THE ADA AND WEBSITE ACCESSIBILITY POST-*DOMINO'S*: DETANGLING EMPLOYERS' AND BUSINESS OWNERS' WEB AND MOBILE ACCESSIBILITY OBLIGATIONS

*Ahmed J. Kassim and Laura Lawless**

I. INTRODUCTION

Companies that offer goods and services online or otherwise maintain an online presence continue to face an onslaught of website accessibility lawsuits. Plaintiffs with disabilities allege companies' websites are discriminatory because the websites are incompatible with assistive technologies, like screen readers for the visually impaired. Plaintiffs have sued private defendants in federal court under Title III of the Americans with Disabilities Act (ADA) and, in some cases, under similar state and local laws as well. The exposure in these cases entails not only the possibility of injunctive relief requiring extensive modifications to defendants' websites, but

**Ahmed J. Kassim is Counsel at Porzio, Bromberg & Newman, P.C. in New York, NY. Laura Lawless is a Partner at Squire Patton Boggs (US) LLP in Phoenix, AZ.*

also, under some state and local laws, damages to the aggrieved plaintiffs, defense costs, and payment of the claimants' attorneys' fees.

These "surf by" claims have raised serious questions about whether, when, and how website owners must comply with the ADA. Neither Congress nor the U.S. Department of Justice (DOJ) has articulated the precise technical requirements for website accessibility under Title III. As a result, the applicability of the ADA to websites (and mobile applications) has come under intense judicial scrutiny, resulting in conflicting rulings during the past several years. Business groups hoped that the Supreme Court would hear the *Robles v. Domino's Pizza, LLC* appeal[1] and issue a decision that would end—or at least minimize—the tsunami of website accessibility lawsuits that have been filed nationwide. Since that did not happen, the waters remain murky. With the pace of these suits showing no signs of slowing, and with no clear guidance on the horizon, it is critical that every business operating a website consider how to manage the growing risk of litigation.

II. ADA AS A BASIS FOR LITIGATION OVER WEBSITE ACCESSIBILITY

A. *What Does the ADA Have to Do With the Internet?*

The ADA broadly protects the rights of individuals with disabilities in employment, access to state and local government services, places of public accommodation, transportation, and other important areas of American life. When Congress passed the ADA in 1990, it intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] However, the ADA contains no mention of websites and mobile applications because, when the law was adopted in 1990, the Internet was in its infancy. The ADA's emphasis at the time was making physical facilities accessible. Indeed, most businesses understand their obligations to make their physical facilities accessible under the ADA, and the DOJ has partnered with disability advocates to adopt a comprehensive set of technical scoping requirements to guide owners and operators of places of public accommodation. What many struggle with in the Internet age is how to ensure that their websites and mobile applications are accessible to the disabled as the web increasingly supplants brick-and-mortar institutions. To gain greater access to products and services sold and information made available online, disabled individuals have sued under the ADA, specifically under Title III, to compel private website operators to make their websites more accessible.[3]

1. *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).
2. *See* 42 U.S.C. § 12101(b)(1).
3. *See* Lewis Wiener & Alexander Fuchs, *Trending: ADA Website Accessibility Lawsuits*, Law360, Dec. 15, 2016, https://www.law360.com/articles/871491/trending-adawebsite-accessibility-lawsuits.

Title III of the ADA prohibits discrimination based on disability in the activities of *places of public accommodation*.[4] It states: "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."[5] The ADA expressly provides that a place of public accommodation engages in unlawful discrimination if it fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[6]

Congress designed Title III to ensure that individuals with disabilities obtain equal access to the goods and services available at a wide range of physical places open to the public, which the statute refers to as "places of public accommodation." The ADA regulations broadly define a *place of public accommodation* as "a facility operated by a private entity whose operations affect commerce" that fall under one of several enumerated categories.[7] Section 12181(7) sets forth the twelve specific categories of places deemed "places of public accommodation," including hotels, restaurants, places of entertainment, stores, and gyms.[8]

B. *Are Websites Places of Public Accommodation?*

To bring a claim under Title III of the ADA, a plaintiff "must allege (1) that she is disabled within the meaning of the ADA; (2) that defendant owns, leases or operates a place of public accommodation; and (3) that defendant discriminated against her by denying her a full and equal opportunity to enjoy the services defendant provides."[9] The applicability of the second element to the Internet—whether a website or mobile app is a place of public accommodation—is the crux of website accessibility litigation. Section 12181(7) does not include websites or mobile apps as "places of public accommodation." Since 1990, Congress has revised Title III of the ADA twice, but neither revision amended "place of public accommodation" to include the Internet or websites.[10]

Determining the definition and reach of "places of public accommodation" is, therefore, critical to assessing the rights of people with disabilities with respect to the Internet. However, there is no unifying interpretation or application of the ADA to websites as places of public accommodation.

4. 42 U.S.C. §§ 12181–12189.
5. *Id.* § 12182(a).
6. *Id.* § 12182(b)(2)(A)(iii).
7. 28 C.F.R. § 36.104.
8. 42 U.S.C. § 12181(7).
9. Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d Cir. 2008).
10. *See, e.g.*, Act of Sept. 25, 2008, Pub. L. No. 110-325, 122 Stat. 3554.

As discussed below, the DOJ has opined that the ADA applies to the Internet, but it has not clarified exactly what standards commercial websites must meet to comply with Title III. Further complicating the issue, ADA jurisprudence distinguishes between businesses that operate only online and those that operate both online and at physical locations. Some courts hold that Title III applies to online-only businesses, while others do not.[11]

1. The DOJ's Position.

The DOJ enforces and promulgates rules under the ADA consistent with Congress's mandate that the agency would apply the statute in a manner that evolved over time.[12] Consistent with this approach, the DOJ stated in the preamble to the original 1991 ADA regulations that the regulations should be interpreted to keep pace with "emerging technology."[13] DOJ regulations define *place of public accommodation* consistent to those in Section 12181(7) and clarifying that a "place" is a "facility" that offers the types of services enumerated in Section 12181(7).[14]

Although the ADA's statutory language does not address websites, the DOJ considers websites offering goods or services to consumers to be "places of public accommodation," which must be accessible to the disabled.[15] Since 1996, the DOJ has explained that it believes that "web pages" are encompassed within Title III.[16] DOJ regulations require that public accommodations "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."[17] The implementing regulations list examples of auxiliary aids and services, including Braille materials and displays, screen reader software, and other means of informing hearing and visually impaired individuals.[18] However, even though the DOJ expects commercial websites and mobile applications to be accessible to the disabled, it has never adopted specific technical regulations under Title III. In contrast, the DOJ has adopted detailed guidance regarding website compliance under Title II of the ADA, which applies to government entities.[19] The DOJ's silence with respect to Title III was thus a source of great consternation to many in the private retail and commercial community.

11. *See* Section B.(2), *infra*, for a discussion on the federal circuit split on this issue.
12. *See* H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990); 42 U.S.C. § 12186(b).
13. 56 Fed. Reg. 35544-01, 35566 (July 26, 1991).
14. 28 C.F.R. § 36.104.
15. *See* 75 Fed. Reg. 43,463.
16. *See* Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Senator Tom Harkin (Sept. 9, 1996), https://www.justice.gov/crt/foia/file/666366/download.
17. 28 C.F.R. § 36.303(c)(1).
18. *See id.* § 36.303(b)(2).
19. *See* Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d.

In 2010, to provide guidance around website accessibility, the DOJ initiated rulemaking that would have resulted in technical standards for private websites and mobile applications.[20] This proposed rule was not only intended to clarify the application of Title III to commercial websites,[21] but also to formally adopt the Website Content Accessibility Guidelines (WCAG).[22] The WCAG, developed by the non-governmental World Wide Web Consortium (W3C), sets forth voluntary technical standards that make web content more accessible to people with disabilities.[23] From 2010 to 2015, the DOJ brought or intervened in many enforcement actions against commercial website operators where the settlements required compliance with WCAG 2.0 AA guidelines, leading many to believe the DOJ would formally adopt the guidelines as the governing accessibility standard.[24]

However, the DOJ repeatedly delayed the release of the final rule. In late 2017, with the change of administrations, the DOJ added the proposed rule to a list of "inactive" regulatory actions[25] and ultimately withdrew the proposal on December 26, 2017.[26] In 2018, members of Congress wrote to then-Attorney General Jeff Sessions complaining about the lack of clarity for website compliance under the ADA and encouraging the DOJ to clarify whether the ADA applies to websites given the increase in website accessibility lawsuits.[27]

In its response, the DOJ confirmed its position that the ADA applies to the websites of public accommodations. Assistant Attorney General Stephen E. Boyd stated that the DOJ's "interpretation is consistent with the ADA's Title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to

20. 75 Fed. Reg. 43,460 (proposed July 26, 2010).

21. *See id*. at 43,463.

22. WCAG 2.0 guidelines are private-industry standards for website accessibility developed by technology and accessibility experts. WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. 36 C.F.R. pt. 1194, app. A (2017).

23. *See Introduction to Web Accessibility*, W3C, https://www.w3.org/WAI/fundamentals/accessibility-intro (last updated June 5, 2019).

24. *See*, *e.g*., Minh N. Vu, *WCAG 2.0 AA Is the New Accessibility Standard for Federal Agency Websites, ADA Title III*, Seyfarth Shaw, Jan. 10, 2017, https://www.adatitleiii.com/2017/01/wcag-2-0-aa-is-the-new-accessibility-standard-for-federal-agency-websites.

25. Office of Info. & Reg. Affairs, OMB, Inactive RINs (2017), https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf.

26. 82 Fed. Reg. 60,932.

27. *See* Letter from Ted Budd, Member of Congress, et al., to Jeff Sessions, U.S. Att'y Gen. (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf; and Letter from Senator Chuck Grassley et al., to Jeff Sessions, U.S. Att'y Gen. (Sept. 4, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf.

people with disabilities."[28] Boyd also stated that, "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA." Ultimately, the lack of regulatory certainty left businesses with a mandate to make their websites accessible but no directions on how to do so.

2. The Federal Courts' Interpretation: Circuit Split.

Federal courts are not waiting on Congress or the DOJ to act, but federal case law is far from settled. Marked differences are developing within and among the circuit courts of appeals on the issue of whether websites are "public accommodations."

The courts have largely split into two factions. Within the First, Second, and Seventh Circuits, courts have found that the ADA is not limited to brick-and-mortar structures and can apply to a website independent of any nexus to a physical place.[29] Courts in these circuits highlight Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available to other members of the public and that Congress intended the ADA to adapt to evolving technology.[30] On the other end, courts in the Third, Fifth, Sixth, and Ninth Circuits interpret "place of public accommodation" to be physical places, and, therefore, goods and services provided by a public accommodation must have a sufficient nexus to a physical place in order to be covered by the ADA.[31] Courts in these circuits have concluded that a public accommodation must be a physical place because the twelve enumerated categories of public accommodations in Section 12181(7) are all physical places.

Predictably, this split has already led to conflicting rulings, even in cases involving the same defendant, making compliance untenable for website operators with a national reach. For instance, in 2012, district courts in the

28. Letter from Stephen E. Boyd, Asst. Att'y Gen., to Ted Budd, Member of Congress (Sept. 25, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf.

29. *See, e.g.*, Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc., 37 F.3d 12, 19 (1st Cir. 1994); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999); Morgan v. Joint Admin. Bd., Ret. Plan, 268 F.3d 456, 459 (7th Cir. 2001); Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 576 (D. Vt. 2015); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012); Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017).

30. *See Scribd*, 97 F. Supp. 3d at 575; *Netflix*, 869 F. Supp. 2d at 200–02.

31. Earll v. eBay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015); Ford v. Schering–Plough Corp., 145 F.3d 601, 612–14 (3d Cir. 1998); Magee v. Coca-Cola Refreshments, 833 F.3d 530, 534 (5th Cir. 2016); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

First and Ninth Circuits considered whether Netflix's highly popular website constitutes a place of public accommodation.[32] Applying their respective circuit precedents, the district courts, just two months apart, reached opposite conclusions on the applicability of Title III to Netflix's website.[33]

The Ninth Circuit in *Robles v. Domino's Pizza, LLC* is the latest and highest court to weigh in directly on the issue.[34] In *Domino's*, the plaintiff sued the national pizza chain alleging that its website and mobile app violated the ADA because they did not work with common screen-reading software. The district court dismissed the lawsuit, holding that, although Title III applied to websites, allowing the case to proceed without clear web accessibility regulations from the DOJ would violate Domino's due process rights and that the primary jurisdiction doctrine required the court to defer to the DOJ until it acted. The district court was especially concerned about using the WCAG as a legal standard absent a specific regulation.

On appeal, Domino's argued that only physical facilities were bound by the public accommodation provision of the ADA.[35] Domino's contended that companies were not required under the law to make their websites and mobile apps fully accessible if they offered customers with disabilities other options for accessing their goods and services, such as a telephone hotline.[36]

The Ninth Circuit rejected Domino's theory, reversed the district court's dismissal, and remanded the case. The Ninth Circuit held that (1) Title III of the ADA covers websites with a nexus to a physical place of public accommodation, relying heavily on the fact that the Domino's app and website are two of the most used ways to order take-out and delivery,[37] and (2) liability for not having an accessible website, even with no regulation on the subject, does not violate due process rights of a business covered by Title III.[38] The Ninth Circuit concluded by making clear that it was *not* expressing any opinion whether Domino's website or mobile app complied with the ADA, and instructed the district court to proceed with

32. *See* Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1024–29 (N.D. Cal. 2012); *Netflix*, 869 F. Supp. 2d at 201–02.

33. *Compare Cullen*, 880 F. Supp. 2d at 1024–29 (holding that "[t]he Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation"), *with Netflix*, 869 F. Supp. 2d at 201–02 (holding the Netflix website is a place of public accommodation under First Circuit precedent and defendant may not discriminate in the provision of the services (i.e., streaming video) of that public accommodation).

34. *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

35. *See id*. at 905.

36. *See id*. at 905 n.5.

37. *Id*. at 905.

38. *Id*. at 907.

discovery on that issue.[39] The U.S. Supreme Court denied Domino's petition for writ of certiorari,[40] leaving the circuit split unresolved.

Despite the split as to whether Title III extends to *all* websites or just those with a nexus to a physical location, the courts are nearly unanimous (including now the Ninth Circuit) in holding that a website can and should be construed as providing "services of a place of public accommodation" under the ADA *where the site's inaccessibility impedes access to goods and services of physical locations*.

The result of this split is that businesses are now left needing to comply with a number of different and developing interpretations of how the ADA might apply to online and mobile platforms nationwide. But without clear standards from the DOJ or the courts, businesses must speculate about how to comply with the ADA. Despite undertaking costly development, with the best of intentions to service all customers, website operators can remain vulnerable under the ADA.

C. *Lack of Clear Unified Guidance Fuels Litigation.*

The genesis of website accessibility claims under Title III is well documented.[41] Without clear congressional mandate, regulatory direction, or consistent decisional law, businesses are at the mercy of myriad and sometimes conflicting interpretations of how the ADA applies to online and mobile platforms nationwide, a phenomenon fueling an explosion of website accessibility lawsuits. In 2016, roughly 250 lawsuits were filed regarding allegedly inaccessible websites and/or mobile applications.[42] As a result of the DOJ's withdrawal of rulemaking in December 2017, the number of website accessibility lawsuits mushroomed to over 2,200 suits by the end of 2018,[43] where it roughly remained through 2019.[44] It is anticipated that federal website accessibility filings for 2020 will exceed 3,000 cases.[45]

39. *Id*. at 911.

40. *See Domino's*, 140 S. Ct. 122.

41. *See*, *e.g.*, Mark S. Sidoti, Mitchell Boyarsky & Ahmed J. Kassim, *Navigating Website Accessibility Claims*, New York Law J., Mar. 20, 2017, https://www.law.com/newyorklawjournal/almID/1202781633698/navigatingwebsite-accessibility-claims.

42. Minh N. Vu, Kristina M. Launey & Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, ADA Title III News & Insights, Seyfarth Shaw, Jan. 23, 2017, http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016.

43. Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, ADA Title III News & Insights, Seyfarth Shaw, Jan. 31, 2019, https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018.

44. Kristina M. Launey & Minh N. Vu, *The Curve Has Flattened for Federal Website Accessibility Lawsuits*, ADA Title III News & Insights, Seyfarth Shaw, Apr. 29, 2020, https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits.

45. *See* Jason Taylor, Record Breaking Year for Digital Accessibility Lawsuits, Dec. 21, 2020, https://blog.usablenet.com/a-record-breaking-year-for-ada-digital-accessibility-lawsuits.

Notably, the case law has been, with rare exceptions, pro-plaintiff.[46] Business groups hoped that the Supreme Court would take up the *Domino's* case and issue a decision that would end—or at least curtail—the tsunami of website accessibility litigation nationwide, but the Supreme Court passed on the opportunity.[47]

Plaintiffs' counsel are aware of the uncertainty in the law and the fact that a vast majority of websites are substantially noncompliant with the WCAG.[48] Despite the uncertainty as to whether WCAG 2.0 or later versions will become the official legal standard for website accessibility under Title III, courts increasingly rely on the WCAG as a benchmark for measuring accessibility, and the plaintiffs' bar began to demand compliance with the WCAG as a term of pre-suit settlement.[49] As courts began to order compliance with the WCAG 2.0 AA guidelines as an equitable remedy to procure compliance with Title III, settlements incorporating WCAG substantial compliance and minimizing legal spending on both sides increased in number.[50]

Initially, plaintiffs' firms would serve a detailed demand letter to the target entities, describing the websites' deficiencies, and demanding that the website be brought to conformance with WCAG 2.0 AA (or 2.1 AA) and payment of counsel fees and costs incurred—a low-cost resolution appealing to both plaintiff and defendant. However, in recent years, plaintiffs are increasingly skipping the demand letters and immediately suing, a step that not only increases costs through filing fees and early appearances but puts other would-be claimants on notice that resolution and remediation may not be far off.

Plaintiffs are also making claims under analogous state and local laws in certain jurisdictions, such as New York[51] and California,[52] alleging that the respondents' websites violate local human rights or civil rights statutes

46. For two notable defense rulings, *see* Diaz v. Kroger Co., No. 18 Civ. 7953 (KPF) (S.D.N.Y. June 4, 2019) (dismissing complaint because the ADA claims had been rendered moot by defendant's remediation of its website to comply with the WCAG 2.0), and Himelda Diaz v. Apple, Inc., 18-cv-07550 (LAP) (S.D.N.Y. Mar. 28, 2019) (granting Apple's motion to dismiss because plaintiff had failed to allege any particularized injury and noting that the complaint was identical to over four hundred others filed over the last two years).

47. David G. Savage, *Supreme Court Allows Blind People to Sue Retailers If Their Websites Are Not Accessible*, L.A. Times, Oct. 7, 2019, https://www.latimes.com/politics/story/2019-10-07/blind-person-dominos-ada-supreme-court-disabled.

48. WCAG encompasses four principles, thirteen guidelines, and over sixty testable success criteria. *See* https://www.w3.org/WAI/standardsguidelines/wcag. Each of the sixty-plus success criteria provides three levels of conformance: A (lowest), AA, and AAA (highest). *Id.* A website failing even one of those criteria, at any level, opens the door to a lawsuit for noncompliance.

49. *See*, *e.g.*, *Domino's*, 913 F.3d at 907.

50. *See*, *e.g.*, Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

51. *See* N.Y. State Human Rights Law, N.Y. Exec. Law § 290 *et seq*.

52. *See* Cal. Civ. Code § 51(b).

that guarantee equal access for people with disabilities. Some of these state and local laws allow for nominal monetary recovery. Whether framed as a single-plaintiff case or a threatened class action, reliance on these bases of recovery is driving up the cost of settlement.

The lawsuits are often similar in approach. Pleadings tend to repeat boilerplate allegations that a hearing or visually impaired individual was deprived of full access to website content because of digital barriers to access. Although the lawsuits often identify deficiencies in the websites' accessibility, the reliance on a cadre of frequent (and sympathetic) litigants, repetition of boilerplate allegations, and the allure of prevailing plaintiff fee recovery have spurred the creation of a cottage industry of accessibility suits that are expensive and difficult to defend.[53] The suits require little pre-filing inquiry; claimants or attorneys' staff can use free, accessible tools of varying degrees of accuracy to identify "deficiencies" on a target's site and, from there, conclude that the site as a whole is inaccessible.[54] The standard progression of such suits is toward early settlement, as the cost of remediating the target website and contributing toward the putative plaintiff's attorneys' fees is less than litigating to an uncertain outcome, which typically requires the retention of one or more website accessibility experts, the cost of which alone incentivizes early settlement.[55] Indeed, more than ninety-three percent of website accessibility cases filed in 2018 settled, and of the cases filed in 2019, fifty-five percent settled within sixty days.[56]

III. WHO IS VULNERABLE TO SUIT?

All websites that transact business with the public are potentially vulnerable to website accessibility suits. ADA lawsuits have targeted the websites of retailers (including, as noted above, Target and Winn-Dixie stores), restaurants (*e.g.*, Domino's Pizza Inc.), universities (including Harvard and MIT[57]), and celebrities (including Beyoncé[58] and Kylie Jenner[59]).

53. *See* Sidoti, Boyarsky & Kassim, *supra* note 41; *see also* Amici Curiae Brief of Retail Litig. Ctr., Inc. & Nat'l Retail Fed'n at 16–22, Domino's Pizza, LLC v. Robles, (2019) (No. 18-1539), https://www.supremecourt.gov/DocketPDF/18/18-1539/108278/20190716175135889_18-1539%20-%20Amicus.pdf.

54. *See* Sidoti, Boyarsky & Kassim, *supra* note 41.

55. *See id.*

56. *See* Jason Taylor, *2018 ADA Website Accessibility Lawsuit Recap Report*, UsableNet, Dec. 26, 2018, https://blog.usablenet.com/2018-ada-web-accessibility-lawsuitrecap-report.

57. *Deaf Advocates Sue Harvard, MIT for Better Webcast Captions*, Law360, Feb. 12, 2015, https://www.law360.com/articles/621255/deaf-advocates-sue-harvard-mit-for-better-webcast-captions.

58. Ashley Cullins, *Beyonce's Parkwood Entertainment Sued over Website Accessibility*, Hollywood Rep., Jan. 3, 2019, https://www.hollywoodreporter.com/thr-esq/beyonces-parkwood-entertainment-sued-1172909.

59. *Kylie Jenner's Company Is Being Sued for Being Inaccessible to the Blind*, L'Officiel, Dec. 15, 2017, https://www.lofficielusa.com/beauty/kylie-jenner-s-company-is-being-sued-for-being-inaccessible-to-the-blind.

Although these lawsuits have been filed across the country, the vast majority are filed in New York, California, and Florida, jurisdictions with decisional law more favorable to Title III plaintiffs. Whether the website has a nexus to a physical location may dictate where the suit is filed because, to date, ADA jurisprudence has recognized distinctions between businesses that operate only online and those that operate both online and at physical locations. Accordingly, companies with physical locations that operate websites and/or mobile apps will need to ensure that their websites and mobile apps are ADA-compliant. Meanwhile, for those companies that *only* operate through a website and/or mobile app, the applicability of the ADA is based on jurisdiction.

Needless to say, the circuit split largely moots the issue of where plaintiffs will file suit as it has facilitated aggressive forum shopping, with plaintiffs' firms filing suit in a handful of jurisdictions that they have deemed most favorable. For example, when the district court granted Domino's motion to dismiss in 2017, website accessibility filings plummeted in California, which had been a popular forum for these suits, and skyrocketed in other jurisdictions.[60]

It is becoming common for companies to be sued more than once by different plaintiffs even after they have settled initial claims and agreed to remediate their websites.[61] For instance, many retailers have multiple brands with separate websites for each, and some mistakenly believe that one settlement will cover all future legal actions, or a company is sued during the course of its initial remediation because some of the site is still inaccessible.[62] Defendants are advised that, until their websites are fully WCAG-compliant, with user testing to ensure usability and functionality, they remain vulnerable to *seriatim* litigation.

IV. STRATEGIES FOR WEBSITE OPERATORS POST-*DOMINO'S*

The circuit split on Title III's applicability to websites and apps, and the Supreme Court's declination to review the *Domino's* appeal—as well as the DOJ's current stance—means that the deluge of website accessibility lawsuits will continue.

A business with a consumer-facing website should assume that it is a target and should develop a coordinated strategy involving internal

60. *See*, *e.g.*, Kristina M. Launey & Melissa Aristizabal, *Website Accessibility Lawsuit Filings Still Going Strong*, Seyfarth Shaw, ADA Title III News & Insights, Aug. 22, 2017, https://www.adatitleiii.com/2017/08/website-accessibility-lawsuitfilings-still-going-strong; Minh N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, Seyfarth Shaw, ADA Title III News & Insights, Jan. 2, 2018, https://www.adatitleiii.com/2018/01/2017-website-accessibilitylawsuit-recap-a-tough-year-for-businesses; Taylor, *supra* note 56.

61. *See* Taylor, note 56.

62. *See*, *e.g.*, Haynes v. Hooters of Am. LLC, 893 F.3d 781 (11th Cir. 2018).

stakeholders, legal counsel, and website accessibility design professionals to manage risk before, during, and after a lawsuit.[63] Proactive steps to minimize the likelihood of litigation due to the inaccessibility of their website or mobile platform allow companies greater control over the remediation and implementation process and show a commitment to their disabled customers. Ultimately, the best deterrence is having a website that is accessible to the disabled.

Before receipt of a lawsuit or pre-suit demand letter, companies should have their website evaluated for compliance with WCAG 2.0's various criteria and any applicable local human rights law, preferably by a vendor employing testers with a range of visual, auditory, mobility, and cognitive disabilities using a variety of assistive technologies. The evaluation should also include a comparison of the audit results from the consultant to those generated by the readily available web tools used by plaintiffs' firms to assess WCAG compliance.

Additionally, businesses should invest in understanding the WCAG and the types of issues the guidelines address, including training their employees on website-accessibility requirements, designating personnel to ADA compliance if warranted, and adopting and posting website accessibility policies and statements. Companies often contract for content from third-party vendors. Before entering into third-party contracts for content, companies should ensure that such agreements contain adequate accessibility assurances and indemnification terms.

If any deficiencies are discovered, a business should create a remediation plan to implement upgrades on a timeline that is reasonable for that business. Until the DOJ adopts specific technical requirements for web accessibility, businesses have flexibility in determining how to make their websites compliant with the ADA's general requirements of nondiscrimination and effective communication. Short-term goals should include identifying immediate improvements (such as to top-level pages, navigations, headers, and footers) that can significantly reduce the likelihood of becoming a target. Any implementation plan should include a process for integrating accessibility into future updates, redesigns, and new pages. For the long term, website owners should establish a track record for their compliance programs and conduct regular internal and third-party audits, which will lend support to the company's contention that it intends to maintain compliance in the future.

While not a complete bar to lawsuits and settlement demands, if implemented correctly, these measures significantly bolster a respondent's defenses and position a company to expeditiously and efficiently resolve claims.

63. *See, e.g.*, Mark S. Sidoti, *Practical Strategies for Defending ADA Website Accessibility Claims*, N.Y. L.J., Mar. 8, 2019, https://www.law.com/newyorklawjournal/2019/03/08/practical-strategies-for-defending-ada-website-accessibility-claims.

Once a pre-suit demand letter or a complaint is received, companies should act quickly. At the outset, a company should confirm the accuracy of the complaint or demand letter because plaintiffs' firms typically cut and paste the same allegations into hundreds of complaints, which may contain allegations that are either false or inapplicable to the target site. Erroneous allegations could serve as a basis for a motion to dismiss or to amend the complaint (or, once alerted, plaintiff's counsel may decide to abandon the case). In cases where the target entity has a clearly non-compliant website, knowledgeable defense counsel in this area, when engaged early, can often negotiate settlements fairly quickly.[64] Allowing a case that should, and ultimately will, settle to proceed to a default, or even to a responsive pleading and mandatory initial court conferences, only serves to increase the plaintiff's fees and costs.

Finally, if considering challenging website accessibility claims, consult experienced counsel, as it is critical for website owners at the outset to understand the precedential decisions in their jurisdiction (and those on appeal) when evaluating whether and on what basis claims might be challenged. As the cited cases demonstrate, numerous defendants and trade groups (appearing as *amici* in appeals) have invested significant resources to test the boundaries of these claims and the reach of many of the common defenses. These precedential opinions should guide website owners away from spending resources mounting otherwise futile challenges, which only serve to run up defense costs and plaintiffs' counsel fees. And, of course, failing to cite binding precedent in the jurisdiction, or filing motions over the standing orders of local judges, may result in the imposition of sanctions.

V. CONCLUSION

Most companies have faced a new reality in recent years—make their websites accessible to individuals with disabilities, or face exposure to lawsuits claiming that the sites violate the ADA. Companies should expect the seemingly endless stream of website accessibility lawsuits to continue and should, therefore, prioritize mitigation. As reliance on online services increases, the best way to avoid being a target is to achieve substantial conformance with at least WCAG 2.0 AA (preferably 2.1 AA). In short, taking swift, definitive action to guarantee and maintain accessibility for all not only reduces the risk of website accessibility exposure, but also makes good business sense.

64. *See* Sidoti, *supra* note 63 (summary of special considerations and terms that should factor into negotiation of website accessibility settlements including elimination of class exposure, res judicata, follow-on claims, private vs. public settlement agreements, time frame for remediation, and confidentiality).