

January 24, 2023

5 MINUTES TO READ · 1200 WORDS

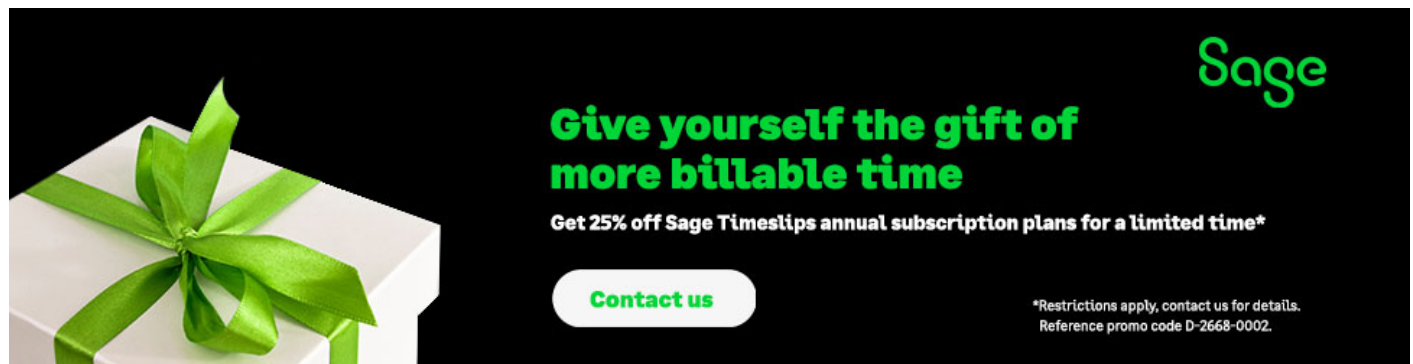
Who Is Responsible When Your Website Is Not ADA Compliant?

By Francis M. Curran and Paul H. Aloe

Share:



Lawsuits brought by blind or visually impaired persons regarding website accessibility under the Americans with Disabilities Act (ADA) and similar state statutes in California and New York against businesses have mushroomed in recent years. In New York alone, more than 2,000 website accessibility cases were filed in 2021. ¹ These lawsuits typically allege that the websites are inaccessible to persons with visual disabilities because they are not designed to be compatible with commonly used screen-reading software. And while the dollar amount of damages available under the ADA for noncompliance is usually relatively small, plaintiffs' attorneys are entitled to an award of attorneys' fees, which could be substantial.



Sage

Give yourself the gift of more billable time

Get 25% off Sage Timeslips annual subscription plans for a limited time*

[Contact us](#)

*Restrictions apply, contact us for details. Reference promo code D-2668-0002.

Title III of the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . .” The ADA is commonly associated with physical locations and the accommodations (such as wheelchair accessibility, reserved parking, and service animals) necessary to make those locations accessible for people with disabilities. Although physical locations are virtually always treated as places of public accommodation, the critical issue for a business facing an ADA lawsuit regarding its website is whether or not the website is a place of

public accommodation. The Supreme Court has not decided the issue, [2](#) and lower courts are divided on whether a business's website counts as a place of public accommodation.

For example, some circuits (including the First Circuit, [3](#) Fourth Circuit, [4](#) and Seventh Circuit) [5](#) hold that a place of public accommodation (including websites) may be independent of any connection to a physical space. Other circuits (including the Ninth Circuit, [6](#) Third Circuit, [7](#) and Sixth Circuit) [8](#) hold that, while places of public accommodation must be physical places, websites providing goods and services may fall within the ADA if they have a sufficient connection to such a physical place (such as a store or restaurant). The Second Circuit itself has not ruled on the issue, but district court opinions within the circuit have held both that websites themselves are places of public accommodation and the ADA excludes websites of businesses with no public-facing, physical retail operations from the definition of public accommodation. [9](#) Finally, the 11th Circuit previously held that websites were not places of public accommodation under the ADA; however, the court vacated its opinion after it was issued based upon the dispute becoming moot. [10](#)

In addition to the uncertainty of whether a business website qualifies as a place of public accommodation, there is uncertainty regarding what standards a website must meet to comply with the ADA. Unlike physical locations, which have specific and objective standards under building codes and other regulations to determine whether or not a building complies with the ADA, there are currently no rules or statutes defining when a website is ADA compliant. Instead, website accessibility lawsuits typically allege that the website in question does not comply with the Web Content Accessibility Guidelines (WCAG) 2.1. [11](#) In March 2022, the U.S. Department of Justice issued a long-anticipated guidance report on web accessibility under the ADA. [12](#) Unfortunately for those looking for certainty on the issue, the report simply encourages businesses to ensure that common barriers to visual access are prevented or removed. It suggests that businesses consult technical standards such as WCAG or the Section 508 Standards [13](#) applicable to the federal government's own websites for guidance concerning how to ensure accessibility of website features. And, although the Department of Justice's Guidance takes the position as a matter of policy that the ADA applies to websites, the Guidance does not carry the force of law.

When a company is sued for alleged ADA violations on its website, settlement is usually the most cost-effective way of resolving the matter. Many cases settle for less than the cost of legal fees that

a company would pay for simply answering the complaint. However, there are several potential legal defenses to ADA website claims. If the company is sued in a court following its holdings that the ADA does not apply to websites or that limits the ADA to websites tied to a company's physical locations (often called a brick-and-mortar connection), a company could assert the ADA does not apply to its website and seek dismissal of the action. Additionally, if the plaintiff fails to adequately allege "standing" in his complaint, it is subject to dismissal. ¹⁴ Standing is a constitutional requirement—if plaintiffs do not have standing, they cannot bring a claim. To demonstrate standing in an ADA website case, a plaintiff must sufficiently allege an "injury in fact." That is, a plaintiff must specifically allege that the plaintiff visited the relevant website intending to make a purchase—it is not enough that the plaintiff merely browsed the website. In addition, a plaintiff must plausibly allege a "real and immediate threat of future injury," meaning that the plaintiff intends to return to the subject website.

In closing, the uncertainty of the law on this issue means that businesses will continue to face the risk of website accessibility cases under the ADA and, absent aggressively raising legal defenses available in some circuits, are subject to paying fair settlements at an early stage in order to avoid the expense of their own legal fees and the risk that they will be responsible for the potentially large attorneys' fees awarded to counsel for plaintiffs. And because there are no fixed standards similar to building codes applicable to websites, businesses can never be sure that their website is compliant with the ADA, even if it meets WCAG standards. Until the Supreme Court or Congress resolves the issue, this uncertainty will continue.

Endnotes



1. Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2021 Despite Mid-Year Pandemic Lull*, Seyfarth Shaw LLP (Mar. 21, 2022), <https://www.adatitleiii.com/2022/03/federal-website-accessibility-lawsuits-increased-in-2021-despite-mid-year-pandemic-lull>.
2. The Court had a recent opportunity to decide the issue but declined to hear the case. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir.), cert. denied, 140 S. Ct. 122, 205 L. Ed. 2d 41 (2019)).
3. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).
4. *Mejico v. Alba Web Designs, LLC*, 515 F. Supp. 3d 424, 434 (W.D. Va. 2021).

5. *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).
6. *Robles*, 913 F.3d at 898.
7. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998).
8. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).
9. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017) and *Winegard v. Newsday LLC*, 2021 WL 3617522 (E.D.N.Y. 2021).
10. *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir.), vacated as moot, 21 F.4th 775 (11th Cir. 2021).
11. Web Content Accessibility Guidelines (WCAG) 2.1 (World Wide Web Consortium), <https://www.w3.org/TR/WCAG21>.
12. Guidance on Web Accessibility and the ADA (U.S. Dep't of Just. Civ. Rts. Div. (Mar. 18, 2022)), <https://www.ada.gov/resources/web-guidance>.
13. Information and Communication Technology Revised 508 Standards and 255 Guidelines (U.S. Access Bd.), <https://www.access-board.gov/ict>.
14. See, e.g., *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022).

Download the PDF of this issue

ENTITY:

SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION

TOPIC:

CIVIL RIGHTS AND CONSTITUTION

The material in all ABA publications is copyrighted and may be reprinted by permission only. Request reprint permission [here](#).



Francis M. Curran

-

Francis M. Curran (fcurran@kudmanlaw.com) is a senior attorney at Kudman Trachten Aloe Posner LLP, where his practice focuses on business litigation. He has represented clients in all forms of litigation in court and in arbitration, with more than 30 arbitration awards and numerous court decisions to his credit.

Paul H. Aloe

-

Paul H. Aloe (paloe@kudmanlaw.com) is a partner at Kudman Trachten Aloe Posner LLP, where he chairs the firm's litigation and bankruptcy departments. His practice focuses on commercial litigation and trial practice, corporate bankruptcy, real estate and land use issues, constitution issues, and corporate issues. In bankruptcy, he has a focus on small business reorganizations.

Published in *GPSolo eReport*, Volume 12, Number 6, January 2023. © 2023 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. The views expressed in this article are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association or the Solo, Small Firm and General Practice Division.

ABA American Bar Association |

/content/aba-cms-dotorg/en/groups/gpsolo/publications/gpsolo_ereport/2023/january-2023/who-is-responsible-when-your-website-is-not-ada-compliant