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Website Accessibility:  
Top Ten Questions (and Answers) for 2022

## Presentation to the National Apartment Association

Presented by:

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The purpose of this update is to identify select developments that may be of interest to readers. The information contained herein is abridged and summarized from various sources, the accuracy and completeness of which cannot be assured. This update is not and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

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# Presenters



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## Presenter Bios

- Tony Mingione counsels and defends businesses on issues concerning the ADA and analogous state statutes. Tony has successfully defended companies in courts throughout the country in accessibility litigation and frequently publishes and lectures in this area. In addition to his ADA accessibility practice, Tony also regularly advises clients on all aspects of labor and employment law.
- Martin Krezalek concentrates his practice on business litigation and dispute resolution and regularly defends businesses across the country facing website accessibility lawsuits alleging violations of the ADA. He often writes on the subject. He recently published an Op Ed piece that appeared on the front page of the New York Law Journal: *DOJ's Failure To Provide Effective Guidance on Website Accessibility Requirements Under the ADA Leaves Congress as the Only Option To Address the Problem of Abusive Lawsuits*

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## The Blank Rome Team

- Blank Rome has a nationally-recognized ADA Website and Mobile App Defense and Compliance Team
- We employ a multi-disciplinary approach to assist clients with compliance, litigation, and remediation
- Our lawyers have represented clients across the country facing these types of suits, and are recognized as thought leaders in this space
- We act quickly to stem the damage and limit attorneys' fees, and we help counsel our clients about methods of quick website remediation (including helping with vendor selection) if that is requested

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# Agenda: The Top 10

- FHA vs. ADA
- High Level Numbers
- What is Happening in the Industry?
- State Law Differences
- The Importance of Mobile and Apps
- Widget and Overlays
- WCAG Standards
- Potential Congressional Involvement
- Insurance and Other Protections
- Q&A



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# The Americans with Disabilities Act

- The ADA lists several types of public accommodations, but because the statute predates the internet, websites are not specifically included.
- As virtually every business entity now has web presence, the US DOJ has pursued enforcement actions against companies with allegedly inaccessible websites and mobile applications.
- In the last decade scores of private ADA enforcement actions have been filed accusing websites of being inaccessible to the blind and visually impaired.

## FHA vs. ADA – What are the laws?

- The Americans with Disabilities Act (“ADA”) prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations by any private entity that owns, leases (or leases to), or operates any place of “public accommodation.”
- The Fair Housing Act protects people from discrimination when they are renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities. (Additional protections apply to federally-assisted housing.)



# What is Website Accessibility?

Visual disability claims: visually impaired individuals use JAWS or other screen reading software/devices to access and “read” content on websites, but software does not work with defendant’s website, or only certain portions of site.

Examples:

- images cannot be “read” because of lack of alt text
- drop down menus do not work
- color-coded maps cannot be comprehended
- video not closed-captioned (hearing impaired)

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## Example: Lack of Alternative Text

The image below does not contain alternative text, so a screen reader would simply state to the user: “Image” because there is no text coded to tell the reader what to recite to the user. Consequently, persons with disabilities will not be able to easily understand what this box is for or if they would be interested in its content.



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## Example: Lack of Alternative Text

The language selection drop-down is missing alternative text, and as a result a screen reader would only read aloud “javascript:void(0)”. Additionally, access to the language selection drop-down is not accessible via commonly accepted industry-accessible standards.



# Global Accessibility Awareness Day

Global Accessibility Awareness Day occurs every May. It is designed to help raise awareness about barriers people with disabilities have to accessing the Internet. It encourages people to take one hour today to experience what people with disabilities encounter when accessing the Internet.

Ex. Go mouseless for an hour - use keyboard to interact with websites (tab/shift, etc.)

Ex. Try out a screen reader for an hour:

- Windows: NonVisual Desktop Access (free download)
- Mac: Built-in program called “VoiceOver”



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## How is Compliance Measured?

- There is no comprehensive standard
- As a result, many businesses – and courts – look the Web Content Accessibility Guidelines



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# The Fair Housing Act

- The Fair Housing Act (“FHA”) covers most housing.
- Exceptions include owner-occupied buildings with no more than four units, single-family houses sold or rented by the owner without the use of an agent, and housing operated by religious organizations and private clubs that limit occupancy to members.



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# The ADA vs. the FHA

- Private vs. Public
- Disability vs. Many Classifications
- Enforcement
- Reactive vs. Proactive
- Is it a distinction without a difference?



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## Broader Legal Landscape from the Defense Side



- COVID court backlog is over
- The lawsuit numbers don't tell the whole story
- Demand letters
- Draft complaints
- Third party liability

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# Companion State Law Claims

- Generally, state law disability claims mirror federal ADA claims.
- Several key differences, primarily in what relief/damages (if any) are available.



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## High Level Trends

- Filings are on the rise and show no signs of slowing down
- According to data from UsableNet New York has moved back ahead of California as the state with the highest volume of Website Visual Disability lawsuit filings.



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# What Makes CA Different: Unruh versus ADA

- **California –Unruh Act**

- A violation of the ADA is a violation of the Unruh Act
- In addition to attorney fees, costs, and injunctive relief, allows for statutory penalties
  - Backward-looking -- provides for a minimum of \$4,000 in statutory damages for each incident of discrimination. In theory, \$4,000 per visit.
  - In 2018 summary judgment decision, *Thurston v. Midvale (Los Angeles Superior)*, court held that plaintiff's repeated visits to the same inaccessible website did not establish separate offenses for purposes of calculating damages and plaintiff was entitled to only \$4,000
- Intentional discrimination required for Unruh claim independent of any ADA violation



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# What Makes NY Different?

- New York's Human Rights Law permits recovery of monetary damages
- Experienced Plaintiffs' Lawyers are located in New York
- A key point for the Rental Housing Industry: it's where a lot of buildings are located.

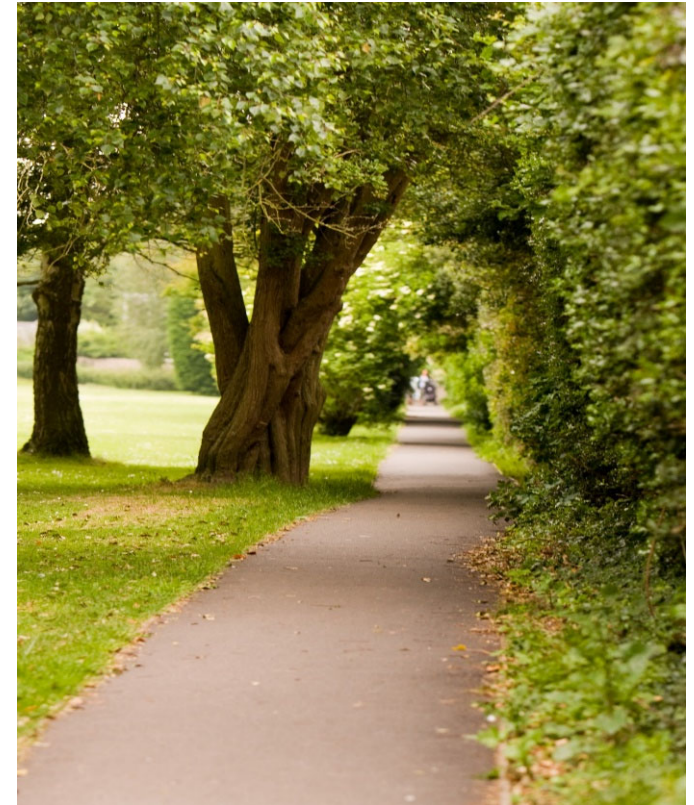


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## How do These Cases Typically go?

- Plaintiffs (attorneys) pick an area of focus
- Compile a list of participants in the category
- Compile a list of websites for those participants
- Run a software accessibility-checking tool
- (Maybe) follow up with a manual review
- Send a demand letter/draft complaint
- Await responses
- Settle or sue
- Repeat



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# What is Happening in the Rental Housing Industry?



- The Rental Housing Industry has not been immune.
- According to UsableNet, Real Estate, Property Management and Hospitality companies are the defendants in about 2% of all visual disability website lawsuit cases.
- And that number jumps to over 5% of lawsuits based on mobile apps.

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## Why Target Apartments/Hospitality?

- Proliferation of customer-facing websites
- Sites are complex and thus difficult to keep accessible
- Many businesses have multiple websites, which adds to settlement value
- Plaintiff's lawyers are used to suing these entities for physical accommodation cases
  - They know the players
  - They think these businesses will settle easily

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# Apartment Housing Industry Cases

- Examples of Allegations in Apartment Housing Industry Cases:
  - A. Defendants own and manage buildings throughout the United States, including [the Building], located at [Address]. They rent within these buildings, studio apartments, and apartments with one or more bedrooms.
  - B. Defendants' Website is heavily integrated with their building, serving as its gateway. Through the Website, Defendants' tenants and prospective tenants are, inter alia, able to: learn information about [the Building], including its location, apartment features and building amenities; view images and floorplans of the apartments; learn about the neighborhood; and search availabilities through a third party website.
  - C. It is, upon information and belief, Defendants' policy and practice to deny Plaintiff and other blind or visually-impaired users access to their Website, thereby denying the facilities and services that are offered and integrated with their apartment building. Due to their failure and refusal to remove access barriers to their Website, Plaintiff and visually-impaired persons have been and are still being denied equal access to Defendants' apartment building and the numerous facilities, goods, services, and benefits offered to the public through their Website.



# Mobile Apps



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- Suits alleging mobile apps are inaccessible to the visually impaired are becoming more common
- And if you have been sued for your website, your chances of being sued for your app rise dramatically

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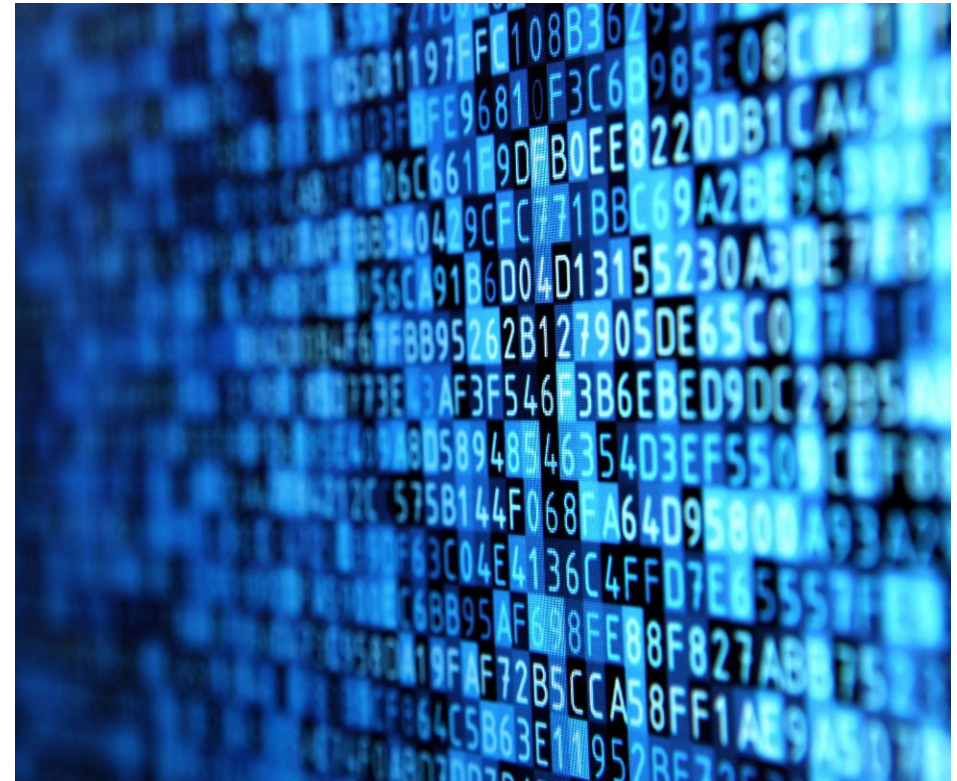
# Legal Precedent for ADA to Apply to Apps

- **Department of Justice (DOJ)**
  - DOJ joined many private cases in 2000-2015 on the side of plaintiffs to establish that Websites and Apps were subject to the ADA.
  - Settlements agreed to include damages and remedying Websites to conform to WCAG.
- **DOJ in 2014**
  - In resolving lawsuit alleging that individuals with disabilities were denied full and equal enjoyment of tax-preparation goods and services provided through H&R Block's website and mobile applications, the DOJ entered into consent decree settlement with H&R Block requiring accessibility of websites and mobile apps
- **DOJ Today**
  - DOJ is absent - at the end of 2017, the DOJ suspended moving forward with ADA rulemaking (adopting specifications like WCAG) and enforcement, leaving a void now filled by private lawsuits
  - In March 2022, the DOJ declined to promulgate regulations and instead issued "Guidance."
- ***Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (2019)**
  - Plaintiff alleged he could not order pizza because Domino's failed to design its website and app so his screen reading software could read them.
  - Court noted that the website and app were two of the primary (and heavily advertised) means of ordering Domino's products to be picked up at or delivered from Domino's restaurants.
  - Court held that the ADA applies to Domino's website and app because those features facilitate access and connect customers to the goods and services of Domino's physical restaurants
  - 9<sup>th</sup> Circuit Court of Appeals is the highest court in the country to hold that the ADA applies to Websites *and Mobile Apps*

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# Widgets and Overlays

- What are they?
- What are they supposed to do?
- Do they work?



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# WCAG 2.0 and WCAG 2.1



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## W3C® WCAG 2.1

### Web Content Accessibility Guidelines

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# Why WCAG 2.1 for Lawsuits?

- More criteria = easier to find flaws in a website's accessibility
  - Since there are no official laws or regulations governing what constitute compliance with the ADA, plaintiff's lawyers are demanding that businesses, at a minimum, meet the most widely-accepted industry standard
  - Version 2.1 (June 2018) is the most-recent iteration of that standard
- No decisions yet directing *private companies* to comply with WCAG 2.1
  - But has happened in Title II of ADA context (programs/activities provided to the public by State & local governments)
  - *Payan v. Los Angeles Cmty. Coll. Dist.*, No. 2:17-CV-01697-SVW-SK, 2019 WL 3298777, at \*1 (C.D. Cal. July 22, 2019)
    - In granting a motion for permanent injunction against public college, court ordered the college to comply with WCAG 2.1
    - *"Within one year of the date of this Order, LACCD shall ensure that the LACCD website, the LACC website, and all other educational or instructional websites available to students enrolled at LACC, including all educational resources or embedded programs on those websites (such as PeopleSoft) made available to LACC students, are accessible to blind students in accordance with WCAG 2.1 Level AA standards"*
- Many consent decrees reference WCAG 2.1
  - *"Defendant agrees to modify the Website[ ] as needed to substantially conform to the Web Content Accessibility Guidelines 2.0 and/or Web Content Accessibility Guidelines 2.1 Level A and AA Success Criteria ... or any other [Web Content Accessibility Guidelines] deemed to be applicable" within eighteen months of Court approval of the Consent Decree. If defendant "is unable to achieve substantial conformance" with the Web Content Accessibility Guidelines despite using Reasonable Efforts, defendant "shall be deemed to have satisfied its obligations under this Consent Decree[.]"* *Crosson v. PopSockets LLC*, No. 19 CV 200 (CBA)(LB), 2019 WL 6134416, at \*2 (E.D.N.Y. Oct. 8, 2019).

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## The Online Accessibility Act: Lifeline or False Hope?

- October 2, 2020, Representatives Lou Correa (D-CA) and Ted Budd (R-NC) introduced a bipartisan bill titled the Online Accessibility Act, intended to curb predatory website accessibility lawsuits that accuse consumer-facing websites of violating Title III of the Americans with Disabilities Act (“ADA”).
- The Online Accessibility Act would take websites and mobile applications outside of Title III of the ADA—which was meant to address accessibility to services provided by physical businesses—and create a new ADA Title VI dedicated specifically to consumer facing websites and mobile applications.
- The measure stalled but was reintroduced in December 2021.

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# A Few Words About Insurance

- Policies do exist to cover web accessibility lawsuits
- Coverage may be available under existing general liability or umbrella policies as well
- Blank Rome's Policyholder Practice is a valuable resource in this area
- If you get sued, do not forget to check for coverage



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## A few Words About Vendors

- Various price points
- Scalable solutions
- Automated evaluations
- Manual testing
- Certifications of compliance
- Indemnification
- Third party liability
- Ongoing maintenance



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## Other Protections

- Vendor Agreements
- Third Party Content Monitoring
- Broadcast Accessibility on Site
- Solicit Feedback
- Self-Audits
- Consent Decrees
- Enlist help from Plaintiff's Counsel in Settlements



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# What's Next?



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## Practical Next Steps and Best Practices

- Deal with any Outstanding Demand Letters or Lawsuits
- Inventory your Offerings
- Self-Audit or Third Party Audit
- Determine Whether you Need a Vendor
- Select a Compliance Standard
- Draft and Display an Accessibility Statement
- Monitor and Audit Going Forward
- Consider Insurance and Other Protections

# Questions



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