Is The Digital Accessibility Storm Almost Over?

By **Shira Blank, Rachel DiBenedetto and Joshua Stein** (May 8, 2024)

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Though the sunnier summer season is on its way, people charged with keeping tabs on the digital accessibility legal landscape might still feel they're under a constant storm warning. For close to a decade now, a dark cloud has hovered over private businesses that — in the absence of clear regulations or uniformity among courts — have faced a relentless deluge of demand letters and lawsuits from the plaintiffs bar.

Even businesses that have followed best practices and strived to offer digital access in substantial conformance with the most current version of the Web Content Accessibility Guidelines, or WCAG, now version 2.2, at Levels A and AA, have often been caught in the storm.

While we are still seeing website accessibility lawsuits being filed on a daily basis in a number of jurisdictions under the Americans with Disabilities Act and equivalent state and city laws, there are finally changes in the air that suggest that sooner than later, the storm may end, the clouds will part and a ray of sunlight will emerge.

To help you cut through all the recent developments and focus on the key takeaways to help you stay dry, we address businesses' most pressing questions about the legal landscape, with an eye toward what they might expect going forward.

What happened to that Supreme Court case from last year that was supposed to make it harder on serial filers going forward?

You are referring to Acheson Hotels LLC v. Laufer,[1] and unfortunately, the matter took a very unusual turn that failed to provide businesses with the anticipated relief going forward.

By way of background, Laufer was a serial plaintiff who sued hundreds of hotels alleging that their websites failed to provide disability accessibility information, in violation of the ADA. She admittedly had no plans to visit the hotels, but claimed she did not need any concrete plans because she was a self-appointed ADA "tester," meaning that she was testing the hotels for compliance with the law on behalf of other people with disabilities.

The question posed to the U.S. Supreme Court was whether an ADA tester like Laufer has Article III standing to challenge a website's failure to provide information in violation of the ADA despite having no plans to visit the hotel, and thus never having suffered any injury as a result of the lack of information.

Shortly before oral argument, Laufer voluntarily dismissed the lawsuit as well as the entirety of her massive docket of other pending lawsuits in the lower courts with prejudice — claiming it was because of allegations of misconduct by her lawyers, though one could argue it was because she was concerned about how the Supreme Court was going to rule and

what that would have done to the serial ADA plaintiff cottage industry.

While the Supreme Court rejected her attempts to avoid oral argument, after hearing from the parties, the court **ultimately held** in December 2023 that the case was moot because the matter creating the controversy had been dismissed. Even though the court cautioned the plaintiffs bar that future attempts to avoid a ruling on the merits via the same conduct might be met with a very different result, for now, the circuit split on tester standing remains.

There is no question this was a frustrating development. However, we do not want to overstate the potential real-world impact had the court found in favor of the hotel and tightened standing requirements. Even when there is a clear deficiency in standing, courts frequently provide plaintiffs with an opportunity to amend their pleadings to add information necessary to survive a motion to dismiss.

That said, a Supreme Court decision on the subject would have at least clarified the law across the country and required the plaintiffs bar to expend additional effort to draft more than cookie-cutter complaints, which would have helped stem the constant flow of demand letters and lawsuits.

Is there any promise of relief from new regulations on the horizon?

Yes, but whether it will directly affect private businesses may be a question that cannot be answered prior to the November election. The U.S. Department of Justice, which regulates and enforces in this space, announced on April 8 that it will finally publish a final rule governing digital accessibility under Title II of the ADA, which applies to state and local governments.[2]

This new rule clarifies the obligations that state and local governments have to make their digital platforms accessible to individuals with disabilities.[3] More specifically, it adopts the WCAG 2.1 at Levels A and AA as the technical standard. It also sets forth a list of exceptions for the types of content and materials that do not have to meet the WCAG.

If I do not work for a state or local government entity covered by Title II, how could this help me?

In prior regulatory efforts involving the ADA, the DOJ often first focused on Title II before then drawing upon those regulations, moving on to regulate private businesses, which can be considered places of public accommodation under Title III of the ADA. So, stay tuned — because barring a change in administration in 2024, it would be reasonable to expect this Title II regulatory process to be followed by similar efforts for companies covered by Title III.

In the interim, businesses looking to prioritize their digital accessibility enhancement efforts might look to the Title II regulations and their exceptions for some guidance.

With the Supreme Court having avoided the issue, how are individual lower courts currently handling these cases?

Interestingly, with the lack of clarity from the Supreme Court and DOJ — for now — individual federal courts are beginning to push back on serial plaintiffs, granting businesses' motions to dismiss that attack serial plaintiffs' standing to maintain their claims with increased frequency.

Of course, these rulings depend on the specific facts, the jurisdiction and the assigned judge, but some recent decisions of note include the following.

Feliz v. IHealth Labs Inc.

This year started out relatively strong for businesses in this area. In January, the U.S. District Court for the Southern District of New York — historically one of the more plaintiff-friendly districts for website accessibility cases — in Feliz v. IHealth Labs Inc. dismissed a plaintiff's website accessibility complaint for lack of standing and denied the plaintiff leave to amend.

In its decision, the court focused on the plaintiff's conclusory and boilerplate claims, which failed to adequately allege an intent to return.[4]

Martin v. Second Story Promotions Inc.

About one month later in February, another court in the Southern District of New York dismissed Martin v. Second Story Promotions Inc., a website accessibility lawsuit filed by two serial plaintiffs, with prejudice for lack of subject matter jurisdiction and denied the plaintiffs leave to amend. The court completely rejected the plaintiffs' claims, which it held were comprised solely of conclusory claims devoid of any factual support.

The court further noted that the sheer number of cases that the plaintiffs filed together in the district — with the same counsel, with relatively identical complaints, and on the same day — totally undermined their assertions that they experienced injury in fact as a result of the defendant's failure to maintain an accessible website.[5]

Thorne v. Capital Music Gear LLC

About a month and a half after that in April, another Southern District of New York court dismissed a serial plaintiff's complaint for lack of standing in Thorne v. Capital Music Gear LLC. Specifically, the court held that the plaintiff failed to establish any intent to return — and further, that simply stating the "magic words," i.e. that the plaintiff "intends to return" to the subject website, is insufficient to overcome this burden when the totality of the relevant facts, including past visits and proximity, demonstrate the opposite.[6]

It will be interesting to see whether other courts, including those in the Southern District of New York, seize on the opportunities presented to them by the Feliz, Martin and Thorne courts to similarly push back on serial plaintiffs who fail to plead their claims with specificity and fail to demonstrate that they have any real interest in using a defendant company's products and to return to the website.

What should I do now, as I await additional legislative and possible judicial clarity?

For the time being, we anticipate that serial plaintiffs will continue to forum shop for sympathetic ears — including moving to state courts — and these lawsuits will continue. However, with the increased risk of dismissal on the pleadings, plaintiffs counsel may be more careful about which companies they target and how they draft their complaints. And, as they also understand that litigating these matters is far more expensive than resolving them out of court, prelitigation settlements will continue to be the norm.

Companies should continue to make whatever efforts they can to avoid falling prey to digital accessibility lawsuits or private demand letters. This involves conducting regular audits of digital platforms from both a code and user perspective — relying on human testers, not just scanning tools — and bringing websites and mobile applications into compliance with the WCAG 2.2 at Levels A and AA.

Remember, accessibility is a marathon and a journey, not a sprint or a destination. Accordingly, companies would do well to offer relevant individuals training and incorporate accessibility into the development, design and governance processes to avoid having their digital platforms fall out of conformance with the WCAG and become inaccessible to individuals with disabilities.

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[1] Acheson Hotels LLC v. Laufer, 601 U.S. 1 (2023).

[2] https://www.justice.gov/opa/pr/justice-department-publish-final-rule-strengthen-web-and-mobile-app-access-people.

[3] https://www.ada.gov/notices/2024/03/08/web-rule/.

[4] Feliz v. IHealth Labs Inc., No. 23-cv-00354 (JLR), 2024 WL 342701 (S.D.N.Y. Jan. 30, 2024).

[5] Martin v. Second Story Promotions Inc., No. 1:22-cv-10438 (MKV), 2024 WL 775140 (S.D.N.Y. Feb. 26, 2024).

[6] Thorne v. Capital Music Gear LLC, No. 23-cv-776 (LGS) (S.D.N.Y. Apr. 12, 2024).