# Expect More Web Accessibility Claims, Despite DOJ Guidance

By **Shira Blank and Joshua Stein** (May 13, 2022)

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With spring in full effect, one thing remains constant — and we don't mean high pollen counts.

Come rain or shine, serial plaintiffs asserting website accessibility claims under Title III of the Americans with Disabilities Act show no signs of slowing down.

The end of 2021 and start of 2022 have brought us a deluge of Title III updates about digital accessibility. First, the U.S. Department of Justice finally issued its long-awaited website accessibility guidance.

Unfortunately, instead of changing the legal landscape, or foretelling the coming of much-needed regulations, it merely focuses on reiterating previously made general statements of position and summarizing best practices.

Second, in the absence of concrete guidance or regulations from DOJ or action by Congress, we continue to see increased activity from courts, as certain jurisdictions are taking the initiative to stem the tide of litigation on their own.

While these developments have suddenly armed businesses with additional avenues to fight back against serial plaintiff's claims, it has also created splits among both circuit and district courts — particularly:

- A split between the U.S. Courts of Appeal for the Second and Eleventh Circuits on standing requirements in Title III cases; and
- A split between the U.S. District Courts for the Southern and Eastern Districts of New York on whether certain websites even qualify as places of public accommodation, or PPA, under Title III.

### DOJ Issues New Guidance Focusing on Best Practices for Website Accessibility

On March 18, the DOJ published its eagerly anticipated guidance on website accessibility and the ADA.[1] Approximately four and a half years ago, following the change to the Trump administration, the DOJ withdrew its advanced notice of proposed rulemaking relating to website accessibility.[2]

This prompted an onslaught of private demand letters and lawsuits filed in both state and federal court against businesses based on the theory that their websites are inaccessible to individuals with disabilities and thus violate Title III.

It is positive that DOJ issued guidance at all, as it may provide certain businesses and developers with a better understanding of their obligations under Title III. However, those who were hoping that the issuance of the guidance would mark the beginning of the Biden administration's DOJ efforts to regulate the space will likely be disappointed.

After all this time, the guidance primarily reiterates things that the DOJ had previously made clear, and we already knew — namely, the DOJ takes the position that businesses of PPA are obligated to make their websites accessible to individuals with disabilities.

Here are some takeaways from the guidance:

- The DOJ reiterated its position that Title III's requirements for PPA to provide full and equal enjoyment to individuals with disabilities extends to the PPA's offerings on the web, and accordingly, the programs, goods and services that they offer online must be accessible to individuals with disabilities.

- The DOJ declined to formally adopt any accessibility standards; rather, the guidance states that businesses have flexibility in choosing how to make their websites accessible. The guidance does reference the Web Content Accessibility Guidelines — the universally recognized guidelines for accessibility among most businesses and advocates — as an example of an existing technical standard which provides helpful guidance concerning making a website accessible.

- The DOJ makes it clear that enforcing the rights of individuals with disabilities to enjoy website accessibility is a priority, and it is taking enforcement action in this context.

The guidance does not directly or unequivocally resolve the question of whether Title III applies to websites of online-only businesses — i.e., businesses that do not have a brick-and-mortar location, but only offer goods and services to the public online.

The U.S. District Court for the Eastern District of New York has held that online-only businesses are not PPA under Title III.[3] The California Supreme Court has held the opposite — in the 2019 White v. Square Inc. decision — and as discussed further below, so have courts in the Southern District of New York.

That said, the Title III sample sashes that the DOJ pointed to as examples of its enforcement action — specifically, public agreements that it entered into with companies to address claims that their websites were inaccessible to people with disabilities — demonstrate that the DOJ has pursued, and reached agreements with, companies that are online only.

This implicitly suggests that the DOJ will consider such online-only businesses covered by Title III.

Perhaps the most important takeaway from the guidance is the DOJ's clear notice that website accessibility is an enforcement priority. As such, it should not be surprising that over the last six months, we have continued to see DOJ enter into numerous high-profile website accessibility settlement agreements.

We can expect this to be the norm for the time being. The DOJ's failure to directly regulate this space and adopt formal standards for compliance also means that the guidance will do little to curb the ongoing surge of demand letters, litigations, and regulatory investigations/enforcement actions that businesses continue to face.

**The Second and Eleventh Circuits Split on Standing Requirements in Title III Matters**

This year has also seen two prominent circuit courts, the Second and Eleventh — which have jurisdiction over two states home to a significant volume of website accessibility filings and demand letters, New York and Florida — arrive at opposite conclusions on the question of whether plaintiffs who asserted nearly identical facts, had standing to maintain their Title III claims.

In the March 18 Harty v. West Point Realty Inc. decision, the U.S. Court of Appeals for the Second Circuit[4] affirmed the U.S. District Court for the Southern District of New York's dismissal of the plaintiff's accessibility complaint for lack of standing.

In Harty, the plaintiff alleged that the defendant's website failed to provide information regarding its hotel's accessible features, in violation of Title 28 of the Code of Federal Regulation, Section 36.302(e)(1), which requires hotels to identify and describe their accessible features as well as those of their guest rooms, so that potential guests can determine whether the hotel meets their accessibility needs.

In Harty, the plaintiff did not allege that he viewed the defendant's website with the intent of visiting its hotel, he merely asserted that the website did not comply with the ADA and accordingly, he suffered an injury. The district court dismissed the complaint, finding that the plaintiff had failed to sufficiently allege that he suffered an actual, concrete injury, and accordingly, he lacked standing to maintain his claims.

The Second Circuit affirmed — noting that in the 2021 TransUnion LLC v. Ramirez decision, the U.S. Supreme Court clarified that a plaintiff has standing to bring a claim for monetary damages based on a statutory violation only where he can show a current or past harm beyond the violation itself.[5]

And given that here, the plaintiff merely alleged that because the website in question did not comply with the ADA, it "infringed his right to travel free from discrimination" but nowhere did he claim that he was using the website to arrange for future travel, he could not demonstrate that he suffered an injury.

The Second Circuit also rejected the plaintiff's arguments that because he was a tester and suffered an "informational injury" he had sufficiently met this burden. To the contrary, the Second Circuit held that a plaintiff must show that he actually has an "interest in using the information [on the website] ... beyond bringing [his] lawsuit," which he had not.

Conversely, in Laufer v. Arpan LLC, the U.S. Court of Appeals for the Eleventh Circuit,[6] faced in March with the same facts and legal authority, reached the opposite conclusion and reversed the U.S. District Court for the Northern District of Florida's dismissal of the accessibility complaint.

In Laufer, the plaintiff was, like Harty, a self-described tester who also never intended to visit the hotel in question but yet, asserted that the lack of accessibility-related information caused her harm. The Eleventh Circuit found that because the plaintiff alleged that she suffered "frustration and humiliation" due to the defendant's alleged violation of Title III, she had standing to sue and maintain her claims.

Further, relying on TransUnion, just like the Second Circuit, the Eleventh Circuit found that

"discriminatory treatment" — in some shape or form — is a "concrete, de facto injur[y] that w[as] previously inadequate in law," and is sufficient to demonstrate an injury under Title III.

This decision — from the same circuit that in 2021 vacated its decision in Gil v. Winn-Dixie — where it previously[7] found that websites are not PPA under Title III — is surprising, and sets up a circuit split on Title III standing that may ultimately make its way to the Supreme Court.

For now, plaintiffs in the Eleventh Circuit need only allege that they felt frustrated or humiliated in order to demonstrate that they have standing to maintain Title III claims, even if they have no intention of returning to the location in question.

It should come as no surprise that we have recently seen a huge uptick in activity in Florida, as former serial filers and their counsel are now coming out of hiding and renewing their previous pursuits. The good news for businesses facing Title III suits in the Second Circuit is that the Harty decision signals an interest by the Second Circuit in clamping down on these cases by requiring plaintiffs to actually plead a concrete injury in order to sustain their claims.

**Serial Filing of Website Accessibility Cases in New York Yields Additional Decisions and Exacerbates a Split Within the Second Circuit**

Last summer, in Winegard v. Newsday LLC, the Eastern District of New York issued a decision that diverged from other courts in the circuit, finding that Title III does not apply to websites that are not clearly connected to a physical PPA.[8]

Other courts in the Eastern District of New York subsequently followed suit, seizing upon this rationale to dismiss lawsuits brought by other serial plaintiffs. This, however, has led to a split with the Southern District of New York, which has declined to adopt this reasoning.

Three months after Winegard, in the November 2021 case Martinez v. Mylife.com Inc., another court in the Eastern District of New York[9] granted a defendant's motion to dismiss on the ground that the defendant's website is not a PPA under Title III.

The court found that since the plain text of Title III "contemplates inclusion of only businesses with a physical location," this text could not apply to the defendant's website, which had no public-facing physical location. The court distinguished cases in the circuit finding the opposite, holding that none of these cases suggest that a stand-alone website qualifies as a PPA.

A few months later, however, in Romero v. 88 Acres Foods Inc., a court in the Southern District of New York[10] found the opposite, holding that the website qualified as a PPA under Title III, and adding that it did not find the Winegard court's logic compelling.

The Romero court conducted its own analysis of Title III, as well as its legislative history — holding that the purpose of the ADA is to "eliminate discrimination against disabled individuals, and to integrate them 'into the economic and social mainstream of American life.'"

Based on that logic, the court found that the term "public accommodation" under Title III incorporates private commercial websites — including those that lack a connection to a physical place — and as such, those websites must be accessible to individuals with

disabilities.

Ideally, this issue will make its way before the Second Circuit sooner rather than later so that the Second Circuit can take a unified position on the matter. Of course, even if it does, as those of us eagerly awaiting the Second Circuit's decision on gift card accessibility cases know all too well, it may be some time before we see a final decision.

**Conclusion**

Despite all of these recent developments from regulators and courts, for the foreseeable future, businesses should not expect the current climate relating to website accessibility lawsuits and demand letters to dramatically change.

While some clarity may eventually come with additional judicial rulings up the appellate chain — particularly in jurisdictions such as Florida, New York and California — true systemic change will require either concrete DOJ guidance and regulations, or an act of Congress specifically addressing when Title III applies to websites, and what standards businesses are expected to meet in those instances.

For now, those faced with website accessibility litigations confront a legal landscape full of twists and turns. While it may be more difficult for a plaintiff to show that they have standing to maintain their Title III claims in the Second Circuit, this requirement has arguably been relaxed in the Eleventh Circuit. Similarly, the strength of a website accessibility complaint in the Southern District of New York will be greater than one in the Eastern District of New York.

As we have long advised, the easiest way to avoid falling prey to a website accessibility lawsuit or private demand letter, continues to be proactively achieving substantial conformance with Web Content Accessibility Guidelines 2.1 Levels A and AA — as confirmed via human-based auditing from both the code and user perspectives.

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[1] https://beta.ada.gov/web-guidance/.

[2] https://www.workforcebulletin.com/2019/01/16/federal-appellate-courts-ring-in-the-new-year-by-taking-up-website-and-mobile-application-accessibility/.

[3] https://www.workforcebulletin.com/2021/08/23/its-a-new-day-edny-district-court-deviates-from-peers-holding-that-newspapers-website-is-not-a-place-of-public-accommodation-under-title-iii-of-the-ada/.

[4] Harty v. West Point Realty, Inc., 20-cv-2672, 2022 WL 815685 (2d Cir. Mar. 18, 2022).

[5] TransUnion LLC v. Ramirez, 594 U.S. ___, ___, 141 S.Ct. 2190, 2206 (2021).

[6] Laufer v. Arpan LLC, 2022 U.S. App. LEXIS 8270 (11th Cir. 2022).

[7] https://beta.ada.gov/web-guidance/.

[8] https://www.workforcebulletin.com/2021/08/23/its-a-new-day-edny-district-court-deviates-from-peers-holding-that-newspapers-website-is-not-a-place-of-public-accommodation-under-title-iii-of-the-ada/.

[9] Martinez v. Mylife.com, Inc., No. 21-cv-4779 (BMC), 2021 WL 5052745 (E.D.N.Y. Nov. 1, 2021).

[10] Romero v. 88 Acres Foods, Inc., 2022 WL 158686 (S.D.N.Y. Jan. 18, 2022).