The Growing Tide of ADA Website Accessibility Litigation Is Washing Ashore In Massachusetts

By Mike Perry and Shauna Twohig
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I. DIGITAL ASSETS HAVE BECOME LEGAL LIABILITIES

The last several years have seen an explosion of web accessibility litigation initiated by both individuals and advocacy groups. Plaintiffs in these lawsuits typically allege that a company's website violates Title III of the Americans with Disabilities Act (ADA) because it is not designed to work with assistive technologies — such as screen readers for the visually impaired, or closed-captioning for the hearing-impaired — and is therefore inaccessible to persons with disabilities.

There are three main causes for the recent proliferation of web accessibility litigation: First, because people have become increasingly dependent on the internet to facilitate nearly every aspect of their daily lives, businesses large and small have increased their digital asset portfolios. As a result, the potential for ADA accessibility litigation now extends beyond a company's website to include everything from mobile applications and email correspondence to social media and even video games. Second, despite this ever-growing dependence on the internet as a means of facilitating commerce, the Department of Justice (DOJ) — the federal agency responsible for administering and enforcing Title III of the ADA — has failed to enact regulations establishing accessibility standards for company websites. Third, in the absence of specific direction from the DOJ, courts have been left to decide whether Title III applies to digital assets and, if so, what is required to make those assets ADA compliant. Given the lack of direction from the DOJ, federal circuit courts remain divided on this issue, and the U.S. Supreme Court has declined to settle the debate.

In the wake of this uncertainty, aggressive plaintiffs' attorneys have filed thousands of web accessibility lawsuits.[1] In previous years, New York and Florida were the most prolific jurisdictions for web accessibility lawsuits. However, as plaintiffs' attorneys in those states turn their attention to emerging theories of liability,[2] Massachusetts has witnessed a recent surge of web accessibility litigation.

II. THE DOJ'S FAILURE TO ESTABLISH ACCESSIBILITY STANDARDS FOR WEBSITE COMPLIANCE

Title III of the ADA was designed to prevent discrimination against persons with disabilities at "public accommodations" — a broad term that encompasses everything from retail businesses and restaurants to service establishments and transportation terminals. The ADA was enacted in 1990 — long before the use of the internet to conduct business transactions became commonplace. As a result, the ADA does not expressly address whether, and to what extent, websites qualify as places of "public accommodation," much less provide guidelines for website compliance. Although the ADA does not address this issue directly, the DOJ has long concluded that websites are places of public accommodation, and therefore, company websites subject to the ADA must provide "effective communication to individuals with disabilities."[3] In 2010, the DOJ announced its consideration of regulations designed to establish website

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accessibility requirements. The proposed rulemaking notice signaled that the DOJ might adopt a set of Web Content Accessibility Guidelines (WCAG) developed by the World Wide Web Consortium (W3C). In particular, WCAG 2.0 sets forth 12 guidelines, each containing objectively verifiable criteria for determining if web content satisfies the relevant guidelines. In order for a website to conform to the WCAG 2.0, the entire website needed to satisfy all 12 guidelines under one of three conformance levels: A, AA or AAA.[4] The DOJ's 2010 proposed rulemaking notice pronounced W3C's WCAG 2.0 AA as "wellestablished industry guidelines" to render web content accessible.

In 2017, the DOJ withdrew this proposed rulemaking notice.[5] The withdrawal was unwelcome news to businesses — many of which had delayed making expensive changes to their websites pending the DOJ's anticipated promulgation of specific guidelines. Moreover, the withdrawal of these proposed guidelines served as an impetus for creative plaintiffs' attorneys who used this opportunity to file ADA accessibility lawsuits against vulnerable businesses.

In the face of this onslaught of litigation, members of both houses of Congress wrote letters to the DOJ requesting guidance with respect to website accessibility under the ADA.[6] In response, on Sept. 25, 2018, then- Assistant Attorney General Stephen E. Boyd issued a letter confirming the DOJ's earlier position that the ADA applies to the websites of public accommodations. AAG Boyd's letter also called for "flexibility" in assessing website compliance with Title III of the ADA, and stated that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."[7]

III. THE CIRCUIT COURTS REMAIN SPLIT, AND THE U.S. SUPREME COURT HAS DECLINED TO WEIGH IN

In the face of the DOJ's lack of regulation on this issue, significant differences have emerged among federal circuit courts as to whether the ADA limits places of public accommodation to physical spaces, thereby excluding websites from the ambit of Title III. Courts in the First, Second and Seventh Circuits have found that the ADA can apply to a website independent of any connection between the website and a physical location.[8] Conversely, courts in the Third, Sixth, Ninth and Eleventh Circuits have concluded that places of public accommodation must be physical places, but that the goods and services provided by a place of public accommodation (including through its website) may be covered by the ADA if they have a sufficient nexus to a physical location.[9]

The U.S. Supreme Court recently had an opportunity to resolve this split in the case of *Robles v. Domino's Pizza LLC*, 913 F.3d 898 (9th Cir. Jan. 15, 2019), *cert. denied*, 140 S. Ct. 122 (Oct. 7, 2019). In *Robles*, the Ninth Circuit affirmed the district court's ruling that the ADA encompassed both the defendant's website and mobile application, explaining that Title III of the ADA "applies to the services of a place of public accommodation, not services *in* a place of public accommodation."[10] Domino's subsequently sought *certiori* review of the Ninth Circuit's decision; however, on Oct. 7, 2019, the Supreme Court declined to accept the case.

IV. THE FIRST CIRCUIT'S VIEW ON WEB ACCESSIBILITY LAWSUITS

As noted above, the First Circuit has held that imposition of liability under Title III of the ADA does not depend on any nexus to a physical location. For example, in *Carparts Distribution Center Inc. v. Automotive Wholesaler's Association of New England Inc.*, 37 F.3d 12 (1st Cir. 1994), the First Circuit ruled that the ADA's prohibition on discrimination in a place of public accommodation applied to medical reimbursement plans. In so ruling, the court noted that the "plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter."[11]

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Since then, Massachusetts federal courts have consistently interpreted *Carparts* to mean that Title III of the ADA applies to websites and other digital assets. For example, in *Nat'l Ass'n of the Deaf v. Netflix Inc.,* 869 F. Supp. 2d 196 (D. Mass. 2012), the district court (Ponsor, D.J.) ruled that the ADA applied to the defendant's video streaming service, stating that "[u]nder 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."[12] Following *Netflix*, federal judges in Massachusetts have routinely declined to dispose of website liability lawsuits at the motion to dismiss stage.[13]

More recently, in *Nat'l Ass'n of the Deaf v. Harvard Univ.,* 377 F. Supp. 3d 49 (D. Mass. 2019), the U.S. District Court for the District of Massachusetts (Robertson, M.J.) ruled that Title III of the ADA applies not only to content contained on a company's own website, but also to content hosted on third-party websites and platforms. In that case, Plaintiff brought a putative class action against Harvard University under Title III of ADA, seeking declaratory and injunctive relief requiring Harvard to provide timely, accurate captioning of the audio and audiovisual content that Harvard makes available online to the general public for free. Harvard moved to dismiss, asserting, *inter alia*, that it could not be held responsible under Title III for content posted on third-party websites such as YouTube, iTunes U, or SoundCloud. The district court rejected Harvard's argument, reasoning that the "[i]mplementing regulations applicable to Title III … prohibit disability discrimination by a public accommodation or a federal fund recipient 'directly or through contractual, licensing, or other arrangements.'"[14]

V. MASSACHUSETTS BUSINESSES SHOULD PREPARE FOR ADA WEBSITE ACCESSIBILITY LITIGATION

Perhaps encouraged by the success of plaintiffs in jurisdictions such as New York and Florida, the increase in lawsuits filed over the past year suggests that Massachusetts is now poised to be the next hotspot for website accessibility litigation. The sudden increase in website accessibility cases in Massachusetts, coupled with a seeming reluctance by district court judges to dispose of these cases at the motion to dismiss stage, suggests that Massachusetts companies with public-facing websites — including retailers, service providers, entertainment venues, restaurants, and professional service firms — should assume that those websites (and any other accompanying digital assets) are subject to Title III of the ADA, and therefore, these companies must take steps necessary to ensure that their websites are compliant with commonly accepted standards of accessibility. Otherwise, they may find themselves on the wrong end of an ADA accessibility lawsuit.

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Notes

1. *See* "Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018," *supra*, available at: https://www.adatitleiii.com/2019/01/number-of-federalwebsite-accessibility-lawsuits-nearly-triple-exceeding- 2250-in-2018/.
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2. *See* Ryan P. Phair, M. Brett Burns & Torsten M. Kracht, "The Next Wave of Accessibility Litigation in the Retail Industry: Braille Gift Cards" (Nov. 5, 2019), available at: https://www.huntonretailindustryblog.com/2019/11/articles/advertising-marketing/the-next-wave-of-accessibilitylitigation-in-the-retail-industry-braille-gift-cards/.

3. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), available at: https://www.justice.gov/crt/foia/file/666366/download.

4. *See* WCAG 2.0 Guidelines, available at: https://www.w3.org/TR/WCAG20/.

5. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 28 C.F.R. Parts 35 and 36 (2017), available at: https://www.govinfo.gov/content/pkg/FR-2017-12-26/pdf/2017-27510.pdf.

6. *See* Letter from Hon. Ted Budd, Member of Congress, et al., to Hon. Jeff Sessions, U.S. Attorney General (June 20, 2018), available at: https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf; Letter from Hon. Chuck Grassley, U.S. Senator, et al., to Hon. Jeff Sessions, U.S. Attorney General (Sept. 4, 2018), available at: https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf.

7. Letter from Stephen E. Boyd, U.S. Assistant Attorney General, to Hon. Ted Budd, Member of Congress, et al. (Sept. 25, 2018), available at: https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-tocongress.pdf.

8. *See, e.g., Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New England Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *Nat'l Ass'n of the Deaf v. Netflix Inc*., 869 F. Supp. 2d 196, 200 (D. Mass. 2012); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015); *Andrews v. Blick Art Materials LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers*, AFL-CIO CLC, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999).

9. *See, e.g., Gil v. Winn-Dixie Stores Inc.,* 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017); *Haynes v. Dunkin' Donuts LLC*, 2018 WL 3634720, at *2 (11th Cir. July 31, 2018); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Earll v. eBay Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998); *Peoples v. Discover Fin. Servs. Inc.*, 387 F. App'x 179, 183 (3d Cir. 2010); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997); *Brintley v. Aeroquip Credit Union*, 321 F. Supp. 3d 785 (E.D. Mich. 2018).

10. 913 F.3d at 905 (emphasis in original).

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11. *Id.* at 19.

12. 869 F. Supp. 2d at 202.

13. *See, e.g., Gathers v. 1-800-Flowers.com Inc.,* No. 17-CV-10273-IT, 2018 WL 839381 (D. Mass. Feb. 12, 2018); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, C.A. No. 3:15-30024-KAR, 2019 WL 1409301, at *1 (D. Mass. Mar. 28, 2019).

14. 377 F. Supp. 3d at 63.

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