADA.<sup>18</sup> In congressional hearings regarding the ADA, Congress clearly expressed its broad intent in defining the word "discrimination."<sup>19</sup> The term "discrimination" can be somewhat misleading:

Although the term "discrimination" evokes images of active discrimination, e.g., a person is expressly forbidden to enter the premises because of his or her disability, Congress also intended to eliminate more passive forms of discrimination, e.g., a person is physically unable to enter the premises because it lacks a wheelchair-accessible entrance. *See, e.g.*, H.R. Rep. No. 101-485(II) at 99 (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 382 (a primary purpose of the ADA is to "bring individuals with disabilities into the economic and social mainstream of American life.")<sup>20</sup>

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origin, age, handicap, [and] marital status." FLA. STAT. § 760.07 (2013).

<sup>17</sup> *See infra* notes 47-49 and accompanying text and Part III.B.

<sup>18</sup> *See infra* notes 19-24 and accompanying text.

<sup>19</sup> *See infra* note 20 and accompanying text.

<sup>20</sup> *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 706 n.1 (D. Or. 1997). In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (Kennedy, J., concurring), Justice

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Further, the regulations underpinning the ADA also emphasize Congress's intent as follows:

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.<sup>21</sup>

The underlying goal or mandate of the ADA was to ensure that persons with disabilities have an equal opportunity to enjoy a place of public accommodation as other persons without disabilities.<sup>22</sup> Due to an age-old tradition of constructing facilities with architectural barriers, it was clear that this law called for a paradigm shift to design, construct,

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Kennedy stated:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. . . . [K]nowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.

One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. The law works this way because the law can be a teacher. . . . [T]he Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.

*Id.* at 374-75 (citations omitted).

<sup>21</sup> 28 C.F.R. § 36.101 (2013).

<sup>22</sup> See *Indep. Living Res.*, 982 F. Supp. at 733 (finding that one of the objectives of the ADA is “to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons”).

and retrofit facilities so that anyone can use them.<sup>23</sup> When compared to other civil rights laws that require a person to refrain from discriminatory behavior, the ADA placed an affirmative duty to modify, and spend money on changes to, the physical environment to eliminate discrimination.<sup>24</sup>

However, it is simple to analogize the discrimination under the ADA to other civil rights laws that involve other protected classes. As with any civil rights law, the goal is to promote equal treatment and full inclusion.<sup>25</sup>

Even before Congress enacted the ADA, it was comparatively rare for the owner of a public accommodation to stand on the front steps of the building holding a sign which read “no wheelchairs allowed.” No sign was necessary. The imposing row of steps in front of the building already communicated the message that persons in wheelchairs were not welcome. Accordingly, the ADA requires more than merely refraining from active discrimination, e.g., “you are forbidden to enter this building because you are in a wheelchair.” The operator of a public accommodation may also be required to take affirmative steps to ensure that the “opportunity” to patronize the facility is a meaningful one. *See* H.R.Rep. No. 101-485(II) at 104 (May 15, 1990), *reprinted at* 1990 U.S.C.C.A.N. 267, 387. As a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons, to the extent feasible given the limitations imposed by that person’s disability. *See* 28 CFR §§ 36.202, .203, .302.<sup>26</sup>

During the twentieth anniversary of the ADA, the senators who enacted the statutes reminisced about the legislative intent and the

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<sup>23</sup> *See* 28 C.F.R. §§ 36.101, .401-.406.

<sup>24</sup> *See* 28 C.F.R. § 36.304 (2013); *infra* note 26 and accompanying text.

<sup>25</sup> *See infra* notes 26-27 and accompanying text.

<sup>26</sup> *Indep. Living Res.*, 982 F. Supp. at 733.

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successes of the Act:

The Americans With Disabilities Act—signed into law on January 26, 1990—has been described as the Emancipation Proclamation for people with disabilities. The ADA set four goals for people with disabilities: [e]qual opportunity, full participation, independent living, and economic self-sufficiency. But as the chief Senate sponsor of the ADA, I can tell my colleagues that at its heart, the ADA is very simple. In the words of one disability rights advocate, this landmark law is about securing for people with disabilities the most fundamental of rights: “The right to live in the world.” It is about ensuring that people with disabilities can go places and do things that other Americans take for granted.

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Our society is so dynamic and changes so rapidly that we are often oblivious to quiet revolutions taking place in our midst. One such revolution has been unfolding for the last 20 years since the signing of the Americans with Disabilities Act. How soon we forget that, prior to ADA, Americans with disabilities routinely faced prejudice, discrimination, and exclusion, not to mention the physical barriers to movement and access in their everyday lives. In hearings prior to passing the law in 1990, we heard heartbreaking testimony about the obstacles and the discrimination that people with disabilities encountered every day of their lives. We heard stories of Americans who had to crawl on their hands and knees to go up a flight of stairs or to gain access to their local swimming pool, who couldn’t ride on a bus because there was no lift, who couldn’t go to a concert or a ball game with their families because there was no accessible seating, who couldn’t even cross the street in a wheelchair because there were no curb cuts. In short, we heard thousands of stories about people who

were denied “the right to live in the world.”<sup>27</sup>

Title III of the ADA specifically prohibits discrimination against persons with disabilities by private entities operating in places of public accommodation.<sup>28</sup> The Act defines a place of “public accommodation” as a facility operated by a private entity whose operations affect commerce and fall within one or more of the twelve broad categories of facilities listed in the statute.<sup>29</sup> “While the list of categories is

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<sup>27</sup> 156 Cong. Rec. S6132 (2010) (statement of Sen. Tom Harkin).

<sup>28</sup> 42 U.S.C. § 12182(a) (2006).

<sup>29</sup> See 42 U.S.C. § 12181(7) (2006).

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

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exhaustive, the representative examples of facilities within each category are not. Within each category only a few examples are given.”<sup>30</sup>

The ADA specifically addresses elimination of architectural barriers; the general prohibition of the ADA prohibits unequal treatment:

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.<sup>31</sup>

Then the ADA specifically addresses the removal of barriers in existing facilities and provides that the owner of a building or some entity violates the ADA in the following ways:

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier . . . is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily

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*Id.*

<sup>30</sup> 28 C.F.R. app. C § 36 (2013).

<sup>31</sup> 42 U.S.C. § 12182(b)(1)(A)(i).

achievable.<sup>32</sup>

Further, the ADA also requires all commercial facilities, including public accommodations constructed or altered after 1993, to be designed and constructed in an accessible method:

[D]iscrimination for purposes of section 12182(a) of this title includes—

(1) 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 to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the

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<sup>32</sup> § 12182(b)(2)(A)(iv)-(v).

The term “readily achievable” means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12181(9).

usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.<sup>33</sup>

Given the broad reach of title III of the ADA, persons with disabilities now have the right to demand that building owners tear down restrictive barriers throughout the nation, and there have been thousands of suits filed throughout the country demanding equality and access.<sup>34</sup> But as demonstrated above, there is frustration in both the bench and the bar regarding the fact that, out of the fifty-four million persons with disabilities, only a handful of disability advocates and their

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<sup>33</sup> 42 U.S.C. § 12183(a) (2006).

<sup>34</sup> See Hunt, *supra* note 5, at 1. When signing the ADA in 1991, President George H.W. Bush stated, in part:

And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.

And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

With, again, great thanks to the Members of the United States Senate, leaders of whom are here today, and those who worked so tirelessly for this legislation on both sides of the aisles. And to those Members of the House of Representatives with us here today, Democrats and Republicans as well, I salute you. And on your behalf, as well as the behalf of this entire country, I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), available at [http://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html).

attorneys are filing the majority of lawsuits.<sup>35</sup>

As a litigator who has been a part of the Disability Rights Bar Association, the reason for this disparity is clear. Title III of the ADA provides only two remedies for private litigants—first, injunctive relief to remove the architectural barrier<sup>36</sup> and second, attorneys' fees and costs.<sup>37</sup> So, in order for a person to sue, a plaintiff with a disability must have a desire to engage in litigation solely to see a certain barrier removed when he or she decides to return to the subject premises.<sup>38</sup>

Such a person is not entitled to damages notwithstanding the actual harm caused by the existence of physical barriers.<sup>39</sup> Further, in order to get relief, the person must assert that they will return to the exact place that they suffered discrimination.<sup>40</sup> As such, it should be no surprise that most people would patronize those stores or public accommodations that choose to provide access rather than revisit a situation that was uncomfortable and humiliating.

None of these cases are frivolous. Most public accommodations will contain some barriers to access notwithstanding the best efforts by business owners.<sup>41</sup> Further, businesses can easily remediate many

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<sup>35</sup> See *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1341-43 (11th Cir. 2013) (Bowen, J., dissenting); see also *Disability Stats and Facts*, DISABILITY FUNDERS NETWORK, <http://www.disabilityfunders.org/disability-stats-and-facts> (last visited November 23, 2013) (stating that there are approximately fifty-four million Americans with disabilities).

<sup>36</sup> 42 U.S.C. § 12188(a) (2006).

<sup>37</sup> 42 U.S.C. § 12205 (2006).

<sup>38</sup> See *Houston*, 733 F.3d at 1334-35.

<sup>39</sup> See *id.* at 1334-35. The issue of harm is an everyday occurrence. For example, a person who cannot get into a bathroom because of physical inaccessibility may urinate or defecate in his or her pants or in the parking lot. See, e.g., *Boemio v. Love's Rest.*, 954 F. Supp. 204, 205-06 (S.D. Cal. 1997).

<sup>40</sup> See *Houston*, 733 F.3d at 1334-35.

<sup>41</sup> 42 U.S.C. § 12101 (2006); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1043 (9th Cir. 2008) (finding that more accommodations were necessary despite the defendant's compliance in removing the architectural barriers that were at issue in the first complaint); *Fortyune v. Am. Multi-Cinema*, 364 F.3d 1075, 1078-79, 1082-83 (9th Cir. 2004) (finding that a movie theater with handicap seating was in violation of the ADA by not adopting policies that accommodated the plaintiff); *Indep. Living Res. v. Or. Arena Corp.*, 1 F. Supp. 2d 1159, 1169 (D. Or. 1998) (explaining that a violation

architectural barriers, such as creating or redrawing an accessible parking space or installing grab bars in a bathroom.<sup>42</sup> Despite the existence of disabled access tax credits<sup>43</sup> and the education and training of the Department of Justice,<sup>44</sup> there needs to be more education.

However, Floridians with disabilities can use the FCRA to obtain the same purposes as the barrier-removal provision of the ADA.<sup>45</sup> The FCRA would allow more persons with disabilities to complain about barriers to access and would allow businesses to take advantage of the cost savings of the conciliation procedures of the FCRA.<sup>46</sup> Prior to 2012, the administrative agency that enforces the FCRA, i.e., the Commission, had refused to accept jurisdiction of any barrier-removal claims.<sup>47</sup> The Commission adopted a policy to deny, for lack of jurisdiction, assertions of discrimination that relate to the design, construction, and accessibility of public accommodations.<sup>48</sup> There was statutory basis for such denial, and that denial served to preclude all persons with disabilities who faced discrimination due to architectural barriers from coverage under the public accommodation portion of the FCRA.<sup>49</sup> This ended in 2012 when a Florida appellate court, in *McGuire v. Peabody Hotel Group*, required the Commission to accept jurisdiction of a barrier-removal claim.<sup>50</sup> In *McGuire*, Kevin McGuire “made a reservation to stay in a wheelchair-accessible room at the Peabody Orlando Hotel . . . .”<sup>51</sup> After arriving to check in at two

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of the ADA does not have to be intentional).

<sup>42</sup> See *Houston*, 733 F.3d at 1327.

<sup>43</sup> 26 U.S.C. § 44 (2012).

<sup>44</sup> *Department of Justice ADA Responsibilities*, ADA.GOV, [http://www.ada.gov/doj\\_responsibilities.htm](http://www.ada.gov/doj_responsibilities.htm) (last visited Nov. 22, 2013).

<sup>45</sup> See 42 U.S.C. § 12182(a) (2000); FLA. STAT. § 760.08 (2013).

<sup>46</sup> See FLA. STAT. §§ 760.06(5), .11(11) (2013); see also OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, REPORT NO. 06-09, ELIMINATING FCHR WOULD LIMIT OPTIONS AND INCREASE COSTS TO CITIZENS SEEKING REMEDY FOR DISCRIMINATION 1-2 (2006), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0609rpt.pdf>.

<sup>47</sup> See *McGuire v. Peabody Hotel Grp.*, 99 So. 3d 984, 985 (Fla. Dist. Ct. App. 2012).

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> *McGuire*, 99 So. 3d at 985.

<sup>51</sup> *Id.*

o'clock in the morning<sup>52</sup> on June 14, 2010, he was shown three different rooms, but none of them had an accessible bathroom.<sup>53</sup> This situation forced Mr. McGuire to find another hotel with a bathroom that was accessible at three o'clock in the morning.<sup>54</sup>

The Commission denied jurisdiction of the complaint and wholesale decided that “the complaint related to the design, construction, and accessibility of the hotel’s facilities under the federal Americans with Disabilities Act . . . , rather than to the provision of services under the Florida Civil Rights Act, and that the Commission did not have jurisdiction to enforce the ADA.”<sup>55</sup> The court found that this was error because section 760.08, Florida Statutes (2010), provided that

All persons shall be entitled to the full and equal enjoyment of the goods, services, *facilities*, privileges, advantages, and *accommodations* of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, *handicap*, familial status, or religion.<sup>56</sup>

As such, the court stated that the failure to remove architectural barriers would be discrimination if such failure denied Mr. McGuire “the full and equal enjoyment of the hotel’s goods, services, facilities, privileges, advantages, and accommodations guaranteed by section 760.08.”<sup>57</sup>

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<sup>52</sup> The author was Mr. McGuire’s attorney. The case does not cite the specific time when Mr. McGuire arrived; this information is provided from the author’s own personal experience representing Mr. McGuire.

<sup>53</sup> *McGuire*, 99 So. 3d at 985.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

### III. THE FCRA—A PANACEA TO ACHIEVE THE GREATEST ACCESSIBILITY WITH THE LOWEST SOCIETAL COSTS

The goal of all disability discrimination laws is to ensure that persons with disabilities are provided with equal opportunities for inclusion and enjoyment of all “goods, services, facilities, privileges, advantages, [and] accommodations” of all public and private entities.<sup>58</sup> One of the issues inherent in a civil rights law that is twenty-five years old is that there remains a lack of knowledge and sensitivity to the specific needs of persons with disabilities.<sup>59</sup> Hopefully with ongoing new construction that is compliant with construction accessibility codes and continued integration of persons with disabilities within the community, the passage of time will increase accessibility.<sup>60</sup>

Pursuant to the mandate of the ADA, persons with disabilities have the right to demand accessibility.<sup>61</sup> Concurrently, the business community has bewailed the litigation costs and the advocates who have sued businesses to remove barriers under the ADA.<sup>62</sup> Since 2000, there have been at least five attempts to amend the ADA to provide a requirement for a demand and waiting period prior to bringing suit under the ADA.<sup>63</sup> Advocates have long maintained that businesses

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<sup>58</sup> See, e.g., 42 U.S.C. § 12182(a) (2006).

<sup>59</sup> See *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Fred Shotz), available at <http://judiciary.house.gov/legacy/shot0518.htm> (“The millions of businesses still in violation of this civil rights law either don’t care or choose to bury their heads in the sands of ignorance.”).

<sup>60</sup> See 42 U.S.C. § 12183 (2006) (discussing the requirements for building new structures and modifying existing structures to remove discriminatory barriers).

<sup>61</sup> See 42 U.S.C. § 12188(a) (2006) (“[I]njunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities . . .”).

<sup>62</sup> See *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Rep. Mark Foley), available at <http://judiciary.house.gov/legacy/fole0518.htm> (describing the thousands of dollars in litigation costs that potential ADA claims cause for businesses as legal extortion).

<sup>63</sup> See ADA Notification Act of 2000, H.R. 3590, 106th Cong. (2000); ADA Notification Act of 2001, H.R. 914, 107th Cong. (2001); ADA Notification Act of 2009, H.R. 2397, 111th Cong. (2009); ADA Notification Act of 2011, H.R. 881, 112th Cong. (2011); ADA Notification Act of 2013, H.R. 777, 113th Cong. (2013).

have had a pre-existing duty since 1990 to make their premises accessible and such a notification period would allow businesses to wait until they are accused of discrimination to make any changes.<sup>64</sup> Further, any changes would effectively bar persons with disabilities who may require time-sensitive accommodations to be able to participate in an activity.<sup>65</sup> Examples of these are persons who are deaf who need to see a doctor or children with a mobility impairment that require an accommodation to attend summer camp. In other words, the ADA Notification Act would throw the baby out with the bathwater.

So the question remains, why would the FCRA be a panacea? First, we need to discuss what the FCRA is.

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I know that there are many Americans with disabilities who have been become [sic] increasingly frustrated at the lack of compliance with the ADA access requirements. I know that. But having a bunch of rogue attorneys using their law to reap attorneys [sic] fees does no one but the lawyers any service. And at least in my community, local ADA advocates have become alarmed that these lawsuits are backfiring not only on the ADA but on sympathy for people with disabilities.

*ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Rep. Foley), available at <http://judiciary.house.gov/legacy/fole0518.htm>.

<sup>64</sup> See *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Christine Griffin), available at <http://judiciary.house.gov/legacy/grif0518.htm> (explaining that the notification requirement would allow businesses to wait and see if a complaint was ever raised against their facilities); Dave Reynolds, *NCIL Urges Action Against ADA Notification Act*, RAGGED EDGE MAG. (Apr. 4, 2011), <http://www.raggededgemagazine.com/extra/notifact040401.htm>.

<sup>65</sup> See *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Andrew D. Levy), available at <http://judiciary.house.gov/legacy/levy0518.html> (explaining that, in the case of access to critical health services, prompt injunctive relief is necessary and the notification requirement would undermine the time-sensitive nature of the relief); *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Christine Griffin), available at <http://judiciary.house.gov/legacy/grif0518.htm> (suggesting that, in order to prevent time-sensitive harm, preliminary injunctive relief is necessary).

### A. *The FCRA and the Commission*

Florida established the Commission as a community relations-based agency in 1969.<sup>66</sup> With the passage of the Florida Human Rights Act of 1977, the Commission became an enforcement agency.<sup>67</sup> The Florida Human Rights Act permitted the Commission to investigate and resolve employment-discrimination complaints through administrative and legal means.<sup>68</sup> The jurisdiction of the Commission expanded with the passage of the Florida Fair Housing Act in 1983,<sup>69</sup> the FCRA in 1992, and the Whistle-blower's Act in 1999.<sup>70</sup> The Commission holds itself out as an agency that provides cost-effective and accessible investigatory processes that resolve discrimination complaints in the areas of employment, housing, and public accommodations.<sup>71</sup>

Part I of chapter 760 of the Florida Statutes is the FCRA, the purpose of which is to protect individuals against discrimination in areas of employment, and public accommodations based on “race, color, religion, sex, national origin, age, handicap, [and] familial status.”<sup>72</sup> Pursuant to section 760.06, Florida Statutes, the Commission can “receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice.”<sup>73</sup>

The definition of “public accommodation” under the FCRA is narrower than that of the ADA<sup>74</sup> and only includes the following:

- (a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is

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<sup>66</sup> See *History of the Commission*, FLA. COMM'N ON HUMAN RELATIONS (2007), [http://www.fchr.state.fl.us/about\\_us/history](http://www.fchr.state.fl.us/about_us/history).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> FLA. STAT. §§ 760.20-37 (2013).

<sup>70</sup> FLA. STAT. § 448.102 (2013); *History of the Commission*, *supra* note 66.

<sup>71</sup> See *Annual Report 2010-2011*, *supra* note 15, at 2-4, 6.

<sup>72</sup> FLA. STAT. §§ 760.01-.11 (2013).

<sup>73</sup> § 760.06(5).

<sup>74</sup> See 42 U.S.C. § 12181(7) (2006).

actually occupied by the proprietor of such establishment as his or her residence.

(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.

(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.

(d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.<sup>75</sup>

Further, the FCRA does not contain a definition of “disability” or “handicapped.”<sup>76</sup>

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<sup>75</sup> FLA. STAT. § 760.02(11). For an interpretation of what types of accommodations are included within the definition of section 760.02(11)(d), see *Sing v. Nettles Island Marina*, 70 So. 3d 632, 633 (Fla. Dist. Ct. App. 2011), and *Mena v. Lifemark Hosps. of Fla., Inc.*, 50 So. 3d 759, 761 (Fla. Dist. Ct. App. 2010).

<sup>76</sup> Kwall, Showers & Barack, *The Florida Civil Rights Act*, FINDLAW (Mar. 26, 2008), <http://www.corporate.findlaw.com/litigation-disputes/the-florida-civil-rights-act.html>. The Florida Senate’s Professional Staff of the Commerce Committee provided the following:

As individuals with disabilities and organizations representing such individuals began to object to the use of such terms as “handicapped person” or “the handicapped,” [because of the negative connotation implicit in identifying a person solely by his or her impairment,] Congress changed the federal law accordingly. As a result, the use of the terms “disability” (instead of “handicap”) and “individual with a disability” (instead of an “individual with a handicap”) have been phased out of Federal law.

*Bill Analysis and Fiscal Impact Statement*, THE FLORIDA SENATE 5 (Apr. 8, 2008), <http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?FileName=2008s0>

The Florida Supreme Court has unambiguously established that a fundamental principle of statutory construction at operation within the state is that when “a state law is patterned after a federal law on the same subject,” as is the case with the FCRA, “the Florida law will be accorded the same construction as given to the federal act in the federal courts.”<sup>77</sup> The relevant nondiscrimination prohibition in the FCRA provides as follows: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.”<sup>78</sup> This is very similar to the general prohibition against discrimination in the ADA, which provides as follows:

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

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572.cm.doc&DocumentType=Analysis&BillNumber=0572&Session=2008.

<sup>77</sup> *State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995) (citing *Gay v. Inter-Cnty. Tel. & Tel. Co.*, 60 So. 2d 22, 23 (Fla. 1952); *O’Loughlin v. Pinchback*, 579 So. 2d 788, 791 (Fla. Dist. Ct. App. 1991)); *accord Winn-Dixie Stores, Inc. v. Reddick*, 954 So. 2d 723, 728 (Fla. Dist. Ct. App. 2007). Courts in Florida have repeatedly found that the disability provisions of the FCRA are to be interpreted in conformity with the ADA and its regulations in 42 U.S.C. §§ 12101-12213 (2006), as the Florida statute was modeled after its federal counterpart. *See, e.g.*, *St. Johns Cnty. Sch. Dist. v. O’Brien*, 973 So. 2d 535, 540 (Fla. Dist. Ct. App. 2007) (“The FCRA is construed in conformity with the federal ADA and related regulations.”); *McCaw Cellular Communs. v. Kwiatek*, 763 So. 2d 1065, 1065 (Fla. Dist. Ct. App. 1999) (“Courts construe the FCRA in conformity with the federal American with Disabilities Act (ADA).”); *Smith v. Avatar Props., Inc.* 714 So. 2d 1103, 1106 (Fla. Dist. Ct. App. 1998) (finding that the “FCRA should be construed in conformity with the American with Disabilities Act”); *Greene v. Seminole Elec. Coop.*, 701 So. 2d 646, 647 (Fla. Dist. Ct. App. 1997) (noting that the FCRA “should be construed in conformity with the Rehabilitation Act and the Americans With Disabilities Act” (citation omitted)); *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. Dist. Ct. App. 1994) (noting that “the instruction of numerous state decisions” should be followed and finding that, “if a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same construction as placed on its federal prototype”).

<sup>78</sup> FLA. STAT. § 760.08 (2013).

operates a place of public accommodation.<sup>79</sup>

Pursuant to the Florida Supreme Court, “absent legislative intent to the contrary, a broad interpretation was consistent with the Legislature’s overall purpose in enacting the Civil Rights Act and with the Legislature’s stated intent to construe such provisions liberally.”<sup>80</sup> In describing the FCRA, the court stated as follows:

The general purpose of Florida’s Act is to “secure for all individuals within the state freedom from discrimination” and “to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against the domestic strife and unrest, to preserve the public safety, health and general welfare, and to promote the interests, rights and privileges of individual’s [sic] within the state.” The Legislature has further noted that the act is to be construed in accord with the fair import of its terms and shall be liberally construed to further the general purposes stated therein.<sup>81</sup>

One of Florida’s attorney generals has also opined on the liberal and broad reading of this statute, and, for the construction of the public accommodations portion of the statute, the attorney general referred to the ADA to define “public accommodation” under the FCRA.<sup>82</sup>

However, without even resorting to the clear legislative intent in enacting the public accommodations provisions of the FCRA, the terms

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<sup>79</sup> 42 U.S.C. § 12182(a) (2006).

<sup>80</sup> *Donato v. AT&T*, 767 So. 2d 1146, 1153 n.3 (Fla. 2000).

<sup>81</sup> *Id.* at 1149 (citations omitted); *accord* *Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So. 2d 891, 897 (Fla. 2002) (“First, it is axiomatic that in construing a statute courts must first look at the actual language used in the statute. Second, . . . ‘[w]e are guided by the Legislature’s stated purpose for enacting this chapter and its directive that the Act be liberally construed in reaching our decision.’ Additionally, because section 760.11(7) purports to abridge an individual’s right of access to the courts, that section must be narrowly construed in a manner that favors access.”) (citations omitted).

<sup>82</sup> *Whether Municipality Can Restrict Use of Softball Field to One Gender; Municipal Parks as “Public Accommodations,”* FLA. ATT’Y GEN. OP. 2008-58 (2008).

of the statute are clear and unambiguous.<sup>83</sup> The statutory scheme does not include a limitation under the FCRA that would exclude claims by persons in wheelchairs who experience discrimination by virtue of physical barriers.<sup>84</sup> If the legislature had intended to limit the scope of the FCRA to bar any affirmative action of the entity, such as removal of architectural barriers, it knew how to do so and could have done so.<sup>85</sup>

Similar to the court in *McGuire*, federal courts have found that the FCRA applies to barrier removal in both employment and in public-accommodation cases.<sup>86</sup> Pursuant to the court in *McGuire* and statutory

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<sup>83</sup> “[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” Fla. Birth-Related Neurological Injury Comp. Ass’n v. Dep’t of Admin. Hearings, 29 So. 3d 992, 997 (Fla. 2010) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). When a court interprets a statute, it is constrained to follow the plain meaning of the statutory language “without resort to any canon of construction, if possible.” *Batur v. Signature Prop. of Nw. Fla., Inc.*, 903 So. 2d 985, 994 n.18 (Fla. Dist. Ct. App. 2005) (citing *Holly*, 450 So. 2d at 219)). Further, “when the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is presumed to have been excluded intentionally.” *L.K. v. Dep’t of Juvenile Justice*, 917 So. 2d 919, 921 (Fla. Dist. Ct. App. 2005) (citations omitted). In *Board of Trustees of Florida State University v. Esposito*, 991 So. 2d 924, 926-27 (Fla. Dist. Ct. App. 2008), the court recognized that the FCRA was a “stand-alone statutory scheme” and the omission of a reference to a specific law was indicative of the legislative intent for the limitation not to apply to this statutory scheme. The court found that it could not “impute words into the FCRA that were not included by the Legislature.” *Id.* at 927.

<sup>84</sup> *Larsen v. Carnival Corp.*, No. 02-20218CIVGRAHAM, 2002 WL 31345612, at \*5-6 (S.D. Fla. June 12, 2002) (arguing that even if the statutory language does not specify modification requirements, the statute still protects a right to equal treatment).

<sup>85</sup> In comparison, section 413.08, Florida Statutes, which makes some discrimination a misdemeanor, specifically contains a section which may exclude barrier removal and is not modeled on the ADA:

(2) An individual with a disability is entitled to full and equal accommodations, advantages, facilities, and privileges in all public accommodations. *This section does not require any person, firm, business, or corporation, or any agent thereof, to modify or provide any vehicle, premises, facility, or service to a higher degree of accommodation than is required for a person not so disabled.*

FLA. STAT. § 413.08(2) (2013) (emphasis added).

<sup>86</sup> See *Rasmussen v. Cent. Fla. Council BSA*, No. 6:07-cv-1091-Orl-19UAM, 2008 WL 681055, at \*2-3, \*11 (M.D. Fla. Mar. 7, 2008). Courts have also found that the

intent, the Commission never had authority to cherry-pick which type of disability the statute protects or which type of discrimination the statute prohibits.<sup>87</sup>

***B. The Definition of Public Accommodation in the FCRA is Too Narrow***

The current definition of public accommodation in section 760.02(11), Florida Statutes, tracks the language of title II of the Civil Rights Act of 1964.<sup>88</sup> Due to the concern regarding the constitutionality of civil rights laws under the Commerce Clause in the 1960s, title II limited discrimination actions under the Civil Rights Act to a certain number of public accommodations that directly affect interstate commerce.<sup>89</sup> However, since 1964, federal civil rights jurisprudence and statutory law have expanded to reach any type of public accommodations, either by discrimination in the right to make and enforce a contract in the Civil Rights Act of 1991<sup>90</sup> or in the expansive definition of public accommodation in the ADA of 1990.<sup>91</sup>

While the FCRA never had a similar concern regarding interstate commerce, the recent federal provisions allowing more comprehensive civil rights laws were not incorporated.<sup>92</sup> The

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denial of removing an architectural barrier could be discrimination under the employment provisions of the FCRA. *See Lerman v. Xentel*, No. 08-62077-CIV, 2009 WL 4632881, at \*1, \*4-5 (S.D. Fla. Dec. 2, 2009) (finding that modifying a bathroom could be a reasonable accommodation).

<sup>87</sup> *See* *McGuire v. Peabody Hotel Grp.*, 99 So. 3d 984, 985 (Fla. Dist. Ct. App. 2012).

<sup>88</sup> *Compare* FLA. STAT. § 760.02(11) (2013), *with* 42 U.S.C. § 2000a(b) (2006).

<sup>89</sup> *See* 42 U.S.C. § 2000a; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250-53 (1964). In 1964, Congress justified the enactment of broad remedial civil rights legislation under the Commerce Clause of the Constitution. *See Katzenbach v. McClung*, 379 U.S. 294, 298-305 (1964); *Heart of Atlanta Motel*, 379 U.S. at 255-59. As such, the federal definition of public accommodation was dependent on items that travel in interstate commerce. *See* 42 U.S.C. § 2000a.

<sup>90</sup> *See* 42 U.S.C. § 1981 (2006).

<sup>91</sup> *See* 42 U.S.C. § 12181(7) (2006). Since the 1960s, the breadth of the interpretation of how a public accommodation affects commerce is practically without limit. *See* § 12181(1).

<sup>92</sup> *Compare* 42 U.S.C. § 12181 (addressing commerce and providing a broad

legislative history of the FCRA shows that the definition of public accommodation under section 760.02 was amended into the FCRA in 2003 as part of Florida Senate Bill 46-A.<sup>93</sup> Pursuant to the Senate Staff Analysis and Economic Impact Statement of the FCRA on May 15, 2003, “The prohibition against persons in places of public accommodations is intended to track in part similar language found under the federal Civil Rights Act which prohibits discrimination in places of public accommodation and allows the United States Attorney General to enforce against such discrimination.”<sup>94</sup> There is no plausible reason to distinguish discrimination in a restaurant as compared with a convenience store.<sup>95</sup> This general proposition is no different for race or disability.<sup>96</sup> Discriminatory treatment is repugnant and unlawful despite the location of the discrimination, and it should not matter if you can be served food or have entertainment at such location.

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definition of public accommodation), *with* FLA. STAT. § 760.02(11) (excluding commerce and providing a narrow definition of public accommodation).

<sup>93</sup> S.B. 46-A, 18th Leg., Spec. Sess. A (Fla. 2003).

<sup>94</sup> Roberts, S. Staff Analysis and Econ. Impact Statement, CS/SB 0046-A, Florida Civil Rights Act of 1992, at 1, 7 (May 15, 2003), <http://archive.flsenate.gov/data/session/2003A/Senate/bills/analysis/pdf/2003s0046A.j u.pdf>. In detailing the differences between the two acts, the Senate Staff Analysis states as follows:

There are, however, several differences between the proposed language and the federal law. Federal law defines public accommodations to include at a minimum prohibits [sic] inns or other lodgings with more than 5 rooms for rent. This proposed legislation prohibits discrimination in inns or lodgings with more than 4 rooms. Federal law prohibits the discrimination in places of public accommodations on the grounds of race, color, religion, or national origin. This proposed legislation prohibits discrimination in such places on the grounds of race, color, religion, national origin, sex, handicap or familial status. Florida Civil Rights Act already provides some form of civil relief after administrative remedies are exhausted, for persons from discrimination on the grounds of gender, handicap, marital status and age depending on whether the claim is based on education, housing, employment or public accommodations.

*Id.* at 7.

<sup>95</sup> *See* FLA. STAT. § 760.02(11) (2013) (limiting the definition of public accommodations to facilities that sell food for consumption on the premises).

<sup>96</sup> *See* FLA. STAT. § 760.01(2) (2013) (including handicapped persons within its class of protection).

**C. *Why Increased Use of the Protections of the FCRA Process is Beneficial to the Disability Community and to the Business Community***

The most frequent complaint this author hears from business owners who are sued for barrier removal under the ADA is that they do not believe that the plaintiff had ever been to their business, and had their prospective customer only asked, the business owner would have gladly fixed the barrier without the need for litigation. A disability advocate's frequent response to the business owner is that after almost twenty-five years after this law was enacted, you should not need a personal invitation to comply; "remove the architectural barriers in one year, and pay my lawyer's fees of between five and fifteen thousand dollars."

This is not to say that there are not hundreds of claims involving removal of simple barriers.<sup>97</sup> The dance in the previous paragraph involves the majority of suits in which strip malls or small business owners are sued over parking spaces or bathrooms in a restaurant.<sup>98</sup> These cases are often quickly settled and almost never have one contested hearing before the court.<sup>99</sup> While these cases are merit worthy, the litigation costs on both the plaintiff's and defendant's side may be more than the cost of removing the barriers to access.<sup>100</sup> Further, with the application of the disabled access tax credit, it may be more of a benefit for a business to remove barriers in the midst of other renovations to its premises.<sup>101</sup>

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<sup>97</sup> See, e.g., *Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success*, NAT'L COUNCIL ON DISABILITY 174, 200-01 (July 26, 2007), <http://www.ncd.gov/publications/2007/July262007>.

<sup>98</sup> See *id.* at 177. There are similarly hundreds of cases that involve systemic practices of large corporations that fail to place accessible seating in auditoriums, limit access to their retail stores through inaccessible front doors, limit aisle widths in department stores, create policies that segregate, or limit the participation of persons with disabilities. See *id.* at 179-86. Such cases are rarely settled quickly, and, while the simple cases are similar to a dance, the systemic violations are expert-intensive cases that are akin to marathons. See *id.* at 179-81, 188.

<sup>99</sup> See *id.* at 188.

<sup>100</sup> See *id.* at 184-85, 200-01.

<sup>101</sup> 26 U.S.C. § 44 (2012); see *Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success*, *supra* note 97, at 203.

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Under the FCRA, the Florida Legislature established both the civil rights protected in the State of Florida as well as the administrative and civil remedies under the Act.<sup>102</sup> Section 760.11, Florida Statutes, details the administrative procedures that are a required condition precedent to any civil action.<sup>103</sup> Thus, the proper procedure in such matter is as follows:

(1) The complainant files a complaint by phone, in person, or in writing.<sup>104</sup>

(2) A copy of the complaint must be sent to the respondent, and then the respondent is permitted an opportunity to respond to the complaint.<sup>105</sup>

(3) Within 180 days, the Commission must conduct an investigation to determine whether or not reasonable cause exists.<sup>106</sup>

(4) The Commission, by registered mail, should notify the complainant and the respondent of the reasonable-cause determination, the date of such determination, and the options available under this section.<sup>107</sup>

(5) If the Commission finds for the complainant, the complainant has a right to sue in court within one year or through the administrative hearing.<sup>108</sup>

(6) If the Commission does not find for the complainant, the complainant may request an administrative hearing to review the Commission's reasonable-cause determination under sections 120.569 and 120.57, Florida Statutes.<sup>109</sup>

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<sup>102</sup> See FLA. STAT. §§ 760.01-.11 (2013).

<sup>103</sup> *Id.*

<sup>104</sup> *Public Accommodations*, FLA. COMM'N ON HUMAN RELATIONS, [http://fchr.state.fl.us/complaints\\_\\_1/public\\_accommodations](http://fchr.state.fl.us/complaints__1/public_accommodations) (last visited Nov. 23, 2013). The form for the questions asked is included on the agency's web page. *Id.*

<sup>105</sup> § 760.11(1).

<sup>106</sup> § 760.11(3).

<sup>107</sup> *Id.*

<sup>108</sup> § 760.11(4).

<sup>109</sup> § 760.11(7).

(7) After the administrative hearing, the Commission shall issue a final order by adopting, rejecting, or modifying the recommended order as provided under sections 120.569 and 120.57.<sup>110</sup>

However, through the entire Commission process, the Commission has a continuing duty to attempt to conciliate and resolve the complaint: “If a complaint is within the jurisdiction of the Commission, the Commission shall simultaneously with its other statutory obligations attempt to eliminate or correct the alleged discrimination by informal methods of conference, conciliation, and persuasion.”<sup>111</sup>

**D. What Effect Does Complying with Administrative Preconditions Have on a Plaintiff?**

Given the fact that the primary relief in a claim for barrier removal under the ADA is injunctive relief for the removal of barriers, it would make sense that the aggrieved person would want to take advantage of an expedited process and would prefer that all funds be devoted to remediating the problem rather than on attorneys’ fees and costs.<sup>112</sup> Professional disability advocates, who endeavor to have a barrier-free world, could send complaints to many different businesses without the need for an attorney or even, in most cases, an expert.<sup>113</sup> Further, as the FCRA has a provision for damages,<sup>114</sup> the damages demanded may be less than the filing fees for an action in federal court.<sup>115</sup>

If the aggrieved person is not an advocate, but instead one of the

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<sup>110</sup> *Id.*

<sup>111</sup> § 760.11(11).

<sup>112</sup> See 42 U.S.C. § 12188(a) (2006); *Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success*, *supra* note 97, at 186.

<sup>113</sup> See *Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success*, *supra* note 97, at 182-84.

<sup>114</sup> See FLA. STAT. § 760.11(5).

<sup>115</sup> The cost of filing a civil suit in federal court is \$350.00. *U.S. Court of Federal Claims Fee Schedule*, UNITED STATES COURTS, <http://www.uscourts.gov/FormsAndFees/Fees/USCourtOfFederalClaimsFeeSchedule.aspx> (last visited November 18, 2013).

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majority of persons with disabilities who encounter discrimination, the person will be able to self-advocate and be able to meet with and explain their issues to the defendant.<sup>116</sup> There are no formalities of standing, jurisdictional bars, or knowledge of the intricacies of the Supreme Court's current interpretation of the definition of disability to impede self-advocacy.<sup>117</sup> Further, the FCRA does not require the person to return to the defendant's premises.<sup>118</sup>

Of course, not all cases can be resolved, and cases will go beyond the conciliation stage, but the vast majority of cases will be resolved because, in all but the most egregious cases, it is difficult to obtain damages from a jury in cases involving disability discrimination.<sup>119</sup> The biggest drawbacks for a plaintiff from the administrative process are the delay in resolution and the possibility of the Commission not finding in favor of the complainant that the architectural barrier did not cause discrimination on the basis of disability in the full and equal enjoyment of the goods or services provided by the public accommodation.<sup>120</sup> After receiving a finding of no cause, the complainant would need to bring his or her action before an administrative hearing officer to review the findings of the

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<sup>116</sup> See FLA. STAT. § 760.11; *Annual Report 2010-2011*, *supra* note 15, at 4 (the Commission “offers a mediation process that often produces a mutually agreeable resolution” by facilitating dialogue between the aggrieved party and the respondent).

<sup>117</sup> Compare FLA. STAT. § 760.11(1) (“Any person aggrieved . . . may file a complaint with the commission within 365 days of the alleged violation.”), *with* *Houston v. Marod Supermarkets Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013) (quoting *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001)) (listing the requirements for standing in a federal claim including “(1) ‘injury-in-fact’; (2) ‘a causal connection between the asserted injury-in-fact and the challenged action of the defendant’; and (3) ‘that the injury will be redressed by a favorable decision’”).

<sup>118</sup> Compare FLA. STAT. § 760.11 (outlining the process for filing a complaint and for seeking redress and highlighting the notable absence of a requirement for an aggrieved party to establish in his or her complaint a desire to return to the establishment or a likelihood of repetitive discrimination), *with Houston*, 733 F.3d at 1334-35.

<sup>119</sup> See A. Lee Parks & Edward D. Buckley, *The Vanishing Jury Trial in Employment Litigation*, PARKS CHESIN WALBERT (Nov. 14, 2013), <http://www.pcwlawfirm.com/news/vanishing-jury-trial-employment-litigation/>.

<sup>120</sup> See FLA. STAT. § 760.11(7); *Annual Report 2010-2011*, *supra* note 15, at 4 (“Many cases end with a finding of ‘no cause’ by the Commission.”).

Commission in order to receive damages.<sup>121</sup> However, such finding will not preclude the plaintiff from filing an action in federal court under the ADA if the architectural barriers remain in place.<sup>122</sup>

***E. What Effect Do Administrative Preconditions Have on the Defendant?***

The damages caused by the presence of architectural barriers are not a covered occurrence under most general commercial liability insurance policies.<sup>123</sup> As such, most defendants are responsible for their own defense, including expert fees, when defending a claim under the ADA.<sup>124</sup> For any defense attorney, the first question a client asks is how much is the case going to cost.<sup>125</sup> Further, as the presence of an architectural barrier is certain in most of these cases, the defendant is also going to be responsible for the plaintiff's attorneys' fees and costs as well.<sup>126</sup>

As such, the question should be, how does one limit the amount of fees and costs. While the increased use of the FCRA administrative

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<sup>121</sup> See FLA. STAT. § 760.11(7); *Annual Report 2010-2011*, *supra* note 15, at 4 (“After either determination, the complainant may choose to pursue the matter at the Division of Administrative Hearings . . . . In the overwhelming majority of FCHR cases the division reviews, [however,] it concurs with the Commission’s determination—more than 91 percent of the time.”).

<sup>122</sup> See 42 U.S.C. § 12182(b)(2)(A)(iv) (2006).

<sup>123</sup> See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1064 (9th Cir. 2007) (“California courts have held that an insurance company has no contractual duty to defend in an ADA suit alleging that a defendant’s facilities were inaccessible.”); *Pacatte Constr. Co. v. AMCO Ins. Co.*, 12-CV-01472-JST, 2013 WL 2153675, at \*4-6 (N.D. Cal. May 16, 2013) (holding that the insurance policy did not cover the ADA complaint); *Modern Dev. Co. v. Navigators Ins. Co.*, 4 Cal. Rptr. 3d 528, 531 (Ct. App. 2003) (finding that the ADA violation did not constitute an “occurrence” under the insurance policy).

<sup>124</sup> See *Pacatte Constr. Co.*, 2013 WL 2153675, at \*2 (noting that the plaintiff settled the case for \$35,000 after paying \$152,144.22 in attorneys’ fees to defend against the ADA suit).

<sup>125</sup> See Thomas E. Willging & Emery G. Lee III, *In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation*, FEDERAL JUDICIAL CENTER 5-6 (Mar. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf).

<sup>126</sup> See 42 U.S.C. § 12205 (2006).

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process can cause more people to file complaints, the cost of the complaint will go down because of the reduced need to litigate in federal court. However, there will always be issues with litigants who demand an exorbitantly high amount for damages or demand removal of barriers that exceed what is readily achievable.<sup>127</sup> In such cases, the defendant can narrow issues prior to litigation.<sup>128</sup>

Under the ADA, if a defendant remediates the harm of an inaccessible architectural barrier prior to judgment or some other type of judicial imprimatur, the plaintiff is not entitled to injunctive relief and will not be entitled to fees for the prejudgment removal of barriers.<sup>129</sup> If the defendant removes the barriers by the time that the administrative process is complete, the complainant will not have a cause of action under the ADA since there is no injunctive relief that a court can grant.<sup>130</sup> In the event that the case is limited to an architectural barrier that the defendant claims would not be readily achievable to remove, then the ADA case is limited to that barrier.<sup>131</sup>

To the extent that the plaintiff claims that he or she has a case under the FCRA, the plaintiff has the burden to establish damages.<sup>132</sup> Emotional damages, in the absence of physical or economic harm, are difficult to prove unless the actions of the defendants are egregious.<sup>133</sup>

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<sup>127</sup> See Hunt, *supra* note 5, at 9-10.

<sup>128</sup> See *id.* at 9-12; *Annual Report 2010-2011*, *supra* note 15, at 4.

<sup>129</sup> See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605-06 (2001).

<sup>130</sup> See Hunt, *supra* note 5, at 10. “[F]ederal courts have found ADA claims moot when ‘the alleged discrimination cannot reasonably be expected to recur because ‘structural modifications are unlikely to be altered in the future once the structural changes have been made to be ADA compliant.’” See *Access 4 All, Inc. v. Bamco VI, Inc.*, 11-61007-CIV, 2012 WL 33163, at \*6 (S.D. Fla. Jan. 6, 2012) (quoting *Nat’l Alliance for Accessibility, Inc. v. Walgreen Co.*, No. 3:10-CV-780-J-32-TEM, 2011 WL 5975809, at \*3 (M.D. Fla. Nov. 28, 2011)).

<sup>131</sup> See Hunt, *supra* note 5, at 9-10.

<sup>132</sup> See *Marcenaro v. Creative Hairdressers Inc.*, No. 12-60236-CIV, 2012 WL 1405690, at \*2 (S.D. Fla. Apr. 23, 2012).

<sup>133</sup> See *Stone v. GEICO Gen. Ins. Co.*, No. 8:05-cv-636-T-30TBM, 2009 WL 3720954, at \*6 (M.D. Fla. Nov. 5, 2009). In some states, such as California, the civil rights statute includes a minimum statutory damage provision and a treble damage provision. See CAL. CIV. CODE § 52(a) (West 2006).

These cases are relatively simple to contemplate. For example, a difference in damages exists for a person who has difficulty in rolling up too steep a ramp to get to a convenience store versus a person who fails to hold his or her urine while on a date due to a facility lacking an accessible toilet versus the scenario with Mr. McGuire who had to find a new hotel at three o'clock in the morning despite being promised that the hotel would provide an accessible hotel room.<sup>134</sup> In most cases, any damage award will be significantly lower than the litigation costs of both sides combined.<sup>135</sup>

To the extent that the defendant believes that the damages demanded are excessive, the defendant always has the opportunity to file an offer of judgment.<sup>136</sup> The offer of judgment will shift the liability for fees to the plaintiff if the recovery is twenty-five percent less than the offer by the defendant.<sup>137</sup> Such practices provide more leverage for the defendant to provide an offer that would resolve the case rather than allow a plaintiff to overly litigate a case and then expect fees at the conclusion of such case.<sup>138</sup>

#### IV. CONCLUSION

It appears that the goal for most businesses is to push the majority of the cases into arbitration or some other form of alternate dispute resolution; however, this is not done with cases involving barrier removal under the ADA.<sup>139</sup> In cases where the primary relief is the removal of barriers, and not monetary damages, such a result would appear to be a matter of common sense. For twenty years, the Commission has rejected jurisdiction for barrier-removal cases without any basis in law.<sup>140</sup> If the Commission accepted its duties under the statute and investigated and conciliated such claims, the Commission

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<sup>134</sup> As a disability advocate, the author has provided these hypothetical situations based on his personal experiences representing disabled persons.

<sup>135</sup> See Hunt, *supra* note 5, at 6.

<sup>136</sup> See FLA. STAT. § 768.79(1) (2013).

<sup>137</sup> *Id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *Annual Report 2010-2011*, *supra* note 15, at 6; *supra* notes 2, 12 and accompanying text.

<sup>140</sup> See *supra* notes 47-57 and accompanying text.

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would need additional funding to accomplish this goal.<sup>141</sup> In any event, this goal would save Florida businesses millions of dollars in litigation costs, encourage persons with disabilities to self-advocate, and serve the mandate of all disability discrimination laws to tear down walls with a sledgehammer.

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<sup>141</sup> See FLA. STAT. § 760.11 (2013); OFFICE OF PROGRAM POL'Y ANALYSIS & GOV'T ACCT., REP. NO. 07-43, FCHR HAS TAKEN STEPS TO IMPROVE INVESTIGATION REPORTS AND INCREASE CUSTOMER SATISFACTION 3 (Nov. 2007), *available at* <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0743rpt.pdf>. This assumption is based on the Author's personal experiences as a disability advocate. Currently, the Commission conciliates all complaints with the Agency's in-house personnel telephonically. The Commission should permit complainants to engage outside mediators at the complainants' own expense to mediate claims in person. Discrimination claims are always an issue of a perceived imbalance of power. The person who claims to be a victim of discrimination believes that a person who has more power at the time of the discrimination treated him or her unequally. By having the victim of discrimination meet face-to-face with the person or the entity that the victim contends is the source of their problem creates a power parity and encourages conciliation and understanding.