Web Accessibility Outlook: More Regulation, Less Litigation

By **Shira Blank and Joshua Stein** (August 23, 2022)

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With the 32nd anniversary of the Americans with Disabilities Act last month, regulators and courts seem to be bestowing belated gifts upon businesses and advocacy groups.

After years of endless website accessibility litigation and demand letters, relief from both the courts and federal regulatory agencies may finally be at hand.

During the first half of 2022, the developments in this space, while significant in concept, actually did little to change the playing field. The U.S. Department of Justice issued its long-awaited website accessibility guidance on March 18.

But this guidance was a summary of previously articulated positions, and contained nothing in the way of new regulations. It therefore failed to stop the waves of website accessibility cases.

Thankfully, the second half of the year has already reflected progress for businesses, as courts — growing tired of serial plaintiffs' filings — are making it increasingly difficult for the same individuals or attorneys to file hundreds of website accessibility cases.

Government agencies, including the DOJ, seem prepared to finally take steps to create regulations. The department announced that it intends to restart the rulemaking process to enact website accessibility regulations under Title II of the ADA — which applies to state and local governments.

The DOJ also recently issued joint guidance with the U.S. Department of Health and Human Services on making telehealth services accessible to people with disabilities.

Furthermore, courts are finally sending serial plaintiffs in New York and California a clear message: Standing to maintain their claims is not presumed — and neither is coverage by the ADA or state and local law — simply because they reference a business's website.

These two states are effectively the two most prevalent jurisdictions for website accessibility litigation — with Florida close behind. So the courts pushing back and the looming promise of more regulation could mean that a slowdown of these filings may be imminent.

Regulatory Updates: DOJ's Forthcoming Website Accessibility Guidelines and Joint Guidance With HHS on Telehealth Accessibility

The DOJ has historically taken the position that Title III of the ADA applies to both websites and mobile applications. But its withdrawal of an advanced notice of proposed rulemaking on Dec. 26, 2017, helped drive the most recent onslaught of private demand letters and

lawsuits filed in both state and federal court against businesses.

These letters have been based on the theory that their websites — both those connected to brick and mortar facilities, and those that only exist in cyberspace — are inaccessible to individuals with disabilities. Since the withdrawal of the ANPR, businesses and advocacy groups alike have been clamoring for either the DOJ or Congress, or both, to regulate this space

On July 26, the DOJ issued its annual press release[1] commemorating the ADA's anniversary — and "Promoting Website Accessibility" was the first item on the agenda. On the heels of its guidance earlier this year, the department announced that it would be undertaking rulemaking concerning standards for website accessibility for state and local governments under Title II.[2]

While no specific mention was made about regulating places of public accommodation, or PPA, under Title III, in prior regulatory efforts involving the ADA, the DOJ tended to focus first on Title II, and then draw upon those regulations to help propel similar efforts to regulate PPA under Title III.

Therefore, barring another disruption caused by a change in administration in 2024, it would be reasonable to expect the Title II regulatory process to be followed by similar efforts for Title III.

In the interim, we note that the DOJ's ADA anniversary press release did reference the settlement agreements that it has reached with private businesses covered by Title III over the last year. These settlements require businesses to provide online access to individuals with disabilities to obtain vaccine information and book COVID-19 vaccine appointments.

Therefore, even in the absence of Title III regulations, businesses can expect the DOJ to continue to pursue regulatory investigations involving website accessibility — particularly in the health care industry.

Along those lines, three days after the press release, in further recognition of the ADA's anniversary, the DOJ and the HHS issued their joint guidance on nondiscrimination in telehealth.[3] This guidance acknowledges that telehealth has become an increasingly important way of delivering health care and has many advantages — but also that it can present challenges to individuals with disabilities.

In the guidance, the HHS and the DOJ affirm that they are committed to ensuring that health care providers who use telehealth do so in a way that does not discriminate against people with disabilities. This includes making sure that the technology utilized is accessible to these users.

In the guidance, the departments provide a number of examples of access that can and should be provided. These include requiring telehealth providers to ensure that web-based platforms used for telehealth appointments support screen reader software for individuals who are blind or have low vision, and that video conferencing programs allow sign language interpreters to join from a separate location, to assist patients who are deaf or hard of hearing.

The joint guidance also contains a complaint procedure, encouraging individuals who believe that telehealth providers have violated their civil rights to file complaints with either the HHS or the DOJ. Accordingly — and given the DOJ's recent activity in this space noted

above — we can expect to see continued enforcement action against health care providers related to accessible technology.

Judicial Updates: Courts in New York and California Pushing Back on Serial Litigants

To date, 2022 has also seen a number of important legal updates in New York on website accessibility.

As we discussed in a previous **Law360 guest article**, the U.S. Court of Appeals for the Second Circuit has taken a stand on standing in this context — holding in Harty v. West Point Realty Inc., decided in March, that a plaintiff must show an actual interest in using the information appearing on a website beyond simply bringing a lawsuit.

But dueling decisions in the U.S. District Court for the Eastern District of New York, which has held that Title III does not apply to websites not clearly connected to a physical PPA, and the U.S. District Court for the Southern District of New York, which has disagreed with that holding, exposed a fissure between how the two districts were analyzing these cases.

At the time of our previous article, this fissure appeared to be widening. We noted then that plaintiffs would be more likely to bring website accessibility claims in the SDNY, assuming that their filings would be more successful.

However, in another positive development for businesses, courts in the SDNY, no doubt also tired of these filings, have begun finding their own ways of pushing back.

For instance, in Tavarez-Vargas v. Culture Carton LLC,[4] in response to a motion by the plaintiff's counsel for a default judgment, an SDNY court in February ordered the filing of supplemental briefing on whether the defendant's website actually constitutes a PPA such that the complaint states a claim under the ADA, before it would even consider the motion.

This was one of a number of similar cases in which the court ordered this type of briefing from plaintiffs counsel, indicating that a plaintiff's standing is not automatically presumed — and neither is the sufficiency of an ADA claim where a plaintiff does little more than file a boilerplate complaint alleging that they were denied access to a business's goods and services on its website.

Perhaps even more encouraging, both federal and state courts in California — a state that attracts a significant volume of these types of serial filings and demand letters, due to the availability of a minimum of $4,000 in automatic statutory damages under a state law, the Unruh Act — are also beginning to push back on boilerplate complaints.

In Gomez v. SF Bay Area Private RVS Inc.,[5] the U.S. District Court for the Northern District of California last month denied a serial plaintiff's application for a default judgment. The court held that the plaintiff had not established standing, because he had failed to allege he had any intention of patronizing the defendant's physical location in the future, or that he was prohibited from doing so based on barriers that he encountered on its website.

This decision demonstrates that federal courts in California are carefully analyzing the factual allegations in these complaints before determining whether a default judgment is appropriate.

And in the development that may have the biggest immediate impact on curtailing website

accessibility filings and demand letters, it appears as though even the California State Court of Appeals has finally had enough, and is effectively putting an end to website accessibility lawsuits against online-only businesses.

Many serial plaintiffs in California avoid filing lawsuits in federal court, assuming that they will have more luck in state court, where they will simply threaten or file complaints under the Unruh Act, entitling them to statutory damages. State courts have been receptive to suits filed against businesses that are not connected to a physical PPA.

However, it appears that may no longer be an option against online-only businesses. Earlier this month, in Martinez v. Cot'n Wash Inc.,[6] the California Court of Appeals echoed the U.S. Court of Appeals for the Ninth Circuit in holding that websites themselves are not PPA under the ADA, effectively foreclosing website accessibility claims against online-only businesses.

Without a valid Title III claim, the plaintiff argued that he was still able to state a claim under the Unruh Act, because the defendant company's failure to remove its website's accessibility barriers — particularly after receiving the plaintiff's demand letter informing it that such barriers existed — constituted intentional discrimination.

The Court of Appeals disagreed, and held that simply pointing to the discriminatory effect of a facially neutral policy or action — in this case, maintaining an inaccessible website — is not, on its own, a sufficient basis to infer intentional discrimination under the Unruh Act.

The court also called out both the DOJ and Congress for their continued inaction in this space.

While this decision does not affect claims against businesses that have a nexus to a physical location that offers goods and services to the public, it should stymie the seemingly never-ending deluge of website accessibility filings and demand letters that have been coming out of California targeting online-only businesses.

Of course, it is likely that this case may be appealed. However, for now, this is a decidedly positive development for online-only businesses seeking relief from such California state law claims.

Conclusion

As we approach the end of summer and prepare to head into the fall, change certainly feels like it is in the air.

While the full impact of these recent developments remains to be seen, businesses who have been consistently disappointed in the lack of website accessibility guidelines from Congress and the DOJ in recent years may now be cautiously optimistic that regulation — and relief for private entities — is in the pipeline, and will follow Title II regulations.

In the interim, businesses should also be encouraged that courts in key jurisdictions for website accessibility cases are beginning to turn in their favor, taking steps that may finally curtail the efforts of serial plaintiffs to file website accessibility cases under increasingly spurious theories.

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.

Once this is accomplished, businesses would do well to remember that accessible technology initiatives are a journey, not a destination, requiring the incorporation of accessibility into development, design and governance processes.

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[1] https://www.justice.gov/opa/pr/justice-department-commemorates-32nd-anniversary-americans-disabilities-act.

[2] https://www.reginfo.gov/public/do/eAgendaViewRule?RIN=1190-AA79&pubId=202204&utm_medium=email&utm_source=govdelivery.

[3] https://www.ada.gov/telehealth_guidance.pdf.

[4] Tavarez-Vargas v. Culture Carton LLC, No. 21 Civ. 9876 (JPC), 2022 BL 62132 (S.D.N.Y. Feb. 24, 2022).

[5] Gomez v. SF Bay Area Private RVS Inc., No. 21-cv-03701-BLF, 2022 BL 262692 (N.D. Cal. July 28, 2022).

[6] Martinez v. Cot'n Wash Inc., No. B314476, 2022 BL 266409 (Cal. App. 2d Dist. Aug. 01, 2022).