

October 2010

## The Business of Suing: Determining When a Professional Plaintiff Should Have Standing to Bring a Private Enforcement Action

Brandon Murrill

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Torts Commons](#)

---

### Repository Citation

Brandon Murrill, *The Business of Suing: Determining When a Professional Plaintiff Should Have Standing to Bring a Private Enforcement Action*, 52 Wm. & Mary L. Rev. 261 (2010), <https://scholarship.law.wm.edu/wmlr/vol52/iss1/6>



# NOTES

## THE BUSINESS OF SUING: DETERMINING WHEN A PROFESSIONAL PLAINTIFF SHOULD HAVE STANDING TO BRING A PRIVATE ENFORCEMENT ACTION

### TABLE OF CONTENTS

INTRODUCTION . . . . .	263
I. THE PROBLEM: IDENTIFYING A PROFESSIONAL PLAINTIFF AMONG ORDINARY PLAINTIFFS . . . . .	267
<i>A. Defining the Professional Plaintiff . . . . .</i>	267
<i>B. Difficulties in Distinguishing Professional         Plaintiffs . . . . .</i>	270
1. <i>The Plaintiff's Role in the Injury . . . . .</i>	271
2. <i>Litigiousness . . . . .</i>	272
3. <i>Motivation . . . . .</i>	274
II. THE EVOLUTION OF PRIVATE ENFORCEMENT ACTIONS: THE MOVEMENT TOWARD A PERSONALIZED INJURY REQUIREMENT . . . . .	276
<i>A. The Early Professional Plaintiffs: English         "Common Informers" and Qui Tam Suits . . . . .</i>	276
<i>B. Taming the Professional Plaintiff:         The Introduction of the Personalized         Injury Requirement . . . . .</i>	278
<i>C. How Modern Professional Plaintiffs Have         Defeated the Personalized Injury Requirement . . . . .</i>	280
III. CLASSIFYING STANDING RESTRICTIONS IN PRIVATE ENFORCEMENT ACTIONS POPULAR WITH PROFESSIONAL PLAINTIFFS . . . . .	283



<i>A. Narrowing the Injury</i> .....	284
<i>B. Narrowing the Plaintiff</i> .....	285
<i>C. Classifying Other Standing Requirements</i> .....	286
IV. RECOMMENDATION: GUIDELINES FOR BETTER PERSONALIZED INJURY STANDING REQUIREMENTS IN CITIZEN SUIT STATUTES .....	288
<i>A. Scope</i> .....	288
<i>B. Proper and Improper Bases for Citizen         Suit Standing</i> .....	289
<i>C. Guidelines for Drafting Statutes and         Their Application</i> .....	291
1. <i>Guidelines for Plaintiff Standing Requirements</i> .....	292
2. <i>Guidelines for Injury Standing Requirements</i> .....	293
<i>D. Concerns with Overreaching</i> .....	298
CONCLUSION .....	298



## INTRODUCTION

Among the characters that occupy the modern legal landscape, the professional plaintiff is one of the most despised. Such plaintiffs are, in the words of one judge, “rapacious jackals whose declared concern for the corporate well-being camouflages their unwholesome appetite for corporate dollars.”<sup>1</sup> They have been denigrated as “bounty hunters”<sup>2</sup> and cast as the punchline in at least one joke.<sup>3</sup>

But despite decades of abuse lobbed at them by the press<sup>4</sup> and members of Congress,<sup>5</sup> professional plaintiffs continue to inhabit the realm of civil litigation. Perhaps their longevity stems from a characteristic that Judge Easterbrook identified in *Murray v. GMAC Mortgage Corp.*<sup>6</sup> In refusing to affirm the denial of class treatment to a family bringing more than fifty lawsuits under the Fair Credit Reporting Act, Easterbrook stated that “the district judge did not explain ... why ‘professional’ is a dirty word. It implies experience, if not expertise.”<sup>7</sup>

Thus, from a different perspective, the professional plaintiff is more akin to a misunderstood hero—the battle-tested “private attorney general” who shoulders the burden of enforcing regulatory violations for the good of society.<sup>8</sup>

---

1. Anthony Borden, *The Shareholder Suit Charade*, AM. LAW., Dec. 1989, at 68 (quoting *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 67 (N.D. Ill. 1982)).

2. See Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL’Y J. 395, 414 (2006).

3. See Thomas W. Antonucci, *The Private Securities Litigation Reform Act and the States: Who Will Decide the Future of Securities Litigation?*, 46 EMORY L.J. 1237, 1242 n.32 (1997) (noting that a floor debate in the Senate referred to professional securities plaintiffs as “the world’s unluckiest investors” (quoting the Private Securities Litigation Reform Act of 1995, H.R. REP. NO. 104-369, at 32-33 (1995) (Conf. Rep.))).

4. See, e.g., Kurt Eichenwald, *Millions for Us, Pennies for You*, N.Y. TIMES, Dec. 19, 1993, at C1; Timothy L. O’Brien & Jonathan D. Glater, *Robin Hoods or Legal Hoods?*, N.Y. TIMES, July 17, 2005, at B1.

5. Antonucci, *supra* note 3, at 1242 n.32.

6. 434 F.3d 948 (7th Cir. 2006).

7. *Id.* at 954; see also Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 128 n.201 (2009).

8. See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 215-16 (1983); see also Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 4-5, 8 (2002) (“Private justice is not simply a



In the recently decided case of *Gordon v. Virtumundo, Inc.*, the Ninth Circuit brought new attention to the professional-plaintiff controversy.<sup>9</sup> In *Gordon*, the plaintiff set up his e-mail account so that he would be spammed for the purpose of bringing lawsuits under the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003.<sup>10</sup> Just as Article III of the Constitution requires that a plaintiff suffer an injury in order to bring a lawsuit,<sup>11</sup> the CAN-SPAM Act has a statutory standing requirement that asks whether a plaintiff has been “adversely affected by a violation.”<sup>12</sup> The court, in declining to find that the plaintiff had standing, emphasized the nature of the litigant:

As Gordon concedes, he is a professional plaintiff. Since at least 2004, Gordon has held no employment. He has never been compensated for any of his purported Internet services, and his only income source has come from monetary settlements from his anti-spam litigation campaign.... Gordon’s status is uniquely relevant to the statutory standing question here.<sup>13</sup>

The Ninth Circuit decided that the plaintiff in *Gordon* failed to meet the statutory standing requirement, in part because he was not a true injured party, but rather a professional plaintiff running a “litigation mill.”<sup>14</sup>

In a concurring opinion, Judge Gould noted that private causes of action, such as the one that Congress provided to citizens in the CAN-SPAM Act, are the descendants of a long line of remedies provided by common law to fight “perceived injustice[s].”<sup>15</sup> However, the common law “did not develop remedies for people who gratuitously created circumstances that would support a legal claim and acted with the chief aim of collecting a damage award.”<sup>16</sup> Because

---

helpful adjunct to public regulation. Done correctly, it is an essential ingredient.”).

9. 575 F.3d 1040 (9th Cir. 2009).

10. *Id.* at 1055. The CAN-SPAM Act is codified at 15 U.S.C. §§ 7701-7713 (2006).

11. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining “injury” as a concrete, actual “invasion of a legally protected interest”).

12. 15 U.S.C. § 7706(g)(1).

13. *Gordon*, 575 F.3d at 1056.

14. *Id.* at 1057.

15. *Id.* at 1067 (Gould, J., concurring).

16. *Id.* at 1067-68.



Congress did not intend that the CAN-SPAM Act grant standing to “all persons,” but limited standing to those who had suffered true injuries, the *Gordon* plaintiff could not maintain an action because the alleged harm did not “proximately cause[]” the damages.<sup>17</sup>

As the use of statutes allowing citizens to sue to enforce the law continues to grow,<sup>18</sup> legislatures and courts will be faced with an important dilemma: in private enforcement actions in which plaintiffs have taken significant steps to inflict legal injuries upon themselves for the purpose of earning money, should the law give them statutory standing to sue?

This Note explores that question. Part I defines professional plaintiffs with three criteria: their motivation to make money, their role in bringing about their injury, and the frequency with which they sue. Courts typically look to these factors when determining whether the plaintiff is a professional who should be denied standing.<sup>19</sup> In contrast to the *Gordon* court’s opinion, this Part argues that none of these criteria appropriately separates professional litigants from ordinary plaintiffs for the purpose of denying professional plaintiffs statutory standing.

Part II follows the evolution of private enforcement actions from the historical *qui tam* suit that any citizen could bring to the modern statutes that grant remedies only to those who suffer personalized injuries.<sup>20</sup> If Congress introduced the personalized injury standing requirement into citizen suit statutes to address problems with “bounty hunters” who would repeatedly bring suit under *qui tam* provisions for monetary gain,<sup>21</sup> then that purpose has been frustrated. This Part argues that modern professional plaintiffs have adapted to the personalized injury requirement by “manufactur[ing]”<sup>22</sup> injuries to escape the standing requirement

---

17. *Id.* at 1067-69.

18. See Bucy, *supra* note 8, at 5 (“Private justice ... has grown exponentially over the past few decades.”).

19. See *infra* Part I.B.

20. See *infra* notes 98-101 and accompanying text (describing the difference between the two types of actions).

21. The origins of the personalized injury requirement are fairly complex, but deterring professional plaintiffs was one consideration. See *infra* notes 94-97 and accompanying text.

22. See *Gordon*, 575 F.3d at 1068 (Gould, J., concurring) (discussing “manufactured claims”). Throughout this Note, this term is used to refer to a plaintiff’s act of bringing an injury upon himself.



and return to the era in which *qui tam* actions predominated. A personalized injury standing requirement is meaningless when its definition is so broad that it can easily be “manufactured” by anyone.<sup>23</sup>

Part III examines efforts by Congress and judges to bar professional plaintiffs from the courthouse by narrowing the injury standing requirements of private enforcement action statutes. The goal of this narrowing is to find an optimal level of permissiveness that will exclude professional plaintiffs from the justice system<sup>24</sup> while at the same time leaving the courthouse door open to plaintiffs with legitimate grievances.<sup>25</sup> Although standing requirements vary among statutes, legislatures and judges generally make it more difficult for professional plaintiffs to “manufacture” injuries by (1) narrowing the definition of the *injury*, or (2) narrowing the definition of the *plaintiff*. Because many citizen suit statutes have similar standing provisions, legislatures should draft or amend these statutes to specify characteristics of injuries or plaintiffs that serve as good proxies for when plaintiffs are professional. Such careful lawmaking will ultimately save judicial time and effort.

Part IV proposes guidelines for legislatures to use when formulating these modified personalized injury standing requirements. In statutes in which the legislature wants to deny standing to professional plaintiffs,<sup>26</sup> lawmakers should make the personalized injury standing requirements meaningful by adhering to general rules for each of the two types of standing restrictions.<sup>27</sup> For those restrictions that narrow the definition of the plaintiff, the legislature

---

23. See *infra* Part II.C.

24. See *Gordon*, 575 F.3d at 1069 (Gould, J., concurring) (“[H]ere the CAN-SPAM statutory language grants a private right of action not to ‘all persons’ regardless of injury, but only to IAS providers who suffer adverse effect. These requirements make clear that a litigation-seeking party in Gordon’s circumstances has no standing to proceed under the CAN-SPAM Act.”).

25. See Bucy, *supra* note 8, at 27 n.142 (“The Conference Committee recognizes the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims.” (quoting the Private Securities Litigation Reform Act of 1995, H.R. REP. NO. 104-369, at 39 (1995) (Conf. Rep.))).

26. In some situations, a legislature may want to encourage professional plaintiffs to file suit because they help to enforce a statute. See *Gordon*, 575 F.3d at 1069 (Gould, J., concurring) (discussing standing in the housing discrimination context).

27. See *infra* Part III for more on the two types of personalized injury standing restrictions.



should ensure that the required characteristics of the plaintiff are (1) consistent with the goals of the statute, (2) costly or undesirable for the average person to adopt, (3) easy and noncontroversial for courts to determine, and (4) capable of separating the professional plaintiff from the ordinary plaintiff. Restrictions that narrow the definition of the injury should meet the same factors, except that the word “manufacture” should be substituted for the word “adopt” in factor (2).

#### I. THE PROBLEM: IDENTIFYING A PROFESSIONAL PLAINTIFF AMONG ORDINARY PLAINTIFFS

##### *A. Defining the Professional Plaintiff*

Professional plaintiffs are the chameleons of civil litigation, in that the statutory provision under which they sue often dictates their nature.<sup>28</sup> Stereotypical images that define professional plaintiffs and their attorneys in the popular imagination arise from these different contexts: the wheelchair-using litigant demanding hundreds of thousands of dollars in attorneys’ fees because a hotel bathroom was allegedly in violation of the Americans with Disabilities Act (ADA);<sup>29</sup> a family gleefully awaiting the arrival of credit offers in the mail to look for potential violations of the Fair Credit Reporting Act;<sup>30</sup> and the investor who owns “a few shares of stock in each of a large number of companies,”<sup>31</sup> ready to “race to the courthouse”<sup>32</sup> the moment a company’s stock price plummets.

---

28. For examples of how the structure of particular private enforcement statutes affects the actions of professional plaintiffs, see *infra* Part I.B.

29. Adam A. Milani, *Go Ahead. Make My 90 Days: Should Plaintiffs Be Required To Provide Notice to Defendants Before Filing Suit Under Title III of the Americans with Disabilities Act?*, 2001 WIS. L. REV. 107, 178-80 (relating the story of a lawsuit against Clint Eastwood’s Mission Ranch). The ADA is codified at 42 U.S.C. §§ 12101-12213 (2006).

30. See *Murray v. Cingular Wireless II, L.L.C.*, 242 F.R.D. 415, 418 (N.D. Ill. 2005). The Fair Credit Reporting Act is found at 15 U.S.C. §§ 1681-1681x (2006).

31. Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 281 (2004). The Securities Exchange Act of 1934 is codified at 15 U.S.C. §§ 78a-78oo (2006).

32. Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 537 (1997). The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)), attempted to put an end to the “race.” Fisch, *supra* at 537.



For example, the *Gordon* plaintiff, James S. Gordon, Jr., made a business out of catching and suing spammers.<sup>33</sup> A technological wizard operating behind a digital curtain,<sup>34</sup> he oversaw his Internet domain, subscribing to hundreds of “online promotions” and “prize giveaways.”<sup>35</sup> A flood of commercial e-mails poured forth from businesses and marketers, including the defendant Virtumundo, landing in Gordon’s intentionally unfiltered inboxes.<sup>36</sup> Gordon, who referred to his efforts as “research,” sued the companies behind the e-mails, seeking “injunctive relief, several millions of dollars in statutory and treble damages, and his attorney’s fees and costs.”<sup>37</sup> Other people, known as “clients,” helped Gordon in his efforts, feeding his litigation with tens of thousands of additional e-mails. Gordon rewarded these individuals with settlement money according to their proportional contribution of e-mails to a winning lawsuit.<sup>38</sup>

Despite superficial differences, professional plaintiffs like Gordon are members of a species of litigant—a species with a few defining characteristics. First, and most importantly, professional plaintiffs are professional, meaning that they are in the business of bringing lawsuits with the primary aim of winning large sums of money.<sup>39</sup> They and their lawyers may claim to have other goals, such as fighting for the underrepresented “little guy” against powerful

---

33. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1056 (9th Cir. 2009).

34. This analogy is borrowed from L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* 183-85 (Geo. M. Hill Co. 1900).

35. *Gordon*, 575 F.3d at 1046.

36. *Id.* at 1046, 1055.

37. *Id.* at 1046-47.

38. *Id.* at 1056.

39. See Borden, *supra* note 1, at 68. Regardless of merit, the “perceived threat” of a costly lawsuit is sometimes enough to force a company to settle with the professional plaintiff, making litigation unnecessary. See Jane Easter Bahls & Steven C. Bahls, *Suited Up*, ENTREPRENEUR MAG., May 1999, available at <http://www.entrepreneur.com/magazine/entrepreneur/1999/may/17684.html>.



interests,<sup>40</sup> but these goals remain secondary considerations to the ultimate goal of collecting damages.<sup>41</sup>

Second, professional plaintiffs often play a role in bringing about the injuries that serve as the foundation for their lawsuits,<sup>42</sup> although some play a more active role than others.<sup>43</sup> One example is the professional plaintiff with a disability suing under the ADA who actively scours local businesses for obscure, technical violations to serve as the basis for a cause of action.<sup>44</sup>

Litigiousness is the third characteristic that distinguishes professional plaintiffs from ordinary litigants,<sup>45</sup> with a single plaintiff often bringing multiple lawsuits under a statute granting a citizen the right to a remedy for legal wrongs.<sup>46</sup> The plaintiffs are often represented by the same attorneys in their efforts,<sup>47</sup> and usually receive compensation from their attorneys for permitting the lawyers to put the plaintiffs' names on the lawsuits.<sup>48</sup>

---

40. See Borden, *supra* note 1, at 68 (noting plaintiffs' lawyers' "flood of rhetoric about private attorneys general battling against corporate shenanigans on behalf of the little guy"); see also Milani, *supra* note 29, at 133 (quoting a professional plaintiffs' lawyer for individuals with disabilities as stating that "[e]very disabled person who comes after a lawsuit will find nice clear parking spaces, rails, ramps and bathrooms they can access—all that is fixed when we walk away from a case").

41. See *Gordon*, 575 F.3d at 1068 (Gould, J., concurring).

42. See *supra* note 16 and accompanying text.

43. See *infra* Part I.B.1.

44. See Linda H. Wade & Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go into a Bar: Serial ADA Litigation Is No Joke*, 25 TRIAL ADVOC. Q. 31 (2006). But see Milani, *supra* note 29, at 133 (summarizing the benefits of professional plaintiff-driven ADA litigation).

45. See *In re Gibson Greetings Sec. Litig.*, 159 F.R.D. 499, 501 (S.D. Ohio 1994) ("It is not disputed that Mr. Steiner has filed approximately 182 class actions in the last twelve years.... While the Court is not prepared to define a 'professional class action plaintiff,' it is clear that a person who has filed such a vast number of lawsuits comes within any definition of that phrase.").

46. See *supra* notes 28-32 and accompanying text; see also Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 156 (2004) (observing the "obvious benefits from specialization by law firms" that represent professional plaintiffs in shareholder litigation).

47. See *Stewart v. Stanley*, 5 So. 2d 531, 536 (La. 1941) (observing that "the same attorneys appear over and over again as representing these plaintiffs"); Thompson & Thomas, *supra* note 46, at 157 (stating that "professional plaintiffs almost always appear in cases represented by the same firm over and over again").

48. See *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 813 (N.D. Ohio 1999) (referring to professional securities plaintiffs as "hired gun[s]").



Thus, in many ways, *Gordon* is simply a new episode in the money-drenched saga that inevitably ensues when a legislature grants citizens the power to enforce the law. But, as Judge Gould noted in his concurrence, the “gratuitously created circumstances” underlying *Gordon* were particularly extreme.<sup>49</sup>

*B. Difficulties in Distinguishing Professional Plaintiffs*

*“[T]he burdens Gordon complains of are almost exclusively self-imposed and purposefully undertaken.”*<sup>50</sup>

The *Gordon* case illustrates an instance of a larger phenomenon: plaintiffs who bring an injury upon themselves for monetary gain. Judge Gould suggested that Gordon’s involvement in causing his injury could be used to deny him standing.<sup>51</sup> But when one compares “amateur” plaintiffs, who aim to enforce the law, with professional plaintiffs, whose goal is to make money, it is difficult to distinguish between the two—especially if courts do not also consider plaintiffs’ motivation in bringing the lawsuit or their litigious nature, both of which this Note argues are improper bases for denying standing. It is this chameleon-like ability to blend in with ordinary plaintiffs by carefully “manufacturing” injuries that makes professional plaintiffs so difficult to identify. As Judge Gould observed, plaintiffs like Gordon “purposely structure themselves to look like one of the limited entities eligible to sue but do so for the primary purpose of collecting damages and settlements from litigation.”<sup>52</sup> The following sections consider each factor that the *Gordon* court used to deny the plaintiff standing and argue that none of them should be considered as part of a standing analysis.

---

49. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1067-68 (9th Cir. 2009) (Gould, J., concurring) (“But, for a person seeking to operate a litigation factory, the purported harm is illusory and more in the nature of manufactured circumstances in an attempt to enable a claim.”).

50. *Id.* at 1057 (majority opinion).

51. See *supra* notes 16-17 and accompanying text.

52. *Gordon*, 575 F.3d at 1068 (Gould, J., concurring).



*1. The Plaintiff's Role in the Injury*

Suppose that an “amateur” plaintiff with a disability visits a restaurant with the intention of having dinner. Frustrated at the lack of handicapped parking spaces,<sup>53</sup> she sues the business owner under the ADA.<sup>54</sup> Later, a “professional” plaintiff with a disability arrives at the restaurant with the sole intent of looking for violations of the ADA on which to base a lawsuit. Discovering no handicapped parking spaces, she also sues the business owner under the statute. Short of somehow ascertaining each plaintiff’s motivations in this scenario, it would be difficult—if not impossible—for a court to distinguish the professional plaintiff from the regular litigant based on actions alone. If the plaintiffs could be said to have brought the injuries upon themselves, it is only in the sense that they discovered existing violations.<sup>55</sup> The difference between the plaintiffs in this scenario is that the professional plaintiff *intended* to find violations, whereas the ordinary litigant did not.<sup>56</sup>

As a further illustration, consider a shareholder who purchases a few shares in hundreds of companies, hoping that a stock price decline in at least one of the companies will serve as the fruitful basis for a suit under the Securities Exchange Act of 1934.<sup>57</sup> Here, the professional litigant has taken a more active role than in the previous example—purchasing shares in hundreds of companies in the way that Gordon actively subscribed to hundreds of promotions, hoping that it would result in spam.<sup>58</sup> But if an injury results, the

---

53. This example is based on an actual case. *See* Milani, *supra* note 29, at 126 (discussing *Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1049 (S.D. Cal. 1998)).

54. 42 U.S.C. §§ 12101-12213 (2006).

55. Congress may have intended the difficulty in distinguishing the plaintiffs in this scenario. As Judge Gould noted, “Congress provided standing to ‘any person’ subjected to disability discrimination in violation of the ADA, and it also did not expressly require a showing of injury or adverse effect from the discrimination.” *Gordon*, 575 F.3d at 1069 (Gould, J., concurring). Standing that results from simply discovering existing violations is known as “tester standing” in the housing discrimination context. *See id.*; *see also infra* notes 156-58 and accompanying text.

56. Wade & Inacio, *supra* note 44, at 31 (explaining that a “disabled [professional plaintiff] will visit as many businesses as possible at the specific request of ... that person’s lawyer, hoping to uncover ADA violations upon which to sue”).

57. The court in *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 544 (N.D. Tex. 1997), mentioned this scenario.

58. *See Gordon*, 575 F.3d at 1046, 1055.



professional plaintiff-shareholder will not have caused the share price to drop any more than an ordinary investor did—or any more than Gordon caused the online marketing companies to send him spam e-mails. Again, the difference between the professional plaintiff-investor and the ordinary investor is found not in the *action* of purchasing the shares but in the *intent* with which each party made the purchase. So, if a court determining whether a litigant has standing was to consider only the litigant's actions prior to the alleged injury in a shareholder suit, it would be difficult to distinguish a professional plaintiff from a regular litigant by looking only at the role each played in bringing about his or her injury.

The Ninth Circuit in *Gordon* attempted to resolve this problem by inquiring into the plaintiff's motivation in bringing his lawsuit.<sup>59</sup> By considering the facts of the case, the court attempted to infer the “professional” motivation of the plaintiff by determining that he frequently sought out violations of the CAN-SPAM statute for the purpose of filing multiple lawsuits to make a significant amount of money.<sup>60</sup> But considering a plaintiff's litigiousness and motivation in filing suit poses other problems that make both factors improper bases for denying a plaintiff standing.

## 2. Litigiousness

Case history and policy indicate that litigiousness—meaning that a plaintiff seeks out many violations and files lawsuits based on them—is not a proper way to distinguish the professional plaintiff from the ordinary litigant if the lawsuits are filed in good faith. For example, in *Murray v. Cingular Wireless II, L.L.C.*, in which a professional plaintiff sued for violations of the Fair Credit Reporting Act, the court refused to “adopt a rule limiting a plaintiff” to a certain number of lawsuits so long as each lawsuit had an adequate factual basis.<sup>61</sup> In a case involving a possible professional plaintiff suing under the ADA, a California district court similarly found that a plaintiff with a disability could not be penalized as a “vexatious litigant” if the plaintiff had a reasonable explanation for filing

---

59. See *supra* notes 13-14 and accompanying text.

60. See *supra* notes 33-38 and accompanying text.

61. 242 F.R.D. 415, 419 (N.D. Ill. 2005).



multiple lawsuits and claiming multiple injuries, and also possessed a “good faith belief that he [would] prevail on the merits of most of his claims.”<sup>62</sup> One scholar has suggested that evidence of a litigious plaintiff’s propensity to bring lawsuits should be inadmissible as improper character evidence that has no bearing on “the merits of the current case.”<sup>63</sup>

Congress has permitted courts to consider litigiousness in an effort to deny professional plaintiffs standing under the Private Securities Litigation Reform Act of 1995. Plaintiffs bringing shareholder class actions pursuant to the Act may be prohibited from serving as lead plaintiffs if they have already brought five securities class actions throughout any three-year period.<sup>64</sup> However, the provision is not mandatory and courts have often granted plaintiffs an exemption from it, finding that litigiousness may actually be *beneficial* to the legal system.<sup>65</sup> Under this reasoning, filing multiple lawsuits provides plaintiffs with experience that allows them to monitor their attorneys more effectively during the course of a lawsuit.<sup>66</sup> In addition, in a case brought under the Fair Credit Reporting Act, the Seventh Circuit wrote that there did not appear to be case law suggesting “that someone whose rights have been violated by 50 different persons may sue only a subset of the offenders.”<sup>67</sup>

Even if litigiousness was to be considered as a characteristic of professional plaintiffs, as it has been in a few ADA cases,<sup>68</sup> it would

---

62. *Molski v. Rapazzini Winery*, 400 F. Supp. 2d 1208, 1210-11 (N.D. Cal. 2005).

63. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 474-75 (1986).

64. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)).

65. See Scheuerman, *supra* note 7, at 128 n.201 (summarizing cases that explain the benefits of litigiousness); see also *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (“Repeat litigants may be better able to monitor the conduct of counsel, who as a practical matter are the class’s real champions.”). But see *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 457 (S.D. Tex. 2002) (declining to appoint a litigious plaintiff as lead plaintiff in a securities action because it would result in “fractured attention and resources with respect to [the] suit”).

66. See *supra* note 65.

67. *Murray*, 434 F.3d at 954.

68. See, e.g., *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 864 (C.D. Cal. 2004), *aff’d sub nom.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007) (holding that, “[a]lthough litigiousness alone is insufficient” to support a finding of vexatiousness, “it is a factor the Court considers indicative of an intent to harass”). In the *Mandarin* case, the



be possible for many such plaintiffs to escape detection by settling lawsuits out of court, leaving no record of their tendency to sue.<sup>69</sup> This tactic would make litigiousness an unreliable indicator of a plaintiff's money-seeking motivation, as it would be possible that a professional plaintiff had settled hundreds of lawsuits out of court before bringing one to trial.

### 3. Motivation

Motivation also fails as a proper basis for denying a professional plaintiff standing. In the 1941 case of *Stewart v. Stanley*, the Supreme Court of Louisiana decided that "professional plaintiff[]" taxpayers had standing to sue despite a history of litigiousness because the court found that it had "no right to inquire into the motives of the plaintiffs."<sup>70</sup> But unlike most modern professional plaintiffs, the *Stewart* litigants were suing for injunctive rather than monetary relief, and did not bring the alleged injury upon themselves.<sup>71</sup> Thus, the plaintiffs could not have brought suit out of pure financial motivation.

Several other courts have also held that it is not proper to consider the plaintiff's motivation for bringing suit in other contexts.<sup>72</sup> In cases involving vexatious litigants, in which courts

---

court also considered the "textual and factual similarity" of the myriad complaints brought by the plaintiff. *Id.* For another case in which litigiousness was considered, see *Brother v. Tiger Partner, L.L.C.*, 331 F. Supp. 2d 1368, 1374-75 (M.D. Fla. 2004) ("This type of shotgun litigation undermines both the spirit and purpose of the ADA.").

69. See Bahls & Bahls, *supra* note 39 ("It's difficult to track these people or gauge the prevalence of their scam because many agree to a quick settlement without ever filing formal charges.").

70. 5 So. 2d 531, 536 (La. 1941) ("[T]he right of a person to institute a law suit [sic] is not dependent upon or affected by the motive which prompts him in the exercise of his right." (quoting *Welsh v. Bd. of Levee Comm'rs*, 168 La. 1037, 1042 (1929))).

71. *Id.* at 534-35.

72. See, e.g., *Somers v. AAA Temp. Servs., Inc.*, 284 N.E.2d 462, 465 (Ill. 1972) ("It is generally accepted that where the plaintiff asserts a valid cause of action, his motive in bringing the action is immaterial."); *Bull v. Int'l Power Co.*, 92 A. 796, 797 (N.J. Ch. 1914) ("So far at least as the statutory feature of the case is concerned, the complainants' motives are entirely immaterial."). But see *Knapp Engraving Co. v. Keystone Photo Engraving Corp.*, 1 A.D.2d 170, 172 (N.Y. App. Div. 1956) (stating that a plaintiff's good faith in filing suit "may properly be explored").



may examine motive,<sup>73</sup> courts typically consider whether the plaintiff is bringing the suit in bad faith without a reasonable chance of winning—not whether the plaintiff wants to make money from the suit.<sup>74</sup> An “inherent difficulty [in] proving state of mind” exists when assessing financial motivation because it requires peering into the “mental processes” of a person without the benefit of “eyewitness’ testimony.”<sup>75</sup> As one congressman noted in the context of the ADA, “it is almost impossible to prove” that a plaintiff intends to sue for money damages instead of to further the goals of the statute.<sup>76</sup> The analysis that a court would have to undertake in each trial to determine whether the plaintiff brought the suit for money would also waste judicial time and resources, saddling courts with significant difficulties in routine cases that “might seriously obscure their real merits.”<sup>77</sup> In addition, in the absence of plaintiffs’ admissions that the prospect of monetary gain motivated them to bring a lawsuit, intent would have to be inferred from their litigiousness or role in bringing about their injury.<sup>78</sup> As mentioned previously, courts should not consider these factors when determining whether a plaintiff has standing to sue.<sup>79</sup>

Because of the time and effort a court must expend in considering the above three factors, legislatures and courts should use a different analysis to deny standing to professional plaintiffs. Part II explores the history of private enforcement actions and suggests that the personalized injury standing requirement re-

---

73. See *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986) (setting out a test for determining whether a litigant is vexatious).

74. See *id.*; see also *Wilson v. Pier 1 Imports (US), Inc.*, 411 F. Supp. 2d 1196, 1200 (E.D. Cal. 2006) (finding, in the context of a professional ADA plaintiff, that the content of the plaintiff’s allegations, rather than litigiousness, was the true test of frivolity). But see *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 866 (C.D. Cal. 2004) (“Molski’s motivation is, ultimately, to extract a cash settlement.”); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1285 (M.D. Fla. 2004) (stating that the plaintiff’s “explanation for his initial visit to the Facility was disingenuous”).

75. *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1133 (4th Cir. 1988) (quoting *Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

76. *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 18 (2000) (statement of Rep. Mark Foley, United States Congressman from Florida).

77. See *Higgins v. Shenango Pottery Co.*, 99 F. Supp. 522, 525 (W.D. Pa. 1951) (quoting *Dickerman v. N. Trust Co.*, 176 U.S. 181, 190 (1900)).

78. See *supra* notes 42-48 and accompanying text.

79. See *supra* Parts I.B.1, I.B.2.



presents a better focus for legislatures. As this Note will soon make evident, professional plaintiffs have plied their trade for as long as private enforcement bounties have existed and greed has been a part of human nature.

## II. THE EVOLUTION OF PRIVATE ENFORCEMENT ACTIONS: THE MOVEMENT TOWARD A PERSONALIZED INJURY REQUIREMENT

### A. *The Early Professional Plaintiffs: English "Common Informers" and Qui Tam Suits*

*"[T]here arose a small but ruthless and unprincipled group of people who, from time to time, interested themselves in particular sets of statutes the enforcement of which would provide them with easy and appreciable profit."*<sup>80</sup>

It was England circa 1750. Lawlessness and debauchery pervaded London like a deep fog. So-called "lesser infringements of the law" proliferated, including gambling, petty thievery, and the unlicensed operation of dancing establishments.<sup>81</sup> As historian and criminologist Leon Radzinowicz explains, the authorities, having used other methods of combating the "more serious crimes," turned to the populace to tackle the misdemeanors that plagued the "morals and good order of society in general."<sup>82</sup> In this atmosphere of villainy, the *qui tam* suit came into wide use, offering a monetary bounty to the ordinary citizen for "act[ing] as a policeman, and as a protector of the community against a vast mass of delinquency."<sup>83</sup>

But the empowerment of a large army of citizen-policemen did not come without costs. As one commentator observed, "*qui tam* was

---

80. 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 147 (1956).

81. *Id.* at 142, 144-45.

82. *Id.* at 142, 145-46; see also Robert W. Fischer, Jr., Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. REV. 778, 778-79 & n.4 (1973) ("Generally speaking, *qui tam* appears to have been used where individual violations of a statute were of minor importance, but an aggregated series of violations was of some social significance." (citing 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 146 (1948))).

83. RADZINOWICZ, *supra* note 80, at 145-47. Radzinowicz defined a common informer as "a person who brought certain transgressions to the notice of the authorities and instituted proceedings, not because he, personally, had been aggrieved or wished to see justice done, but because under the law he was entitled to a part of any fine which might be imposed." *Id.* at 138.



controlled by an elite group of professional plaintiffs.”<sup>84</sup> These litigants had many of the characteristics of modern professional plaintiffs, including their ability to specialize in bringing certain causes of action, their litigious nature, and their primary aim of winning money.<sup>85</sup>

Early professional plaintiffs also posed many of the same problems as their modern counterparts. An anonymous nineteenth-century pamphleteer noted that there were “many cases wherein the informer is so interested, that he would rather nurse the criminal than check the crime.”<sup>86</sup> In addition, the Metropolitan Police spoke out against informers, observing that they “do not take ... measures to prevent parties infringing the law, but merely to entrap them in order to get the penalty.”<sup>87</sup> Modern professional litigants pose similar problems. As one commentator has observed, “deterrence usually takes a back seat to the compensation goal.”<sup>88</sup> Additional problems of early qui tam suits, which mirror those presented by the modern professional plaintiff, include that the availability of bounties for qui tam suits pitted citizens against each other, that they provided plaintiffs with “excessive powers,” and that they were “subject to abuse.”<sup>89</sup>

As Radzinowicz describes, English society turned against the common informer almost immediately, with the literature identifying various insults directed at them. Edward Coke called them “viperous vermin,” and others referred to them as “unprincipled pettifoggers.”<sup>90</sup> Eventually, popular anger led to the abolishment

---

84. Fischer, *supra* note 82, at 799 (citation omitted).

85. See RADZINOWICZ, *supra* note 80, at 147-50; Fischer, *supra* note 82, at 779 & n.6. See *supra* Part I.A for more details on the characteristics of modern professional plaintiffs.

86. RADZINOWICZ, *supra* note 80, at 152 (quoting *Considerations of a Police Report, of the Year of Our Lord, 1816, with a Plan for Effectually Suppressing ... Thieving*, in 21 PAMPHLETEER 210 (1822)).

87. RADZINOWICZ, *supra* note 80, at 153 (quoting *Report from the Select Committee on the Police of the Metropolis*, in 16 PARL. PAPERS 1 (1834)).

88. Keith L. Johnson, *Deterrence of Corporate Fraud Through Securities Litigation: The Role of Institutional Investors*, 60 LAW & CONTEMP. PROBS. 155, 156 (1997); see also Gluck v. CellStar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997) (“The best relief for the plaintiff class is not always the relief which would be sought by a ‘professional plaintiff.’”).

89. See Fischer, *supra* note 82, at 779; see also *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000) (“For obvious reasons, the informer statutes were highly subject to abuse.”).

90. RADZINOWICZ, *supra* note 80, at 139.



of qui tam statutes in England.<sup>91</sup> In the United States, however, qui tam actions survived, primarily through the False Claims Act, which originated during the Civil War, representing the most popular qui tam suit in the United States that remains to this day.<sup>92</sup> At least one commentator has argued that qui tam actions also continued in a different form: as statutes granting citizens a private right to enforce the law, but with the additional requirement that the citizens have suffered a personalized injury. This reasoning makes modern “injured” professional plaintiffs simply a different type of qui tam plaintiff.<sup>93</sup>

*B. Taming the Professional Plaintiff: The Introduction of the Personalized Injury Requirement*

Throughout centuries of American and English legal history, the notion that a legislature could grant standing to any person to uphold certain laws through private enforcement actions persisted.<sup>94</sup> In the United States, these laws did not initially distinguish between those plaintiffs who suffered a personalized injury and those who sued based on an injury to society because the Supreme Court had not yet read a personalized injury requirement into Article III of the Constitution.<sup>95</sup> Although the rise of this require

---

91. Fischer, *supra* note 82, at 779.

92. *Vi. Agency of Natural Res.*, 529 U.S. at 768 (“[T]he False Claims Act (FCA) is the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*.”). The False Claims Act is a qui tam statute that permits any citizen to sue a federal contractor for defrauding the government. *Id.* at 765; *see also* Fischer, *supra* note 82, at 787, 788 & n.59.

93. *See* Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 84-87 (describing the gradual move to private enforcement statutes with a personalized injury requirement); *see also* Fischer, *supra* note 82, at 785 (“It is possible to draft a statute so that the class of injured parties is very large.”).

94. *See, e.g.*, Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170-77 (1992) (chronicling the lengthy history of private enforcement actions without a personalized injury requirement); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341-42 (1989) (“Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.” (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943))).

95. *See* Sunstein, *supra* note 94, at 177 (finding that, before World War II, “people ha[d] standing if the law ha[d] granted them a right to bring suit”); *see also* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1133 (2009) (“[F]or several decades in the middle of the last century, Congress was allowed to authorize legal challenges



ment resulted primarily from the historical and constitutional development of private enforcement actions,<sup>96</sup> courts and legislatures in modern times have also used tighter personalized injury requirements as a way to reduce the influence of professional plaintiffs on the justice system.<sup>97</sup>

Early professional plaintiffs had an easier time obtaining statutory bounties than the professional litigants active today because the lack of a personal injury requirement meant that they could earn money for reporting criminal conduct that was widely practiced in society.<sup>98</sup> The *qui tam* procedure used by early plaintiffs, which allowed any citizen to sue to enforce the law, can be distinguished from the procedure used by modern plaintiffs under statutes that “limit[] the class of potential plaintiffs” through the use of standing requirements.<sup>99</sup> *Qui tam* professional plaintiffs did not have to show an “individual wrong” to themselves,<sup>100</sup> whereas modern professional plaintiffs must typically make such a showing when bringing private enforcement actions that offer a monetary bounty—a type of suit that plaintiffs have widely used in the United States during the last few decades.<sup>101</sup>

---

to government action by parties whose only cognizable interest was just that: that the government abide by the law.”).

96. See Magill, *supra* note 95, at 1160-62, 1167-78 (reviewing the “death” of Congress’s ability to grant standing to the public in suits against the government in the absence of a personalized injury); Sunstein, *supra* note 94, at 198-202 (discussing the Court’s reasoning in *Lujan*).

97. See *infra* Parts II.C, III.

98. See RADZINOWICZ, *supra* note 80, at 146 (stating that common informers were “on alert to discover any infringements of the law”).

99. Fischer, *supra* note 82, at 783-85 (discussing “injured party plaintiffs”). The CAN-SPAM Act’s requirement that plaintiffs show they have been “adversely affected” by the defendant is one such requirement. See *supra* notes 11-12 and accompanying text. Some early plaintiffs did suffer an injury, but the *qui tam* procedure was more prevalent at the time. See *The History and Development of Qui Tam*, *supra* note 93, at 87.

100. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 731 (2004) (“According to one lawyer, indeed, ‘[q]ui tam actions are judged with great jealousy, because the plaintiff does not seek to recover anything that he has lost, nor to redress any individual wrong, but only to expose the faults of his neighbor and turn them to his own profit.’” (quoting *Vaughn v. McQueen*, 9 Mo. 330, 331 (1845))).

101. See Bucy, *supra* note 8, at 13 (“There are a number of statutes that empower private persons, as well as public prosecutors, to sue those who violate the statutes.”). This Note focuses on private enforcement statutes with standing requirements that require an injury. *Qui tam* statutes used by professional plaintiffs, such as the False Claims Act, are beyond the scope of this Note.



Scholars have attempted to categorize private enforcement actions based on the purpose of a lawsuit and whether the underlying action requires a personalized injury. Professor Pamela Bucy classifies the early *qui tam* professionals as operating under the “‘common good’ private justice” model.<sup>102</sup> As she states, these actions “are brought by plaintiffs who have suffered no personal injury but who have been given authority to sue malfeasors because their lawsuits ... bring additional resources to law enforcement’s efforts.”<sup>103</sup> Most modern professional plaintiffs bring private enforcement actions under what Professor Bucy calls the “‘victim’ private justice” model that applies to “those who have been injured by a defendant’s breach of statutory duty.”<sup>104</sup> This historical distinction is important because professional plaintiffs have rendered it meaningless.

*C. How Modern Professional Plaintiffs Have Defeated the Personalized Injury Requirement*

*“The CAN-SPAM Act was enacted to protect individuals and legitimate businesses—not to support a litigation mill for entrepreneurs like Gordon.”*<sup>105</sup>

Today’s professional plaintiffs would like to return to the era of the common informer, in which any person could sue a private party for violating the law to collect a monetary bounty.<sup>106</sup> But the recent popularization of the personalized injury requirement for standing<sup>107</sup> and its tightening by courts and legislatures<sup>108</sup> have frustrated these goals. Guided by the prospect of financial gain, professional plaintiffs have adapted to overcome this personal injury requirement by creating injuries where none previously existed so as to appear indistinguishable from ordinary plaintiffs.<sup>109</sup> Indeed, in some

---

102. *Id.*

103. *Id.*

104. *Id.* at 13-15. Plaintiffs suing under the Securities Exchange Act represent an exception because Professor Bucy considers them to occupy a third, “hybrid” category. *Id.* at 23.

105. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1057 (9th Cir. 2009).

106. *See supra* notes 82-83 and accompanying text.

107. *See supra* Part II.B.

108. *See infra* Part III.

109. *See supra* note 52 and accompanying text.



cases, it is nearly impossible to separate the “real” plaintiffs from the professionals without peering into the plaintiffs’ minds.<sup>110</sup>

These attempts to “blend in” with actually injured plaintiffs represent a successful method that modern professional litigants use to avoid the personalized injury requirement. In recent times, legislatures have imposed tighter plaintiff injury requirements in part to keep “bounty hunters” away from the courthouse.<sup>111</sup> But the statutes that professional plaintiffs use often define the injury element so broadly that it can be easily “manufactured” by anyone.<sup>112</sup> As Judge Gould noted, when a plaintiff can create an injury, it renders the injury requirement of the statute illusory, providing any person who “manufacture[s]” an injury with the ability to collect the statutory bounty.<sup>113</sup>

Vague statutory standing requirements also violate the tenets of modern constitutional standing doctrine. Current Article III jurisprudence denies standing to plaintiffs bringing “generalized grievances more appropriately addressed through the political process.”<sup>114</sup> If a statute defines the injury so broadly that any person can “manufacture” it with little trouble, the injury becomes a generalized grievance, and thus the statutory standing requirement is unconstitutional.

For example, in *Nike v. Kasky*, the plaintiff sued under a California citizen suit statute prohibiting false advertising.<sup>115</sup> The statute’s standing provision provided that a plaintiff must “have suffered injury in fact and have lost money or property as a result

---

110. See *supra* notes 75-76 and accompanying text.

111. See Fischer, *supra* note 82, at 785 (“[When] the class of injured parties is very large ... the possibilities for abuse would be almost equal to those arising from the universal class of plaintiffs under a *qui tam* statute.”); see also *infra* Part III.

112. The CAN-SPAM Act used by the plaintiff in the *Gordon* case required only that the plaintiff be a provider of “Internet access service” who was “adversely affected” by the defendant’s violation. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1051 (9th Cir. 2009); see also *infra* note 117 and accompanying text. By setting up an e-mail server and signing up e-mail addresses for online promotions, Gordon was able to satisfy these requirements with minimal effort. Cf. *supra* notes 33-38 and accompanying text.

113. See *supra* note 49 and accompanying text.

114. Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 171 (1997).

115. 539 U.S. 654, 656 (2003); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 591 (2005).



of the defendant's unfair competition."<sup>116</sup> Professor Trevor W. Morrison observes that the statute's "injury requirement alone may often be inadequate [to protect free speech] because injury will be too easy to establish."<sup>117</sup> He also writes that plaintiffs suing under the California statute could easily "establish 'injury' on the basis of a single product purchase or similar low-cost, commonplace activity," and that the statute thus fails to prevent "ideologically and financially motivated plaintiffs" from bringing suit.<sup>118</sup>

The CAN-SPAM Act, which served as the basis of Gordon's lawsuit, provides a further illustration. It has two primary standing requirements: the plaintiff must (1) be a "provider of Internet access service" and (2) have been "adversely affected" by the defendant's alleged violations.<sup>119</sup> Had the Ninth Circuit not used the legislative history of the Act to interpret the statute as requiring that the Internet access service be "bona fide," and had the court found that Gordon's action of bringing spam upon himself constituted an adverse effect,<sup>120</sup> then Gordon would have succeeded in suing on an injury he created and brought upon himself. If the court had reached that result, then only a small investment of time and money would be required for the average person to register a domain name and sign up for online "promotions" and "prize giveaways" to obtain enough spam necessary to file a complaint and reap the financial rewards of the CAN-SPAM Act.<sup>121</sup> In other words, the original personalized injury requirement was not personal enough; it did not sufficiently limit the class of plaintiffs who could sue and did not require a serious injury.

---

116. Morrison, *supra* note 115, at 639 (quotations omitted).

117. *Id.* at 640.

118. *Id.* at 640-41.

119. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1051 (9th Cir. 2009) ("We first address whether Gordon is a 'provider of Internet access service' who, if adversely affected by a statutory violation, has private standing to bring CAN-SPAM Act claims.").

120. The court declined to reach this result. *See id.* at 1055-57 (discussing how Gordon failed to meet the standing requirements). Gordon could not demonstrate injury because "the harms redressable under the CAN-SPAM Act must parallel the limited private right of action and therefore should reflect those types of harms uniquely encountered by IAS providers." *Id.* at 1053. Gordon failed to show that he was a protected plaintiff because the court's "review of the congressional record reveal[ed] a legitimate concern that the private right of action be circumscribed and confined to a narrow group of private plaintiffs." *Id.* at 1050.

121. *See generally id.* at 1045-46 (describing how Gordon created his antispam operation).



Comparing the CAN-SPAM Act to a private enforcement statute with a narrower personal injury requirement such as the ADA demonstrates the importance of a properly focused personal injury standing requirement in preventing professional plaintiffs from “manufacturing” injuries. The ADA’s public accommodations provision contains a standing requirement implying that a plaintiff bringing a private enforcement action must have a disability.<sup>122</sup> Professor Samuel Bagenstos notes that this requirement limits the plaintiffs who may sue to “the narrowly drawn class of individuals with disabilities, as defined by the ADA.”<sup>123</sup>

It is unlikely that the average professional plaintiff would render himself disabled for the purpose of bringing a private enforcement action under the ADA. So, as long as the ADA’s definition of “disabled” remains tight enough,<sup>124</sup> the statute’s narrower, more personalized injury requirement limits the potential pool of professional plaintiffs by making it more difficult for the average person to “manufacture” an injury.<sup>125</sup> For the professional plaintiff without a disability, the cost of creating an injury in this context is probably prohibitive.

Part III further explores the legal tools that Congress and courts use to stop professional plaintiffs from suing on “manufactured” injuries. Toward that end, policymakers have redefined the injury requirements in statutes favored by professional plaintiffs to make it more costly and undesirable for the average plaintiff to create an injury under each statute.

### III. CLASSIFYING STANDING RESTRICTIONS IN PRIVATE ENFORCEMENT ACTIONS POPULAR WITH PROFESSIONAL PLAINTIFFS

For centuries, professional plaintiffs have been one step ahead of courts and legislatures in using private enforcement actions to make

---

122. See 42 U.S.C. § 12188 (2006) (referring to “any person who is being subjected to discrimination on the basis of disability” and “a person with a disability”).

123. Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 27 (2006).

124. The ADA’s definition of “disability” is “a physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102.

125. See D. Russell Hymas & Brett R. Parkinson, Comment, *Architectural Barriers Under the ADA: An Answer to the Judiciary’s Struggle with Technical Non-Compliance*, 39 CAL. W. L. REV. 349, 373 (2003).



easy money despite efforts aimed at stopping them.<sup>126</sup> Modern methods used to bar the professional litigant from the courthouse often involve modifying the statutes under which the litigants sue. These provisions can be placed into three categories: those that (1) narrow the definition of the *injury* necessary to sustain a claim so that the injury is harder to “manufacture,” (2) narrow the definition of the *plaintiff* who may bring a claim by including characteristics that are costly or undesirable to adopt, or (3) alter or eliminate the *monetary incentives* that motivate professional plaintiffs to bring claims. This Part focuses on the first two categories of methods, which together modify the “personalized injury” standing requirement to make it more “personalized.”<sup>127</sup> These methods can be derived from Justice Kennedy’s concurring opinion in *Lujan v. Defenders of Wildlife*, in which he stated that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” but “Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”<sup>128</sup>

### A. Narrowing the Injury

The first classification includes statutory provisions that narrow the definition of an injury needed for standing under a citizen suit statute. These provisions represent the injury portion of the

---

126. See *supra* notes 80-89 and accompanying text.

127. The third option, reducing or eliminating the monetary incentive for plaintiffs to bring lawsuits, is misguided because it might also discourage proper litigants from filing lawsuits. See Bagenstos, *supra* note 123, at 18 (“Without the prospect of recovering fees, too few attorneys will be willing to take public interest cases, and the law will be underenforced.”); see also *supra* note 25 and accompanying text. For example, Congress entertained the idea of requiring potential plaintiffs to provide business owners with ninety days to fix alleged ADA violations before the plaintiffs could sue. Milani, *supra* note 29, at 135-36. This safe harbor period would have the effect of barring professional plaintiffs, who would be less likely to file suit if businesses could correct violations and avoid paying plaintiffs’ attorneys fees. See *id.* at 136-37. But it also might prevent amateur plaintiffs from suing if the cost of notification was too great.

128. 504 U.S. 555, 580 (1992) (Kennedy, J., concurring); see also Bagenstos, *supra* note 123, at 27 (discussing how Congress has done this in the context of “the ADA’s public accommodations title”). Although Justice Kennedy was referring to constitutional standing, this Note assumes that the same reasoning would apply to statutory standing.



“personalized injury” requirement that is the defining characteristic of citizen suit statutes<sup>129</sup> and are aimed at making the injury difficult for plaintiffs to create.<sup>130</sup>

For example, courts have already imposed their own standing requirements under the ADA that narrow the definition of an injury. As two commentators have noted, plaintiffs alleging a violation must show a “‘real and immediate threat’ of repeated future harm.”<sup>131</sup> Those scholars believe that this standing requirement properly prevents professional plaintiffs from “claiming ADA violations in many places of public accommodation at which it is highly unlikely that such persons will visit in the future.”<sup>132</sup> Here, courts narrow the definition of the injury so that, in order to create an injury, professional plaintiffs must visit the establishment they intend to sue multiple times,<sup>133</sup> adding additional cost to their efforts. The greater the cost, the less likely professional plaintiffs will find the action worth pursuing.

### *B. Narrowing the Plaintiff*

The second type of standing requirement narrows the definition of the plaintiff and represents the “personalized” part of the “personalized injury.” These provisions seek to ensure that the statute protects only those plaintiffs whom the legislature intended the statute to protect by requiring some characteristic that is costly or undesirable for plaintiffs to “manufacture.” A commentator has

---

129. See *supra* notes 99-101 and accompanying text.

130. Regular plaintiffs “suffer” injuries. Professional plaintiffs “create” injuries. Often, it is hard to tell the difference. See *supra* Part I.B.

131. Hymas & Parkinson, *supra* note 125, at 373 (quoting *Aikins v. St. Helena Hosp.*, No. C 93-3933 FMS, 1994 WL 794759, at \*3 (N.D. Cal. Apr. 4, 1994)) (emphasis omitted); see also Wade & Inacio, *supra* note 44, at 34 (cataloguing cases in which courts have dismissed suits for lack of standing on this basis).

132. Hymas & Parkinson, *supra* note 125, at 373. Courts have imposed a similar standing requirement on plaintiffs suing holders of invalid patents for alleged antitrust violations. Such plaintiffs must demonstrate that they had the ability and desire “to enter the relevant market,” and that the invalid patent caused the plaintiff to refrain from entering the market. Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 166 (2006).

133. Hymas & Parkinson, *supra* note 125, at 370 (“This requirement can be reduced to the plaintiff showing that (s)he had definite plans to return to the place of public accommodation, such as a frequently visited restaurant.”).



suggested that there are statutes in which “a universal class of plaintiffs will afford too much opportunity for abuse, and the number of possible plaintiffs should be limited.”<sup>134</sup> An example of this type of provision would be the requirement that an individual suing under the ADA have a disability because a disability is not desirable for professional plaintiffs to “manufacture.”<sup>135</sup> This provision at least limits use of ADA remedies to professional plaintiffs with disabilities.

### *C. Classifying Other Standing Requirements*

Considering the standing requirements of other citizen suit provisions indicates that most of them can be classified under one of the two categories above, with some falling under both. The CAN-SPAM Act’s standing requirement that the plaintiff be a bona fide “provider of Internet access service,”<sup>136</sup> is an example of a requirement that narrows the definition of the plaintiff because individuals who are not providers or individuals who are providers but not bona fide providers will not have standing to sue under the Act.<sup>137</sup> The Act’s requirement that the plaintiff has been “adversely affected” by the defendant’s alleged violations<sup>138</sup> falls under both categories. This standing restriction narrows the definition of the injury because it mandates that the injury be severe enough to constitute an adverse effect and not merely an inconvenience.<sup>139</sup> It further narrows the definition of the plaintiff because not all bona fide Internet access providers can sue; only those bona fide providers who have been adversely affected have standing.<sup>140</sup>

Similarly, commentators have noted that, under the ADA, the barrier to the person with a disability must be “within the class of barriers that affect that person’s disability.”<sup>141</sup> This restriction

---

134. Fischer, *supra* note 82, at 800 n.112.

135. See *supra* note 122 and accompanying text. Essentially, the large cost of adopting the statute’s required characteristic outweighs any monetary benefit to be gained from doing so.

136. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1051 (9th Cir. 2009); see also *supra* notes 119-20 and accompanying text.

137. See *supra* notes 119-21 and accompanying text.

138. See *supra* notes 119-21 and accompanying text.

139. See *Gordon*, 575 F.3d at 1057 (finding that Gordon “endure[d] no real ISP-type harm”).

140. See *supra* notes 119-20 and accompanying text.

141. Hymas & Parkinson, *supra* note 125, at 371.



narrows both the definition of the injury and the definition of the plaintiff. It shrinks the injury because plaintiffs with disabilities can bring a suit for only those barriers that affect their disabilities—not all barriers will suffice. And it reduces the pool of potential plaintiffs by granting standing to only those people whose disabilities are affected by particular barriers.

Standing restrictions in securities suits can be similarly categorized. Historically, professional plaintiffs bringing lawsuits under the Securities Exchange Act of 1934<sup>142</sup> frequently purchased a small number of shares in hundreds of companies for the purpose of suing when the stock price declined.<sup>143</sup> In an attempt to remedy this situation, Congress passed the Private Securities Litigation Reform Act.<sup>144</sup> The Act institutes more restrictive standing requirements in an effort to hobble certain types of professional plaintiffs.<sup>145</sup> It sets a ceiling on “the number of lawsuits in which an individual [can] serve as class representative,” and forces plaintiffs to certify that they have “reviewed the complaint” and “not purchased stock for the purpose of participating in the litigation.”<sup>146</sup> These limitations are examples of restrictions that narrow the definition of the plaintiff by prohibiting litigious plaintiffs who purchased stock with the intent to sue from bringing an action.<sup>147</sup> The Act also appoints as lead plaintiff the person or entity with the “largest interest in the litigation.”<sup>148</sup> This provision further narrows the definition of the plaintiff by permitting only the person or entity with the largest interest in the outcome of the case to sue on behalf of the other shareholders.<sup>149</sup>

---

142. 15 U.S.C. §§ 78a-78oo (2006).

143. See *supra* notes 31-32 and accompanying text.

144. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)); see also Patricia J. Meyer, Note, *What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 FORDHAM L. REV. 2517, 2518 (1998) (arguing that the PSLRA “represents Congress’ attempt to resolve the conflict ... between the true fraud victim plaintiff and the professional plaintiff”).

145. See Fisch, *supra* note 32, at 536-37.

146. *Id.*

147. Part I argues that such intent-based factors are not proper standing requirements because of the difficulty of determining the plaintiff’s state of mind and the fact that litigiousness may actually benefit the legal system. See *supra* Part I.B.

148. Fisch, *supra* note 32, at 537.

149. See *supra* note 32.



Because the provisions tightening standing requirements in citizen suits can be classified into one or both of the categories that make up the personalized injury requirement, a more general solution exists to the difficulties that legislatures and courts experience with respect to professional plaintiffs. Part IV proposes a set of guidelines for legislatures to use in drafting standing requirements that exclude professional plaintiffs who would not further the goals of the statute.

#### IV. RECOMMENDATION: GUIDELINES FOR BETTER PERSONALIZED INJURY STANDING REQUIREMENTS IN CITIZEN SUIT STATUTES

##### A. *Scope*

So far, this Note has operated under the assumption that it is always desirable to exclude professional plaintiffs from the justice system. Although most statutes that modern professional plaintiffs use contain some personalized injury requirement,<sup>150</sup> the statutes' broader purpose is to transform plaintiffs into private enforcers of the law for the benefit of society.<sup>151</sup> Several arguments have been made in support of these "private Attorney[s] General," including that they reduce the need for public enforcement by decreasing the pressure on "governmental regulatory resources,"<sup>152</sup> "detering wrongful conduct,"<sup>153</sup> and "providing relief for victims who may have no other effective remedy."<sup>154</sup> One commentator has noted that, "[h]ow much a particular type of private attorney general is thought to be an agent for public ends, in addition to private ones, critically affects the rules by which we should enable (and constrain) her and the fees with which we should reward her."<sup>155</sup>

At least one context exists in which Congress has found that the public benefits of professional plaintiffs outweigh any corollary

---

150. See *supra* notes 100-01 and accompanying text.

151. See Bucy, *supra* note 8, at 8.

152. *Id.* at 4, 17. But see Coffee, *supra* note 8, at 229.

153. Bucy, *supra* note 8, at 17.

154. *Id.*

155. William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2173 (2004).



negative aspects: housing discrimination civil rights lawsuits.<sup>156</sup> Judge Gould noted that the Fair Housing Act allows any person to sue for violations, including plaintiffs who “manufacture” an injury by walking into a house with the intent of being discriminated against.<sup>157</sup> He explained that having a monetary bounty to encourage people to report these violations might be helpful, even if money is the only thing that motivates many of the plaintiffs to bring suit.<sup>158</sup>

But Judge Gould also cautioned that courts “should not extend the concept of ‘tester’ standing to an area where [courts] do not have confidence that Congress intended to empower anyone to make claims.”<sup>159</sup> So in cases in which professional plaintiffs sue under a statute not intended to protect them—or when the injuries they sue upon are not true injuries for which the legislature intended defendants to be liable—either courts or legislatures should step in to reduce the pressure on court resources and the burden on defendants. In addition, the Constitution may require Congress to limit the people who may bring suit and the injuries upon which a lawsuit may be based.<sup>160</sup>

### *B. Proper and Improper Bases for Citizen Suit Standing*

Part I demonstrated the problems involved when courts use after-the-fact guesswork to try to determine whether plaintiffs are professional for the purpose of denying them statutory standing.

---

156. See *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1069 (9th Cir. 2009) (Gould, J., concurring) (“There are a few areas in which our developing statutory law has embraced the concept of permitting claims by those who insert themselves in the controversy for the express purpose of creating a lawsuit. One of the best examples is that we accord standing to those who ‘test’ for discrimination in housing by feigning interest in a housing site.”); see also Amy F. Robertson, *Standing To Sue Under Title III of the ADA*, COLO. LAW., Mar. 27, 1998, at 55 (“[A] tester who intends to continue to patronize, or would like to patronize, a discriminatory public accommodation but brings suit based on an encounter created in order to institute litigation will satisfy the requirements of future harm and will have standing under Article III.”).

157. See *Gordon*, 575 F.3d at 1069 (Gould, J., concurring).

158. See *id.* (“There may be good reasons for allowing this practice as a way to strengthen the enforcement of housing discrimination laws, and Congress provided a broad standing provision for private actors.”).

159. *Id.*

160. See *supra* notes 94-96 and accompanying text.



Inquiries involving plaintiffs' litigiousness, motivation, and role in bringing about their injury present many difficulties for courts.<sup>161</sup>

Litigiousness is not a proper basis because it can be hard to detect and is not traditionally an appropriate inquiry in the absence of bad faith.<sup>162</sup> People who have been truly injured multiple times should be able to sue all of the potential defendants for all of the injuries they sustained.<sup>163</sup> Litigiousness also may give plaintiffs experience, benefiting the legal system by making the plaintiffs better enforcers of the law.<sup>164</sup>

Motivation is difficult for courts to ascertain, which is why courts have held that it is an improper basis for denying plaintiffs standing.<sup>165</sup> Examining plaintiffs' role in bringing about the injury often fails to distinguish plaintiffs who intend to sue for money from those who intend to further the goals of the statute in cases that are not as clear as *Gordon*.<sup>166</sup>

The courts' guesswork as to whether the legislature intended to allow professional plaintiffs to sue, where to draw the line regarding who constitutes a "professional plaintiff," and what represents a "true injury" suggests that it should be the legislature's job to determine what types of plaintiffs and injuries are permitted.<sup>167</sup> Such proscriptive lawmaking would avoid the large uncertainty and burden on judicial resources that these inquiries place upon courts. One judge in an ADA case has made this recommendation, stating that "the system for adjudicating disputes under the ADA cries out for a legislative solution. Only Congress can respond to vexatious

---

161. *See supra* Part I.B.

162. *See supra* notes 61-62 and accompanying text.

163. *See supra* note 67 and accompanying text.

164. *See supra* notes 64-65 and accompanying text.

165. *See supra* notes 70-77 and accompanying text.

166. *See supra* notes 53-58 and accompanying text. It could be argued that, if a professional plaintiff can meet the statutory standing requirements, then the legislature intended that plaintiff to sue to enforce the law. But the fact that legislatures have not corrected attempts by courts to narrow the standing requirements in the ADA—and Congress's passage of the Private Securities Litigation Reform Act instituting new standing requirements—suggests that this is not always the case.

167. *See Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1069 (9th Cir. 2009) (Gould, J., concurring) ("We should not extend the concept of 'tester' standing to an area where we do not have confidence that Congress intended to empower anyone to make claims.").



litigation tactics that otherwise comply with its statutory frameworks.”<sup>168</sup>

Parts II and III demonstrated that the proper focus of efforts to bar professional plaintiffs is the personalized injury requirement of a citizen suit statute. But rather than focus on a plaintiff’s role in bringing about the injury, legislatures should make this requirement more personalized by narrowing the definition of the plaintiff or injury.<sup>169</sup>

### *C. Guidelines for Drafting Statutes and Their Application*

When legislatures formulate standing restrictions to prevent the average person from creating an injury or adopting the characteristics of a plaintiff that the statute protects, they should adhere to a few guidelines. For those restrictions that narrow the definition of the plaintiff, legislatures should ensure that the required characteristics of the plaintiff are (1) consistent with the goals of the statute, (2) costly or undesirable for the average person to adopt, (3) easy and noncontroversial for courts to determine, and (4) capable of separating the professional plaintiff from the ordinary plaintiff. Restrictions that narrow the definition of the injury should meet the same factors, although the word “manufacture” should be substituted for the word “adopt” in factor (2).

If a legislature chooses, plaintiffs who are litigious or motivated by money to create their own injuries would still be able to sue, but these plaintiffs would be considered part of the class of people that the statute is meant to protect, and their injuries would be injuries that the statute is meant to deter.<sup>170</sup> Also, because “manufacturing” an injury would be costlier for the average person if the guidelines are followed, there would be a significantly smaller chance that plaintiffs who meet the statutory standing requirements would be motivated solely by money rather than by furthering the goals of the statute.<sup>171</sup>

---

168. *Brother v. Tiger Partner, L.L.C.*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004).

169. See *supra* Part III for examples.

170. See *supra* notes 156-58 and accompanying text.

171. See *supra* notes 115-18 and accompanying text.



*1. Guidelines for Plaintiff Standing Requirements*

The ADA serves as a useful vehicle for examining the effects of these proposed guidelines. Factor (1) asks whether the proposed language narrowing the definition of the plaintiff is consistent with the goals of the citizen suit statute. This factor requires Congress to articulate the purpose of the statute to determine the “class of persons entitled to bring suit.”<sup>172</sup> For example, as noted above, the ADA has a provision narrowing the definition of the plaintiffs who can sue to those individuals who have disabilities.<sup>173</sup> One of the purposes of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>174</sup> So the requirement that a person bringing a lawsuit have a disability would satisfy factor (1), because although it may reduce the number of people bringing lawsuits under the ADA, it limits the plaintiffs to individuals with disabilities, which is the “class of individuals” the statute was meant to protect.<sup>175</sup>

Factor (2) asks Congress to consider whether the proposed characteristic intended to limit the pool of potential plaintiffs is costly or undesirable for the average person to adopt. This factor introduces a barrier that attempts to prevent the average person from simply adopting the characteristics of a legitimate plaintiff in order to bring a lawsuit.<sup>176</sup> It also requires that the plaintiff have a disability—a characteristic that would be both costly and undesirable for a person without a disability to bring about solely for the purpose of initiating a lawsuit.<sup>177</sup> Thus, the disability requirement, so long as it is narrow, is likely to bar nearly all plaintiffs without disabilities from circumventing the statute’s personalized injury requirement, satisfying factor (2).

Factor (3) requires the characteristics used to limit the types of plaintiffs who may sue to be easy and noncontroversial for courts

---

172. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992); *see also supra* note 128 and accompanying text.

173. *See supra* notes 122-23 and accompanying text.

174. 42 U.S.C. § 12101(b)(1) (2006).

175. *See id.*

176. *See supra* note 52 and accompanying text.

177. *See supra* notes 124-25 and accompanying text.



to determine. Past troubles with courts attempting to consider the plaintiff's role in bringing about the injury, litigiousness, or motivation create the need to include this factor.<sup>178</sup> The characteristic should be noncontroversial—meaning that the lack of the characteristic should be a proper basis for excluding plaintiffs. Nor should courts have to conduct lengthy inquiries when determining whether plaintiffs have the characteristic that the statute requires. Assuming that the definition of “disabled” is clear enough, then the requirement that the plaintiff have a disability satisfies factor (3). It is noncontroversial that plaintiffs lacking a disability should not be able to sue under a statute meant to protect people with disabilities, and courts will be able to determine whether plaintiffs have a disability more easily than courts are able to determine whether plaintiffs have a certain subjective motivation.<sup>179</sup>

Finally, factor (4) seeks to ensure that the above guidelines have resulted in a standing requirement that actually separates professional plaintiffs from ordinary plaintiffs. Congress should imagine scenarios in which professional plaintiffs and their attorneys would try to thwart the standing requirement, assuming that those who would want to gain money by bringing a lawsuit would use all available legal means to blend in with those plaintiffs that the statute intends to protect. Professional plaintiffs who do not have a disability would probably have a difficult time meeting the legal disability requirement without rendering themselves disabled, which seems too costly under factor (2). Thus, all of the factors weigh in favor of the standing requirement.

## *2. Guidelines for Injury Standing Requirements*

The fact that professional plaintiffs with a disability can still bring lawsuits under the ADA suggests that additional personalized injury standing requirements will be necessary if Congress believes

---

178. *See supra* Part I.B.

179. *See* 1 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 2:2 (West 2008) (“The ADA definition is adequate because it provides disability categories rather than listing all disabilities covered, the ADA regulations give specific examples of requisites of those categories, and the regulations also list what is not considered a disability.”). The disability inquiry is not always a simple one, but it will be easier for courts to consider in the average case than the plaintiff's motivation. *See supra* Part I.B.3.



that not all people with a disability should be able to bring suit for any violation. One solution is to narrow the definition of an injury under the ADA. Restrictions that narrow the definition of the injury should meet the same factors as those that narrow the definition of the plaintiff, although the word “manufacture” should be substituted for the word “adopt” in factor (2).

For example, many courts have attempted to narrow the definition of an injury under the ADA by requiring that plaintiffs alleging a violation demonstrate a “‘real and immediate threat’ of repeated *future* harm.”<sup>180</sup> Commentators have suggested that this requirement keeps professional plaintiffs from “claiming ADA violations in many places of public accommodation at which it is highly unlikely that such persons will visit in the future.”<sup>181</sup> Applying the four factors for injury standing limitations indicates that this court-created standing requirement is improper.

Factor (1) asks whether the injury limitation is consistent with the goals of the statute. At least one commentator has suggested that requiring ADA plaintiffs to demonstrate the threat of harm is not consistent with the goals of the statute.<sup>182</sup> The commentator argues that the ADA was not passed to protect only those plaintiffs who frequent businesses but also those who just visit once.<sup>183</sup> This factor, therefore, weighs against finding a valid injury limitation.

Under factor (2), assuming a professional plaintiff with a disability, the question would be whether requiring plaintiffs to make multiple visits to the places they intend to sue would be too costly or undesirable for plaintiffs who want to “manufacture” an injury to bring suit. The burden on the professional plaintiff would depend on how close the business was to the plaintiff’s house, as it would be much easier for the plaintiff to visit a close restaurant multiple

---

180. Hymas & Parkinson, *supra* note 125, at 373; *see also supra* note 131 and accompanying text.

181. Hymas & Parkinson, *supra* note 125, at 373; *see also supra* note 132 and accompanying text.

182. Elizabeth Keadle Markey, *The ADA’s Last Stand?: Standing and the Americans with Disabilities Act*, 71 *FORDHAM L. REV.* 185, 202 (2002).

183. *See id.* at 209 (“This requirement therefore weakens the ADA, allows unlawful conduct, and frees defendants from accountability.”).



times than a distant one.<sup>184</sup> This factor weighs neither for nor against the standing requirement.

Applying factor (3), Congress must determine whether the requirement that a plaintiff demonstrate a “real and immediate threat of repeated *future* harm”<sup>185</sup> would be easy and noncontroversial for courts applying the standing limitation to determine. One factor that courts have considered when making the future harm determination is whether the plaintiffs intend to return to the business they are suing.<sup>186</sup> But this intent inquiry sounds too much like the subjective “motivation” determination made in some professional plaintiff cases that has posed serious difficulties for courts in the past.<sup>187</sup> So factor (3) weighs against a finding of a valid injury limitation.

Finally, factor (4) asks if the injury limitation would allow courts to distinguish professional plaintiffs from plaintiffs whom Congress wants to permit to sue. Assuming a professional plaintiff with a disability, it is unlikely that considering the number of times a plaintiff has visited a particular business would distinguish legitimate plaintiffs from professional ones; a professional plaintiff wanting to bring a lawsuit could simply visit the business frequently to meet this requirement. Thus, because factors (1), (3), and (4) weigh against the injury limitation that requires ADA plaintiffs to demonstrate a threat of future harm by frequently visiting the business they intend to sue, it should not be incorporated into the statute.

An example of a provision that narrows the ADA’s definition of injury and satisfies the four-part test is the requirement that a plaintiff does not have standing if “the alleged barrier did not discriminate against the plaintiff because his or her full and equal

---

184. See *Doran v. Del Taco, Inc.*, No. SACV04046CJC(ANX), 2006 WL 2037942, at \*10 (C.D. Cal. July 5, 2006) (“There simply are too many inconsistencies and inaccuracies for the Court to conclude that Mr. Doran visited Del Taco restaurant # 415, which is located over 500 miles from his residence, *before* he filed his complaint.”).

185. Hymas & Parkinson, *supra* note 125, at 373; see also *supra* note 131 and accompanying text.

186. Markey, *supra* note 182, at 186 (describing a scenario in which a restaurant host excludes a blind man from a restaurant because the man wants to bring his guide dog with him).

187. See *supra* Part I.B.3.



enjoyment of the facility was not impaired.”<sup>188</sup> For example, two scholars note that a minor technical violation, such as a parking space for persons with disabilities that is an inch narrower than accessibility guidelines require, does not impact a plaintiff’s enjoyment of a facility.<sup>189</sup> Preventing plaintiffs from suing business owners for such minor deviations from nonstatutory guidelines would reduce litigation by professional plaintiffs.<sup>190</sup>

This standing requirement satisfies all four factors of a valid injury limitation. It is consistent with the goals of the ADA because Congress intended that places of public accommodation provide persons with disabilities “full and equal enjoyment” of the facilities rather than facilities that fully comply with obscure technical regulations.<sup>191</sup> As further evidence that Congress directed the ADA at correcting major violations rather than technical ones, the statute includes language requiring that places of public accommodation be made “readily accessible” only if they are new or modified,<sup>192</sup> whereas existing facilities must make adjustments to enhance accessibility only if the adjustments are “readily achievable.”<sup>193</sup>

Under factor (2), it would be more costly and undesirable for the average person with a disability to manufacture an injury under the “full enjoyment” standing requirement because professional plaintiffs typically rely on highly technical violations, which are numerous and easy to find, when suing a business under the ADA.<sup>194</sup> Requiring that the accessibility violations actually interfere with the plaintiff’s use of the facility would reduce the number of

---

188. Hymas & Parkinson, *supra* note 125, at 374. The authors of that article argue for a modification of the “full enjoyment” standard, but that discussion is beyond the scope of this Note.

189. *Id.* at 374-75.

190. *Id.* at 375 (“A defendant has a legitimate concern that a ‘professional plaintiff’ might measure the parking space and then bring a lawsuit against the restaurant, alleging that the one-inch deviation from the Accessibility Standards was an architectural barrier.”).

191. 42 U.S.C. § 12182(a) (2006) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”); *see also* Hymas & Parkinson, *supra* note 125, at 375 (“It is important to note that full and equal enjoyment, and not mere accessibility, is the desired goal of Title III of the ADA.”).

192. 42 U.S.C. § 12183(a)(1); *see also* Hymas & Parkinson, *supra* note 125, at 361.

193. 42 U.S.C. § 12182(b)(2)(A)(iv); *see also* Hymas & Parkinson, *supra* note 125, at 361.

194. *See supra* note 189 and accompanying text.



violations that can serve as a valid injury, forcing professional plaintiffs to search harder for major violations that could grant them standing. If courts interpreted the “full enjoyment” standard to mean that a plaintiff may sue a business for only those violations that relate to the plaintiff’s disability, then it would further narrow the barriers that any particular plaintiff could use as a basis for a lawsuit.<sup>195</sup>

Analysis under factor (3) indicates that whether an alleged barrier impacts the plaintiff’s “full enjoyment” of the facility is easier and less controversial to determine than, for example, the plaintiff’s motivation in bringing a lawsuit.<sup>196</sup> Courts in some jurisdictions already compare an individual’s disability with the “architectural barrier” the person allegedly faces, and further require the barrier to be “related” to the person’s disability.<sup>197</sup> For highly technical violations, such as the parking spot that is one inch too narrow,<sup>198</sup> it will be easy for judges to determine that the violation has no effect on a plaintiff’s use of the facility. For violations that are more serious, there may be disagreement over whether the violation interferes with a plaintiff’s “full enjoyment.”<sup>199</sup> But courts will spend less time deciding whether an alleged non-technical barrier constitutes a violation than they would spend deciding whether every plaintiff who brings an ADA claim—whether technical or not—is financially motivated. Finally, under factor (4), even if the standing requirement permits professional plaintiffs with disabilities to sue for violations that interfere with their “full enjoyment” of a facility, these lawsuits are preferable to claims based on highly technical violations that cost businesses and the justice system time and resources while doing nothing to increase accessibility.<sup>200</sup>

---

195. Many courts already impose this requirement. *See Hymas & Parkinson, supra* note 125, at 372.

196. *See supra* Part I.B.3.

197. *See Hymas & Parkinson, supra* note 125, at 372.

198. *See supra* note 189 and accompanying text.

199. *See Hyman & Parkinson, supra* note 125, at 365 (“A case-by-case determination of an architectural barrier is certain to provide inconsistent rulings among the courts.”).

200. *See supra* note 189 and accompanying text.



*D. Concerns with Overreaching*

Narrowing statutory standing requirements responds to the problem that overly permissive standing requirements open the floodgates for professional plaintiffs to sue.<sup>201</sup> But if stricter standing requirements become too selective, they risk closing the courthouse door to plaintiffs with legitimate grievances.<sup>202</sup> The legislature should ensure that any standing restriction achieves the proper balance between excluding undesirable plaintiffs and permitting those who have suffered what the legislature considers to be actionable injuries to sue. The factors above are intended to determine whether the standing requirements are adequate proxies for excluding certain plaintiffs and injuries from the protection of the statute. As they are only proxies, they are not perfect indicators of whether Congress meant to protect the plaintiff or injury. However, the factors are better indicators than the characteristics that courts have previously considered<sup>203</sup>—even if they seem less directly related to whether the plaintiff is a professional.

## CONCLUSION

Two narratives describe the role of professional plaintiffs in society. To some, they are the “private attorneys general”<sup>204</sup> who muster their experience to launch a barrage of litigation and collect their rightful tribute from the unrepentant hordes—violators of scores of statutory commands. To others, they are “viperous vermin”<sup>205</sup> who scuttle from the darkness to gorge themselves on meaty prizes bestowed by unwary legislators.

---

201. For a brief history of how the permissive standing requirements of a California law allowed professional plaintiffs to flourish, see Gavin L. Charlston, Note, *When Silence Means Everything: The Application of Proposition 64 to Pending Actions*, 58 HASTINGS L.J. 623, 625-29 (2007).

202. See *supra* note 25 and accompanying text. This risk is an additional reason why it is improper to consider motivation, litigiousness, or the plaintiff's role in bringing about the injury. These restrictions make the standing requirements too narrow, and frequently exclude legitimate plaintiffs by failing to separate professional plaintiffs from ordinary plaintiffs. See *supra* Part I.B.

203. See *supra* notes 161-66 and accompanying text.

204. Bucy, *supra* note 8, at 63; see also *supra* note 8 and accompanying text.

205. RADZINOWICZ, *supra* note 80, at 139; see also *supra* note 90 and accompanying text.



This Note has not attempted to elevate one narrative over another—indeed, both contain some truth. Instead, this Note has considered the question of whether plaintiffs should have standing to sue when they have brought an injury upon themselves for the purpose of collecting a damage award under a citizen suit statute. History has shown that statutes giving citizens the right to enforce the law in the absence of a personalized injury to the plaintiff fell into disfavor because they were often abused.<sup>206</sup> To remedy this situation, legislatures and courts require that plaintiffs have suffered a personalized injury different from that suffered by society as a whole.<sup>207</sup> But the definitions of the plaintiffs who can sue and the injuries that can serve as the basis for a cause of action are often broad enough under private enforcement statutes' standing requirements that professional plaintiffs can easily "manufacture" injuries or adopt the characteristics of the plaintiffs that the statute protects, rendering the personalized injury requirement meaningless.<sup>208</sup>

If legislatures wish to avoid this outcome, they must stay vigilant and remember professional plaintiffs when drafting private enforcement statutes. This Note has provided guidelines for legislatures to use when determining whether a proposed personalized injury standing requirement involving a limitation of the plaintiff or the injury will properly deny standing to litigants who do not further the goals of the statute.<sup>209</sup>

Legislatures should draft standing requirements with some concrete characteristic of the plaintiff or injury that indicates whether the plaintiff or injury is one that the statute probably meant to protect.<sup>210</sup> Using such proxies will save time while ensuring that the statute protects a narrow class of individuals, although legislatures must be careful not to prohibit too many legitimate claims from being pursued.<sup>211</sup> Legislators should refrain from using factors that are unpredictable and waste judicial

---

206. *See supra* notes 86-91 and accompanying text.

207. *See supra* Part II.B.

208. *See supra* Part II.C.

209. *See supra* Part IV.

210. *See supra* Part IV.C.

211. *See supra* Part IV.D.



resources, such as the plaintiff's motivation, litigiousness, or role in bringing about the injury.<sup>212</sup>

How well legislators articulate the role that professional plaintiffs should play in enforcing certain statutes ultimately will determine whether society accepts the plaintiffs. It is a difficult task that calls upon legislators to harness the volatile forces of human greed to serve the ends of justice.

*Brandon Murrill\**

---

212. *See supra* Part I.B.

\* J.D. Candidate 2011, William & Mary School of Law; B.A. 2008, University of North Carolina at Chapel Hill. This Note is dedicated to my parents, Wendy and Bill, and my sister, Jessica.