



Wyrick Robbins Yates & Ponton LLP  
ATTORNEYS AT LAW

4101 Lake Boone Trail, Suite 300, Raleigh, NC 27607  
PO Drawer 17803, Raleigh, NC 27619  
P: 919.781.4000 F: 919.781.4865 www.wyrick.com

## CLIENT ALERT

Rise in ADA Accessibility Claims Related to Website Design

October 13, 2016

By: Todd Eveson, PJ Puryear, and Eric Anderson

### **The Next Wave of ADA Litigation: Website Accessibility**

Recently, many businesses have found an unpleasant surprise waiting in their mailboxes: a demand letter alleging the business's website is inaccessible to the visually impaired (and those with other disabilities) and therefore in violation of the Americans with Disabilities Act (the "ADA"). Because the ADA and its interpretative regulations lack specifics as to what it means to have an "accessible" website, these claims provide fertile ground for plaintiff's attorneys and uncertainty for businesses. This client alert provides an overview of how companies can protect against these claims, and how to react should they receive a demand letter.

#### **Background history**

Until recently, ADA claims focused primarily on brick-and-mortar facilities and whether those facilities met the highly-specific requirements of the ADA. Because of the ADA's technical nature, alleging ADA claims sometimes required nothing more than a "drive-by inspection" where a serial plaintiff and a "consultant" could drive through a shopping center or walk into a bathroom, find an ADA violation, and report that to the plaintiff's attorney, who would then file suit (the ADA does not include a notice and cure provision prior to litigation). Settling these disputes often presented a more economical solution than litigation, which incited serial plaintiffs to file an unprecedented number of ADA suits, sometimes on the most minor of violations.

We are now seeing the next wave of ADA litigation. Over the last year, plaintiff's firms have begun focusing on website accessibility, arguing that, despite technical guidance from the ADA and its regulations, company websites violate the ADA when their design impedes access by the visually impaired or those with other disabilities.<sup>1</sup> These claims are based on two theories: (1) websites are "places of public accommodation," and therefore subject to the ADA, and/or (2) websites that are not designed to assist the visually impaired violate the ADA's "effective communication" requirement,

---

<sup>1</sup> While we are seeing a recent proliferation, ADA/website litigation dates back to 2000, when Bank of America became the first bank to reach a settlement with disability rights advocacy groups and individuals to make its website and ATMs accessible to blind and vision-impaired customers. *National Federation of the Blind v. Target Corp.*, a 2006 federal case, was the first to hold that a business may be sued under Title III of the ADA over website accessibility.

which, for example, is what forces a business to provide auxiliary aids. Since the ADA and its regulations do not provide guidance on website accessibility, plaintiff's attorneys are relying primarily on the Web Content Accessibility Guidelines 2.0 Level A and AA Success Criteria ("WCAG 2.0 AA") issued by the Web Accessibility Initiative of the World Wide Web Consortium, discussed in greater detail below.<sup>2</sup>

Initially, these efforts focused on box stores, traditional targets for ADA litigation and settlement. Now plaintiff's firms are expanding their scope: numerous complaints from restaurant owners prompted the National Restaurant Association to issue an alert to the trade group's members in February of this year regarding ADA website compliance demand letters.<sup>3</sup> In May, the Chicago Tribune noted that as many as 25 realtors and home builders had recently received ADA/website demand letters.<sup>4</sup> Community banks and other financial institutions appear to be the next targets.

These demand letters are not idle threats. Since 2015, plaintiff's attorneys have filed over 100 website-related ADA lawsuits in federal court. The overwhelming majority of these lawsuits have been filed in just three states: Pennsylvania, New York, and California. However, given the recent uptick in cases filed, a similar uptick in pro-plaintiff court rulings, and the likelihood that the Department of Justice (the "DOJ") will issue regulations subjecting websites to ADA compliance, we expect a proliferation of this litigation nationwide. Plaintiff's attorneys are not the only source of website accessibility litigation: disability rights advocacy groups and the DOJ have also aggressively pursued legal and enforcement action against both for-profit and non-profit private entities.<sup>5</sup>

### **Do websites have to be ADA compliant?**

The ADA passed into law in July 1990, before the internet as we know it today even existed. Needless to say, the ADA's accessibility chapters (Title II and Title III) make no mention of websites, e-commerce, or the internet, instead focusing on physical places. In 2003, the DOJ issued a technical assistance document addressing *governmental* website accessibility entitled, "Accessibility of State and Local Government Websites to People with Disabilities."<sup>6</sup> The DOJ has also promulgated a "Best Practices Tool Kit for State and Local Governments" which provides further guidance and suggestions on website accessibility.<sup>7</sup> Both of these documents only apply to governmental websites, and both provide suggestive guidance, indicating compliance is voluntary. Since 2010, the DOJ has forecasted that it would bring websites under ADA regulation, but to date has not done so. Most recently, the DOJ has announced it intends to have regulations governing website accessibility for private sector websites in 2018.

---

<sup>2</sup> <https://www.w3.org/WAI/intro/wcag.php>.

<sup>3</sup> [http://www.garestaurants.org/uploads/4/4/5/3/44535221/ada\\_website\\_drive-by\\_lawsuit\\_alert\\_2-8-16.pdf](http://www.garestaurants.org/uploads/4/4/5/3/44535221/ada_website_drive-by_lawsuit_alert_2-8-16.pdf).

<sup>4</sup> <http://www.chicagotribune.com/classified/realestate/ct-re-0515-kenneth-harney-column-20160511-column.html>.

<sup>5</sup> See, e.g., *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196 (D. Mass. 2012); U.S. DOJ Settlement Agreement with edX Inc. (April 2, 2015), [https://www.ada.gov/edx\\_sa.htm](https://www.ada.gov/edx_sa.htm).

<sup>6</sup> <https://www.ada.gov/websites2.htm>.

<sup>7</sup> <https://www.ada.gov/pcatoolkit/chap5toolkit.htm>.

Despite this, courts are addressing whether websites are “places of public accommodation.” The results are mixed, with some courts holding private websites constitute a “place of public accommodation” and thus subject to ADA compliance,<sup>8</sup> others holding that for websites to be subject to the ADA, they must have a physical connection to goods and services available at a physical store,<sup>9</sup> and others requiring a “place of public accommodation” to be a physical location.<sup>10</sup> State courts have been equally inconsistent, but in some instances, are not only willing to find websites subject to the ADA, but willing to rule in a plaintiff’s favor despite no clear statutory or regulatory guidance.<sup>11</sup> Such ambiguity raises compliance questions for all companies, whether they have a brick-and-mortar location or exist solely in cyberspace. However, given the DOJ’s willingness to prosecute website-related ADA cases<sup>12</sup> using the WCAG as the standard of compliance, businesses should clearly be on alert.

### **What is WCAG and how is it used?**

WCAG is a set of standards<sup>13</sup> prepared by the Website Accessibility Initiative of the World Wide Web Consortium with the intent of making web content more accessible. Both pending DOJ regulations and settlement agreements entered into by DOJ and advocacy use the WCAG as guidance regarding the appropriate level of website accessibility. Because WCAG is becoming the standard, plaintiff’s firms have formed relationships with IT consultants that test a company’s website against WCAG, then using the “compliance failures” as a basis for sending a demand letter complete with requested changes and, of course, some form of settlement demand. Because of the uncertainty of proceeding in federal court on this issue, plaintiff’s firms are more likely to provide companies a demand letter as opposed to filing suit, thereby reducing risk of creating bad precedent. Demand letters have also included remedial measures including monthly automated testing of a company’s website and creation of a web accessibility policy.

### **What should businesses with websites do?**

All business should strive to make their websites fully accessible to individuals who are hearing or visually impaired. Doing so, however, can involve significant expense. Requiring such a

---

<sup>8</sup> *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999); *Nat’l Ass’n of the Deaf v. Netflix Inc.*, 869 F.Supp. 2d 196 (D. Mass. 2012); *Nat’l Fed’n of the Blind v. Scribd Inc.*, No. 2:14-cv-162 (D. Vt. March 19, 2015). The First Circuit Court of Appeals has previously held that places of public accommodation under Title III of the ADA need not be physical places. *Carparts Dist. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England*, 37 F.3d 12 (1st Cir. 1994).

<sup>9</sup> *See, e.g., Earll v. eBay Inc.*, No. 13-15134 (9th Cir. April 1, 2015).

<sup>10</sup> *Ford v. Schering Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).

<sup>11</sup> *Davis v. BMI/BNB Travelware*, no. CIVDS-1504682 (San Bernardino Superior) (Mar. 21, 2016); <http://www.forbes.com/sites/legalnewslines/2016/03/29/judges-handling-ada-lawsuits-over-websites-not-waiting-on-doj-regulations/#48e5947b7287>.

<sup>12</sup> *See Nat’l Federation for the Blind v. HRB Digital LLC*, No. 13-cv-10799 (D. Mass Mar. 6, 2014), available at <https://www.ada.gov/hrb-cd.htm>, where the DOJ negotiated a settlement forcing H&R Block to bring its website into conformance with WCAG standards.

<sup>13</sup> <http://www.w3.org/TR/WCAG20/>.

significant capital investment may not be reasonable for smaller businesses from a purely financial standpoint, even more so considering the lack of a clear mandate and guidelines from either the ADA or the DOJ. Under the ADA, companies are required to move barriers or make accommodations that are “readily achievable.” If changes are economically unfeasible, or prevent the provision of goods and services, companies have a defense against making such changes.

Operationally, companies concerned about accessibility issues should consider instructing IT to become familiar with WCAG or engaging an IT consultant conversant in WCAG to provide preliminary information and testing. This information can then serve as the foundation for strategic decisions regarding website revision and creation of company policy. Legally, general and/or outside counsel need to be educated regarding this new wave of ADA enforcement, and need to create strategies to address any ADA-related demand letters.

### **Action Steps for Clients**

- Contact your website administrator to ask if they are versed in WCAG.
- If not, consider engaging IT consultant with WCAG knowledge.
- Determine cost of testing your website for WCAG compliance.
- Determine if your insurance policy would cover a website-related ADA claim.
- Consider whether other communication areas (telephone customer support, mobile applications) need to be revisited to ensure compliance with the ADA’s “effective communication” standard.
- If you receive a demand letter or notice of litigation, engage counsel with ADA experience.

If you have any questions related to this Client Alert, please contact one of the following members of our firm:

PJ Puryear  
[ppuryear@wyrick.com](mailto:ppuryear@wyrick.com)

Eric Anderson  
[eanderson@wyrick.com](mailto:eanderson@wyrick.com)

Todd Eveson  
[teveson@wyrick.com](mailto:teveson@wyrick.com)

*All rights reserved. This Client Alert may not be reproduced in whole or in part without the written permission of Wyrick Robbins Yates & Ponton LLP.*

*NOT LEGAL ADVICE: This publication is not to be considered specific legal advice and should not be relied upon in lieu of advice from an attorney. Each client’s situation is unique, and if you have need for legal advice, you should seek advice from an attorney.*