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IS YOUR WEBSITE ADA-ACCESSIBLE? PLAINTIFFS' ATTORNEYS ARE TROLLING FOR LAWSUITS IN ARKANSAS

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You installed wheelchair ramps in offices; your doorways are at least thirty-two inches wide; you have braille printed on signs; and you have taken all of the steps necessary to provide physical access to your business for disabled employees, clients, or customers. You believe that your business is fully compliant with the Americans with Disabilities Act's (ADA) accessibility regulations. But what about your website—is it accessible to individuals with disabilities? Does your website have to be ADA-compliant? If so, what does that even entail?

Scores of businesses in the medical, financial, and retail industries have been forced to answer these questions in response to demand letters and lawsuits alleging that their websites present barriers to access by individuals with visual and hearing impairments, and therefore violate the ADA. Specifically, plaintiffs' attorneys from the Pennsylvania-based law firm of Carlson, Lynch, Sweet, Kilpela & Carpenter, LLP, among others, are crawling the web for unsuspecting businesses with websites that fail to meet standards set forth in the World Wide Web Consortium's (W3C) Web Content Accessibility Guidelines (WCAG 2.0 AA), because these websites—when used to facilitate access to a company's goods and services—may violate Title III of the ADA.

This Article analyzes the application of Title III of the ADA to websites of public accommodations, discusses—at the risk of losing readers—the WCAG 2.0 standards, and finally proposes a strategy for responding to the Carlson Lynch demand letters.

"PLACES" OF PUBLIC ACCOMMODATION

The ADA was enacted in 1990 to provide a clear and comprehensive national mandate for the removal of barriers to employment, transportation, public services, communities, and telecommunications, for individuals with disabilities. Title III of the ADA prohibits discrimination by private entities in **places** (i.e., physical locations) of public accommodation, to wit:

> 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.

42 U.S.C. § 12182(a) (2000) (emphasis added). The ADA specifically identifies 12 particularized categories of "places of public accommodation," all of which are physical, real (not virtual) locations, to wit: (1) places of lodging; (2) establishments serving food or drink; (3) places of exhibition or entertainment; (4) places of public gathering; (5) grocery stores, shopping centers or other sales or rental establishments; (6) laundromats, dry cleaners, banks, or other service establishments; (7) specified public transportation terminals; (8) places of public display or collection; (9) parks and zoos; (10) schools; (11) day care centers; and (12) places of exercise or recreation. 42 U.S.C. § 12181(7). Similarly, the applicable federal regulations define a "place of public accommodation" as "a facility operated by a private entity whose operations affect commerce and fall within at least one" of 12 specified categories set forth in 42 U.S.C. § 12181(7). 28 C.F.R. § 36.104. A "facility" is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real and personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104.

Upon this brick and mortar foundation, courts have expressly recognized that this list provides a "comprehensive" definition of "public accommodation." *See, e.g., Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1240 (11th Cir. 2000) (holding that Title III applied only to those portions of a cruise ship that fit within the 12 statutorily enumerated public accommodations). This list of categories is "exhaustive" and "not merely exemplary or illustrative." *Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1177 (C.D. Cal. 1998), *aff'd,* 212 F.3d 1159 (9th Cir. 2000). As such, because the "ADA includes an exhaustive list of private entities that constitute a public accommodation," along with a clear definition of facility, it would seemingly follow that a website does not come within the ambit of Title III's protection. *See Torres v. AT & T Broadband, LLC*, 158 F. Supp. 2d 1035, 1037 (N.D. Cal. 2001).

Unfortunately, the issue is not so simple. In fact, since 2015, at least 240 lawsuits have been filed in federal courts across the country. There are two primary theories used to support the position that Title III's accessibility requirements apply to websites: (1) the website itself is a place of public accommodation, or (2) the website is one of the goods, service, facilities, privileges, advantages, or accommodations of a place of public accommodation. Under the first line of cases, which were the earliest decisions on the matter, courts in the Third, Sixth, and Ninth Circuits held that the ADA only applies to physical locations—not websites. *See 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); *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104 (9th Cir. 2000).

Under the second line of cases, courts have held that there must be a nexus between the website and a physical, concrete place of public accommodation in order for the ADA to apply. *See Access Now, Inc. v. Southwest Airlines, Inc.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002); *see also Nat'l Fed. of the Blind v. Target Corp.*, 452 F. Supp.2d 946 (N.D. Cal. 2006). Under the final line of cases, some courts in the First Circuit, Second Circuit, and Seventh Circuit have held that all commercial websites must comply with the ADA, even if there is no

connection to a physical place. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994)) (holding that public accommodations are not limited to physical structures); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999)) (holding that the statute was meant to guarantee more than mere physical access to particular types of businesses); *Doe v. Mutual Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999)) (holding that the ADA applies to more than physical spaces).

For instance, in *National Federation of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015), a disability advocates group sued Scribd Inc., a digital library, alleging that its reading subscription services website and mobile applications were inaccessible to the blind in violation of the ADA. Scribd moved to dismiss, arguing, amongst other things, that as a website that did not have a brick-and-mortar store, they were not required to comply with the ADA. The U.S. District Court for the District of Vermont held, as a matter of first impression, that websites and mobile applications were places of public accommodation under Title III of the ADA. *Id* at 576. The *Scribd* court reasoned that the plain language of 42 U.S.C. § 12187(7) was ambiguous and, in light of the ADA's purpose—"to end widespread discrimination against disabled individuals"—all commercial websites must comply with the rules and regulations of the ADA. *Id.* at 576.

WHAT STANDARDS EVEN APPLY?

Recognizing that significant commercial activities were migrating to the Internet, the Department of Justice (DOJ), which enforces Title III of the ADA, has taken the position that websites operated by businesses in the private sector are subject to Title III's accessibility requirements. As such, DOJ released an advance notice of proposed rulemaking in July 2010, relating an intent to amend the ADA's regulations to specifically require websites operated by public accommodations to meet certain accessibility standards. With internal political strife regarding the implementation of these regulations, particularly because of the economic impact of compliance, however, DOJ repeatedly delayed issuing a proposed rule, which—in light of the change in administrations—is very unlikely.

The absence of clear, detailed guidance spelling out what obligations apply to public accommodations' websites and mobile applications has not stopped the DOJ from pursuing an aggressive agenda outside the administrative review process. DOJ has filed *amicus* briefs in cases filed by private litigants and advocacy groups in support of their website accessibility claims and has even pursued its own enforcement actions. In recent settlements, DOJ has required a host of businesses, such as cruise lines, museums, online grocers, and others to conform their websites to the World Wide Web Consortium's (W3C) voluntary Web Content Accessibility Guidelines (WCAG) 2.0 standards.

The official WCAG 2.0 guidelines, which can be found at http://w3.org/TR/WCAG20, are organized under four principles, under which companies can obtain ratings of A, AA, or AAA, ranging from least accessible to most accessible, to wit:

1. **Perceivable** – Information and user interface components must be presentable to users in ways they can perceive.
    - Guideline 1.1: Information and user interface components must be

presentable to users in ways they can perceive.
- Guideline 1.2: Time-based Media: Provide alternatives for time-based media.
- Guideline 1.3: Create content that can be presented in different ways (for example simpler layout) without losing information or structure.
- Guideline 1.4: Make it easier for users to see and hear content including separating foreground from background.

2. **Operable** – User interface components and navigation must be operable.
   - Guideline 2.1: Make all functionality available from a keyboard.
   - Guideline 2.2: Provide users enough time to read and use content.
   - Guideline 2.3: Do not design content in a way that is known to cause seizures.
   - Guideline 2.4: Provide ways to help users navigate, find content, and determine where they are.

3. **Understandable** – Information and the operation of user interface must be understandable.
   - Guideline 3.1: Make text content readable and understandable.
   - Guideline 3.2: Make Web pages appear and operate in predictable ways.
   - Guideline 3.3: Help users avoid and correct mistakes.

4. **Robust** – Content must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.
   - Guideline 4.1.: Maximize compatibility with current and future user agents, including assistive technologies.

Any website can be tested for compliance with these guidelines and accessibility for the disabled by entering its URL at http://wave.webaim.org. After entering the URL, http://wave.webaim.org will run an "accessibility test" and produce a report, highlighting any "errors" or areas of noncompliance.

HOW TO HANDLE THE LITIGATION TROLLS

Firms like Carlson Lynch are targeting businesses across every industry with cut-and-paste demand letters. In fact, in the last few months, Carlson Lynch has sent hundreds of letters to utility companies, retail businesses, and banks, and hospitals across the United States threatening to file lawsuits, alleging that the companies' websites are not accessible to disabled individuals in violation of the ADA, and that if their websites are publically available, the ADA requires the website to meet the WCAG 2.0 standards. After stating that DOJ and various courts have required websites to comply with the ADA's general accessibility mandate, the Carlson Lynch demand letter will allege that the firm's visually-impaired clients attempted to access the website and experienced "access barriers." Those access barriers will be confirmed by an "expert report"—a copy-and paste section from one of the free online website accessibility checkers—within the letter.[1]

Thereafter, the letter will conclude with general threats of litigation and propose a settlement with an unspecified amount of attorneys' fees, along with the following "remedial measures": (1) designate one or

[1] Ironically, the Carlson Lynch website—as of the date of the writing of this article—has multiple compliance errors.

more individuals to manage web accessibility testing, repairing, implementation, maintenance, and reporting; (2) create and maintain a web accessibility policy consistent with prevailing standards; (3) initiate a 'needs assessment" and subsequent training for web and content development personnel on WCAG 2.0; (4) contractually require your third-party web developer to maintain WCAG 2.0 compliance on your website; (5) hire a third party to conduct monthly website accessibility testing; (6) implement other policies as necessary to implement an accessible website. If your client ignores the first letter, a second letter—drafted in a haughty tone—will be dispatched approximately two months later. The second later will also likely include an errant reference to your client's "privacy policy" with no further explanation.

At this point, recipients of these demand letters have taken various approaches. Some clients have continued to ignore the letters, never to hear from Carlson Lynch again. Others have decided to simply negotiate a low attorneys' fees settlement. This is a frustrating approach because the law is clearly unsettled and, at least in Arkansas, the likelihood of success on the merits is very suspect. A bolder, more cathartic approach, is to respond in kind and advise Carlson Lynch that your clients will pursue legal action if the demand letters do not stop. The firm will not relent and respond about a month later with an allegation that a complaint was filed and that your client will be served with a copy of the summons shortly. At least for one company, this has been an empty threat. Another company, which took Carlson Lynch at its word, decided that it had enough with the demand letters and filed a complaint for declaratory judgment against the firm because of the misleading nature of the demand letters. *See Mazzio's LLC v. Carlson Lynch Sweet and Kilpela, LLP et al.*, 4:16-CV-00059 (N.D. Ok. 2016). That case appears to have resolved rather quickly, as it was dismissed without prejudice prior to Carlson Lynch filing an answer. Businesses should consult with counsel to determine the efficacy of any approach.

CONCLUDING THOUGHTS

As businesses of all types face an ever-growing barrage of demand letters and lawsuits involving web accessibility, it is important that they adopt strategies to minimize their exposure. The most important of these concerns is to take the issue seriously. Specifically, websites often present information in a way that renders screen readers or other assistive technology often used by individuals with visual imparities inoperable. For example, assistive technology cannot "read" an image or interpret navigational headings, links, or data tables. Similarly, most online forms, which are essential to requesting information and accessing goods and services, are also often unusable by individuals with disabilities. In these ways, it can be difficult or impossible for disabled individuals to fully access the information presented by a website, make online purchases, or otherwise interact with a website without assistance.

From a business perspective, making websites WCAG 2.0 compliant may garner good will with customers and increase sales. Building accessibility into a website from the beginning is less costly than trying to redesign the site after litigation ensues. By counseling clients from the beginning to use the WCAG 2.0 guidelines, clients can avoid having to go back and correct inaccessible pages and features post-litigation or post-rulemaking. Although the DOJ has not

issued guidelines on accessibility, and will not for some time, there is a growing body of law in support of the proposition that the ADA applies to websites. As outlined above, advocacy groups have become more active in filing lawsuits, and business clients are losing customers and users if inaccessible websites shut out disabled potential customers. As such, it is important to put a plan in place and to develop an internal deadline for accomplishing some level of accessibility for websites. Retention of seasoned web developers is necessary to assist in any remediation efforts. Smart risk management principles guide businesses to conduct a cost-benefit analysis between cost of compliance and litigation.

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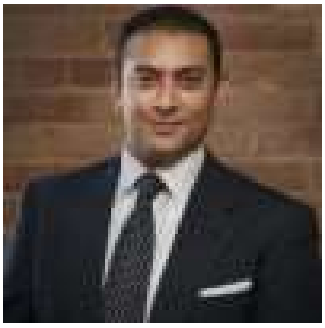

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