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Murky Rules Complicate ADA Compliance Online

By **Joshua Briones and Nicole Ozeran** (July 2, 2021, 1:03 PM EDT)

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During the COVID-19 pandemic, companies minimized or entirely eliminated consumers' in-person experiences. To stay afloat and engaged with consumers, companies expended significant capital further expanding and developing their online presence, making their websites significant revenue drivers.

And throughout 2020 and 2021, the number of website accessibility lawsuits filed under the American with Disabilities Act and the Unruh Civil Rights Act, California's equivalent of the ADA, did not abate. Rather, in Los Angeles County alone, nearly a dozen such lawsuits are now filed each day.[1]

The rules surrounding website accessibility are murky at best, leaving creative plaintiffs counsel with opportunities to bring claims against numerous websites. As such, these lawsuits or threats of suit are seemingly unavoidable.

This article lays out the rules of website accessibility, the common questions companies ask when hit with one of these suits and how to help minimize a company's ultimate exposure.

How It Goes Down

You will likely first get a demand letter from plaintiffs counsel alleging that their client, an unidentified disabled person, attempted to use your company's website or mobile apps but was unable to do so because of unidentified access barriers.

While there is no requirement that plaintiffs counsel send your company a demand letter or notice under the ADA or Unruh Act, they will often do so to avoid expending the $500 fee for filing a complaint.

The claimants are regularly blind individuals who allege they visited the website or mobile app and experienced an alleged accessibility barrier. A single claimant can visit countless websites. It is therefore not uncommon to see form complaints filed against numerous companies brought on behalf of the same plaintiff by the same plaintiffs law firm.

Plaintiffs typically seek monetary damages and one-way attorney fees under California's Unruh Act — not the injunctive relief and equal-handed attorney fees available under the ADA.

This uneven risk of litigation allows plaintiffs and their attorneys to force quick settlements as companies do not want to be responsible for a settlement that is likely to increase as the case progresses along with their own rising defense costs.

What Are the Rules?

To make things even more frustrating, there are no official rules to website accessibility. Though the U.S. Department of Justice issued an advance notice of proposed rulemaking on the accessibility of web information services in 2010, nothing has come of it, leaving a murky area for plaintiffs counsel to thrive in for years.

However, beginning in 2019 — and increasingly since — courts have seemingly adopted the accessibility standards set forth by the World Wide Web Consortium in the Web Content Accessibility Guidelines, or WCAG. While helpful to have some guidance on this issue, it's still not that simple.

Can We Get Some Guidance?

History

Even the WCAG standards leave doubt as to what is required of websites, as different versions of the WCAG standards exist or are anticipated to come into existence — WCAG 2.0 was published as final on Dec. 11, 2008.

A decade later, on June 5, 2018, WCAG 2.1 was published. WCAG 2.2, originally planned for release in November 2020, is now expected this summer.

To further add to the confusion, in January 2021, the World Wide Web Consortium also published the first working draft of WCAG 3.0, though the finalized version of WCAG 3.0 is not expected to be completed for years.

WCAG 3.0

The finalized WCAG 3.0 standards are anticipated to provide welcome standardization. Specifically, WCAG 3.0 will differ from the WCAG 2.0 series in that it will include web accessibility tests and scoring mechanisms, helping provide uniformity of testing and providing real guidance to companies who are trying to access whether access barriers exist on their websites.

Online Accessibility Act

There is also a glimmer of hope on Capitol Hill. On Feb. 18, 2021, Rep. Lou Correa, D.-Calif., Rep. Ted Budd, R-N.C., and Rep. Richard Hudson, R.-N.C., reintroduced the Online Accessibility Act as H.R. 1100, seeking to slow the flood of ADA website accessibility cases.

The act seeks to amend the ADA to specifically prohibit discrimination by "any private owner or operator of a consumer facing website or mobile application" against individuals with disabilities.

It also seeks to establish digital accessibility compliance standards to be drafted by the Access Board. This would establish an identifiable compliance standard that companies could implement, providing

more certainty to companies and the field, in general.

Most dramatically, the act seeks to create a mandatory administrative process that claimants must exhaust before filing a lawsuit.

The multistep presuit process would provide businesses with prelitigation notice and an opportunity to cure, and would require individuals to provide notice to the website owner of alleged noncompliance, provide the owner or operator with a 90-day notice and remediation period, and file a complaint with the DOJ.

The U.S. attorney general then would have 180 days to investigate and determine whether to file a civil enforcement action. If no enforcement action is filed, the claimant will be able to file a lawsuit.

Until Congress acts on the pending legislation, however, companies with websites and mobile apps face a barrage of lawsuits and accessibility claims with no clear guidance on how they can be defended or avoided.

Is Your Website a Public Accommodation?

It depends.

Federal Court Interpretation

There currently exists a split among the federal courts whether websites are public accommodation under the ADA.

- *Public Accommodation:* The U.S. Court of Appeals for the First Circuit and district courts in the Second Circuit have expressly found that a website can be a place of public accommodation independent of any connection to a physical location, e.g., online-only stores. The U.S. Court of Appeals for the Seventh Circuit has indicated it may adopt a similar position.

- *Nexus Test:* The U.S. Court of Appeals for the Ninth Circuit has adopted an alternate view, applying the nexus test. Under the nexus test, a website may be considered a place of public accommodation only if there is a sufficient nexus to a physical place that is otherwise covered by the ADA.

  The U.S. Court of Appeals for the Third and Sixth Circuits have similarly adopted the nexus test as to goods and services, but have not yet applied it to websites.

- *Not a Public Accommodation:* On April 7, the U.S. Court of Appeals for the Eleventh Circuit created a third school of thought, finding that websites are not public accommodations, regardless of any nexus test.

  In Gil v. Winn-Dixie Stores Inc., the Eleventh Circuit reversed the 2017 decision of the U.S. District Court for the Southern District of Florida and held that liability for website accessibility can only exist where the website's accessibility barriers creates a tangible barrier to the physical public accommodation.

  The Eleventh Circuit held that websites are not public accommodations, and that because Winn-

Dixie's website and app had limited functionality and was not a point of sale, the website also did not constitute an intangible barrier to the physical stores.

Until the U.S. Supreme Court takes up the issue of whether a website is a public accommodation, companies are left guessing whether they are a target for such lawsuits.

State Court Interpretation

It should be noted that the circuit split, and even the requirement of a nexus has not deterred plaintiffs counsel in California. Instead, plaintiffs counsel have found creative ways to avoid application of federal law.

First, they file their actions in California state court alleging an Unruh Act violation, making sure to not include an ADA claim and thus avoiding any potential removal of the claim under federal question jurisdiction. Second, they limit their damages claims to $74,999 to avoid diversity jurisdiction.

How Does California Have Jurisdiction Over These Claims?

When it comes to website accessibility claims, traditional notions of personal jurisdiction have been stretched so far as to seem to have little meaning. In fact, California courts have found that everyone with a website that can be accessed in California is arguably liable under the Unruh Act.

In the case of Thurston v. Fairfield Collectables of Georgia LLC, filed Aug. 26, 2020, in the California Fourth District Court of Appeal, the court broadly applied California website accessibility laws to a Georgia-based online retailer.

In that case, Fairfield argued that the court lacked jurisdiction as Fairfield did not direct any marketing to California, did not specifically conduct business in the state, did not have any offices in the state and did not have any employees within the state.

The appellate court, however, found that Fairfield had substantial connections with the state and therefore purposefully availed itself of jurisdiction in the state because Californian consumers accounted for 10% of the company's consumer base and 8% of the company's total sales.

With California accounting for an average of 13% of national sales for companies, this ruling implies that nearly all companies with consumer-facing websites will likely be subject to jurisdiction in California. While companies can opt out of selling to Californians to avoid jurisdiction, we have yet to see a company take this approach.

What Should You Do?

Each situation is unique and must be evaluated independently. However, with the vagueness of the law and state courts' wide latitude for these claims, the ability to avoid one of these lawsuits is nearly impossible.

The big question is, when your company is hit with a demand letter regarding its website's accessibility, what should you do? Possible options are:

- Not responding to the letter. Unfortunately, 9 out of 10 times, plaintiffs counsel will ultimately file the lawsuit and then make increased attorney fees demands for the extra work they were forced to incur.

- Develop your defenses. If you're positioned correctly, you may be able to litigate the issue and create positive case law for the entire industry.

  In fact, in the right situation, companies should consider litigating critical issues to narrow the application of law to websites, such as (1) the application of the nexus test to an Unruh Act claim where the Unruh Act claim is hinged on a violation of the ADA and (2) whether a tester claimant has standing to assert a claim.

Conclusion

The legal landscape surrounding website accessibility claims continues to develop. With little guidance from the DOJ or Congress, courts are left to make their own interpretations of the application of the ADA to websites.

This results in wildly divergent standards and becomes a breeding ground for lawsuits.

Companies have to continue to put forth their best efforts to comply with the ever-changing and undefined website and mobile application accessibility requirements until more definitive guidance is provided by either the courts or Congress.

Correction: A previous version of this article incorrectly identified the party affiliation of Reps. Budd and Hudson. This error has been corrected.

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[1] See Daily CNS Los Angeles State Reports.