Down in Front: Entertainment Facilities and Disabled Access under the Americans with Disabilities Act

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Down in Front: Entertainment Facilities and Disabled Access Under the Americans with Disabilities Act

by

KATHERINE C. CARLSON*

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Introduction

According to Congress, there are approximately forty-three million Americans with disabilities. \(^1\) The Americans with Disabilities Act (hereinafter ADA) \(^2\) is designed to ensure them equal opportunity in all aspects of life. \(^3\) Modeled largely on the Rehabilitation Act of 1973, \(^4\) the ADA extends protection to employment, \(^5\) public services, \(^6\) and "public accommodations and services operated by private entities." \(^7\)

This note will focus on the impact of the ADA on that limited class of public accommodations which provide entertainment to the general public. \(^8\) Further attention will be given to the special accommodations provided to those who use wheelchairs or other devices to assist in mobility.

The heart of the ADA is, of course, the statute itself. \(^9\) In addition to the statute, there are regulations for its implementation promulgated by the Attorney General. \(^10\) Due in part to the "newness" of the statute and in part to the tendency of private entities to settle their disputes rather than go to trial, there is relatively little case law explaining the ADA. The goal of this note is to both demonstrate that current regulations provide insufficient guidance to businesses and that the only route to a practical solution must come from the courts.

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\(^3\) Id. § 12101(b). For a discussion of the ADA as a civil rights statute, see Robert L. Burghdorf, Jr., "Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act, 64 TEMP. L. REV. 551 (1991).
\(^6\) Id. §§ 12131-12165.
\(^7\) Id. §§ 12181-12189. Under Title III, jurisdiction is limited to those private entities that "affect commerce." 42 U.S.C. § 12181(7). Title III has been held constitutional as applied to these entities. See, e.g., Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574 (S.D. Cal. 1993).
\(^8\) 42 U.S.C. § 12181(7)(C) (including, "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment"). Note that although a sports arena is a public accommodation for the purposes of Title III, a radio or television broadcast from the same stadium is not. See Stoutenborough v. National Football League, 59 F.3d 580, 583 (6th Cir. 1995).
\(^9\) 42 U.S.C. §§ 12101-12213.
\(^10\) These regulations are mandated by 42 U.S.C. § 12134 and are found in the Code of Federal Regulations.
Part I provides a basic overview of the ADA and its function. Part II discusses the ADA in practice—specifically as it relates to theaters, sports arenas, and other exhibition facilities. Finally, Part III suggests solutions to the problems raised by the ADA in practice.

I

Statutory Overview

A. Disability Defined

"The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of having such impairment; or (C) being regarded as having such impairment."¹¹ Because this language is taken directly from the Rehabilitation Act,¹² its meaning is relatively well-settled.¹³ The Code of Federal Regulations provides some of the necessary additional interpretations.

For example, the Code of Federal Regulations defines the term "physical or mental impairment" specifically to include orthopedic impairments—the type of disability that would result in reliance on a wheelchair or other mobility aid such as crutches or a walker.¹⁴ "Major life activities" are defined by the Code as "caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁵ Congress clearly intended to


¹⁴. “The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.” 28 C.F.R. § 36.104 (1997). See also 29 C.F.R. § 1630.2(h) (1996).

include in the definition of a “qualified person with disability” one who has a “record of such impairment” or is “regarded as having such an impairment.” Both of these definitions apply to individuals who are treated as though they are disabled even though they may not actually be disabled. People who require wheelchairs, walkers, canes, or other mechanical aids to move around certainly meet the statutory requirements necessary to be classified as a “qualified person with a disability” as defined by the ADA.

B. The Scope of Title III: Public Accommodations and Services Operated by Private Entities

Title III of the ADA proscribes disparate treatment of the disabled in their everyday lives. The legislative history of the Act reflects congressional concern over the deleterious effects of discrimination against people with disabilities: the large majority of people with disabilities do not go to the movies, do not go to the theater, do not go to see musical performances, and do not go to sporting events.

Congress sought to remedy this problem by including “motion picture house[s], theater[s], concert hall[s], stadium[s], or other place[s] of exhibition or entertainment” in the definition of public accommodations. Making these facilities accessible to the disabled would ensure that people with disabilities would be better able, and thus more likely, to enjoy the same forms of entertainment as the general population.

C. Discrimination Defined

Discriminatory activities in public accommodations are defined as “denial of participation,” “provision of an unequal benefit,” and/or “provision of a separate benefit.” The ADA mandates that

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16. 28 C.F.R. § 36.104
17. See generally id.
18. Id.
23. Id. § 12182(b)(1)(A)(ii).
24. Id. § 12182(b)(1)(A)(iii).
accommodations be provided "in the most integrated setting appropriate to the needs of the individual." To that end, public accommodations have an affirmative duty to provide the disabled with access—just what type and degree of access remains unclear.

For the purposes of Title III, discrimination includes the following:

(i) the imposition . . . of eligibility criteria that screen out an individual . . . or any class of individuals with disabilities from fully and equally enjoying any . . . facilities . . . or accommodations . . . ;

(ii) a failure to make reasonable modifications . . . when such modifications are necessary to afford . . accommodations to individuals with disabilities . . . ;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded . . or otherwise treated differently than other individuals because of the absence of auxiliary aids and services . . . ;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . 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 . . facilities or accommodations available through alternative methods if such methods are readily achievable.

The ADA includes in the definition of discrimination the "failure to design and construct facilities . . that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable . . ." The ADA also defines as discriminatory the alteration of a facility without making it "readily accessible" to the "maximum extent feasible." The emphasis here is on the responsibility of private entities in the business of providing places of public accommodation to build and remodel so that their facilities provide access for the disabled.

25. Id. § 12182(b)(1)(B). See also 28 C.F.R. § 36.203.

26. "Readily achievable" means easily accomplished and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable factors to be considered include: (1) The nature and cost of the action needed under this part; (2) The overall financial resources . . of the site or sites involved in the action . . ; (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity. . . . 28 C.F.R. § 36.104 (1996). "[T]he financial ability of any business is key to the court's definition of what modifications are 'readily achievable' under ADA, experts say." Sarah Thailing, A Lawsuit Spurred by the Americans with Disabilities Act Could Prove Costly to Business at Large if Jurisprudence Rules that it is . . . Payday for the ADA, S.F. BUS. TIMES, Mar. 26, 1993, at 1.


28. Id. § 12183(a)(1).

29. Id. § 12183(a)(2).
The Code of Federal Regulations explains that the term "readily achievable" is a fluid concept; its meaning is dependent upon the specific situation—both the requisite alterations and the needs of the facility. The statute also relies heavily on the term "reasonable." This too is an ambiguous concept that does not lend itself to precise definition.

D. Enforcement

The ADA makes enforcement the responsibility of the Attorney General: "The Attorney General shall investigate alleged violations of [Title III], and shall undertake periodic reviews of compliance of covered entities under [Title III]." The Attorney General is also responsible for the promulgation of regulations and standards for determining compliance for covered entities.

In addition to being enforceable by the Attorney General, the ADA carries with it a private right of action. Through this provision, those people actually affected by discrimination are able to enforce the provisions of the ADA.

E. Available Remedies

"The remedies and procedures set forth in section 2000a-3(a) of [the Civil Rights Act of 1964] are the remedies and procedures [Title III] provides to any person who is being subjected to discrimination on the basis of disability in violation of [42 U.S.C. §12183]." Injunctive relief ordering the alteration of facilities, "requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods" may also be granted.

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30. 28 C.F.R. § 36.104. See also supra note 26.
32. See id. § 12134(a).
33. See id. § 12188(a).
34. The Civil Rights Act of 1964 provides for "a civil action for preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order . . ." and, at the court's discretion, "a reasonable attorney's fee" to the prevailing party. 42 U.S.C. §§ 2000a-3(a), 2000a-3(b) (1996). Compensatory or other damages are not an available remedy under this act.
35. 42 U.S.C. § 12188(a). 42 U.S.C. §12183 applies to new construction and alterations in public accommodations and commercial facilities. Because the Civil Rights Act of 1964 does not provide for money damages to private plaintiffs, such damages are not allowed in private suits; they can only be awarded in cases instigated by the Attorney General. See Mayberry v. Von Valtier, 843 F. Supp. 1160, 1167 (E.D. Mich. 1994).
In actions instituted by the Attorney General, a wider range of remedies are available.\textsuperscript{37} In a civil action instituted by the Attorney General,

[T]he court—(A) may grant any equitable relief that such court considers to be appropriate . . . ; (B) may award such other relief as the court considers to be appropriate, including monetary damages . . . ; (C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—(i) not exceeding $50,000 for a first violation; and (ii) not exceeding $100,000 for any subsequent violation.\textsuperscript{38}

The statute directs “the court” to take into account the entity’s “good faith effort or attempt to comply” with the ADA in determining what penalty to impose.\textsuperscript{39}

Intent to discriminate is not a necessary element of a prima facie case under the ADA.\textsuperscript{40} That is to say that, while a defendant’s attempts to provide access are relevant to a court’s decision, they are by no means conclusive. Even if the unintended results of a practice are discriminatory, there may be an ADA violation. This is based in Rehabilitation Act cases which do not require plaintiffs to prove that defendants intended to discriminate, only that they did discriminate.\textsuperscript{41} To require otherwise would undermine the very purpose of the ADA; the idea behind the ADA is the elimination of all discrimination against the disabled whether intentional or not.

II

The ADA in Practice

In general, Title III violations can be divided into two basic categories—existing facilities and new construction or alteration. For existing facilities, the Act requires only reasonable modifications to ensure access.\textsuperscript{42} For new construction or alteration, Title III requires

\begin{itemize}
  \item \textsuperscript{37} See, e.g., id. § 12188(b).
  \item \textsuperscript{38} Id. §§ 12188(b)(2)(A)-(C). Punitive damages are specifically disallowed by the statute. Id. § 12188(b)(4).
  \item \textsuperscript{39} Id. § 12188(b)(5).
  \item \textsuperscript{40} See Mayberry, 843 F. Supp. at 1165 (courts will look to Rehabilitation Act cases in determining whether intent to discriminate is an essential element of an ADA Title III cause of action). See also Rothman v. Emory Univ., No. 93-c-1240, 1994 U.S. Dist. LEXIS 4002, at *9 (N.D. Ill. 1994)(“the ADA is interpreted consistently with the [Rehabilitation Act], and therefore the same reasoning is applicable to claims under both [Acts]”).
  \item \textsuperscript{42} See 42 U.S.C. § 12182(b)(2).\
\end{itemize}
that a facility be "readily accessible to and usable by individuals with disabilities,"\textsuperscript{43} a standard of mandatory accessibility. The discussion below is divided into three areas: (1) theaters, with an emphasis on existing facilities; (2) sports arenas, with an emphasis on new construction; and (3) other exhibition facilities.

A. Theaters

Movie theaters are specifically listed as public accommodations in Title III of the ADA.\textsuperscript{44} Thus, they are required to make reasonable accommodation for the disabled.\textsuperscript{45} Just what it means to make "reasonable accommodation" remains at issue, particularly for existing facilities.

In applying the ADA to newly constructed movie theaters, the statute and regulations are relatively clear and easy to apply. Title III prohibits facilities from providing a separate benefit to the disabled and requires that accommodations be afforded in the most integrated setting possible.\textsuperscript{46} For mobility impaired patrons of movie theaters, this means that accessible seating should be scattered throughout the auditorium.\textsuperscript{47} In newly constructed theaters, seating can no longer be confined to the back row as it is in most existing theaters; disabled patrons must be given the option to sit in the front, middle, or back of the theater just as the able-bodied are. The requirements of the ADA are less clear with regard to compliance by existing theaters.

Prior to the passage of the ADA, a variety of access regulations were in place, primarily state and local human rights laws.\textsuperscript{48} But, because there were no federal regulations or standards, accessibility varied greatly across the country. The ADA was intended to solve this problem; unfortunately, it has not yet fulfilled its promise.

\textsuperscript{43} Id. § 12183(a).
\textsuperscript{44} Id. § 12181(7)(C).
\textsuperscript{45} This is true even when a private company operates the theater in a space leased from the Department of Transportation, an arm of the executive branch that is exempted from the ADA. See Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 37 (D.D.C. 1994).
\textsuperscript{46} 42 U.S.C. § 12182(b)(1)(B).
\textsuperscript{48} See, e.g., CAL. CIV. CODE § 51 (Deering 1997); CONN. GEN. STAT. § 46a-64 (1996); D.C. CODE ANN. § 1-2519 (1996); IOWA CODE § 216.7 (1996); KAN. STAT. ANN. § 44-1002 (1997); LA. CONST. art. 1, § 12 ; ME. REV. STAT. ANN. tit. 5, § 4566-A (West 1996); N.H. REV. STAT. ANN. § 354-A:16 (1995); N.M. STAT. ANN. § 28-7-3 (Michie 1996); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1996).
The most prominent case involving a theater chain began as a state-law suit in 1991. "[T]wo women in wheelchairs sued the United Artiste [sic] EmeryBay multiplex, charging that they had to sit in a 'degrading and inferior' location behind a low wall at the back of the theater." At that time, the ADA was not yet in effect; the women's claim was based exclusively in state law. In 1993, Connie Arnold, the plaintiff, moved to add a similar claim under the ADA and the suit was removed to federal court.

In a 1994 opinion, the United States District Court for the Northern District of California granted plaintiff's motion to certify the suit as a Rule 23(b)(2) class action. The case never made it to trial, however; United Artists reached a settlement in April 1996.

Under the terms of the settlement, United Artists agreed to provide dispersed wheelchair seating and to modify 1% of the seats in existing theaters to have folding or removable aisle-side armrests installed in order to facilitate the transfer of wheelchair patrons into theater seats. While denying liability, United Artists also agreed to pay damages to the individuals involved in the suit and to set up a fund for disabled moviegoers.

It is unclear whether the impetus for settlement by companies such as United Artists is a belief that its facilities are not in compliance, uncertainty about the state of compliance, or simply the high cost of litigation. The problem, many maintain, is that the ADA fails to clearly define "readily achievable," the standard by which accommodations are to be judged. Without clarity, businesses are

49. Thailing, supra note 26.
51. See Thailing, supra note 26.
52. See Jennifer Cohen, Arnold v. United Artists Theater Circuit; Peck v. United Artists Theater Circuit, RECORDER, Apr. 15, 1993, at 5; Jorge Aquino, Handicap-Access Claim Reinstated Against Theater Chain, RECORDER, Dec. 14, 1993, at 4. Peck v. United Artists involved the theater's alleged failure to provide assisted listening devices to hearing impaired patrons, and it is beyond the scope of this note.
53. See Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 443 (N.D. Cal. 1994). A Rule 23(b) class action is the standard class action which allows a combination of small, almost identical, claims into one large action so as to pool plaintiff resources and achieve one consistent result. FED. R. CIV. P. 23(b)
56. See Richter, supra note 54.
57. Thailing, supra note 26, and accompanying text.
forced to make their best effort to comply, not knowing if their efforts will be "good enough."\(^{58}\)

In a preliminary decision in *Arnold v. United Artists Theatre Circuit*,\(^ {59}\) the presiding judge ruled that seating for disabled patrons must be dispersed throughout the theater "[t]o the extent that it is readily achievable."\(^ {60}\) The judge in that case "based his decision on a manual published by the state agency that writes disability access regulations."\(^ {61}\) The same agency, the California Division of the State Architect, sent conflicting information to United Artists in 1993.\(^ {62}\) While the apparent inconsistency here is with state regulations and not the ADA, the same confusion abounds with implementation of the ADA.\(^ {63}\)

The Code of Federal Regulations requires that facilities provide accommodation which is not separate or distinct from the accommodation provided to the general public.\(^ {64}\) "This general requirement [that accommodation be provided in an integrated setting] would appear to categorically prohibit 'segregated' seating for persons in wheelchairs. Section 36.304 [of the Code of Federal Regulations], however, only requires removal of architectural barriers to the extent that removal is 'readily achievable.'"\(^ {65}\) When seat removal is not readily achievable, the Code allows a facility to provide some other means, such as portable chairs, to permit disabled patrons to be seated with their able-bodied companions.\(^ {66}\)

In some cases it may not be readily achievable for auditoriums or theaters to remove seats to allow individuals in wheelchairs to sit next to accompanying family members or friends. In these situations, the "final rule"\(^ {67}\) retains the requirement that the public accommodation

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\(^{58}\) "Business wants to comply, but the ADA is so vague," said Kerwin Lee, an architect and consultant with Rolf Jensen & Associates in Concord, part of a 150-person firm that helps architecture firms comply with building codes. 'They are groping in the dark,' Lee said. 'The only means of resolution seems to be lawsuits like [Arnold v. United Artists]'" \(^{Id.}\)

\(^{59}\) 158 F.R.D. 439.

\(^{60}\) \textit{Id.} at 445 (emphasis added).


\(^{62}\) \textit{See id.} (the agency stated that movie theaters were not required to integrate seating for the disabled).

\(^{63}\) \textit{See infra} note 89 and accompanying text.

\(^{64}\) 28 C.F.R. § 36.203(a).


\(^{67}\) In using the term "final rule" I intend to refer to the ADA in its final form.
provide portable chairs or other means to allow the accompanying individuals to sit with the persons in wheelchairs. "Persons in wheelchairs should have the same opportunity to enjoy movies, plays, and similar events with their families and friends" as do other patrons.68 "The final rule specifies that portable chairs or other means to permit family members or companions to sit with individuals who use wheelchairs must be provided only when it is readily achievable to do so."69

It is apparent from this rather short passage that the ADA is far from clear. At one point, the "final rule" is said to require that portable chairs be provided for companions when seat removal is not possible; two sentences later, the so-called "final rule" requires portable chairs only when their provision is "readily achievable."70 Later, the same regulations refer to the "potential safety hazard created by the use of portable chairs," leaving open the question of what really is or ought to be the "final rule."71

In those cases where the only acceptable method of compliance is removal of architectural barriers (i.e., seat removal), the requirements of the regulations are more specific. The requirements for existing facilities are written so that they may not exceed the standards of the ADA Accessibility Guidelines ("ADAAG").72 "For example, section 4.33 of ADAAG only requires wheelchair spaces be provided in more than one location when the seating capacity of the assembly area exceeds 300 . . . . Similarly, section 4.1.3(19) of ADAAG requires six accessible wheelchair locations in an assembly area with 301 to 500 seats."73 Thus, most modern theaters will require a maximum of six wheelchair-accessible locations.74 The regulations do not address how many "seats" there ought to be in each of these locations. In the absence of more stringent requirements, it is reasonable to expect that most areas will have enough room for only one wheelchair.

69. Id. (emphasis added).
70. Id.
72. 28 C.F.R. § 36.308(a)(3).
73. 28 C.F.R. Pt. 36, App. B §4.33.3.
74. Modern theaters tend to be small because in an effort to compete with television and videotapes, theaters have chosen to offer more of a selection of movies by dividing up available space into smaller theaters.
The additional requirement that seating “[p]rovide lines of sight and choice of admission price comparable to those for the general public”\(^7\) is fairly easy to achieve in movie theaters where patrons pay a flat rate for attendance (i.e., one not based on their choice of seat) and, as a rule, remain seated. This requirement becomes more problematic when patrons are inclined to stand, as they often do at events such as concerts or sporting events.

**B. Sports Arenas\(^7\)**

Sports arenas present special problems in ADA compliance both for existing facilities and new construction. In those facilities, able-bodied patrons are likely to stand up during all or part of the exhibition. “The [Department of Justice], in endorsing the Atlanta [Olympic] facilities, has found that facilities should be designed so that ‘at the height of excitement a wheelchair user can enjoy the moment like everyone else.’”\(^7\)\(^7\) “Enhanced sightlines are a major issue for existing structures, and especially new ones.”\(^7\)\(^8\)

The issue of enhanced sightlines is greatest in new construction because new construction is held to a higher standard than is the alteration of existing facilities.\(^7\)\(^9\) In a suit filed in June 1996, the Paralyzed Veterans of America alleged that Washington D.C.’s MCI Center would not meet the requirements of the ADA when it was completed because “the vast majority of proposed wheelchair locations provide wheelchair users with obstructed views of the action.”\(^8\)\(^0\)

In its suit, the Paralyzed Veterans of America named both the architect and the owner/operator of the arena as defendants.\(^8\)\(^1\) Ellerbe

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\(^7\)\(^5\) 28 C.F.R. § 36.308(1)(ii)(B).
\(^7\)\(^6\) The discussion here is primarily centered on the MCI Center, an arena in Washington D.C. It serves both as a concert venue and as a sports facility. My focus will be on its use as the latter.
\(^7\)\(^9\) 28 C.F.R. § 36.308(3)(b).
Becket, the architect, was dismissed as a defendant in July 1996, leaving only the owner/operators. In dismissing the claim against the architect, the judge pointed to the statute, noting that it "explicitly places responsibility for compliance with ADA on owners, operators, lessors and lessees," not designers. The Justice Department then filed its own suit against Ellerbe Becket in October.

In its decision, the district court ruled that "the ADA requires that wheelchair locations have 'lines of sight comparable to those of the general public.'" In addition, the court discussed the other two elements of ADA accessibility requirements: integration - that accessible seats not be segregated from seats for the able-bodied - and dispersal - that seats must be scattered throughout the facility.

While a design cannot fully pursue each of these three features—perfect integration is incompatible with enhanced sightlines, for example—architects need not sacrifice one goal to achieve another. Instead, a design can substantially meet all three goals, combining enhanced sightlines with substantial integration and adequate dispersal. Wheelchair users would not choose to forego enhanced sightlines in order to achieve better integration or dispersal, and a new arena like the MCI Center can be designed so that they do not have to.

In essence this means that wheelchair users must be given the same options as the able-bodied, a requirement that is spelled out in the statute and regulations. Why then does this confusion remain?

One possible answer is that the Justice Department has failed to provide clear, consistent interpretations of its own regulations. In

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83. Winston, supra note 80.
85. PVA III, 950 F. Supp. at 402. See also Caruso v. Blockbuster-Sony Music Entertainment Centre, 968 F. Supp. 210, 219 (D.N.J. 1997) (holding that the requirement of "comparable sightlines" does not require that persons in wheelchairs be able to see over the heads of standing spectators).
86. PVA III, 950 F. Supp. at 398.
87. Id.
Prior to 1993, the Department [of Justice] did not officially insist on enhanced lines of sight; indeed, in one case the Deputy Chief of the Public Access Section explicitly told Major League Baseball owners that the ADA did not require enhanced sightlines. Since that time, the Department has discussed the issues of sightlines and dispersal, but the Technical Assistance Manual Supplement of 1994 and the May 1996 “Accessible Stadiums” release are the only public statements to suggest a requirement of enhanced sightlines. These remain the most current statements of Justice Department’s interpretation of these issues, however, and the Court held on October 21 that they state the interpretation which binds the parties.90

But, “[t]he Department of Justice has never . . . require[d] that 100% of the wheelchair seating provide enhanced sightlines. Instead, taking the Olympic Stadium for a model as the Justice Department has directed, a facility is in compliance with the ADA regulations if a substantial percentage of seats provide those sightlines.”91 Applying a “flexible test of substantial compliance,” the court ruled that the MCI Center, as proposed, did not comply with the requirements of the ADA, but that compliance might be achieved with only “moderate changes.”92

C. Other Exhibition Facilities

The problems of ADA compliance are not limited to movie theaters and sports arenas; other facilities designed for public exhibition and/or entertainment also have difficulty complying with the law. Concert venues, for example, share some of the problems of theaters and sports arenas but also have problems unique to their type of facility.

For most people, the biggest challenge in attending a concert is getting tickets. For the disabled, securing appropriate accommodation once they have gone through the same hassle of purchasing tickets is often an even bigger challenge.93 For example, in the case of

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89. PVA III, 950 F.Supp. at 399. See also Caruso, 968 F. Supp. at 216.
90. Id. at 399.
91. Id. at 401 (emphasis added).
92. Id.
amphitheaters, the audience is often situated on a slope which can be difficult for patrons in wheelchairs to navigate.\footnote{See id.} New facilities must ensure that any such slope is navigable by those using wheelchairs, walkers, crutches, etc. For existing facilities, accommodation can take on a variety of forms; employees can be provided to assist a wheelchair-bound patron to his designated seat or the patron can be reassigned to a seat which does not require traveling along a too-steep slope.\footnote{See generally 42 U.S.C. § 12182(b)(2)(A)(v) (provision requiring that facilities be made available through “alternative methods”); 28 C.F.R. Pt. 36, App. A; 36 C.F.R. § 1192.23 (1996) (maximum allowable slope); and 28 C.F.R. § 36.305 (1996) (alternatives to barrier removal).}

The problem of obstructed sightlines discussed above in conjunction with sports arenas is equally applicable to concert venues.\footnote{See Zoltak, supra note 77. As a specific example of this problem: The Garth Brooks' show at the Tacoma Dome is a prime example of how [the disabled] are overlooked and ignored. My husband waited in line just as long as everyone else and paid the same price for our tickets. He saw the show; I did not. We did not get to sit together and my entire view of the concert consisted of people's backs, an empty stage, and a quick glimpse of Garth on a ladder. Overlooked—View of Concert Obstructed for Those in Wheelchairs, SEATTLE TIMES, Sept. 12, 1993, at F6.} It is just as likely that able-bodied spectators will stand during a concert as it is at fourth and goal during a playoff game. Like sports arenas, concert venues often provide variably-priced seating, and the regulations require that people with disabilities have the same choice of seat location and price as the general public.\footnote{28 C.F.R. § 36.308.} In essence, the impact of the ADA on concert venues is a hybrid of its impact on arenas and movie theaters.

In contrast to sports arenas and movie theaters, where only the owner and/or operator is liable for ADA violations, in the case of concert venues and other places of exhibition, entertainers are also liable for any ADA violations.\footnote{See Coral Mackenzie, Includes Restaurants, Theaters: Sweeping Law Hits Private Establishments Next Year, INDIANAPOLIS BUS. J., Sept. 23, 1991, at 6. Allocation of liability can still be affected contractually; the law is not absolute. Id.} The idea behind this is that “smart” entertainers will refuse to perform in places that do not meet ADA guidelines thus encouraging owners to comply, thereby creating another level of private enforcement.\footnote{Id.} Placing liability on individual
entertainers essentially adds another level of private enforcement in the entertainers themselves.

III

Suggested Solutions

Problems associated with the ADA are fairly easy to see, but enforcement remains inconsistent. No one - not the Department of Justice, not the courts, not architects, not business owners - seems to know exactly what the ADA requires. In some cases, the law can even lead to absurd results.100 Most of the urban myth surrounding the horrific results of the ADA is just that—myth. But, many of these stories “seem to be fair examples of applying well-intentioned laws or policies to achieve a result which can plausibly be called ‘perverse.’”101 How then can the goals of the ADA be met without leading to absurd unintended consequences?

The statute charges the Attorney General with the job of promulgating regulations for implementation of the ADA.102 Some argue that those regulations, as they now exist, are insufficient.103 I argue that the regulations should not try to be all things to all people; they should only provide a framework within which the courts can decide questions of compliance on a case-by-case basis using a more


In the most striking... story, Mother Teresa’s “Missionaries of Charity” wanted to renovate two old buildings in order to care for the homeless. New York City’s Office for People With Disabilities, however, insisted that the nuns install elevators. The nuns had planned to carry any disabled person up the stairs themselves, just as they had carried the disabled in Calcutta. The director of the office informed them, “no, you don’t carry people up and down in our society. That’s not acceptable here.” So the nuns, who could not afford an elevator, abandoned the project altogether.

Id. (citations omitted).

101. Id.


103. See, e.g., PVA III, 950 F. Supp. at 398.

The Department has not established a single, clear interpretation, but has instead left a nebulous record, comprised mostly of informal documents, press releases, announcements, and correspondence. This has not provided clear guidance to architects, who have been left at best an educated guess as to the design features required to comply with ADA regulations. The Justice Department decided against a rule-making process, which would have left a concrete, workable record from which to discern a standard.

Id.
common-sense approach. Places of public accommodation, by their
very nature, vary one from the next. As a class, they lend themselves
to general guidelines but not to specific requirements. It therefore
makes sense for the courts to make individual determinations based
on all of the relevant facts.

A. Number of Wheelchair Accessible Locations

The Regulations use a so-called “one percent plus one” formula
for determining the number of wheelchair spaces required. Under
this formula, newly constructed facilities are required to provide
wheelchair seating equal to one per cent of their capacity plus one
additional seat. At first blush this seems like a good idea: the
regulation is relatively clear in its requirements. While this is true, it
does not account for the financial impact that unfilled wheelchair
seating may have on the owner of a facility. The answer to this
problem may be as simple as removable seats. Seats that fold out of
the way would provide the utmost flexibility and economy for facility
operators and the utmost choice and convenience for wheelchair
users. Because such seats would be folded out of the way only when
there was a need for them, facilities would not have to let unused
wheelchair spaces sit unsold. In the interest of assuring access for
disabled patrons, it would be reasonable to require that some portion
of the potential wheelchair seats be reserved (i.e., not sold to the
general public) until the “last minute.” For wheelchair users, this type
of arrangement could potentially provide the greatest choice of seat
placement and price, when applicable. Owners would be able to
charge wheelchair users the same price for their chosen seats as able-
bodied patrons because they would not be forced to sit in any given
area of the facility.

104. 28 C.F.R. Pt. 36, App. A (this requirement comes from Section 4.1.3(19) of the
ADAAG).
106. Robert P. Bennett noted in PARAPLEGIA NEWS:
The new baseball stadium in Baltimore has a seating arrangement most people
seem to like: About 400 conventional seats simply fold out of the way to make
room for wheelchairs . . . . This same technology can be used effectively in a
movie theater [or other places of exhibition], and it would not cause the same
reduction of conventional seating wheelchair stalls now cause [sic].
B. Portable Chairs as a Method of Integration

One method of compliance that may provide a workable solution to the problem of segregated seating for the disabled is the provision of portable chairs so that companions may sit with the disabled. But this raises questions of safety of all patrons and comfort for the able-bodied companion. Portable chairs can be hazardous in the event of an emergency if they block escape routes. Additionally, very few types of portable chairs provide even a modicum of comfort. It would seem that the jury is still out on the sufficiency and advisability of portable seating as a method of ADA compliance. Again, a better solution could be found in the use of fold-away seats.

C. Enhanced Sightlines, Lessons Learned from Paralyzed Veterans of America

Ensuring that wheelchair-bound patrons are able to see all the action is potentially the most difficult objective to achieve because it is dependent upon the behavior and actions of other patrons. The operators of the MCI Center proposed two solutions to the problem of impaired sightlines: (1) refusing to sell those seats in front of wheelchair spaces; and (2) an “education and enforcement” policy which would discourage patrons seated in front of wheelchair patrons from standing up during play. The first solution is akin to a structural change. In order to ensure that those seats remained empty, they would have to be removed or cordoned off in some manner. This raises problems of lost revenue. The solution is likely the same as with fixed wheelchair seating. By using seats that fold out of the way, they would have to be removed only if the designated wheelchair spaces behind them were occupied.

Owners and operators have suggested that they simply enforce a “no standing” policy for those seated in front of disabled people. This is apt to be less effective, particularly in the context of sporting events. People tend to stand in reaction to some excitement on the field or stage. In those situations, it is unlikely that able-bodied patrons would remain seated at all times, thus subjecting the wheelchair user to

107. “Since wheelchair seating is usually in an open area or ‘pen’ at the back of the auditorium, a wheelchair user can’t sit near a nonwheeler.” Bennett, supra note 106.
108. See, e.g., 28 C.F.R. Pt. 36, App. B.
increased attention when he sought to enforce the no-standing policy.110

IV
Conclusion

Even the most vocal critics of the ADA appear to support the Act's goals.111 However, disagreements arise when the ADA is applied to real-life situations. The disabled clamor for total equality of access and enjoyment while private entities claim that they are doing the best they can under the circumstances. The statute and regulations often provide only generalized requirements, worsening the situation.

Congress has assigned to the Attorney General the duty and power to interpret [the ADA] and to set standards for enforcement and compliance. Unfortunately, while the Department of Justice issued broad Standards for Accessible Design, it has not seen fit to step up to its statutorily mandated role by providing concrete guidelines for architects and builders.112

As a result of the Regulations' near complete failure to provide adequate guidance, courts are forced to step in to enforce compliance on a case-by-case basis. While this is not the method envisioned by the statute,113 it is possibly the most equitable and effective means of enforcement.

To be successful in its goals, the ADA must reach a delicate balance between the needs of the disabled and the financial realities facing private entities. This can only be accomplished by the courts with their ability to judge cases individually.

110. The policy against standing would only be in effect in sections where wheelchair patrons are located; therefore all ambulatory patrons in the arena will be permitted to stand during play, except those seated in front of wheelchair patrons. This situation presents the very real danger of subjecting wheelchair users to resentment or hostility. PVA III, 950 F. Supp. at 403.

111. Stuhlberg, supra note 100, at 1311 n. 5 (support for the goals of the ADA is virtually undisputed).

112. PVA III, 950 F. Supp. at 394.
