



FROM THE STAIRWAY TO CYBERSPACE: WHERE WE ARE HEADED WITH THE ADA

AGENDA

- General Background and the Rise of Website Accessibility Litigation
 - General Background
 - Potential Liability
 - The Plaintiffs' Bar and its Strategy
- The Legal Standard for Web Accessibility
 - Title III of the Americans With Disabilities Act
 - The California Unruh Act
- What is the Applicable Standard for Compliance?
 - Department of Justice
 - Web Content Accessibility Guidelines
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HISTORY OF THE ADA

- ADA – Americans with Disabilities Act of 1990, 42 U.S. Code § 12101
- Nation's first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications
- Title III of the ADA - a person owning, leasing, or operating a “place of **public accommodation**” may not discriminate against an individual with a disability regarding the “full and equal enjoyment” of goods and services

WHAT IS A PUBLIC ACCOMMODATION?

- Under the ADA, a “**public accommodation**” is a private entity listed in one of twelve categories, including “sales or other retail establishment.”
- Federal courts split on whether a place of public accommodation must be, or have a connection or link with, a physical place.
- The Courts of Appeals are split on whether the term public accommodation refers to actual physical structure or whether it has a broader meaning encompassing facilities that exist in “electronic space”

DISABLED INDIVIDUALS AND ACCESS

If Title III of ADA applies to websites to prohibit discrimination on the basis of disability, who is being protected?

Primarily:

- Blind and low vision
- Hearing-impaired
- Learning disabled
- Cognitive limitations

DOES THE ADA EXIST IN CYBERSPACE?

- Courts split on question of whether ADA applies to websites of businesses that have no physical place of business -
- **EAST COAST**: Massachusetts Dist. Ct held Netflix streaming website is place of public accommodation even if no brick & mortar business (Nat'l Ass'n of the Deaf v. Netflix, 869 F.Supp.2d 196)
- **WEST COAST**: California N. Dist. Ct held that Netflix and eBay's websites not covered by Title III of ADA because no connection to actual, physical place of business (Cullen v. Netflix, 2013 U.S. Dist. LEXUS 4246; Earll v. eBay, Inc., 599 Fed.Appx. 695)

THE LEGAL STANDARD FOR WEB ACCESSIBILITY

The California Unruh Act

- All persons are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, including both private and public entities
- Two avenues for plaintiff to establish a violation:
 - Showing that the ADA has been violated (for which intentional discrimination is not required); or
 - Absent showing that the ADA has been violated, plaintiff must show intentional discrimination (which requires a heightened burden and factual showings).
 - Must show Company intentionally designed website to exclude individuals with disabilities

THE RULES IN CYBERSPACE: ARE THERE ANY?

- Currently no regulations promulgated by Department of Justice (DOJ) to provide guidance for websites to comply with ADA
- DOJ has planned to issue new regulations for years and now postponed until 2018
- In 2010, DOJ issued Notice of Proposed Rule Making (ANPRM), taking position that many websites are places of public accommodation until Title III

THE DOJ-PEAPOD SETTLEMENT- A LESSON

- November 17, 2014: DOJ reached settlement with Peapod, LLC, owner and operator of peapod.com, an online grocery retailer
(DJ 202-63-169 - https://www.ada.gov/peapod_sa.htm)
- Peapod settlement agreement requires that a website and apps with arguably *no nexus to a physical place* be made accessible to the disabled – this foreshadows what expected regulations may require

THE SETTLEMENT SPECIFICS

- In **Peapod** case, DOJ included 3 specific provisions that are noteworthy:
 - 1) DOJ requires company to comply with WCAG 2.0 Level AA standards. May signal that the DOJ views the AA guidelines as the appropriate regulatory standard
 - 2) Notably, there is virtually no mention of smartphone apps and mobile devices in the proposed rulemaking
 - 3) Settlement requires company to take certain steps to ensure that 3rd party content providers comply with proposed accessibility standards—but excuses noncompliance if requiring 3rd party to comply with standards creates an "undue burden"

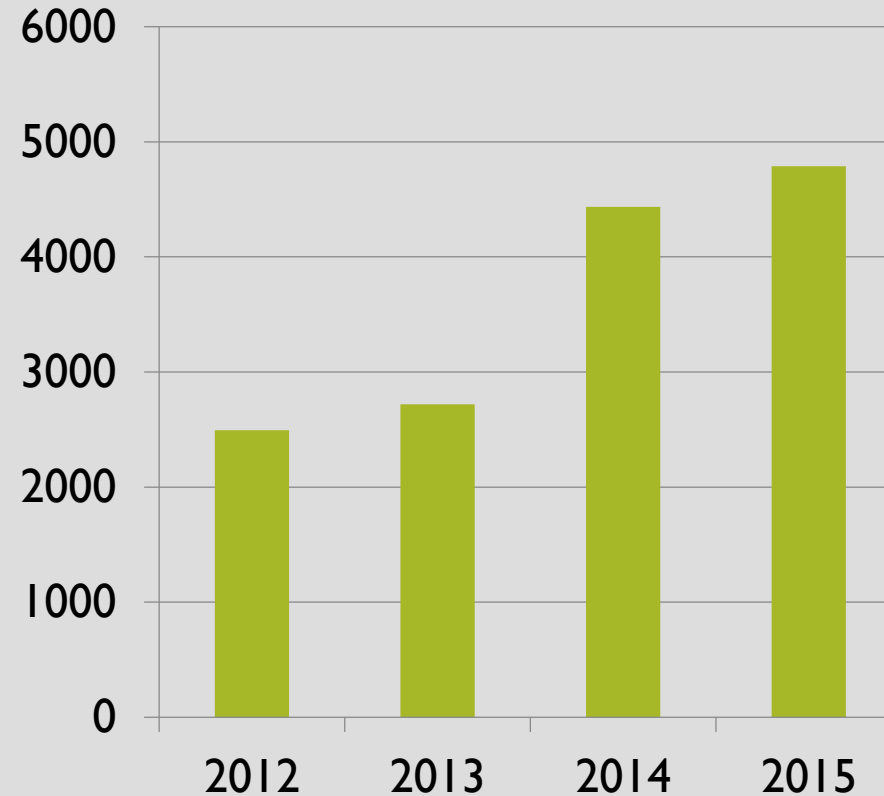
WEB CONTENT ACCESSIBILITY GUIDELINES

- WILD WILD WEST when it comes to rules and regulations that apply to websites
- Businesses can look to the WCAG (Web Content Accessibility Guidelines), widely-recognized set of web accessibility standards created by World Wide Web Consortium (W3C)
- WCAG 2.0 covers wide range of recommendations for making web content more accessible for individuals with disabilities

INCREASE IN THE NUMBER OF ADA ACCESSIBILITY CLAIMS

- The ADA has long focused on businesses' alleged failure to provide individuals with disabilities with physical access to their premises
- Today, increasing number of plaintiffs are bringing claims for alleged violations of the ADA by failing to have accessible websites

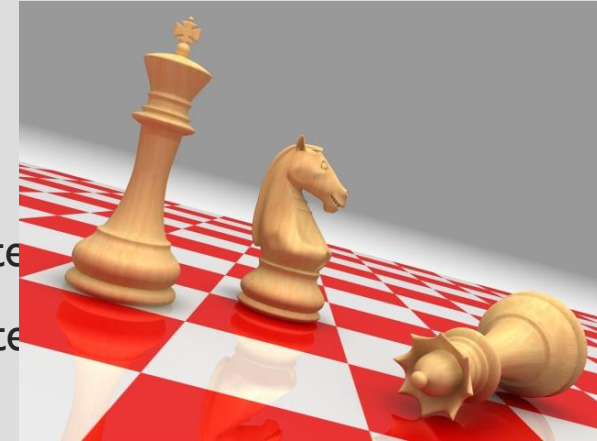
ADA Title III Claims Filed in Federal Court



THE RISE OF WEBSITE ACCESSIBILITY CLAIMS

Plaintiffs' Bar's Strategy

- Sending hundreds and hundreds of form letters
- Including to a number of our clients
- We are in the process of handling several of these matters
- Many times the same company will receive multiple letters operating in this space



ADA TROLLS: LAW FIRMS ARE CASHING IN

- Some law firms are taking advantage of the lack of DOJ rules or regulations for ADA website compliance and accessibility
- Law firms are preying on businesses of all sizes & types, trolling websites for any errors that could be perceived as a barrier to a disabled individual to get access to the business website
- Law firms sending aggressive demand letters and filing lawsuits against businesses claiming they have identified website “access barriers” to disabled persons

THE “M.O.” OF ONE “TROLLING FIRM”

- One firm out of Pennsylvania, has taken advantage of the situation and in late 2015, began sending businesses aggressive demands couched in “settlement letters”
- They allege to represent disabled individuals who cannot access companies websites due to “access barriers” (sometimes without actually naming a client or Plaintiff)
- They scan the website for “errors”, alerts the company and temps them to settle with the firm to avoid significant future costs of remediation and litigation

COMPONENTS OF TYPICAL DEMAND LETTER

- Summary of purported website analysis and percentage of webpages with accessibility issues
 - Some letters include references to free website accessibility [checkers](#)
 - Other letters indicate that they have retained an expert who has performed an analysis
- Discussion of legal basis for claims
- Proposal for resolution

CARLSON
LYNCH
& KULPFELDT

**CARLSON
LYNCH**

December 7, 2015

Sent Via Federal Express

Chief Legal Officer
[REDACTED]

Re: [REDACTED] including Notice of Preservation Obligation

FOR SETTLEMENT PURPOSES ONLY

Dear Sir or Madam:

We represent disabled individuals throughout the United States who use the Internet to facilitate their access to goods and services. These individuals have disabilities that include: blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, mobility impairments, speech disabilities, photosensitivity and combinations of these. The United States Department of Justice ("DOJ") and various federal courts have concluded that businesses which offer goods and services to the public through websites are public accommodations that must comply with the general accessibility mandate of the Americans with Disabilities Act ("ADA").

Experts working with our clients, have identified access barriers on your website as follows:

Section 508 Standards & WCAG 2.0 Compliance Failures

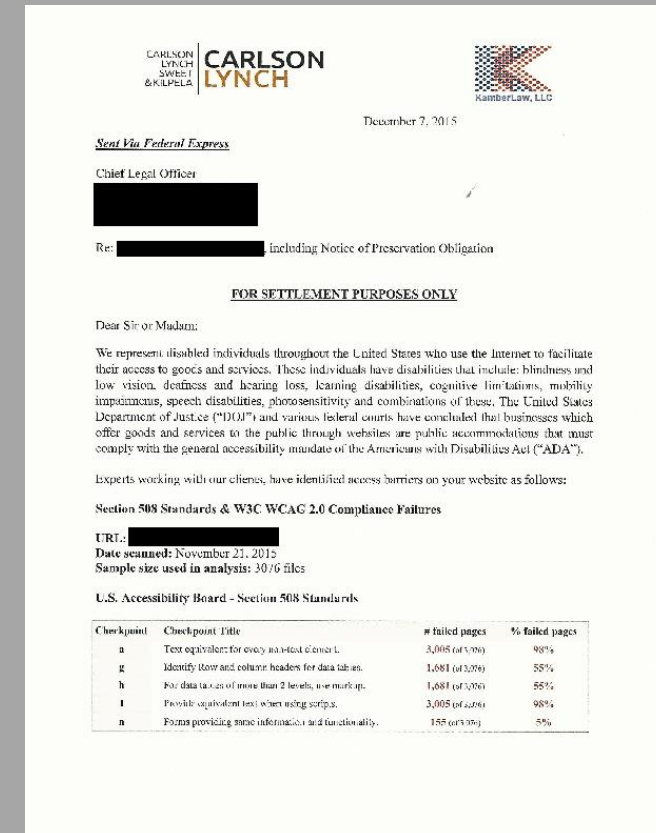
URL: [REDACTED]
Date scanned: November 21, 2015
Sample size used in analysis: 3076 files

U.S. Accessibility Board - Section 508 Standards

Checkpoint	Checkpoint Title	# failed pages	% failed pages
a	Text equivalent for every non-text element.	3,005 of 3,009	99%
g	Identify row and column headers for data tables.	1,681 of 3,009	55%
h	For data tables of more than 2 levels, use markup.	1,681 of 3,009	55%
i	Provide equivalent text when using scripts.	3,005 of 3,009	99%
n	Forms providing same information and functionality.	155 of 3,009	5%

COMPONENTS OF TYPICAL DEMAND LETTER

- Draft settlement agreement
 - Website compliance
 - Follow on testing and monitoring
 - Cash payment to compensate for legal and expert fees – actual amount conveniently left blank
- Plaintiffs looking for settlements with five figure cash payment plus commitment to make website accessible and future monitoring



BEWARE OF THE “TROLLS” ...

- These firms promise businesses cost-savings and uses scare tactics to lure unsuspecting companies to settle
- These firms coerce companies to retain their “experts” at a premium cost to manage web accessibility testing, repair and maintenance
- They don’t offer to defend settling companies against future litigation by other law firms
- They require payment of attorney’s fees and costs as part of settlement

THE PATH TO COMPLIANCE

- “Full” compliance is a misnomer because the guidelines are gray and change constantly
- “Reasonable accessibility” is the goal
- Work toward removing access barriers, enhancing accessibility and optimizing features on business websites

INSURANCE COVERAGE ISSUES

- What policies might cover this risk:
- D&O
- EPL
- CGL
- Others?
- What about Cyber cover?

EPL INSURANCE POLICIES

- EPL policies commonly cover ADA claims
- But significantly, these policies DO NOT cover the cost of the remediation of the website.
- So what do they cover?

NOTICE ISSUES

- Claim letters coming in
- Company files it or sits on it
- Very common for these claims to be turned in months after the initial claim letter