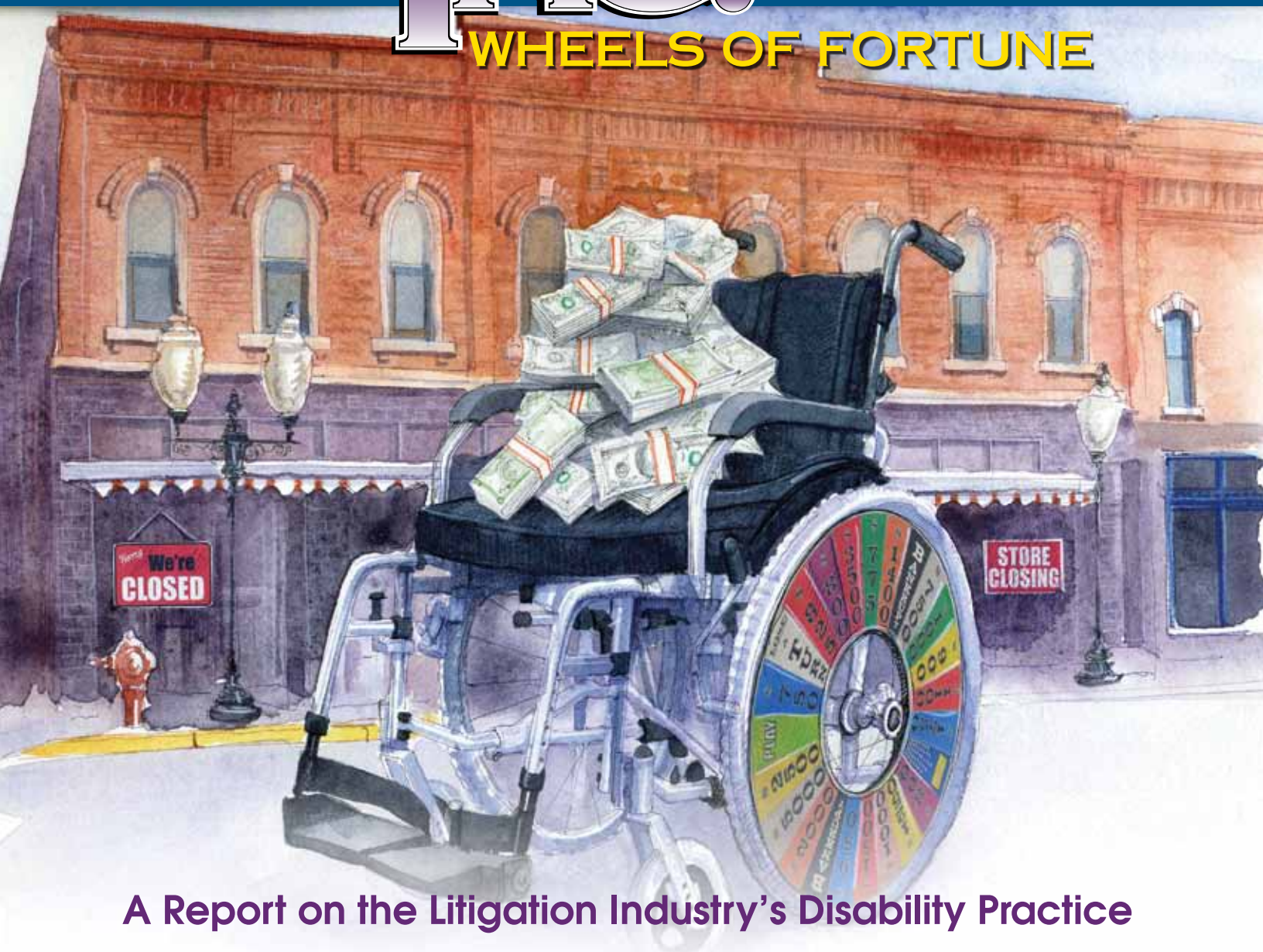


No. 12, November 2014

TRIAL LAWYERS INC.

UPDATE

WHEELS OF FORTUNE



A Report on the Litigation Industry's Disability Practice

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A Report on the Litigation Industry's Disability Practice

The notion that the government of an advanced industrial democracy should help take care of citizens who cannot care for themselves is not controversial.¹ Acting on this concept, in 1956, Congress amended the Social Security Act to establish what would become the Social Security Disability Insurance program (SSDI),² which awards Social Security payments to those whose disability makes them unemployable.

In 1990, Congress further expanded the federal government's role in assisting the disabled by passing the Americans with Disabilities Act (ADA),³ which requires employers, public entities, and commercial facilities to make reasonable accommodations for disabled individuals. These two legislative schemes are, in theory, complementary: the federal approach is designed to facilitate the active lives and employment prospects of disabled individuals to the extent possible, while offering a safety net to those unable to work on account of their disability.

If the overarching legislative scheme of federal disability law makes some sense, plaintiffs' attorneys—whom we at the Manhattan Institute like to call Trial Lawyers, Inc.⁴—have found ways to exploit legal rules in disability statutes to their personal benefit, fleecing taxpayers and business owners alike in the process. SSDI litigation has become a booming business line for Trial Lawyers, Inc., as attorneys advertise aggressively to attract individuals to “go on” disability—and win a fee from the federal government for each claimant successfully placed on the public dole.⁵

Trial Lawyers, Inc. rakes in over \$1.2 billion annually from the federal government in SSDI-related fees. That's triple the revenues paid through the program to the litigation industry at the turn of the century (Figure 1).⁶ The cost of SSDI to taxpayers today is more than federal payments for welfare, housing subsidies, food stamps, and school lunches combined.⁷

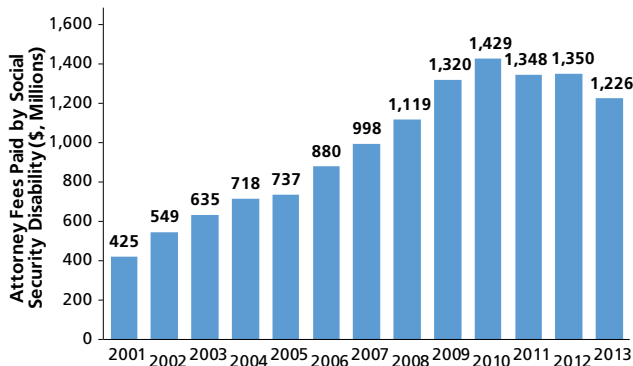
Although the total costs of lawsuits under the ADA are harder to quantify, litigation under this statute is also a significant and growing business line for Trial Lawyers, Inc. Yearly ADA-related payouts paid through employment-discrimination claims filed with the federal Equal Employment Opportunities Commission (EEOC) exceed \$100 million and have grown at an annualized rate of more than 12 percent over the last seven years (Figure 2),⁸ a period when overall tort-litigation costs in the U.S. have fallen.⁹ These payouts, moreover, understate the true cost of such litigation, which almost always settles, given that the expected expense of defending against an ADA lawsuit to the employer tops \$250,000.¹⁰

In addition, nearly 3,000 cases are filed annually in federal courts under Titles II and III of the ADA, which govern public transportation and accommodations,¹¹ and which permit attorneys to win “bounties” in lawsuits filed against businesses for technical violations of the accommodation provisions.¹² The number of these lawsuits has grown more than 17 percent annually, on average, over

the last seven years (Figure 3).¹³ (The total number of lawsuits filed represents only a fraction of the businesses

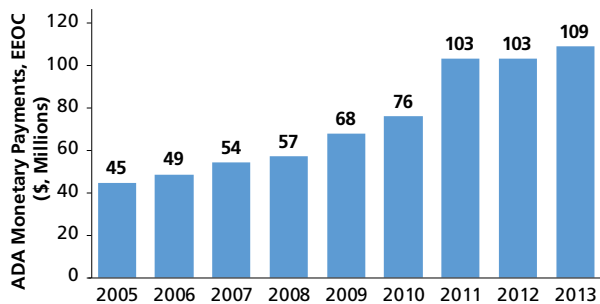
threatened with legal action by letters from “lawsuit mill” plaintiffs’ firms demanding payment.)¹⁴

Figure 1. Attorney Fees for Social Security Disability Claims Have Roughly Tripled Since 2001



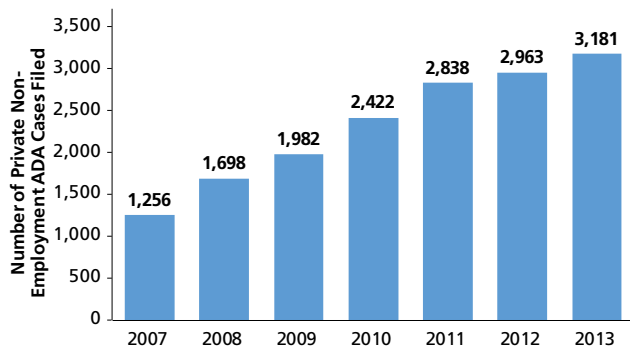
Source: Social Security Administration

Figure 2. Monetary Payments for EEOC-Filed ADA Employment Claims Have More Than Doubled Since 2007



Source: Equal Employment Opportunity Commission

Figure 3. The Number of Accommodation-Based ADA Lawsuits Has More than Doubled Since 2007



Source: U.S. Courts (“Other” ADA Case Filings)

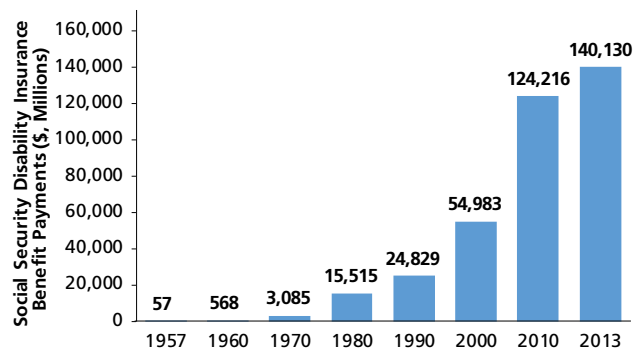
BREAKING THE BANK: SOCIAL SECURITY DISABILITY INSURANCE

When the New Deal architects were crafting the original Social Security legislation, they contemplated adding disabled individuals to the program but elected not to do so, given fears of unpredictable costs, administrative inefficiencies, and strong disincentives to work.¹⁵ With the creation of the disability insurance program in 1956, such fears have been realized as costs have exploded (Figure 4).¹⁶

In part, this growth in costs is attributable to amendments modifying eligibility criteria, generally expanding the number of people covered. Among individuals to gain coverage were dependents of eligible workers (1958) and widows of eligible disabled (1967).¹⁷ In 1984, Congress directed the Social Security Administration (SSA) to allow applications based on combinations of less severe disabilities¹⁸ and more strongly consider pain when evaluating physical disabilities, as well as ability to function when considering mental illness.¹⁹ (Unsurprisingly, such subjective considerations substantially loosened eligibility criteria.)²⁰

The growth of SSDI has encouraged—and has been encouraged by—Trial Lawyers, Inc. In 2013, more than \$1.2 billion was paid out by SSDI to lawyers: money secured straight

Figure 4. Social Security Disability Insurance Benefit Payments Have Grown Dramatically Since the Program’s Inception



Source: Social Security Administration

HOW SSDI WORKS

Theoretically, the SSDI application process is straightforward: if a person develops a medical condition that will prevent him from working for one year or longer, or is terminal, and he has worked for a minimum of five of the preceding ten years, he is eligible to apply for disability benefits.²¹ The worker then files an application with the SSA, which passes the application on to state-level employees at the Disability Determination Services (DDS) office,²² who determine if the applicant is: a) eligible to apply; b) disabled to the point that “basic life activities” are inhibited; and c) suffering from a condition on the SSA’s central list of disabilities²³ or unable “to perform any kind of work that exists in the national economy.”²⁴

Only about 35 percent of applicants are accepted after initial consideration,²⁵ while a further 10 percent of those rejected win their petition after “reconsideration” by the DDS.²⁶ Applicants still denied after reconsideration can appeal to one of the SSA’s Administrative Law Judges (“ALJs”),²⁷ the Social Security Appeals Council, and ultimately federal court.²⁸ ALJ hearings include the ALJ, the applicant, the applicant’s representative,²⁹ and perhaps a few experts to give testimony.³⁰ Needless to say, having an attorney or other representative to navigate this process is almost essential.

Although the SSDI process is far from simple, persistent claimants with able representation tend to fare well. The ALJ review process, atypical in American law, involves “non-adversarial” proceedings in which the ALJ is supposed to protect the best interests of SSA but also issue an impartial decision.³¹ Even though applicants who come before an ALJ have already been twice rejected in the DDS process, evidence suggests that these administrators tend to approve most claims, with an overall approval rate across all ALJs of around 60 percent.³² Moreover, if a claimant gets in front of the *right* ALJ, his claim

is nearly guaranteed: an analysis of the first half of 2011 of the work product of ALJs with more than a few disability cases showed that more than 100 judges had an approval rate of at least 90 percent, with 27 judges approving 95 percent of all claimants.³³

A 2013 report by the Senate Committee on Homeland Security and Government Affairs claimed that part of the reason for the growth in SSDI rolls was a conscious decision by SSA to clear a rising backlog of applications,³⁴ by, in essence, telling employees to work faster.³⁵ A 2012 minority staff report released by the Committee’s Permanent Subcommittee on Investigations elaborated on some of the shortcomings of these less-than-thorough decisions. Reviewing 300 disability case files, the subcommittee “found that more than a quarter of agency decisions failed to properly address insufficient, contradictory, or incomplete evidence.”³⁶

Although Debra Bice, then SSA’s Chief Administrative Law Judge,³⁷ said that hearings should last at least 45 minutes,³⁸ many nevertheless lasted between three and 15 minutes. Some ALJs never asked about the applicants’ medical history; others asked no questions at all, allowing applicants’ representatives to do the talking.

Some decisions were based on evidence that was, at best, not presented to the ALJ—and, at worst, contradicting evidence that was—while others referred to “off-the-record conversations between judges and attorneys that were never explained on the record.”³⁹ (See box, page 6, “A Conn Game,” for one particularly egregious case of an alleged improper relationship between an ALJ and an attorney representative.) Only one-third of reviewed cases considered applicants’ entire medical records, reasoned using only available evidence, included decisions that were thorough, and used easy-to-follow logic.⁴⁰

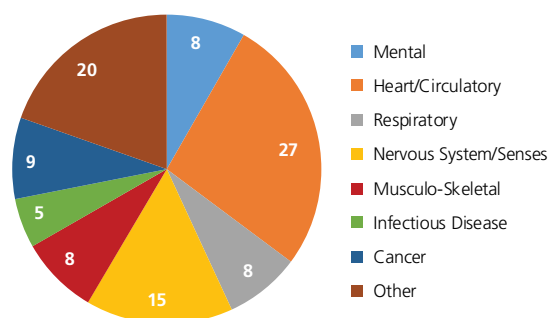
from Americans’ wages, given that SSDI is funded by a 1.8 percent payroll tax.⁴¹ In the first six months of 2014, Americans paid nearly \$600 million in fees⁴² to the representatives who help applicants get approved for benefits.

Such high payouts flow to the litigation industry, notwithstanding that representatives’ awards in SSDI filings are capped at the lesser of 25 percent or \$6,000.⁴³ Making

\$6,000 per applicant can become very lucrative very quickly: the *Wall Street Journal* reported that in 2010, nine of the ten highest-earning SSDI lawyers made over \$2 million in fees (and all ten made over \$1.5 million).⁴⁴

Part of the reason for the sharp rise in SSDI profits for Trial Lawyers, Inc. is, ironically, the result of Congress’s 2004 decision to change the existing law so that claim-

Figure 5. Share of Social Security Disability Recipients, by Diagnosis, 1960



Source: Social Security Administration

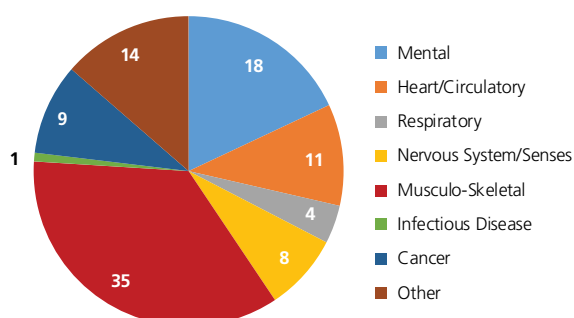
ants' representatives in SSDI applications no longer had to be attorneys.⁴⁵ Such a change meant that more players, beyond law firms, could now help get individuals onto the Social Security Disability rolls, including nonprofit groups and for-profit companies hired by hospitals, insurers, or state and local governments that stand to save money if their clients or constituents end up on SSDI. At the same time, law firms specializing in Social Security Disability services—most prominently, Binder and Binder—profited handsomely from the new rules by adopting a sophisticated business model (see box, page 8, “SSDI Cowboys Herd Up Claimants”).⁴⁶

In recent decades, the number of SSDI beneficiaries has grown steadily while disability rates in the U.S. have remained flat. Over the same period, the percentage of Americans unable to work because of certain serious conditions, such as heart disease, has shrunk markedly.

This growth is largely attributable to an increase in the number of beneficiaries for harder-to-verify disability claims, like mental illness or back pain. The percentage of SSDI beneficiaries diagnosed with mental illness has more than doubled since 1960: mental disorders are now the second-most-common diagnosis for those in the program.⁴⁷ Over the same period, the share of recipients claiming back pain and other musculoskeletal disorders has more than quadrupled: individuals with this diagnosis now constitute more than 35 percent of all SSDI beneficiaries (Figure 5 and Figure 6).⁴⁸

If SSDI's growth is not the result of an increasing level of severe disabilities among the American population, it stands

Figure 6. Share of Social Security Disability Recipients, by Diagnosis, 2012

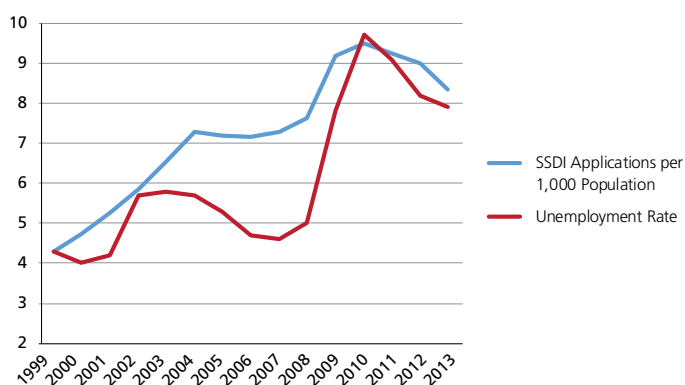


Source: Social Security Administration

to reason that the program—abetted by Trial Lawyers, Inc.—has become a backup welfare program for those with medical conditions that might pass as a disability. Indeed, although there has definitely been a consistent upward trend in SSDI claims, the year-to-year rise and fall of applications closely mirrors the unemployment rate (Figure 7).⁴⁹

A minority staff report from the U.S. Senate Committee on Homeland Security and Government Affairs' Permanent Subcommittee on Investigations speculated that the employed usually receive health insurance, which can help cover treatment for many disabilities and mitigate their effects. When the unemployment rate of the disabled rose to higher levels during the Great Recession than for those without disabilities, a lack of health insurance (and thus a decrease in health care) possibly made many previously manageable medical conditions disabling.⁵⁰

Figure 7. Social Security Disability Applications Have Trended Upward, Following Unemployment Rate



Source: Social Security Administration; Census Bureau; Bureau of Labor Statistics

A CONN GAME

In 2011, a *Wall Street Journal* report examined the uncommonly high approval rate of West Virginia Administrative Law Judge David B. Daugherty.⁵¹ Daugherty was known for processing a large volume of SSDI cases even before SSA began pushing ALJs to begin processing claims more quickly in 2008 (Daugherty had processed an average of 1,160 claims annually over the preceding four years).⁵²

He also tended to be exceedingly likely to sign off on SSDI claims, approving an average of 90 to 95 percent of claims already twice denied by SSA.⁵³ By 2010, Daugherty's approval rate had risen even further: the judge denied only *four* of 1,284 disability claims before him.⁵⁴ Colleagues not only criticized Daugherty for his high approval rate but also for his tendency to take cases previously assigned to other judges without their permission and for his penchant for presiding over the cases of Eric Christopher Conn, a prominent Kentucky disability lawyer who billed himself as "Mr. Social Security."⁵⁵

Following the *Wall Street Journal* exposé, SSA requested that the Office of the Inspector General conduct an investigation, with Daugherty placed on administrative leave. According to an October 2013 staff report by the Senate Committee on Homeland Security and Governmental Affairs, during the course of the investigation, Conn shredded documents that may have been material—approximately 2.6 million sheets of paper.⁵⁶

The staff report focused on the relationship between Daugherty and Conn, who had pulled in over \$22 million in fees paid directly to himself from the SSDI system dating back to 2001, including \$3.8 million in Daugherty's last full year as an ALJ, the third-highest payout among all Social Security lawyers in America.⁵⁷ The staff report documented "a raft of improper practices by the Conn law firm to obtain disability benefits, inappropriate collusion between Mr. Conn and [Daugherty], and inept agency oversight which enabled the misconduct to continue for years."⁵⁸

The report detailed how Conn had built his practice, from one founded in 1993 out of a

trailer in eastern Kentucky into one of the most lucrative disability firms nationwide.⁵⁹ Having begun his career as an attorney before the U.S. Court of Appeals for Veterans Claims, Conn had resigned in 2002 amid "allegations of professional misconduct" to avoid "further investigatory proceedings."⁶⁰

He then built his disability law practice through the "aggressive use of advertising"—including "billboards, television and radio commercials, and his presence at local events"—which he used to recruit a large number of claimants to represent.⁶¹ Conn even hired former Miss Kentucky USA, Kia Hampton, for one of his commercials questioning the ethics of rival disability firm Binder and Binder.⁶²

The Senate staff report documented that once he attracted clients, Conn maneuvered to ensure that his cases were seen before Daugherty.⁶³ With Conn becoming increasingly "unavailable" for hearings before any ALJ other than Daugherty, accusations of "judge shopping" made their way to Hearing Office Chief Administrative Law Judge Charlie Paul Andrus, who was responsible for overseeing all staff and administrative procedures.

In July 2006, Andrus sent out a memorandum that "reminded the Huntington office ... that cases from Eric Conn and Bill Redd, another attorney who also represented a high number of claimants, were to be assigned in strict rotation to prevent the appearance of judge shopping."⁶⁴ Nonetheless, there was no ban on

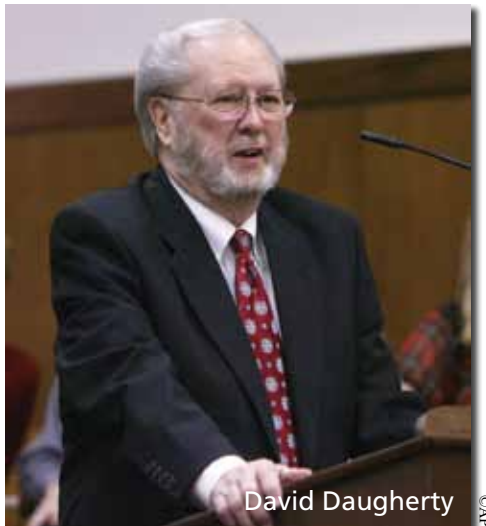


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judges assigning cases—or giving Conn special treatment—until the *Wall Street Journal* story appeared in May 2011.⁶⁵

The report observed that Daugherty worked to assign himself cases handled by Conn: “When the agency primarily handled disability claims in paper, any ALJ could go through unassigned cases in the file cabinets, locate a file, and write a decision,” a practice actually encouraged by the agency.⁶⁶ Once the agency implemented an electronic system, Judge Daugherty was able to “locate cases electronically and assign cases to himself for decision,” something that apparently no one anticipated an ALJ might do.⁶⁷

Once Daugherty had assigned himself to Conn’s cases, Daugherty generated lists of Conn-represented claimants whom he intended to approve for a given month, which he communicated to Conn’s office via telephone, along with a summary of the evidence needed for a particular claimant on the list, to be sent to Conn’s preferred doctors.⁶⁸ Through such efforts, Daugherty not only approved essentially all claims but also fast-tracked the process, cycling claims through in 30 days, on average, compared with a national average of over a year.⁶⁹



The staff report detailed that although Daugherty had reported no income from 2003 to 2011, apart from his government salary and benefits on required financial disclosure forms, his bank accounts showed \$69,000 in unexplained cash deposits (with a brief break in such deposits in 2007–08, when another \$26,200 in unexplained cash deposits showed up in the accounts of his daughter, then seeking election to a county-level magistrate judge position).⁷⁰ Records showed that Conn’s law firm averaged \$9,000–\$10,000 in withdrawals each month.⁷¹

On the night before the Senate Committee released its staff report, the television show *60 Minutes* aired a special that explored many of the report’s allegations.⁷² Eight days later, David Daugherty was found passed out in a car in a church parking lot—beside an empty liquor bottle and pills container, with duct-taped hose running from the car’s exhaust pipe to a cracked window—in an apparent suicide attempt.⁷³

Eric Conn is still practicing disability law under the moniker Mr. Social Security: his website proclaims: “Here at the Conn Law Firm, you will find that all attorneys and team members abide by the highest ethical standards in the legal profession.”⁷⁴

NPR reports that when a mill closed in Aberdeen, Washington, many former employees ended up on disability. Two had suffered heart attacks. One had broken his leg and ankle. Another had diabetes. One of the men who had suffered a heart attack told NPR’s reporter that his “dad had a heart attack and went back to work in the mill.” He said that he would have preferred to have gone back to work, too, but disability was the next best option.⁷⁵

The CATO Institute’s Tad DeHaven argues more broadly that “disability insurance has become more like permanent unemployment insurance or a general welfare program,”⁷⁶ as looser and looser determination standards have led “many people who are capable of working [to] choose instead to remain idle and receive benefits.”⁷⁷ *The Atlantic*’s Jordan Weissmann writes: “[The] program’s payments are small—

the average benefit is a bit over \$1,000 per month—[but] they’re not much worse than a minimum wage job. Better yet, they’re indexed to inflation, meaning they sometimes rise faster than wages, and come with generous government healthcare. For former blue-collar workers who feel they’ve lost all hope of finding employment, or who don’t want to spend their last years leading to retirement standing all day at McDonald’s, disability isn’t a bad offer.”⁷⁸

Whatever is responsible for the increase in SSDI claims, the disability rolls keep growing. By 2013, 8.9 million workers received federal disability benefits,⁷⁹ of which 5.9 million received benefits for the first time between 2009 and 2012.⁸⁰

Getting individuals off SSDI once enrolled is also becoming increasingly difficult. SSA “is required to conduct periodic

SSDI COWBOYS HERD UP CLAIMANTS

Binder and Binder is the undisputed king of the SSDI game.⁸¹ Founded by Harry Binder in 1975 (Harry's brother Charles joined four years later), the law firm built an empire by aggressively advertising on television and mass transit, often featuring Charles in a suit and cowboy hat.⁸²

Binder and Binder was already successful when, a decade ago, Congress amended Social Security Disability rules to permit nonlawyers to represent SSDI claimants.⁸³ The law firm responded by hiring teams of nonlawyers to process claims and significantly increased advertising to pull in more clients.⁸⁴ The firm raked in \$88 million in 2010—far more than any other firm—with Charles alone receiving over \$22 million in direct payments from government coffers.⁸⁵

Binder and Binder has come under criticism from SSA for backdating documents, while former employees have alleged that the firm withheld documents adverse to clients' interests from Social Security proceedings.⁸⁶ The firm insists that it has never withheld a "material fact," but former employees describe a "sticker system" that the firm used to sort records, with red stickers signifying documents not to be submitted; a memo attributed to Charles Binder instructed the firm's workers that a record should be submitted to the government "if it is not harmful to the client" (with "not harmful" in bold).⁸⁷



medical and work reviews to ensure that beneficiaries continue to qualify for the program," yet the 2012 U.S. Senate Committee on Homeland Security and Government Affairs' Subcommittee minority staff report noted that the agency was facing a 1.5 million case backlog in Continuing Disability Reviews—in no small part due to the program's exponential growth.⁸⁸

As such, SSDI is increasingly becoming something like a permanent welfare program. In a 2013 article, *Forbes* noted that of those beneficiaries who stopped receiving benefits in 2011, only 6 percent left to return to work, while 36 percent died, and the majority, 52 percent, left merely by virtue of reaching the retirement age and transitioning to traditional Social Security pension benefits.⁸⁹ A 2013 NPR report noted that less than 1 percent of Americans receiving SSDI benefits in 2011 had returned to work by 2013.⁹⁰

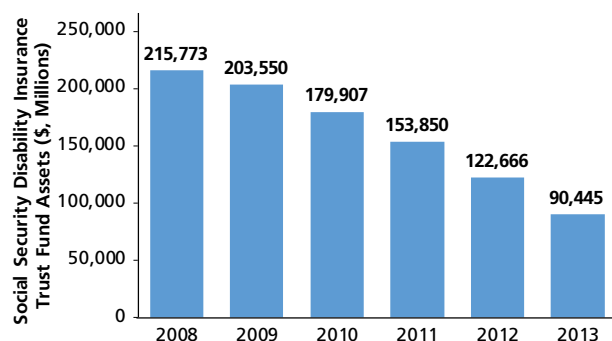
The Social Security Disability program has grown so big that it has been running consistent deficits—outstripping

receipts from the 1.8 percent payroll tax that funds it.⁹¹ The total dollar payout of SSDI was approximately \$144 billion in 2013, up from \$72 billion in 2003.⁹² After running a \$75 billion deficit in 2013, the program was projected to be bankrupt by 2016 (see Figure 8).⁹³

Although Social Security "trust funds" are somewhat magical accounting numbers, the total cost of SSDI, including related Medicare spending, is hard to ignore: about \$260 billion, which, as NPR notes, is "eight times more than [the U.S.] spend[s] on welfare" and "more than [the U.S.] spend[s] on welfare, food stamps, the school lunch program, and subsidized housing combined."⁹⁴

Beyond SSDI's fiscal cost, the expanded disability rolls under the program have, unsurprisingly, coincided with a shrinking employment rate for disabled Americans,⁹⁵ even as advances in technologies, workplace environments, and health care have led some scholars to argue that SSDI's conception of disability should be nearing extinction.⁹⁶

Figure 8. Assets in the Social Security Disability Insurance Trust Fund Are Declining Rapidly



Source: Social Security Administration

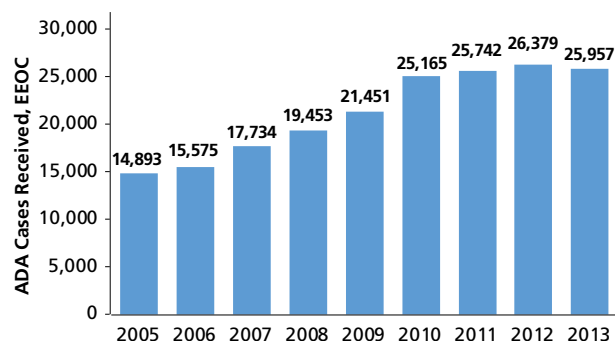
Between 2008 and 2014, the number of Americans classified as disabled by the Bureau of Labor Statistics rose from 28 million to 30 million, while the total number of disabled individuals employed fell 10 percent.⁹⁷ The ready availability of SSDI—eased by aggressive advertising campaigns and legal maneuverings of plaintiffs’ lawyers like Charles Binder and Eric Christopher Conn—has contributed to this process, as well as to the bottom line of Trial Lawyers, Inc.

SMALL-BUSINESS SHAKEDOWN: LITIGATION UNDER THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act requires businesses to help disabled individuals—defined as those with “a physical or mental impairment that substantially limits a major life activity”⁹⁸—in two main ways: (1) by making reasonable efforts to accommodate them in all employment decisions (Title I); and (2) by accommodating them in public transport, facilities, and telecommunications (Titles II, III, and IV, respectively).⁹⁹ Litigation under the ADA varies, depending on the title under which an action originates (see box, page 10, “How ADA Litigation Works”).

Employment-discrimination claims under Title I of the ADA are almost as numerous as those alleging sex discrimination (and about one-third less frequent than race-discrimination claims). The former have increased in recent years, too (Figure 9).¹⁰⁰ Although these cases

Figure 9. Employment-Related ADA Case Filings with the EEOC Have Risen in Recent Years



Source: Equal Employment Opportunity Commission

are big business for the plaintiffs’ bar, they are somewhat less prone to abuse than some other forms of litigation—including Title III ADA claims—both because EEOC must prereview claims and because each disability claim is bound to individual circumstances, thereby generally preventing class-action lawsuits under the ADA’s employment provisions.¹⁰¹

Title III ADA claims, which govern public accommodation for the disabled, have generated what legal analyst Walter Olson calls a “lawsuit mill” approach akin to that employed by patent trolls.¹⁰² Under Title III, the ADA does not itself empower private individuals to sue for money damages for facility-related claims (see box, “How ADA Litigation Works”).¹⁰³ Such money damages can only be pursued in government actions; the statute’s sole remedy for individuals is “injunctive” relief, where a court directs a business to stop violating the law.¹⁰⁴ ADA claims for injunctive relief do, however, allow successfully suing attorneys to recover attorney fees and costs.¹⁰⁵

In addition, various states have their own laws enabling individuals to file lawsuits for money based on ADA violations—notably California, Florida, and New York.¹⁰⁶ Although statutory awards permitted under these laws are modest, they do offer disabled individuals an incentive to cooperate with disability lawyers to file multiple claims alleging violations—generating multiple awards for the plaintiff and even hefty fees for the plaintiff’s lawyer (see box, page 11, “Turning Disabilities into Dollars”).

HOW ADA LITIGATION WORKS

The Americans with Disabilities Act empowers individuals to sue private businesses to enforce its provisions. Under both the employment and the accommodations provisions, all businesses, even small businesses, must comply with its terms, but the legal remedies are limited.

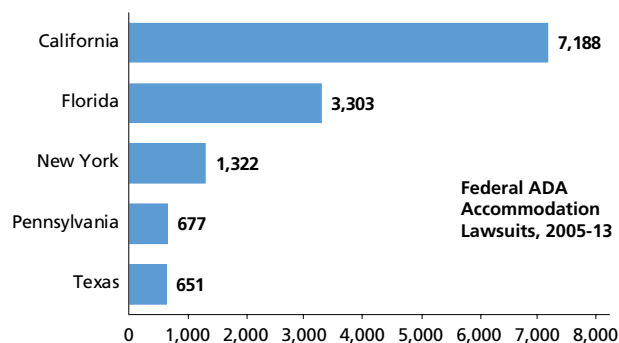
Rather than going directly to court, individuals making an employment-discrimination claim must go through an administrative process with the federal Equal Employment Opportunity Commission.¹⁰⁷

Those suing a business for failing to comply with the “accommodations” provisions—for inadequate structures (such as wheelchair ramps), or signage, or any host of technical violations—find businesses easy targets under the ADA. Although individual plaintiffs cannot sue for damages under the accommodations provisions of the ADA, lawyers still have incentives to bring such cases for “injunctive relief” (to remedy alleged wrongs) because the ADA allows lawyers to collect costs and “reasonable attorney fees” from the defendant in the event of a successful suit.¹⁰⁸ In addition, many states—including the ADA-litigation hotbeds of California, Florida, and New York—have their own statutes allowing plaintiffs to collect damages in suits alleging inadequate accommodation for disabled persons consistent with violations of the federal ADA.¹⁰⁹

Under these state laws, disability lawsuits have become big business for the litigation industry. Case filings in federal court have doubled in the last six years.¹¹⁰ Between 2005 and 2013, more than 10,000 federal disability lawsuits were filed against business owners based on an alleged building or infrastructure infraction—excluding alleged employment offenses—in California and Florida alone (Figure 10).¹¹¹ In each of those years, a majority of all ADA Title III filings were filed in just ten districts nationally.¹¹²

Accommodation claims under the ADA are not only concentrated among a small number of jurisdictions but are also dominated by a small number of lawyers—and even a small number of plaintiffs, most of whom are “frequent filers” repeatedly making similar accusations against multiple businesses.

Figure 10. Accommodation-Based ADA Lawsuits Are Concentrated in Certain Large States



Source: NBC, U.S. Courts (“Other” ADA Case Filings)

An academic study of ADA Title III filings for 2010 determined that in all but one of the top ADA-litigation districts, the top-filing lawyer filed at least 20 percent of all cases: “in four districts, the Top Lawyer accounted for over half of all filings.”¹¹³ Between 2005 and 2013, just 31 individuals filed 56 percent of all the ADA Title III lawsuits in California.¹¹⁴

One plaintiff, Scott Johnson, filed more than 3,000¹¹⁵—typically on his own behalf, as Johnson is both a quadriplegic and an attorney.¹¹⁶ A sole practitioner who drives a special wheelchair van along with a service dog, Johnson typically settles cases for \$4,000–\$6,000.¹¹⁷ Other active disability attorneys in California—including Lynn Hubbard III, Thomas Frankovich (see box, page 11, “Turning Disabilities into Dollars”), and Morse Mehrban—file multiple cases on others’ behalf, reportedly settling for much larger sums.¹¹⁸

Mehrban, for instance, has used about a dozen plaintiffs for about 90 percent of his ADA lawsuit filings.¹¹⁹ For the purposes of ADA litigation, these plaintiffs have to be disabled but do not have to be model citizens—or, indeed, citizens at all, as shown by Alfredo Garcia, an illegal alien who has faced weapons, drug, and burglary charges in addition to serving as a plaintiff in more than 600 of Mehrban’s ADA lawsuits.¹²⁰

Another of Mehrban’s favorite litigants, Tom Mundy, was an unemployed contractor when he netted \$300,000 in a single year in ADA lawsuits. As of 2010, Mundy had filed 523 lawsuits with Mehrban.¹²¹ Despite such success, Mehrban is

TURNING DISABILITIES INTO DOLLARS

In 1994, a 48-year-old attorney in the San Francisco Bay area, Thomas Frankovich, decided to drop his personal-injury law practice to pursue litigation opportunities arising under the new federal Americans with Disabilities Act.¹²² Frankovich's decision proved lucrative: his multimillion-dollar practice has helped stock his luxurious offices with pricey collectors' art and antiques and helped supply his ranches with a herd of some 140 bison.¹²³ (Frankovich also owns a home in Marin County, California, and a house and condo in Mazatlán, Mexico.)¹²⁴

Frankovich's business model, replicated by many other California disability attorneys running ADA lawsuit mills,¹²⁵ takes advantage of a 1959 California antidiscrimination law, the Unruh Civil Rights Act,¹²⁶ which was expanded to include disabled access rights after passage of the federal ADA in 1990.¹²⁷ Specifying that disabled individuals are "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever,"¹²⁸ the Unruh Act offers a monetary "bounty" to any injured individual successfully suing for a violation—a private mechanism for enforcement absent from the ADA itself.¹²⁹

Although the monetary bounty paid out to *plaintiffs* under the Unruh Act is modest—historically \$4,000, cut to \$1,000 for disability suits in 2012 reform legislation¹³⁰—Frankovich and other disability-lawsuit specialists discovered that they could reach settlements with businesses averaging \$20,000 to \$35,000, extracting all but the plaintiff's statutory bounty for themselves as attorney fees.¹³¹ To leverage these sums into large revenue streams, Frankovich developed a symbiotic relationship with repeat plaintiffs, filing similar claims on behalf of the same individual against multiple businesses.

One of Frankovich's top plaintiffs was Woodland Hills, California, resident Jarek Molski, a paraplegic after a 1985 motorcycle injury, who developed a career out of threatening to sue small businesses over alleged ADA infractions.¹³² Molski filed more than 400 lawsuits against small businesses for "insufficient handicapped parking, misplaced handrails and other violations of the [ADA], demanding that business owners be fined \$4,000 for every day their facilities failed to meet exacting federal standards."¹³³

Molski was always joined by a nonprofit coplaintiff, Disability Rights Enforcement, Education Services: Helping You Help Others



(DREES), and frequently represented by Frankovich: of the 223 lawsuits Frankovich filed in 2004 in the Northern and Central Districts of California alleging ADA violations, Frankovich represented Molski in 156 of them.¹³⁴ By one estimate, Frankovich netted over \$10 million from cases filed on behalf of Molski.¹³⁵

Molski's days as a professional litigant drew to a close after a federal judge, the late Edward Rafeedie, received his 2004 case—filed by Frankovich—against the Mandarin Touch Restaurant, located 116 miles from Molski's home.¹³⁶ Molski alleged that he was injured when visiting the restaurant after his hand became caught in the exterior door of a too-narrow doorway to the restaurant's restroom.¹³⁷ Judge Rafeedie was suspicious, noting that on May 20, 2003, Molski had allegedly suffered injuries at three different businesses, El 7 Mares Restaurant, Casa de Fruta, and Rapazzini Winery.¹³⁸ The judge further observed:

"The Court is tempted to exclaim: 'what a lousy day!' It would be highly unusual—to say the least—for anyone to sustain two injuries, let alone three, in a single day, each of which necessitated a separate federal lawsuit. But in Molski's case, May 20, 2003, was simply business as usual. Molski filed 13 separate complaints for essentially identical injuries sustained between May 19, 2003, and May 23, 2003. The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period."

In a subsequent ruling, Rafeedie noted that on "May 23, 2003, Molski claims he was injured at five separate businesses that

were separated from one another by a total distance of more than 140 miles, and which are 160 to 300 miles from his home in Woodland Hills.”¹³⁹

Ultimately, Rafeedie judged Molski to be a “vexatious litigant” and issued an order barring him from filing further ADA suits absent the judge’s approval—a decision ultimately upheld by the court of appeals.¹⁴⁰ In a follow-up decision, the court looked at Frankovich and shed further light upon his business model:

After filing the lawsuit, the Frankovich Group sends a copy of the complaint directly to each defendant, along with a letter, which can only be described as astonishing. Describing itself as “friendly advice,” the letter counsels the unrepresented defendant against hiring his own lawyer. The letter claims that the “vast majority” of defense attorneys simply “embark on a ‘billing’ expedition” when hired, rather than looking out for their client’s best interest. “Simply put,” the letter continues, “defense attorneys want to sufficiently ‘bill it’ before they get realistic about the settlement.” Accordingly, the letter states, the money required to retain a defense attorney “could be better spent on the remedial work and settlement of the action.”

The letter further advises the defendants that their insurance policy may cover this claim, and goes on to describe, in considerable detail, what provisions of a general liability policy might

provide coverage, including separate discussions of bodily injury, advertising, and wrongful eviction coverage. The Frankovich Group even offers to represent defendants in a suit against their insurer, should the insurer refuse to provide coverage.¹⁴¹

Rafeedie determined that Frankovich’s law firm had “engaged in a pattern of unethical behavior designed ultimately to extort money from businesses and their insurers” and issued a pre-filing order requiring Frankovich “to seek leave of court before filing any new complaints under Title III of the Americans with Disabilities Act.”¹⁴² The judge also referred the matter to the state bar, which determined in 2008 that there was not “clear and convincing evidence” that Frankovich had “committed moral turpitude by engaging in a scheme to extort,” though the bar did “reprove” him for inappropriate contact with a defendant and issued various sanctions.¹⁴³

Notwithstanding the bar’s reproof, Frankovich was soon up to his old tricks. In the early months of 2010, for instance, he filed at least 23 lawsuits against mostly small, minority-owned businesses in the Mission District of San Francisco.¹⁴⁴ In 2013, he successfully petitioned the Central District of California to vacate Judge Rafeedie’s pre-filing order.¹⁴⁵ In at least one respect, Frankovich has changed: in 2008, he finally moved his offices out of a 100-year-old Victorian home that was wheelchair-inaccessible and into a new space that was (mostly) ADA-compliant.¹⁴⁶

not resting on his laurels with his current stable of clients. His website informs prospective plaintiffs:

- “You stop by a hardware store and need to use the restroom but find there are no grab (support) bars (handrails) next to the toilet. You may be entitled to **\$4,000.**”
- “You’re in a restaurant and want to use the restroom mirror to make yourself presentable. The mirror is mounted too high on the wall for you to use. You may be entitled to **\$4,000.**”¹⁴⁷

If California has been the greatest profit center for Trial Lawyers, Inc.’s ADA-litigation business line, two large East Coast states, Florida and New York, trail not far behind. Among the most aggressive ADA lawyers along the eastern seaboard is Ben-Zion Bradley Weitz, who established an ADA accommodation-suit practice in Florida a decade

ago, before passing the New York bar in 2010 and expanding his business to include the Big Apple.¹⁴⁸

In New York, Weitz has represented double-amputee Zoltan Hirsch in 143 lawsuits—once filing nine cases on Hirsch’s behalf in a single day¹⁴⁹—and has blanketed businesses on the Upper West Side between 65th and 87th Streets with substantially similar ADA lawsuits.¹⁵⁰ The *New York Times* reported that, as of 2012, Weitz had closed a known 106 cases. Though settlement terms are typically confidential, the paper estimated that Weitz had earned \$600,000 in his then-brief stint in New York.¹⁵¹ Although he eventually ran into trouble in the form of federal district judge Sterling Johnson (see box, page 13, “Not So Sterling Suits”), Weitz escaped unscathed—and is now expanding his business into Colorado.¹⁵²

A PATH TO REFORM

For some time, legislators have been trying to fix ADA litigation and the SSDI program. In 2000, then-Congressman Mark Foley, Republican of Florida, introduced a bill, the ADA Notification Act, which would have allowed businesses 90 days to remedy an alleged violation of ADA Title III before legal action could commence.¹⁵³ Democrat Tim Johnson of South Dakota introduced an identical bill in the Senate.¹⁵⁴ Despite such bipartisan cooperation, neither bill moved out of committee—not in 2000, nor in any of the

three next Congresses (when Foley introduced the same bill, gathering as many as 63 cosponsors).¹⁵⁵

Although Foley's federal ADA bill never gained traction, California did pass significant reforms in 2012 that may finally stem the tide of litigation abuse in the Golden State.¹⁵⁶ In the previous legislative session, Senator Bob Dutton, Republican from Rancho Cucamonga, had unsuccessfully introduced a bill paralleling the federal Foley bill, giving businesses targeted with accommodations disability lawsuits 120 days to remedy the problem before litigation could com-

NOT SO STERLING SUITS

In winter 2013, Ben-Zion Bradley Weitz found himself before Sterling Johnson, a federal judge sitting in the Eastern District of New York in Brooklyn, who had jurisdiction over an ADA lawsuit that Weitz and Adam Shore had filed against local sandwich shops.¹⁵⁷

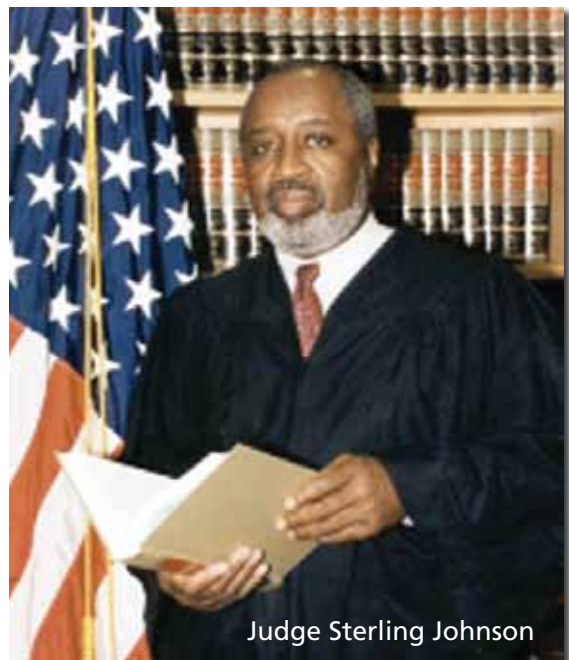
Johnson questioned the attorneys' fee request, noting that the \$425 hourly rate sought was "far in excess of the top end \$350 rate generally awarded to experienced counsel in this district," while observing that "Shore has only seen one ADA case through trial"—with Johnson also suggesting that the "only skill or expertise Shore and Weitz have exhibited is the ability to file near-identical pleadings without intermission throughout this country."¹⁵⁸

In examining Shore and Weitz's case further, Johnson was sufficiently unimpressed that he drew a comparison between their claims to the ADA litigation previously brought in California by Tom Frankovich on behalf of Jarek Molski, which had drawn a California judge's sanction and prompted a finding that Molski was a "vexatious litigant" (see box, "Turning Disabilities into Dollars").¹⁵⁹

In his case, Johnson complained that the named plaintiff, Mr. Costello, had repeatedly not shown up in court as requested. Johnson even sent his law clerks to the defendants' restaurants, where they made notable discoveries: "Upon recently visiting each of the businesses that were named defendants in Plaintiffs eight lawsuits, the Court was shocked to see that most if not all of the alleged structural deficiencies preventing access to persons with disabilities still exist.... In fact, many of the ADA violations alleged in the complaints filed by Plaintiff did not even exist in the first place. For example, in the Amended Complaint, Plaintiff alleges

that Subway [restaurant] fails to provide a wheelchair accessible restroom. However, during the Court-initiated trip, it was observed that the Subway had no restroom at all."¹⁶⁰

Although the Second Circuit Court of Appeals subsequently reversed Johnson's decision¹⁶¹—ruling that sending his law clerks out to investigate was inappropriate—Judge Johnson's opinion threw into serious question ADA attorneys' claims that their efforts are intended primarily to improve facilities for disabled people (and are, accordingly, successful in achieving those ends).



©U.S. District Court for the Eastern District of New York

Judge Sterling Johnson

mence.¹⁶² In 2012, Dutton paired with Democrat Darrell Steinberg, California Senate’s president pro tempore, and introduced an alternative bill, Senate Bill 1186, which would:

- Lower statutory damages awarded to a successful plaintiff from \$4,000 to \$1,000 if the alleged violation is fixed within 60 days¹⁶³
- Give small businesses 30 days to fix an identified violation without penalty and cap potential damages at \$2,000¹⁶⁴
- Forbid “demand for money” letters under disability accommodation lawsuits¹⁶⁵

Democrat Dianne Feinstein, the state’s senior U.S. senator, wrote Steinberg a letter backing the bill, in which she chronicled ADA-litigation abuse in the state—demonstrated by examples and 13 attached demand letters—and expressed concern that “these lawsuits can place a significant financial burden on small businesses and may ultimately jeopardize their ability to survive, contribute to the local economy, and provide services to the disabled and non-disabled alike.”¹⁶⁶

Feinstein expressly mentioned S.B. 1186, noting that she was prepared to introduce federal legislation in the absence of action.¹⁶⁷ On September 19, 2012, California governor Jerry Brown signed the bill into law,¹⁶⁸ with the encouragement of another letter from Senator Feinstein.¹⁶⁹

It is too soon to tell what the long-term effects of Senate Bill 1186 in California will be, though in 2013, the state still had 995 ADA Title III lawsuits—slightly more than Florida (816), but significantly more than any other state.¹⁷⁰ With

such claims trending upward nationally in 2014—filings were up some 40 percent above 2013 levels halfway through the year¹⁷¹—federal reform may yet be warranted.

In addition to various “right to reform” rules allowing companies time to remedy an alleged ADA accommodation violation before litigation can commence (at least for smaller businesses), reformers should consider a true two-way fee shift or “loser pays” provision that would enable businesses *wrongly* accused of violating the ADA to fight back in court. Under the current regime, such a defense is economically unfeasible if the cost of defense exceeds the cost to settle (which is why almost all ADA Title III claims settle without trial).¹⁷²

Interestingly, California’s Disabled Persons Act¹⁷³ has such a loser-pays provision, which the California Supreme Court ruled in December 2012 would apply in cases filed under that statute, notwithstanding the lack of such provision under the federal ADA.¹⁷⁴ Unfortunately, because there is no parallel two-way fee shifting provision under California’s Unruh Civil Rights Act,¹⁷⁵ which has parallel liability and damages provisions,¹⁷⁶ the practical effect of the court’s ruling may be merely to encourage attorneys pursuing disability actions in California *not* to file under the Disabled Persons Act—using only the Unruh Act for their hook to get plaintiffs potential damage awards.

As for Social Security Disability Insurance, the Senate Committee on Homeland Security and Government Affairs not only has been studying the strains on the program but also has been investigating ostensibly improper benefit awards by ALJs, with related allegations of fraud (see box, page 6, “A Conn Game”).¹⁷⁷

Committee member Tom Coburn, Republican senator from Oklahoma, has assumed a leadership role on this issue.¹⁷⁸ Although Coburn is not seeking reelection in November, his mantle may be taken up by fellow Oklahoman and likely successor, current Representative James Lankford,¹⁷⁹ who has also been aggressively scrutinizing SSDI abuses from his position atop the House Oversight and Government Reform Committee’s Energy Policy, Health Care and Entitlements Subcommittee.¹⁸⁰





Little legislation to reform SSDI has emerged from Congress recently; but in the final days of 2013, SSA did move to restrict some of the freedoms of decision making that ALJs have traditionally enjoyed.¹⁸¹ Still, further steps are warranted. The staff report addressing the alleged Daugherty-Conn abuses made several recommendations worthy of consideration, including:

- Improving ALJs' consideration of DDS decisions to deny benefits claims, both by ensuring that such decisions are well documented and possibly by permitting ALJs "to contact the DDS examiner who made the prior decision in the presence of the claimant's representative to ask about the reasons for the prior denial"
- Improving training for ALJs, quality review of ALJ decision making, and reporting to Congress
- Updating medical-vocational guidelines and prohibiting claimants from offering medical opinions from doctors with revoked or suspended licenses
- Requiring the inspector general to conduct "an annual review of the practices of the law firms earning the most attorney fees from processing disability cases to detect any abusive conduct"¹⁸²

Newly launched SSDI Solutions Initiative, a project of the Committee for a Responsible Federal Budget, cochaired by former Representatives Earl Pomeroy (D-N.D.) and Jim McCrery (R-La.),¹⁸³ will offer energy and creativity to the project of Social Security Disability reform.

Fundamentally, neither the problem of ADA lawsuit abuse nor the problems associated with the SSDI program are easy to fix. At least for small businesses lacking sophisticated in-house legal teams, complying with Title III of the ADA is difficult and expensive—which is why permitting some capacity to remedy noncompliance before being sued, as well as some capacity to recover legal expenses in the event of a successful defense, is necessary to forestall abuses.

The Social Security Disability program offers a different dilemma: unlike old-age benefits, for which the universe of recipients is easily defined, deciding just who is too disabled to work is often not self-evident, with standards changing over time as the practice of medicine and workplace norms and capabilities evolve. In a sense, the SSDI problem is the inverse of the ADA problem: if the latter suffers from being overly adversarial, such that profit motives can overwhelm constructive efforts to facilitate accommodations for the disabled, the former suffers from not being adversarial, with an administrative apparatus ill equipped to detect false claims.

Whatever the solutions, reform is urgent. Social Security Disability Insurance and the Americans with Disabilities Act are both significant legislative advances that, functioning properly, have made and should continue to make our society more productive and humane. Yet these noble goals should not be exploited to crush business owners and taxpayers—a development all the more pernicious when the weight of abuses serves not to help the disabled but to enrich the self-serving magnates running Trial Lawyers, Inc.

Endnotes

- ¹ Cf. JOHN RAWLS, A THEORY OF JUSTICE 14–15 (1971) (arguing that “social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society”); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 285 (1960) (noting that “[i]n the Western world some provision for those threatened by the extremes of indigence or starvation due to circumstances beyond their control has long been accepted as a duty of the community”).
- ² See *generally* Social Security Act Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807.
- ³ Pub. L. 101-336, 104 Stat. 327 (1990)(codified in scattered sections of 42 U.S.C.A. (West Supp.1991)).
- ⁴ See *generally* Center for Legal Pol’y, Manhattan Inst. For Pol’y Res., Trial Lawyers, Inc., <http://www.triallawyersinc.com/> (last visited Sept. 29, 2014).
- ⁵ Under current Social Security law, attorneys or other representatives who successfully assist applicants seeking to qualify for SSDI are entitled to receive 25 percent of “back pay” dating to the onset of disability, up to a maximum of \$6,000. See 42 U.S.C. §§ 206(a)(2)(A), 1631(d)(2)(A).
- ⁶ Chart data are derived from information offered by the Social Security Administration. See Statistics on Title II Direct Payments to Claimant Representatives, Social Security: Official Social Security Website, <http://www.ssa.gov/representation/statistics.htm> (last visited Sept. 29, 2014).
- ⁷ *This American Life: 490: Trends With Benefits*, WBEZ (originally aired Mar. 22, 2013), transcript available at <http://www.thisamericanlife.org/radio-archives/episode/490/transcript>.
- ⁸ *Americans with Disabilities Act of 1990 (ADA) Charges*, U.S. EEOC, <http://www1.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Sept. 29, 2014).
- ⁹ See Towers Watson, 2011 Update on U.S. Tort Cost Trends 3, <http://www.casact.org/library/studynotes/Towers-Watson-Tort-Cost-Trends.pdf> (showing U.S. tort costs shrinking or growing more slowly than gross domestic product each year from 2004 through 2010, excluding 2010 costs associated with the BP oil spill).
- ¹⁰ Jon Hyman, *How Much Does it Cost to Defend an Employment Lawsuit?*, WORKFORCE BLOG (May 14, 2013), <http://www.workforce.com/blogs/3-the-practical-employer/post/how-much-does-it-cost-to-defend-an-employment-lawsuit>.
- ¹¹ Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending December 31, 2012 and 2013, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2013/december/C02Dec13.pdf> (last visited Sept. 29, 2014).
- ¹² Under Title I of the ADA, which governs employment discrimination, individuals who successfully allege discrimination based on disability are entitled to recover monetary damages including back pay and their attorneys are entitled to attorneys’ fees and costs. See 42 U.S.C. §§ 2000e–5(g)(1), 2000e–5(k). Under Title III, which governs public accommodations, individual claimants successfully alleging that a commercial facility is not in compliance with the ADA are entitled solely to injunctive relief, not monetary damages, but their attorneys are entitled to recover costs and fees. See 42 U.S.C. § 12188(a)(2); see also *American Bus Ass’n v. Slater*, 231 F.3d 1, 5 (D.C.Cir.2000) (“By specifying the circumstances under which monetary relief will be available, Congress evinced its intent that damages would be available in no others.”).
- ¹³ Chart data are derived from U.S. Courts data. See United States Courts: Statistical Tables Archive, http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.aspx (last visited Sept. 29, 2014).
- ¹⁴ See Walter Olson, *ADA and the ‘Chipotle Experience’*, CATO AT LIBERTY (July 29, 2010, 1:37pm), <http://www.cato.org/blog/ada-chipotle-experience>.
- ¹⁵ See Tad DeHaven, *The Rising Cost of Social Security Disability Insurance Policy*, Pol’y Analysis No. 733, 3 (Cato Inst., Aug. 2013), available at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa733_web.pdf (citing EDWARD D. BERKOWITZ, *AMERICA’S WELFARE STATE: FROM ROOSEVELT TO REAGAN* 158–59 (Johns Hopkins University Press 1991)).
- ¹⁶ See Social Security Act Amendments of 1956, *supra* note 2. Chart data are derived from information offered by the Social Security Administration. See Old Age, Survivors, and Disability Insurance: Table 4.A2. Disability Insurance, 1957–2013, U.S. Social Security Administration, Office of Retirement and Disability Policy, Annual Statistical Supplement, 2014, <http://www.ssa.gov/policy/docs/statcomps/supplement/2014/4a.html> (last visited Sept. 29, 2014).
- ¹⁷ See DeHaven, *supra* note 15, at 4; Social Security Amendments of 1958, Pub. L. No. 85-840, 72 Stat. 1021; Social Security Amendments of 1967, Pub. L. 90-248, § 173, 81 Stat. 877.
- ¹⁸ See *id.*, at 5.
- ¹⁹ David H. Autor, *The Unsustainable Rise of the Disability Rolls in the United States: Causes, Consequences, and Policy Options* 5 (MIT Working Paper No 12-01, Nov. 2011), available at <http://economics.mit.edu/files/7388>.
- ²⁰ See DeHaven, *supra* note 15, at 5.
- ²¹ See Autor, *supra* note 19, at 4.
- ²² MINORITY STAFF REPORT OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 112TH CONG., SOCIAL SECURITY DISABILITY PROGRAMS: IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS 10 (Comm. Print 2012), available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=6f2d2252-50e8-4257-8c6f-0c342896d904 [hereinafter Senate Minority Staff Report 2012].
- ²³ See DeHaven, *supra* note 15, at 9.
- ²⁴ Senate Minority Staff Report 2012, *supra* note 22, at 10.
- ²⁵ See Autor, *supra* note 19, at 4.
- ²⁶ See Autor, *supra* note 19, at 10.
- ²⁷ See DeHaven, *supra* note 15, at 10.
- ²⁸ *Id.*
- ²⁹ See Chana Joffe-Walt, *Unfit for Work*, NPR PLANET WORK (2013), <http://apps.npr.org/unfit-for-work>.
- ³⁰ Senate Minority Staff Report 2012, *supra* note 22, at 22.
- ³¹ See Joffe-Walt, *supra* note 29.
- ³² See Damian Paletta, *Disability-Claim Judge Has Trouble Saying ‘No’: Near-Perfect Approval Record, Social-Security Program Strained*, WALL ST. J. (May 19, 2011), available at <http://online.wsj.com/news/articles/SB10001424052748704681904576319163605918524>.
- ³³ See *id.*
- ³⁴ STAFF REPORT OF THE S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 113TH CONG., HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY’S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM 8 (Comm. Print 2013), available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36 [hereinafter Senate Committee Report 2013].
- ³⁵ See *id.* at 11.
- ³⁶ Senate Minority Staff Report 2012, *supra* note 22, at 3-4.
- ³⁷ *Id.* at 21.
- ³⁸ *Id.* at 36.
- ³⁹ *Id.* at 37.
- ⁴⁰ See *id.* at 127.
- ⁴¹ See DeHaven, *supra* note 15, at 2.

- ⁴² *Statistics On Title II Direct Payments To Claimant: Year 2014*, SOCIAL SECURITY ADMIN., <http://www.ssa.gov/representation/statistics.htm#2014=&sb=-1> (last visited Sept. 29, 2014).
- ⁴³ See DeHaven, *supra* note 15, at 12.
- ⁴⁴ Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold In U.S. Disability System*, WALL ST. J. (Dec. 22, 2011), available at <http://online.wsj.com/news/articles/SB10001424052970203518404577096632862007046>.
- ⁴⁵ See Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493 (2004).
- ⁴⁶ See DeHaven, *supra* note 15, at 13.
- ⁴⁷ Soc. Sec. Admin. Office of Ret. & Disability Pol'y, *Annual Statistical Report on the Social Security Disability Insurance Program*, 2012, Pub. No. 13-11826, Table 40 (2013), http://www.ssa.gov/policy/docs/statcomps/di_asr/2012/di_asr12.pdf.
- ⁴⁸ *Id.*
- ⁴⁹ Data are derived from information provided by the Social Security Administration, the U.S. Census Bureau, and the Bureau of Labor Statistics. See Social Security: Official Social Security Website, Selected Data From Social Security's Disability Program, <http://www.ssa.gov/oact/STATS/dibStat.html#f1> (listing Social Security Disability applications from 2008 through 2013) (last visited Sept. 29, 2014); United States Census Bureau, Population Estimates, <http://www.census.gov/popest/data/national/totals/2013/index.html> and <http://www.census.gov/popest/data/historical/index.html> (population estimates) (last visited Sept. 29, 2014); Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, <http://data.bls.gov/timeseries/LNS14000000> (unemployment rate) (last visited Sept. 29, 2014).
- ⁵⁰ Senate Minority Staff Report 2012, *supra* note 22, at 1.
- ⁵¹ Paletta, *supra* note 32.
- ⁵² *Id.* ("In 2005, he reached 955 decisions, approving benefits in 90% of the cases. From 2006 through 2008, he decided 3,645 cases, approving benefits roughly 95% of the time. Last year, at 99.7%, he had one of the highest award rates in the country, and is on pace to award even more benefits in 2011, according to agency statistics.").
- ⁵³ *Id.*
- ⁵⁴ *FY 2010—ALJ Disposition Data (Cumulative For 9/26/09 Through 9/24/2010)*, SOCIAL SECURITY ADMIN., http://www.socialsecurity.gov/appeals/DataSets/archive/03_FY2010/03_September_ALJ_Disposition_Data_FY2010.pdf (last visited Sept. 30, 2014).
- ⁵⁵ See Paletta, *supra* note 32; see also Senate Committee Report 2013, *supra* note 34, at 25 & note 101(citing Attorney, Eric Conn, "Eric C. Conn, Beyond the Billboard," Excerpts from the Medical Herald Leader, 8/8/2005, www.mrsocialsecurity.com).
- ⁵⁶ Senate Committee Report 2013, *supra* note 34, at 7 & 122.
- ⁵⁷ *Id.* at 87-88.
- ⁵⁸ *Id.* at 1.
- ⁵⁹ *Id.*
- ⁶⁰ *Id.* at 24 (citing *In re Eric C. Conn*, Attorney at Law, No. 01-8001 (U.S. Vet. App. Sept. 30, 2002), available at <https://www.courtlistener.com/cavc/5bPG/conn-v-principi/>).
- ⁶¹ *Id.* at 24.
- ⁶² *Id.* at 25 & note 107.
- ⁶³ *Id.* at 27 ("In addition to requiring special accommodations in order to represent his clients, Mr. Conn also appears to have frequently canceled his clients' hearings if he discovered the case was assigned to a judge other than his preferred Judge, David Daugherty.").
- ⁶⁴ *Id.* at 39.
- ⁶⁵ *Id.* at 44.
- ⁶⁶ *Id.* at 37.
- ⁶⁷ *Id.* at 37-38.
- ⁶⁸ *Id.* at 2.
- ⁶⁹ *Id.*
- ⁷⁰ *Id.* at 89-91.
- ⁷¹ *Id.* at 92.
- ⁷² *60 Minutes: Disability USA* (CBS television broadcast, Oct. 6, 2013), available at <http://www.cbsnews.com/videos/disability-usa/>.
- ⁷³ WSAZ News Staff, The Associated Press, *Police Report: Possible Attempted Suicide by Former Judge*, WSAZ NEWS CHANNEL 3 (Oct. 18, 2013), http://www.wsaz.com/news/headlines/Local_Social_Security_Judge_Under_Scrutiny_122259399.html.
- ⁷⁴ THE CONN LAW FIRM & ASSOCIATES, <http://mrsocialsecurity.com/> (last visited Sept. 30, 2014).
- ⁷⁵ See Joffe-Walt, *supra* note 29.
- ⁷⁶ See DeHaven, *supra* note 15, at 1.
- ⁷⁷ See *id.* at 2.
- ⁷⁸ Jordan Weissman, *Disability Insurance: America's \$124 Billion Secret Welfare Program*, ATLANTIC (Mar. 25, 2013), available at <http://www.theatlantic.com/business/archive/2013/03/disability-insurance-americas-124-billion-secret-welfare-program/274302>.
- ⁷⁹ *Disabled worker beneficiary statistics by calendar year, quarter, and month*, SOCIAL SECURITY ADMIN., <http://www.ssa.gov/oact/STATS/dibStat.html> (last visited Sept. 29, 2014).
- ⁸⁰ Senate Minority Staff Report 2012, *supra* note 22, at 1.
- ⁸¹ BINDER & BINDER, <http://www.binderandbinder.com/> (last visited Sept. 30, 2014).
- ⁸² See Jillian Kay Melchior, *Binder on Binder & Binder: A Disability Lawyer Profits Off His Radical Political Ideas*, NAT'L REV. (July 8, 2013), available at <http://www.nationalreview.com/article/352741/binder-binder-binder-jillian-kay-melchior>; see also BINDER & BINDER, About Binder & Binder, <http://www.binderandbinder.com/About-Us/> (last visited Sept. 30, 2014).
- ⁸³ See Social Security Protection Act of 2004, *supra* note 45.
- ⁸⁴ Paletta & Searcey, *supra* note 44.
- ⁸⁵ *Id.*
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