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**The ADA almost 30 years later:  
Judicial activism versus the administrative pullback and the impact on the ADA's application  
to websites**

**I. Background on Website Accessibility and the ADA**

The Americans with Disabilities Act (“ADA”) was passed in 1990, during the early stages of the Internet. Since the ADA was enacted before the Internet became so widely prominent, neither the ADA nor its legislative history discusses the Internet or the Web. *See* The Committee on Civil Rights, The Committee on Information Technology Law, The Committee on Legal Issues Affecting People with Disabilities, *Website Accessibility for People with Disabilities*, 62 The Record 118 (2007). However, the ADA is a broad, remedial statute that can be applied in situations not expressly anticipated by Congress. *Id.*; *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). As the Internet has become increasingly more prevalent, courts have had to deal with the question of how to apply the ADA to websites to ensure that individuals with disabilities receive equal opportunity with respect to information online. *See* Ryan Brunner, *Websites as Facilities under ADA Title III*, 15 Duke L. & Tech. Rev. 171 (2017).

Title III of the ADA protects against discrimination in places of public accommodation. In order to prove a Title III claim under the ADA, a plaintiff must establish three elements: (1) the plaintiff must be disabled; (2) the defendant must be a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff must have been denied public accommodations by the defendant because of his or her disability. Thus, the main issue courts have had to address is whether a website is a place of public accommodation under the ADA. *Brunner* at 172.

Website accessibility lawsuits continue to increase nationwide, and nearly every business sector has faced such lawsuits. Florida ranks first in the number of website accessibility suits filed in federal court in 2017. Because of the increasing probability that a business will be forced to defend a website access claim, it is important to understand the current legal landscape and ways to address this critical concern.

**II. The Law Regarding Website Accessibility**

**Circuit split as to whether websites are places of public accommodation**

Federal circuit courts are split as to whether a website is a place of public accommodation that satisfies the second element of a Title III ADA claim. There are three different approaches taken to answer this question: (1) a non-physical structure, such as a website, can be considered a place of accommodation; (2) only actual physical structures, such

as a building or store location, are places of accommodation; and (3) a nonphysical place may be a place of public accommodation if it has a sufficient nexus to a physical structure that is a public accommodation. *Brunner* at 174-175. The first approach is the most plaintiff-friendly in terms of the ease of bringing an ADA claim stemming from the use of a website, while the second approach makes it nearly impossible for a plaintiff to argue that their rights under the ADA were violated through the use of a website. The third approach provides a middle ground, with the Second, Ninth, and Eleventh circuits holding that a nonphysical space, such as a website, could be a place of public accommodation if there is a connection between the good or service complained of and an actual physical space.

Given the different approaches taken by each circuit in analyzing whether websites are places of public accommodations under the ADA, it is important for businesses or individuals operating a website to understand the approach taken by the courts in their state. Still, since this area of law is constantly changing and adapting to the growth and prevalence of the internet, it is in the business's best interest to ensure website compliance with the ADA so as to avoid a discrimination lawsuit altogether.

### **The third approach: a website's connection to a physical store location**

The third approach considering whether websites are places of public accommodations under the ADA provides a more individualized, case-specific analysis, considering the specific aspects of the website and a physical location and determining the connection between the two. Jurisdictions that adopt this approach see a variety of outcomes as a result of the fact-intensive inquiry this approach entails.

For example, in June, the Southern District of Florida concluded that websites may be public accommodations under the ADA when they operate as a "gateway" to physical store locations. *Gil v. Winn-Dixie Stores, Inc.*, 2017 U.S. Dist. LEXIS 90204 (S.D. Fla., June 13, 2017). The *Gil* decision was the first web accessibility verdict resulting from a two-day non-jury trial. While the court did not decide whether websites are per se places of public accommodation, the court reasoned that where a website is heavily integrated with a physical store and operates as a gateway to the physical location, it is a public accommodation. In so finding, the court considered factors such as a customer's ability to download coupons, locate stores, and refill prescriptions on the website, demonstrating a nexus between the website and the "brick and mortar" store. The court ultimately ordered injunctive relief and awarded Gil his attorneys' fees and costs.

Conversely, just a few months after the *Gil* decision, the Southern District ruled in favor of a defendant restaurant in a suit alleging that its website violated Title III. *See Gomez v. La Carreta Enters.*, 2017 U.S. Dist. LEXIS 170777 (S.D. Fla. Oct. 13, 2017). The Court held that to state a claim under Title III, the plaintiff must adequately allege that his inability to access the website impedes his access to the restaurant. *Id.* Similarly, in *Gomez v. Bang & Olufsen Am., Inc.*, the court dismissed a claim of unequal access where the plaintiff's grievance was that the defendant's website did not provide a blind person with the same online shopping experience as non-disabled persons. *Gomez v. Bang & Olufsen Am., Inc.*, 2017 U.S. Dist. LEXIS 15457 (S.D. Fla. Feb. 2, 2017). The court held that "the ADA does not require places of public accommodations to create full-service websites for disabled persons, or to have a website at all. All the ADA requires is that if a retailer chooses to have a website, [it] cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store." *Id.* at \*4. Thus, courts see a variety of outcomes when considering a website's connection to, and interaction with, a physical location, while also analyzing actual - as opposed to hypothetical - impediments to the brick and mortar location.

### **Websites that are inherently public accommodations**

As explained above, courts tend to focus on whether a website is a public accommodation based on its nexus to a physical store location. However, it is important to consider websites that are not connected to a physical location, but are arguably inherently public accommodations because of their commercial purposes. For example, websites such as Amazon.com or airline websites do not have a physical store location – if a consumer wants to purchase an airline ticket, or an item from Amazon, they cannot go to a storefront to do so. Perhaps in these situations, ADA compliance is even more critical because the goods and services are only available through the company’s website, and there is no option to go to a storefront for the same services when no physical location exists. See Ryan Campbell Richards, *Current Issues in Public Policy: Reconciling the Americans with Disabilities Act and Commercial Websites: a Feasible Solution?*, 7 Rutgers J.L. & Pub. Pol’y 520, 533 (2010).

For instance, in *Access Now v. Southwest Airlines*, plaintiffs argued they were seeking equal access to Southwest’s virtual “ticket counters” as they exist online. *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002). The court rejected this argument, explaining that because the Internet website, southwest.com, does not exist in any particular geographical location, plaintiffs could not demonstrate that the website impeded their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency. *Id.* However, one can argue that “it would be a counterintuitive position indeed to hold that no nexus exists because airplane tickets are not sold in physical stores,” as the airline website is clearly providing a public accommodation by selling tickets that could otherwise not be accessed elsewhere. Richards at 553.

Therefore, while the question of whether a website is inherently a public accommodation or a service of public accommodation has yet to be conclusively determined, perhaps compliance regulations should not turn on whether or not there is a physical location of the public accommodation. As demonstrated through Southwest.com and Amazon.com, individuals can be denied equal access to public accommodations just as easily on websites where there is no physical location.

### **Tester Plaintiffs**

Businesses should also be aware of the existence of tester plaintiffs and their role in filing ADA lawsuits. “Testers” are typically individuals with disabilities who visit places of public accommodation to determine their compliance with Title III of the ADA. Upon discovery of a place of public accommodation’s non-compliance, the tester will file a lawsuit for injunctive relief in an effort to force the business to comply with the ADA. See Kelly Johnson, *Testers Standing Up for Title III of the ADA*, 59 Case W. Res. 683, 685 (2009). Federal courts have been skeptical of testers as plaintiffs and have dismissed many tester cases for lack of standing. *Id.*, citing *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001); *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1208 (S.D. Cal. 2007); *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115 (S.D. Cal. 2006); *Brother v. Tiger Partner, LLC*, 331 F. Supp.2d 1368 (M.D. Fla. 2004); *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000).

More recently, in 2013, the Eleventh Circuit ruled that tester plaintiffs have standing to bring ADA access complaints, regardless of tester motives. See *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013). The ruling effectively limits the ability of businesses to attack a plaintiff’s standing based on tester status.

## **III. The Role of the Department of Justice in Defining Website Accessibility Standards**

ADA standards are issued by the Department of Justice (“DOJ”). In 1996, the DOJ took the position that Title III of the ADA applies to websites and web-based goods and service providers. The DOJ affirmed this position again in 2010 when it considered revising the regulations implementing Title III. See Kendall Hoechst, *Must your website be ADA-compliant?* Vermont Employment Law Letter (2017). Since 2010, the DOJ has not provided any guidance in the form of regulations to allow businesses to determine whether their website meets the standards. *Id.*

Earlier this year, the DOJ stated that it planned to address the uncertainty on the website issue in 2018 by writing regulations for employers to follow to make sure their websites are accessible. See Roy Maurer, Society for Human Resource Management, “DOJ Halts Plan to Create Website Accessibility Regulations,” available at <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/website-accessibility-disabilities-regulations-doj.aspx> (Sept. 25, 2017). And yet, despite the DOJ’s commitment to adopt new website accessibility standards, the Trump administration recently moved ADA website regulations onto the “inactive” list of its first agenda in July 2017. This means that clear regulations have no known place in the agency’s planned rulemaking, as they are indefinitely on hold. See Hoechst (2017). Accordingly, it seems as though there will be no greater degree of certainty with respect to the website accessibility landscape for the near future.

#### **IV. What Can Businesses do to Ensure their Website is in Compliance?**

##### **Ensure conformity with WCAG 2.0 criteria**

The Web Content Accessibility Guidelines (WCAG) 2.0 AA are voluntary guidelines issued by the World Wide Web Consortium (W3C), which have been approved by the DOJ in public settlement agreements of Title III lawsuits. See Hoechst (2017). “The WCAG have been adopted as the standard for federal agency websites and are considered the gold standard by private-sector experts.” *Id.* Therefore, in the absence of clear regulations from the DOJ, employers can proactively ensure their website is compliant by seeing that it meets the technical requirements of WCAG 2.0 AA. Additionally, if a business is undergoing website redesign or maintenance, it is important to keep accessibility issues in mind and ensure continued compliance with the WCAG 2.0 AA.

##### **Utilize a website compliance site to determine areas of non-conformity**

If a nexus exists between the website and physical location, utilize one of the free website compliance sites to determine areas of non-conformity and take steps to make fixes during periods of regular website updating. There are a number of resources available online that provide checklists for creating an ADA-compliant website that are available at no cost to users.

##### **Add a banner to the website**

Recently, courts have suggested using an accessible banner on the website that provides a staffed telephone number to address accessibility issues. This could potentially be a means of compliance if it can be shown that telephonic access provides equal access for people who cannot use the website due to disability. See *Gorecki v. Dave & Buster’s, Inc.*, 2017 U.S. Dist. LEXIS 187208 (C.D. Cal. Oct. 10, 2017). For instance, if a person has difficulty accessing the website independently, he or she may call the staffed telephone number listed on the banner,

which will connect the screen-reader user with a receptionist or other employee who can provide assistance. *See id.* The *Gorecki* court explained that the DOJ has specifically stated that entities with inaccessible websites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their website. *Id.*, citing *Nondiscrimination on the Basis of Disability*, 75 FR 43460 (July 26, 2010). As long as the banner connecting a person to the staffed telephone line guarantees full and equal enjoyment of the goods and services offered through the website, the standard required by the ADA, then an inaccessible website with such a banner could be found to be in compliance with the ADA. *See Gorecki* at \*16.