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FUTURE OF DISABILITY RIGHTS: PART THREE† STATUTES OF LIMITATIONS IN AMERICANS WITH DISABILITIES ACT "DESIGN AND CONSTRUCTION CASES"

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CONTENTS

† For earlier articles in the series, *see generally* Peter Blanck, *"The Right to Live in the World:" Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367 (2008); *see also* Eve Hill & Peter Blanck, *Future of Disability Advocacy and "The Right to Live in the World,"* 14 TEX. J. C.L. & C.R. ___ (forthcoming 2009). For analysis of various aspects of the ADA and other disability civil rights laws, *see generally* PETER BLANCK, EVE HILL, CHARLES SIEGAL & MICHAEL WATERSTONE, DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS (2d ed. 2009).

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INTRODUCTION

In July, 2009, in *Frame v. City of Arlington*, the Federal Court of Appeals for the Fifth Circuit found that violations of the Americans with Disabilities Act's (ADA) requirements for accessible new construction were subject to a statute of limitations running from the date of completion of construction.[1] The Fifth Circuit majority declined to apply the "continuing violation" doctrine or the "discovery" rule.[2]

Although rehearing en banc is being pursued, the *Frame* decision illustrates a central and unsettled issue in ADA rights enforcement—the application of statutes of limitations to construction violations when the construction and the injury occur years apart.[3] At issue are not cases in which a plaintiff encountered a non-compliant new building or facility and then waited years before suing. Rather, the issue arises in cases where the building or facility was constructed and the plaintiff did not encounter the barrier until years or even decades later. In the intervening period, ownership may have changed and information about original design and construction may be unavailable. So too, the plaintiff may have suffered no past injury, and therefore had no cause of action or standing until she actually encountered, or perhaps learned of and was deterred by, the alleged violation.

ADA Titles II and III, unlike the Fair Housing Amendments Act (FHAA), provide for continuing obligations to increase accessibility of even pre-ADA buildings.[4] In most cases, therefore, even if a new construction or alterations violation were time-barred, the defendant

1. 575 F.3d 432, 433 (5th Cir. 2009).

2. *Id*. at 439-40.

3. *Id*. at 434-35.

4. *See* The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services, *available at* http://www.ada.gov/taman2.html [hereinafter Title II TA Manual]; *see also* The Americans with Disabilities Act, Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities, *available at* http://www.ada.gov/taman3.html [hereinafter Title III TA Manual].

would still be required to achieve program access (under Title II),[5] or to remove barriers (under Title III).[6] The plaintiff will be barred from demanding renovations only if she fails to plead the ongoing obligation in addition to the new construction violation.[7]

There are, however, significant differences between the new construction requirements and the ongoing obligations. In particular, the requirements for existing (unaltered) Title III facilities are less stringent and less specific than the new construction standards.[8] For example, according to the Department of Justice, an existing four-story facility probably is not required to install an elevator to meet its Title III barrier removal obligations.[9] The same facility, if newly constructed, likely would be required to include an elevator.[10] For existing (unaltered) Title II facilities, the standard is program access, which may be accomplished through non-structural methods, such as changing to an accessible location on request, making only part of a facility accessible or making only a portion of multiple related facilities accessible.[11] Thus, the level and extent of accessibility may be reduced if post-ADA buildings are treated as existing facilities. In addition, commercial facilities (as opposed to public accommodations) only are covered by the new construction and alteration requirements of Title III, so there is no continuing duty.[12]

The Fifth Circuit's strict approach in *Frame* may hinder private enforcement of the ADA's "design and construct" requirements. This may be true not only for the sidewalks and curb cuts at issue in the case, but also for government buildings, transportation facilities, and public accommodations. Consider two hypothetical situations to inform such an analysis:

> *Situation A:* A single curb with no curb ramp was constructed in 2000 in a state where the applicable statute of limitations is two years. A person with a disability moves to town in 2008, encounters the inaccessible curb near his house, and files suit in 2009 against the architect, the builder and the city.
>
> *Situation B*: A city builds 100 curbs without curb ramps between 2000 and 2009. A person with a disability moves to town in 2008,

5. *See* Title II TA Manual, *supra* note 4, § 1000.
6. *See* Title III TA Manual, *supra* note 4, § 4.4000.
7. *See generally* Title II and Title III TA Manuals, *supra* note 4.
8. *See* Title III TA Manual, *supra* note 4, §§ 4.4100-4.4500.
9. *See id.* § 4.4200.
10. *See id.* §§ 5.4000, 7.5115.
11. *See* Title II TA Manual, *supra* note 4, § 5.2000.
12. *See* Title III TA Manual, *supra* note 4, § 1.3000.

encounters inaccessible curbs at various locations, and files suit in 2009 against the architect, the builder and the city.

Two additional factors may come into play. If the plaintiff moved to town in 2006 and encountered the curb ramps in 2006, 2007 and 2008, before suing in 2009, this may change the analysis. The other wrinkle arises if each situation is placed in the ADA Title III (public accommodation) context. If the construction violation is an inaccessible store (or, in Situation B, a group of related stores), a change in ownership in 2005 may alter the analysis. It may also make a difference to the outcome if the plaintiff is an individual or an organization. Clearly, these hypothetical situations are complex and fact-specific, requiring resolution based on consistent and practical approaches to resolving the statute of limitations issue in the disability rights context.

This article continues our program of investigation examining the future of disability rights advocacy and enforcement, here with a focus on statutes of limitations in ADA design and construction cases. In this series, we have tried to take a balanced approach to complex and contested issues involving disability rights. We also suggest that a more informed analysis of such issues will not only help resolve such disputes, but also assist in dispute mitigation and avoidance. In that vein, Part I of this Article overviews construction requirements in federal disability rights law. Parts II and III then examine statutes of limitations applicable to ADA construction claims. In Part IV, we suggest other approaches to construction law claims that may provide useful guidance to resolving the present issue. We conclude with analysis of future approaches to resolve and mitigate ADA construction disputes, and as illustrative of future approaches to disability rights enforcement and advocacy.

I. CONSTRUCTION REQUIREMENTS IN FEDERAL DISABILITY RIGHTS LAW

Since 1968, federal disability civil rights laws have included physical inaccessibility within the definition of discrimination. The earliest federal disability rights law, the Architectural Barriers Act (ABA), focused specifically on physical access, requiring all buildings constructed, altered or leased by the United States after August 12, 1968 to be physically accessible.[13] The ABA does not require accessibility modifications to federal buildings constructed or leased before 1968 unless they have been altered.[14] It also does not impose any other

13. 42 U.S.C. § 4151 et seq. (2006).

14. *See id.*

nondiscrimination requirements.[15] Accessibility under the ABA is determined by compliance with accessibility construction standards.[16]

Section 504 of the Rehabilitation Act of 1973 took disability rights further, going beyond physical access to provide that "[n]o otherwise qualified individual with a disability in the United States . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or . . . conducted by any Executive agency."[17]

Regulations implementing Section 504 provide a variety of nondiscrimination requirements, including effective communication and modification of policies. Section 504 also requires that new facilities "shall be designed and constructed to be readily accessible to and usable by" people with disabilities.[18] In addition, "[a]lterations to existing facilities shall, to the maximum extent feasible, be . . . readily accessible to and usable by" people with disabilities.[19] Section 504 regulations require, for existing facilities, that covered entities "shall operate each program or activity so that . . . when viewed in its entirety, it is readily accessible to and usable by handicapped persons."[20] This requirement imposes an ongoing obligation on federally supported programs to modify even existing unaltered facilities to ensure access.[21] Accessibility under Section 504 requires compliance with the Uniform Federal Accessibility Standards (UFAS).[22]

The Fair Housing Amendments Act of 1988 (FHAA) requires inclusion of accessibility elements in all newly constructed multifamily housing.[23] The FHAA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of" a disability,[24] or "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a

15. *Id.*

16. *Id.* The ABA has, until recently, used the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. app. A, which is being replaced by the recently issued *ABA Accessibility Guidelines*, *available at* http://www.access-board.gov/ada-aba/abaag.cfm (last visited Oct. 6, 2009).

17. 29 U.S.C. § 794 (2006).

18. Dep't of Justice Section 504 Regulation, 28 C.F.R. § 41.58(a) (2009); *see also* Dep't of Educ. Section 504 Regulation, 34 C.F.R. § 104.23(a) (2009).

19. 28 C.F.R. § 41.58(a); *see also* 34 C.F.R. § 104.23(b).

20. 28 C.F.R. § 41.57(a); *see also* 34 C.F.R. § 104.22(a).

21. *See* 28 C.F.R. § 41.57(b); 34 C.F.R. §104.22(d).

22. *See* 34 C.F.R. § 104.23(c); 41 C.F.R. sub pt. 101-19.6, app. A.

23. Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. § 3604 (2006)).

24. 42 U.S.C. § 3604(f)(1).

dwelling, or in the provision of services or facilities in connection with such dwelling, because of" a disability.[25]

> Under the FHAA,
>
> [D]iscrimination includes . . . a failure to design and construct those dwellings in such a manner that~~t~~ (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design: (I) an accessible route into and through the dwelling; (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (III) reinforcements in bathroom walls to allow later installation of grab bars; and (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.[26]

Compliance with the FHAA accessibility requirements may be accomplished by compliance with the Department of Housing and Urban Development's (HUD) Fair Housing Act Accessibility Guidelines,[27] or compliance with the American National Standard (ANS A117.1) or with local building codes that include comparable housing accessibility.[28] The FHAA does not impose requirements for alterations or for ongoing accessibility improvements in existing buildings.[29]

ADA Title II extends Section 504's requirements to all state and local government programs and activities, regardless of whether they receive federal funding.[30] Regarding design and construction, the ADA Title II regulations provide:

> (a) *Design and Construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
>
> (b) *Alteration*. Each facility or part of a facility altered by, on behalf

25. *Id.* § 3604(f)(2).
26. *Id.* § 3604(f)(3).
27. *See* 24 C.F.R. pt. 100 (2008).
28. *See* 42 U.S.C. § 3604(f)(4)-(5).
29. *Id.* § 3604.
30. *See id.* §§ 12131-32.

> of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.[31]

Accessibility under Title II requires compliance with either UFAS or the ADA Standards for Accessible Design.[32] Like Section 504, Title II applies in existing facilities, requiring covered entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."[33] Title II permits damages awards for aggrieved individuals if the discrimination is intentional.[34]

Title III of the ADA prohibits disability discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[35] Title III specifies that discrimination includes "a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities,"[36] and "a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities."[37]

Title III also defines discrimination to include "a failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable."[38] Accessibility under Title III requires compliance with the ADA Standards for Accessible Design.[39] The ADA provides for "certification" of state and local building codes' equivalence with the ADA Standards.[40] If a building code is certified by the Department of Justice, compliance with that code, through its permit and inspection process, will provide rebuttable evidence of compliance with the ADA

31. 28 C.F.R. § 35.151(a)-(b) (2009).

32. *Id.* § 35.151(c).

33. *Id.* § 35.150(a).

34. *See, e.g.*, Delano-Pyle v. Victoria County, 302 F.3d 567, 574 (5th Cir. 2002); Suarez v. Super. Ct. of Cal., 283 F. App'x 470, 471 (9th Cir. 2008); Badillo v. Thorpe, 158 F. App'x 208, 214 (11th Cir. 2005).

35. 42 U.S.C. § 12182(a) (2006).

36. *Id.* § 12183(a)(1).

37. *Id.* § 12183(a)(2).

38. *Id.* § 12182(b)(2)(A)(iv).

39. 28 C.F.R. pt. 36, app. A (2009).

40. *Id.* §§ 36.601-36.608.

Standards.[41] Title III does not provide for damages for aggrieved individuals with disabilities.[42]

II. STATUTE OF LIMITATIONS APPLICABLE TO ADA CONSTRUCTION CLAIMS

A. Purposes

Statutes of limitations in general serve a number of interests. Many of these interests apply to limitations in the disability rights construction cases under consideration in this article, where the allegedly discriminatory act occurred in the past but the plaintiff did not discover or suffer injury from that act until much later.

Limitations are intended to provide repose to potential defendants, including providing peace of mind, avoiding disruption of settled expectations, reducing uncertainty and reducing protective measures and their associated costs.[43] In construction-related cases, statutes of limitations allow building owners to plan effectively, determine appropriate insurance needs and expenditures, and confidently appraise, purchase and sell buildings. These interests are served by applying statutes of limitations in disability construction cases consistently, particularly if the applicable law (e.g., the FHAA) provides standing for testers, nondisabled residents with association claims, and organizations, who potentially may self-generate causes of action indefinitely and broadly. Under the FHAA, this risk is increased because of the availability of economic damages, in contrast to the ADA, where damages are limited.

Statutes of limitations are also intended to enhance reliability and accuracy of the results of judicial proceedings by avoiding deterioration of evidence.[44] This interest is served by applying limitations periods in disability construction cases under the ABA, Section 504, FHAA, and ADA Titles II and III. This is because long after a building is constructed, evidence about who built it, what standards were applied, and why (e.g., structural impracticability) may be lost.

Statutes of limitations additionally avoid applying contemporary legal standards to acts done in the distant past.[45] This is particularly

41. *Id.* § 36.602.

42. *Id.* § 36.501.

43. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460-71 (1997).

44. *Id.* at 471-83.

45. *Id.* at 493-95.

important in civil rights cases, including disability rights cases, because contemporary standards of discrimination continue to evolve. However, it is less clear this interest is at stake in ADA and FHAA construction cases, where the applicable accessibility standard has been settled in regulations and changes to those standards would not be applied retroactively to new construction and alterations.[46]

Statutes of limitations further are intended to reduce the number of cases filed in general and to reduce the number of unwarranted or frivolous cases in particular by providing shorter limitations periods for disfavored types of cases.[47] Limitations are said to reduce the number of meritless cases filed, but the assumed connection between merit and timeliness requires further empirical analysis.[48]

Other legal, policy, and economic interests served by limitations, however, are not necessarily served in ADA design and construct cases. Thus, limitations are intended to avoid an unfair advantage to plaintiffs who believe they have a claim and, without limitations, could maintain evidence that supports their case over unaware defendants who may lose supportive evidence.[49] When neither plaintiff nor defendant knows about the claim, as is often the case in disability rights cases involving limitations, this situation does not come into play.[50] In some construction cases, the defendant builder may be more likely to know the claim exists (by virtue of knowing the building's accessibility features) than the plaintiff, and, therefore, is more likely to be in a position to conceal the violation. A short limitations period facilitates and rewards efforts to prevent plaintiffs from discovering violations.[51]

Limitations also limit the accrual of injuries. Over time, a plaintiff's damages may increase and remedies become more difficult to accomplish.[52] In ADA cases, this concern is reduced because damages are limited and the facility at issue does not change or become less correctible. Limitations are intended to encourage diligence on the part of plaintiffs and defendants.[53] But again, when neither party has knowledge of the alleged violation, this purpose is not served by a

46. However, changes to accessibility standards may change the standards for ongoing obligations in existing buildings.

47. Ochoa & Wistrich, *supra* note 43, at 495-500.

48. *Id.* at 497-99.

49. *Id.* at 483-88.

50. *Id.* at 485-86.

51. *Id.* at 483-88.

52. Ochoa & Wistrich, *supra* note 43, at 475-76.

53. *Id.* at 488-92.

limitations period.[54]

Some considerations weigh against strict application of limitations in disability rights design and construction cases. Statutes of limitation may hinder the adjudication of substantive legal issues.[55] Applying a time bar (particularly one borrowed from an unrelated context) in a case where the plaintiff had no opportunity to raise her claim within the time period may be unfair.[56] Moreover, applying a strict time bar under a statute designed to bring equality of opportunity to a traditionally underrepresented group, may not deter discrimination and undermine the remedial purposes of the civil rights law.

In addition, given that the ADA is a relatively new law with a broad scope and complexity, judicial interpretation is needed to guide behavior. Tight limitations prevent judicial input into the statute's meaning, leaving all prospective parties limited guidance to shape their behavior. Finally, in disability rights design and construction cases, where the plaintiff has no knowledge of the violation and no basis for a cause of action until after the limitations period has passed, strict application of the limitations period may encourage bad actors to delay opening facilities to the public until after construction is complete, to conceal violations and to discourage individuals with disabilities from entering. It may likewise encourage overzealous enforcement efforts by plaintiff organizations, which must file their claims quickly, without complete investigation or conciliation efforts. We should note that we do not assume bad actors on either side of the issue.

Depending on which disability rights statute is at issue, therefore, the purposes of limitations may apply differently. The ADA includes ongoing accessibility obligations for existing buildings.[57] Thus, strict application of the statute of limitations arguably does not provide repose to defendants. It simply changes the applicable standard. The FHAA, however, does not include an ongoing obligation for existing facilities.[58] Therefore, strictly applying limitations arguably does provide a significant repose benefit, but, at the same time, may increase the risk of unfairness and frustration of the statute's remedial purposes.

54. *Id.* at 485.

55. *Id.* at 500-05.

56. *Id.* at 505.

57. *See* Title II TA Manual, *supra* note 4, § 5.1000; *see also* Title III TA Manual, *supra* note 4, § 4.4400.

58. 42 U.S.C. § 3604(f) (2006) (housing owners do have ongoing obligations to allow tenants to make reasonable structural modifications to units at the tenant's expense).

B. Applicable Limitations Period

The FHAA provides a statutory two-year statute of limitations running from "the occurrence or the termination of an alleged discriminatory housing practice."[59] In contrast, the ADA does not provide a statute of limitations and federal courts must borrow the most applicable statute of limitations from state law.[60] Courts differ on which state statute is most appropriate. Some federal courts apply the state's personal injury law, regardless of the type of ADA claim (employment, construction, policy, etc.) under consideration.[61] These courts reject a case-by-case approach, citing the need for certainty and consistency.[62] For this proposition, they rely on Supreme Court cases addressing sections 1983 and 1981.[63] The Court has held that state personal injury statutes of limitations apply to all section 1983 and 1981 cases, regardless of subject matter.[64] In doing so, the Court notes the broad subject-matter coverage of the federal law would require selection of a different state limitations period for nearly every case and would sometimes be analogous to more than one state law.[65]

Other courts have applied the state civil rights or disability rights laws' statute of limitations, at least where the state law is based on, or provides coverage and protections similar to the ADA.[66] These courts argue that to apply the personal injury limitations to a federal cause of action, while applying a different limitations period to an identical state

59. *Id.* § 3613(a)(1)(A).

60. *See, e.g.*, Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 208 (3d Cir. 2008); Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1137 n.2 (9th Cir. 2002).

61. *See* Gaona v. Town & Country Credit, 324 F.3d 1050, 1054-56 (8th Cir. 2003); Everett v. Cobb County Sch. Dist., 138 F.3d 1407, 1409-10 (11th Cir. 1998); Baker v. Bd. of Regents, 991 F.2d 628, 632 (10th Cir. 1993); Morse v. Univ. of Vt., 973 F.2d 122, 127 (2d Cir. 1992) (Rehabilitation Act); Voices for Independence v. Pa. Dept. of Transp., No. 06-78, 2007 WL 2905887, at *3 (W.D. Pa. Sept. 28, 2007). *Compare* Deck v. City of Toledo, 56 F. Supp. 2d 886, 889-91 (N.D. Ohio 1999) (declining to apply statute of limitations from state disability rights law because state law was not identical to ADA Title II in that state law did not cover public entities) *with* Frank v. Univ. of Toledo, 621 F. Supp. 2d 475, 482-83 (N.D. Ohio 2007) (distinguishing *Deck* and applying two-year personal injury limitations period to ADA Title II education claim).

62. *See Morse*, 973 F.2d at 127.

63. *See* Owens v. Okure, 488 U.S. 235 (1989); *see also* Goodman v. Lukens Steel Co., 482 U.S. 656, 660-61 (1987); Wilson v. Garcia, 471 U.S. 261, 268 (1985).

64. *Owens*, 488 U.S. at 236; *Goodman*, 482 U.S. at 660; *Wilson*, 471 U.S. at 280.

65. *Owens*, 488 U.S. at 248-51; *Goodman*, 482 U.S. at 661-63; *Wilson*, 471 U.S. at 271-80.

66. Wolsky v. Med. Coll. of Hampton Rds., 1 F.3d 222, 225 (4th Cir. 1993); Bodley v. Macayo Rests., LLC, 546 F. Supp. 2d 696, 700 (D. Ariz. 2008); Kramer v. Regents of Univ. of Cal., 81 F. Supp. 2d 972, 976 (N.D. Cal. 1999); Williams v. Trevecca Nazarene Coll., No. 97-5705, 1998 WL 553029, at *1 (6th Cir. Aug. 17, 1998).

cause of action, would undercut consistency between state and federal law and encourage forum-shopping.[67] This is because a plaintiff with a single claim may change the result simply by choosing whether to file her case in state or federal court.[68]

In addition, unlike section 1983, the ADA's subject matter scope is limited to disability rights in a few contexts—employment, equal opportunity in public accommodations and government programs and construction.[69] Therefore, under this approach the most analogous state law may differ depending on the type of ADA claim at stake. If the state civil rights statute does not cover disability, then the personal injury limitations period may be more analogous. If the state has a disability rights law, but it does not cover government entities, the personal injury limitations period may be more analogous to a Title II claim.[70] Other limitations periods may also be analogous. For example, a design and construct claim may be most analogous to a state law claim for latent construction defect or nuisance.

Once the applicable statute of limitations has been identified, the central issues are: (1) when the limitations period accrues, and (2) whether there are applicable doctrines that allow pursuit of pre-limitations period construction. The answers may vary depending on who the plaintiff is—a resident, prospective resident or visitor (for Title II) with a disability, a customer or prospective customer (for Title III) with a disability, an organization, or a state or federal agency.[71]

The answer may also depend on the type of relief sought. Declaratory and injunctive relief are available under Titles II and III. Compensatory relief is available only under Title II and only for

67. *Kramer*, 81 F. Supp. 2d at 977.

68. *Id.*

69. *See* Title II TA Manual & Title III TA Manual, *supra* note 4.

70. *See generally* Deck v. City of Toledo, 56 F. Supp. 2d 886, 889-90 (N.D. Ohio 1999).

71. ADA standing for testers with disabilities who do not intend to use the government program or public accommodation being tested is controversial. The Tenth Circuit has held that, based on the broad language and purpose of Title II of the ADA, testers have standing for both injunctive and compensatory relief under Title II. *See* Tandy v. City of Wichita, 380 F.3d 1277, 1286-87 (10th Cir. 2004). However, some courts have found no tester standing for injunctive relief under Title III, because the tester does not meet the redressability requirement for standing (he is unlikely to attempt to access the public accommodation again once it is made accessible). *See* Kramer v. Midamco, No. 1:07CV3164, 2009 WL 2591616, at *7 (N.D. Ohio Aug. 20, 2009); Harris v. Stonecrest Care Auto Ctr., LLC, 472 F. Supp. 2d 1208, 1217 (S.D. Cal. 2007); s*ee also* Norkunas v. Wynn Resorts Holdings, No. 2:07-CV-00096-RLH-PAL, 2007 WL 2949569, at *3-4 (D. Nev. Oct. 10, 2007) (requiring plaintiffs to demonstrate actual intent to return to a public accommodation under Title III).

intentional discrimination.[72] The answers may also consider the defendant's role (architect, builder, current or former owner, lessee/lessor, or operator) and whether the case involves a single site or a group of related sites.[73]

III. ACCRUAL

In situations where a federal statute borrows a state limitations period, the state law governs the length of the limitations period, but federal law governs the accrual of the limitations period.[74] Thus, federal courts are not bound by the state law regarding when the limitations period begins to run.

There are several possible dates from which the statute of limitations for an ADA construction case may begin to run: (1) the date the plaintiff encounters or discovers the violation (encounter or discovery rule); (2) the date construction is completed; or, (3) the date the defendant ceases to control the facility or corrects the violation (continuing violation).

A. Encounter or Discovery

At least two federal courts have applied an "encounter" or "discovery" rule to statute of limitations questions under the ADA and FHAA. In *Voices for Independence v. Pennsylvania Department of Transportation*, the district court addressed a Title II transportation case brought by an organization and several residents with disabilities seeking injunctive relief for alleged inaccessible new or altered curb ramps.[75] Some of the ramps were constructed outside the limitations period and some constructed within the limitations period.[76]

72. *See, e.g.*, Suarez v. Super. Ct. of Cal., 283 F. App'x 470, 471 (9th Cir. 2008); Badillo v. Thorpe, 158 F. App'x 208, 214, (11th Cir. 2005); Delano-Pyle v. Victoria County, 302 F.3d 567, 574 (5th Cir. 2002).

73. Courts are split on whether architects and contractors are covered entities under Title III. *Compare* Lonberg v. Sanborn Theaters Inc., 259 F.3d 1029, 1036 (9th Cir. 2001) (architects not covered because they are not owners, lessees, lessors, or operators of place of public accommodation), *and* Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C., 945 F. Supp. 1, 2 (D.D.C. 1996) (architects not covered because they do not design and construct), *with* United States v. Days Inns of Am., Inc., 151 F.3d 822, 825 (8th Cir. 1998) (franchisors are covered because coverage is not limited to owners, lessees, lessors, and operators of public accommodations), *and* United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262, 1267-68 (D. Minn. 1997) (architects are covered because they design facilities and because coverage is not limited to owners, lessees, lessors, and operators of public accommodations, because that would eliminate coverage of commercial facilities).

74. Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987).

75. No. 06-78, 2007 WL 2905887, at *1 (W.D. Pa. Sept. 28, 2007).

76. *Id*. at *3.

The court determined that the discriminatory act under Title II is construction or alteration.[77] However, applying the federal discovery rule, the court found that the cause of action for that act is not complete until the plaintiff's injury arises.[78] In other words, the cause of action is not complete, and the limitations period does not begin, "until a plaintiff—a qualified individual with a disability—is denied access by virtue of a defective curb cut, irrespective of the date on which the curb was defectively installed."[79]

In *HIP v. Port Authority of New York and New Jersey*, the court, in a Title II transportation case, considered whether a claim for an alteration completed more than two years before the lawsuit was barred by the statute of limitations.[80] The court concluded that the discrimination was continuing and the cause of action was not complete until the plaintiffs were excluded by the inaccessible element.[81] In other words, their injury did not arise until they learned of, and either attempted to access or were deterred from accessing, the facility.[82]

This approach is based on the general tort principle that a cause of action for personal injury is not complete until an injury occurs. This approach is also consistent with standing principles requiring a plaintiff to have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[83] This approach recognizes that it would be impracticable, unfair, and contrary to the broad remedial purposes of the ADA to require prospective plaintiffs to preemptively investigate and prosecute construction defects.[84]

The encounter approach was proposed in the FHAA context by Robert Schwemm in 2006.[85] This rule would treat fair housing complaints as sounding in tort law.[86] The encounter rule would trigger the limitations period on the first encounter, meaning when the occupant

77. *Id*. at *13.

78. *Id*.

79. *Id*.

80. No. 07-2982, 2008 WL 852445, at *1-2 (D.N.J. 2008).

81. *Id.* at *3.

82. *Id.* at *4.

83. Voices for Independence v. Pa. Dept. of Transp., No. 06-78, 2007 WL 2905887, at *14 (W.D. Pa. Sept. 28, 2007) (quoting Town of Piscatawy v. Duke Energy, 488 F.3d 203, 208 (3d Cir. 2007)).

84. *Id.* at *15.

85. Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753 (2006).

86. *Id.* at 779.

with a disability first purchased or rented the unit, when a visitor with a disability first visited the building, or when a resident already living in a unit first acquired a disability. [87]

To date, no courts have adopted the proposed encounter rule in FHAA cases. *Garcia v. Brockway* explicitly rejected it, finding general tort principles may not trump the FHAA statutory limitations language specifying accrual at the time of the "occurrence."[88] Unlike the FHAA, however, the ADA does not have statutory accrual language and generally relies on state tort statutes of limitations. Therefore, the encounter or discovery rule is more appropriate to ADA claims.

The discovery/encounter rule may be problematic when a plaintiff visits an inaccessible site repeatedly, within and outside the limitations period. Under one approach, each visit constitutes a new discovery/injury, thus extending the statute of limitations indefinitely.[89] Under a first-encounter approach, the first encounter begins the limitations period.[90] Subsequent visits may increase the plaintiff's damages (if damages are available), but will not restart the limitations period.[91]

Applying the discovery/encounter rule to our earlier two hypothetical situations, the plaintiff is not time-barred in either situation, because her discovery of the violation was within two years of her suit. However, adding the wrinkle of her first encounter taking place in 2006 and repeated encounters thereafter, if each discovery restarts the limitations period, the plaintiff has potential claims going back two years from the date of her suit. If only the initial encounter starts the limitations period, all of the plaintiffs' new construction claims would be time-barred because she first discovered them more than two years before suit. Because this approach treats the completion of construction as the discriminatory act, rather than treating the discrimination as an ongoing act, the new construction claims may be distinguished from the ongoing existing-facility obligations, which would not expire.

The problem with the discovery/encounter approach is that it provides no level of repose for potential defendants. At no time, even after decades, may they be certain they are beyond liability for

87. *Id.* at 857-88.

88. Garcia v. Brockway, 526 F.3d 456, 464 (9th Cir. 2008), *cert. denied*, Thompson v. Turk, 129 S. Ct. 724 (2008); *see also* Iowa v. Evans, 757 N.W.2d 166, 171 (Iowa 2008).

89. Wallace v. Kato, 549 U.S. 384, 387-88 (2007) (applying these rules to a § 1983 tort claim).

90. Schwemm, *supra* note 85, at 856-57.

91. *Id.*

construction violations. However, the fact that damages are limited under the ADA mitigates the danger of an indefinite limitations period in ADA, as opposed to FHAA, cases.

B. Date of Construction

Applying a strict construction completion date as the trigger for the statute of limitations is, of course, the simplest and most predictable approach to the issue. It provides a clear level of repose for defendants. However, it prevents blameless plaintiffs from enforcing their rights because they did not encounter the violation until after the limitations period had passed. Simply, the statute of limitations may, and often will, expire before anyone has standing to challenge it, thus completely immunizing the defendant.

In *Frame v. City of Arlington*, the Fifth Circuit addressed the statute of limitations to be applied to alleged inaccessible sidewalks and curbs throughout a city.[92] The court held that the statute of limitations for ADA Title II design and construction cases runs from the date of construction.[93] Therefore, plaintiffs could only assert new construction violations for sidewalks and curbs constructed or altered within two years before the lawsuit was filed.[94] The court rejected the continuing violation doctrine and the discovery rule as mechanisms for extending the statute of limitations.[95]

The Third Circuit in *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority*, held that the statute of limitations in an ADA Title II transportation alterations case did not begin to run until construction was completed, reversing a lower court decision that the plaintiff's discovery of the violations, before completion of construction, was sufficient to start the statute of limitations.[96] Because the question before the Third Circuit was so different and because it did not resolve the discovery rule or the continuing violation doctrine, this case does not really address the question.

This approach has also been applied in several decisions addressing FHAA design-and-construct cases. The FHAA provides a

92. Frame v. City of Arlington, 575 F.3d 432, 433 (5th Cir. 2009).

93. *Id.* at 441; *see also* Alliance for Disabled in Action, Inc. v. Renaissance Enters., Inc., 853 A.2d 334, 339 (N.J. Super. Ct. App. Div. 2004).

94. *Frame*, 575 F.3d at 441. Although the court did not address the issue, presumably the plaintiffs would be able to assert continuing program access requirements for curbs and sidewalks outside the statute of limitations period.

95. *Id.* at 438-41.

96. *Disabled in Action of Pa.*, 539 F.3d at 213, 217-18.

statutory limitations period of two years after "the occurrence or the termination of an allegedly discriminatory housing practice."[97] In *Garcia v. Brockway*, a consolidated appeal of two cases, plaintiffs included a disabled occupant, a housing organization and a nondisabled tester.[98] One of the developments involved had been completed and the last unit sold seven years before the plaintiff with a disability purchased his unit.[99] The other development was completed seven years before the suit and sold three years before suit.[100]

The court held that the statute of limitations under the FHAA for construction violations accrues at the completion of construction.[101] The court identified "design and construction" to be the allegedly discriminatory housing practice and believed the construction was the last discriminatory act of the defendants.[102] Therefore, completion of construction represented the termination of the discriminatory practice.[103] Following *Garcia*, the district court in *Fair Housing Council of Oregon v. Cross Water Development, LLC* determined that the FHAA limitations period begins to run on the date of the last occurrence of discrimination, which, in a design and construction case, is the date of issuance of the last certificate of occupancy.[104] The court found the doctrines of equitable tolling and equitable estoppel inapplicable to the facts, but did not consider the continuing violation or discovery rules.[105]

Similarly, in an earlier FHAA case, *Moseke v. Miller and Smith, Inc.*, an organization and an occupant with a disability sued the developers, architects, and condominium associations of several related housing developments.[106] The buildings were constructed four years before the individual plaintiff bought her unit.[107] The Virginia district court found that the statute of limitations began to run when construction was completed and had expired before the plaintiff bought her apartment because no act by the defendants occurred within the

97. 42 U.S.C. § 3613(a)(1)(A) (2006).

98. 526 F.3d 456, 459-60 (9th Cir. 2008), *cert. denied*, Thompson v. Turk, 129 S. Ct. 724 (2008).

99. *Id.* at 459.

100. *Id.* at 460.

101. *Id*. at 466.

102. *Id*. at 462.

103. *Garcia*, 526 F.3d at 461.

104. No. C08-5755, 2009 WL 799685, at *2 (W.D. Wash. Mar. 24 2009).

105. *Id*. at *3.

106. 202 F. Supp. 2d 492, 493-94 (E.D. Va. 2002).

107. *Id*. at 501.

limitations period.[108] The court rejected the "discovery" rule because the statutory limitations period runs from the occurrence or termination, not the discovery.[109]

One ADA Title III district court case, *Speciner v. Nationsbank*, also appears to have applied this approach, finding, without discussion, that a challenge to an alteration was time-barred because it was not filed within three years of the alteration. [110] However, the court found that the requirements for barrier removal were ongoing and not time-barred.[111]

Courts applying this approach read the statutory language to define a violation as a failure to "design and construct," which is complete when the construction is completed. Other courts disagree, because the FHAA defines a failure to design and construct to be discrimination only in the context of "the sale or rental" of housing. Thus, the FHAA would appear to require both inaccessible design and construction and a sale or rental to complete a cause of action. This would argue the statute of limitations should not run on a given unit until it is sold or rented.

In *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, the court found that "the discriminatory act occurs during the sale or rental of the units. Thus, once a unit has been sold or rented, the discriminatory act is complete" and the statute begins to run.[112] The court rejected the argument that construction should be the trigger, based on the language of the FHAA, which focuses on design and construction in the context of sale or rental and based on the problem that developments that go unsold or unrented long after they are built

108. *Id*.; *see also* United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1141, 1143-44, 1146 (D. Idaho 2003) (concluding that, for purposes of government FHAA and ADA action for civil penalties, compensatory damages, and injunctive relief, statute of limitations was statutory [three years for damages (28 U.S.C. § 2415); five years for penalties (28 U.S.C. § 2462); no limitations for injunctive relief] and, based on statutory language, claims accrued at time of construction, and the continuing violation doctrine did not apply. However, statutory "discovery rule" applied to compensatory damages claim); United States v. Pac. Nw. Elec., Inc., No. CV-01-019-S-BLW, 2003 WL 24573548, at *1 (D. Idaho Mar. 21, 2003) (considering the statute of limitations' accrual for a case brought by the U.S. Attorney General seeking civil penalties. The court found the applicable trigger to be the completion of construction. The court relied heavily on the fact that the United States was seeking civil penalties, rather than injunctive or compensatory relief, in distinguishing cases applying other approaches).

109. *Moseke*, 202 F. Supp. 2d at 509.

110. 215 F. Supp. 2d 622, 634-35 (D. Md. 2002).

111. *Id.* at 630

112. 210 F. App'x 469, 479 (6th Cir. 2006).

would be immune from ever being challenged.[113]

The ADA similarly does not support the strict date-of-construction approach. Like the FHAA, Title III defines inaccessible design and construction to constitute discrimination in the context of "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations" of a public accommodation.[114] Therefore, to complete a cause of action under Title III, an attempt to achieve enjoyment of goods, services and so forth, must occur. This language would argue that the statute of limitations does not run until an individual with a disability attempts to access the place of public accommodation. Title II and Section 504, similarly, prohibit inaccessible construction only as it excludes from participation or denies the benefits of a public entity's services.[115]

Under the date-of-construction approach, the plaintiff in hypothetical situation A, above, lost her claim before she ever moved to town. In fact, every potential plaintiff's claim is forever barred. As of 2002, the curb became an existing facility subject only to the program access requirement. Nothing the plaintiff may do revives the new construction claim, and it makes no difference who the defendants are or when they controlled the curb.

In situation B, the plaintiff has lost her claim for curb ramps built before 2007, unless the court applies a version of the continuing violation doctrine that would treat all the curb ramps as a single continuing practice.

C. Continuing Violation Doctrine for Multiple Related Projects

The continuing violation doctrine was originated by federal courts in employment civil rights cases in response to the ninety-day limitations period originally in Title VII.[116] It has been applied in

113. *Id.*; *see also* Iowa *ex rel.* Claypool v. Evans, 757 N.W.2d 166 (Iowa 2008). The Iowa Supreme Court addressed a FHAA case by the state attorney general on behalf of the state civil rights agency and an occupant with a disability against the designer and developer of a condominium. *Evans*, 757 N.W.2d at 167-68. The condominium was built and the individual purchased his unit more than two years before the individual plaintiff filed his complaint with the state agency. *Id.* at 171. All the units were sold more than two years before the attorney general filed suit. *Id.* The court determined that the trigger date for the individual plaintiff was the date he purchased his unit. *Id.* The trigger date for the agency was the date of the sale of the last unit in the complex. *Id.* at 171.

114. 42 U.S.C. § 12183(a) (2006) ("discrimination for purposes of section 12182(a) of this title includes [new construction]").

115. *Id.* § 12132(a).

116. Michael Lee Wright, Case Note, Sharpe v. Cureton, *319 F.3d 259 (6th Cir. 2003)*, 71 TENN. L. REV. 383, 385 (2004).

numerous diverse contexts, including civil rights, employment, environment, nuisance and other torts.[117] Congress has explicitly endorsed the doctrine in civil rights statutes, including in the amendment to Title VII in 1972,[118] in the amendment to the Fair Housing Act that added the disability provisions and extended the limitations period,[119] and in the Lilly Ledbetter Fair Pay Act of 2009, in which Congress overruled the Supreme Court's attempts to cut back the continuing violation doctrine in equal pay cases.[120]

There is a great deal of confusion surrounding the continuing violation doctrine in the disability rights context and in other contexts where it has been applied.[121] Courts have developed different tests for applying the doctrine in different situations.[122] In general, there are two types of continuing violations.

The first type "takes a series of related and assertedly wrongful acts, decisions, or failures to act (each of which may or may not be sufficient on its own to form the basis for a separate claim) occurring both within and outside of the limitations period prior to suit, and aggregates them into a single unit for limitations purposes."[123] This type of violation is cumulative and the statute of limitations begins to run only when the defendant stops its behavior.[124] Hostile work environment cases fall into this category because, while the individual

117. *See* Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 273-74 (2008).

118. Wright, *supra* note 116, at 385-86. The Conference Committee analysis stated:

> This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law, it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.

118 CONG. REC. H7166 (daily ed. Mar. 6, 1972) (statement of Sen. Williams).

119. Inclusion of the word "termination" as the accrual point in the two-year statute of limitations (42 U.S.C. § 3613(a)(1)(A)) was intended to "reaffirm the concept of continuing violations, under which the statute of limitations is measured from the last asserted occurrence of the unlawful practice." H.R. Rep. No. 100-711, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2194.

120. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 26 & 42 U.S.C.).

121. *See* Graham, *supra* note 117, at 273, 278-79.

122. Wright, *supra* note 116, at 384.

123. Graham, *supra* note 117, at 280.

124. *Id*. at 280-81.

acts may or may not be actionable, the cause of action arises from the cumulative effect of the individual acts.[125] A plaintiff may recover for all the individual acts, including those outside the limitations period, as part of the cumulative cause of action.[126] Essentially, this approach makes the limitations period longer for purposes of remedy, extending it back to include older acts. At least one of the discriminatory acts must happen within the limitations period.

This type of continuing violation is the one at issue in addressing multiple related construction elements, such as multiple curb ramps or multiple stores by the same owner, when the date of construction is taken as the accrual date, but where some of the sites were constructed within the limitations period while others were not.

The second type of continuing violation dissects misbehavior, instead of aggregating it. This branch of the continuing violation doctrine regards the perpetuation of, or (in some cases) failure to redress prior misconduct as wrongful and actionable in its own right, giving rise to a series of separate and fresh claims accruing within the limitations period on a day-by-day, act-by-act, or similarly parsed basis.[127]

This type of continuing violation frequently involves an act that occurred long ago where the effects continue into the present, such as continuing nuisance cases.[128] In these situations, the plaintiff may only recover for the harm caused within the limitations period.[129] The limitations period for purposes of remedy remains the same. However, this approach allows a plaintiff to recover for later injuries caused by an act that, by itself, would be time-barred. This is the type of continuing violation applied by courts, discussed below, that treats new construction as a continuing violation until it ceases.

The two types of continuing violations are labeled the "pure" continuing violation and the "modified" continuing violation,[130] or the "serial" and the "systemic" continuing violations.[131] For purposes of this article, they will be called the "pure continuing violations doctrine" and the "ongoing violation" doctrine. Both types can occur in disability rights construction, as well as other disability rights contexts.

In its latest word on the subject in the employment equal pay

125. *Id.* at 281.
126. *Id.*
127. *Id.*
128. Graham, *supra* note 117, at 282.
129. *Id.*
130. *Id.* at 283.
131. Allison Cimpl-Wiemer, Comment, Ledbetter v. Goodyear: *Letting the Air out of the Continuing Violations Doctrine?*, 92 MARQ. L. REV. 355, 360 (2008).

context, the Supreme Court, in *Ledbetter v. Goodyear Tire & Rubber Co.*, cut back the continuing violation doctrine by finding that a discriminatory pay schedule established outside the limitations period was the discriminatory act and paychecks received pursuant to that pay schedule were not discriminatory acts themselves, but were merely the continuing effects of the original pay schedule.[132]

Public outcry over the *Ledbetter* decision led Congress to enact the Lilly Ledbetter Fair Pay Act of 2009, in which it overruled the Supreme Court's approach to equal pay cases.[133] It is beyond the scope of this article to attempt to decipher the different approaches to the continuing violation doctrine or the effect of the Ledbetter Fair Pay Act.

D. Pure Continuing Violations

The continuing violation doctrine was recognized in Fair Housing Act cases by the Supreme Court in *Havens Realty Corp. v. Coleman*, prior to the enactment of the Fair Housing Amendments Act adding the disability rights requirement.[134] At the time of the case, the Fair Housing Act's statute of limitations was 180 days.[135] In *Havens*, an individual "renter plaintiff," two "tester plaintiffs" and a fair housing organization alleged that the defendant had engaged in "racial steering"—telling black prospective tenants there were no units available, while offering units to white prospective tenants.[136] The suit sought declaratory, injunctive and monetary relief.[137]

The District Court dismissed the case, finding no standing for the organization and finding the individual plaintiffs' claims were barred by the statute of limitations.[138] The Fourth Circuit reversed, finding the alleged racial steering was a "continuing violation" that continued until a time within the statute of limitations period.[139] The Supreme Court held that the testers (both black and white) could have standing as residents of the city, based on an injury to their right to live in an integrated neighborhood.[140] The Court held that the organization could have organizational standing based on injury to its housing counseling

132. 550 U.S. 618, 621, 636-37 (2007).

133. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 26 & 42 U.S.C.).

134. 455 U.S. 363, 380-81 (1982).

135. *Id.* at 366.

136. *Id.* at 368.

137. *Id.* at 367.

138. *Id.* at 369.

139. *Havens*, 455 U.S. at 369-70.

140. *Id.* at 381.

and referral services.[141] The Court found the black tester could have standing to challenge the specific incidents in which she was given untruthful information.[142]

The suit alleged five incidents of racial steering.[143] Four of the incidents occurred outside the 180-day limitations period.[144] The only incident within the 180-day period involved only the white tester.[145] The plaintiffs argued that the defendant's practice of racial steering constituted a continuing violation that continued into the statute of limitations period, and none of the incidents should be barred.[146]

The Court found that the practice of racial steering was a continuing violation that continued into the statute of limitations period and, therefore, the resident and organizational plaintiffs' claims, based on the continuing practice, were not time-barred.[147] However, the Court found that the tester plaintiff's claim was based only on the actual incidents that occurred outside the limitations period.[148]

Havens is an application of the "pure" continuing violation theory, where the challenged discrimination is an overarching practice that is cumulative of a number of individual acts. Based on *Havens*, a discriminatory policy or practice that continues into the limitations period may be considered a continuing violation, thus saving claims within and outside the limitations period from being time-barred.[149]

However, the continuing violation doctrine will apply only when the plaintiff's injury arises from the continuing practice and not from the individual incidents. In addition, at least one discriminatory act must occur within the limitations period. This doctrine will also only apply to plaintiffs whose standing or injury is based on the impact of the violation on the protected group as a whole. Individual members of the protected class who encounter discrimination are unlikely to be able to claim a continuing violation, but must sue within the limitations period after the relevant incident.

Pure continuing violations cases occur in housing design and construction claims that use the construction date as the statute of limitations accrual trigger. When some units were constructed within

141. *Id.* at 379.
142. *Id.* at 374.
143. *Id.* at 380.
144. *Havens*, 455 U.S. at 380.
145. *Id.*
146. *Id.* at 381.
147. *Id.* at 380-81.
148. *Id.* at 381.
149. *Havens*, 455 U.S. at 380-81.

the limitations period and others were constructed outside the period, courts applying this doctrine allow the plaintiff to recover for violations in all the units.

National Fair Housing Alliance v. A.G. Spanos Construction, Inc. is an example.[150] The district court addressed a claim by an organization against the builders and owners of several rental complexes where some of the units were completed within the limitations period and some were not.[151] The plaintiffs sought relief for all the units, including those completed before the limitations period.[152] Following *Garcia*, the court treated the construction as the trigger date for the limitations period.[153] However, the court found that the continuing construction was part of a single continuing violation and, therefore, the plaintiff may seek remedies for all the units, regardless of when they were completed.[154]

The court distinguished *Garcia*, where the Ninth Circuit found the continuing violation doctrine inapplicable because all the construction at issue had been completed outside the limitations period.[155] Because there was no act by the defendant within the limitations period, the pure continuing violation theory could not apply.[156] *Garcia* rejected the application of the modified continuing violation theory, discussed below.[157]

The court in *Silver State Fair Housing Council, Inc. v. ERGS, Inc.*, applied the doctrine to allow an organizational plaintiff to pursue FHAA claims against two housing developments where the same developer was involved, the construction of one began after the completion of the other and the two were "seamless in time." [158]

This continuing violation approach has also been applied in ADA construction cases. In *Deck v. City of Toledo*, the court addressed a situation similar to *Frame* but reached a different conclusion based on the continuing violation doctrine.[159] The plaintiffs challenged inaccessible curbs at streets and sidewalks that were constructed or

150. No. 07-3255, 2008 WL 4369325, at *1 (N.D. Cal. Sept. 23, 2008).

151. *Id.* at *1-2.

152. *Id.* at *2.

153. *Id.* at *1 (citing Garcia v. Brockway, 526 F.3d 1092, 1092 (9th Cir. 2008), *cert. denied*, Thompson v. Turk, 129 S. Ct. 724 (2008)). However, the court went on to apply the continuing violation doctrine, discussed below.

154. *Id.* at *2-3.

155. *A.G. Spanos Constr. Inc.*, 2008 WL 4369325, at *3.

156. *Id.* (citing *Garcia*, 526 F.3d at 462).

157. *Garcia*, 526 F.3d at 462-64.

158. 362 F. Supp. 2d 1218, 1220-21 (D. Nev. 2005).

159. 56 F. Supp. 2d 886, 895 (N.D. Ohio 1999).

altered since January 26, 1992.[160] The city argued that, for streets and sidewalks constructed more than two years (the limitations period) before suit, the plaintiffs' claims were time-barred.[161]

The court declined to consider every new sidewalk or street to be an ongoing violation lasting from construction until correction.[162] Instead, the court concluded that the recently constructed inaccessible sidewalks and streets were part of a series of related violations as part of an "over-arching policy of discrimination" in the form of failing to supervise contractors installing curb ramps.[163]

In *Equal Rights Center v. AvalonBay Communities, Inc.*, a plaintiff organization challenged inaccessible housing developments under the FHAA and Title III of the ADA.[164] The housing developments were in a variety of states and were constructed over a number of years with a variety of different violations.[165] The plaintiff discovered the violations through testing and plan reviews.[166] The court ruled that none of the claims were time-barred because all the developments were part of a pattern or practice of discrimination.[167] Therefore, as long as some of the violations occurred within the limitations period, none of the violations were time-barred.[168] *Frame* is the first case to face this fact situation and decline to apply the continuing violation doctrine.[169]

Applying the pure continuing violation doctrine to situation B, above, the plaintiff would be able to assert claims for all the curbs constructed since the effective date of the ADA because all of them might be considered part of a continuing pattern or practice of discrimination. However, cases applying this approach have involved organizational, rather than individual, plaintiffs, because organizations' injuries (e.g., association, representation and diversion of resources) arise from the construction policy, whereas individual claims arise from the sites they encounter.

Arguably, the courts have applied this approach too liberally, by treating all new construction of curb ramps by a city as a single pattern or practice. Courts may need to conduct additional analysis of how

160. *Id.* at 888.
161. *Id.*
162. *Id*. at 892.
163. *Id*. at 893-95.
164. No. AW-05-2626, 2009 WL 1153397, at *1 (D. Md. Mar. 23, 2009).
165. *Id*. at *1, 8.
166. *Id*. at *1.
167. *Id*. at *9.
168. *Id*. at *9.
169. Frame v. City of Arlington, 575 F.3d 432, 438 (5th Cir. 2009).

related the different curb construction projects are to determine whether they really are part of a continuing practice. For example, curb ramps constructed as parts of different programs (new streets, resurfacing of old streets, adding independently of street repairs, replacing old curbs) may result in different violations for different reasons. Evidence of a pattern or practice would include use of the same design standards, use of the same contractors, inclusion in the same contract, and so forth. Without such evidence, different construction projects arguably should not be considered as part of the same pattern or practice.

E. Ongoing Violation (Modified Continuing Violations Doctrine)

The final approach used by courts to ADA new construction statutes of limitations treats every new construction or alteration as an ongoing violation that continues until the defendant gives up control of it or until it is corrected. This approach is based on the "modified" continuing violation doctrine discussed above. This approach considers the discriminatory act to be the continuing "failure" to design and construct in accordance with the accessibility standards,[170] or the continuing "exclusion."[171] It does not depend on the timing of the plaintiff's encounter or injury, or on the date of construction. Essentially, there is no limitations period for injunctive relief under this approach.

For injunctive relief, a plaintiff may require all modifications needed to repair the violations in existence at the time of the suit.[172] However, for purposes of damages, if available, the plaintiff may only recover for encounters within the limitations period.[173] Under this approach, it does not matter when the plaintiff discovered or encountered the violation, except for purposes of damages. The Supreme Court has indicated that a continuing violation must consist of more than merely the lasting *effect* of a past act.[174] However, unlawful acts may include failures to act.[175] Courts applying the ongoing violation approach recognize that the ADA makes "failure" to design

170. 42 U.S.C. §§ 3604(f)(3)(C)(i), 12183(a)(2) (2006).

171. *Id*. § 12132; 29 U.S.C. § 794(a) (2006).

172. Schwemm, *supra* note 85, at 856-57.

173. *Id.*

174. Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 560 (1977). Notably, in both these employment cases, the plaintiff knew about the alleged unlawful policy and waited until beyond the limitations period before filing.

175. *See, e.g.*, 42 U.S.C. §3604(f)(3)(c) ("failure to design and construct").

and construct an unlawful act.[176]

Most FHAA and ADA cases have applied this approach to new construction cases.[177] In *Kuchmas v. Towson University*, plaintiffs included a college student with a disability, a nondisabled student, a faculty member and an organization.[178] They sued the university and the architect, developer, contractor, owner, and manager of an inaccessible rental apartment building built five years before the disabled college student rented an apartment there.[179] The suit was filed one year after the attempt to rent.[180] The court identified possible accrual triggers to be construction, encounter or cessation of control.[181] In *Kuchmas*, the court treated the ongoing exercise of control over an inaccessible new building as an ongoing violation.[182] This approach would allow either an individual or organizational plaintiff to pursue claims for all units until all units are sold.

In *Sentell v. RPM Management Co.*, the court, in two opinions, addressed a suit by an occupant with a disability against the owner and the architect of a rental housing complex.[183] The court concluded that the statute of limitations began to run on the plaintiff's claim against the architect when the architect completed his last act on the building, that is, at the time of design and construction.[184] The court subsequently concluded, following *Kuchmas*, that the limitations period for the claim against the owner did not accrue until the plaintiff visited the apartment.[185] Although its analysis is not clear, the court appears to have relied on the concept that the design and construction violation is ongoing as long as the defendant exercises control over the facility.

In *Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Associates*, two organizations sued the developer of a low-income housing development.[186] The plaintiffs became aware of the violations

176. Kuchmas v. Towson Univ., 553 F. Supp. 2d 556 (D. Md. 2008); E. Paralyzed Veterans Ass'n v. Lazarus-Burman Assocs., 133 F. Supp. 2d 203 (E.D.N.Y. 2001).

177. *See* Indep. Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs., 840 F. Supp. 1328, 1360 (N.D. Cal. 1993).

178. 553 F. Supp. 2d at 558-59.

179. *Id.*

180. *Id.*

181. *Id.* at 562.

182. *Id.* at 562-63. In an earlier case, the court had previously found the date of last sale to be the trigger. Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 40 F. Supp. 2d 700, 710 (D. Md. 1999).

183. No. 4:08CV00629JLH, 2009 WL 2601367, at *1 (E.D. Ark. Aug. 24, 2009); No. 4:08CV00629JLH, 2009 WL 2135812, at *1 (E.D. Ark. July 13, 2009).

184. *Sentell*, 2009 WL 2601367, at *3.

185. *Id.* at *3-4.

186. 133 F. Supp. 2d 203, 205 (E.D.N.Y. 2001).

(through a visit by a prospective buyer with a disability) over two years before filing suit.[187] The court concluded that the violation was ongoing until corrected, regardless of when the plaintiff encountered it.[188]

In *Montana Fair Housing, Inc. v. American Capital Development, Inc.*, the court considered the statute of limitations under the FHAA and Montana law.[189] Two organizations and an occupant with a disability sued the developer, designer, contractor, and manager of low-income housing that was completed five years before the suit.[190] The occupant with a disability moved into the building four years before suit, accessibility modifications were made to the plaintiff's unit less than two years before suit, and accessibility violations remained at the site even after the suit was filed.[191] The court concluded that "the statute is clear," the violation is ongoing, and the limitations period does not begin to run until the violation is corrected.[192]

The FHAA's statutory limitations language supports the ongoing violation approach. The FHAA's statutory accrual point is the "occurrence or the termination" of the discrimination.[193] In a construction case, the "occurrence" is the construction. Reading the "termination" also to be the construction makes the addition of the word "termination" meaningless. In addition, the legislative history of the FHAA, indicates that Congress intended the accrual trigger of "termination" to reflect and reaffirm the continuing violation doctrine, rather than focusing on the completion of construction.[194]

The two ADA cases addressing the issue involved existing facilities. Because those facilities are subject to ongoing obligations, these cases do not resolve the issue, although they shed some light. In *Schonfeld v. City of Carlsbad*, plaintiffs with disabilities challenged inaccessible city buildings, parking lots and streets.[195] This case focused on the inadequacy of the city's transition plan and, therefore,

187. *Id.* at 207-08.
188. *Id.* at 213 (referring to the "continuing violation" doctrine).
189. 81 F. Supp. 2d 1057, 1059, 1063 (D. Mont. 1999).
190. *Id.* at 1059-61.
191. *Id.* at 1060-62.
192. *Id.* at 1063.
193. 42 U.S.C. § 3613(a)(1)(A) (2006).
194. H.R. REP. NO. 711, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2194 ("The latter term is intended to reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice." (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982)).
195. 978 F. Supp. 1329, 1331 (S.D. Cal. 1997).

addressed both program access and new construction.[196] The court did not distinguish between the two obligations and found that the continuing exclusion of the plaintiffs from inaccessible city facilities was an ongoing violation.[197]

In *Pickern v. Holiday Quality Foods Inc*., a plaintiff had not visited the inaccessible store during the one year limitations period before filing suit.[198] This case challenged an existing facility, rather than new construction.[199] Therefore, the possibility of the statute of limitations accruing at the date of construction was not applicable. The court allowed the claim to continue, deciding that, as long as the violations continued into the limitations period and as long as the plaintiff is aware of them and is deterred from entering, the injury continues and the limitations period does not expire.[200] *Garcia*, discussed above, takes a much different approach in a new construction case under the FHAA.[201]

Applying the ongoing violation approach to our hypotheticals, the plaintiff in situation A could sue to challenge the inaccessible facility forever. Similarly, in situation B, each newly constructed curb ramp has its own ongoing, unending statute of limitations and, therefore, the plaintiff can challenge them at any time.

Adding the factor of change of ownership, the previous owner, who conducted the design and construction, no longer has control over the facility to remedy violations. This is important particularly in ADA cases, where the primary, often exclusive, relief is injunctive. For this reason, it may be appropriate to limit liability to the period when the defendant had control over the facility.

Under such an approach, as in *Sentell* and *Kuchmas*, architects, builders and former owners would be relieved of liability when the limitations period runs out from the date their involvement with the

196. *Id.* at 1333.

197. *Id.* However, the court went on to find that the plaintiffs had not provided evidence that newly constructed curb ramps installed by the city were not in compliance. *Id.* at 1341-42.

198. 293 F.3d 1133, 1135 (9th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002).

199. *Id.*

200. *Id.* at 1137; *see also* Bodley v. Macayo Rests., LLC, 546 F. Supp. 2d 696, 700 (D. Ariz. 2008) (in an existing facility, statute of limitations runs from the termination of the discrimination, and thus is ongoing until it is corrected, even if the plaintiff has known of the violation for longer than the limitations period).

201. Garcia v. Brockway, 526 F.3d 456, 461 (9th Cir. 2008), *cert. denied*, Thompson v. Turk, 129 S. Ct. 724 (2008).

project ended (upon construction or sale).[202] Current owners would be liable on an ongoing basis because they continue to benefit from the inaccessible building, have the ability to correct the violations and have the ability to pursue a variety of claims against the architects, builders, former owners and others. While it may seem unfair to hold a subsequent owner responsible for design and construction he did not participate in, it is not unfair in all cases.

Buyers can and should verify accessibility when they purchase newly constructed facilities, either by conducting their own inspections or by requiring certification or audit from sellers, builders or architects. Post-construction buyers, unlike subsequent plaintiffs, may protect themselves from the effects of accessibility violations, or these factors may be monetized and considered in the purchase price.

Adding the possibility of multiple visits by a plaintiff, within and beyond the limitations period, creates an additional complication. Under the strictest approach to ongoing violation, it makes no difference when the plaintiff first encounters the violation. The violation continues, and injury can arise again and again, until it is corrected. This issue should make no substantive difference in a claim for injunctive relief only, as the remedy is not cumulative—whatever violations exist must be corrected. However, for cases in which damages are available for each injury, it would be unfair for the plaintiff to accumulate damages claims by sitting on her claims for a long period of time and then demanding damages for the entire time period (either based on days, months or years of deterrence or on multiple unsuccessful visits).

IV. OTHER OPTIONS

Courts have not looked to other contexts to seek guidance for applying statutes of limitations to disability design and construction cases. Latent construction defects offer one alternative approach. In California, latent construction defects are subject to a combined statute of limitations scheme.[203] Recognizing that the parties who design and construct a facility often are no longer involved years later when a defect is discovered and causes injury, California provides a ten-year maximum statute of limitations for designers and builders against

202. *See generally* Sentell v. RPM Mgmt. Co., No. 4:08CV00629JLH, 2009 WL 2601367, at *1 (E.D. Ark. Aug. 24, 2009); Kuchmas v. Towson Univ., 553 F. Supp. 2d 556, 556 (D. Md. 2008).

203. CAL. CIV. PROC. CODE § 337.15(g) (West 2009).

liability for latent defects.[204]

In addition, the relevant general tort rule regarding discovery or injury applies. Therefore, for potential defendants who ceased control over the property on completion of discovery, a plaintiff must demonstrate that she acted within the tort limitations period after her injury or discovery *and* that the claim was brought within the strict ten-year limitations period running from completion of construction.[205] For current owners, the violation is ongoing and the limitations period does not accrue until injury or discovery occurs.[206] This approach is similar to the ongoing violation theory, with a limitation based on cessation of control, combined with a first-encounter rule.

A modified ongoing obligation approach, where the violation is ongoing until corrected, but the limitations period for a particular plaintiff's claim begins upon her first injury, is also applied in nuisance cases.[207] In those cases, the nuisance is ongoing until corrected, but the plaintiff must file within the limitations period after suffering or learning of a compensable injury.[208] Medical and legal malpractice claims demonstrate a pure continuing violation model, in which the professional's "continuous treatment" or "continuous representation" without correcting the error postpones running of the limitations period until the representation or treatment ends.[209] The plaintiff may sue for all the representation or treatment as long as a portion of it occurred during the limitations period.[210]

CONCLUSION

New construction and alterations are essential elements in the ADA scheme to achieve equal opportunity for people with disabilities. In light of its importance, it is essential to achieve an appropriate balance between providing repose, economic practicality, and predictability for defendants, supporting reliable evidence for courts, and ensuring causes of action are not unjustly barred.

Most disability design and construction cases have arisen in the FHAA context. Courts in those cases have applied date of construction and ongoing violation theories to determine the accrual of the statute of limitations. In FHAA cases involving related construction that occurred

204. *See id.* § 337.15(a).
205. *See* 43 CAL. JUR. 3D *Limitation of Actions* § 100 (2009).
206. *Id.*
207. *See* Graham, *supra* note 117, at 308-10.
208. *Id.* at 310.
209. *Id.* at 299.
210. *Id.* at 300.

within and outside the limitations period, most courts have applied a pure continuing violation doctrine to treat construction within the limitations period as part of a continuing discriminatory practice with the occurrences outside the period, so that all are actionable. While a discovery or encounter theory has been proposed in FHAA cases, courts have not adopted it. A few have rejected it, based on the statutory language of the FHAA limitations provision.

While the FHAA cases are instructive for ADA Title II and Title III cases, different considerations apply. FHAA includes a statutory limitations period specifying that the period runs from "the occurrence or the termination of the allegedly discriminatory practice."[211] Thus, courts look for the occurrence or termination of the construction. Some have found the termination to occur when construction terminates. Others have found the violation does not terminate until it is corrected. Courts rejecting the discovery rule rely on this language and on the fact that discovery is a traditional tort concept not included in the statute.

The ADA does not include a statutory limitations period, but borrows from state law. Generally, ADA claims adopt state tort (personal injury) limitations. Therefore, in the ADA case, there is a stronger basis for applying the discovery rule. Moreover, because the ADA does not specify that limitations should be based on an occurrence or determination of an act, ongoing violations are more consistent with the ADA.

Unlike the FHAA, the availability of damages is limited under the ADA. No damages are available under Title III and damages are only available under Title II for intentional discrimination. This limited remedial scheme argues in favor of reduced reliance on statutes of limitations, because defendants do not face monetary penalties. The unpredictability of damages amounts argues in favor of strictly applying limitations to provide repose. Although the costs of retrofitting buildings may be high, those expenses may be predictable and defendants may and should plan for them.

Unlike the FHAA, Title II and Title III of the ADA impose obligations, not just for new construction, but also for alterations and existing facilities (barrier removal and program access). On the one hand, the fact that strict application of a statute of limitations in an FHAA case will leave the plaintiff with no remedy and leave a newly constructed building inaccessible forever would appear to argue in favor of extended limitations.

On the other hand, application of a clear limitations period under

211. 42 U.S.C. § 3613(a)(1)(A) (2006).

the FHAA arguably gives defendants true predictability, economic rationality and repose. The same is not true of the ADA. The ongoing obligations for existing buildings will apply, even if a cause of action for new construction is time-barred. Although the new construction and existing building standards are different, defendants may have no real repose. However, the availability of ongoing obligations arguably reduces the injustice to plaintiffs of having their new construction claims time-barred.

Any given approach to the statute of limitations is inadequate to address all the various factual situations in which new construction and alterations claims arise.

Strict application of the date of construction as the limitations trigger, as in *Frame,* threatens to bar all plaintiffs from enforcing their rights, when, through no fault of their own, they never encountered or knew of the violation.

The pure continuing violation doctrine, available when some elements were constructed within the limitations period and others were not, mitigates this effect by treating all the elements as part of a single discriminatory practice. However, it seriously undermines predictability and economic rationality for defendants, as it is difficult to predict which elements will be considered to be related. In addition, courts should be careful to apply the doctrine only when the new and old construction projects are actually related.

The discovery rule focuses purely on when the plaintiff learns of and is, therefore, injured by the violation. This essentially provides no limitations period at all, as a plaintiff may discover the violation at any time. Moreover, taken to the extreme, a plaintiff may accumulate violations (and damages, where available) by sitting on her claims. A proposed first-encounter rule would provide some limitation, in that the limitations period for a particular plaintiff's claim would begin to run on her first encounter with, or knowledge of, the violation. However, this rule has not been adopted.

Similarly, the ongoing violation approach, adopted from civil rights, nuisance or malpractice laws, provides little closure, as the violation is ongoing, and may be challenged any time, until it is corrected. However, this approach in the FHAA context has been held to accrue when the particular defendant ceases to control the facility, which provides some limits on indefinite liability and retains liability with the party who can control and redress the facility.

Other approaches might be adopted from some latent construction defect laws, which combine: (1) ongoing liability for parties who

remain in control of the facility (current owners); (2) a strict statute of limitations running from the date of the discriminatory act (e.g., the construction or the medical procedure) for parties whose involvement ended with the act; and (3) a first-encounter rule to limit the ability of a plaintiff to manipulate the system by dragging out stale claims.

Future approaches to resolve and mitigate ADA construction disputes should be mindful of broader implications for disability rights enforcement and advocacy. As a policy matter, physical accessibility is a core goal of the ADA.[212] It will not be achieved if new construction and alterations are not made accessible and people with disabilities will continue to have limited options for employment and access to programs, goods and services.

Private enforcement has an important role to play in achieving physical access. Courts should be careful not to use statutes of limitations to create a catch-22 whereby individuals with disabilities, through no fault of their own, have no meaningful opportunity to challenge violations in court or through administrative complaints and informal mechanisms such as mediation. Because an individual with a disability cannot challenge an inaccessible building until she encounters it, basing the accrual of the statute of limitations solely on construction date, as the *Frame* court did, creates just such a dilemma.

Perhaps counter-intuitively, basing the accrual of the statute of limitations solely on construction date also may create unintentional enforcement incentives for disability organizations to constantly search for violations, use testers or even create plaintiffs and file prematurely without adequate investigation or informal compliance and mediation efforts.[213] It also increases demand for enforcement by the federal government. Additionally, placing the primary burden of ensuring compliance on individuals with disabilities, disability nonprofit organizations and the public (through federal agency enforcement) is inappropriate and inefficient, as building owners have better access to information about facilities' accessibility and the ability to remedy violations without judicial intervention.

212. Universal design approaches, though not mandated by the ADA, may further transcend basic ADA accessibility requirements. For such an approach, *see* The Global Universal Design Commission, Inc. (GUDC) Voluntary Standards, *available at* http://www.globaluniversaldesign.com/ (Universal Design voluntary consensus standards for commercial buildings to expand access to buildings for all people, regardless of physical stature and varying abilities).

213. For a general discussion of the incentives for so-called "abusive" ADA litigation, *see* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006).

On the other hand, building owners are able to protect themselves from infinite potential liability by demanding certification of compliance from those who design and build their facilities or from accessibility experts. Additional mechanisms for certifying compliance, such as through local building officials or through federal government plan reviews, inspections and compliance reviews, would help building owners proactively address accessibility issues and avoid disputes.

Builders and designers should be protected from infinite and unending liability to people with disabilities (in contrast to their liability to building purchasers and owners) long after their ability to address or remedy violations has passed. Specifying accrual from the date a covered entity gives up control over the facility may address this issue. Nor should potential plaintiffs who have encountered an inaccessible building be able to hold on to their complaints indefinitely or accrue damages for multiple visits beyond the limitations period after their first encounter. Accrual of the statute of limitations period from the date of first encounter, rather than re-starting it at each encounter, may address this issue.

In summary, design and construction violations of the ADA may best be considered ongoing "failures" that continue until the covered entity gives up control of the facility or until the alleged violation is corrected. This approach eliminates the need for the "pure" continuing violations doctrine to relate-back recent construction to related construction outside the limitations period. The limitations period for a plaintiff's cause of action may appropriately accrue at the time of the plaintiff's first encounter with the allegedly violative facility. There are opportunities for federal, state and local governments, disability stakeholders, builders and owners to partner to create additional and proactive mechanisms to facilitate building owners' investment and purchasers' ability to ensure buildings meet ADA standards.