Avoiding (and Defending) ADA Lawsuits Brought Against Financial Institutions for Web-Based ADA Violations

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Materials

Speaker Biographies
Program PowerPoint Presentation
Varying Interpretations of Title III Cases of the ADA

Speaker Biographies

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Marilyn is a partner in the Labor & Employment group. She regularly assists employers of all sizes with a wide array of issues arising under federal, state, and local employment laws. When serving her clients, Marilyn understands the import of balancing legal constraints with practical business needs and goals. With former management and in-house experience, Marilyn is uniquely qualified to understand the multi-faceted challenges that arise in the modern workplace and to guide employers to appropriate solutions. Marilyn helps employers understand not only the potential legal consequences of employment decisions, but also the practical implications of such decisions. Through exercising both legal and practical expertise, Marilyn works with her clients to reach the best decisions for their businesses in a wide range of circumstances. When workplace disputes are unavoidable, Marilyn is an experienced litigator with a strong record of resolving threatened court actions, agency charges, and other disputes in favor of her clients. Marilyn's thoughtful approach to evaluating cases, coupled with strong negotiating skills, have contributed to a history of multiple zero-payout settlements reached at very early stages, saving her clients substantial time and money when faced with threatened litigation. Marilyn has particular expertise in wage and hour matters, and she has successfully defended employers against class-wide claims for alleged unpaid overtime and misclassification of workers. She also has conducted multiple wage and hour audits, particularly with regard to exemption status. Marilyn additionally has expertise in leave, accommodation, and workers' compensation matters, and she regularly offers practical guidance to help employers effectively manage complex issues and avoid liability in these areas. She has presented and offered numerous training sessions on the foregoing topics. Marilyn also is firmly committed to assisting non-profit organizations as well as individuals without resources who require legal assistance. She has worked on a variety of pro bono matters during her years at the firm, including serving on a team representing clients on death row in Texas. This commitment is an extension of her work during law school, where she received a CALI Award for her work representing death-row inmates in Cornell's capital punishment clinic.

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Chris is a partner in the Trial Group and a member of the Commercial Litigation & Class Action Defense and Electronic Discovery groups, among others. Chris's works efficiently to deliver advice that is clear, efficient, and above all practical, to enable his clients to quickly assess legal risk and achieve their business objectives. Chris' class action experience includes the defense of major corporations, including products manufacturers and distributors, publishers, financial institutions, and retailers, in deceptive and unfair advertising, sales, and trade practices class actions; class actions alleging the violation of federal and state consumer protection and anti-discrimination statutes; and in antitrust class action lawsuits. Chris' broad-based commercial litigation and arbitration experience includes the prosecution and defense of licensing and other contract breach claims on behalf of entertainment and apparel companies; the prosecution and defense of claims on behalf of insurers in large scale insurance fraud and insurance contract breach cases; the defense of surety bond issuers in connection with claims on large commercial bonds; the prosecution of computer fraud and trade secret misappropriation claims on behalf of a major defense contractor; and the prosecution and defense of clients in "business divorce" cases. Chris has also defended clients in a wide variety of products litigation, including but not limited to those with significant asbestos and lead paint liabilities; assisted in client internal investigations; represented employers and former employees in non-compete litigation; negotiated performer agreements; and counseled and litigated on behalf of clients across a wide spectrum of businesses in connection with their brand, distribution, licensing, non-compete, non-disclosure, agency and other agreements, as well as on their websites

and other advertising and promotional materials. Chris has contributed book chapters to, authored articles for, and been quoted by, numerous legal publications and media outlets on a wide variety of legal subjects. He has also dedicated much time to pro bono matters, including the representation of neglected and abused children in litigation against New York City's child services agency and against state juvenile detention center personnel, the representation of detainees in human rights litigation, and the representation of veterans seeking to obtain prompt disability benefit determinations. He is a member of the Boards of Directors of Hunger Free America and of the Center for Family Representation.

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Joe is a partner in the Finance & Restructuring group and a member of the Banking Industry Group. He practices in both the Firm's Washington, D.C. and Southern California offices. Joe possesses a broad knowledge base regarding foreign banks and domestic banks, savings associations, bank holding companies, finance companies, mortgage banking companies and their subsidiaries and affiliates. His practice includes providing financial intermediaries advice in the areas of regulatory and strategic planning, application and licensing, legislative strategy, commercial and consumer lending, examination, supervision and enforcement, and general corporate matters. Joe's FDIC-insured financial institution clients benefit from his experience in the special state and federal statutory and regulatory requirements—including safety and soundness issues—that apply to regulated financial intermediaries. He regularly counsels clients on matters such as retail operations, privacy, identity theft, consumer compliance, application and underwriting, payments systems, Internet, electronic commerce, examination, supervision and enforcement, operational and strategic planning matters. Joe is a frequent lecturer on legal topics involving the operation and regulation of financial service companies. Specific regulatory topics upon which Joe has advised clients and spoken at conferences include the Dodd-Frank Act, prudential regulation, the Volcker Rule, the Bank Secrecy Act (and other anti-money laundering provisions), mortgage lending and the CFPB.

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Lanier is a partner in the Securities & Financial Services Litigation group. He represents banks in a wide array of matters, ranging from responding to subpoenas to defending class actions. Lanier serves as Co-Chair of the U.S.-China Practice Group and was shortlisted for the Asialaw Dispute Resolution Awards in 2017 for "Best in Banking & Finance" and a winner of the China Business Law Award in 2018 in the category of "Banking & Finance." He recently was described as "one of the foremost experts in the world on international banking" by the Pharma Letter. In addition to his work for banks, Lanier frequently handles general commercial litigation matters, including contract disputes, prosecuting and defending against claims of fraud and breach of fiduciary duty, pre-M&A motion practice, post-closing adjustment disputes and post-judgment and arbitral award enforcement actions. His articles on legal and banking issues have appeared in *The Wall Street Journal*, The *New York Law Journal*, *Quartz*, *CFO Magazine*, and the *Notre Dame Law Review*. He has been quoted in numerous media outlets, including the National Law Journal, Bloomberg, Businessweek, People's Daily, and Tencent. Lanier has spoken at conferences sponsored by the Wharton China Business Society at Wharton Business School, The Center for Chinese Legal Studies at Columbia University Law School, and the International Symposium on Economic Crime at Cambridge University. He is an adjunct professor of law at Fordham University School of Law, where he teaches a seminar on banking regulation and enforcement.

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Avoiding (and Defending) ADA Lawsuits Brought Against Financial Institutions for Web-Based ADA Violations

Presenters:
Joe Lynyak
Marilyn Clark
Lanier Saperstein
Chris Karagheuzoff

Growing Trend of Website Accessibility Cases

- **Recent groundswell of website accessibility cases in past few years**
- **In 2017, over 800 website accessibility cases were filed in federal courts across the country**

New York and Florida Are Hotbeds of ADA Litigation

- In New York, the number of Title III cases nearly doubled from 2016 to 2017, largely due to the rise of website accessibility cases.
- In the first two months of 2018 alone for example, over 130 website accessibility cases were filed in New York federal courts, which amounts to more than three cases each business day.

Agenda

- ADA overview
  - A brief history outlining the road to website accessibility suits
- Current lawsuit landscape: A discussion by Dorsey litigators
  - Summary of claims
  - Possible defenses
  - Remedies available under the ADA (and state laws)
  - Plaintiffs' bar tactics
  - Procedural resolutions of these lawsuits
- How to get your institution off the litigation radar: Recommended compliance measures

The Presenters

- Marilyn Clark
- Lanier Saperstein
- Chris Karagheuzoff

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The Statute

- Title III of the ADA, which applies to "places of public accommodation," prohibits discrimination against individuals with disabilities. 42 U.S.C. § 12188.
  - Individuals with disabilities must be offered the "full and equal enjoyment of the [entity's] goods, services, facilities, privileges, advantages or accommodations." 42 U.S.C. § 12812(a).
- Neither the ADA nor its implementing regulations, however, define the term, "place of public accommodation."
  - Rather, the regs identify 12 broad categories of "facilities" whose operations affect commerce…

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The ADA was enacted before the Internet became a common vehicle of commerce

So the question remains: Is a website a "place of public accommodation"?

- July of 2010: DOJ issued Advanced Notice of Proposed Rulemaking (ANPRM) to specifically address ADA compliance on the Internet
  - The ANPRM raises a range of issues involving the ADA and websites, highlighting the complexities surrounding accessibility compliance in this unique context
- December 26, 2017: DOJ withdrew the ANPRM without proposing or issuing useful guidance
  - 82 Fed Reg. 60932 (Dec 26, 2017)
- Banks are now at the mercy of the courts….

Presuming websites are covered by the ADA, what accessibility requirements exist?

- Title III provides that illegal discrimination includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services…." 42 U.S.C. § 12182(b)(2)(A)(i).
- The DOJ's regulations regarding auxiliary aids require "effective methods of making visually delivered materials available to individuals who are blind or have low vision." 28 C.F.R. § 36.303(b)(2).

Growing Trend of Website Accessibility Cases

- The ADA's "auxiliary aids and services" language creates an inroad for a whole new universe of lawsuits in the website context.
- Blind and visually impaired people often use specialized software – such as screen-reader technology – which reads website content aloud or displays website content on a refreshable Braille display.
- The plaintiffs' bar targets entities with websites that do not adequately allow for the use of screen-reader software or "provide a text equivalent for non-text elements."
  - Send demand letters or file complaints seeking immediate remediation of these alleged deficiencies.

Accessibility to Visually & Hearing Impaired

Ultimately, however, the method chosen to address any accessibility issue is up to the public accommodation:

> A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities…The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual … A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

28 C.F.R. § 36.303(c).

Accessibility to Visually & Hearing Impaired

- Thus, the ADA's provision regarding auxiliary aids reflects a generally flexible standard that does not mandate any specific method of compliance.
  - *See Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) ("The auxiliary aid requirement allows a public accommodation to provide the information in any format, so long as it results in effective communication.").
- The DOJ has noted that, until specific technical requirements for a particular technology are complete, "public accommodations have a degree of flexibility in complying with title III's more general requirements of nondiscrimination and effective communication – but they still must comply."
  - *Robles v. Dominos Pizza LLC,* No. 16-cv-06599, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017) (citing DOJ's statement of interest to a Southern District of Florida court in case regarding Lucky Brand's point of sale devices).

Jurisdiction

- Courts have federal question subject-matter jurisdiction over ADA claims under 28 U.S.C. § 1331
- Additionally, courts may, where appropriate, exercise supplemental jurisdiction over analogous state law claims brought in conjunction with ADA claims

Individual & Class Actions

- ADA claims may be brought either as putative class actions or as individual actions by a single plaintiff
- The trend in New York is for plaintiffs to bring putative class actions, but settle early on in their individual capacities

Survey of Case Law on Whether Title III is Limited to Physical Spaces

Title III does not expressly include websites as "places of public accommodation."

Currently, there is a federal circuit court split on whether the ADA's Title III protections extend beyond physical "places of accommodation," such as to websites, or if they are instead limited to physical "brick and mortar" structures.

Courts Are All Over the Map Interpreting Title III of the ADA

Some courts narrowly interpret Title III as applying only to physical access.

Federal courts in California, Florida and Ohio have held Title III is not limited to actual physical structures, but there must be a sufficient nexus to physical structures.

Other courts have held that websites constitute places of public accommodation even absent any connection to brick-and-mortar locations.

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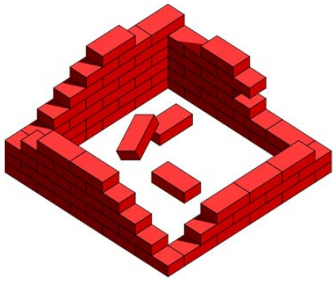
ADA Limited to Physical Structures

- **The Court of Appeals for the Sixth, Ninth, and Eleventh Circuits have held that "places of public accommodation" are physical structures, and that accommodations for the disabled must be made only at the location where goods and services are offered.**
- **These courts have grounded their holdings largely in the ADA's text, which lists physical locales as "public accommodations."**



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ADA Limited to Physical Structures

- ***Peoples v. Discover Financial Services, Inc.*, 387 F. App'x 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.")**

ADA Limited to Physical Structures

- ***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.")**

ADA Limited to Physical Structures

Middle Ground: As something of an exception to this general rule (although not one that is likely to be of particular relevance here), some courts within these circuits have held that websites may be places of public accommodation if there is a "**nexus**" between a website and goods and services that can be procured at a physical location.

For example, in a case involving Target.com, a district court in the Ninth Circuit held:

> Target.com also allows a customer to perform functions related to Target stores. For example, through Target.com, a customer can access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store.... [T]he court finds that *to the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim,* and the motion to dismiss is denied. To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.

Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949-56 (N.D. Cal. 2006) (emphasis added).

ADA Limited to Physical Structures

Other Exception Examples:

- *Gil v. Winn Dixie Stores, Inc.*, 2017 WL 2609330, at *5 (S.D. Fla. Mar. 15, 2017) (denying defendant's motion for judgment as a matter of law because "it appears that, just as in *Target Corp.*, Winn-Dixie's website is heavily integrated with, and in many ways operates as a gateway to, Winn-Dixie's physical store locations,' but declining to "determine whether Winn-Dixie's website is a public accommodation in and of itself.")
- *Gomez v. Bang & Olufsen Am., Inc.*, 2017 WL 1957182, at *4 (S.D. Fla. Feb. 2, 2017) ("All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-motar *[sic]* store.... Because Plaintiff has not alleged that Defendant's website impeded his personal use of Bang and Olfusen's retail locations, his ADA claim must be dismissed.")

Websites as Places of Public Accommodation

The Court of Appeals for the Seventh Circuit (and, arguably, the First Circuit) have found that websites are places of public accommodation and that illegal discrimination can occur in connection with websites, even if an individual never is present in a physical store

- ***Doe v. Mutual of* Omaha *Insurance Co.*, 179 F.3d 557, 559 (7th Cir. 1999) ("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, *Web site*, 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."**

Websites as Places of Public Accommodation

- ***Morgan v. Joint Administrative Board, Retirement Plan of the Pillsbury Co. and American Federation of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001):**

  The defendant asks us to interpret "public accommodation" literally, as denoting a physical site, such as a store or hotel but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person *over the Internet* than a furniture store can refuse to sell furniture to a disabled person who enters the store. The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.

Websites as Places of Public Accommodation

- ***Carparts Distribution Center., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.,*** **37 F.3d 12, 19-20 (1st Cir. 1994)**

  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...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 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.

Websites as Places of Public Accommodation

Carparts Distribution Center **has subsequently been interpreted as supporting the view that websites are public accommodations.**

- ***Nat'l Ass'n of the Deaf v. Netflix, Inc.,*** **869 F. Supp. 2d 196, 201-02 (D. Mass. 2012) ("Consequently, while the home is not itself a place of public accommodation, entities that provide services in the home may qualify as place of public accommodation. Under Defendant's reading of the statute, many businesses that provide services to a customer's home – such as plumbers, pizza delivery services, or moving companies – would be exempt from the ADA. The First Circuit held in *Carparts* that such an interpretation is absurd. Under the *Carparts* decision, *the Watch Instantly web site is a place of public accommodation and Defendant may not discriminate in the provision of the services of that public accommodation streaming video-even if those services are accessed exclusively in the home."*)**

Websites Likely To Be Deemed Places of Public Accommodation

- **The Second Circuit Court of Appeals, which hears appeals from New York federal courts, has yet to address directly whether websites are within the ADA's ambit.**
- **Perhaps the most instructive case on this issue, however, is *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), opinion amended on denial of *reh'g*, 204 F.3d 392 (2d Cir. 2000).**

Websites Likely To Be Deemed Places of Public Accommodation

- In *Pallozzi*, a couple alleged that their application for a joint life insurance policy had been denied by Allstate because of their mental disabilities. The threshold question was whether Title III of the ADA "regulate[s] insurance underwriting practices." 198 F.3d at 31.
- The Second Circuit noted at the outset that the Title III named an "insurance office" as a "public accommodation" and that "[s]ection 302(a) bars a 'place of public accommodation' from 'discriminat[ing] against [an individual] on the basis of disability in the full and equal enjoyment of [its] goods [and] services.'" *Id.* (quoting 42 U.S.C. §§ 12181(7)(F), 12182(a)) (alterations and emphases in original). In this context, the Second Circuit found that the "goods" and "services" provided by an "insurance office" are insurance policies. The court therefore held that "the prohibition imposed on a place of public accommodation from discriminating against a disabled customer in the enjoyment of its goods and services appears to prohibit an insurance office from discriminatorily refusing to offer its policies to disabled persons...." *Id.* (citing *Doe v. Mutual Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999)).
- The Second Circuit rejected Allstate's argument that the ADA was only concerned with physical access and that "because insurance policies are not actually used in places of public accommodation, they do not qualify as goods and services 'of[a] place of public accommodation." *Pallozzi*, 198 at 32 (quoting 42 U.S.C. § 12181(7)(F) and 42 U.S.C. § 12182(a)) (emphases in original). This argument did not prevail in the court's view because "Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation," [42 U.S.C. § 12182(a)], suggests to us that the statute was meant to guarantee them more than mere physical access." *Id*

Websites Likely To Be Deemed Places of Public Accommodation

- The Second Circuit also cited to a quotation from *Carparts* (the Seventh Circuit case addressed above): "To . . . . limit the application of Title III to physical structures . . . 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." *Id.* (quoting Carparts, 37 F.3d at 20). Finally, the court indicated that it is the sale of goods and services, rather than the means by which such sales are effectuated, that drives the analysis of whether the ADA applies:

  > 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 Section 302(a) of Title III. 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,' 42 U.S.C. § 12181(7)(E), as well as a 'travel service, ... gas station, office of an accountant or lawyer, [or] pharmacy,' *id.* § 12181(7)(F) – 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.

Websites Likely To Be Deemed Places of Public Accommodation

- *Pallozzi* does not address websites; the issue there was access to goods and services (there, insurance policies) offered at a physical location. The *Pallozzi* Court rejected the argument that the good or service to which access was denied need be one that was actually used at the physical location, noting that the "most conspicuous 'goods' and 'services' provided by an 'insurance office' are insurance policies." *Id.* at 31.
- However, because in making its ruling, the *Pallozzi* Court cited favorably to *Carparts* and *Doe* (which held explicitly that a website is covered by the ADA). District courts within the Second Circuit – especially within the Eastern District of New York – have seized upon that and broadened the scope of the reasoning and holding of the *Pallozi* Court to hold that a website is a place of public accommodation covered by the ADA. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017).
- Other district courts in the Second Circuit had previously cited *Pallozi* in reaching the same conclusion. *See Nat'l Fed'n of the Blind v. Scribd. Inc.*, 97 F. Supp. 3d 565, (D. Vt. 2015) (Title III of the ADA covers the website of a company without any physical locations); *Market v. Five Guys Enterprises LLC*, 1:17-cv-00788-KBF, 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. July 21, 2017) ("[T]he text and purposes of the ADA, as well as the breadth of federal appellate decisions, suggest that defendant's website is covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant's restaurants, which indisputably are public accommodation under the statute.").

What Does Compliance Mean?

While flexible standards when it comes to compliance can be beneficial for a website provider, they also beg the question of what specific steps are adequate to make a website compliant?

What Does Compliance Mean?

- Some defendants have argued that their websites comply by providing "effective communication" through another medium, like the telephone.
  - *See, e.g., Target*, 452 F. Supp. 2d at 956 ("[D]efendant concludes that Target need not modify its website, so long as it provides the information contained therein in some other format, such as by telephone.")
  - *Carroll*, 18 WL 3212023, at *4 ("Defendant argues that it has complied with the method suggested by the Department of Justice in its 2010 Advance Notice of Proposed Rulemaking in that Defendant's website "contains a link at the top of the page to 'Convenient Support' and a phone number... to contact the credit union.")
  - *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116, 2017 WL 5186354, at *9 (D.N.H. Nov. 8, 2017) ("Blue Apron argues that the court should dismiss the complaint because it accommodates its visually-impaired customers by providing effective communication … through a phone number.").

What Does Compliance Mean?

- We have not identified a case in which a court ruled that a phone number is an appropriate alternative. Rather, the vast majority of the opinions in this space are rulings on motions to dismiss, and "the flexibility to provide reasonable accommodation is an affirmative defense and not an appropriate basis upon which to dismiss the[se] action[s]." *Target*, 452 F. Supp. 2d at 956.
- The case in which a court came closest to holding that a phone number alternative may be permissible is *Robles*, in which the court noted that "[p]laintiff has failed to articulate why either Defendant's provision of a telephone hotline for the visually impaired or its compliance with a technical standard other than WCAG 2.0 does not fall within the range of permissible options afforded under the ADA." *Robles,* 2017 WL 1330216, at *6.

What Does Compliance Mean?

- As to issues that will typically render a website non-compliant, there are a number of cases holding that, if screen-reader technology does not work with a defendants' website, plaintiffs state a cognizable injury to prevail on a motion to dismiss.
  - *See, e.g., Gathers*, 2018 WL 839381, at *3-4 (allegations showing that screen reader does not work properly with the website is enough to plead an injury);
  - *Gniekowski*, 251 F. Supp. 3d at 913-24 ("The Court finds that because Ameriserv's website barred Plaintiffs' screen reader software from reading the content of its website, Plaintiffs were unable to conduct on-line research to compare financial services and products; and this constitutes an injury-in-fact under Article III of the ADA.").

What Does Compliance Mean?

The Gold Standard

- It is likely that a website which complies with World Wide Web's Consortium's Web Content Accessibility Guidelines 2.0 ("WCAG 2.0") will be considered compliant with the ADA.
- A number of consent decrees—some of which have included the DOJ as a party—require defendants to make websites comply with WCAG 2.0 specifically.
  - *See, e.g., National Federation for the Blind v. HRB Digital LLC*, No. 13-cv-10799 (D. Mass.) (Consent Decree filed March 6, 2014) (consent decree in case in which DOJ intervened agreed to make website WCAG 2.0 complaint);
  - *Stanley v. BarBri, Inc.*, No. 16-cv-01113 (N.D. Tex.) (Consent Decree Filed Jan. 22, 2018) (consent decree in which BarBri agreed to make websites WCAG 2.0 compliant);
  - *Dudley v. Miami Univ.*, No. 14-cv-38 (S.D. Ohio) (Consent Decree Filed Dec. 14, 2016) (consent decree in case in which DOJ intervened agreed to make website WCAG 2.0 complaint).

What Does Compliance Mean?

A number of plaintiffs have specifically complained that websites were not WCAG 2.0 compliant, s*ee, e.g., Robles v. Dominos Pizza LLC,* 2017 WL 1330216, at *1; *Gathers v. 1-800-Flowers.com, Inc.*, No. 17-CV-10273, 2018 WL 839381, at *1 (D. Mass. Feb. 12, 2018).

However, underscoring the fact that WCAG 2.0 constitutes a gold standard of sorts with respect to compliance, we have found only one instance in which a court actually ordered a defendant to make its website WCAG 2.0-compliant in order to comply with the ADA.

- *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017) (ordering remediation measures in conformity with the WCAG 2.0 since Winn-Dixie provided no evidence that this would be unduly burdensome)
- *See also Robles,* 2017 WL 1330216, at *8 ("Indeed, the Court, after conducting a diligent search, has been unable to locate a single case in which a court has suggested, much less held, that persons and entities subject to Title III that have chosen to offer online access to their goods or services must do so in a manner that satisfies a particular WCAG conformance level.").

What Does Compliance Mean?

The lack of guidance by the DOJ regarding what is required to for a website to be compliant with Title III has led defendants to make due process and primary jurisdiction arguments, which have been met with mixed results.

- ***See Robles,* 2017 WL 1330216 (granting defendant's motion for summary judgment pursuant to the primary jurisdiction doctrine "which allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency") (internal citations omitted)**
- ***Harvard Univ.*, 2016 WL 3561622 (denying defendant's motion to dismiss the claims based on primary jurisdiction)**
- ***Del-Orden v. Bonobos, Inc.*, No. 17-cv-2744, 2017 WL6547902 (S.D.N.Y. Dec. 20, 2017) (reserving judgment until later in the proceedings on the issue of whether it would violate due process for the court to evaluate the standards of the website using WCAG).**

Potential Relief Available

- **The ADA provides for injunctive relief and attorneys' fees, but not monetary damages.**
- **Local state and city laws, however, such as in New York, Minnesota, and California, may provide for damages or other monetary penalties.**

Damages Awards

- Most ADA website accessibility cases settle early on and the settlement terms are private.
- In *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), however, the parties settled class action website accessibility claims under the ADA and local California law and the terms of this settlement are public. The defendant, in addition to agreeing to modify its website to meet accessibility guidelines, created a $6 million settlement fund for California State law violations.

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Potential Defenses to Raise

- Website is not a "public accommodation" and/or lack of nexus physical location
- Undue Burden
- Provision of reasonable alternative accommodations
- Fundamental Alterations
- Due Process
- Lack of standing
- Mootness
- Doctrine of Primary Jurisdiction
- Third-party conduct

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Avoiding ADA Claims: Staying Ahead on Compliance Measures

- **Proactive website remediation:**
  - **Makes you a less attractive target**
  - **Allows you greater control over the process**
  - **Shows your commitment to disabled customers**
- **Recommended approach:**
  - **Identify compliance vendor (e.g., WeCo)**
  - **Create remediation plan**
  - **Adopt accessibility policy**
  - **Identify and train internal compliance point person to ensure compliance efforts are maintained**
  - **Review any third-party contracts for web-based services to ensure adequate accessibility assurances and indemnification terms**

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Reference Materials

Web Content Accessibility Guidelines (WCAG) 2.0 — http://www.w3.org/TR/2008/REC-WCAG20-20081211/

DOJ ANPRM—Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations — https://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf#page=1

DOJ—Withdrawal of ANPRM — https://www.gpo.gov/fdsys/granule/FR-2017-12-26/2017-27510

DOJ-A Guide to Disability Rights Laws — https://www.ada.gov/cguide.htm#anchor62335

OCC Policies and Procedures-Reasonable Accommodations for Individuals with Disabilities — https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-3100-29.pdf

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Questions???

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Avoiding (and Defending) ADA Lawsuits

Varying Interpretations of Title III Cases of the ADA

July 26, 2018

Narrower Interpretations of ADA (Defendant-Friendly)	In-Between Interpretations of ADA	Broader Interpretations of ADA (Plaintiff-Friendly)
Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998) (affirming dismissal of Title III claim against employer and insurance company for disparity in benefits for mental and physical disabilities, in part, because insurance policy was offered to plaintiff, not at insurance office—a physical place of accommodation—but rather in the context of her employment, and providing, "we do not find the term 'public accommodation' . . . to refer to non-physical access"). *Peoples v. Discover Financial Services, Inc.*, 387 F. App'x 179 (3d Cir. 2010) (restricting term "public accommodation" under Title III of ADA to physical places and affirming summary judgment for defendant because the alleged discrimination—insufficient investigation of fraud claim– did not relate to the "equal enjoyment of goods, services, facilities, privileges, advantages or accommodations" on physical property "owned, leased or operated" by defendant).	*Cullen v. Netflix, Inc.*, 600 F. App'x 508 (9th Cir. 2015) (concluding statutory term "place of public accommodation" requires "some connection between the good or service complained of and an actual physical place," and holding Netflix is not subject to ADA because its services lack any connection to a physical place). *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) (holding plaintiffs sufficiently stated ADA claim because website was heavily integrated with brick-and-mortar stores and operated as gateway to the stores). *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017) (declining to decide whether Winn-Dixie's website is "a public accommodation in and of itself, because the factual findings demonstrate that the website is heavily integrated with Winn-Dixie's physical store locations and operates as a gateway to the physical store locations.").	*Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999) (holding Title III of ADA is not limited to physical structures and that because insurance office is a place of public accommodation, it may not discriminatorily refuse to offer its insurance policies—a good or service—to disable persons). *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (denying motion to dismiss complaint and holding website is a place of public accommodation, even absent a connection to brick-and-mortar store). *Markett v. Five Guys*, No. 17-cv-788, 2017 U.S. LEXIS 115212 (S.D.N.Y. 2017) (holding plaintiff stated a claim under ADA because *either* website itself is a place of public accommodation or because of website's close relationship as a service of the restaurant, which is a place of public accommodation). *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) (concluding that provision of insurance benefits was covered by Title III because the term "public accommodation" is not limited to actual physical structures).

Avoiding (and Defending) ADA Lawsuits

Varying Interpretations of Title III Cases of the ADA

July 26, 2018

Narrower Interpretations of ADA (Defendant-Friendly)	In-Between Interpretations of ADA	Broader Interpretations of ADA (Plaintiff-Friendly)
Parker v. Metro. Life Insurance Co., 121 F.3d 1006 (6th Cir. 1997) (holding provision of disability insurance plan by employer that was administered by an insurance company does not fall within purview of Title III and concluding a public accommodation must be a physical place, but reserving opinion "as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation.").	*Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870 (N.D. Ohio 2018) (denying motion to dismiss because plaintiff stated a claim under ADA by sufficiently alleging a nexus between store's website and physical locations).	*National Association of the Deaf v. Netflix, Inc*., 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (holding Netflix's website is place of public accommodation providing web-based services and that the "ADA covers services 'of' a public accommodation, not services 'at' or 'in' a public accommodation"). *Doe v. Mutual of Omaha Insurance Co*., 179 F.3d 557 (7th Cir. 1999) (holding Title III's coverage extends beyond physical products to contracts and insurance policies, and providing, "the owner or operator of a store, . . . Web site, or other facility (whether in physical [or electronic] space), that is open to the public cannot exclude disabled persons") (internal citations omitted). *Rendon v. Valleycrest Productions*, 294 F.3d 1279 (11th Cir. 2002) (finding plaintiffs stated valid claim under Title III that automated telephone contestant selection process is discriminatory screening mechanism, policy or procedure preventing disabled plaintiffs from appearing as contestants on TV show filmed at a studio, which is a place of public accommodation).