THE "WILD WEST" OF ADA WEBSITE LITIGATION

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ACCESSIBILITY LAWSUITS FILED UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT (ADA) HAVE BEEN ON THE RISE, INCREASING BY 37% FROM 2015 TO 2016.

Much of this increase has been driven by litigation focused on the accessibility of websites. Meanwhile, grocers have become more dependent on e-commerce and have adopted technology allowing customers to order groceries and other goods online for pick-up, bringing their websites within the sights of ADA plaintiffs.

The vast majority of cases are filed by a small group of serial plaintiffs represented by ADA plaintiff attorneys and advocacy organizations. These litigants typically visit numerous places of "public accommodation" in order to "test" their compliance with the ADA, then file lawsuits that usually settle for nuisance amounts. Plaintiffs have incentive to file suit because Title III allows them to recover their attorneys' fees and costs. Though damages are not available, plaintiffs often receive compensation in settlements. Plaintiffs have increasingly turned their attention to "testing" the accessibility of websites, ensnaring retailers in unpredictable litigation.

No Rules Govern the Accessibility of Websites

The ADA was enacted in 1990, several years before the widespread adoption of the internet. Title III requires "public accommodations" to be accessible to the disabled, a class of persons that includes those with vision, hearing, and learning disabilities. Businesses that provide goods or services to the public must provide disabled persons with equal access to those goods and services; any barriers must be removed. While the ADA does not specifically address websites in the statute or the regulations, the Department of Justice (DOJ), which enforces the ADA, has long held that the ADA applies to business websites.

The failure of the DOJ to enact rules governing websites has left a void in ADA enforcement, creating a "Wild West" scenario with courts left to their own devices to determine the law and plaintiffs seeking advantage wherever they can. The Ninth Circuit (which includes all federal courts in California) has taken a restrictive view of the ADA's applicability to websites.

In California, an entity's website may not impede a qualified disabled person's full and equal enjoyment of the goods and services offered in that entity's physical place of "public accommodation." Applied to grocers, a plaintiff cannot sue based on a website's inaccessibility alone – the website must frustrate his or her enjoyment of a physical store. For example, a plaintiff cannot sue a grocer where an inaccessible website prevented her from ordering groceries for delivery, but can sue where an inaccessible website prevented her from using an in-store pickup option. In contrast, some courts outside the Ninth Circuit consider the website itself a place of "public accommodation," allowing plaintiffs to file suit upon visiting an allegedly inaccessible website with no need to visit a physical location – entangling grocery delivery companies like Peapod in ADA litigation.

Grocers Should Be Proactive to Avoid Litigation

The Ninth Circuit's high bar for ADA website litigation has not deterred plaintiffs, who continue to sue to extract nuisance settlements. The best defense for grocers is to stay off the "wanted list" of ADA plaintiffs entirely by ensuring their websites and mobile applications are accessible.

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The DOJ has not issued any rules on website accessibility apart from a draft rule issued in 2010, which has yet to be published. While commentators project that website regulations will be published in 2018, the current political climate may cause further delays. Given this absence of authority, the DOJ and ADA plaintiffs have adopted the Web Content Accessibility 2.0 (WCAG 2.0) as standards for website accessibility.

The WCAG have yet to be blessed as compliance standards by courts in the Ninth Circuit, one of which refused to adopt them in lieu of a published rule. The value of the WCAG lies in preventing litigation in the first place.

The WCAG were crafted to accommodate disabled individuals' use of technology such as screen readers and custom web browsers. These tools transform ordinary websites and applications into usable form for the vision and hearing impaired. The WCAG are geared toward ensuring that websites are compatible with this technology. Recommendations in the WCAG include:

- Providing a text equivalent for every image, which allows a screen reader to provide an audio explanation of an image;
- Providing captions for video and transcripts for audio contained on the website;
- Providing documents in an accessible format, as text–based formats like HTML and RTF are more compatible with screen readers than PDFs;
- Designing the website or application so that content is easy to see and hear;
- Allowing color and font sizes to be changed in users' web browsers and operating systems to allow users with low vision to better differentiate between text and background colors;
- Providing alternatives for time requirements in transactions; and
- Permitting a website to be fully functional from a keyboard.

Confirming compliance with these can be difficult for a retailer to accomplish alone, especially for smaller grocers. A practical way to ensure compliance is to contact a qualified web design agency to conduct an audit of the website or application to identify any violations or accessibility concerns and develop a plan to bring the website or application into compliance.

Retailers can also handle the matter internally by having their IT professionals do a self–audit using the WCAG and the ADA's online toolkit (which advises state and local governments on compliance with ADA Title II, but is equally applicable to private businesses).

Grocers are advised to ensure that their websites and mobile applications comply with the WCAG. Grocers should be attentive to any changes in the WCAG and the ADA regulations themselves, as both will evolve over time. Compliant websites and mobile applications are the best tools to persuade potential ADA plaintiffs to look elsewhere for their next lawsuit. ▪

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