



Navigating ADA Compliance Issues in an Online World

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Presented by: Alexandra Dugan & Anne Yuengert

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Background

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What does Title III Cover?

- 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. U.S.C. § 12182(a)
- “Title III covers both tangible barriers... and ***intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges[]***.” *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002)

What does Title III Cover?

- Places of public accommodation must “***ensure full and equal enjoyment of goods, services, facilities, privileges, advantage, or accommodations***” by the disabled
 - Broad definition of place of public accommodation
 - What is not a place of public accommodation?
 - Condominium owners association if individually owned, even if held out for rental to public. *Dunn v. Phoenix West II, LLC, Phoenix West II Owners Association, Inc.*, 2016 WL 740294 (S.D. Ala. 2016)
 - Private clubs & religious organizations
 - Different obligations exist than Title I (employment) and Title II (state and local government) 42 U.S.C. § 12187

What is the Standard for Websites?

- There is no current legal standard for private companies
 - ADA requires accessibility to goods and services
 - DOJ announced proposed website rules in 2010 and by 2016 made clear that regulations would follow industry standard (WCAG)
 - Trump Administration withdrew proposed rules and made clear it will not regulate in this area
 - Leaves courts determining on a case by case basis
- Government websites must meet WCAG 2.0, level AA
- Industry standard is World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG)
 - Began as WCAG 1.0 (1999) and is now 2.1 (2018)
 - Three levels of compliance— A (basic), AA (substantially accessibly), AAA (aspirational)

Is a Website a Place of Public Accommodation?

- Significant issue in light of increased consumer use of websites v. brick and mortar locations
- Courts are split on whether non-physical spaces can be places of public accommodations
 - Places of accommodation are limited to physical places; Title III does not apply
 - Title III applies when there is sufficient connection between goods and services of traditional places of accommodation (*i.e.* bank branch) and alternative consideration (*i.e.* website)— gateway theory
 - (3) “Spirit of the law”: places of accommodation are not limited to physical places so Title III does apply

Accessibility Issues

- Accessibility issues for blind, visually impaired and deaf users
 - Screen reader technology
 - Voice synthesizers and text-to-speech conversion software
 - Text magnification/enlargement tools
 - “Alt-tags”—embedded, written descriptions for photographic, video, or audio content
 - Control of moving content
- Physical disabilities related to use of mouse (e.g., joint diseases, quadriplegia)— voice dictation

Remedies under the ADA

- Injunctive relief
- Reasonable attorney's fees for successful plaintiff
- Monetary damages (if brought by DOJ)

Case Law Update

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Does the Plaintiff Have Standing?

- *Mitchell v. DayMet Credit Union*, No. 3:18-CV-60-TMR, 2019 WL 3536578, at *5 (S.D. Ohio Aug. 2, 2019)
 - No future harm was alleged where plaintiff did not state a reason or intention for returning to defendant's website
- *Griffin v. Dep't of Labor Fed. Credit Union*, 293 F. Supp. 3d 576 (E.D. Va. 2018), aff'd, 912 F.3d 649 (4th Cir. 2019)
 - Blind person lacked standing to bring ADA action for injunctive relief against credit union which he was ineligible to join
- *Zaid v. Smart Fin. Credit Union*, No. CV H-18-1130, 2019 WL 314732, at *4 (S.D. Tex. Jan. 24, 2019)
 - "Plaintiff's past attempts to access SFCU's website, coupled with SFCU's website's continued inaccessibility and Plaintiff's plan to use SFCU's website in the future once it is accessible, are sufficient to satisfy the injury-in-fact requirement. The court therefore concludes that Plaintiff has standing to pursue this action."
 - However, dismissed complaint on basis that website is not place of public accommodation

Sufficient Nexus

- *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass 2019)
 - Plaintiff alleged that some AV content for videos on defendants' website and those hosted by third-party platforms such as YouTube did not have timely or accurate captioning such as to make some content inaccessible
 - Generally rejected idea that nexus was required under applicable precedent; *“only circuits that have concluded that places of public accommodation must be physical spaces have held that good and services provided by a public accommodation must have a sufficient nexus to a physical place in order to be covered under ADA”*
 - But even if a nexus was required, sufficiently pled that inaccessible content has “a nexus with on-campus activities”
 - Court previously rejected Harvard's contention that content hosted by 3rd party platforms was not subject to ADA and Rehabilitation Act

Serial Plaintiffs

- Plaintiff in GA brought multiple cases against various credit unions based on claim that website violated ADA by being inaccessible to users
 - 4 cases in ND Ga and 1 in SD Ga
- SD Ga case (*Jones v. Savannah Fed. Credit Union*, No. CV417-228, 2018 WL 3384310 (S.D. Ga. July 10, 2018)) was decided before cases in ND Ga but came to opposite conclusion regarding standing
- 3 different judges addressed the 4 ND Ga cases
 - Void for vagueness
 - Guidance from 11th Cir

9th Cir Updates

- *Thurston v. Midvale Corp.*, 252 Cal. Rptr. 3d 292, 301 (Ct. App. 2019)
 - “We hold that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress’s mandate that the ADA keep pace with changing technology to effectuate the intent of the statute.”
- *Estavillo v. Behaviour Interactive*, No. 19-CV-01025-WHO, 2019 WL 2635538 (N.D. Cal. June 27, 2019)
 - Store with only a digital-location but no physical location is not subject to place of accommodation in Title III
- *Namisnak v. Uber Techs., Inc.*, No. 17-CV-06124-RS, 2018 WL 7200717, at *4 (N.D. Cal. Oct. 3, 2018)
 - “While ‘travel service’ is listed as a place of public accommodation under section 12181(7)(F), the Ninth Circuit’s binding precedent limits the term ‘places of public accommodation’ to ‘actual, physical places.’”
 - Held that Uber as a travel service was not a physical place

Other Decisions of Note

- *Wu v. Jensen-Lewis Co.*, 345 F. Supp. 3d 438 (S.D.N.Y. 2018)
 - Blind plaintiff was unable to access information about store's hours and locations on website. Court held that by not having information accessible on website, defendant violated Title III of ADA
- *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752, 754 (11th Cir. 2018)
 - “It appears that the website is a service that facilitates the use of Dunkin’ Donuts’ shops, which are places of public accommodation. And the ADA is clear that whatever goods and services Dunkin’ Donuts offers as a part of its place of public accommodation, it cannot discriminate against people on the basis of a disability, even if those goods and services are intangible”



Best Practices

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Compliance Considerations

- Does the site meet WCAG 2.0 AA?
 - Used as measure by some plaintiffs' lawyers in targeting websites
 - Relied upon by courts and DOJ in determining whether a website is ADA compliant
 - Supported by various advocacy groups and relied upon in numerous settlements and/or cooperative agreements
- Have you employed a company to review and audit the website for ADA website compliance issues?
 - If so, document steps to come into compliance and reasons (if any) for not making changes
 - Consider some reimbursement clause in case of claims
 - Specify WCAG standard
 - Regular checks and updates

Compliance Considerations

- Does the website have any agreement requiring arbitration and/or particular venue or choice of law provision?
- Is employee training on ADA issues provided (particularly how to handle inquiries or complaints)?
- Have you considered any applicable state or local obligations that mimic or go beyond ADA?
- Is there an accessibility statement on the website?
- Is there 24/7 telephone service?
- Have you built in on-going compliance checks, such as periodic assessment testing?

Complaint Handling

- Steps to take when you get a threatening letter from a lawyer
 - Determine coverage and standing
 - Figure out how much client wants to spend to defend it
 - Hire an expert
 - Fix it (but make sure you do it right)
- Don't respond to some letters (but always respond to a lawsuit)
 - Big firms sent tens of thousands of letters
 - Unless you are a high profile target, it will take 12 months+ to turn into a lawsuit
 - In the meantime, work on getting website to meet WCAG 2.0

Litigation

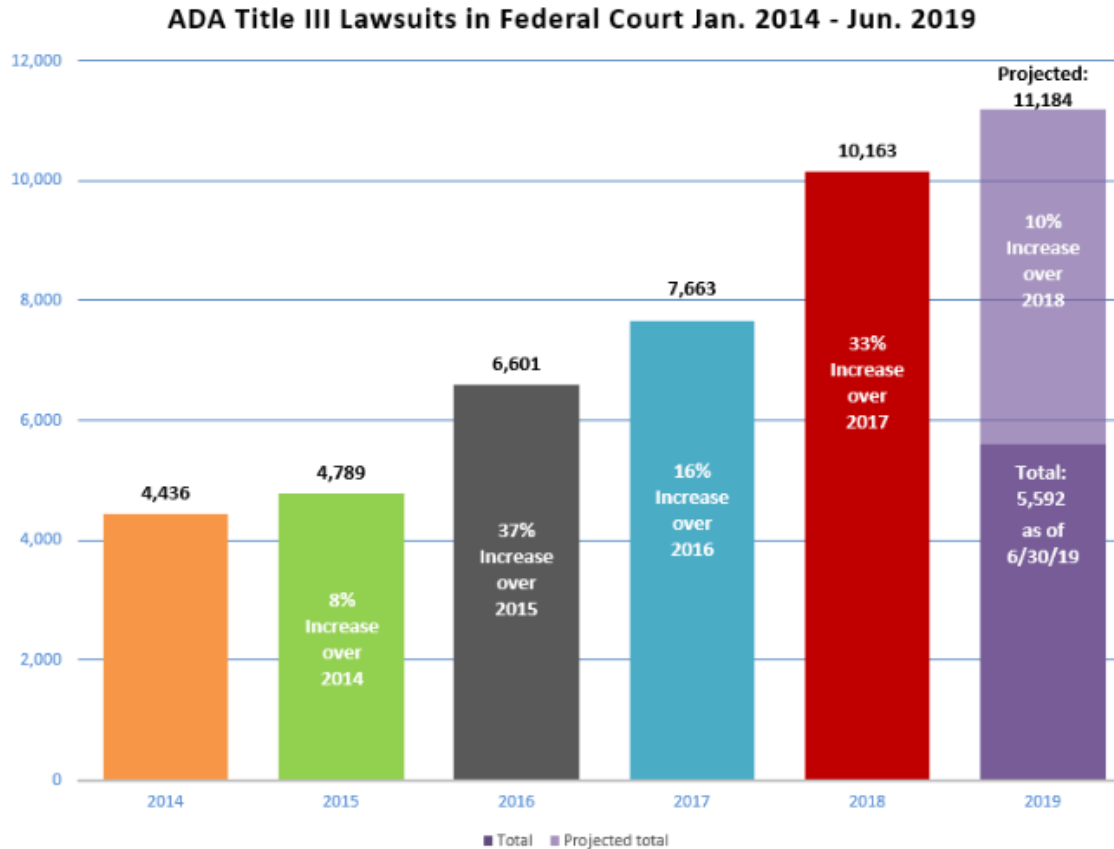
- Check out the plaintiff
 - Individual v. advocacy group
 - Any history at brick & mortar or online location?
 - Litigation history
- Check out the website (if you haven't done so already)
- Check for insurance coverage (unlikely) or indemnity
- Settlement considerations
 - Include the right stakeholders
 - Be specific
 - Early settlement is preferable



What's Next?

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Continued Litigation



[Graph: ADA Title III Lawsuits in Federal Court Jan. 2014 – Jun. 2019: 2014: 4,436; 2015: 4,789, 8% increase over 2014; 2016: 6,601, 37% increase over 2015; 2017: 7,663, 16% increase over 2016; 2018: 10,163, 33% increase over 2017; 2019: Total: 5,592, as of 6/30/19, Projected Total: 11,184, 10% increase over 2018]

Denial of Domino's Petition for Cert

- *Robles v. Domino's Pizza*, 913 F.3d 898 (9th Cir. 2019)
 - 9th Cir held “ADA applied to Domino’s website and app because the ADA mandates that places of public accommodation, like Domino’s, provide auxiliary aids and services to make visual materials available to individuals who are blind.”
 - Even though customers primarily accessed website and app away from physical restaurants, the ADA applies to services **of** a public accommodation, not services **in** a place of public accommodation
- Denial of petition for cert despite Domino’s pleas to resolve “burdensome epidemic”
- Further uncertainty in online world

Enforcement & Regulatory Landscape

- Additional enforcement actions?
 - Consent decrees between Nat'l Federation of the Blind, H&R Block & DOJ (<http://www.ada.gov/hrb-cd.htm>)
 - Involved website, mobile app and online tax prep product
 - Civil penalty of \$55K; compliance reporting obligations
- Additional guidelines?
 - DOJ previously signaled that design standard guidance was forthcoming but has been placed on hold
 - Nothing on the horizon

Speakers



Alexandra Dugan

Partner

Nashville, TN

adugan@Bradley.com

615.252.4638



Anne R. Yuengert

Partner

Birmingham, AL

ayuengertBradley.com

205.521.8362

Birmingham | Charlotte | Dallas | Houston | Huntsville | Jackson | Montgomery | Nashville | Tampa |
Washington, D.C.