Surfin' USA: Website Accessibility Lawsuits are Alive And Well Under The ADA

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Chances are if you operate a business (public accommodation) that maintains a traditional brick-and-mortar location, then you are no stranger to Title III of the Americans with Disabilities Act (ADA). But just about every business needs to have a basic understanding of Title III these days, as it has recently become a common tool used in litigation alleging that websites fail to live up to legal standards. What do all businesses need to know about Title III and the "surf-by" lawsuit?

What Is Title III?

Title III requires that private business owners maintain a physical environment that is accessible by all. Thus, guests with disabilities who visit the property must be provided accommodations that eliminate potential barriers to goods and services where such removal is "readily achievable" or "easy accomplishable and able to be carried out without much difficulty or expense." Facilities that are newly constructed must be built in compliance with the applicable regulations. Businesses in the hospitality, retail, and food services sectors know Title III well – while other businesses may have less familiarity with its requirements, especially when it comes to website compliance.

When Congress enacted the ADA in 1990, its application was not intended for the digital age. The internet was in its infancy, and it was impossible for Congress to anticipate how inescapable it would become in American lives. Over time, the interpretation of Title III was expanded to cover websites and mobile apps so that individuals who rely on assistive technology to connect to the internet, such as screen readers or text magnification software, can have access to the goods and services made available through these digital tools. The expansion of Title III is consistent with Congress' intent to keep accommodations available under the ADA on "pace with the rapidly changing technology of the times." The unintended consequence of Title III's expansion to websites and mobile apps? The advent of the "surf-by" lawsuit.

The "Surf-By" Lawsuit – Not As Fun As It Sounds

Recognizing an opportunity to take advantage of unsuspecting businesses, plaintiffs' firms started filing lawsuits or sending demand letters to businesses with an online presence claiming that their publicly available websites and mobile apps are inaccessible to users with disabilities. These claims are regularly brought by claimants who act as "testers" – those who visit a business' website or use a mobile app for the sole purpose of discovering potential accessibility violations. Since a single

claimant can test numerous websites and apps while expending relatively little effort, it is not uncommon to see lawsuits with similar facts, filed against numerous businesses, brought on behalf of the same plaintiff, often by the same law firm. It is not unusual to see these lawsuits rise to the hundreds for a single plaintiff.

While promoting website accessibility may be the stated goal of a "surf-by" lawsuit, there is also a financial incentive to the plaintiff and their legal representative. Title III limits a plaintiff's legal remedies to injunctive relief and attorneys' fees but analogous state discrimination laws like California's Unruh Civil Rights Act or New York's Human Rights Law, also provide monetary damages for accessibility violations. Therefore, the costs of defending against a "surf-by" lawsuit through the litigation process, let alone trial, frequently exceed the cost of remedying the alleged accessibility violations found on a businesses' website or app. This simple exercise in economics allows claimants and their attorneys to force quick settlements with relatively little effort as businesses do not want to be responsible for a settlement that is likely to increase as the case progresses as well as their own rising defense costs.

To make matters worse, the state of website accessibility law is in flux. The U.S. Department of Justice (USDOJ) issued an Advance Notice of Proposed Rulemaking on the Accessibility of Web Information Services way back in 2010 with the aim of establishing website requirements to allow individuals with disabilities access to the goods, services, facilities, privileges, accommodations or advantages offered by public accommodations.

The USDOJ appeared to adopt the accessibility standards set forth in the Web Content Accessibility Guidelines (WCAG) 2.0, but in 2017 it officially withdrew the proposal to further evaluate the need and appropriateness for such regulations. The result of the USDOJ's inaction leaves businesses with websites and mobile apps facing a barrage of "surf-by" lawsuits and accessibility claims with no clear guidance on how they can be defended or avoided.

Congress To The Rescue?

On October 1, 2020, the Online Accessibility Act (H.R. 8478) was introduced in the House of Representatives seeking an amendment to the ADA that prohibits discrimination by "any private owner or operator of a consumer facing website or mobile application" against individuals with disabilities. The bill sought to establish web accessibility standards (WCAG 2.0 Level A and Level AA) for consumer facing websites and mobile apps. Its author recognized that complete compliance with these standards was not required as it can be costly and difficult to achieve. As a result, only substantial compliance, as defined by the Architectural and Transportation Barriers Compliance Board, would be required to avoid potential liability. As an aside, even the authors of the WCAG recognize that complete compliance with their standards may not be practical or possible in each instance.

Notably, the Online Accessibility Act proposed a mandatory administrative process that claimants who allegedly were denied access to websites and mobile apps would have had to complete before

who allegedly were denied access to websites and mobile apps would have had to complete before filing suit. The process would have been initiated when the claimant provides notice to an owner or operator that their website or mobile app does not comply with the WCAG 2.0 guidelines. The owner or operator would then have 90 days to bring the website or app into compliance. If they fail to achieve compliance within 90 days, the claimant would be entitled to file an administrative complaint with the USDOJ within 90 days after the notice period ends. The USDOJ has 180 days to complete an investigation, at which point it could initiate a civil enforcement action against the owner or operator of the website or mobile app in U.S. District Court.

Individual claimants would have only been able to file suit after the 180-day period that the USDOJ has to complete its investigation expired or if the USDOJ chose not to pursue a civil enforcement action. This proposed administrative hurdle would have prevented a claimant from running to court and blindsiding a business with a "surf-by" lawsuit, as they are currently doing, effectively providing the website owner and operator an opportunity to cure any accessibility issues before a complaint is filed. Accordingly, the quick settlements plaintiffs have historically been able to achieve by threatening or initiating litigation would have been a thing of the past.

Not-So-Fast Congress

The Online Accessibility Act ultimately failed to pass during the U.S. Congressional session that ended on January 3, 2021. Though it can be re-introduced during Congress' current session, it is unlikely to advance very far, as disability rights advocates criticized the bill for limiting plaintiff's rights under the ADA. Needless to say, the plaintiffs' bar did not favor the bill either.

Moreover, advocates argued that the bill used an outdated standard of compliance (WCAG 2.0 Level A and Level AA) and not the more recent standard WCAG 2.1. Further concerns, such as restrictions placed on civil penalties against first time and habitual violators of the ADA, the delays caused by the imposition of an administrative process, and burden placed on the USDOJ to investigate claims, sealed the bill's fate in 2020 and these concerns will likely be raised again in 2021 if the legislation gets resurrected.

The Battle Over Website Accessibility Rages On

So where do we go from here? It appears that the "surf-by" lawsuit is not going anywhere. Federal lawsuits alleging website inaccessibility continue to increase year after year in just about every jurisdiction. Meanwhile, owners and operators of websites and mobile apps must ensure the accessibility to individuals with disabilities without clear guidance on how it can be achieved.

But not all hope is lost for business owners. The 11th Circuit Court of Appeals is expected to issue a decision in *Gill v. Win-Dixie Stores, Inc.* this year. This case may hold that the WCAG guidelines should be the legal standard for accessible public accommodation websites. The *Gill* matter involved the first and only trial involving an alleged inaccessible website under the ADA in which the lower federal court adopted the WCAG guidelines as the accessibility standard. If the 11th Circuit Court of Appeal agrees with the lower court, businesses that fall within its jurisdiction (Georgia

Court of Appeal agrees with the lower court, businesses that fall within its jurisdiction (Georgia, Florida, and Alabama) can confidently assume that their websites and mobile apps will be held to the same accessibility standard going forward. Moreover, we could start to see other courts follow suit and spread this standard across the country.

Limiting Exposure To "Surf-By" Lawsuits

Until there is clear guidance on what it takes to achieve accessibility, business owners who own or operate a website or mobile app should make all reasonable efforts to comply with WCAG 2.1 to make sure their online assets are accessible for ADA-covered disabilities. A good practice would be to implement features that help facilitate easier navigation and are compatible with assistive technologies.

There are also countless online tools that allow business owners to check whether their websites meet the WCAG 2.1 guidelines (and the forthcoming 2.2 guidelines scheduled for publication in 2021). The websites should be reviewed on a regular basis and policies should be implemented to ensure the same. If websites are being maintained internally, the employees responsible for the same should receive regular training on website accessibility. Moreover, the Website Accessibility Initiative maintains FAQs on website and mobile accessibility. Finally, if your website or mobile app is maintained by a third party, you should regularly meet with them to make sure all aspects of the website are accessible to those with disabilities and that they are following best practices as to WCAG compliance. Regrettably, none of these methods are foolproof. Yet they can be used to put your businesses' best foot forward if facing a "surf-by" lawsuit.

Conclusion

Despite its failure to pass in Congress, the Online Accessibility Act marks an admirable effort to put an end to the "surf-by" lawsuit involving website and mobile app accessibility. Unfortunately, critics argue that the bill did not do enough to balance the protections afforded by Title III of the ADA to individuals with disabilities and the interests of business owners facing potential accessibility claims. Even in defeat, the bill marks a step forward and attempt to create a clear accessibility standard for website and mobile app owners and operators.

Perhaps the Online Accessibility Act is a sign of things to come in the new year or maybe businesses will finally receive guidance on how to provide adequate accessibility to websites and mobile apps from the federal courts. But until that guidance comes, businesses owners and operators should anticipate continued ADA scrutiny and challenges to the accessibility of their websites and mobile apps. Despite the ambiguity that exists one thing remains certain – by taking proactive steps to ensure compliance with WCAG 2.1, the risk of future accessibility claims, lawsuits, and costly settlements can decrease significantly.

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