

# **Websites, Mobile Applications and the ADA: Strategies to Avoid this Litigation Land Mine**

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# Surge of Website Accessibility Claims

- 37% increase in ADA-related litigation from 2015 to 2016
  - While not all attributable to website accessibility suits, this area is gaining momentum
  - E-commerce continues to expand
  - Greater reliance on mobile applications for retailers and hospitality industry



# Variety of Businesses at Risk

- All businesses with websites or mobile applications are at risk.
  - Foot Locker, Toys “R” Us, Brooks Brothers, NBA, H&R Block, Peapod, Anthropologie, and Burger King have all been sued for website accessibility violations recently.
  - Mall retailers, community banks, schools, and the healthcare industry have also been targeted.
- Settlements
  - On average, cases have resolved in the range of \$10,000 - \$75,000.

# Tools that Aide Plaintiffs

- Easy to identify websites that are susceptible to risk
  - Website accessibility evaluation tool allows users to enter any website, and it will display errors and alerts (<http://wave.webaim.org/>)
- Plaintiffs firms can easily issue numerous demand letters



# Americans with Disabilities Act Overview

- ADA protects the rights of individuals with disabilities as to:
  - Employment
  - Access to state and local government services
  - Places of public accommodation
  - Transportation

# ADA: Title II v. Title III

- Title II
  - Applies to state and local governments
- Title III
  - Applies to places of public accommodation (privately operated entities whose operations affect commerce and that fall within 1 of 12 categories and commercial facilities)

# Is a Website a Place of Public Accommodation?

- Title III:
  - “[n]o 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.” 42 U.S.C. 12182



# Is a Website a Place of Public Accommodation?

- Public accommodation has historically included the following:
  - Lodging and restaurants
  - Theaters, concert halls, stadiums, auditoriums
  - Grocery stores, shopping centers, banks, gas stations, hospitals
  - Bus terminals and airports
  - Museums, parks, zoos, gyms
  - Day care centers and schools



# Is a Website a Place of Public Accommodation?

Circuits split as to whether a “website only” establishment is a public accommodation

– 9<sup>th</sup> Circuit

- Place of public accommodation must have physical location.
- BUT, a website inaccessible to disabled individual may be in violation of the ADA if it provides unequal access to a “service” of a place of public accommodation – must be a nexus between challenged service and place of public accommodation.

– 7<sup>th</sup> Circuit

- Public accommodation can include non-physical locations, including websites
- “An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.” See *Doe v. Mutual of Omaha Ins. Co.* 179 F.3d 557, 558-59 (7th Cir. 1999)

– 1<sup>st</sup> Circuit

- Plain meaning of “public accommodation” does not require that it be a physical structure for persons to enter.
- The ambiguity of “public accommodation” considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.

# Department of Justice (DOJ) Guidance

- 2010: *Advance Notice of Proposed Rulemaking on Accessibility of Web Information and Services*
  - DOJ announced that it would issue new regulations under Title III to address website accessibility under ADA for state and local governments and public accommodations.
  - DOJ sought public comment regarding standards to adopt for website accessibility, resources available to make existing websites accessible, reasonable alternatives to make websites accessible, timing to implement changes, etc.
- November 2015: DOJ shifted releasing rules to the category of “long term actions”.

# Department of Justice Guidance

- April 28, 2016: *Supplemental Advance Notice of Proposed Rulemaking (SANPRM)*
  - Applicable to state and local governments, but has more far-reaching implications
  - Requested public comment to 123 questions



# DOJ Guidance

## 2016 SANPRM High Level Themes

- Applicable to “web content” (i.e. advertisements) and not just websites
- WCAG\* 2.0 AA should be standard
- May provide 2 years to comply
- Smaller businesses may have less onerous requirements
- May exempt the following:
  - Archived web content
  - Conventional electronic files (i.e. PDFs, Word documents, Excel, etc.)
  - Third party content (both linked and not linked)

\*Web Content Advisability Guidelines

# DOJ Guidance

## 2016 SANPRM High Level Themes

- Social media platforms
  - Information provided must be accessible.
- Educational institutions
  - Content must be accessible.
- Mobile applications
  - Sought public comment as to whether accessibility rules should apply.

# DOJ Guidance

## 2016 SANPRM High Level Themes

- Potential Defenses for non-conformance with WCAG 2.0 AA
  - Undue burden
  - Fundamental alteration



# DOJ Guidance

## 2016 SANPRM High Level Themes

- When asserting defense, consider the following:
  - Burden on company to prove
  - An assertion of burden of compliance must be made by head of entity after considering *all resources* available.
  - Decision must be documented in a written statement, including reasons for making decision.
  - Must provide access in some alternative fashion



# Web Content Accessibility Guidelines (WCAG) 2.0 Level AA

- Four principles of accessibility
  - Perceivable
    - Information and interface cannot be invisible to any sense.
  - Operable
    - Interface cannot require interaction that user cannot perform.
  - Understandable
    - Content or operation of interface cannot be beyond understanding.
  - Robust
    - Content can be interpreted reliably by a wide variety of user agents, including assistive technology.
- See <http://www.w3.org/TR/WCAG20/> for further technical specifications.

# Department of Justice-Guidance

- In January 2017, United States Access Board announced final rule requiring websites and electronic content of federal agencies to conform to WCAG 2.0 AA within 1 year.
- BUT, President Trump recently signed an executive order entitled *Reducing Regulation and Controlling Regulatory Costs*.
  - The purpose is to manage costs associated with governmental imposition of private expenditures required to comply with federal regulations.
  - It is highly unlikely that DOJ will issue website regulations for public accommodations, and therefore, state of law will remain uncertain.

# Where Do The Courts Stand?

- Since DOJ has failed to issue rules, Courts are addressing website accessibility on a case-by-case basis.
- Inconsistent rulings



# Recent Case Law

- *National Association of the Deaf, et al. v. Harvard University, et al.*, Case No. 3:15-cv-30023-MGM, United States District Court, District of Massachusetts
  - Facts: Plaintiffs claim that universities failed to provide equal access for hard of hearing individuals to audio and audiovisual content made available online to the general public for free by failing to caption online content.
  - In February 2016, the United States Magistrate Judge issued a Report and Recommendation denying universities' request for stay pending DOJ's issuance of proposed rules on website accessibility.
  - Proposed rules may aid, but are still proposed, and thus will be of limited help.

# Recent Case Law

- *National Federation of the Blind v. Scribd, Inc.*, 97 F.Supp.3d 565 (D. Vt. 2015)
  - Facts: Plaintiffs claim that Scribd's websites and apps are inaccessible to the blind because they use an exclusively visual interface.
  - The site of the sale is irrelevant. All that matters is whether the good or service is offered to the public.
  - Scribd was determined to be a place of public accommodation under Title III.

# Recent Case law

- In April 2016, Netflix entered into Settlement Agreement with American Council of the Blind, Bay Council of the Blind and an individual.
  - By December 31, 2016, Netflix agreed to provide blind individuals using screen-reading technology with access to services provided on Netflix's website.
  - Netflix agreed to provide audio description to many titles, which describes what is happening visually on the screen when there is no dialogue or when there are significant visual elements.



# Recent Case law

- *Davis v. Colorado Bag’N Baggage*, Case No. CIVDS1504682, California Superior Court, County of San Bernardino
  - Facts: Plaintiff claims that Colorado Bag’N Baggage failed to make its website accessible to a blind shopper.
  - Court held that Plaintiff presented sufficient evidence to conclude that Title III of the ADA applies to Plaintiff’s use of the website where Plaintiff demonstrated he sought goods and services from a place of public accommodation.
  - There was a sufficient nexus between Defendant’s retail store and its website.

# Recent Case law

- *Jose Del-Orden v. Reebok International Ltd.*, Southern District of New York (Class action)
  - Plaintiffs claim ADA violations because website is not accessible to visually impaired people because site blocks screen-reader software.
- *Sipe and Gross v. Deckers Outdoors Corp.*, PA federal court (Ugg boots)
  - Complaint alleges that website is incompatible with screen-reader software when individuals attempted to shop on website.
- *Gniewskowski, et al. v. Party City*, PA federal court
  - Settlement agreement does not bar subsequent website accessibility lawsuit.



# Recent Case law

- *Gil v. Winn Dixie* (Southern District of Florida)
  - DOJ inserted itself into lawsuit filing a Statement of Interest stating that Title III application to websites is consistent with other court decisions when there is a nexus to brick and mortar location.
  - DOJ also expressed view that websites not affiliated with brick and mortar location are also covered under Title III.
- *Kidwell v. Fla. Comm'n on Human Rels.* (Middle District Florida)
  - Court held that SeaWorld website was not a place of public accommodation, though plaintiff was *pro se* and outcome could have been different if plead better.
- *Farmer v. Sweetgreen* (Southern District of New York)
  - Settlement agreement requires improving accessibility of online ordering portal and mobile app, ability to provide feedback regarding website accessibility and addressing issues raised, and web accessibility training to programmers.

# Insurance Coverage

Employment Practices Liability policies may provide coverage for ADA website claims

- Other coverages which may also be implicated include:
  - Media Liability
  - Cyber Liability
  - E &O Coverage (of website developer)
- Costs to comply with injunctive or equitable relief are typically not covered.

# Strategies to Avoid Potential ADA Website Accessibility Violations

- Familiarize and implement, to the extent possible, WCAG 2.0 AA guidelines
- For example, provide text alternatives, create content that can be accessible in a variety of formats, make website functional with keyboard
- Educate those at your company responsible for creating and maintaining your website
- Consider hiring a consultant to audit your website



# Looking Forward

- We anticipate that the law will move in the direction that websites must be compliant with WCAG 2.0 AA, or any subsequent updates
- As you create new websites, add content, or create new applications, consider incorporating technical specifications to make them more accessible
- Be pro-active – we only anticipate this area of the law to grow



# Resources

- ADA Best Practices Tool Kit for State and Local Governments (<https://www.ada.gov/pcatoolkit/toolkitmain.htm>)
  - Provides guidance and checklists
- ADA Guidance on Effective Communication (<https://www.ada.gov/effective-comm.htm>)
- Cornell University Northeast ADA Center (<https://www.northeastada.org/pages/accessibility/website-access.cfm>)
- WAVE Web Accessibility Evaluation Tool (<http://wave.webaim.org/>)
- Web Content Accessibility Guidelines (WCAG) Conformance Requirements (<https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conformance-requirements-head>)

# ADA Website Accessibility

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