

An Explosion in ADA Website Accessibility Lawsuits: Is Your Company Facing Legal Exposure?

Presented by:

- Charles S. Marion, Partner, Commercial Litigation
- Anthony Mingione, Partner, Labor & Employment

May 17, 2018

Presenters



Charles S. Marion
Partner
Business Litigation
Philadelphia, PA



Anthony Mingione
Partner
Labor & Employment
New York, NY

BLANKROME

DISCLAIMER

© 2018 Blank Rome LLP

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.

BLANKROME

Agenda

- Background on ADA Website Disability Claims
- Current State of the Law on Such Claims
- Impact of State and Local Laws
- Typical Case Trajectory
- Business Strategies to Prevent/Defend Claims
- Q&A (time permitting)



May 17, 2018: Global Accessibility Awareness Day

Today is Global Accessibility Awareness Day, 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”



BLANKROME

A Recent Explosion in ADA Litigation

- There has been a tremendous increase in the number of cases being filed accusing companies operating consumer-facing websites of violating the Americans with Disabilities Act (“ADA”).

In 2017, 7663 cases filed (16% increase over 2016)

In 2016, 6601 cases filed (37% increase over 2015)

- High increase of cases particularly in New York City, California, and the Southern District of Florida.
- Consumer-facing websites particularly targeted include: retailers, hotels, banks, etc.

Plaintiffs Are Claiming:

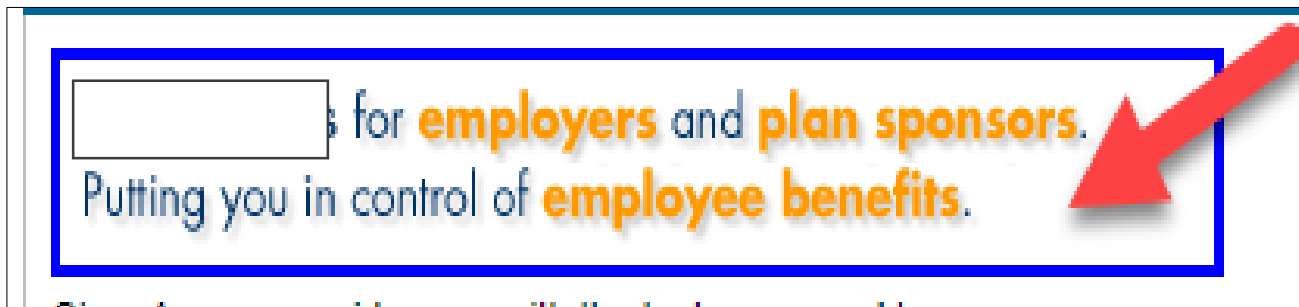
Primary claim: visually impaired individuals use JAWS or other screen reading software/devices to access and “read” content on websites, but software does not work with defendant’s website, or only certain portions of site.

For example:

- 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)

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.



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.



State of Uncertainty

There is a great deal of uncertainty in this area about (1) what to do if sued or receive a claim, or (2) if you have not been sued, how to reduce the risk that you will be and limit exposure.

Reasons for this uncertainty:

- The ADA was enacted long before Internet being used, says nothing about websites.
- There is a split among the courts and Circuits regarding whether/when ADA applies to a website and when a claim can be stated arising from problems a disabled person has accessing a website.
- No government rules or guidelines exist.

State of Uncertainty

- The ADA only talks of physical spaces and accommodations—12 categories.
- Split among courts involves whether a “nexus” is required between a website and a physical space/location.
- The Department of Justice had announced it would be issuing rules in this area but in December withdrew them entirely.

Companion State Law Claims

- Generally, state law disability claims mirror federal ADA claims.
- Several key differences, which are monetary in nature.
- Each state is different, but the NY Human Rights Law permits recovery of money damages and civil penalties.

Case Trajectory

- Vast majority of cases settle in early stages.
- One case has gone to trial (Winn-Dixie, Florida).
- Some cases have been dismissed in certain jurisdictions (although some of those cases now on appeal).
- Initially, most brought as individual actions, but recently many more as class actions.

Case Trajectory

The split in authority has led to an increase in these cases being filed in favorable jurisdictions, *e.g.*:

- *Markett v. Five Guys*, 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. Jul. 21, 2017)
- *Andrews v. Blick Art Materials*, 2017 U.S. Dist. LEXIS 121007 (E.D.N.Y. Aug. 1, 2017)

What Should Companies Do?

- Assess whether their websites are accessible to screen reading software/devices, etc.
- While no government standards, an industry group, the World Wide Web Consortium, has issued Web Content Accessibility Guidelines (“WCAG”).
- Current version is 2.0 AA—version 2.1 expected to be issued this summer.



Web Content Accessibility Guidelines

- WCAGs provide instructions and specifications for web developers to design/modify websites for people with visual disabilities.
- They are *recommended* international web standards.
- But they have been widely accepted and followed, including by various courts.
- WCAGs have no independent legal significance but are often used by litigants as a means to measure website remediation.

Best Practices

- Generally recommended that companies take what steps are necessary to make their websites accessible.
- Good business—want everyone to access site.
- Will reduce if not eliminate exposure for future claims, lawsuits.
- If sued and settle and as part of settlement agree to update site and bring it into compliance, will have a mootness argument if sued again.
- Consider strategies for giving plaintiff's counsel “gatekeeper” role to combat copycats.

Additional Best Practices

- Develop and post on website an Accessibility Policy.
- Set up a “hotline” (and email address) for people to call (or email) if they experience accessibility issues.
- Make sure any third parties who run or contribute content to portions of website make their content accessible.
- Obtain indemnification, warranties, other helpful clauses in contracts with website developers, managers, other vendors.



Additional Best Practices

- Don't overlook any mobile apps you offer your customers – make those accessible as well.
- Consider on-line job application forms, page, etc.



BLANKROME

If you have any questions, please contact:



Charles S. Marion
Partner
Business Litigation
+1.215.569.5384
cmarion@blankrome.com



Anthony Mingione
Partner
Labor & Employment
+1.212.885.5246
amingione@blankrome.com

BLANKROME