

# Property Managers, Owners and Leasing Companies Are Susceptible to Website Accessibility Lawsuits

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The recent and pervasive trend of lawsuits being filed against companies based upon website accessibility issues, including numerous suits brought against hospitality companies for such issues and for failure to identify accessible features of their properties online, is now expanding to include property management companies in multifamily apartment buildings, property owners and other leasing entities. Despite thousands of lawsuits, many companies remain unaware of this extremely tangible risk.

Since its passage, the Americans with Disabilities Act ("ADA") has typically been applied in the context of physical barriers that may exist for disabled individuals, such as a lack of accessible seating, inaccessible entrances or countertops that are too high. However, lawyers for disabled individuals are making a concerted effort to expand the ADA's requirements to websites and mobile apps, invoking the federal Fair Housing Act (FHA) and related state statutes as well. In fact, the filing of lawsuits against companies for purportedly inaccessible websites is one of the fastest-growing trends in consumer litigation against

businesses of all types, and property managers, property owners and leasing companies are becoming targets.

For example, in just one day in federal court in California last week, five lawsuits were filed against different property management companies alleging various types of violations, including several related to the management companies' websites, asserting claims under the ADA, the FHA, and the California Fair Employment and Housing Act (FEHA), Disabled Persons Act and Unruh Civil Rights Act. Nearly half a dozen similar actions were filed on August 28. Indeed, the plaintiffs' bar filed more lawsuits with such claims in the first six months of 2018 (more than a thousand) than they did in all of 2017. These cases are easier to assert than most ADA cases; the plaintiffs do not need to even leave their homes.

### **Traditional Interpretations of "Places of Public Accommodation" Are No Longer Reliable**

Title III of the ADA has an expansive definition of "public accommodation" that includes private entities whose operations affect commerce and whose businesses are generally open to the public and fall within one of the enumerated categories in the statute, such as retail stores, hotels, restaurants, movie theaters, recreational facilities and doctors' offices. In the statute, each category ends with the catch-all phrase "or other place ...." Traditionally, each of the enumerated categories of public accommodation is a physical location. The cited catchall phrase is one of the hooks that attorneys for disabled individuals are using to argue that businesses' websites and apps--in addition to their physical locations--must comply with the ADA.

Courts across the country are split on whether a website qualifies as a "place of public accommodation" under the ADA. Courts typically adopt one of three positions: (1) places of public accommodation can **only** be physical structures under the ADA, and websites thus are not encompassed by the ADA; (2) places of public accommodation need not be physical structures, and websites thus are encompassed by the ADA; or (3) for a non-physical "place" such as a website to be a "place of public accommodation," it must have a **sufficient nexus** to a physical structure that constitutes a public accommodation in order to be encompassed by the ADA. The latter two more expansive interpretations are particularly problematic for property management companies.

### **Recent Cases Demonstrate the Risks**

According to recent reports, **over 800 lawsuits** claiming lack of website accessibility were filed in federal courts in 2017. More than 1,000 lawsuits were filed in just the first six months of 2018. Every business is a target.

Last year saw the first post-trial verdict regarding website accessibility. *Gil v. Winn-Dixie*, 2017 U.S. Dist. LEXIS 90204 (S.D. Fla. June 13, 2017). In that case, the court adopted the "nexus theory" described above and found that the defendant's website was essentially an extension of its physical locations. The court therefore ordered Winn-Dixie to bring its website into conformance with specific website accessibility standards (even though the ADA contains no such website standards), develop and adopt website accessibility policies, provide website accessibility training, and conduct regular ongoing compliance audits. It also awarded the plaintiff more than \$100,000 in attorneys' fees. While not every case ends

in a win for the plaintiff, the majority of the cases around the country have reached similar results.

The federal lawsuits filed against property management companies over the past two weeks in Orange County contain a wide variety of allegations for ADA/FHA and related violations. Some of the claims are for the more typical violations related to physical access issues, such as lack of ramps or accessible parking. The website allegations, though, may be the most pernicious. In California, the "nexus" theory is the currently applicable standard; thus, if the website has a nexus to the physical property, it likely will be subject to some sort of accessibility requirements. These claims are becoming easier for plaintiffs to prevail upon, and plaintiffs' counsel are getting more creative in finding ways to obtain remedies beyond the injunctive relief provided by the ADA.

An easy add-on claim arises when plaintiffs, usually through counsel or a disabled rights organization, send letters outlining the alleged violations and requesting modifications and/or accommodations; the company's failure to respond appropriately (or at all) gives rise to a claim for failure to engage in the required interactive process. Another assertion is that the inaccessibility of the entity's website actively screens out disabled prospective tenants. Likewise, plaintiffs assert that failing to describe or picture accessible aspects of the properties on the company's website not only results in noncompliance with the ADA/FHA and related state laws but also has the intent and/or effect of discouraging the disabled from applying for such housing. Similar claims have been levied against the hospitality industry.

While defendants are not subject to monetary damages under the ADA (beyond attorneys' fees and costs), the costs of litigation and compliance can be substantial. Moreover, plaintiffs are increasingly coupling these lawsuits with claims under state laws, and other federal laws, that allow for the imposition of damages--sometimes treble damages. As noted above, the recently filed cases include claims under the FEHA, Disabled Persons Act and Unruh Civil Rights Act, and seek statutory damages, including treble damages.

### **No Definitive Guidelines Exist for Website Accessibility**

If a court finds that a company's website is a place of public accommodation required to be accessible under the ADA and related statutes, there are no definitive guidelines for companies looking to bring their websites into compliance. The Department of Justice ("DOJ") during the Obama administration commenced the rulemaking process to issue regulations concerning websites. At that time, the DOJ signaled its intent to adopt an expansive view of the definition of "place of public accommodation," indicating that it would adopt the privately promulgated Web Content Accessibility Guidelines (WCAG-2.0), Level AA, which set forth standards to make web content more accessible to a wide range of people with disabilities. (This is a moving target; notably, a WCAG-2.1 standard has now been promulgated, and Yale University recently released its own proposed website accessibility commitment and policy.)

In July 2017, however, the DOJ announced that it was putting the rulemaking on the "inactive" list. Then, in December 2017, the DOJ announced that it was officially withdrawing its two Advance Notices of Proposed Rulemaking related to website accessibility, purportedly to evaluate whether promulgating such regulations was necessary and appropriate. The DOJ's decision to withdraw the notices dooms businesses to a lack of

definitive and uniform guidance regarding ADA compliance in cyberspace for the foreseeable future.

However, companies cannot simply sit back and wait for definitive regulations. As seen in litigation throughout the country, the absence of DOJ promulgated guidance is allowing the courts and the plaintiffs' bar to fill the void with a patchwork of inconsistent legal holdings. This will be an evolving and uncertain area until official rulemaking takes place, and companies must closely follow this evolution to avoid potential exposure.

### **Recommendations**

***In light of the current state of these issues, it is imperative for companies to be proactive:***

- Respond promptly to letters outlining potential accessibility issues, preferably in consultation with legal counsel.
- Review public-facing websites and mobile apps for accessibility to the disabled as well as content. Website auditing software is available to help identify potential accessibility issues. While there are no definitive guidelines, both the DOJ and various courts have approved the WCAG-2.0, Level AA, standards, which means that they provide (at least currently) a good measuring post against which to assess accessibility. In addition to ensuring actual accessibility of the website, make certain that accessible aspects of your facilities (both common areas and rental units) are featured in descriptions and photographs.
- Ensure that your web designers are sufficiently knowledgeable of commonly applied accessibility standards to understand and implement appropriate modifications to provide maximum accessibility for disabled users, and review accessibility on an ongoing basis.
- Examine your vendor agreements and update them as appropriate to address accessibility issues, cover compliance updates and potentially shift liability for noncompliance. Review of contracts should be done in conjunction with legal counsel to minimize potential exposure.
- Stay current on accessibility standards being imposed by the courts.
- Talk to your insurance brokers about website accessibility coverage. Not all policies cover claims related to websites, and this is a good opportunity to ensure that you are properly protected.

Communicate with members of Congress and industry associations to urge them to work with the DOJ to implement standards and guidance. Without such definitive guidance, lawsuits will continue to proliferate, and your business is at risk.