

MEMORANDUM

TO: National Apartment Association

FROM: Anthony A. Mingione
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DATE: September 28, 2022

RE: ADA Website Accessibility Litigation

I. Introduction

Over the past five years, owners and operators of consumer-facing websites and apps have been battered with lawsuits alleging violations of Title III of the 1990 Americans with Disabilities Act (the “ADA”), a federal civil rights law that requires places of public accommodation to meet certain standards of accessibility for disabled visitors. In these digital accessibility cases, the plaintiffs claim that the defendants’ websites or apps are not accessible to the blind and visually impaired due to barriers that create roadblocks for “screen reader” tools that read content aloud. The plaintiffs seek court-ordered remediation of the websites, attorneys’ fees, and monetary compensation. This memorandum discusses the root causes and effects of this phenomenon, provides practical insight to guide informed decisions about websites and their design, and explains some of the available courses of action to employ in the unfortunate event of a lawsuit.

II. ADA Website Accessibility Lawsuits

The number of digital accessibility cases has climbed to a rate of 10 per day, with over 4,000 cases filed in 2021 (quadrupling the number of such cases filed in 2017). The main reason behind the explosion of these cases is the lack of clear governmental guidance. The DOJ has declined to use its regulatory power to define what it takes for a website to be “accessible” for ADA purposes, and Congress has failed to amend the ADA to provide much-needed clarity. The lack of an officially-established standard has left businesses exposed to lawsuits without a compliance standard. Opportunistic plaintiffs’ lawyers have seized advantage by monetizing the uncertainty into quick-hitting litigation. The volume has been driven by a cottage industry of plaintiffs’ lawyers of varying sophistication, who use software tools that scan the internet in search of websites with purported accessibility issues. Upon finding potential issues, these lawyers file boilerplate complaints on behalf of “professional plaintiffs” that include cut-and-paste claims. Filing identical lawsuits against multiple defendants, sometimes several per day, costs the plaintiff firm a minimum investment of time and resources. But these lawsuits (even the mere threat of such a lawsuit) will cost the defendant-website owner much more. The cases are designed to “sue and settle,” *i.e.*, produce a quick cost/benefit analysis-driven settlement—with all significant costs

(litigation defense and/or settlement, and remediation) borne by the defendants, and likely passed-on to consumers.

No industry is safe. Websites belonging to retailers, universities, wineries, luxury goods brands, financial institutions, publishers, tour companies, restaurants and hotels, as well as apartment buildings and other multifamily housing facilities, have all been targeted. As discussed below, any entity with a website and/or is at risk. And websites promoting luxury apartments sales and rentals have not been spared.

III. How We Got Here

Title III of the ADA and its implementing federal regulations¹ prohibit 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 ADA lists several types of physical public accommodations (e.g., restaurants, retailers, hotels), but because the statute predates the internet, *websites* are not specifically included. Nevertheless, the United States Department of Justice (“DOJ”), which enforces the ADA’s requirements, and several federal courts, have stretched the ADA to require that websites be accessible to disabled visitors. As discussed below, the problem in doing so is that, unlike heavily-regulated brick & mortar business locations, there is not a regulatory standard against which to measure the accessibility of a website.

The absence of regulations is not due to a lack of opportunity. Indeed, the DOJ has had more than ample time to address the issue. In 2010, the DOJ under President Obama announced its intention to issue formal rules providing official guidance on the requirements for making a website accessible. Most legal and industry experts were expecting this process to result in the issuance of rules adopting guidelines promoted by the World Wide Web Consortium (W3C) as the minimal standard needed to make a website ADA complaint. The W3C is a non-governmental international consortium devoted to the development of protocols and guidelines for the World Wide Web. Its Web Content Accessibility Guidelines 2.0 Level AA Success Criteria (WCAG 2.0) have emerged as the most widely-accepted industry standard on what makes a website accessible to the visually impaired and other disabled individuals. WCAG 2.0 AA is made up of certain principles and guidelines, testable success criteria, and advisory techniques, all of which provide the framework to assist designers to understand the criteria and implement the techniques to render the website “accessible.”²

While often referenced in pleadings and settlement agreements, WCAG 2.0 was never formally implemented by regulatory promulgation or legislative enactment. In fact, no rules whatsoever were ever issued to clarify the technical requirements for private sector website accessibility. In late-2017, as part of its anti-regulatory stance, the DOJ under President Trump

¹ Title III of the ADA is codified at 42 U.S.C. §§ 12181-12189, and its implementing regulation at 28 C.F.R. pt. 36,

² The federal government adopted WCAG 2.0 AA as the standard for its own websites. For its part, the DOJ has itself previously stated that WCAG 2.0 AA were the “well-established industry guidelines” to strive for in making one’s web content accessible, and has insisted that every private sector defendant with whom it settles an enforcement action agree to meet this standard.

officially suspended the rulemaking process and announced that it was “*evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate.*” It was about then that digital accessibility lawsuits exploded. While approximately 800 such lawsuits were filed in 2017, the numbers have since quadrupled (*year 2018* – 2314 filings; *year 2019* – 2890 filings; *year 2020* – 3503 filings; *year 2021* – 4055 filings).³

The lack of an officially-established standard has left businesses exposed to lawsuits without a safe harbor. The archetypical complaint includes a primary claim that the defendant’s website fails to incorporate screen reader technology and, as a result, visually impaired individuals who use JAWS or other screen reading software/devices to access and “read” content on websites are unable to access the website, or can access only certain portions. In ADA parlance, the defendant is accused of erecting “barriers” that deny the visually impaired plaintiff full and equal access to all of the services the website offers, and deter him from attempting to use the website. Common examples of alleged barriers include: *images cannot be “read” because of lack of alt text; drop down menus do not work; color-coded maps cannot be comprehended; and video not closed-captioned (hearing impaired).* As discussed in the next section, it is all too easy for plaintiffs’ lawyers to allege the existence of barriers to survive dismissal.

Those hoping that the Biden administration would restart the rulemaking process that was abandoned in 2017 were disappointed when on March 18, 2022 the DOJ issued a nonbinding sub-regulatory statement called “*Web Accessibility Guidance Under the Americans with Disabilities Act,*” which purports to describe how businesses can ensure that their websites are accessible. Unfortunately, the “Guidance” does no such thing, and it is nonbinding. The Guidance lists several common website accessibility problems and explains the importance of accessibility. The Guidance also points to third-party resources (like the WCAG 2.0) for information on how to make websites accessible. But although it purports to describe how businesses can ensure accessibility, the Guidance fails to specify any series of actions which, if implemented, would constitute ADA compliance. Accordingly, the present landscape is expected to continue unless Congress amends the ADA to make it more difficult for plaintiffs’ lawyers to pursue these lawsuits.

Commentators and observers had hopes of a Congressional resolution when, on October 2, 2020, Representatives Lou Correa (D-CA) and Ted Budd (R-NC) introduced a bipartisan bill titled the Online Accessibility Act, which was 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 Online Accessibility Act officially would officially adopt the WCAG 2.0 AA criteria, which would establish the first-ever statutory codification of an accessibility standard for business websites. Importantly, the drafters recognized that perfect conformance is not possible, and the bill provides that a website or mobile application should be considered accessible if it is in substantial

³ These numbers were compiled by UsableNet Inc. in its 2021 Year End Report of ADA Digital Accessibility Lawsuits. UsableNet is a technology firm that offers accessibility-compliance technology and remedial services.

compliance with WCAG 2.0 AA or any subsequent update, revision, or replacement to the WCAG 2.0 AA published by the W3C. The bill also contemplates that some degree of flaws and errors must be acceptable. The bill would also grant the Architectural and Transportation Barriers Compliance Board (an existing independent United States government agency devoted to accessibility for people with disabilities) with the authority to promulgate rules defining, among other key terms, “substantial compliance,” and “alternative means of access.”

One of the most consequential elements of the Online Accessibility Act would be its requirement that an individual exhaust administrative remedies designed to give businesses the opportunity to remedy any alleged accessibility barriers before a lawsuit could be filed. After exhausting the administrative remedies (and assuming the DOJ does not bring a civil action), an individual claiming denial of access could then file a civil action under the new ADA Title VI. But the boilerplate cut and paste complaints that have inundated courts under the current rubric will no longer suffice. A would-be plaintiff will have to plead each element of the claim with particularity, including the specific barriers to access. The bill failed to gain traction in 2020, but was reintroduced in the 2021-2022 legislative session. Without substantial support from disability rights advocates, however, it seems unlikely to pass.

IV. The Legal Landscape

Unless the legislative or regulatory landscape changes, web accessibility lawsuits are here to stay for the foreseeable future. As a result, it is important to focus on how these suits work, and what strategies are available to defend them. Most ADA website lawsuits end in early settlement. Here is why. Aside from not getting targeted in the first place, the best-case scenario for a defendant facing an ADA website lawsuit is prevailing on a motion to dismiss—a point at which the legal fees are still relatively minimal. Despite their boilerplate nature, however, these complaints have proven generally difficult to dismiss because of the factual issues that almost invariably exist regarding a website’s accessibility.

The absence of a regulatory safe harbor has resulted in a critical advantage for serial plaintiffs’ lawyers. A comparison to brick & mortar facilities illustrates the issue. Every owner of a physical place of public accommodation knows that it must provide at least one counter which is at least 36 inches long and no more than 36 inches high so as to ensure accessibility to wheelchair bound customers. The proper measurements are coded in the ADA Accessibility Guidelines (“ADAAG”), which are legally binding standards issued by the DOJ for determining whether a facility is accessible for ADA purposes. Compliance with the ADAAG acts as a safe harbor for a business sued for ADA violations and a company can potentially get a lawsuit dismissed (or prevail on summary judgment) if an ADA accessibility expert can certify the premises as ADAAG compliant. No similar binding accessibility guidelines exist in the website context. On a motion to dismiss the court is forced to accept all allegations in the plaintiff’s complaint as true. If a defendant argues that it has taken steps to remediate its website to make it ADA-compliant, the plaintiff can deny the efficacy of the remediation, sometimes supplementing that position with an affidavit from an “expert” claiming that its tests of the website demonstrate that it is still inadequate as stated in the complaint. The court will then likely deny the motion, due to the unclear regulatory landscape and competing factual (or expert) allegations, and send the case into the discovery phase,

which can be costly.

Anecdotal evidence suggests that the going range to settle a New York ADA website accessibility case is somewhere in the \$15,000-\$40,000 range, inclusive of legal fees. A cost-benefit analysis thus often counsels against litigating a case to completion because the costs of defense (with an uncertain outcome and potential exposure to the plaintiff's counsel fees as well) may far outweigh what is often perceived as a ransom demand to resolve the case quickly. Some defendants settle in lieu of moving to dismiss (or otherwise litigating past the initial stage of the lawsuit), while others take a shot at dismissal, and then revert to a settlement posture if they lose the motion – being mindful that the settlement demand is usually adjusted upwards to account for the plaintiff law firm having to brief and argue the motion.

Defense can be more costly, but it is not futile. Cases have been dismissed in certain jurisdictions on a variety of legal theories. One key consideration in a proper litigation defense is the jurisdiction in which the lawsuit is filed. There is a split among the federal courts and Circuits regarding whether (and/or when) the ADA applies to a website, and as to how (and/or when) a person can state a claim. For example, there is no uniformity in how website accessibility claims comport with the text of the law limiting the ADA's applicability to places of public accommodation. Courts in the Third, Sixth, Ninth and Eleventh Circuits have held that the ADA applies only to physical places, and thus does not apply to websites wholly unconnected to a physical location. These courts covering major metropolitan areas including Philadelphia, Detroit, Cleveland, Miami, Phoenix, Atlanta, Seattle, San Francisco, and Los Angeles require a plaintiff to demonstrate that, at a minimum, the challenged website facilitates the use of a brick and mortar location; *i.e.*, the so-called "nexus" requirement. *See, e.g., Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (finding that eBay was not subject to the ADA because eBay's services are not connected to any actual, physical place); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018) (plaintiff sufficiently alleged a nexus between Jo-Ann's website and its brick-and-mortar stores); *Gomez v. Bang & Olufsen Am., Inc.*, 2017 WL 1957182 (S.D. Fla. Feb. 2, 2017) (plaintiff failed to state ADA claim because he only alleged that he planned to order goods online). California's Second Appellate Division came to the same conclusion in August 2022.

Plaintiffs have responded to unfavorable federal court rulings by expanding the scope of their lawsuits to state anti-discrimination laws, such as the Unruh Civil Rights Act Civ. Code § 51 et seq. ("Unruh Act"). A person harmed by discriminatory conduct can recover under the Unruh Act on two alternative theories: (1) a violation of the ADA, or (2) denial of access to a business establishment based on intentional discrimination. *Martinez v. San Diego Cty. Credit Union* (2020) 50 Cal. App. 5th 1048, 1059 (citing *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 670); *see also* § 51, subd. (f).

To recover under the predicate of an ADA violation (*i.e.*, Section 51(f)), a plaintiff must demonstrate a violation of the ADA. *See Martinez*, 30 Cal.App.5th Supp. at 18; *see also* Civ. Code § 51(f) ("[a] violation of the right of any individual under the [ADA] . . . shall also constitute a violation of this section"). A direct claim (the second Unruh prong) requires a plaintiff to demonstrate "intentional discrimination in public accommodations in violation of the terms of [Unruh]." *Munson*, 46 Cal.4th at 668 (quoting *Harris v. Capital Growth Investors XIV* (1991) 52

Cal.3d 1142, 1175); *Earll v. eBay Inc.* (N.D. Cal. Aug. 8, 2012) No. 11-00262, 2012 WL 3255605, at *4 (same). This requires “willful, affirmative misconduct on the part of those who violate [Unruh],” and that a court may not infer intentional discrimination from the *effects* of a facially neutral policy on a particular class. See *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853-854 (rejecting plaintiff’s attempt to show intentional discrimination by relying on the effects of defendant’s facially neutral policy).

In August 2022, the California Court of Appeal, Second Appellate District held that the website of an internet-only business is not a place of public accommodation under the Unruh Act. See *Martinez v. Cot’n Wash, Inc.*, No. B314476, 2022 WL 3025828, at *15 (Cal. Ct. App. Aug. 1, 2022) (“[W]e conclude that CW’s website is not a ‘place of public accommodation’ under Title III as currently written. Thus, the FAC also cannot state a claim under the Unruh Act based on CW’s denying Martinez access to CW’s website in a manner that violates Title III”).

On the other hand, courts in the First (covering Boston), Second (covering New York City), and Seventh (covering Chicago) Circuits have found that the ADA can apply to a website that is independent of any connection between the website and a physical place. See, e.g., *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 400 (E.D.N.Y. 2017) (finding that defendant’s website was itself a place of public accommodation); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (video streaming website was place of public accommodation even though the website could only be accessed in private residences). Several judges in the Eastern District of New York, however, have recently split from their colleagues and held that the ADA does not apply to stand alone websites, but instead requires a connection to a physical location. See, e.g., *Winegard v. Newsday LLC*, No. 19-CV-04420(EK)(RER), 2021 WL 3617522, at *5 (E.D.N.Y. Aug. 16, 2021) (“the text of the ADA’s definition of ‘public accommodation’ clearly refers to physical places, and does not include stand-alone websites.”); *Suris v. Gannett Co.*, No. 20-CV-1793 (BMC), 2021 WL 2953218, at *2 (E.D.N.Y. July 14, 2021) (granting motion to dismiss because, even construing the list categories of establishments covered by Title III liberally, “defendants’ website is not a good or service of a place of public accommodation.”).

While many jurisdictions have been affected by the surge of surf by lawsuits, the highest concentration of cases have been filed in New York and California.

V. ADA Website Cases Have Been Filed Against Businesses in the Apartment Housing Industry

While website accessibility actions against apartment operators have not been as prevalent as e-commerce and retail (UsableNet reports 1% of cases are filed against Real Estate Agencies & Properties), apartment operators can be targeted. Even at that rate, however, several ADA web accessibility lawsuits are filed under the ADA each month. Additionally, similar lawsuits are now being filed under the federal Fair Housing Act (“FHA”). Reliable statistics on FHA lawsuits are not available, but anecdotal reports suggest such suits are now as common as their ADA counterparts. The legal analysis is essentially the same for web accessibility lawsuits under both laws.

Aimco Properties, L.P. (“Aimco”), a real estate investment trust that owns apartment properties in California, Colorado, D.C., Florida, Georgia, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Minnesota, Pennsylvania, Tennessee, Virginia, and Washington, was sued in the Southern District of New York in 2018 in connection with www.aimconyc.com, its website that promotes its luxury rental units in New York City.

The same serial plaintiff (and lawyer) filed identical complaints against apartment building owners in the neighborhoods of Long Island City, New York (e.g., Gantry Park Landing <https://gantryparklanding.com>, The ARC <https://arclivinglic.com>); and Bushwick, Brooklyn (Denizen Bshwk www.denizenbushwick.com).⁴ Each complaint included similar allegations describing the defendants’ connection to the websites:

Defendants, Their Website and Their Website’s Barriers

X. 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.

Y. 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 third party website www.on-site.com.

Z. 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.⁵

VI. Key Takeaways

If your website is not accessible, you may be targeted for non-compliance with the ADA. If you get sued or receive a demand letter, you should immediately contact a website accessibility

⁴ *Fischler v. 50-01 2nd Street Associates LLC et al.*, Case No. 1:18-cv-05162-DLI-VMS (S.D.N.Y.); *Fischler v. 30-02 Associates LLC et al.*, Case No. 1:18-cv-05318-JBW-SJB (S.D.N.Y.); *Fischler v. All Year Management LLC et al.*, Case No. 1:18-cv-04704-ENV-RML (S.D.N.Y.)

⁵ *Fischler v. 50-01 2nd Street Associates LLC et al.*, Case No. 1:18-cv-05162-DLI-VMS (S.D.N.Y.) (Complaint, dated Sept. 13, 2018, ECF No. 1).

defense attorney. The law in this space is rapidly developing, and the most effective strategies to address these lawsuits are neither static nor one-size-fits-all. Nor are the preferred courses of action mutually exclusive. Below are a few significant considerations.

Remediation is Paramount. To be sure, making a website accessible may be an expensive proposition. Your website provider may be equipped to identify any ADA compliance issues. Alternatively, you may have to retain a digital accessibility consultant to conduct an audit of the content and code for the website. Following the audit, the consultant and/or website provider will identify the steps to make your website accessible to the visually impaired, outline the timeline to administer the fixes and estimate the costs, all of which can be a significant five-figure expense. Nevertheless, the best—and probably only—way to protect yourself is to bring your website into reasonable compliance with the ADA. And, if sued, remediation will almost certainly be a part of your resolution of the case. Accordingly, an audit of your website and an effective remediation plan (where appropriate) is strongly advised.

Defenses Exist. If you are sued, you are not without weapons to fight the lawsuit. The relief sought in ADA cases is primarily injunctive since the statute does not provide for monetary damages. Plaintiffs seek judicial directives requiring businesses to remediate their websites and prohibiting any additional alleged discriminatory activity.

How to best attack a digital accessibility lawsuit depends on the jurisdiction. For example, complaints filed in Florida and California can be analyzed for allegations that the plaintiff, among other things, actually intended to explore renting in the building promoted by the website. Lack of such allegations may warrant dismissal. In *Gomez v. Knife Mgmt., LLC*, the court granted a restaurant operator's motion to dismiss because, even if defendant's website was a public accommodation, the plaintiff failed to allege that he intended to visit one of defendant's restaurants in the near future, or ever. No. 17-cv-23843, 2018 U.S. Dist. LEXIS 159178 (S.D. Fla. Sept. 14, 2018). Nor did the plaintiff allege that the website impeded his ability to access the restaurant. In *Brooks v. Lola & Soto Bus. Grp., Inc.*, No. 2:21-cv-00158-TLN-DB, 2022 WL 616798 (E.D. Cal. Mar. 2, 2022) plaintiff alleged that she was unable to find the location and hours of operation of Defendant's store on its website, which prevented her from visiting the location to purchase products and/or services. The court granted defendant's motion to dismiss because plaintiff failed to identify a nexus between a website barrier and plaintiff's ability to access the physical location. *Id.* at *7 ("Plaintiff does not allege she tried to order clothes from the Website for pickup at Defendant's shop but was unable to do so ... [n]or does she identify any integration or interconnectedness between the Website and Defendant's physical store ... [i]nstead, Plaintiff identifies only a store locator ... that, by all indications, would have no functional difference from the results obtained by a simple Google search for [Defendant's shop] on any internet browser") (internal citation omitted). A similar defense may be tailored in the apartment rental context. In New York, this defense may prove more difficult. In *Kathy Wu v. Jensen-Lewis Co., Inc.*, in denying defendant's motion to dismiss, the court noted that plaintiff did not allege that Jensen-Lewis's website itself was a place of public accommodation, but instead alleged that Jensen-Lewis's brick-and-mortar stores were public accommodations and that its website was "*a service, privilege, or advantage of its stores.*" No. 17 CIV. 6534 (ER), 2018 WL 5723122, at *3 (S.D.N.Y. Nov. 1, 2018). Allegations of the inaccessibility of the website itself were thus enough to avoid

dismissal. As mentioned above, however, the recent *Winegard v. Newsday LLC* and *Suris v. Gannett* decisions out of the Eastern District of New York provide a modicum of hope that certain judges in New York will be receptive to the argument that the plaintiff must allege a connection .

It is worth noting that ADA includes “sales or rental establishment[s]” as one of the twelve places identified as public accommodations. Thus, plaintiffs may argue that a website that serves as a gateway between potential renters and the rental office constitutes “a service, privilege, or advantage of” the rental office so as to render the website subject to the ADA’s reach. Depending on the jurisdiction, however, a defense may exist if the supposed barriers on the website do not impede the plaintiff’s access to the physical location.

Defendants which have remediated the barriers identified in the plaintiff’s complaint can also argue that the case is moot. A claim for injunctive relief is rendered moot where there is no reasonable expectation that the alleged violation will recur, and where events have eradicated the effects of the alleged violation. While dismissal on mootness grounds is not easy to achieve (given the above-mentioned ease with which plaintiffs’ lawyers can create factual issues) an argument based on mootness caused by the defendant’s subsequent remedial efforts remains an available weapon under the right circumstances.

Finally, depending on the facts, lack of personal jurisdiction remains a viable argument. The mere fact that a website is available to be viewed from a particular state, without having any special connection to that state, does not alone support personal jurisdiction. *See Mercer v. Rampart Hotel Ventures, LLC*, No. 19 CIV. 3551 (PAE), 2020 WL 882007, at *5 (S.D.N.Y. Feb. 24, 2020), appeal dismissed (July 14, 2020) (“Rampart’s national web presence—which is not alleged to target or have any special connection to New York—is exactly the kind that the *Camacho* court held insufficient, on its own, to support jurisdiction under § 302(a)(1)”; *Diaz v. Kroger*, 2019 No. 18 Civ. 7953 (KPF), 2019 WL 2357531, at *7 (S.D.N.Y. June 4, 2019) (finding no personal jurisdiction over out-of-state defendant, notwithstanding accessibility of defendant’s interactive website in forum state, because company did not deliver goods to any New York zip code). A plaintiff’s visits to the website may therefore not be enough to establish jurisdiction absent some connection between the business transacted and the cause of action sued upon, a substantial relationship between the transaction and the claim asserted, or some “degree of interactivity and commercial nature of the exchange of information” occurring on the website. *Camacho v. Vanderbilt Univ.*, No. 18 CIV. 10694 (KPF), 2019 WL 6528974, at *3 (S.D.N.Y. Dec. 4, 2019). Some defendants have also sought to transfer cases to more defense-friendly jurisdictions. The availability of this strategy depends on the facts of the particular case, but it is most effective where the plaintiff has stretched the allegations to acquire jurisdiction in a plaintiff-friendly forum, when in actuality jurisdiction is more appropriate elsewhere. This can be an especially attractive defense in the housing industry, as people generally relocate infrequently, and there are arguments to be made testing whether a particular plaintiff actually intended to try and rent an apartment in the defendant’s rental property.

Pursue an Effective Settlement. If you are sued and decide to settle, you should try to get as much mileage as possible out of your settlement. A private settlement agreement with one plaintiff will make that one case go away, but it will not moot a new claim by a new plaintiff.

Thus, as part of any settlement, it is advisable that the settlement take the form of a publicly-filed “Consent Decree,” to be entered by the court and placed on the docket. At a minimum, such a settlement should include (1) a stipulated injunction to maintain your website ADA/screen-reader compliant, which should include a requirement to continually update the website as content is added over time; and (2) an agreement that the court retain jurisdiction to hold you accountable. Doing so should provide a strong mootness argument if sued again (some entities have been sued multiple times).

Inaction Can be Costly. The incidence of ADA accessibility lawsuits is expected to continue to rise. No industry is immune. A coordinated strategy is the best approach to manage risk before, during, and even after a lawsuit. Successful strategies involve internal decisionmakers, solid legal advice, and qualified web design professionals.

A.A.M.

M.S.K.