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Victoria Prussen Spears

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Website Accessibility: The Legal Landscape

Paul Trahan, Nathan Damweber, and Hiram Kuykendall*

The authors of this article discuss the shifting legal landscape of website accessibility and the rising tide of website accessibility lawsuits filed on behalf of sight- and hearing-impaired plaintiffs against financial institutions, retailers, and other businesses.

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far-reaching that courts must be conscious that what they say today might be obsolete tomorrow.[1]

For several years now, financial institutions, retailers, and other businesses have been facing a rising tide of website accessibility lawsuits filed on behalf of sight- and hearing-impaired plaintiffs. The suits have alleged violations of Title III of the Americans with Disabilities Act ("Title III"), which requires "places of public accommodation" to provide "full and equal enjoyment" of their goods and services to people with disabilities.

The trend appears to be accelerating. In the last two years alone, more than 800 website accessibility lawsuits have been filed in various U.S. courts. The number of Title III lawsuits increased by 16 percent in 2017, with most of the increase attributable to federal web accessibility complaints.[2] These statistics do not include the thousands of demand letters sent to businesses on behalf of would-be plaintiffs, inviting potentially costly pre-litigation settlements of Title III complaints. Also notable and concerning to potential targets of web

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[1] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273 (U.S. 2017).

[2] *See* Kristina M. Launey, Minh N. Vu, & Susan Ryan, *ADA Title III Lawsuits Increase by 16% in 2017 Due Largely to Website Access Lawsuits*; *Physical Accessibility Legislative Reform Efforts Continue*, SEYFARTH SHAW (Feb. 1, 2018), https://www.adatitleiii.com/2018/02/ada-title-iii-lawsuits-increase-by-14-percent-in-2017-due-largely-to-website-access-lawsuits-physical-accessibility-legislative-reform-efforts-continue/.

accessibility lawsuits, it appears that many courts continue to side with plaintiffs.[3]

The legal basis for many of these decisions rests on a finding that "places of public accommodation" may include not just the physical, brick-and-mortar spaces businesses occupy, but also the websites they maintain. This creates a potential legal risk for any entity that interacts with customers and clients online. Banks, credit unions, and other financial institutions are obviously on this "at-risk" list.

The impetus behind this legal juggernaut is not entirely clear, but a relatively small number of plaintiffs' firms appear to be leading the charge; indeed, a single plaintiff's attorney and his affiliated plaintiffs filed more than 1,500 Title III cases *in one year*.[4]

Some commentators have suggested that the disparate standards defining web accessibility and the lack of clear guidance in this area have created a void that these plaintiffs' attorneys are filling.

In September of 2010, after working on website accessibility regulations for many years, the Department of Justice ("DOJ") announced that it "intend[ed] to engage in additional rulemaking *in the near future* (italics added) addressing accessibility in [certain areas], including . . . accessibility of Websites operated by covered public entities and public accommodations."[5]

The "near future" turned out to be not all that near. DOJ officials had said they planned to address accessibility issues in 2018.[6] But when the Trump Administration issued an administrative order requiring the elimination of two existing regulations for every new one adopted, the DOJ announced that it was

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[3] *See* Kristina M. Launey & Minh N. Vu, *Two New York Federal Judges Refuse to Dismiss Website Accessibility Cases*, SEYFARTH SHAW (Aug. 7, 2017), https://www.adatitleiii.com/2017/08/two-new-york-federal-judges-refuse-to-dismiss-website-accessibility-cases/; *see also* Judy Greenwald, *Disability Suits Over Website Access Surge*, BUSINESS INSURANCE (Nov. 6, 2017), http://www.businessinsurance.com/article/20171106/NEWS06/912317033/Americans-with-Disabilities-Act-lawsuits-over-website-access-surge.

[4] Caroline Larsen, *A Reprieve for Arizona Businesses: State Judge Stays More Than 1,100 Cases by Serral ADA Plaintiff*, OGLETREE DEAKINS (Sep. 28, 2016), https://www.ogletree.com/shared-content/content/blog/2016/september/arizona-businesses-state-judge-stays-more-than-1100-cases-by-serial-ada-plaintiffentry.

[5] *Nondiscrimination on the Basis of Disability in State and Local Gov't Servs*, 75 FR 56163, 2010-21821 (Dep't of Justice Sept. 15, 2010).

[6] Ted Wheeler, *E-Tailer fights Threat of 'Drive-By' ADA Lawsuit*, COURTHOUSE NEWS SERVICES (Mar. 27, 2017), https://www.courthousenews.com/e-tailer-fights-threat-drive-ada-lawsuit/.

putting website accessibility on its "inactive" list while it assessed whether rulemaking in this area is "necessary and appropriate."[7]

That assessment, DOJ said, "will be informed by additional review of data and further analysis."[8] In the meantime, the DOJ "will continue to assess whether specific technical standards are necessary and appropriate to assist covered entities with complying" with the Americans with Disabilities Act ("ADA").[9] In response to a spate of lawsuits, credit unions asked Congress in June for clarity on website requirements. The DOJ responded to the subsequent inquiry from Rep. Ted Budd with its position, citing its Notice of Withdrawal: promulgating a web accessibility standard through regulation was still under evaluation. The DOJ response interpreted the ADA to apply to websites, and noncompliance with a voluntary standard did not necessarily constitute violation of the ADA. The DOJ closed its letter noting that Congress also had the ability to provide clarity through legislation.[10] Translation: There are no DOJ standards governing website accessibility and there are not likely to be any in the immediately foreseeable future.

SHIFTING LEGAL LANDSCAPE

With no statutory requirements or regulatory standards defining accessibility compliance, court decisions have varied widely—to say the least. The ADA requires that people with disabilities have access to "any place of public accommodation." A core question on which the courts have differed is: What constitutes a "place of public accommodation?" The statute specifically references places of lodging, dining establishments, entertainment venues and public gathering places, sales or rental establishments, public transportation depots, certain places of recreation, and certain educational establishments.

But it says nothing about websites.[11] And if websites are not places of public accommodation, then the ADA's accessibility requirements (presumably) do not apply to them.

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[7] Minh N. Vu, *DOJ Places Website Rulemaking on the "Inactive" List*, SEYFARTH SHAW (Jul. 21, 2017), https://www.adatitleiii.com/2017/07/doj-places-website-rulemaking-on-the-inactive-list/.

[8] Jennifer S. Rusie & David Raizman, *DOJ Officially Pulls the Plug on Regulations Already on Life Support*, THE NAT'L LAW REVIEW (Dec. 26, 2017), https://www.natlawreview.com/article/doj-officially-pulls-plug-regulations-already-life-support.

[9] *Id.*

[10] *See* Minh N. Vu, *DOJ Says Failure to Comply With Web Accessibility Guidelines is Not Necessarily a Violation of the ADA*, Seyfarth Shaw (Oct. 2, 2018), https://www.adatitleiii.com/2018/10/doj-says-failure-to-comply-with-web-accessibility-guidelines-is-not-necessarily-a-violation-of-the-ada/.

[11] 42 U.S.C. § 12181(7) (1990).

However, as one federal court observed recently, "a 'failure to take such steps as may be necessary to ensure that no individual with a disability is excluded' from the 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations' of the website violates the law."[12]

This should give pause to any business operating a website.

THIRD, SIXTH, NINTH, ELEVENTH, AND FOURTH CIRCUITS: ADA APPLIES ONLY TO PHYSICAL SPACES

Courts in the U.S. Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits (joined recently by the U.S. Court of Appeals for the Fourth) have held that the statutory language unambiguously defines places of public accommodation as physical structures. And as one federal court noted, "the only goods and services that a disabled person has a 'full and equal' right to enjoy are those offered at a physical location."[13]

Third Circuit

For example, in *Ford v. Schering-Plough Corporation*, a former employee sued both her former employer and Metropolitan Life ("MetLife"), the carrier of the employer's group insurance policy, arguing that setting a two-year cap on benefits for mental disabilities, but not for physical disabilities, denied individuals with mental disabilities equal access to disability benefits, which, this plaintiff contended, met the definition of a "public accommodation."[14]

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[12] *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 388 (E.D.N.Y. 2017) (Emphasis added).

[13] *Id.* at 388–89 (emphasis added) (citing *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place . . . . This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places."); *Peoples v. Discover Financial Services, Inc.*, 387 Fed. Appx. 179, 183 (3d Cir. 2010) ("Our court is among those that have taken the position that the term [public accommodation] is limited to physical accommodations."); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (en banc) ("As is evident by § 12187(7), a public accommodation is a physical place and this Court has previously so held."); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) ("Title III provides an extensive list of 'public accommodations' in § 12181(7) . . . . All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services . . . . [T]his context suggests that some connection between the good or service complained of and an actual physical place is required."); *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1282 (11th Cir. 2002) ("Title III encompasses a claim involving telephonic procedures that, in this case, tend to screen out disabled persons from participation in a competition held in a tangible public accommodation.").

[14] *See* 145 F.3d 601, 612–13 (3d Cir. 1998).

The plaintiff argued that the benefits were services offered by a place of public accommodation. The court disagreed, stating that "[t]he plain meaning of Title III is that a public accommodation is a place," and noting, "this is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places."[15] This reading of the statute, the court said, is consistent with civil rights decisions prohibiting discrimination based on race or religion in places of public accommodation, which have also specified that these prohibitions apply only to places and do not include other areas, such as membership in an organization.[16] The court determined that the fact that a workplace is a public accommodation does not mean that the insurance policies at issue were covered by Title III. There, plaintiff's disability benefits were tied to the terms and conditions of her employment, which is covered under Title I (which addresses discrimination against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment), not Title III.[17]

Similarly, in *Peoples v. Discover Financial Services*, a blind plaintiff, convinced he had been fraudulently overcharged by a prostitute for sexual services, filed a complaint with his credit card company, Discovery Financial Services, Inc., n/k/a DFS Services LLC ("DFS").[18] Finding no evidence of fraudulent billing practices, DFS rejected the complaint. The plaintiff sued, arguing that DFS had violated Title III of the ADA by failing to provide reasonable accommodations and safeguards to cardholders with vision impairments, and had discriminated against him by failing to consider his blindness when investigating his fraud claim. The plaintiff's claim was that the communications between the prostitute's credit card processing system and DFS is a public accommodation within the meaning of the ADA.[19] While acknowledging a split among the district courts on the definition of a "public accommodation," the court reaffirmed the Third Circuit's position that "a public accommodation is a place."[20] Because the alleged discriminatory behavior (failure to consider the plaintiff's blindness) in no way relates to the equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations on physical property that

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[15] *Id.*

[16] *Id.* at 613.

[17] *Id.* at 612.

[18] *See* 387 Fed. Appx. 179, 181 (3d Cir. 2010).

[19] *Id. at* 183.

[20] *Id.* at 183–84.

DFS . . . owns, leases, or operates," the court concluded, the lower court had ruled correctly in rejecting the plaintiff's ADA claim.[21]

Sixth Circuit

In *Parker v. Metropolitan Life Insurance Company*, an employee sued her employer and its insurance carrier, alleging that the differential treatment of physical and mental disabilities in the long-term disability plan violated Title III.[22] The plan offered employees benefits for physical disabilities until age 65, but benefits for mental disabilities were capped at two years. The arguments echoed those in the Third Circuit case, *Ford v. Schering-Plough Corp,* and the Sixth Circuit ruled similarly. While an insurance office does meet the definition of a "public accommodation," the court agreed, "the good that plaintiff seeks is not offered by a place of public accommodation." In other words, a benefit plan offered by a private employer is not a good offered by a place of public accommodation, and therefore, is not covered under Title III of the ADA.[23] The court noted, "The public cannot enter the office of MetLife . . . and obtain the long-term disability policy that plaintiff obtained. [Plaintiff] did not access her policy from MetLife's insurance office."[24] "Rather, she obtained her benefits through her employer. There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office."[25]

Ninth Circuit

Similarly, in *Weyer v. Twentieth Century Fox Film Corporation,* another suit targeting Title III disparities in benefits for physical and non-physical (mental illness, alcoholism, and drug abuse) disabilities, the court ruled that "an insurance company administering an employer-provided disability policy is not a 'place of public accommodation' under Title III."[26] All the "public accommodations" listed in Title III, have something in common, the court reasoned. "They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services . . . . [T]his context suggests that some connection between the good or service complained of and

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[21] *Id.*

[22] *See Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1008–09 (6th Cir. 1997).

[23] *See id.* at 1010.

[24] *Id.* at 1011.

[25] *Id.*

[26] *See* 198 F.3d 1104, 1114–15 (9th Cir. 2000).

an actual physical place is required."[27] While the insurance office was a place of public accommodation that must be accessible to the disabled, the court agreed, "this case is not about such matters as ramps and elevators so that disabled people can get to the office. The dispute in this case, over terms of a contract that the insurer markets through an employer, is not what Congress addressed in the public accommodations provisions."[28]

Eleventh Circuit

In *Rendon v. Valleycrest Productions, LTD,* hearing- and mobility-impaired plaintiffs claimed that producers of the television show, "Who Wants To Be A Millionaire," violated Title III by operating an automated telephone contestant selection process that screened out disabled individuals.[29] The district court dismissed the complaint, finding that because the selection process was not conducted at a physical location, there was no "public accommodation" that had to be accessible to the disabled. The Eleventh Circuit reversed, concluding that the Title III complaint targeted "telephonic procedures that, in this case, tend to screen out disabled persons from participation in a competition held in a tangible public accommodation."[30] The fact that the screening happened off-site did not affect whether the plaintiffs had stated a claim within Title III, the court said. What mattered was that the eligibility criteria had prohibited the plaintiffs from accessing a privilege or advantage of the defendants' public accommodation.[31] However, the court also made it clear that it was still interpreting the statutory definition of "public accommodation" as a physical place or a facility, operated by a private entity, whose operations affect commerce and which falls under one of the twelve public accommodation categories listed in the statute.[32]

Fourth Circuit

In *Carroll v. Northwest Federal Credit Union*, the court also cited the direct language of the ADA as the basis for dismissing this suit, filed by a blind plaintiff who complained that the credit union's website was not accessible to the screen reader the plaintiff used to read content.[33] In his complaint, the

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[27] *Id.* at 1114.

[28] *Id.*

[29] 294 F.3d 1279, 1280–81 (11th Cir. 2002).

[30] *Id.* at 1282 (emphasis added).

[31] *Id.*

[32] *Id.* at 1282 n.3.

[33] *Carroll v. Nw. Fed. Credit Union*, 1:17-CV-01205(E.D. Va. Jan. 26, 2018).

plaintiff alleged that certain accessibility barriers on the credit union's website denied him "the full use and enjoyment of the [credit union's] facilities and services."[34] Granting the credit union's motion to dismiss the case, the court noted that websites are not included on the list of entities Title III identifies as public accommodations.[35] "Over the years, Congress has extensively amended the ADA," the court noted, but "*at no point did Congress choose to add websites as a public accommodation*."[36] Making another distinction important in ADA complaints, the court ruled that this plaintiff also lacked standing because he was not eligible to join the credit union, suggesting that credit unions—which typically have certain membership requirements—differ from other institutions that are required to serve the general public.[37] And approximately three months after dismissing his original complaint, the court dismissed plaintiff's amended complaint on the same bases.[38]

CHINKS IN THE LEGAL ARMOR: LANDMARK CASES CONNECT WEBSITES WITH PHYSICAL LOCATIONS

The brick-and-mortar theory of ADA compliance on which these decisions rely offers a potential defense against web accessibility complaints, but the defense is narrow. As one commentator has noted, under this theory, a website operated by an entity that has no physical presence would not have to be accessible to the disabled; but an entity that has a brick-and-mortar presence "could run afoul of the ADA if the website's inaccessibility interferes with the 'full and equal enjoyment' of the goods and services offered at the physical store . . . ."[39] In other words, if a court sees a sufficient connection between a good or service on the website and an actual physical location, it could find that the accessibility requirements of Title III apply, regardless of the jurisdiction in which a business operates.

In *National Federation of the Blind v. Target Corporation*, a Northern District of California case (where courts have ruled that public accommodations are

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[34] *Keith CARROLL, Plaintiff, v. NORTHWEST FEDERAL CREDIT UNION* ("Northwest FCU") Serve: Executive Director In His/Her Official Capacity, Defendant (E.D. Va. Oct. 24, 2017).

[35] *Carroll*, *supra* note 32.

[36] *Id.* (emphasis added).

[37] *See id.; see also* Tina Orem, *Credit Union Prevails in ADA Case*, CREDIT UNION TIMES (Jan. 29, 2018), http://www.cutimes.com/2018/01/29/credit-union-prevails-in-ada-case?slreturn=1517258217; *see also id.*

[38] *See Carroll v. Nw. Fed. Credit Union*, 1:17-CV-01205 (E.D. Va. Apr. 16, 2018).

[39] *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 389 (E.D.N.Y. 2017).

physical places), the court refused to fully dismiss a suit against Target claiming that the company's website violated the ADA because it was not accessible to the blind.[40] Plaintiffs in this suit argued that because Target's website was not accessible to blind customers, they could not perform certain functions related to Target stores, including accessing information about store locations and hours, refilling prescriptions, and ordering photo prints for pick-up at a store.[41]

Target countered that the plaintiffs did not have a valid ADA complaint because they did not claim that they had been denied access to Target stores.[42] The court acknowledged Ninth Circuit rulings that Title III defines a public accommodation as a physical place.[43] However, the court also noted that the statutory language of the ADA "applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation."[44] Finding the distinction between the two prepositions to be significant, the court concluded that Target's website was "heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores."[45] The inaccessibility of the company's website was a valid ADA complaint, the court concluded, because it impeded the plaintiffs' full and equal enjoyment of goods and services offered in Target stores.[46] However, the court also noted that the plaintiffs did not have a valid ADA claim about the accessibility of web content that was not related to goods and services offered in Target stores.[47]

Similarly, in *Gil v. Winn-Dixie Stores, Inc.,* the U.S. District Court for Florida's Southern District used similar reasoning to depart from the Eleventh Circuit's view that ADA complaints are limited to the accessibility of physical structures.[48] The blind plaintiff in this case complained that because the supermarket chain's website was not accessible to the screen reader software the plaintiff used to navigate websites, he could not access key information and services, including store locations and hours, digital coupons linked to customer

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[40] *See Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 949–951, 956 (N.D. Cal. 2006).

[41] *Id.*

[42] *Id.* at 952.

[43] *Id.*

[44] *Id.* at 953 (emphasis in original).

[45] *Id.* at 955.

[46] *Id.* at 949–56.

[47] *Id.*

[48] *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1342 (S.D. Fla. 2017).

rewards cards, and online prescription refills.[49] The plaintiff also alleged that Winn-Dixie's website did not contain notices of its accessibility features or of proposed changes in them.[50]

While acknowledging that the plaintiff was not complaining about the accessibility of a physical place, the court noted that Winn-Dixie's website was "heavily integrated" with the physical store locations.[51] Although the website did not directly sell goods and services to customers, the court reasoned, the services offered by the website were "services, privileges, advantages and accommodations" offered by the physical store locations.[52]

Because the website was inaccessible to customers who had to use screen reader technology, the court found, those customers were denied the full and equal enjoyment of the same offerings available to sighted customers, in violation of the ADA. But the website violated the ADA, the court concluded, not because it was a "place of public accommodation" as defined by the statute, but because it "operate[d] as a gateway to the physical store locations," making it a service of a public accommodation, and thus subject to Title III.[53] Winn Dixie has since asked the U.S. Court of Appeals for the Eleventh Circuit for a reversal of that decision.[54]

Conversely, as demonstrated in *Young v. Facebook, Inc.*, plaintiffs are not always able to establish the connection between a website and a physical location that some courts have required to sustain an ADA compliance complaint.[55] There, a Facebook user with bipolar disorder alleged that Facebook unlawfully discriminated against her by failing to provide reasonable customer services to assist individuals with mental disabilities after Facebook deactivated her account for purported violations of Facebook's Statement of Rights and Responsibilities.[56] The ADA applied, she argued, because Facebook sold gift cards in various retail stores across the country, and its deficient website

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[49] *Id.* at 1349.

[50] *Id.* at 1344.

[51] *Id.* at 1349.

[52] *Id.*

[53] *Id.*

[54] *See* Dori K. Stibolt, *ADA Website Cases Continue to Befuddle Businesses*, FOX ROTHSCHILD, LLP (Nov. 30, 2018), https://southfloridatrial.foxrothschild.com/ada-title-iii/ada-website-cases-continue-to-befuddle-businesses/.

[55] *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

[56] *Id.*

deprived her of full and equal access to the goods and services available to other Facebook customers in those stores.[57]

The U.S. District Court for the Northern District of California disagreed. Although the retail stores in which Facebook gift cards are sold were places of public accommodation, the court said, the plaintiff had not alleged that Facebook in any way leased or operated those stores.[58] As a result, the court held, Facebook's internet services did not have a nexus to a physical place of public accommodation that was sufficient to make Facebook liable under the statute.[59]

The nexus requirement provides a thread on which website operators may be able to hang a defense in ADA compliance litigation. But some courts have begun to focus on control of the website rather than its connection to a brick and mortar facility.

For example, in *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, a group of blind and visually impaired plaintiffs sued AmeriServ (among others), contending that its website violated the ADA because it was not accessible to screen reader technology.[60] A federally chartered bank, AmeriServ offers banking and financial services through its website, as well as through brick-and-mortar retail locations the bank owns and operates throughout Pennsylvania. AmeriServ did not dispute that its physical locations were places of public accommodation and therefore subject to the ADA, but its website, the bank argued, was not a place of public accommodation,[61] and so was not subject to the law's accessibility requirements.

Focusing on the controlling cases in the Third Circuit discussed previously (*Ford v. Schering-Plough Corp*. and *Peoples v. Discover Financial Services)*, the *Gniewkowski* court pointed out that the alleged discrimination in those cases occurred at locations the defendants did not own or control.[62] In this case, the court said, "the alleged discrimination has taken place on property that AmeriServ owns, operates and controls—the AmeriServ website."[63]

This ruling suggests that if a business owns a place of public accommodation, any website it owns may also be subject to the ADA. It does not require much

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[57] *Id.* at 1115.

[58] *Id.* at 1115–16 (citing U.S.C. § 12182(a)).

[59] *Id.* at 1116.

[60] 251 F. Supp. 3d. 908 (W.D. Pa. 2017).

[61] *Id.* at 915.

[62] *Id.* at 915–18.

[63] *Id.* at 918 (emphasis added).

of a leap to conclude that a connection to a physical presence may not be necessary to establish a website's Title III obligations.

FIRST, SEVENTH, AND SECOND CIRCUIT: PUBLIC ACCOMMODATIONS NEED NOT BE PHYSICAL

Courts in the U.S. Courts of Appeals for the First, Seventh, and Second Circuits have followed that path. Diverging sharply from the other circuits in their reading of the ADA, these courts have concluded that places of public accommodation need not be physical structures, and "discrimination may occur when the goods or services of a 'place of public accommodation' are enjoyed by customers who never visit a physical location."[64] Their interpretation of the statute rests primarily on the use of the word "of"—as compared to "at" or "in"—in the statute, which states that "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 . . ."

While courts in the other districts have noted the statute's failure to list websites among the examples of "places of public accommodation," these courts have pointed out that the list includes "travel service" businesses, which, when the statue was enacted, did not usually have a physical location.[65]

First Circuit

In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, for example, the court noted that

> By including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services.[66]

They added,

> To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the

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[64] *See, e.g., Blick Art Materials, LLC*, 268 F. Supp. 3d at 390.

[65] *See id.*

[66] 37 F.3d 12, 19 (1st Cir. 1994).

> purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.[67]

Seventh Circuit

Similarly, in *Doe v. Mutual of Omaha Insurance Company*, the Court of Appeals for the Seventh Circuit held:

> The core meaning of [Section 302(a) of Title III of the ADA], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Website, or other facility (whether in physical space or in electronic space) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.[68]

Second Circuit

In *Pallozzi v. Allstate Life Insurance Co.*, after a couple sued Allstate accusing it of rejecting their application for a joint life insurance policy because of their mental disabilities, the court said:

> We find no merit in Allstate's contention that, because insurance policies are not used in places of public accommodation, they do not qualify as goods or services 'of a place of public accommodation.' The term 'of' generally does not mean 'in,' and there is no indication that Congress intended to employ the term in such an unorthodox manner in [Title III of the ADA]. Furthermore, many of the private entities that Title III defines as 'public accommodations'—such as a 'bakery, grocery store, clothing store, hardware store, [or] shopping center' . . . as well as a 'travel service, . . . gas station, office of an accountant or lawyer, [or] pharmacy,' . . .—sell goods and services that are ordinarily used outside the premises. On Allstate's interpretation, a bakery's refusal to sell bread to a blind person would fall outside the scope of the statute. We see no basis for reading the statute so narrowly.[69]

In *Andrews v. Blick Art Materials, LLC*, a putative class action against a retailer of art supplies, plaintiffs alleged that the company's website violated the

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[67] *Id.*

[68] *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (internal citation omitted).

[69] *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999), *opinion amended on denial of reh'g,* 204 F.3d 392 (2d Cir. 2000).

ADA because it was not accessible to the blind.[70] The plaintiffs argued that the website was either a public accommodation, a place of public accommodation, or a good, service, facility, privilege, advantage, or accommodation of a place of public accommodation, as those terms are defined by the ADA and related regulations.[71] Blick, which operated a brick and mortar store as well as the website, argued that a mere cyber presence could not be a "place of public accommodation," and so the website did not fall within the scope of Title III.[72]

The court ruled otherwise. Embracing the core argument articulated in *Pallozzi* ("It is the sale of goods and services to the public, rather than how and where that sale is executed," that determines applicability of the ADA), the court concluded that it was "unambiguous that under Title III of the ADA, [the website at issue] is a place of public accommodation."[73] This broad interpretation of the ADA, the court said, was consistent with its purpose, which is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[74] A finding that websites are not places of public accommodation, the court noted, would "exempt a huge—and growing—swath of mainstream American life based on the Internet from the [statute's] requirements."[75]

OTHER OUTCOMES AFFECTING ACCESSIBILITY LITIGATION

These decisions highlight the split between the Third, Fourth, Sixth, Ninth and Eleventh Circuits, which have generally rejected the idea that the ADA mandates website accessibility, and the First, Second, and Seventh Circuits, which have generally accepted and expanded the accessibility requirement for websites. Significantly, some courts in the "not-applicable to websites" districts have veered from the judicial orthodoxy in their districts.

In *Gorecki v. Hobby Lobby Stores, Inc.*, for example, a California court (Ninth District) initially refused to dismiss a suit alleging that Hobby Lobby failed to provide "full and equal enjoyment of goods and services" to disabled customers, because the retailer's websites were not accessible to them.[76] "There is nothing unique about this case," the court noted, "as federal courts have resolved

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[70] *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017).

[71] *Id.* at 387.

[72] *Id.*

[73] *Id.* at 393.

[74] *Id.* at 395.

[75] *Id.*

[76] *See* No. 2:17-cv-01131-JFW-SK (C.D. Cal. June 15, 2017).

effective communication claims under the ADA in a wide variety of contexts—including cases involving allegations of unequal access to goods, benefits and services provided through websites."[77] The court eventually dismissed the case after considering a joint stipulation for dismissal.[78]

Awareness of this judicial trend is at least partly responsible for the surge in website accessibility litigation. Targets of these actions have responded in a variety of ways. Some have settled quickly to keep legal costs down and avoid the potentially costly damages and negative publicity an adverse trial verdict would bring. But this reaction, instinctive for many, may not be the most advisable, for two reasons: The settlement costs themselves can be sizable, and, perhaps more importantly, settling a suit with one plaintiff may not preclude suits filed by others.

That was the unsettling conclusion of at least one Pennsylvania court, which ruled that the legal principle of "res judicata" (which generally prohibits two parties from litigating again a suit that has been adjudicated) did not bar a web accessibility suit against a business that had settled with one plaintiff, even though the complaints and facts in the new suit were virtually identical to those in the first. If other courts follow the same reasoning, settling a web accessibility complaint with one plaintiff might reasonably encourage others to follow.

There is a dearth of statutory guidance, regulatory guidance, and case law to limit these suits.

For the time being, however, a business settling with a plaintiff in a website-related ADA lawsuit would be well advised to agree to modify the website to make it ADA compliant and set a deadline in the settlement agreement to do so. At least one court has granted a motion to dismiss a repeat suit for that reason: In that situation, a party filed a lawsuit against a company after the company had already settled with a prior plaintiff with a virtually identical complaint. The settlement specified a deadline for the company to remedy noncompliance and the company was in the process of remedying the barriers identified by both the first and second cases. That settlement deadline had not yet been reached at the time of the second party's suit.[79] Similarly, at least one court has granted a defendant's motion to dismiss because a similar

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[77] *Id.*

[78] *Gorecki v. Hobby Lobby Stores, Inc.*, No. 2:17-CV-01131 JFW (SKx) (C.D. Cal. Oct. 24, 2017) (dismissing *Gorecki v. Hobby Lobby Stores, Inc.*, No. 2:17-cv-01131-JFW-SK (C.D. Cal. June 15, 2017)).

[79] *See Haynes v. Brinker Int'l, Inc.,* No. 17-CV-61265 (S.D. Fla. Sept. 29, 2017).

lawsuit was already settled in which defendant agreed to modify its website to make sure that vision impaired individuals could use it.[80]

CREDIT UNIONS FIGHT BACK

Businesses of all kinds have received demand letters from individuals and advocacy groups threatening web accessibility litigation, but financial institutions generally and credit unions in particular have been major targets. In 2017, more than 60 suits were filed against credit unions in nine states—30 of them brought in a single month (November), and all complaining that content on the websites was inaccessible to vision-impaired consumers relying on screen readers.[81]

Perhaps because they have been targeted so extensively, credit unions, led by the National Association of Federal Credit Unions ("NAFCU"), an industry trade association, have been fighting back aggressively—and with some success. Recognizing that many credit unions were unfamiliar with the ADA and its accessibility requirements, the association published a set of "frequently asked questions" to provide guidance on how to respond to web accessibility suits and demand letters. A NAFCU description of the document says it "includes questions and answers on strategic options under consideration, [identifies] which credit unions are being targeted by plaintiffs' attorneys, and [explains] how credit unions are responding to demand letters regarding their website compliance with the ADA."[82]

As reported on the NAFCU website, "The association has filed 16 amicus briefs in seven different states, including two at the federal appellate level. So far, six of the complaints in which NAFCU has supported the credit union have been dismissed."[83] And the association has sent a cease and desist letter demanding that a California law firm stop sending demand letters to credit unions alleging that they owe legal damages for failure to comply with the

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[80] *Haynes v. Panda Express*, No. 17-CV-61567 (S.D. Fla. Jan. 24, 2018).

[81] *See, e.g.*, Tina Orem, *ADA Cases Spread to Georgia Credit Unions*, CREDIT UNION TIMES (Nov. 17, 2017), http://www.cutimes.com/2017/11/17/ada-cases-spread-to-georgia-credit-unions.

[82] *See* National Association of Federally-Insured Credit Union, *NAFCU Publishes FAQ on ADA to Help CUs Targeted by Lawsuits,* NEWSROOM (Jan. 16, 2018), http://www.nafcu.org/News/2018_News/January/NAFCU_publishes_FAQ_on_ADA_to_help_CUs_targeted_by_lawsuits/.

[83] *See* National Association of Federally-Insured Credit Union, *NAFCU wins cited in CU's ADA suit dismissal,* NEWSROOM (August 10, 2018), https://www.nafcu.org/newsroom/nafcu-wins-cited-cus-ada-suit-dismissal.

ADA. In that letter, NAFCU President Dan Berger accused the law firm of using "questionable facts and assumptions of law" to support its complaints against the credit unions.[84]

Fighting in Congress as well as in courtrooms, the trade group has testified in favor of the ADA Education and Reform Act (which the House Judiciary Committee has approved), citing the need to "protect credit unions and the members they serve from increasing threats of predatory litigation," and to "address website accessibility with clear guidance and standards" rather than through "meritless and costly lawsuits." (The bill has since stalled in the Senate.) In the same vein, the association has emphasized its support for "efforts to ensure individuals with disabilities are not discriminated against and have equal access to financial services," and has urged the Department of Justice to "move forward with proposed rulemaking to clarify [the relevant standards under the ADA]."[85] Additionally, the House Appropriations Committee approved its version of the funding measure directed at the Department of Justice to "clarify standards for website accessibility requirements in FY2019."[86] The Credit Union National Association also wrote Congress in June 2018, with Representative Ted Budd asking the DOJ to clarify website standards. As mentioned earlier, the DOJ refrained from committing to issuing standards, but did state that it interpreted the ADA to apply to websites of public accommodations.[87]

WEBSITE ACCESSIBILITY STANDARDS

Some businesses, including credit unions, have argued that they cannot be sued for violating accessibility standards when there are no generally accepted standards in place—an argument that some courts have accepted but others have found "unpersuasive." One court concluded that "[the] lack of a widely

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[84] David Baumann, *NAFCU Sends Cease & Desist Letter to ADA Law Firm*, Credit Union Times (Jan. 17, 2018), http://www.cutimes.com/2018/01/17/nafcu-sends-cease-desist-letter-to-ada-law-firm?slreturn=1516249037.

[85] *See* Jacqueline Ramsay, *NAFCU Urges DOJ to Address ADA Concerns*, CU Insight (Nov. 10, 2017), https://www.cuinsight.com/press-release/nafcu-urges-doj-address-ada-concerns.

[86] David Baumann, *House Appropriators Pushing Justice Department on ADA Guidance*, Credit Union Times (May 21, 2018), https://www.cutimes.com/2018/05/21/house-appropriators-pushing-justice-department-on/.

[87] *See* Minh N. Vu, *DOJ Says Failure to Comply With Web Accessibility Guidelines is Not Necessarily a Violation of the ADA*, Seyfarth Shaw (Oct. 2, 2018), https://www.adatitleiii.com/2018/10/doj-says-failure-to-comply-with-web-accessibility-guidelines-is-not-necessarily-a-violation-of-the-ada.

accepted standard for website accessibility does not preclude [relief] that would improve access to Defendants' websites by the visually impaired."[88]

Complaints about the lack of clear standards are not entirely accurate. It is true there are no statutory or regulatory standards, but the World Wide Web Consortium ("W3C") has developed comprehensive guidelines detailing essential accessibility features. These standards are known as the Web Content Accessibility Guidelines ("WCAG").

These guidelines have recently been updated (addressing issues related to newer technologies) to version 2.1, maintaining all the elements of the previous version. WCAG version 2.0 is the most widely referenced accessibility guideline both in litigation and in the few laws with clear accessibility standards such as Section 508 of the Rehabilitation Act.[89] That said, there have been cases that call into question using the WCAG as the *de facto* standard.

Robles v. Domino's Pizza LLC successfully argued that the Department of Justice had not provided clear regulations on digital accessibility, and that the plaintiff did not specify a level of compliance.[90] The defense argued that holding Domino's Pizza to the WCAG 2.0 standard would therefore violate the company's right to due process. The court agreed stating:

> Plaintiff seeks to impose on all regulated persons and entities a requirement that they "compl[y] with the WCAG 2.0 Guidelines" without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic. This request flies in the face of due process.[91]

Since then, *Gil v. Winn-Dixie* was found to have violated Title III. In that case, the court upheld two important points:

1) The WCAG 2.0 Level AA was used as an acceptable accessibility guideline.
2) There was no dispute that it is technically possible to make an accessible web environment.[92]

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[88] *See, e.g.*, 279 F.R.D. 529, 559 (C.D. Cal. 2011).

[89] United States Access Board, *Text of the Standards and Guidelines*, https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule/text-of-the-standards-and-guidelines.

[90] *Robles v. Dominos Pizza, LLC*, CV16-06599SJO (SPx) (C.D. Cal. Mar. 20, 2017).

[91] *Id.*

[92] ADA, *Gill v. Winn-Dixie Court Decisions Brief*, SYRACUSE UNIV. (Jun. 13, 2017), https://www.adasoutheast.org/ada/publications/legal/Gil_v_Winn-Dixie.php.

WCAG: Understanding the Guidelines

Unlike the technical standards that govern other components of the web, the WCAG standards are principle-based and can be applied broadly to websites, mobile applications, documents (such as PDFs), and even to other forms of information and communication technology ("ICT") such as hardware interfaces found on copiers.[93] The guidelines are divided into four principles (perceivable, operable, understandable, and robust) that apply to disabilities of all kinds (vision, hearing, mobility, and cognition).

Detailed guidelines in each of the four categories contain testable, normative criteria for determining accessibility success. There are three success rankings:

- A—Covers bare minimum accessibility features and is not generally considered acceptable for websites;
- AA—Incorporates Level A accessibility features and goes beyond them; Level AA is currently recognized as the primary standard for websites; and
- AAA—The highest level, which incorporates and surpasses Levels A and AA; it defines future goals and accessibility potential, but is unlikely to be established as a general accessibility standard.

WCAG's Relationship to Assistive Technology

Many of the accessibility standards have implications for assistive technology ("AT"), which the Assistive Technology Industry Association defines as "Any item, piece of equipment, software program, or product system that is used to increase, maintain, or improve the functional capabilities of persons with disabilities."[94]

Eyeglasses are an obvious assistive technology, used to correct common vision problems—nearsightedness and farsightedness, for example. People who are blind or whose vision is severely impaired rely on screen reader software, which reads aloud both content and contextual information. The common keyboard becomes another form of assistive technology for people with low vision or blindness, as well as for people with mobility impairments who cannot use a mouse. There are many other forms of assistive technology, but all attempt to give people with disabilities access to digital experiences that would otherwise be closed to them.

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[93] United States Access Board, *Text of the Standards and Guidelines: E103–Definitions,* https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule/text-of-the-standards-and-guidelines#E103-definitions.

[94] Assistive Technology Industry Association, *What is AT?*, https://www.atia.org/at-resources/what-is-at/.

The following example illustrates how WCAG standards apply to specific accessibility challenges.

Example of a WCAG Violation

Lack of screen reader support for the blind and low vision user was a major factor in the *Winn-Dixie* case, where the court found that 90 percent of the tabs and the search box on the company's website did not work with screen reader software.[95] This effectively prevented someone who relies on screen reader technology from perceiving and using the Winn-Dixie online website. This was one of the determining factors in the failure to comply with Title III.

One problem out of many that plaintiffs identified: The coding for online applications did not connect the form fields to their labels (name, address, etc.). As a result, a screen reader would read the form field as a generic "text field," providing no information about what information was to be entered. This is a common accessibility error, cited in many accessibility suits, and it violates the most basic WCAG rating (A).

WCAG addresses these issues in detail, providing "success criterion" that, if met, guides developers in creating an accessible site that works with assistive technologies and makes the site more usable.

WCAG 3.3.2, a success criterion listed under Guideline 3.3, "Input Assistance," explicitly states that a label is required for form fields so a user understands the intent of the control.[96]

> *3.3.2 Labels or Instructions: Labels or instructions are provided when content requires user input. (Level A)*

While this may seem obvious visually, it is not always implemented so that a screen reader reads the label when the field is accessed.

While form labeling seems a small detail, it demonstrates how a small technical omission can have dramatic consequences for the user. Results can range from the user requiring help from a third party, reliance on secondary accommodations such as phone support (which can have limitations such as limited hours of operation), or requiring the user to travel to the physical location. Each of these represents a burden to the individual with a vision impairment that is not visited on others.

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[95] Traci Martinez, *Federal courts Hold a Full Trial on Issue of Website Accessibility to Visually Impaired Users*, EMP'T. L. WORLDWIDE (Jul. 12, 2017), https://www.employmentlawworldview.com/federal-court-holds-a-full-trial-on-issue-of-website-accessibility-to-visually-impaired-users/.

[96] W3C Working Group, *Labels or Instructions Understanding SC 3.3.2*, https://www.w3.org/TR/UNDERSTANDING-WCAG20/minimize-error-cues.html.

Website Technical Standards Affecting Accessibility

In addition to the WCAG, the W3C defines additional standards that are commonly used in website, web application, and mobile application development. Below are two important standards that affect accessibility:

- *HTML5, published October 2014*—HTML5 is the most recent and widely recognized markup language for structuring and presenting web-based content. The HTML5 specification extends the previous HTML4 specifications and includes a much richer accessibility specification.[97]
- *Web Accessibility Initiative—Accessible Rich Internet Applications (WAI-ARIA) 1.0, published March 2014*—WAI-ARIA is an additional specification that has been integrated into HTML5, providing a language to create rich, interactive web experiences primarily for people who use assistive devices and technologies such as a screen reader.[98] WAI-ARIA seeks to fill in the missing technical accessibility gaps in HTML5 by providing markup and guidance for a variety of situations such as dynamically updating screen content. Like HTML5, ARIA is not cited directly in litigation as it is just one additional technique that may be used to create accessible digital experiences.

In addition to the standards cited, there are other standards covering common technologies found online. For example, ISO 32000, published December 2008, and ISO 14289-1:2012 (PDF/UA), published July 2012 (later updated to ISO 1428901:2014), define technical accessibility requirements for Portable Document Format (PDF).[99]

In short, there are now sufficient technical standards (HTML5, WAI-ARIA, etc.) and principle-based guidelines (WCAG) to create accessible digital experiences.

Standards and Grievances: An Interesting Correlation

While it is not possible to prove a direct cause and effect, it is certainly interesting to note a correlation between the publication of WCAG (along with the standards mentioned above) and the increase in both Title III web accessibility suits and U.S. Department of Education Office for Civil Rights

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[97] *See* W3C, *W3C Recommendation HTML 5.2* (Dec. 14, 2017), https://www.w3.org/TR/html5/.

[98] W3C, *Making the Web Accessible*, web accessibility initiative, https://www.w3.org/WAI/.

[99] *See* "ISO 32000-1:2008: Document management—Portable document format, Part 1: PDF 1:7" at https://www.iso.org/standard/51502.html and see "ISO 14289-1:2014 Document management applications—Electronic document file format enhancement for accessibility, Part 1: Use of ISO 32000-1 (PDF/UA-1) at https://www.iso.org/standard/64599.html.

Title II/Section 504 web accessibility complaints. This timeline reflects the correlation.[100]

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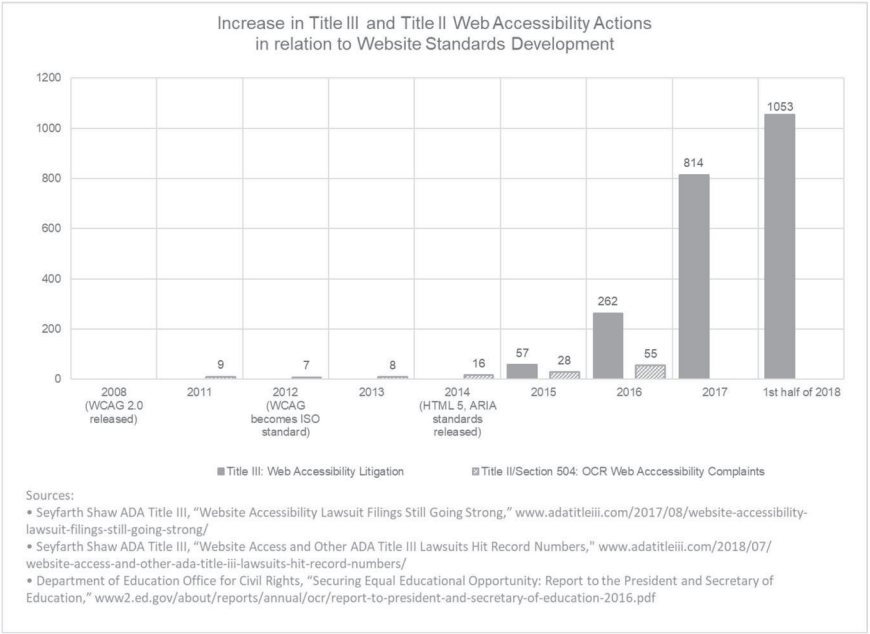
[100] Kristina M. Launey & Melissa Aristizabal, Website Accessibility Lawsuit Filings Still Going Strong, SEYFARTH SHAW (Aug. 22, 2017) https://www.adatitleiii.com/2017/08/website-accessibility-lawsuit-filings-still-going-strong/; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SECURING EQUAL EDUCATIONAL OPPORTUNITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION UNDER SECTION 203(B)(1) OF THE DEP'T OF EDUC. ORG. ACT (2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf (NOTE: OCR data was not available for 2017 and 2018).



BUILD vs. BUY—AND WHO BEARS THE ACCESSIBILITY BURDEN

Most organizations probably understand that they face liability risks if their websites and other digital assets are not accessible. But many do not understand that they cannot avoid those risks by outsourcing the design and programming responsibilities to third parties. A familiar adage applies here: You can delegate responsibility but not authority.

Gil v. Winn-Dixie made it clear that ensuring accessibility of the underlying technology in a website and the services linked to it is the responsibility of the contracting organization. The court noted:

> There are 6 different third parties, including Google and American Express, who interface with Winn-Dixie's website, so Winn-Dixie needs to make sure that those third parties also make sure that their websites are accessible. Winn-Dixie intends to implement the modification to its website by getting everyone, including the third-party vendors, on board.[101]

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[101] *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

WHAT NOW? A CHECKLIST FOR THE WARY

The legal landscape surrounding web accessibility is anything but clear. Court decisions have been inconsistent, legislation and regulations slow to come. Accessibility complaints, however, have been snowballing. Financial institutions, retailers and other businesses, rightly concerned about their liability risks, must consider both the cost of making their websites more accessible and the uncertainty about the accessibility standards they must meet.

It is impossible to develop a blueprint for addressing accessibility issues in this environment. This checklist does not propose comprehensive solutions for the challenges businesses face. But it does outline steps organizations can take to stay ahead of the accessibility curve and minimize the risks of receiving a demand letter or facing a costly and potentially embarrassing lawsuit.

The checklist identifies three priorities and key questions that should be addressed in each:

- Priority 1: Make Accessibility an Enterprise Priority
- Priority 2: Adopt an Accessibility Strategy
- Priority 3: Assess and Minimize Risk

DIGITAL ACCESSIBILITY RISK ASSESSMENT CHECKLIST

Priority 1: Make Accessibility an Enterprise Priority

Questions	Yes	No	Possible Solutions
Is upper management aware of the institution's obligations for ensuring digital accessibility?			[ ] Prepare a digital accessibility brief. [ ] Ask general counsel to perform an accessibility risk assessment. [ ] Invite a reputable accessibility consulting organization, preferably one with financial services experience, to speak on digital accessibility.
Does your organization have an accessibility advisory group?			[ ] Get upper management buy-in on establishing an accessibility advisory group. [ ] Establish an accessibility advisory group. Legal, marketing, and technology areas are key areas to have represented. [ ] Establish regular meeting dates for the group.
Does the organization's legal counsel track legal developments?			[ ] Implement procedures needed to monitor relevant legal developments. [ ] Set up case alerts for web accessibility lawsuits in your industry and within your jurisdiction. Using platforms such as Law 360, you can track how courts are interpreting the ADA and applying it to website accessibility suits in your industry.
Has the organization's leadership determined and communicated clearly how a demand letter or lawsuit, if received, should be routed within the organization?			[ ] Establish internal routing procedures. Note: The best practice for dealing with a web accessibility demand letter or complaint is to route it quickly to senior management and in-house legal counsel. Website accessibility lawsuits often involve plaintiffs' requests for injunctive relief, which must be addressed quickly to minimize adverse consequences for your company.

Priority 2: Adopt an Accessibility Strategy

Questions	Yes	No	Possible Solutions
Is there a central list of all digital products and services, including those provided by vendors that are owned technically (and legally) by the company?			[ ] Inventory digital assets (website, mobile apps, software platforms (lending/mortgage), calculators, employment and job applications, documents, videos, etc.). [ ] Determine who is responsible internally for the delivery of digital assets. Include less obvious assets, such as PDF documents and videos, in addition to the website and banking services. [ ] Determine who has technical control over the asset. • Vendor-controlled Commercial-Off-the-Shelf (COTS) assets • Vendor-controlled product (e.g., Software as a Service (SAAS) products) • IT-controlled, custom-designed assets
Does the organization have an accessibility policy?			[ ] Research industry guidelines for accessibility compliance programs, such as: • Policy-Driven Adoption for Accessibility (PDAA) • Word Wide Web Consortium (W3C)
Are there processes to regularly review and maintain the policy?			
Are there metrics in place to track progress and compliance?			
Are there clear roles and responsibilities assigned to positions within the organization?			[ ] Check with state and federal banking industry trade associations for policy examples or guidelines.

Priority 3: Assess and Minimize Risk

Questions	Yes	No	Possible Solutions
Have you performed a manual and/or automated accessibility audit of digital assets, including websites, mobile applications and publicly distributed documents?			[ ] Ask asset owners to share accessibility audit methods and levels of compliance. [ ] Request an accessibility risk assessment from general counsel. This audit can be internal, if expertise is available, or external, performed by a third party vendor.
Have known defects been communicated to upper management?			[ ] Establish a process for asset owners to report accessibility-related issues to the accessibility advisory group (if available) or upper management. [ ] Establish a schedule for regularly conducting accessibility audits and reporting on results of those audits.
Do the asset owners provide accessibility training for staff?			[ ] Identify accessibility training gaps in the organization. [ ] Research training costs and staff turnover.
Are procedures in place to meet infrequent accessibility needs, such as application updates, or to address accessibility for content uploaded to your website, such as PDF documents?			[ ] Establish a relationship with a third party vendor to make low-volume assets accessible. [ ] Establish expertise within the organization to remediate inaccessible low-volume assets.

CONCLUSION

The "forces and directions of the Internet" continue to change rapidly, and case law regarding online accessibility is reflecting the tumult.

Whether financial institutions' websites, as a whole, are subject to ADA Title III is not yet settled. Much rests on the nuances of what is considered a "public accommodation" as services increasingly move online. Since various courts have their takes, this leaves financial and other institutions positioned somewhat precariously when faced with legal action when their websites, documents, or third party platforms are found to be inaccessible to people with disabilities and the assistive technology they rely upon to navigate digital services.

Until federal regulations become clearer, lawsuits and demand letters are sure to continue and are likely to accelerate. The number of lawsuits in the first half of 2018 has already exceeded the entire year of 2017. Financial services organizations would do well to assemble appropriate staff—including legal, marketing, and technology team members—to assess the accessibility of their materials and platforms and gauge their legal risk. Only then will they know what types of organizational and process changes are needed to minimize the risk of litigation.