

Consumer Finance Monitor (Season 4, Episode 24): Websites as “Places of Public Accommodation” Under Title III of the Americans with Disabilities Act (ADA): A Deep Dive into the Legal and Regulatory Issues Facing Businesses

Speakers: Alan Kaplinsky, Michelle McGeogh, and Lori Sommerfield

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, a show where we explore important new developments, sometimes some older developments that relate to the consumer financial services industry. This is a show that we do, we release a new show each week, and we always try to talk about topics that are really timely and are very important. I'm Alan Kaplinsky with Ballard Spahr. And I'll be moderating our podcast today.

Alan Kaplinsky:

The topic that we're here to talk about today is the current state of website accessibility, regulatory enforcement and litigation brought under Title 3 of the Americans with Disabilities Act, or as we'll now refer to it by its shorthand term, the ADA. And it applies to so-called public accommodations. Because the ADA was enacted in a time when the internet did not exist, smart phones didn't exist, smart TVs didn't exist. Websites were not statutorily enumerated as a category of a place of public accommodation under Title 3.

Alan Kaplinsky:

Instead, there were about a dozen or so examples given a places of public accommodation and includes things like grocery and other retail stores and banks and generally a place where the public is authorized and allowed to visit, and where the whatever the public accommodation is, wants the public to come in and in a sense invites the public in to do business with them. As a result of the fact that websites didn't exist when the ADA was enacted, neither the ADA or the regs that were promulgated by the Department of Justice to implement the ADA specifically addressed how websites should be made accessible to individuals with disabilities, or set an appropriate accessibility technical standard.

Alan Kaplinsky:

However, since 1996, the DOJ has interpreted Title 3 of the ADA to apply to websites, and federal and state court decisions have increasingly taken the same position. Also, there's been a tremendous volume of litigation. It's increased exponentially since 2016, because of the fact that the DOJ has not yet set a uniform standard for website accessibility, and plaintiffs' attorneys view website accessibility, demand letters and litigation as what I would refer to as low hanging fruit for easy revenue. There's also an indication that the by administration, may return to get aggressive enforcement over the next four years.

Alan Kaplinsky:

So I'm really pleased to have on our program today as my guests, I think two of the most knowledgeable people in the country when it comes to the Americans with Disabilities Act, both from the standpoint of giving advice on the act, and how it applies to websites, and also getting involved in litigation when that arises. So first, let me introduce Lori Sommerfield. Lori is a seasoned consumer financial services lawyer, who has practice consumer finance law for over 20 years in federal government, in-house and private practice. She began her career as a staff attorney at the FDIC in Washington, D.C. in a policymaking role.

And she specializes in regulatory compliance with federal and state and AI discrimination laws, including fair lending, responsible banking laws, and of course, pertinent to our subject today, the ADA.

Alan Kaplinsky:

Lori currently is of counsel in our consumer financial services practice group located in our Minneapolis office, where she provides legal advice to clients concerning a broad variety of consumer financial services protection issues, including the ADA. Prior to joining us at Ballard Spahr. She was deputy general counsel for consumer banking at TCF Bank, a very large regional bank and many are located in Minneapolis, Minnesota. And before joining TCF, Lori practiced law with major consumer financial services law firm in Washington, D.C., but I'm not going to mention the name of that firm because they are a competitor. Glad to see Lori saw the light of day and decided to join us about a year or so ago.

Alan Kaplinsky:

Let me also, first of all, welcome Lori to our program. And I'm going to start with you in just a minute with our first question.

Lori Sommerfield:

Thanks Alan. Great to be here.

Alan Kaplinsky:

The second guest we have today is Michelle McGeogh. Michelle is a partner in our Baltimore office, and she's a member of our Real Estate and Construction Litigation Group, and our Labor and Employment Group. She's got extensive experience in real estate litigation on behalf of property owners, investors and developers. She's experienced in a diverse range of real estate, commercial litigation, including commercial foreclosures, lender liability, landlord tenant law, and for purposes of today's program, she's been involved in representing various parties both in a consulting role, and also in a litigation defense role related to disputes arising under the ADA. So a very warm welcome to you, Michelle.

Michelle McGeogh:

Thank you, Alan. Nice to be here.

Alan Kaplinsky:

So before we get to a number of questions that I have for both of you today, I'd like to find out how each of you got involved in this, I guess you could say at one time, it was an arcane practice of law, dealing with the ADA. So I'm first going to ask you Lori how you got involved and then I'll find out how Michelle got involved.

Lori Sommerfield:

Sure Alan. As you mentioned in my biography, I have practiced fair lending and responsible banking law throughout my career, and specializing in the Americans with Disabilities Act was just a natural progression. I started receiving inquiries from clients about how to comply with the ADA, and then in about the year 2015, 2016, I noticed that the ADA website and mobile application litigation was really heating up. So I started following that, started giving my clients advice about how to comply with the ADA in the absence of technical standards, and I just really became very interested in the topic and also passionate about ensuring that individuals with disabilities have appropriate representation. I think they're one of the groups that is least represented in terms of the spectrum of protected class groups, because they've had a really long fight for civil rights legislation. I think, as you mentioned, Alan, the ADA wasn't enacted until 1990. So it's one of the last civil rights laws to be enacted.

Alan Kaplinsky:

And Michelle, tell us how did you get involved in ADA? You have been a real estate litigation attorney and employment litigation attorney. How did you turn toward the ADA?

Michelle McGeogh:

Thanks Alan. Since I started here at Ballard and 2007, I've always represented clients in connection with employment litigation, including under Title 1 of the ADA, and I've represented property owners and investors, developers, landlords under Title 3 of the ADA in real State litigation. So as Lori mentioned, when we saw this tremendous increase in digital accessibility litigation, this was just a natural fit for my background. I already had experience in the ADA under Title 1 and Title 3 of the ADA. And there was a real need for advice and counseling on digital accessibility issues. And so I found myself here.

Alan Kaplinsky:

And then we'll go to the other question. So Lori, the Biden administration and some of the federal agencies that are charged with enforcing consumer laws have indicated a strong return, have returned to strong enforcement of consumer protection laws, similar to the approach that was taken during the Obama era. An example of that, probably the best example is the Consumer Financial Protection Bureau, the CFPB, which was very, very vigorous in enforcing the laws after it got created by Dodd Frank in 2010, and stood up in July of 2011. And under the leadership of Richard Cordray, he left no stone unturned when it came to vigorously enforcing consumer protection laws.

Alan Kaplinsky:

During the Trump administration, at least most consumer advocates, probably all of them, and many industry people, we can see that the amount of the vigor with which the consumer laws were enforced by the CFPB decline. And I am assuming the same thing applies with respect to the Department of Justice when it comes to enforcing the ADA. And so Lori, I'm wondering if you could tell us what you anticipate. Well, first of all, why don't you address and confirm what I said that during the Trump administration, there was virtually nothing going on with respect to Ada enforcement? And then tell us about what is going on right now, and what you anticipate will occur during the remainder of the Biden administration?

Lori Sommerfield:

Sure, Alan, I'd be happy to. Well, first of all you're absolutely right that the Trump administration really did not effectively enforce the ADA during the period 2016 through 2019. Up until that point, the DOJ actively and continuously brought enforcement actions under Title 3 of the ADA. Those enforcement actions involve companies of all varieties, including banks, grocery stores, educational institutions, among others, for violations of the ADA in both a physical space and a website accessibility context. Now, we definitely anticipate an aggressive enforcement posture by the DOJ, as we head into the early years of the Biden administration.

Lori Sommerfield:

And we I've actually gone back and looked at the Senate confirmation testimony that both Attorney General, Merrick Garland and Assistant Attorney General, Kristen Clarke gave before the Senate Judiciary Committee, and unfortunately it doesn't reveal much to us. At times, they're a bit evasive, they're a little unclear about their position on how they would go about enforcing the ADA going forward. But there's no reason not to believe that they would not take a strong enforcement posture because they have been advocates of civil rights laws for years. And also, given this history of activity by the DOJ of bringing enforcement actions up until 2016, I think we would have to think that if past is prologue, there's every reason to believe that the DOJ will return to in a posture in bringing ADA enforcement actions.

Lori Sommerfield:

I think it's also worth noting, and you mentioned this in your introduction Alan, the history of DOJ is interpretive letter and rulemaking in this area. As you noted, there was an interpretive letter issued in 1996 by the Attorney General at that time,

Deval Patrick, that basically stated that websites must be made accessible to individuals with disabilities under Title 3 of the ADA. The DOJ Then went on in 2010 to issue an advance notice of proposed rulemaking seeking public feedback on that topic and what the appropriate accessibility standard should be. Unfortunately, a lot of times languished, and the DOJ reissued it in 2006.

Lori Sommerfield:

So then at that point, there was basically an ANPR and a supplemental ANPR that were in play. Unfortunately, when President Trump became president and entered into office, like so many republican presidents before him, he initiated a regulatory reduction initiative. So the DOJ decided to withdraw those two ANPR's and effectively tabled that rulemaking to set a technical accessibility standard. We do expect that the DOJ will probably reopen that rulemaking process sometime over the next four years, because businesses certainly need clarity in terms of the technical standard that they should comply with. So we remain hopeful that this issue will receive some clarity here in the near future.

Alan Kaplinsky:

Let me ask you something, so Lori, was I accurate in saying that during the Trump administration as far as we know, DOJ didn't launch any investigations involving the ADA, or at least nothing became public?

Lori Sommerfield:

That is correct. There were no public enforcement actions during the period 2016 through 2019 involving-

Alan Kaplinsky:

But I guess it could have been worse in the sense that you had mentioned that and that they had an interpretive letter, some other less formal guidance that had been issued long ago, they didn't withdraw that, am I right?

Lori Sommerfield:

They did not. And actually, there was another inquiry that was issued just during the Trump administration, I think it was 2018, when a member of congress actually wrote to DOJ and requested clarity again about whether DOJ was going to proceed with a rulemaking. And the response that was received was basically, businesses can just basically make their own judgment, they have flexibility to comply with whatever standard they wish. And the World Wide Web Consortium that has issued the Web Content Accessibility Guidelines is the de facto standard that most businesses comply with. That's a topic probably for another part of our Q&A. But I guess DOJ thought that they were providing flexibility to businesses to choose the accessibility standard that they wish to comply with, but unfortunately, that has just created a lot of an uneven playing field in terms of the accessibility standard that companies use today.

Alan Kaplinsky:

Right. So Michelle, let me go to you next because you've litigated many Ada cases over the years. And I'm wondering if you can first tell us about the trends that exist with respect to Ada litigation. And then after you finish doing that, I'm going to ask you about one other case that seems to buck the trend. Well, let's talk about the trend.

Michelle McGeogh:

Sure, absolutely Alan. So the trend is that we can continue to see an exponential rise in digital accessibility cases. At this point, we are seeing thousands of cases filed each year, alleging that various businesses and companies maintain websites that are not accessible to people with disabilities. These types of accessibility barriers include things like being compatible with screen reading technology, including alternative text for images having appropriate color contrast, just to give a few examples. So we can continue to see these cases rise at an exponential pace. There was a slight slowdown in the beginning of 2020 due to the pandemic, but we quickly got back to that same rising pace of litigation.

Michelle McGeogh:

We also continue to see the vast majority of these cases settle, and settle relatively early in the litigation. Litigation, as we know can be expensive, and in certain jurisdictions, motions to dismiss are rarely granted in these kinds of cases. And frankly, sometimes plaintiffs lawyers price the cases to settle for less than a motion to dismiss would cost to file. I also think that generally speaking in terms of trends, some of the complaints and lawsuits that are getting filed are perhaps a little bit more creative than they used to be. They might mention the Fair Housing Act in addition to the Americans with Disabilities Act, or perhaps they rely more heavily on state law. This is especially true in California, where some plaintiffs firms file lawsuits based not on the ADA, but rather California's Unruh Act.

Alan Kaplinsky:

Why is that? Michelle? Why did they do that?

Michelle McGeogh:

So in some jurisdictions, some states have state law that plaintiff's lawyers may view as more favorable to their case. So for example, civil penalties can be awarded, whereas under the ADA the form of relief is injunctive relief and attorney's fees.

Alan Kaplinsky:

So under the ADA, you can't get any kind of monetary relief for the consumer, but you can get injunctive relief. And if you are able to get injunctive relief then, you can get attorney's fees, right?

Michelle McGeogh:

That's right.

Alan Kaplinsky:

That's what the whole thing is all about at least for a lot of plaintiffs' attorneys. I'm sure some of them feel that they are doing good. And I'm sure they are in many cases, but it's really attorney's fees. And what you're saying is that under the Unruh Act in California, you can get monetary relief. Are there are a number of states that also have many ADA laws that are unusual?

Michelle McGeogh:

No, there are quite a few states that have their own version of an ADA law that has different forms of relief available. So that is not necessarily unique to California.

Alan Kaplinsky:

So I would think, am I right Michelle that if a case gets filed against a retailer in state court under the ADA, it's removable to federal court, that is federal question. But if you bring a lawsuit just under a state law, and if the state law allows for remedies that are broader than the federal law, or I guess if there's some states where there's greater clarity about the application of the many state ADA law to accessibility, then may be you don't want to deal with the ADA at all. You want to sue in state court, and the defendant won't be able to remove it, and you'll probably end up with a better settlement.

Michelle McGeogh:

That's right Alan. I think that in certain jurisdictions, plaintiffs firms have pled around diversity jurisdiction by suing only under state law. I see this most often in California where there's cases filed under the Unruh Act and not the ADA. And to avoid federal jurisdiction, plaintiffs firms will limit the relief that they're seeking so as not to reach that \$75,000 threshold for diversity jurisdiction. So that that's absolutely right. And we do see that especially in California.

Alan Kaplinsky:

Right. Now, the Unruh Act, is that as specifically dealing with disabilities, is it a disability protection.

Michelle McGeogh:

Unruh Act is more expansive than that. But our focus here today is the digital accessibility cases. And there are many, many cases in the digital accessibility arena filed under the Unruh Act.

Alan Kaplinsky:

I now want to turn to a particular case that seems to buck the trend, least according to some pundits done quite a bit of reading about the case. It's called the Winn Dixie Case. Winn Dixie is a brand a very large grocery chain, grocery stores located, I think in the southern part of the country, and maybe some other areas, I don't think they're in the north east. And there was a gentleman by the name of Juan Carlos Gil, a blind individual, and he brought a claim against Winn Dixie based on a website that he said was inaccessible to him. And what I'd like to have you do, is first tell us what the important facts are on the case, and then we'll lead to where the courts have gone with it.

Michelle McGeogh:

Sure. Thanks, Alan. So this case is the most significant recent development that we have in this space. This is a case out of the 11th Circuit. And what happened here is that the plaintiff Gil, filed a complaint significantly in 2016. So we've got to put ourselves back a number of years to keep in mind what websites looked like back in 2016. And the plaintiff complained that the grocery stores website had certain accessibility barriers. Well, what did the website look like back then? It had things like a store locator tool, digital coupons, and significant to the plaintiff the ability to refill prescriptions. The plaintiff alleged that the accessibility barriers, namely that the website was not compatible with his screen reading software, prevented him from enjoying some of these features on the website.

Michelle McGeogh:

The plaintiff had used the Winn Dixie store for his primary pharmacy for many, many years. And when he realized that he could refill prescriptions online, the complaint alleges that he desired to use the website for that purpose. But the complaint alleged because the website was not compatible with screen reading software, he was unable to do so. So before the district court, the plaintiff argued that the website itself was a place of public accommodation, and therefore subject to Title 3 of the ADA and required to be accessible. He alternatively argued that the website should be accessible because it had a nexus or a connection to the Brick and Mortar store. And we'll talk about that nexus, I think in a little bit more detail later on.

Alan Kaplinsky:

So Michelle, first of all, where did this lawsuit get filed in federal district court?

Michelle McGeogh:

It was filed in the United States District Court for the Southern District of Florida.

Alan Kaplinsky:

And what did the court rule? Was there some kind of a dispositive motion that got filed? And what did the court end up doing?

Michelle McGeogh:

So one of the very unique things about this case is, is one of the few cases to have gone to trial. After a bench trial, the district court agreed with the plaintiff. The District Court held that Winn Dixie's website was heavily integrated with its physical store and therefore covered by Title 3 of the ADA. The District Court issued an injunction requiring Winn Dixie to remediate its

website and comply with the WCAG 2.0 standard, which will explain what that means. Winn Dixie appealed after that decision.

Alan Kaplinsky:

And they went up to the 11th Circuit. Right?

Michelle McGeogh:

That's right. So, it was pending, this case was pending before the 11th Circuit for over two years. And in April, we finally received the decision from the 11th Circuit, giving some guidance on a number of interesting points. The first thing that the 11th Circuit did, is it addressed the plaintiffs standing in the case. And the 11th Circuit held that the plaintiff had standing. Winn Dixie had disputed that the plaintiff had standing and argued that the plaintiff really didn't suffer any injuries because the plaintiff was able to refill his prescriptions at the Winn Dixie store, and he had done so for many, many years.

Michelle McGeogh:

However, the 11th Circuit held that the plaintiff did suffer an injury in fact, and it was concrete and that end jury was particularized and not hypothetical. The 11th Circuit found that he was unable to avail himself of the goods and services on the website when he was unable to equally enjoy that website, and that was sufficient for standing. Next, the court gave us some guidance on websites as places of public accommodation. The first thing the court did when deciding whether this website was a place of public accommodation under Title 3 of the ADA was to look at the statute. And the ADA provides 12 types of locations that are places of public accommodation. These are all physical locations, things like grocery stores.

Michelle McGeogh:

The court noted that grocery stores are places of public accommodation, but websites are not listed in the definition of places of public accommodation. So pursuant to the plain language of the statute, the court held that public accommodations are limited to actual physical places, such that a website is not a place of public accommodation, pursuant to the plain language of the statute. But the court didn't stop there. It next considered whether the website created an intangible barrier that prevented a disabled person from fully utilizing and enjoying the goods and services at a place of public accommodation. Case law in the 11th Circuit had demonstrated that intangible barriers are things like eligibility requirements, or screening rules, or other procedures that restrict the disabled person's ability to enjoy goods and services.

Michelle McGeogh:

Intangible barriers can be found when a place of public accommodation fails to take action, fails to provide an auxiliary aid, for example, that would permit a disabled person to gain access to the goods and services. So what was really interesting here is that the 11th Circuit found that there was not an intangible barrier, because this website had very limited functionality. It did not function as a point of sale, and the 11th Circuit put a lot of emphasis on this fact. The 11th Circuit also noted that all of the functionality of the website had to be completed in stores. So for example, coupons still needed to be presented at the store, prescriptions still needed to be picked up at the store. So these factual points were very important to the 11th Circuit finding no intangible barrier. And this is very fact specific. They were looking at the website as it existed in 2016.

Alan Kaplinsky:

And so Michelle, what's happened after 11th Circuit came down with his opinion? Has there been any further attempt to get it up to the US Supreme Court?

Michelle McGeogh:

So the plaintiff initially filed a motion for reconsideration, and that was denied. The plaintiff has indicated that he intends to seek review by the United States Supreme Court. The Supreme Court has already declined to hear one website accessibility case that was in Robles versus Domino's. So it's possible that the Supreme Court might hear this Winn Dixie case now that the

issue will have been presented to the Supreme Court a number of times. I think that it would be an interesting case for the Supreme Court to take up, because one interesting aspect of this opinion is that the court did not adopt a nexus requirement. And we talked about that nexus requirement just a little bit in passing.

Michelle McGeogh:

So other circuits, including the 3rd Circuit, 6th Circuit and 9th Circuit's have focus more heavily on whether a website has a nexus or a connection to a place of public accommodation, and have held that only websites that have that nexus, that connection, are subject to Title 3 of the ADA. No other circuits have not taken that approach. For example, the 1st Circuit and 7th Circuit have found that Title 3 of the ADA is not limited to physical places and have rejected this nexus requirement. What's interesting about this case is that it doesn't utilize this nexus analysis and instead focuses on the plain language of the statute as well as whether there's an intangible barrier.

Alan Kaplinsky:

So Michelle, we don't know yet whether the Supreme Court is going to hear the case. I guess we'll know by the end of the year, if it hears that it'll probably hear it in the fall sometime. Was that one of the takeaways from this case? Is this time now for the industry to say, "Let's pop the cork on their champagne?" Or is it a different message that needs to be conveyed?

Michelle McGeogh:

I think unfortunately, it is a different message for defendants in this type of litigation. I don't think this is going to result in a tremendous decrease or reduction in the number of cases filed for a number of reasons. First, I think we will continue to see exponential increases in litigation in other jurisdictions such as New York or California for the reasons we previously discussed. I think that second, the decision was fairly-fax specific. It relied on a website that had only a limited functionality available, and the website significantly did not have any e-commerce component. There's no real transactions, many transactions that can be fully completed online. So I think plaintiffs firms are likely to continue to focus on websites that have some sort of e-commerce connection, websites that allow parties to complete transactions online. I think those will continue to be likely targets for litigation.

Alan Kaplinsky:

Okay. So now I just wanted to make... Yeah, go ahead Lori.

Lori Sommerfield:

I just wanted to make comment here before we move on to a new topic about the trends. I think what we've seen over the past few years is that there really seems to be a lot of decisions that have been more pro-plaintiff in terms of their holding. So this is an encouraging development, I think with the Winn Dixie case, but to Michelle's point, it's not a game changer. This is just one case in one circuit. I do hope and I don't think that even if the US Supreme Court takes up this case, that it's going to further resolve the issue of the circuit split. Because this case, as Michelle pointed out, didn't adopt a nexus standard. But some case needs to go to the US Supreme Court to resolve that circuit split.

Alan Kaplinsky:

Got it.

Lori Sommerfield:

...can finally have some sense of resolution.

Alan Kaplinsky:

Right. Okay. So let's turn to a different topic. And I'd like to ask both of you about the business impact of all this litigation. It seems that financial institutions and businesses are caught between a rock and a hard place trying to comply with the ADA when Department of Justice hasn't issued technical accessibility standard yet. And under the ADA, there isn't any process by which institutions or businesses can be provided with notice and an opportunity to cure any website or mobile application deficiency before being sued by a plaintiff with a disability. In the absence of guidance or rules from DOJ about an appropriate accessibility standard, what technical standards should businesses use to comply with the ADA right now? And then after I asked you that question, I'm going to ask Lori a question related to the possibility of there being federal legislation to clear it up. So you had mentioned something a short while ago, called WCAG. Is that at all relevant here?

Michelle McGeogh:

Yeah. So let me explain. The current standard that most businesses are utilizing and that we recommend is one adopted by the World Wide Web Consortium, that's sometimes referred to as WC3. So the World Wide Web Consortium has issued and adopted standards, those standards are called the Web Content Accessibility Guidelines, WCAG. The current standard is WCAG 2.1, and that was issued in 2018. The WCAG standards have really become the de facto standards, both as a result of case law, and also, for example, the California consumer Privacy Act recommends compliance with WCAG 2.1.

Alan Kaplinsky:

Okay. And so there is something that companies can hang their hat on, in trying to comply. So Lori there's also there has been from time to time, federal legislation that's been introduced to deal with the issue. What can you tell us? What's happening there?

Lori Sommerfield:

That's correct, Alan, I think beginning in about 2016, there have been efforts by Congress to try to pass legislation that would create a safe harbor for businesses and financial institutions in terms of battling this onslaught of digital accessibility lawsuits. The most recent effort was actually a bill that was introduced in October of last year and now reintroduced in February in this Congress, by Representative Ted Budd, who is a republican out of North Carolina, and Lou Korea, a Democrat from California. So a bipartisan effort to basically establish WCAG 2.0 AA as the appropriate technical standard, and it would basically also create a type of safe harbor.

Lori Sommerfield:

The legislation, but I can just give you a quick synopsis of it basically, would allow businesses to be considered compliant if their website or mobile application is in substantial compliance with WCAG 2.0 AA. Under the Act, an individual then would not be able to bring any sort of lawsuit to enforce the ADA until all of his or her administrative remedies were first exhausted. So the aggrieved individual, assuming this is an individual with the disability, would first have to notify the owner of the website, that the website isn't in compliance with that standard. Then within 90 days after receiving the notice, the owner would have to bring the website into compliance, and if they fail to do so, then the individual can file a complaint with the DOJ.

Lori Sommerfield:

Once the complaint was filed with DOJ, then the Attorney General would have to complete an investigation within 180 days to determine whether there was an actual violation. And at that point, then the AG could take action in the nature of either filing a lawsuit or bringing an enforcement action. Under the Act, the AG also would have a duty to investigate and would have to undertake periodic reviews of various consumer facing websites and mobile apps. And if the AG found reasonable cause to believe that a pattern or practice of discrimination had been engaged in, then the AG could basically commence a civil action in any US District Court.

Lori Sommerfield:

But I just want to make one last comment about the legislation, and that's that, as I mentioned, the individual with disability would have to exhaust their administrative remedies before the individual could actually commence a civil action against the owner of the website or the mobile app. And that's the sole and exclusive remedy. So this would definitely be a helpful type of safe harbor for businesses to try to have the opportunity to get that notice and opportunity to cure before a lawsuit is brought against the business court.

Alan Kaplinsky:

Got it. By the way, just to clarify something that I think it's pretty fairly obvious. But when we're talking about website accessibility, we're talking about website accessibility regardless of the hardware that's being used; whether it's a desktop computer, a laptop, a smartphone, what about a smart TV? Same would apply to... Am I right it doesn't matter what hardware we're talking about? What do you think of that, Michelle?

Lori Sommerfield:

So I try to remember to use the term digital accessibility to describe what we've been talking about here today, because you're absolutely right, it's not just limited to websites. And in fact, some plaintiffs firms focus their lawsuits on mobile applications, which can sometimes be a little bit more difficult to create accessible versions. So it's not just limited to website, and it's not specific to any sort of computer.

Alan Kaplinsky:

Okay. So now, we're getting toward the end of our program. And I want to wrap up the program by talking about what should our clients be doing right now, not just our clients, but of course, any business that is dealing with consumers and the public and needs to comply with the ADA. What do they do? And that question is really an open question for either one of you, or both of you to respond to.

Lori Sommerfield:

Michelle, would you like to take maybe the overview approach, and I'll talk about some of the specific things that our clients can be doing now?

Michelle McGeogh:

Sure. And I think one thing that I really want to emphasize is that as much as we've talked about litigation today and what plaintiffs firms are doing, there are absolutely are steps that our clients can take to avoid being a victim of one of these lawsuits. Lori and I have specialized in assisting clients in creating ADA risk management programs that can protect clients against this type of litigation that's increasing at an exponential pace. So it's important for businesses first to start thinking about this right now. Because if you take steps to implement an ADA risk management program, that is I think, going to pay dividends. The other thing I wanted to mention is that there are good business justifications for implementing such a program beyond just avoiding litigation. We know that there are millions of disabled individuals in the United States, and making your website or other digital properties, mobile applications accessible to all consumers, is really good for the bottom line. So implementing a program like this not only decreases litigation and regulatory risk, but also can help with the business's bottom line.

Lori Sommerfield:

I think tagging on to what Michelle just said to it's also the right thing to do from a public policy perspective, to make all of your digital assets accessible to individuals with disabilities. I see it and so does Michelle is sort of a win-win proposition both for businesses, as well as for individuals with disabilities, because otherwise you're missing this entire market of individuals with the-

Alan Kaplinsky:

How large is the market Lori?

Lori Sommerfield:

How large is it?

Alan Kaplinsky:

Yeah, is it really big?

Lori Sommerfield:

It's really quite large. There are approximately 64 million individuals in the United States who have a disability of some type. And some studies have shown that approximately 50% of those individuals are actually online daily, looking for opportunities to purchase goods and services. So conceivably, you are looking at 32 million people per day who could be your new customer?

Alan Kaplinsky:

Wow! So this is an issue that even if there wasn't a law that applied to situation like this, it would make good business sense to make sure that your websites are accessible to the disabled. Because if not, you're giving up a very large part of the market.

Lori Sommerfield:

Exactly. And I think it also goes to one of the requirements in Title 3 of the ADA, that is that businesses that are places of public accommodation have to ensure effective communication with individuals with disabilities. So this is one way in which businesses and financial institutions can further that goal.

Alan Kaplinsky:

I've heard that a number of companies have something called an accessibility statement that they've made or a policy, is that something that you recommend that our clients do, and what is it? Either one of you?

Lori Sommerfield:

Definitely. So toward that actually Alan, if I can just preface my remarks by saying that a lot of the ADA settlement requirements that the DOJ has entered into with companies over the past decade have really evolved into best practices for how to manage legal and regulatory risk when it comes to complying with Title 3 of the ADA. So one of those items is actually adopting and posting an accessibility statement on the business's website and mobile applications. Another best practice is to have an accessibility policy that is more of an internal facing policy, unlike the accessibility statement which is external facing. That basically explains how you are going to go about maintaining accessibility of your digital assets, and ensuring that any requests for accommodation or complaints received from individuals with disabilities will be managed. But those are two critical governance documents in an ADA Risk Management Program.

Alan Kaplinsky:

Michelle, do you have anything to add to what Lori just mentioned in terms of what companies ought to be doing?

Michelle McGeogh:

Sure. So I think one additional thing that we always recommend is engaging an external accessibility consultant to audit and remediate consumer facing websites. The technical compliance part of complying with the WCAG standards can be complicated from an IT perspective. And sometimes we see certain widgets, for example, advertised online, that claim to be able to respond to these issues and create a website that is fully accessible. But we know that these widgets only correct and identify about 30% of the accessibility barriers, relevant to WCAG compliance. So that's why we recommend engaging a

consultant to do a full audit of external digital properties so that a client can move toward compliance with the WCAG standard and not such a limited level of compliance such as 30% compliance.

Michelle McGeogh:

We want to get past that level of compliance to both avoid litigation and ensure like Lori said, that this large contingent of disabled persons are able to actually use a website. I think it's significant that a full audit typically involves user testing, and disabled individual or other trained individual will test a website to make sure that transactions can be completed, that the website is compatible with screen reading software. And that's not something that a widget can necessarily test and remediate.

Alan Kaplinsky:

And I take it Michelle, when you refer to a consultant, you're referring to somebody other than a lawyer. A lawyer can tell you about how to comply, but you really need a techie to really do the auditing work.

Michelle McGeogh:

That's right, Alan. I think to create a successful ADA Risk Management Program, you really need both a lawyer and the IT consultants. For example, taking an analogy to a physical accessibility space, you don't want me creating a new handicap parking spot or raising the height of your sake. So you need really the help of a techie and a lawyer to achieve a successful ADA risk management program.

Alan Kaplinsky:

Understood. Okay. We have drawn to the end of our program today. I want to thank very much, Michelle McGeogh, and I want to thank Lori Sommerfield, my colleagues at Ballard Spahr for providing so much enlightenment today about this topic that certainly is not going away anytime soon. Let me remind you that our podcast shows are produced weekly, except during the month of December when we take a little time off for the holidays. And the shows are generally released on a Thursday of each week. And again, if those shows are available on our website, and they're available on the blog that we publish, and you can get those shows on any podcast platform that you may otherwise use; be it Spotify, Google Play whatever, it appears on every platform. With that, I'm going to thank everybody again, our listeners for taking the time today. Thank you.