

# Insight

IN-DEPTH DISCUSSION

FEBRUARY 22, 2016

## The Wave of Website and Other ADA Accessibility Claims – What You Should Know

BY GAVIN APPLEBY, PETER PETESCH AND MARK PHILLIS

Title III of the Americans with Disabilities Act (ADA), providing for equal access for persons with disabilities in places of public accommodation, has made the country far more accessible. Yet, given its highly technical (and often ambiguous) design, plaintiffs' firms and disability rights advocates file claims over unlawful barriers and technical violations against even the most conscientious places of public accommodation (e.g., hotels, restaurants, theaters, convention centers, stores, service establishments, healthcare facilities, transportation depots, libraries, recreation places, schools, etc.). Fortunately for companies, Title III limits liability to injunctive relief and attorneys' fees for prevailing parties, and creates opportunities to moot – or even foreclose – claims by eliminating barriers promptly or through a comprehensive remediation plan.

Although the 2008 amendments to the ADA (the ADAAA), which expanded interpretations of who is protected under the law, should not have appreciably impacted Title III claims in the same manner as employment claims, and 2010 changes to the design standards and regulations governing places of public accommodation did not radically alter the landscape for businesses, Title III claims are nonetheless on the rise. In 2014, the *Wall Street Journal* reported that Title III lawsuits had increased by 55% from the prior year.<sup>1</sup> The U.S. Department of Justice (DOJ), which enforces Title III, received 6,391 accessibility complaints in fiscal year 2015 – representing a 40% increase over claims in the prior fiscal year. Claims cover areas as diverse as barriers to wheelchairs in physical facilities, parking lots, gas station pumps, acceptance of service animals, effective communication for deaf and hard-of-hearing individuals, access to treatment in healthcare facilities and website accessibility by vision and hearing-impaired persons. Although this article focuses mainly on website accessibility, the basic principles of self-monitoring and eliminating barriers through alterations and training hold true for all Title III claims.

<sup>1</sup> Angus Loten, *Disability Lawsuits Against Small Businesses Soar*, *Wall St. J.*, Oct. 15, 2014, available at <http://www.wsj.com/articles/disabled-access-new-legal-push-1413411545>.

## Proliferation of Website Claims

Over the past few months, companies across the country have received demand letters from plaintiffs' firms and some disability rights advocacy groups alleging the company is violating Title III of the ADA because its website is not sufficiently accessible to individuals with disabilities – mainly vision impairments, but hearing impairments are at issue too if a website includes video. The letters claim that unless the company modifies its website to meet the standards in the World Wide Web Consortium's (W3C) Web Content Accessibility Guidelines (WCAG 2.0 AA), the company will continue to violate Title III. The demand letter then asks recipients to pay a settlement (based on fees and costs) and agree to modify their websites and permit the plaintiffs' experts to assist and monitor whether the website stays in compliance with the WCAG 2.0 AA standards.

Dozens of lawsuits have also been filed in the past few months seeking to force companies to modify their websites to conform to the WCAG 2.0 AA Guidelines.

## What Are the Web Content Accessibility Guidelines?

Web Content Accessibility Guidelines are a set of technical standards developed through an open, collaborative process involving both individuals and organizations around the world. Its goal is to provide a single, shared standard for web content accessibility that meets the needs of individuals, organizations and governments internationally. The WCAG 2.0 AA standards also have been incorporated into an ISO standard by the International Organization for Standardization, but the ISO standard is not law.

## What Types of Issues Might Individuals with Disabilities Encounter in Accessing Websites?

Individuals with disabilities—such as vision-impaired or hearing-impaired individuals—may require assistive devices and specialized software to access the Internet. These devices often include software that enables them to magnify the content of a web page, reads the content to them, or enables them to use a braille reader to read a website. Some individuals with disabilities cannot use a mouse and can only navigate with a keyboard, touchscreen or voice recognition software. For persons with hearing impairments, the visual aspects of a website are accessible but video on a website may not be. Plaintiffs claim that many websites or elements of companies' websites are not compatible with reading devices and deprive individuals with disabilities the ability to use and enjoy the services offered on the web.

## What Does Title III of the ADA Require?

Title III of the ADA requires individuals with a disability be offered the “full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.”<sup>2</sup> It requires that places of public accommodation make reasonable modifications to eliminate barriers to that enjoyment, including changing policies and procedures, removing structural barriers and providing auxiliary aides and services to enable disabled individuals to enjoy the place of public accommodation. There are 12 categories of places of public accommodation in Title III, but given that the statute was passed in 1990, there are no references in that list to the Internet or websites.<sup>3</sup> Regulations and standards expected to be issued by the Department of Justice, however, may seek to change this. Nevertheless, the DOJ recently announced it would not promulgate such regulations until at least 2017. By contrast, the U.S. Department of Health and Human Services and the Federal Access Board (discussed below) are moving more quickly to issue regulations or standards that would incorporate WCAG 2.0 AA. Because of legislation passed in 2011, airlines must already meet these standards.

---

<sup>2</sup> 42 U.S.C. § 12812(a).

<sup>3</sup> 42 U.S.C. § 12181(7).

Until recently, there has been little litigation in this area, and the courts that have considered the breadth of Title III have reached different conclusions. Some courts have found that places of public accommodation are not limited to physical places.<sup>4</sup> They have noted that the ADA should be read broadly to accomplish the goals Congress had in mind when it passed the ADA. Other courts have rejected such an expansive reading and have found that places of public accommodation must be physical places.<sup>5</sup>

The Ninth Circuit and a few other courts have taken a hybrid approach, finding that to be considered a place of public accommodation, there must be “some connection between the good or service complained of and an actual physical place.”<sup>6</sup> In one of the most well-known cases challenging the accessibility of websites, *National Federation of the Blind v. Target Corp.*, the district court denied a motion to dismiss a Title III suit to the extent the claim was that the inaccessibility of the website impeded the full enjoyment of goods and services found in Target stores.<sup>7</sup> The court then noted that because Target’s website and physical stores appeared to be heavily integrated, the scope of the coverage of the website under Title III could be quite broad. The case settled, and representatives from Target have since made presentations on accessibility at the National Federation of the Blind’s national convention.

Significantly, Title III website accessibility may not apply to business-to-business websites. Also important, for companies that require applicants to apply for employment through a website, an ADA Title I issue may arise in regard to ADA accessibility and accommodations. Remedying that issue should not require WCAG 2.0 AA compliance, but some means of providing accommodation to a vision-impaired applicant should be available, even if that accommodation is simply providing an alternative way for an individual to submit his or her application.

## What Regulations or Guidelines Have Been Issued to Require Websites to Meet Certain Accessibility Standards?

The DOJ, which is charged with enforcing Titles II and III of the ADA, has taken steps to provide guidance in this area, but it has moved slowly. Over five years ago, it began the rulemaking process by issuing an Advanced Notice of Proposed Rulemaking on the accessibility of website information and services. The DOJ sought public comment on its proposal that state and local governments and places of public accommodation make their websites and related services accessible to individuals with disabilities.<sup>8</sup> In the Notice, the DOJ asked for public input as to whether it should adopt the standards in WCAG 2.0 AA. It acknowledged that there may be more effective alternatives to what is set forth in the WCAG 2.0 AA Guidelines. At the same time, it noted that the rights of individuals with disabilities must be balanced against the difficulty of providing alternative, accessible means of accessing services through the web.<sup>9</sup> The comment period lasted nearly six months.

After years of delay, this past fall, the DOJ announced that it expects to issue a proposed rule under Title II of the ADA, which covers public entities – i.e., state and local governments, departments and instrumentalities – in fiscal year 2016.<sup>10</sup> The DOJ stated it plans to use the information it learns from the notice and comment period on that proposed rule to draft regulations and standards under Title III of the

4 See, e.g., *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (noting that websites would be covered by Title III); *Carparts Dist. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England*, 37 F.3d 12 (1st Cir. 1994) (finding that insurance offerings are subject to Title III).

5 See, e.g., *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995) (finding that unlike stadiums, access to TV broadcasts is not covered by Title III); *Ford v. Schering Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (finding that a public accommodation is a physical place).

6 *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

7 452 F. Supp. 2d 946 (N. D. Cal. 2006).

8 Advanced Notice of Proposed Rulemaking, Non-Discrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (July 26, 2010).

9 *Id.* at 43,465-67.

10 U.S. DOJ Statement of Regulatory Priorities (Fall 2015), available at [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement\\_1100.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html).

ADA in fiscal year 2018. Based on the DOJ's projected timeline, it will not issue regulations until well after a new administration takes office in January 2017.

Even in the absence of clear regulatory standards, the DOJ and private plaintiffs have embraced the position that websites should be accessible. In fact, the DOJ seems to be asserting in its investigations and settlement agreements that WCAG 2.0 AA is the only means of providing website accessibility to vision-impaired consumers and users.<sup>11</sup> Absent regulatory requirements, however, that position seems questionable. Although DOJ's settlements are not binding legal authority, they reveal DOJ's consistent position on websites.

In the meantime, the Architectural Barriers and Compliance Access Board (Access Board), an independent federal agency that promotes equality for people with disabilities by developing accessibility guidelines and standards, issued a proposed rule in 2015 that would update the accessibility requirements for information and communication technology in the federal sector covered by Section 508 of the Rehabilitation Act.<sup>12</sup> Section 508 is not applicable to the private sector, except potentially by contract with the federal government. The proposed rule, however, would incorporate by reference the WCAG 2.0 AA Guidelines and apply them to not only web-based content, but to non-web-based electronic documents and software. The comment period closed May 25, 2015, and the Access Board currently projects it will issue the final rule by October 2016.<sup>13</sup> Many observers predict that the Access Board's proposed rule, which essentially incorporates the entirety of WCAG 2.0 AA, provides a preview to the content for DOJ rules and standards governing places of public accommodation under Title III.

### What Would Complying with WCAG 2.0 AA Entail?

The WCAG 2.0 AA Guidelines provide specific technical guidance on the design of websites to promote access to individuals with a disability. In general, the WCAG 2.0 AA Guidelines ask owners of websites to:

- Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.
- Provide alternatives for time-based media.
- Create content that can be presented in different ways (e.g., with a simpler layout) without losing information or structure.
- Make it easier for users to see and hear content by, among other things, separating foreground from background.
- Make all functionality available from a keyboard, provide users with sufficient time to read and use content, not design content in a way that is known to cause seizures and provide ways to help users navigate, find content and determine where they are on the website.
- Make text content readable and understandable to web navigation tools. Make web pages appear and operate in predictable ways.
- Maximize compatibility with assistive technologies on user computers and devices.

Making these types of changes to an existing website or designing a new website with all of this functionality is both a time-consuming and expensive undertaking, and may not ultimately be required if the DOJ adopts a different or nuanced standard. This reality makes a quick remedial plan nearly impossible and

---

<sup>11</sup> See, e.g., U.S. DOJ, Press Release, *Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities* Nov. 17, 2014, available at <http://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website>.

<sup>12</sup> Notice of Proposed Rulemaking, Information and Communications Technology (ICT) Standards and Guidelines, 80 Fed. Reg. 10,880 (Feb. 27, 2015).

<sup>13</sup> See <http://www.regulations.gov/#/docketDetail:D=ATBCB-2015-0002/>.

is in sharp contrast to the remedial fix of an accessible ramp, which can be built in a day or two. WCAG 2.0 AA developmental plans may take 12-24 months to complete, with costs as high as half a million dollars.

### **What Should Companies Do Now?**

The absence of clear direction from the courts or the DOJ leaves companies in a difficult position. Even in areas where courts have determined that at least some websites are places of public accommodation, the standard by which a court will judge whether a website is sufficiently accessible so that it complies with Title III remains unsettled. It certainly is possible that reader devices, electronic braille and connections made to live persons who can assist a vision-impaired person (among other options) may be viable alternatives to WCAG 2.0 AA in providing reasonable accessibility, but no courts have yet analyzed that issue in any depth. As for hearing-impaired persons, the video issue is less complicated – embedded transcripts and closed captioning are far easier and less expensive remedies than WCAG 2.0 AA implementation.

Since many website cases were filed in late 2015 and early 2016, it will take time for trial courts to rule and for any appeals to be heard. If the DOJ adheres to its recently revised timeline, it will at best be another year or two until proposed standards will be available. Even if the standards the DOJ proposes are adopted, the agency will almost certainly provide a grace period after it publishes its final rule to allow companies to come into compliance with the standards. Of course, the DOJ, the private bar and disability advocacy groups can – and most certainly have been – making demands and suing in the interim.

If a company is contemplating rolling out a new website, it may want to work with its website designers and vendors on designing the website to meet the Level AA requirements of WCAG 2.0, to the extent practicable and readily achievable. The cost of such an approach, however, is an important consideration. Companies that are not developing a new website may still opt to assess their level of accessibility, and collaborate with their website designers and vendors with experience in website accessibility and with counsel experienced in Title III litigation over other available options to promote accessibility as well as the risks and benefits inherent in such alternatives.

Companies may want to review the WCAG 2.0 AA Guidelines to understand the types of issues the guidelines address and determine if there might be other website modifications that would improve the accessibility of their website for disabled individuals. For example, could the company refer disabled customers to a telephone line through which they could obtain information that is otherwise available on the website? If a company has video on the website, could the same content be provided in written form or with close captioning? Could the company increase the font size used on the website or include a feature that would enable users to increase the font size? Could the company use simpler, sans serif fonts that tend to be easier to read by most people and by many forms of assistive technology? Could the company adopt a uniform style sheet for its website pages to make navigation easier, particularly for users who rely upon electronic braille?

Companies should also continue to monitor how the courts are dealing with these issues, and consider ways to respond if and when they receive a complaint from a customer about website accessibility. The same level of thought should be applied to the accessibility of physical locations. Companies should also anticipate that similar accessibility claims may be on the horizon regarding phone and tablet apps.

*The authors are among a group of attorneys in Littler's Leave of Absence and Disability Accommodations Practice Group who deal with Title III matters.*