Legal Backgrounder

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The Americans with Disabilities Act and Cyberspace: Who Will Provide Sorely Needed Guidance?

by John D. McMickle

The Americans with Disabilities Act (ADA), signed by President George H.W. Bush in 1990, has the laudable purpose of providing "a clear and comprehensive national mandate" to promote access to public accommodations for the disabled by providing "clear, strong, consistent, enforceable standards." On the law's twenty-fifth anniversary, Attorney General Loretta Lynch observed "the Americans with Disabilities Act has proved to be a revolutionary tool for improving the lives of Americans with disabilities."[1] Just this past June, President Donald J. Trump issued a Proclamation that credited the ADA with helping "people of all ages with disabilities … to thrive in the community, pursue careers, contribute to our economy, and fully participate in American society."[2]

The ADA is currently the subject of controversy over whether it regulates not only physical places, but virtual ones as well. Substantial confusion currently prevails on this question. This paper will explain how the confusion has spawned a cottage industry of private ADA litigation that neither furthers the policy objective of increased access for the disabled nor provides clear and consistent standards for stakeholders, including businesses. The paper concludes that the best chance for definitive, national guidance lies not with the courts or with the law's implementing agency—the Department of Justice (DOJ)—but through legislative amendment.

For some time, commentators have argued that private enforcement of the ADA's Title III, which imposes access requirements on places of public accommodation, has been misused.[3] Congress has held hearings on the abuses, and the House of Representatives passed legislation in 2017 designed to reduce vexatious litigation.[4]

Litigation under Title III imposes costs on business owners in the form of attorneys' fees (under the law's fee-shifting provision) and regulatory compliance. A recent multi-sector review by business associations is revealing as to the scope and cost of Title III website litigation. On average, business have payed from $10,000

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[1] *See* Prepared Remarks of Attorney General Loretta Lynch, July 23, 2015, https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-justice-department-event-commemorating.

[2] *See* Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2018, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-anniversary-americans-disabilities-act-2018.

[3] *See* John D. McMickle, *'Drive-by' Lawsuits under Disabilities Statute Costing Economy*, The Hill (Nov. 13, 2017), http://thehill.com/opinion/finance/360079-drive-by-lawsuits-under-disabilities-statute-costing-economy (estimating the amount businesses will pay to attorneys over a 10-year period would be close to a half-billion dollars); *see also* Walter K. Olson, *The ADA Shakedown Racket*, City J., https://www.city-journal.org/html/ada-shakedown-racket-12494.html.

[4] *See*, *e.g.*, Examining Legislation to Promote the Effective Enforcement of the ADA's Public Accommodation Provisions, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, 114th Cong., 2d Sess. (May 19, 2106)("Unfortunately, enterprising plaintiffs and their lawyers have abused the law by filing a flurry of ADA lawsuits aimed at churning out billable hours and extracting money from small businesses rather than improving access for the disabled, as the ADA intended.")(Statement of Subcommittee Chairman); *see also* HR 620, 115th Cong. 2d Sess. (2017).

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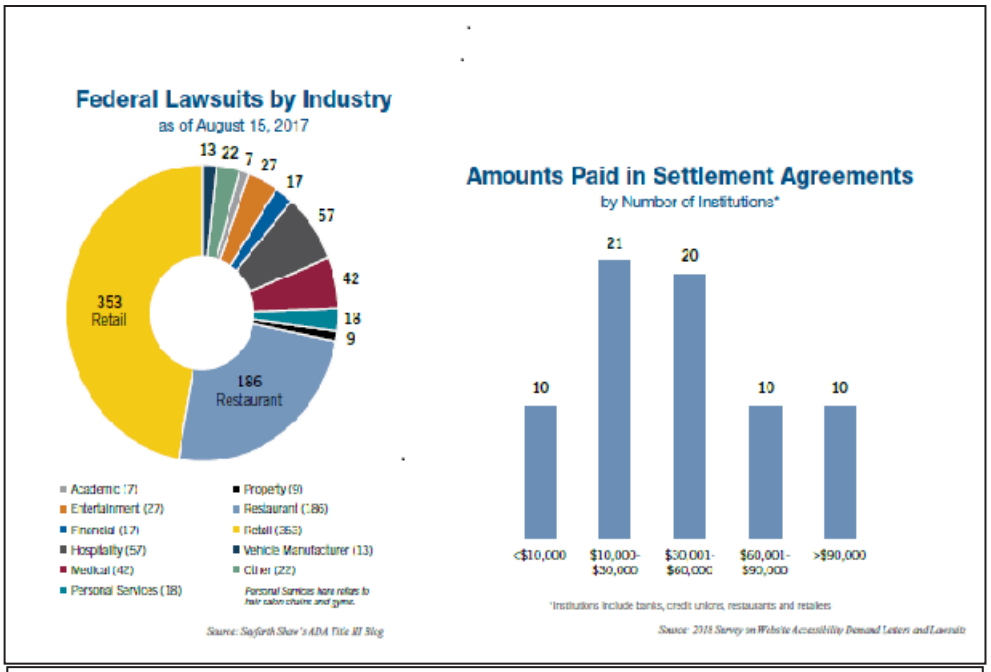
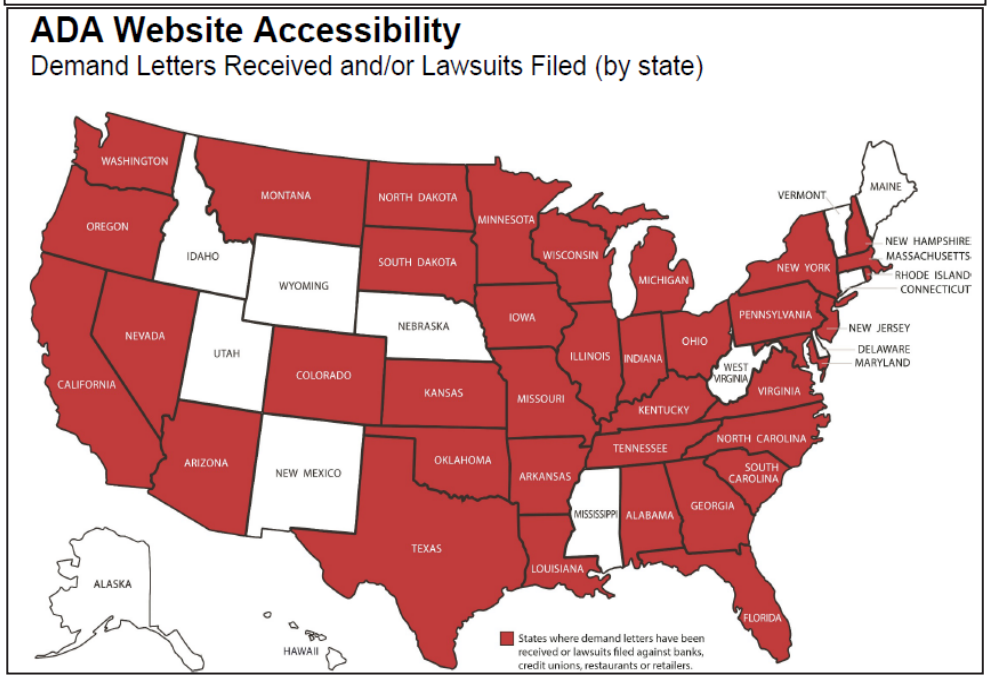
to $60,000 to settle lawsuits or respond to demand letters. In some cases, businesses have paid up to $90,000. Given the explosion of website-related ADA litigation, payments should be expected to increase in coming years. Of note, the first chart below shows that restaurants, retailers, and financial services firms are frequent targets for such lawsuits. The second chart demonstrates that ADA litigation affects virtually every state.





Statutory Interpretation. The ADA contains various sections governing employment, government services, and, relevant here, public accommodations. The statute defines, in some detail, the term "public accommodation" at 42 U.S.C. § 12181(7). That definition provides little insight on whether Title III applies to websites. It is highly specific and does not use terms that can be interpreted more or less broadly depending on circumstances in a particular lawsuit. Also, the statute lists as examples only *physical* spaces—not surprising given that Congress passed the law before the development of the World Wide Web.

The ADA's operative mandate provides that no "individual shall be discriminated against 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 by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12812 (emphasis added). Unlike the public-accommodation definition, the mandate utilizes broader terms that could apply to unforeseen circumstances such as the World Wide Web.

Considering the definition of public accommodation and the ADA's mandate, therefore, is a website a service, advantage, or privilege of a physical place? A restaurant, bank branch, or retail establishment is clearly a public accommodation. If these establishments advertise or take reservations through a website, is that website covered under Title III—not because the website itself is a public accommodation (unlikely based on the legal definition) but because it is a related service or advantage?

Judicial Confusion and Contradiction. The first successful ADA lawsuit alleging website inaccessibility was filed against Target in 2006. The number of website suits rose to 57 in 2015, leaped to 262 in 2016, and exploded to 814 in 2017.[5] As for 2018, a Bureau of National Affairs report recently noted, "mid-way through 2018 … nearly 685 federal ADA website accessibility lawsuits have already been filed. Most of these cases are being brought in the Second and Eleventh Circuits—approximately 68% of all cases filed in 2018 are venued in the Second Circuit and 27% are venued in the Eleventh Circuit."[6] In the Eleventh Circuit, Winn-Dixie has appealed a first-ever verdict related to website accessibility in which the jury awarded over $100,000 in attorneys' fees.[7]

Court decisions arising from these suits have reached different, even opposite, conclusions. The judge in the *Target* case reasoned that Title III applies to the company's website because the site was related to a "bricks-and-mortar" physical location. The judge concluded: "To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA."[8]

Following *Target*, a federal court in California ruled in *Cullen v. Netflix, Inc.* that Netflix.com is not subject to the ADA because Netflix has no associated physical location: "The Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation. … [and] [b]ecause the website is not a place of public accommodation, the ADA does not apply to access to Netflix's streaming library." [9]

Not all courts follow the physical-nexus requirement, however. In a suit nearly identical to *Cullen*, a federal court in Massachusetts held that Netflix.com was subject to the ADA despite its lack of a physical location.[10] And a federal court in New York decided in 2017 that applying Title III only to websites associated with a "bricks-and-mortar" nexus would lead to "absurd results" that would contravene the purposes of the ADA.[11]

At the other end of the spectrum are judicial opinions that seem to determine Title III does not apply to websites at all. For instance, in a case involving a credit union in which the plaintiff was held to lack standing, the court opined that a website is not a place of public accommodation under Fourth Circuit precedent.[12]

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[5]*See* Minh N. Vu *et al*., *Website Access and Other ADA Title III Lawsuits Hit Record Numbers*, Seyfarth Shaw LLP (July 17, 2018).
[6]Joshua Briones and Nicole Ozeran, *INSIGHT: A Mid-Year Review of the Current State of ADA Website Accessibility Lawsuits*, BNA, Aug. 16, 2018, https://www.bna.com/insight-midyear-review-n73014481764/; *see also Haynes v. Dunkin Donuts LLC*, 18-0370 (11th Cir. July 31, 2018)(unpublished opinion).
[7]*See* John O'Brien, *Lawyers Awarded $100K after Historic Verdict for Blind Internet Users; Winn-Dixie Appealing*, Forbes.com, Oct. 2, 2017, https://www.forbes.com/sites/legalnewsline/2017/10/02/lawyers-awarded-100k-after-historic-verdict-for-blind-internet-users-winn-dixie-appealing/#692924ad6b2e.
[8]*National Federation of the Blind v. Target Corporation*, 452 F. Supp. 2d 946, 956 (N.D. Cal 2006).
[9]*Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012).
[10] *See* Bob Egelko, *Netflix May Have to Provide Closed Captions Online*, S.F. Chron., June 22, 2012, https://www.sfgate.com/technology/article/Netflix-may-have-to-provide-closed-captions-online-3652999.php.
[11]*Andrews v. Black Art Materials,* 286 F. Supp. 3d 381, 396 (E.D. N.Y. 2017).
[12]*Carroll v. BAN Federal Credit Union*, No. 2:17-cv-521 slip. op. at 4 (E.D. Va. Mar. 5, 2018).

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Finally, yet another federal court in California dismissed a lawsuit filed under Title III involving Domino's Pizza, reasoning that an application of the ADA to websites would violate the due process rights of the company, given the absence of controlling governmental guidelines for website accessibility.[13]

A Path to Clarity. All branches of the federal government are capable of clarifying if and when businesses' websites constitute places of public accommodation under the ADA. The federal courts, however, can only decide cases presented to them, and as has happened with website-related ADA suits, such a case-by-case approach to interpreting a law will inevitably lead to conflicting outcomes. Only the U.S. Supreme Court can set down a uniform interpretation on this ADA question, and that path is lengthy and uncertain.

The Justice Department has declined to use its authority to adopt regulations on the question of websites' status. In 2010, DOJ did issue an Advanced Notice of Proposed Rulemaking (ANPRM), "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations."[14] The Obama Administration never took further action on the ANPRM, and the Trump Administration withdrew it in December 2017.[15]

On September 4, 2018, the Chairmen of the Senate Judiciary Committee and the Senate Banking Committee, with several other interested Senators, wrote DOJ asking for regulatory clarity. The Senators noted the rapid increase in Title III website lawsuits. According to the letter:

> [T]he lack of regulatory clarity benefits only the plaintiffs' lawyers. Clarity in the law will encourage private investment in technology and other measures that will improve conditions for the disabled. … Accordingly, we respectfully urge the Department to promptly take all necessary and appropriate actions within its authority—including filing statements of interest in currently pending litigation—to resolve the current uncertainty."[16]

Congress had an opportunity to address the applicability of the ADA to websites when it amended the law in 2008 and failed to do so. Courts could perhaps infer from that inaction that Congress did not intend for websites to be covered under the ADA. The conflicting decisions of the past few years, however, indicate that at least some judges have been unwilling to make that inference.

If Congress were to draft an entirely new law meant to promote access to public accommodations for the disabled, it would almost certainly consider applying it to websites. Members had no reason to introduce websites into its debates in the late 1980s when the ADA was being crafted and finalized. Technological change, however, has exposed an unforeseen gap in the law.

Congress can end the confusion by amending Title III so it explicitly covers websites and require DOJ to issue guidelines defining website accessibility. To balance the equities for all stakeholders, Congress could place a temporary moratorium on enforcement of Title III against websites, allowing businesses time to fully comply. In addition, given the complexity of computer coding, Congress could specify that minor or de minimis errors do not violate the ADA. Commercial websites that update frequently to advertise changes in prices or interest rates, for instance, should not be subject to abusive litigation if the updates are not immediately compliant.

Such an outcome respects the democratic process and would provide much needed certainty for all stakeholders—the disabled, the business community and the general public. The status quo, regulation by litigation, produces uneven results and is not the optimal way to ensure that the disabled have full access to the World Wide Web.

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[13]*Robles v. Domino's Pizza,* 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017). This case has been appealed to the Ninth Circuit.
[14]*See* 75 Fed. Reg. 43460 (July 26, 2010).
[15]*See* https://www.gpo.gov/fdsys/pkg/FR-2017-12-26/pdf/2017-27510.pdf.
[16]*See* Letter to Attorney General Jeff Sessions, Sept. 4, 2018, https://bit.ly/2CNdGv4.

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