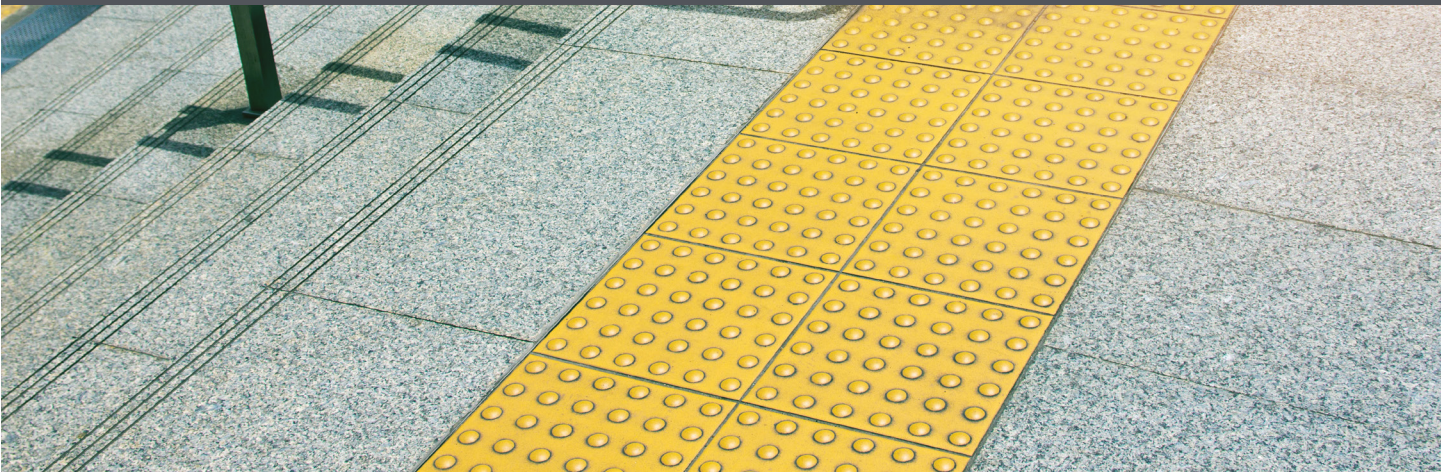


Business Litigation



OCTOBER 2019 • NO. 3

Merchants Beware: Several First-Of-Their-Kind Lawsuits Filed Alleging That Merchants' Failure to Sell Gift Cards with Braille Violates the ADA

An enterprising plaintiffs' lawyer has recently advanced a new theory of claim against retailers, restaurants, and other merchants for alleged violations of Title III of the Americans with Disabilities Act ("ADA"). Eight novel lawsuits filed in the U.S. District Court for the Southern District of New York allege the businesses' failure to emboss gift cards with Braille is a barrier to blind and visually impaired individuals' enjoyment of the services and privileges of the establishments. In light of these recent lawsuits, businesses should consider developing a coordinated strategy involving internal decisionmakers and legal counsel to manage risk of ADA litigation.

The eight purported class action lawsuits were filed against well-known retailers, restaurants, and merchants on October 24, 2019. The plaintiffs are Marcos Calcano and Henry Tucker, who claim to be visually-impaired and legally blind persons requiring the tactile writing system "Braille" to read written materials. The plaintiffs are represented by Jeffrey M. Gottlieb, whose firm Gottlieb & Associates (along with Joseph H. Mizrahi), were among the most prolific serial filers of ADA website accessibility lawsuits in 2018 and early 2019. Gottlieb and Mizrahi rose to relative fame in the ADA practice space by relentlessly targeting art galleries, colleges, hotels, restaurants, and every retailer imaginable.

These are the first cases we have seen alleging violations of the ADA for failure to sell gift cards with Braille. The complaints cite industry surveys indicating that sales

of store gift cards were about \$400 billion in 2019, and growing annually at 10 percent. Each complaint alleges that the merchants' failure to sell Braille gift cards deny blind and visually-impaired persons full and equal access to the gift cards offered by the merchants, and therefore deny access to the products and services offered in conjunction with the merchants' physical locations, and further deter plaintiffs from accessing the physical establishments themselves. Plaintiffs seek a permanent injunction requiring the businesses to design, implement, and sell gift cards with Braille identifying the name of the merchant and denomination of the gift card. Plaintiffs also demand that the packaging enclosing the cards contain Braille conveying other allegedly pertinent information, including terms of use, privacy policies, ability to ascertain balance, and restrictions.

Defending these novel gift card ADA cases will likely require approaches different than the ones taken with ADA website cases. Unlike website ADA cases—where, for instance, a mootness defense may be asserted on the basis of the website being “accessible”—a business either does, or does not, offer Braille gift cards. Accordingly, the first wave of defenses should focus on the law—*i.e.*, whether a business is in fact required to offer gift cards embossed with Braille. The ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a) (West). The ADA further provides that, as part of the injunctive relief, the court may require “the provision of an **auxiliary aid or service**, modification of a policy, or provision of alternative methods . . .” 42 U.S.C.A. § 12188 (West). The Department of Justice regulations implementing the ADA provide that auxiliary aids and services include “*brailled materials and displays*.” 28 C.F.R. § 36.303. The regulation, however, provides an exception—businesses need to ensure that individuals with disabilities are not denied services because of the absence of brailled materials unless the business “*can demonstrate that taking those steps would **fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations***”

being offered or would result in an undue burden, i.e., significant difficulty or expense.” 28 C.F.R. § 36.303.

Potentially complicating a defense based on significant difficulty or expense is the fact that Starbucks has been offering Braille gift cards as part of its permanent gift card lineup since 2013.

So far only a handful of these new Braille gift card lawsuits have been filed. Considering the proclivity for serial ADA litigation by the plaintiffs’ bar in this space, these initial lawsuits may signal a new wave of ADA lawsuits against retailers, restaurants, and any other business offering gift cards to the public. Accordingly, businesses should consider developing a coordinated strategy involving internal decisionmakers and legal counsel to manage risk before, during, and after a lawsuit.

Blank Rome has assisted many clients with defending ADA lawsuits in different contexts. Blank Rome also regularly counsels clients on steps they can take to reduce their risk and exposure to ADA claims.

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