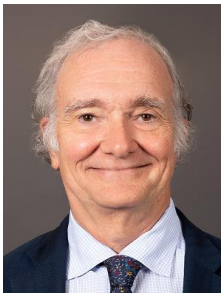
Upcoming High Court ADA Cases May Signal Return To Basics

By **Norman Dupont** (August 18, 2023)



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Congress passed the Americans with Disabilities Act in 1990, and then President George H.W. Bush signed it into law.

Bush's signing message assured all Americans that fears that this new act would "lead to an explosion of litigation" were misplaced.[1]

The ADA was amended in 2008. In neither version of the legislation did Congress envision two current features of ADA litigation — the use of testers, making hundreds of cold calls to private facilities about their accommodations for the disabled, or suits by corporate sober living home entities.

In this term, the U.S. Supreme Court will consider the standing of the first class of individuals and may consider the ability to sue by the second class of corporate entities.

The cases raise a fundamental question of whether current ADA litigation has spiraled out of control without any real corresponding benefits to the intended beneficiaries: individuals with true disabilities.[2]

Recent Past Is Prelude

On June 30, Justices Samuel Alito and Clarence Thomas penned a dissent about the denial of certiorari in another ADA case, Kincaid v. Williams.

As Justice Alito put it: "The ADA is far-reaching, but like all other statutes, it has its limits."[3]

In that case, the two justices dissented from a denial of certiorari in a U.S. Court of Appeals for the Fourth Circuit case holding that the ADA now covers gender dysphoria allegedly resulting from an individual's physical impairment.

As a potential prelude to decisions involving the ADA this term, Justice Alito cited in part the dissenting opinion of a Fourth Circuit judge from the panel decision relating to the original understanding of the ADA in 1990 and how the lower court decision — in his dissenting view — departed from that original text.[4]

Testers Looking for Volumes of ADA Cases to File

The primary case illustrating this potential revisiting of original legislative intent will be heard by the Supreme Court on Oct. 4.

In Acheson Hotels LLC v. Laufer, the court will consider whether a single individual, Deborah Laufer, who has sued over 600 hotels for alleged violation of ADA regulations requiring information about accessible features of rooms and hotel services, has standing to sue.

Laufer, a Florida resident who uses a wheelchair and is admittedly disabled, searches the internet for hotel websites. When she deems insufficient the descriptions for accommodations to the disabled contained on the website, she sues the hotel seeking in

part attorney fees available under the statute.

In this case, Laufer disclaimed any current intention to visit the two hotels in question, which were located in Maine.[5]

Laufer's status as a serial litigant has drawn criticism from lower appellate courts, and she has recently filed a series of motions to withdraw from pending appellate cases that might otherwise trigger additional adverse scrutiny.[6]

The U.S. Chamber of Commerce and other amici have noted the prevalence of such tester-based litigation in ADA litigation in its amicus brief to the Supreme Court.

As the amicus put it: "To generate enough volume to make it worth their lawyers' while, serial tester plaintiffs file multiplicitous lawsuits against business with which they never interact."[7]

Do Testers Have Standing Under the ADA?

The basis of the issue in Acheson is one of Article III standing — whether she presents the type of injury sufficient to qualify as a case or controversy for jurisdictional purposes.

Nonetheless, there is an equally compelling argument that Laufer may not meet the statutory requirements for standing under the ADA.[8] The plain statutory language permits a suit for violations based on a failure to accommodate to:

any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title.[9]

In this case, Laufer was not at either of the hotels then-maintained by the plaintiff, and her claim that she might at some future date visit the state of Maine was viewed as "implausible" by the district court.[10]

On appeal, Laufer abandoned her claim of potential travel plans to Maine (and hence, staying at one of the two hotels).

Given these facts, one returns to the original intent of the statutory words — the best evidence of legislative intent. In this case, the words require that someone with a disability either be currently subject to discrimination by a defined public facility or be "about to be subjected" to such discrimination. It is at best unclear how Laufer could qualify under either formulation of the statutory language.

Another Wave of ADA Litigation by Corporate Sober Living Homes

A second Supreme Court review of the intent of the statutory language and context may come with a currently pending certiorari petition involving a challenge to a U.S. Court of Appeals for the Ninth Circuit ruling that grants a liberal statutory and constitutional standing to corporate entities.

In City of Costa Mesa v. SoCal Recovery LLC, the city seeks review of a January ruling by the Ninth Circuit.[11]

The Ninth Circuit held that at summary judgment stage, a corporate sober living home

business need not establish that any specific individual residing in that facility was in fact disabled under the statutory standards.

Instead, the Ninth Circuit held that the corporate entity could establish its ability to sue for zoning rules requiring a certain dispersion of such facilities from one another — and from licensed treatment facilities — on a collective basis.[12]

By this, the court did not mean that the sober living home could collect data about disabled individuals residing at the facility and then aggregate the data in some anonymous format shielding individual medical histories.

Rather, the Ninth Circuit held it was sufficient for a corporate entity to show that it had plans and procedures for treating those who might be disabled. This, it held, was sufficient to survive summary judgment.

The problem of how a municipal entity can regulate its zoning to limit the density of sober living homes and not run into a series of ADA lawsuits goes beyond California.

Just last year in Florida, the city of Fort Lauderdale survived a challenge to its zoning regulation that required the dispersion of sober living homes between one another of at least 1,000 feet in Sailboat Bend Sober Living LLC v. City of Fort Lauderdale in the U.S. Court of Appeals for the Eleventh Circuit.[13]

The U.S. Court of Appeals for the Third Circuit also upheld a municipal regulation imposed by the City of DuBois, Pennsylvania, as to a methadone clinic.[14]

Yet another case is currently pending before the Eleventh Circuit involving a suit by a sober living facility challenging a permitting decision by Cherokee County in Georgia.[15]

There are also a number of district court cases involving such corporate challenges by sober living operators.

Conclusion

Costa Mesa's petition for certiorari raises the question of whether a corporate entity, such as a sober living home, has standing to seek redress under Title II of the ADA, which requires that public entities provide reasonable accommodations to individuals who are disabled.

This is an issue unlikely to go away even if the Supreme Court were to deny review in this particular case. Moreover, this certiorari petition points out another instance in which litigants — some private parties and some municipal entities — are now seeking review of lower court ADA decisions based on efforts to return to the original text of the statute.

As the recent dissent of Justices Alito and Thomas in the denial of certiorari in Kincaid suggests, textual interpretation of legislation including the ADA is a key consideration at the current Supreme Court.

It is also an example of current challenges to waves of ADA litigation for testers or corporate entities whose claims find no reference to the legislative history or the original congressional context.

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[1] Transcript of the Statement of the President July 26, 1990 at https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037493-statement-by-the-president-americans-with-disabilities-act-of-1990.html.

[2] 42 U.S.C. §12101.

[3] Kincaid v. Williams, 600 U.S. ___, 143 S. Ct. 2414 (Alito J., with whom Thomas J., joins, dissenting from denial of certiorari).

[4] Kincaid, supra, 143 S. Ct. at 2417.

[5] Brief of Petitioner in Acheson Hotels, LLC v. Deborah Laufer, No. 22-429 at pp. 5-7 (filed June 5, 2023; at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-429.html.

[6] J. Overly, 'Left in Dark' in Moot case, 11th Circ. Judges 'Aren't Happy', LAW360 Appellate (Aug. 15, 2023) at: www.law360.com/appellate/articles/1711282?nl_pk=a896b5d7-be6f-410f-a05f-db50b1dac811&utm_source=newsletter&utm_.

[7] Brief of the Chamber of Commerce of the U.S of America, American Resort Development Association, American Bankers Association, and ICSC as Amici Curiae in Support of Petitioner at 5; at https://www.supremecourt.gov/DocketPDF/22/22-429/268869/20230612131628235_Acheson%20Amicus%20final.pdf.

[8] See Fernandez v. 23676-23726 Malibu Road, ___ F.4th ___, 2023 WL 4754577 (9th Cir. July 26, 2023).

[9]42 U.S.C. §12188 (a)(1).

[10] Brief of Petitioner in Acheson Hotels, LLC v. Deborah Laufer, No. 22-429 at pp. 7-8(filed June 5, 2023; at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-429.html.

[11] The author is counsel for seven cities and the Association of California Cities-Orange County as amici who filed a brief in support of the City of Costa Mesa's petition for certiorari. Costa Mesa's petition and the separate amicus brief are at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-71.html.

[12] SoCal Recovery, LLC v. City of Costa Mesa 56 F.4th 802 (9th Cir. 2023).

[13] Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, 46 F.4th 1268 (11th Cir.

2022).

[14] RHJ Med. Ctr., Inc. v. City of DuBois, 564 F. App'x 660 (3d Cir. 2014).

[15] Vision Warriors Church, Inc. v. Cherokee County Bd. of Commissioners, No. 22-10773 (11th Circuit).