

International Franchise Association
52nd Annual Legal Symposium
May 5-7, 2019
Washington, DC

How to Best Avoid or Defend an ADA Drive-By Lawsuit

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Introduction

Federal court lawsuits filed under Title III of the Americans with Disabilities Act (ADA) hit a new high last year, increasing 34% from the previous year, and more than tripling over the last five years.¹ Franchisors and franchisees are frequently defendants in these lawsuits. Plaintiffs' entitlement to attorneys' fees under the ADA has created a cottage industry of plaintiffs' attorneys seeking to cash in on the ease by which they can identify a violation and extract a cost-of-defense settlement requiring remediation. The ADA's transformative and well-intentioned objective is to address "the discriminatory effects of architectural, transportation, and communication barriers upon the disabled."² But as they say, the road to hell is paved with good intentions; and plenty of lawyers are happy to do the work.

Legitimate business owners want nothing more than to follow the law and accommodate as many paying customers as they can. But continued spates of ADA "drive-by" and "surf-by" lawsuits, often initiated by the same attorneys representing the same individuals, suggest that there are incentives at work other than just remedying actual, ongoing injuries and making significant accessibility improvements under the ADA. These serial ADA litigants bring repeated claims without ever intending to buy any products or services from the businesses that they sue, testing the constitutional requirement that all cases present an actual case and controversy.³

Title III of the ADA applies to almost all franchise systems. Franchisors and franchisees alike must be aware of their exposure, undertake proactive measures to minimize their exposure, and fight back when appropriate. Aggressive plaintiffs' counsel know that it is practically impossible to ensure 100% compliance with ADA accessibility design standards, and they have developed enterprising ways to identify, assert, and recover on their clients' claims. The latest efforts have spread from targeting physical barriers to virtual ones, where the unregulated World Wide Web is still the Wild Wild West of accessibility design standards.

This paper provides recommendations and best practices for avoiding and defending claims by serial ADA litigants. Section I describes the typical characteristics of such claims. Section II discusses the various theories of franchisor and franchisee liability under the ADA. Section III identifies common physical and virtual barriers targeted by ADA plaintiffs. Section IV reviews best practices for avoiding and minimizing exposure. Finally, Section V provides advice for litigating franchise-related ADA claims.

¹ Minh N. Vu, Kristina M. Launey & Susan Ryan, Attorneys of Seyfarth Shaw, *Number of ADA Title III Lawsuits File in 2018 Tops 10,000*, ADA Title III: News & Insights <https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/> (Jan. 22, 2019); Judiciary Data and Analysis Office of the Administrative Office of the U.S. Courts, *Just the Facts: Americans with Disabilities Act*, <https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act> (July 12, 2018).

² 42 U.S.C. § 12101(a)(5).

³ U.S. Const. Art. III § 2 cl 1.

I. Drive-By and Surf-By Lawsuits

The ADA contains unique provisions that make “drive-by” lawsuits possible, and indeed, even incentivized. Drive-by lawsuits have common characteristics, often involving the same litigants making similar demands with boilerplate allegations. The drive-by lawsuit’s popularity has given rise to a new trend: the “surf-by” lawsuit. Ultimately, however, plaintiffs asserting drive-by and surf-by lawsuits face similar legal issues.

A. Why the ADA?

The ADA, which became effective in 1990, is sprawling legislation that has made great improvements in the everyday lives of individuals with disabilities. The ADA addresses discrimination in all areas of public life, including employment (Title I),⁴ government entities (Title II),⁵ places of public accommodation (Title III),⁶ and telecommunications (Title IV).⁷ While Title I gets attention for the volume of discrimination claims employees file against employers, Title III, which applies to all “places of public accommodation,” is broader and more exacting in many ways.

Title III provides, “[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.”⁸ You would be hard pressed to travel anywhere in the country without seeing Title III’s ubiquitous impact on American society. The results are pervasive given that the ADA is only a few decades old. But to business owners, the drive-by and surf-by lawsuit epidemic evinces an incentive system gone awry.

The volume of “drive-by” lawsuits is the result of several of Title III’s unique features. First, Title III creates a large group of potential plaintiffs. Title III allows anyone with a disability to assert a claim, which is defined broadly as any physical or mental impairment that substantially limits one or more major life activities, and includes persons who have a past history or record of such impairments, and even persons who are simply perceived by others as having such impairments.⁹ The ADA Amendments Act of 2008 broadened the definition further by adding a wide ranging statutory definition of “major life activities.”¹⁰

Second, Title III creates a large group of potential defendants. The definition of a “public accommodation” is broad, and includes all business regardless of size, location, or the goods or services provided.¹¹ Every place of public accommodation that

⁴ 42 U.S.C. ch. 126, subch. I.

⁵ *Id.* subch. II.

⁶ *Id.* subch. III.

⁷ *Id.* subch. IV.

⁸ *Id.* § 12182(1).

⁹ *Id.* § 12102.

¹⁰ *Id.* (2).

¹¹ *Id.* § 12181(7).

undertakes an alteration or new construction must meet the ADA's accessibility design standards.¹² As a result, one need not travel far to find a target for a drive-by lawsuit.

Third, it is very difficult to ensure 100% compliance with Title III at all times. The accessibility design standards promulgated under Title III are highly specific and technical in nature. The 275-page manual for the 2010 ADA Standards for Accessible Design contains thousands of requirements, from exact measurements of bathroom mirror height and the thickness of carpeting, to the angle of water out of a drinking fountain, and the force required to open a door.¹³

Fourth, defendants can violate Title III without any level of culpability. Title III is essentially a strict liability statute. Thus it does not matter whether a business owner intends to create an accessibility barrier.¹⁴ While the ADA only requires removal of barriers in structures built prior to 1990, to the extent it is "readily achievable," the burden of establishing that defense is on the business owner. Thus, any business that is not in compliance with every single requirement can be sued.¹⁵

Fifth, no pre-suit requirements exist under Title III. Title III does not require exhaustion of administrative remedies, notice of violation, or demand for relief.¹⁶ Under Title I, a plaintiff must first file a claim with the U.S. Equal Opportunity and Employment Commission and receive notice of their right to sue;¹⁷ nothing similar exists under Title III. While some states have begun passing legislation requiring plaintiffs to provide notice of a violation prior to bringing a lawsuit, Congress has not passed such legislation under Title III.¹⁸ The result is that a drive-by plaintiff can begin incurring attorneys' fees that the defendant business owner will have to pay even before the business owner is made aware of a violation.

Finally, Title III claims are a lucrative business for plaintiffs' attorneys and carry little to no exposure for their clients. Title III permits the prevailing party to recover their attorneys' fees.¹⁹ As a practical matter, however, courts only award fees to a prevailing

¹² *Id.* § 12131.

¹³ U.S. Dept. of Justice, 2010 ADA Standards for Accessible Design 68 § 602.6 (drinking fountains), 104 § 302.2 (carpet), 160 § 603.3 (mirrors) (Sept. 15, 2010).

¹⁴ 42 U.S.C. § 12182(2) (defining various forms of discrimination, including discriminatory effects, without reference to intent).

¹⁵ *Id.* (2)(A)(iv)—(v).

¹⁶ *Brito v. DHCS Associates, LLC*, 2017 WL 6405808 (D. Colo. Dec. 15, 2017).

¹⁷ 42 U.S.C. § 12117.

¹⁸ With some procedural variations, Arizona, Minnesota, and Ohio and have adopted statutes requiring notice and 60 days opportunity to cure before the plaintiff can file a lawsuit. See Az. Stat. 41-1492.08; Ohio Rev. Code 4112.16; Minn. Stat. 363A.331. Florida and California have also adopted legislation intending to provide businesses with greater opportunities for review of the alleged violations in order to remedy them. Fla. Stat. § 553.5141; Calif. Civil Code 55.56(e). Utah and Virginia have proposed legislation intended to address serial accessibility lawsuits, but it has not yet passed.

¹⁹ 42 U.S.C. § 12205.

defendant if the plaintiff's claims were entirely frivolous, a very difficult standard to meet.²⁰

B. The Drive-By

You might think that a plaintiff needs to suffer compensable monetary damages in order to assert a claim under the ADA. But whether the plaintiff has suffered damages is simply not an obstacle to the drive-by lawsuit. While compensatory and statutory minimum damages are available under many state laws,²¹ the ADA itself does not permit the recovery of monetary damages, only injunctive relief and attorneys' fees,²² which are sufficient incentives for drive-by plaintiff's claims.

You might also think that a plaintiff needs to be denied access to a business in order to assert a claim under the ADA. But any technical violation of the ADA's extensive accessibility design standards is enough, even if the violation did not in fact prevent any disabled person from accessing the business's goods or services.²³ As a result, many drive-by lawsuits arise from minor violations, the remediation of which might not even materially improve accessibility for disabled persons.

You might even think that a plaintiff needs to be a customer of a business in order to assert a claim under the ADA. Most business owners would certainly think so. But plaintiffs argue that the ADA provides a remedy for dignitary harm, and since their status as a "tester" of ADA compliance does not independently preclude their standing, drive-by plaintiffs take the position that they only need to be deterred from being a customer of a business to assert a claim under the ADA.²⁴

The foregoing gives rise to the drive-by lawsuit, where a plaintiff merely drives by a business, identifies an arguable violation of the ADA's accessibility design standards from his/her car window, and sues the business without prior notice. The plaintiff might never actually visit the business. Some have speculated that plaintiffs have even used Google Maps and Street View to remotely identify ADA violations, such as identifying potentially insufficient disabled parking lot spaces or signage, or the lack of a usable accessible chair lift at a hotel's pool.

²⁰ See, e.g., *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1203 (10th Cir. 2000) ("[A] prevailing defendant in a civil rights action may recover attorney fees only 'if the suit 'was vexatious, frivolous, or brought to harass or embarrass the defendant.'" (citing *Hensley v. Eckerhart*, 461 U.S. 424, 446 (1983))).

²¹ See, e.g., Cal. Civ. Code § 52 (permitting actual damages and an amount up to three times the actual damages for each violation of the Unruh Act, "but in no case less than \$4,000" for each and every offense).

²² 42 U.S.C. § 12188(a)(2).

²³ *Id.* ("Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions."); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332 (11th Cir. 2013) ("The invasion of Houston's statutory right in § 12182(a) occurs when he encounters architectural barriers that discriminate against him on the basis of his disability.").

²⁴ *Id.* ("This legal right created by §§ 12182(a) and 12182(b)(2)(A)(iv) does not depend on the motive behind Plaintiff Houston's attempt to enjoy the facilities of the Presidente Supermarket."). Some courts, however, have disallowed "tester" standing." *Mitchell v. Buckeye State Credit Union*, 2019 WL 1040962 (N.D. Ohio Mar. 5, 2019) (discussing "tester" status and explaining that it does not necessarily prevent standing, but does not confer it either).

Service of the complaint is typically accompanied by the first demand for remediation and payment. The demand might include damages if permitted under state law, but it always includes a demand for costs and attorneys' fees, which of course began to accrue before the business owner was even notified of the violation.

The demand offers to settle the dispute in exchange for remediation of the violation and payment of damages, if available, and attorneys' fees. A typical demand letter looks something like this:

Dear [REDACTED]

I attempted to visit your property at [REDACTED] in Minneapolis on [REDACTED]. I have multiple sclerosis and use a wheelchair. Upon arriving at your property, I found violations of the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) that impeded my ability to access the property (the details are in the accompanying Complaint).

My goal is to be able to access your property as easily as any other citizen. Therefore, I am willing to settle this lawsuit quickly and at minimal expense to you beyond the cost of complying with Federal (the ADA) and State (the MHRA) laws and regulations that ensure the civil rights of people with disabilities.

If you will bring the property into compliance with the laws and regulations the Complaint identifies as currently being violated AND pay me \$2,000 for my inconvenience and the costs of starting this lawsuit, I am willing to dismiss the lawsuit with prejudice.

Of course, because this is a legal matter, you may wish to consult with a lawyer before acting.

This demand letter was issued by a disabled plaintiff who also happens to be an attorney. He contends that he is entitled to recover monetary amounts for his inconvenience and costs as a pro se litigant, notwithstanding Minnesota's statutory requirement that he provide notice of the violation to the business owner before recovering costs and attorneys' fees.²⁵

Many drive-by litigants view themselves as private attorneys general, enforcing the ADA's mandate, and improving the lives of the disabled. But some plaintiffs file hundreds of lawsuits a year, making millions of dollars for their attorneys, by extracting nuisance value settlements from business owners. If this sounds like a racket, that is because sometimes it is. By way of example, one plaintiff's attorney has filed over 20 lawsuits against gasoline stations in the last year, claiming that they have discriminated against his client by using system-mandated gas dispensers that stream video without closed captioning. However, manufacturers of these gasoline dispensers do not offer closed captioning on these devices and gasoline stations have no choice as to which dispensers they use. The plaintiff's attorney demands a payoff amount under a settlement agreement without a clause mandating closed captioning be included on these dispensers, as such remediation is not possible. The drive-by lawsuit

²⁵ Minn. Stat. § 363A.331.

phenomenon has attracted some unscrupulous characters, leading to disbarment,²⁶ and even criminal convictions.²⁷ Complaints of vexatious litigation, however, have not shown to be a particularly effective defense to such claims.²⁸

C. The Surf-By

Over the past few years there has been a sharp increase in threats of litigation alleging that businesses' websites fail to provide equal access to the disabled. In 2018, the number of website accessibility lawsuits *tripled* from the previous year.²⁹ While the first targets of these lawsuits were large retailers, plaintiffs and plaintiffs' attorneys have begun targeting the websites of smaller businesses as well. By way of example, the same ten law firms filed 82% of all website accessibility lawsuits.³⁰ Given that today you can still find non-compliant strip malls almost three decades after passage of the ADA, it is clear that ADA website litigation is not going away anytime soon.

While Title III of the ADA does not expressly define a "place of public accommodation" to include websites, courts have held that they can be subject to the ADA's regulations in many circumstances.³¹ A circuit split exists regarding whether a website or app constitutes a "place of public accommodation" regulated by the ADA. Courts in the First, Second, and Seventh Circuits have held that a physical place is not required for a public accommodation. In these jurisdictions, the ADA governs all websites, even if the business exists exclusively on the internet.³² On the other side,

²⁶ Debra Cassens Weiss, *Lawyer who filed hundreds of ADA suits barred from practice in Texas federal court for three years*, ABA Journal, http://www.abajournal.com/news/article/texas_lawyer_who_filed_hundreds_of_ada_suits_is_temporarily_bared_from_pra (July 13, 2017).

²⁷ *In re Petition for Disciplinary Action against Paul Robert Hansmeier*, A15-1855 (Minn. Sept. 12, 2016), available at <http://lprb.mncourts.gov/LawyerSearch/casedocs/Hansmeier-A15-1855-09122016.pdf>; Matt McKinney, *St. Paul landlord wins case against serial ADA litigant*, Star Tribune Fe. 25, 2016, available at <http://www.startribune.com/st-paul-landlord-wins-case-against-serial-ada-litigant/370215081/>; Barbara Jones, *Paul Hansmeier pleads guilty to two fraud counts*, Minnesota Lawyer, <https://minnlawyer.com/2018/08/22/paul-hansmeier-pleads-guilty-to-two-fraud-counts/> (Aug. 22, 2018).

²⁸ See, e.g., *Neal v. Second Sole of Youngstown, Inc.*, 2018 WL 340142 (N.D. Ohio Jan. 9, 2018) (rejecting claim that serial ADA plaintiff was involved in racketeering activity in violation of the RICO statute).

²⁹ <https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/>

³⁰ These law firms include: (1) Cohen & Mizrahi LLP; (2) Lipsky Lowe, LLP; (3) The Leal Firm, P.A.; (4) Shaked Law Group, P.C.; (5) Lee Litigation Group, PLLC; (6) Gottlieb & Associates; (7) Shalom Law Group, PLLC; (8) Scott R. Dinin, P.A.; (9) Garcia-Menocal & Perez, P.L.; (10) The Marks Law Firm, P.C.

³¹ 42 U.S.C. § 12181(7); Letter from Stephen E. Boyd, Assistant Attorney General, Civil Rights Division, Department of Justice, to the Honorable Tedd Budd, U.S. Representative, (Sept. 25, 2018) ("The Department first articulated its interpretation that the ADA applied to public accommodations websites over 20 years ago.") available at <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf>; Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), available at http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt.

³² See, e.g., *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) ("The plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter."); *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999) ("Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services ... of any place of public accommodation,' *id.*, suggests to us that the statute was meant to guarantee them more than mere physical access."); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co.*, 268 F.3d

courts in the Third, Sixth, Ninth, and Eleventh circuits have held that a public accommodation must be a physical place, but a website may be regulated by the ADA so long as a sufficient “nexus” exists between the website and a physical place providing the goods and services.³³

Most of the more recent decisions addressing the applicability of the ADA to websites support the requirement that a website have a nexus with a physical place.³⁴ The Fifth Circuit looks poised to join the majority, with a recent case holding that websites are not places of public accommodation when they are not associated with a physical place.³⁵ Thus, most authority is trending towards increased coverage for websites under the ADA, and there is a great deal of uncertainty where the law on this issue is not yet established.

The demand letters that accompany surf-by lawsuits typically claim that the plaintiff’s law firm has performed an audit of the website in question, and profess that the examined site is flawed. The plaintiffs demand that the business undertake a comprehensive list of measures to achieve what they assert is the legally required compliance standard.

Like a drive-by lawsuit, the demand offers to settle the dispute in exchange for remediation of the violation and payment of damages, if available, and attorneys’ fees. A typical demand letter looks something like this:

Dear Sir or Madam:

We represent disabled individuals throughout the United States who use the Internet to facilitate their access to goods and services. These individuals have disabilities that include: blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, mobility impairments, speech disabilities, photosensitivity and combinations of these. The United States Department of Justice (“DOJ”) and various federal courts have concluded that businesses which offer goods and services to the public through websites are public accommodations that must comply with the general accessibility mandate of the Americans with Disabilities Act (“ADA”).

456, 459 (7th Cir. 2001) (“An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”).

³³ *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998) (“Restricting ‘public accommodation’ to places is in keeping with jurisprudence concerning Title II of the Civil Rights Act of 1964.”); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (“[A] public accommodation is a physical place and this Court has previously so held.”); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (explaining that “some connection between the good or service complained of and an actual physical place is required”); *Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752, 754 (11th Cir. 2018) (“[T]he alleged inaccessibility of Dunkin’ Donuts’ website denies Haynes access to the services of the shops that are available on Dunkin’ Donuts’ website, which includes the information about store locations and the ability to buy gift cards online.”); see also *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1321 (S.D. Fla. 2017) (summarizing cases on split and holding that “[t]he Plaintiff has sufficiently alleged a nexus between Winn–Dixie’s website and its physical stores such that the Defendant is not entitled to judgment as a matter of law”).

³⁴ See *id.*

³⁵ *Fin. Credit Union*, 2019 WL 314732 (S.D. Tex. Jan. 24, 2019) (citing *Magee v. Coca-Cola Refreshments USA, Incorporated*, 833 F.3d 530 (5th Cir. 2016)).

Before you incur significant cost by engaging outside experts of your own, we invite you to first contact us directly to explore a far more cost-effective and pragmatic approach to resolving these issues. We have already conducted a preliminary investigation working with prominent national experts and determined that your website has significant failures which limit accessibility for individuals with various disabilities. In addition, it is also our understanding that most (if not all) of the most reputable national experts are back-logged as a result of our clients' web accessibility efforts. This fact does not in any way prevent a resolution of our claims in the short term, as we will explain. In addition to limiting equal access to goods and services, these accessibility failures—and [REDACTED] data practices—limit or deprive our clients and other stakeholders of rights and opportunities that other visitors to [REDACTED] enjoy: access to privacy-related notices, opportunities to exercise privacy-related choices, and

the ability to consent to legal terms and conditions to which [REDACTED] claims to bind visitors to its website.

This letter notes the accessibility failures on your website and the privacy and legal consequences of those failures, and proposes a plan to work constructively with you, on behalf of our clients and others similarly situated, to achieve equal accessibility for all disabled individuals who visit the site. In lieu of immediately filing a lawsuit in federal court, we are, in the first instance, proposing a collaborative approach that we have successfully utilized in this and other similar contexts to resolve claims for access to public accommodations by the disabled community. To this end, we urge you contact us within fourteen (14) days of receipt of this letter.

Onerous settlement terms are often offered in a form "Confidential Settlement Agreement," releasing the business from liability in exchange for remediation and payment of attorneys' fees.

In the above example, the plaintiffs' attorney offers to assist the business if other claimants assert claims against it for alleged inaccessibility to its website. But since the plaintiffs' firm does not claim to represent a class, the settlement agreement would do little to eliminate exposure to future claims.

The only way to avoid being sued for website inaccessibility is to make your website fully accessible. Unfortunately, as discussed below, consensus does not yet exist as to what constitutes full website accessibility.

II. Franchisor and Franchisee Liability Under the ADA

Because franchise systems fall under Title III's definition of "public accommodation,"³⁶ almost all franchise systems operate facilities that must meet the ADA's requirements, with liability extending to anyone **who owns, operates, or leases such location or facility.**³⁷ A franchisee is always liable as an operator, and

³⁶ See https://www.ada.gov/ada_title_III.htm (Public accommodations have been described as businesses that are generally open to the public and that fall into one of the 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, doctors' offices, etc. Title III also requires newly constructed or altered place of public accommodation—as well as commercial facilities such as privately owned, nonresidential facilities such as factories, warehouses, or office buildings—to comply with the ADA Standards).

³⁷ 42 U.S.C. § 12182(a) states: "No 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

sometimes as an owner/lessor/lessee. A franchisor who does not own or lease the premises, nonetheless, may be liable for ADA violations if it exercises enough control to be considered an “operator.”

A. Operator-Designer Liability

A franchisor usually mandates some sort of assurance from a franchisee that its franchise location complies with the brand’s standards and characteristics, for example, (i) architectural layouts, (ii) approval of plans or changes to plans for new locations, (iii) approval of changes to existing locations, and (iv) compliance with a franchisor’s operating standards, including inspections to ensure compliance.³⁸

Courts remain split on the precise level of control over a franchise required to make a franchisor an “operator” under the ADA. Whether a particular franchisor may be held liable under the ADA as an operator often “is a question of fact, not law.”³⁹ In part, a franchisor’s liability depends on the parties’ respective agreements, especially the franchise agreements. Courts have held that a franchisor who does not design or construct its franchisees’ locations, and who has no ownership or leasehold interest in the property, is not liable under the ADA as an “operator.”⁴⁰ Generally, the rulings also hold that provisions in the agreements that give the franchisor rights to approve building plans or require the franchisee to comply with all laws, including accessibility laws, do not render the franchisor an “operator” under the ADA for Title III violations. Rather, “[a]n ‘operator’ must have a significant degree of control over the access-related aspects of the facility in question.”⁴¹

The seminal decision on this issue, *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995), held that the meaning of “operator” in the context of franchise agreements **turns on whether the franchisor “specifically controls the modification of the franchises to improve their accessibility to the disabled.”**⁴² Based on this reasoning, the court concluded that the franchisor in that case was not an operator even though the franchise agreement gave it “the right to set standards for building and equipment maintenance and to ‘veto’ proposed structural changes”⁴³ The Ninth Circuit in *Lentini v. Calif. Center for the Arts, Escondido* adopted the Fifth Circuit’s construction of the term “operator.”⁴⁴ While some circuits have yet to

of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

³⁸ Jonathan E Perlman et al., *IFA 47th Annual Legal Symposium, in THIS IS GOING TO COST ME WHAT? LESSONS LEARNED FROM RECENT ACCESSIBILITY CLASS ACTIONS BROUGHT UNDER THE AMERICANS WITH DISABILITIES ACT AGAINST BURGER KING, TACO BELL AND OTHER FRANCHISORS* 12–14 (2014).

³⁹ *Johnson v. Winchester Campbell Properties, LLC*, No. 18-CV-04153-VKD, 2018 WL 6619940, at *3 (N.D. Cal. Dec. 18, 2018)

⁴⁰ Perlman, *supra* note 38, at 13.

⁴¹ *Johnson v. Winchester Campbell Properties, LLC*, No. 18-CV-04153-VKD, 2018 WL 6619940, at *3 (N.D. Cal. Dec. 18, 2018) (citing *Lentini v. Calif. Center for the Arts, Escondido*, 370 F.3d 837, 849 (9th Cir. 2004).

⁴² *Neff*, 58.3d at 1066.

⁴³ *Id.* at 1068.

⁴⁴ 370 F.3d 837, 849 (9th Cir. 2004).

specifically address the point of franchisor liability under the ADA as an operator, most have sided with *Neff*, agreeing that the “relevant inquiry . . . is whether [the franchisor] **specifically controls** the modifications of the franchises to improve their accessibility to the disabled.”⁴⁵

The same reasoning also generally supports the conclusion that franchisors will not be subject to liability under the “failure to design and construct facilities in compliance with the ADAAG” provisions of the ADA, assuming that the franchisor’s role in the decision-making process is merely “a right to approve.”⁴⁶ As long as the franchisor does not dictate the actual design, and the agreements provide that the franchisee must retain its own professionals and ensure that the design and construction of the premises is compliant with accessibility laws, a franchisor will likely not be subject to Title III liability.⁴⁷

However, some courts have extended liability for a Title III violation under the “design and construct” provision of 42 U.S.C. § 12183 to franchisors, architects, and anyone else “who in a broad sense has had a significant hand in the design or construction of a deficient facility.”⁴⁸

For example, in *U.S. v. Days Inn of Am., Inc.*, the DOJ sued Days Inn of America for violations at a franchised location in Illinois, at which Days Inn had no ownership or leasehold interest.⁴⁹ The court held that, as a matter of law, Days Inn of America was liable for any accessibility violations at the hotel because it “designs and constructs hotels in that it carefully licenses and regulates and contributes to the planning of, and building of hotels”⁵⁰ Based on this decisions and cases that followed suit, it is possible that a franchisor without a property interest in the premises, can be liable for Title III ADA violations. Even in the majority of jurisdictions where ADA “operator” liability is more narrowly construed, franchisors may be subject to liability if they mandate or have significant control over the design or aspect of the place of public accommodation that causes or constitutes the ADA violation.

B. Lessor-Lessee Liability

A franchisor is automatically liable under Title III of the ADA if it leases a property or facility to its franchisee:

⁴⁵ *Neff*, 58 F.3d at 1063 (emphasis added); see also *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 Fed. Appx. 85, 91 (2d Cir. 2010) (relying on *Neff* to adopt the Title III definition of “operates” to include “control.”); *Lentini v. Calif. Center for the Arts, Escondido*, 370 F.3d 837, 849 (9th Cir. 2004) (same); *Emerson v. Thiel Coll.*, 296 F.3d 184, 189 (3rd Cir. 2002) (same); *Pona v. Cecil Whittaker’s, Inc.*, 155 F.3d 1034, 1036 (8th Cir. 1998) (same); *A.C. v. Taurus Flavors, Inc.*, 2017 WL 497765, at *2 (N.D. Ill. Feb. 7, 2017).

⁴⁶ Perlman, *supra* note 38, at 13.

⁴⁷ Perlman, *supra* note 38, at 13.

⁴⁸ Perlman, *supra* note 38, at 13.

⁴⁹ 997 F. Supp 1080 (C.D. Ill. 1998).

⁵⁰ *Id.* at 1083.

(b) Landlord and tenant responsibilities. Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.⁵¹

While Title III permits the franchisor and franchisee to allocate responsibility for complying with particular provisions of the regulation in the lease, “any allocation made in a lease or other contract is only effective as between the parties, and both the landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation.”⁵² As a result, not only should leases to franchisees specifically allocate responsibility for ADA compliance, the leases should include provisions requiring the franchisee/tenant to indemnify the franchisor/landlord for any liability arising from failure to comply with Title III. While indemnification provisions do not affect the franchisor/landlord’s liability under the ADA, nor immunize it from lawsuits, such contractual provisions provide recourse to cover any costs incurred.

If a franchisor or franchisee leases a premises from a third-party landlord, care should be taken to allocate responsibility for ADA compliance between the parties. “While compliance is often left to the tenant, especially in freestanding locations, liability in shared commercial locations such as shopping centers may be allocated to the landlord. For example, landlords frequently control entrance and egress points, parking lots, and access to public rights of way such as sidewalks.”⁵³

Finally, many jurisdictions permit a franchisee to terminate a franchise agreement based on material failures to disclose. Accordingly, it is conceivable that a franchisee could seek damages or termination of a franchise agreement based on the franchisor’s failure to disclose that its prototypical construction plans violate the ADA or state law accessibility standards.

III. Hot Accessibility Issues in Franchising

There are a seemingly infinite number of ways a place of public accommodation could impede access to someone who has a disability. In the franchise setting, a few accessibility issues give rise to most common drive-by or walk-in lawsuits.⁵⁴

⁵¹ 28 C.F.R. § 36.201(b)

⁵² TAM § III-1.20000

⁵³ Perlman, *supra* note 38, at 15.

⁵⁴ The Disability Rights Section of the Civil Rights Division of the DOJ has published a useful guide presenting many of these common violations. <https://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>.

A. Top 5 Violations that Trigger Drive-By ADA Lawsuits

1. Parking

The most common accessibility violations found in parking lots are incorrectly marked handicapped spaces. This incorrect marking could be in regard to the parking space itself, the aisle, or the signage.⁵⁵ Parking lots are also often deficient for having an inadequate number of handicapped spaces or for the spaces being improperly located.⁵⁶ Other common violations in regards to parking include improper slope and incorrect dimensions of the handicapped spaces and the route to the entrance.⁵⁷

2. Accessible Route

Often plaintiffs allege that accessible routes to the establishment are not in compliance with the ADA or state accessibility laws because the routes are missing signage, have an improper slope, or contain impediments.

3. Curb Ramps

Curb ramps also contain violations such as width or improper slope. Wheelchair users can tip over on non-flared sides of curb ramps and landings. Wheelchair users may also be unable to go up or down the ramp because there is not enough space to turn on a level surface, rendering the ramp unusable.

4. Doors

Two of the most common and easily avoidable violations with respect to doors include: (1) a door that is too difficult to open,⁵⁸ and (2) a door that closes too quickly. Additionally, door hardware that requires tight grasping, pinching, and twisting of the wrist is another common, yet easily curable violation.

5. Signage

Public accommodations often lack the proper signage, for example on outer doors. Examples of elements and spaces that should be identified with proper signage include accessible entrances when not all entrances are accessible (inaccessible

⁵⁵ See AADAG §502.6 (stating that parking space identification signs shall include the International Symbol of Accessibility and shall be 60 inches minimum above the finish floor or ground surface measured to the bottom of the sign).

⁵⁶ For every 25 parking spaces, there must be at least one accessible parking space. Both parking lots and parking structures are required to comply. AADAG §208.2.

⁵⁷ AADAG § 303 (the maximum slope in a parking lot is 1:48 inches in any direction).

⁵⁸ For all interior hinged doors, the force for pushing or pulling the door open may not exceed five pounds. ADAAG § 404.2.9 The ADA does not impose any requirement with respect to the maximum force necessary to open an exterior door. See ADAAG § 4.13.11(2)(a) (specifically reserving this question). According to California law, the maximum effort to operate doors shall not exceed 5 pounds (22.2 N) for exterior and interior doors, such pull or push effort being applied at right angles to hinged doors and at the center plane of sliding or folding doors. CB § 1133B.2.5.

entrances shall have directional signage to indicate the route to the nearest accessible entrance).

B. Top 5 Violations in Walk-In ADA Lawsuits

1. Customer Service Counters

A common violation arises when customer service counters are too high, or lack a sufficient clear space at a lower level.

2. Customer Seating/Tables

Accessible seating and tables must exist in each separate area of an establishment. For example, if a restaurant has a dining room, bar area, and an outdoor patio, each area must provide accessible and compliant seating.

3. Drinking Fountains

Drinking fountains are often too high to be used with ease by wheelchair users.

4. Bathrooms

Bathrooms can violate accessibility laws by having incorrect dimensions that make them difficult to use by wheelchair users. Also, often the mirrors and/or fixtures are not the correct height. Another accessibility law violation often takes place because pipes underneath bathroom sinks are not covered with insulation, as required to protect against contact.⁵⁹

5. Visual Alarms

Another common violation is a failure to have a visual component to a fire alarm system for the benefit of the hearing-disabled.

C. Kiosks & Touchscreens

As technology develops and provides exciting business opportunities, franchise systems and other places of public accommodation will have to monitor and adapt to how such technological developments create new accessibility issues.

One such technological advancement worth mentioning is the advent of the touch screen ordering system. A touch screen is a computer display system capable of reading the human touch, providing an efficient mechanism for a user to interact with the franchise system. Touchscreens, whether found on kiosks or soda fountains, are rapidly finding their way into many franchise systems. While touch screens provide an easier way for some to order products or interact with services, individuals who are

⁵⁹ ADAAG § 4.19.4 9 (“Hot water and drain pipes under lavatories shall be insulated or otherwise configured to protect against contact.”).

visually-impaired will often find them difficult, or impossible, to operate without audio feedback or a tactile keypad.

1. Kiosk ADA Litigation

For example, DVD rental kiosk company Redbox faced two class action lawsuits alleging that its DVD rental kiosks are not accessible to the visually impaired. The first case was filed in 2012 in the United District Court for the Northern District of California.⁶⁰ After two years of litigation and mediation, the parties entered into a California-wide class settlement. Under this settlement agreement, Redbox agreed to incorporate audio guidance technology, a tactile keypad, and other accessibility features into its DVD rental kiosks located in California; provide 24-hour telephone assistance at each kiosk; and pay \$1.2 million in damages.⁶¹

A second class action lawsuit was filed against Redbox in 2014 in the United States District Court for the Western District of Pennsylvania.⁶² This second lawsuit resulted in a nationwide settlement agreement under which Redbox would agree to provide at least one kiosk per retail location that was accessible to the blind, pay damages, and pay \$397,000 in attorneys' fees and costs.⁶³

2. Touchscreen ADA Litigation

More recently, sight-impaired plaintiffs brought three separate class actions in the United States District Court for the Southern District of New York against Moe's®, Walgreens®, and Five Guys®, because these entities all had inaccessible drink dispensers, the Coca-Cola Freestyle® machine.⁶⁴ While the restaurants identified in the Moe's® and Five Guys® cases were franchise systems, the plaintiffs did not name the franchisees as defendants. In both cases, plaintiffs alleged a nationwide policy against the franchisor for installing Coca-Cola Freestyle® machines at all restaurants.

In *Moe's*, the plaintiffs argued "because the [Coca-Cola] Freestyle machines lack 'adaptive features, such as a screen reader with audio description[s] or tactile buttons

⁶⁰ Complaint, *Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC*, No. 4:12-cv-00195-PJH (N.D. Cal. Jan 12, 2012), ECF No. 1.

⁶¹ See Joint Motion for Preliminary Approval of Settlement and Order and Order Granting Final Approval of Class Settlement and Dismissing Claims, *Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC*, No. C12-00195 PJH (N.D. Cal. 2014), ECF Nos. 73 and 85 (granting \$85,000 for kiosk testing, \$10,000 to each named plaintiff in damages, and \$800,000 for plaintiffs' attorney fees and costs).

⁶² Complaint, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Sept. 17, 2014), EDF No. 1.

⁶³ Joint Motion for Preliminary Approval of Class Action Settlement, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-02178-LPL (W.D. Penn. Nov. 24, 2015), ECF Nos. 29 and 30.

⁶⁴ "Freestyle machines are self-service, automated machines that permit customers to choose from more than 100 Coca-Cola beverages by using a touch-screen interface." *West v. Moe's Franchisor, LLC*, No. 15-cv-2846, 2015 WL 8484567, at *1 (S.D.N.Y. Dec. 09, 2015); see also Amended Complaint, *Gomez v. Burger King Corporation*, No. 12-21718 (S.D. Fla. July 18, 2012), ECF No. 30.

used to control commands' blind people are unable to use them independently."⁶⁵ Specifically, plaintiffs asserted that "they visited a single Moe's restaurant with a guide dog, requested assistance with the [Coca-Cola] Freestyle machine after purchasing a soda, and were denied assistance by Moe's employees."⁶⁶ Eventually, another customer assisted the plaintiffs.⁶⁷ The court dismissed the complaint noting that "[p]laintiffs' allegations hinge[d] on a single visit to a Moe's restaurant, where they received assistance from a customer, not a restaurant employee. From that isolated incident, no reasonable inference can be drawn that Moe's fails to train its employees to provide effective auxiliary aids and services."⁶⁸

Notably, the same plaintiffs in 2016 filed a class action lawsuit against McDonald's Corporation and several franchisees alleging that the Coca-Cola Freestyle® machines are not accessible and that the restaurants failed to provide auxiliary assistance to them on *multiple occasions*.⁶⁹ McDonald's filed a motion for judgment on the pleadings, however, the plaintiffs voluntarily dismissed the case presumably after receiving a payment.⁷⁰

Additionally, in *Boher v. Five Guys Enterprises, LLC*, a blind plaintiff visited a Five Guys® restaurant in San Marcos, California on at least two occasions.⁷¹ On both occasions, plaintiff paid for a fountain soda and was handed a cup to obtain a soda at the Coca-Cola Freestyle® machine.⁷² Although plaintiff was using a white cane, he was not offered, nor did he receive assistance in using the Coca-Cola Freestyle® machine, but instead he was forced to depend on his sighted companion to obtain the beverage.⁷³ The court granted plaintiff's motion for summary judgment holding that an "auxiliary aid or service was required."⁷⁴ The court also found that Five Guys® "discriminated against [the] Plaintiff in violation of 42 U.S.C. § 12182(b)(2)(A)(iii) because it did not offer a qualified reader to assist [the] Plaintiff to use the [Coca-Cola] Freestyle machine."⁷⁵ An interesting point to note is the court's language that "even if an exception applied, for example, if [p]laintiff had expressly requested that his sighted companion assist him instead of [d]efendant's employee, [d]efendant was **still obligated to offer an appropriate auxiliary aid or service.**"⁷⁶

⁶⁵ *Id.* at *1.

⁶⁶ *Id.* at *3.

⁶⁷ *Id.* at *1.

⁶⁸ *Id.* at *4.

⁶⁹ Complaint, *Dicarlo v. McDonald's Corp.*, No. 1:15-cv-02273-ALC-BCM (S.D.N.Y. Mar. 26, 2015), ECF No. 1.

⁷⁰ Stipulation of Voluntary Dismissal, *Dicarlo v. McDonald's Corp.*, No. 1:15-cv-02273-ALC-BCM (S.D.N.Y. June 9, 2016), ECF No. 63.

⁷¹ *Boyer v. Five Guys Enterprises, LLC*, No.: 15-cv-1417-L-JLB, 2018 WL 4680007, at *1 (S.D. Cal. Sept. 28, 2018).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at *5.

⁷⁵ *Id.* at *7.

⁷⁶ *Id.* at *5.

The Coca-Cola Freestyle® cases are an important illustration that franchisors can face Title III liability when their brand standards require franchisees to use electronic information technology that may be inaccessible to individuals with disabilities. In order to diminish potential liability faced by franchisors and franchisees, franchise systems should also consider ways to avoid these accessibility problems altogether, including designing machines with the visually-impaired in mind that contain voice-recognition software, tactile, or some other usable feature.⁷⁷ Lastly, franchise systems should also ensure that contracts and leases with vendors require that the vendors defend such suits, pay all fees, costs, and damages, and warranty that the equipment fully complies with all accessibility laws and regulations.⁷⁸

3. Streaming Video Litigation

In the late 1990s and early 2000s virtually all gasoline franchisors, including Amoco®, Shell®, BP®, ARCO ® and Chevron®, were sued in Title III ADA national class action lawsuits causing them to clean up the industry and ensure access to gasoline pumps (that were redesigned so that persons in wheelchairs could reach both the dispenser and credit card payment devices, as well as demolition and reconstruction of thousands of restrooms).⁷⁹

Just in the last year, a hearing-impaired plaintiff, Alexander Johnson, has filed a series of complaints (more than 20) in the Southern District of Florida against gasoline station franchisees, including Marathon®, Chevron®, and Mobil® stations because the stations do not have closed captioning on the video screens streaming advertising and news on the gasoline dispensers.⁸⁰ The plaintiff complained that he cannot hear the news and commercials being streamed while he fills his tank. However, the defendants in these cases are unable to remedy the alleged violations because the manufacturer does not provide a closed caption option.

Given defendant's technical inability to cure the issue, plaintiff's counsel settles these cases by demanding a pay-off amount, with no remediation requirement (since none is possible). Defendants pay the demand, since it is far less expensive than litigating.

D. Virtual and Website Accessibility Barriers

Unlike most physical barriers, the Department of Justice has not issued ADA Standards for Accessible Design for designing accessible websites. As a result, what constitutes adequate website accessibility remains uncertain. Nonetheless, sight-impaired plaintiffs and groups have brought hundreds of lawsuits alleging that websites

⁷⁷ Perlman, *supra* note 38, at 62.

⁷⁸ Perlman, *supra* note 38, at 62.

⁷⁹ Perlman, *supra* note 38, at 62; *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co., et al.*, 211 F.R.D. 457 (S.D. Fla. 2002); *Greener v. Shell Oil Co.*, No. 98-2425 (N.D. Cal. 1988); *Lawson v. Chevron USA Inc.*, No. 99-0529 (N.D. Cal. 1999).

⁸⁰ See e.g., Complaint, *Johnson v. RSJ Investments, Inc. d/b/a RSJ Chevron*, No. 1:18-cv-24431-CMA (S.D. Fla. Oct. 24, 2018), ECF No. 1; Complaint, *Johnson v. M.C. Energy, L.L.C d/b/a Marathon*, No. 0:19-cv-60893-RKA (S.D. Fla. Apr. 4, 2019), ECF No. 1.

that cannot be read by certain screen reading programs are per se inaccessible and in violation of Title III of the ADA. The most well-known developer of web accessibility standards is the World Wide Web Consortium. It continually issues evolving standards, the most recent one being known as the Web Content Accessibility Guidelines (WCAG) 2.1 (released 2019). The following sets forth the current status of regulations, or rather lack thereof, and summarizes the standards and others concepts that are available for evaluating and ensuring website accessibility and minimizing exposure to surf-by ADA claims.

1. Current ADA Website Accessibility Regulations

The Department of Justice began working on agency guidance for accessible website design more than fifteen years ago. It has been consistent in its position that websites are subject to ADA regulation, and even issued an advanced notice of proposed rulemaking (ANPRM) for public comment. After pushing back the target date for issuing agency guidance multiple times, the Department of Justice officially withdrew its ANPRM in early 2018.⁸¹ The DOJ never has issued any regulations establishing standards for accessible website design.⁸²

On September 25, 2018, the Department of Justice responded to a bi-partisan letter from U.S. House of Representatives requesting clarity on “unresolved questions about the applicability of the ADA to websites,” which have “created a liability hazard that directly affects businesses in our states.” The Department of Justice punted the ball right back:

The Department first articulated its interpretation that the ADA applies to public accommodations’ websites over 20 years ago. This interpretation is consistent with the ADA’s Title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities. Additionally, the Department has consistently taken the position that the absence of a specific regulation does not serve as a basis for noncompliance with a statute’s requirements. Absent the adopting of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA Given Congress’ ability to provide greater clarity through the legislative process, we look forward to working with you to continue these efforts.

While the Department of Justice does not appear to believe that noncompliance with WCAG necessarily constitutes a violation of the ADA, its failure to adopt or even identify any other standard leaves the status quo unchanged, meaning that courts and

⁸¹ <https://www.manatt.com/Manatt/media/Documents/Articles/DOJ-Notice-of-Withdrawal.pdf>

⁸² John M. Gore, Acting Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice, Notice of withdrawal, Dec. 15, 2017, *available at* <https://federalregister.gov/d/2017-27510>.

litigants will likely continue to rely on WCAG to evaluate the accessibility of websites under the ADA.

Litigants have generally been unsuccessful in asserting that the absence of guidelines from the Department of Justice is a defense to website accessibility claims. Earlier this year, in *Robles v. Domino's Pizza LLC*, the Ninth Circuit sided with a majority of other courts holding that the lack of guidelines was not an obstacle to a plaintiff's website accessibility claim.⁸³ The court held, "[w]hile we understand why Domino's wants DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations."⁸⁴ Deferring to the Department of Justice, the court agreed that the lack of guidance could be explained by an intentional "desire to maintain . . . flexibility."⁸⁵

Many observers believe that the Department of Justice will inevitably adopt some version of WCAG or something similar. However, in the absence of a regulation, courts and parties will likely continue to wrangle over the applicable standard for accessible website design.

2. WCAG as a Potential Accessibility Standard

Many regard WCAG as the "leading standard" for accessible website design.⁸⁶ WCAG Version 2.0 was published in 2008, and Version 2.1 was released last year, which adds an additional 17 success criteria.⁸⁷ There are three levels of WCAG compliance: A, AA, and AAA. The general consensus is that AA is a sufficient, although perhaps not necessary, level for compliance with the ADA.⁸⁸ The following will summarize the four "principles" of WCAG and identify some other general features and concepts that are important for website accessibility, which can help reduce the likelihood of being targeted by a surf-by lawsuit.

a. WCAG Principles

WCAG is comprised of four "Principles," which are that websites must be (1) perceivable, (2) operable, (3) understandable, and (4) robust.⁸⁹ Each principle is comprised of two to four "Guidelines," of which there are a total of thirteen.⁹⁰ Each guideline, in turn, contains a number of "Success Criteria," usually around three to nine, that are associated with and listed in order of their respective compliance "Level:" A, AA,

⁸³ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 908 (9th Cir. 2019).

⁸⁴ *Id.* (emphasis in original).

⁸⁵ *Id.*

⁸⁶ *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 381 (E.D.N.Y. 2017) ("The parties' described this as the leading and only existing standard for visually impaired internet access.").

⁸⁷ World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI), Web Content Accessibility Guidelines (WCAG), Overview, <https://www.w3.org/WAI/standards-guidelines/wcag/>.

⁸⁸ *Blick Art Materials, LLC*, 286 F. Supp. 3d at 381 ("The general consensus of experts is that Level AA is the appropriate level for the vast majority of organizations to pursue.").

⁸⁹ W3C WAI, WCAG, WCAG 2.1 at a Glance, <https://www.w3.org/WAI/standards-guidelines/wcag/glance/>.

⁹⁰ *Id.*, *What is in the WCAG 2 Documents*, <https://www.w3.org/WAI/standards-guidelines/wcag/#whatis2>.

or AAA.⁹¹ In order to achieve a compliance level for a particular guideline or principle, all of the success criteria for the level and below must be satisfied.⁹²

WCAG is available online and most reference the “Quick Reference” to review compliance criteria.⁹³ However, there are also more technical “Technique” resources available for designers,⁹⁴ as well as “Understanding” publications available for those who are interested in the reasoning that supports each guideline and success criteria.⁹⁵

Generally speaking, the guidelines provide a sufficient level of detail for those who need to understand ADA website accessibility compliance issues, but are not website accessibility consultants or designers. Some guidelines involve discrete and identifiable criteria (e.g., embedding images and links with appropriate text, captioning audio, titling), while others require greater amounts of professional discretion and overhaul to implement (e.g., overall website design, layout, or code to improve navigability, predictability, or compatibility with assistive software). The following is a general summary of the four WCAG principles, and the more salient guidelines and success criteria within them.

The “Perceivable” principle requires that “[i]nformation and user interface components must be presentable to users [with disabilities] in ways they can perceive.”⁹⁶ This principle generally makes websites more accessible to users with visual and auditory disabilities. It requires that websites provide text alternatives for non-text content (i.e., alt-text) for functionality with screen readers and captions and other alternatives for audio multimedia.⁹⁷ It also requires that content be presentable in different ways, including through assistive technologies, without losing meaning,⁹⁸ and by making it easier for users to see and hear the website content, such as by increasing contrast and text size.⁹⁹

The “Operable” principle requires that “[u]ser interface components and navigation must be operable” for users with disabilities.¹⁰⁰ This principle generally makes websites more accessible to users with visual and motor-skill related disabilities. It requires that all website functionality be available from a keyboard, without use of a mouse, such as through navigation by use of the tab and arrow keys to focus on and select buttons and options, without resulting in a “keyboard trap,” a common problem where the focus cannot be moved back from its current selection.¹⁰¹ It also requires that websites provide enough time to read and use content,¹⁰² avoid content that could

⁹¹ *Id.*

⁹² *Id.*, WCAG, WCAG 2.1 at a Glance, <https://www.w3.org/WAI/standards-guidelines/wcag/glance/>.

⁹³ *Id.*, How to Meet WCAG 2 (Quick Reference), <https://www.w3.org/WAI/WCAG21/quickref/?versions=2.1> (hereinafter, WCAG).

⁹⁴ *Id.*, Techniques, <https://www.w3.org/WAI/WCAG21/Techniques/>.

⁹⁵ *Id.*, Understanding, <https://www.w3.org/WAI/WCAG21/Understanding/>.

⁹⁶ WCAG § 1.

⁹⁷ *Id.* § 1.1.

⁹⁸ *Id.* §§ 1.2, 1.3.

⁹⁹ *Id.* § 1.4

¹⁰⁰ *Id.* § 2.

¹⁰¹ *Id.* § 2.1.

¹⁰² *Id.* § 2.2.

cause seizures,¹⁰³ and provide help navigating and finding content, for example, through appropriate titles for pages and links.¹⁰⁴

The “Understandable” principle requires that “[i]nformation and the operation of user interface must be understandable” to users with disabilities.”¹⁰⁵ This principle generally makes websites more accessible to users with visual and cognitive disabilities. It requires that text be readable and understandable by assistive technologies, for example, by programmed coding that indicates the language of text for use with a screen reader.¹⁰⁶ It also requires that websites make content appear and operate in predictable ways,¹⁰⁷ and it helps users avoid and correct mistakes by providing accessible error messages and instructions for correcting them.¹⁰⁸

The “Robust” principle requires that “[c]ontent must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.”¹⁰⁹ This principle generally makes websites more accessible to users that rely on assistive technologies, such as screen readers. It requires that elements of a website be programmed with coding that helps determine their names and roles in the website’s operation, so that users can interact with them through their assistive technologies.¹¹⁰

b. WCAG Design Features & Prioritization

Understanding, implementing, and verifying compliance with WCAG’s levels, principles, guidelines, and success criteria can be challenging, which is why it usually requires the assistance of a consultant. Even if WCAG Level AA compliance is out of reach, there are a few other efficient and less costly ways to provide interactive features and prioritize important content that can improve website accessibility and afford valuable defenses to website accessibility claims. This is particularly true for surf-by claims, where the targets are often the lowest hanging fruit. For small businesses that cannot afford to hire an experienced programmer to design an accessible website, implementing and prioritizing the following features and content is one way businesses can reduce exposure to website accessibility claims.

At the outset, all websites should provide a link for accessibility assistance, including at least an email address, but ideally a telephone number or accessible chat option, for individualized help and access to the businesses’ goods and service. These types of links commonly inquire, “are you having trouble using this page?” Earlier this year, the court in *Robles v. Domino’s Pizza, LLC* left open the possibility that a telephone line could be an acceptable alternative to ordering goods through an accessible website or app, assuming that the defendant was able to prove its

¹⁰³ *Id.* § 2.3.

¹⁰⁴ *Id.* § 2.4.

¹⁰⁵ *Id.* § 3.

¹⁰⁶ *Id.* § 3.1.

¹⁰⁷ *Id.* § 3.2.

¹⁰⁸ *Id.* § 3.3.

¹⁰⁹ *Id.* § 4.

¹¹⁰ *Id.* § 4.1.

effectiveness.¹¹¹ In a similar vein, while it might not provide a summary judgment defense to a claim, websites can provide a link for accessibility feedback to solicit an interactive dialogue. These types of links commonly inquire, “do you have feedback about using this page?”

Businesses can test their websites for compliance with WCAG using automated testing software. This is the same software many surf-by plaintiffs employ to show objective failures with targeted websites. There are many limitations, however, with automated testing, since “[a]utomated scanning tools cannot apply human subjectivity, and therefore, either produce excessive false positives or—when configured to eliminate false positives—test for only a small portion of the requirements.”¹¹²

c. Recent Website Decisions

Robles v. Domino’s Pizza, LLC was filed in the Central District of California in September of 2016.¹¹³ The case centered on the inability of a blind plaintiff to access Domino’s website or mobile app to order pizzas online using screen reading software.¹¹⁴ In March 2017, District Judge Otero dismissed the lawsuit pursuant to the primary jurisdiction doctrine, which allows courts “to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue with the special competence of an administrative agency.”¹¹⁵ The district court called on Congress, the Attorney General, and the DOJ to set minimum web accessibility standards. Despite the fact that the DOJ announced its intention to provide these web accessibility regulations in 2010,¹¹⁶ the DOJ has not issued a regulation and apparently has no intention of doing so.¹¹⁷

The Ninth Circuit reversed the district court’s ruling and remanded the case to proceed to trial to decide whether Domino’s website and mobile app provided the blind with effective communication and full and equal enjoyment of its products and services.¹¹⁸ The Ninth Circuit held that the lack of web accessibility guidelines does not raise due process issues, the primary jurisdiction doctrine does not apply, and Title III of the ADA applies to websites and mobile applications that facilitate access to the goods and services of a physical place of public accommodation.¹¹⁹

¹¹¹ 913 F.3d 898, 908 (9th Cir. 2019).

¹¹² See <https://www.section508.gov/test/testing-overview>

¹¹³ *Robles v. Domino’s Pizza, LLC*, No.: cv-16-06599 SJO (Spx), 2917 WL 1330216, at *6 (C.D. Cal. Mar. 20, 2017).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Nondiscrimination on the Basis of Disability, 75 Fed. Reg. 43460-01 (July 26, 2010) (issuing Advance Notice of Proposed Rulemaking (ANPRM) to “explor[e] what regulatory guidance [the DOJ] can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible”).

¹¹⁷ The DOJ withdrew its ANPRM on December 26, 2017. See Nondiscrimination on the Basis of Disability, 82 Fed. Reg. 60932-01 (Dec. 26, 2017).

¹¹⁸ *Robles v. Domino’s Pizza, LLC*, No. 2:16-cv-06599-SJO-FFM (9th Cir. 2019).

¹¹⁹ *Id.*

The Ninth Circuit also held that Title III of the ADA applies to Domino’s website and mobile app, even though customers “predominately access them away from the physical restaurant”:

The statute applies to the services of a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring of the premises of a public accommodation would contradict the plain language of the statute.¹²⁰

The court reasoned that the alleged inaccessibility of Domino’s website and mobile app impeded access to goods and services of the physical pizza franchises, which are places of public accommodation.¹²¹

The court cited its prior decision, *Weyer v. Twentieth Century Fox Film Corp.*, where it adopted the nexus requirement, permitting Title III ADA claims to proceed only if there were “some connection between the good or service complained of and an actual physical place.”¹²² Because Domino’s customers use the website and mobile app to locate nearby Domino’s locations and order custom pizzas for “at-home delivery” or “in-store pickup,”¹²³ a nexus exists between Domino’s website and apps and its physical restaurants.¹²⁴

Significantly, the Ninth Circuit panel did not address whether the ADA covers websites and apps “where their accessibility does not impede access to the goods and services of a physical location.”¹²⁵ Therefore, businesses that operate solely through the internet may still be under no obligation to make their websites accessible to the disabled.

The court also left open the question of whether a telephone number that customers using screen-reader software could dial and receive assistance would fall “within the range of permissible options afforded under the ADA.”¹²⁶ The website and mobile app in *Robles* began displaying a telephone number that customers using screen-reading software could dial to receive assistance only **after** the filing of the lawsuit. The Ninth Circuit stated in a footnote that “the mere presence of the phone number, **without discovery on its effectiveness**, is insufficient to grant summary judgment in favor of Domino’s—even though plaintiff had not argued that it needed discovery.”¹²⁷

¹²⁰ *Id.* at 11 (citing *Nat’s Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (emphasis in original) (internal citations omitted)).

¹²¹ *Id.* at 12.

¹²² 198 F.3d 1104, 1114 (2000).

¹²³ *Robles*, No. 2:16-cv-06599-SJO-FFM (9th Cir. 2019).

¹²⁴ *Id.*

¹²⁵ *Id.* at 12.

¹²⁶ *Id.* at 9, n. 4.

¹²⁷ *Id.* (emphasis added).

The court may have been influenced in this regard by Plaintiff's affidavit claiming that no one immediately answered when he called the phone number that the website listed on its opening page for sight-impaired persons to use when seeking assistance. Accordingly, the Ninth Circuit would likely find that a phone number on a website or mobile app that customers using screen-reading software could dial to receive assistance under the ADA, is sufficient if it is manned at all times.

In 2017, the United States District Court for the Southern District of Florida became the first court to issue a final decision on web accessibility after a trial.¹²⁸ The court concluded that Winn-Dixie violated the ADA because the inaccessibility of its website denied the visually-impaired plaintiff the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its customers who are not visually-impaired. The court granted the plaintiff injunctive relief and required Winn-Dixie to do the following: (1) undertake remedial measures to conform its website to the WCAG 2.0 Guidelines; (2) require any third-party vendor that interfaces with its website to also be fully accessible to the disabled by conforming with WCAG 2.0 Guidelines; (3) provide mandatory web accessibility training to all of Winn-Dixie's employees who write or develop the programs, code, or who publish final content on Winn-Dixie's website; and (4) conduct automated accessibility tests of its website at least once every three months to identify any instances where the website is no longer in compliance with the WCAG 2.0 Guidelines.¹²⁹

The verdict in *Gil v. Winn-Dixie Stores, Inc.* is on appeal to the Eleventh Circuit. Winn-Dixie Stores, Inc. is challenging the district court's pretrial ruling that Winn-Dixie's website is a "place of public accommodation," either independently or as a nexus to a physical location, and that the named plaintiff had standing to bring his claim.¹³⁰

d. The Importance of Prioritizing WCAG Compliance for Certain Types of Website Content

Website accessibility cases have shown that some types of content can be more important than others. As a result, on the way to WCAG Level AA compliance, it may be worthwhile to prioritize some types of content over others, particularly certain legal content, such as privacy policies. When a privacy policy sets forth notices and user preferences that are required by statute, such as the California Consumer Privacy Act or Europe's General Data Protection Regulation, some plaintiffs have argued that the privacy policy's inaccessibility violates those laws.¹³¹

Similar reasoning can be extended to a website's general terms of use, Digital Millennium Copyright Act and copyright policies, arbitration agreements, and product warranties.¹³² Some plaintiffs have argued that they are not bound by the typical "clickwrap" or "browsewrap" rules for forming contracts that might otherwise bind non-

¹²⁸ *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

¹²⁹ *Id.*

¹³⁰ *Gil v. Winn-Dixie Stores, Inc.*, No. 17-13497 (11th Cir. 2017).

¹³¹ See *supra* § 1.C, example demand letter.

¹³² *Nevarez v. Forty Niners Football Co., LLC*, 2017 WL 3492110, at *1 (N.D. Cal. Aug. 15, 2017).

disabled users. For example, in *Nat'l Fed'n of the Blind v. Container Store, Inc.*, the court refused to enforce an arbitration agreement because “[a] blind customer would not be able to see the terms on the screen when he/she was given an opportunity to review them and therefore the customer also would not know to ask for them to be read aloud.”¹³³ Because these issues could give rise to claims under specific statutes or contracts, it is worthwhile to prioritize the accessibility of such legal content.

In addition to legal content, other content may be worthy of prioritization when it provides a possible reasonable accommodation or alternative to the website, such as a “Chat now” or “Contact us” feature. Similarly, content necessary to purchase products or services has been the focus of website accessibility claims, such as product configurators and selectors, product descriptions, pricing information, and purchasing forms.¹³⁴ It may also be worthwhile to prioritize content for core services provided by the website, such as login screens, account settings, email preferences, and CAPTCHA screeners. All of the foregoing could be distinguished from pure marketing content, which would be a lower priority.

Finally, there are general criteria that can be used to prioritize content, for example, whether the content receives high traffic, contains issues that are repeated throughout the website, or will take a shorter timeframe to remediate. It may also make sense to focus on issues that will have the greatest impact on the most likely disabilities that affect website interface and operation, such as screen reader functionality for users with visual disabilities, audio captions for users with auditory disabilities, keyboard use for users with motor-skill related disabilities, and navigability for users with cognitive disabilities.

Many of these concepts sound abstract because they are far more subjective than the standards applicable to physical barriers. At first glance, WCAG, its levels, and its “success criteria” may seem like a fairly objective way to measure website accessibility. In reality, however, measuring website accessibility will never be as clear cut as counting parking spaces, measuring the height of a mirror, or the angle of a ramp. Websites develop over time, their content is dynamic, and their design features are interrelated, with changes to one area sometimes inadvertently impacting the functionality of another. Some WCAG guidelines are objective, such as the use of alt-text, while others are subjective, such as whether headings, labels, links, and other features adequately and predictably allow disabled users to navigate a website.

Ultimately, there is no authority that provides concrete direction on how to prioritize website accessibility with respect to specific content. This is likely because content varies considerably from website to website. Most observers provide advice about prioritizing accessibility based on specific coding issues and design concepts that are more universal from website to website. While this advice can be provided generally, assistance from someone with knowledge of website design is necessary to

¹³³ 2016 WL 4027711 at *1 (D. Mass. July 27, 2016).

¹³⁴ See, e.g., *Honeywell v. Harihar Inc*, No. 218CV618FTM29MRM, 2018 WL 6304839, at *2 (M.D. Fla. Dec. 3, 2018) (“She was unable to independently ascertain the accessible features and, as a result, was deterred from patronizing the motel.”).

provide more specific advice. Accordingly, the best way to improve website accessibility is to retain a qualified website accessibility consultant.

IV. Minimizing Exposure to Serial ADA Claims

The best way to avoid and minimize exposure to serial ADA claims is to have accessible buildings and websites, and when that fails, have someone to hold responsible. Most franchisors contractually place the responsibility for ADA compliance on their franchisees. Since accessible design can be a challenging and expensive undertaking, many involved with the ownership or operation of public accommodations rely upon the expertise of professionals, who should be contractually required to stand by their work and provide representations, warranties, and indemnification. Those with exposure to ADA claims should also develop policies promoting and requiring compliance. And when drive-by and surf-by claims inevitably arise, arbitration agreements can also sometimes serve as a way to control exposure by providing a predictable method of dispute resolution. The following will discuss common risk allocation strategies, features of ADA compliance policies, and arbitration agreements.

A. Risk Allocation

Given the ADA's strict liability and technical requirements for compliance, the principle strategy in minimizing exposure to ADA claims is risk allocation. This can be accomplished through the franchise agreement, as well as whatever service agreements are negotiated with consultants, architects, contractors, programmers, and design professionals. Finally, insurance can control exposure to ADA claims, although it is important to review, negotiate, and procure policies carefully to ensure coverage. The three groups that franchisors can allocate risk to are franchisees, professionals, and insurers.

1. Franchisees

The franchise agreement should always include a provision requiring the franchisee to indemnify the franchisor for liability arising from the operation of the franchise. This provision should have language broad enough to include accessibility claims, as the intention of the parties with respect to indemnification will be ascertained from the "clear and explicit language" of the contract.¹³⁵ Indemnification agreements are strictly construed in many jurisdictions. Accordingly, the language must be crystal clear.¹³⁶ When drafting an indemnification provision, it is important to consider the types of potential accessibility claims and damages, the entities entitled to indemnification, and the obligations of the indemnitor.

With respect to accessibility claims, an indemnification provision should cover claims under both the ADA and state accessibility laws, claims by private litigants as well as investigations by regulatory agencies, compensatory, statutory, and punitive damages, and the costs of remediating violations, removing barriers, providing auxiliary

¹³⁵ *Signature Flight Support Corp. v. Am. Trans Air, Inc.*, No. 8:07 CV 2219 T24 TGW, 2010 WL 883643, at *3 (M.D. Fla. Mar. 5, 2010); *Cont'l Heller Corp. v. Amtech Mech. Servs., Inc.*, 53 App., 4th 500, 504 (1997); *Hader v. St. Louis Sw. Ry. Co.*, 207 Ill. App. 3d 1001, 1011, 566 N.E.2d 736, 742 (1991).

¹³⁶ *Id.*

aids and services, reasonable alternative accommodations, expert surveys, consultants, and attorneys' fees. It is a good practice for the indemnification provision to expressly require the franchisee to indemnify the franchisor for claims under the ADA and state accessibility laws. The indemnification provision should also expressly cover not only damages from accessibility demands and lawsuits, but also attorneys' fees and costs, including expert surveys and remediation to the extent the franchisor, in its discretion, determines it must go into the premises and remediate the barriers itself in order to minimize liability where it is a named defendant.¹³⁷

Given the volume of lawsuits plaintiffs file, serial ADA complaints are often sloppy in identifying appropriate defendants. As a result, the indemnification provision should apply broadly to the franchisor as well as its affiliates, parents, officers, board members, owners, subsidiaries, representatives, successors, and assigns. The language of the indemnification provision should also be as broad as possible in terms of the stages of litigation that are covered, including pre-suit expenses, the lawsuit, as well as any appeals. Lastly, the indemnification provision should state that the franchisee will indemnify the franchisor regardless of the nature of the claims, including for example, if the plaintiff alleges that the franchisor's policies or practices lead to systematic noncompliance.

However, franchisors will probably wish to exclude website and mobile app accessibility claims from the indemnification provisions, as the websites and mobile apps are often created and controlled by the franchisor for use by the franchisee's customers. The franchisor should accept liability for this area, which is actually under its complete control, as it is best able to ensure consistent access on all of its web platforms.

The indemnification provision should either give the franchisor the option to defend the ADA lawsuit itself, and be reimbursed for the expense of the litigation, or tender the entire action to the franchisee at the franchisee's expense. However, this second option should only be accepted by the franchisor if the ADA lawsuit targets only one location or locations owned by the same franchisee. If the indemnification provision requires the franchisee to defend the franchisor, the provision must permit the franchisor to select its own counsel at the franchisee's expense. This way, the franchisor will obtain the legal benefits that accompany a duty to defend, but can also argue independently and forcefully that it was not involved in the ownership or operation of the non-compliant public accommodation. For some systems, it may also make sense for the franchisee to specifically agree to cooperate with the defense by allowing the franchisor to enter the premises, remove any offending barriers itself, and recover the costs of doing so from the franchisee.

An indemnification provision should also be accompanied by the franchisee's agreement to comply with all applicable state and federal laws, including specifically compliance with the ADA and ADA Accessibility Guidelines, as well as state and local accessibility requirements. The franchise agreement should further provide that the franchisee disclaims any assistance from the franchisor in designing its location for

¹³⁷ Perlman, *supra* note 38, at 27 (citing Kotel & Weirich, p. 36).

accessibility, and assumes all responsibility for ensuring ADA compliance, including hiring their own architect or consultant to verify the compliance of their build-out. Any lease between the franchisor and franchisee should also provide similar indemnification and compliance terms. Additionally, both the prototypes and the franchise agreements should make clear the franchisee is exclusively responsible, and obligated, to ensure that the location is fully accessible and in compliance with all applicable accessibility laws and regulations.

Certain policies and procedures, such as requirements that franchisees use centralized reservation systems that may not be ADA compliant, can give rise to franchisor liability. However, if a franchisor can show it is not the system that is the problem, but instead the franchisee's operation of the system that caused the violation, such liability can be shifted to the franchisee.¹³⁸ Therefore, if the franchisor's policies and procedures are crafted carefully to ensure ADA compliance, ultimate financial and operational responsibility for compliance can likely be shifted to the franchisee through the franchise agreement.

Finally, franchise agreements usually require the franchisee to maintain insurance of certain types and amounts, depending on the type of franchise system. While most commercial general liability insurance policies now exclude coverage for accessibility claims, coverage can still exist under some specialty lines such as errors and omissions and employment practices liability coverage. As a result, it is still a good practice for the franchise agreement to require that the franchisee name the franchisor and its subsidiaries and affiliates as additional insureds on any policies obtained by the franchisee in connection with the ownership or operation of the franchise.

When selecting insurance, it is important to ensure that the policy actually covers accessibility claims. Coverage exists in a number of types of policies, including business insurance policies, commercial general liability policies, and umbrella policies.¹³⁹ However, franchisors should make sure to examine the insurance policy language closely, especially exclusions, as insurance policies vary greatly.

Insurance policies may include language that the insurance company "shall pay on behalf of the **Insureds** all **Loss** for which the **Insureds** become legally obligated to pay on account of any **Claim** . . . Loss is defined as:

[T]he total amount which the **Insureds** become legally obligated to pay on account of each Claim and for all Claims reported during the **Policy Period** . . . for [a **Wrongful Discrimination Act** for which coverage applies, including but not limited to damages . . . judgments, pre-judgment and post-judgment interest, settlement, and **Defense Costs**."

Franchisors have in the past been able to use this language to argue that insurance policies cover ADA lawsuits. However, many insurance companies have ceased including this language as to not have to cover ADA lawsuits. If franchisors have

¹³⁸ See *Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091 (D. Colo. 2000).

¹³⁹ Perlman, *supra* note 38, at 28.

any bargaining power with their insurance carrier, such a provision would be an important one to add.

2. Professionals and Vendors

The ADA has resulted in a host of professional services related to accessibility design, surveys and audits, consultation, and expert witnesses. There are also architects, designers, contractors, and programmers who profess expertise in designing and building physical and virtual spaces that are accessible and compliant with the ADA. These professionals and vendors can be expensive, but it is money well spent so long as they are backed up by enforceable assurances from those who provide them.

Whether the professional is an architect, construction contractor, web designer, or accessibility consultant, all agreements for such services should include representations that the finished product and services rendered will be ADA compliant. With respect to web and app designers, the contract should expressly warrant and guaranty that the website and app will be fully compliant with the latest WCAG version. It should also discuss the cost and terms for upgrading to comply with future WCAG versions, it should mandate beta testing schedules and required results, and the agreement should include full indemnification to the franchisor-franchisee for all claims asserting that the website or app is not fully compliant, including attorneys' fees, costs, damages, etc. They should also provide a warranty for defects and subsequently discovered accessibility violations, and when the work and services are complete, provide a certification to that effect. Accessibility design is a competitive industry and so buyers should expect to be able to get these sorts of assurances, and if not, look for another vendor who will provide them.

Finally, service agreements should contain indemnification and defense provisions equally broad to those discussed above for the franchisee. When a vendor assumes responsibility for designing and building a physical or virtual space that is accessible and compliant with the ADA, those vendors should also be expected to indemnify the owner or operator from future claims. This includes architects and construction contractors of physical spaces, and web designers and programmers of virtual spaces, as well as those who supply the underlying platforms upon which they operate, such as e-commerce platforms for online sales and hotel reservation systems.

Surprisingly, however, some courts have found agreements to indemnify liability under the ADA unenforceable. For example, in *Equal Rights Center v. Niles Bolton Ass.*, the Fourth Circuit held that “the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity” because “[a]llowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws.”¹⁴⁰ These cases

¹⁴⁰ 602 F.3d 597, 602 (4th Cir. 2010); see also *S & R Dev. Estates, LLC v. Town of Greenburgh, New York*, 336 F. Supp. 3d 300, 311 (S.D.N.Y. 2018) (“state law procedures cannot be used to circumvent Congress's regulatory scheme.”);

Downing v. Osceola Cty. Bd. of Cty. Commissioners, 2017 WL 5495138 at *6 (M.D. Fla. Nov. 16, 2017) (“Both the ADA and the Rehabilitation Act would be undercut by allowing the County to shield itself from liability through indemnification.”).

seem motivated by the general principle prohibiting a party from obtaining indemnification for its own negligence or statutory responsibilities. They ignore the fact, however, that most owners and operators of public accommodations lack the expertise to design accessible buildings and websites, and so it should be permissible and even desirable to outsource the work and place the burden of compliance on the person performing it.

Other courts have adopted a more favorable view of allocating risk for ADA accessibility violations. In *City of Los Angeles v. AECOM Servs., Inc.*, the Ninth Circuit agreed that while it may be improper to allow a complete “shift of liability to a party lacking the power to remedy the violation,” it also explained that “the most a [defendant] may be able to do in furtherance of its duties under the respective acts may, in many situations, be to expressly contract for compliance,” which it pays for.¹⁴¹ “From there, the entity best situated to ensure full compliance may well be the contractor tasked with designing or constructing the [building] in question, and precluding contract clauses for contribution reduces a contractor’s incentives to do so.”¹⁴² To the extent indemnification is deemed inconsistent with the ADA’s non-delegable duties, contribution claims for violations of the other party’s representations and warranties may serve as an acceptable substitute for complete indemnification.¹⁴³

Accessibility design professionals typically carry their own professional liability insurance. As a result, the service agreement should require the professional to name the client as an additional insured on its professional liability policy. The professional may be reluctant to do so because she would prefer not to have a third-party file a claim that could impact her premiums. However, the costs of these additional insured endorsements are usually negligible because in their absence the client simply sues the professional and the insurer needs to assume the defense anyway. If the professional will not provide the additional insured endorsement, again, look for another vendor who will.

3. Insurers

The final group to whom those facing ADA claims can turn is insurance companies. Initially, some insureds were able to obtain coverage for ADA claims under their commercial general liability (CGL) insurance policies’ coverage for “personal and advertising injury,” which applied to injuries arising from “wrongful eviction,” “invasion of privacy,” and sometimes discrimination.¹⁴⁴ Otherwise, insureds have been generally

¹⁴¹ 854 F.3d 1149, 1160 (9th Cir. 2017).

¹⁴² *Id.*

¹⁴³ *Shaw v. Cherokee Meadows, LP*, 2018 WL 3474082, at *2 (N.D. Okla. July 19, 2018) (“The court is persuaded by the Ninth Circuit’s reasoning, and concludes that the FHA, ADA, and Rehabilitation Act do not preempt contribution crossclaims.”); *United States v. Quality Built Const., Inc.*, 309 F. Supp. 2d 767, 779 (E.D.N.C. 2003) (“Defendants hired Hite for its architectural expertise to perform design services for the interiors of the units. It appears that Hite had an independent obligation to perform competently and fulfill the terms of its contract. *See Baker, Watts & Co.*, 876 F.2d at 1108. Therefore, the Court denies summary judgment with respect to these distinct state law claims which may allow for some form of contribution from Hite.”).

¹⁴⁴ *Trammell Crow Residential Co. v. Virginia Sur. Co.*, 643 F. Supp. 2d 844, 850 (N.D. Tex. 2008) (“The endorsement provides that “[p]ersonal injury” means injury, other than “bodily injury,” arising out of one or

unsuccessful in obtaining coverage for ADA claims under the other CGL coverage sections because the claims do not involve “bodily injury” or “property damage” and accessibility violations are not usually regarded by courts as accidental “occurrences.”¹⁴⁵ Most CGL policies do not provide coverage for penalties, fines, and complying with court orders and injunctions.

Additionally, shortly after the ADA passed in 1990, CGL insurers began to revise their policies to exclude coverage for ADA and other discrimination claims, moving that risk to other coverage lines, such as employment practices liability (EPL) policies.¹⁴⁶ And while the cost of remediating barriers would not normally constitute covered damages under a CGL policy, the ordinance or law exclusions commercial property forms also contain language intended to exclude coverage for the cost of compliance with the ADA.

While CGL and property policies are unlikely to afford coverage for ADA claims, coverage is sometimes available under specialty lines. For example, a third-party claim endorsement is commonly available for EPL policies, which is intended to expand coverage for discrimination claims made by third-party customers, and can afford coverage for ADA claims. Errors and omissions policies can also provide coverage, particularly for website accessibility claims when a commonly available cyber coverage endorsement is added to the policy. Policies covering liability for media and cyber-related activities might be another option. ADA claims are insurable like any risk is for a price, but probably not under most standard forms. Therefore, it is essential to carefully review, negotiate, and procure policies to ensure coverage.

B. Compliance Policies

Consistent with the franchise business model, most franchise systems allocate the responsibility of ADA compliance to the franchisee, requiring the franchisee indemnify the franchisor for such risk. Franchisors in these systems have little to do with the franchisee’s physical location except ensuring brand conformity and perhaps assistance with site selection and approval.

There are a few exceptions. Some franchisors are necessarily involved with the design of their franchisee’s physical locations, such as hotels, while other systems include locations owned or operated by the franchisor. Additionally, most franchisors are responsible for the system’s website. Where ownership or control cannot be disputed, a compliance policy can be an effective way to reduce exposure to serial ADA claims.

more of the following *offenses committed in the course of your business.* . . . One of the enumerated “offenses” is discrimination because of ‘physical disability.’”).

¹⁴⁵ *Shelter Island Inc. v. St. Paul Fire & Marine Ins. Co.*, 32 F. App’x 243, 245 (9th Cir. 2002) (“Shelter Island’s maintenance of restaurant premises which are not accessible to the disabled in violation of the ADA does not constitute an “accident” as that term has been defined by California law. Although Shelter Island may not have intended to harm the plaintiffs, Shelter Island chose to maintain restaurant premises that are inaccessible to the disabled.”).

¹⁴⁶ *Yates v. Jumbo Seafood Rest., Inc.*, 2012 WL 293683, at *4 (N.D. Cal. Feb. 1, 2012) (“[B]ecause the Underlying Complaint solely alleges injuries arising out of federal and state laws barring discrimination based on physical disabilities, the Underlying Lawsuit is excluded from coverage under the Policy.”).

Franchise and ADA attorneys do not fully agree on whether the ADA requires covered entities to have a compliance policy.¹⁴⁷ Some counsel strongly advise having and enforcing such a policy as an important part of the company's defense of future claims and desire to ensure that no customer is subjected to discrimination on account of disability. For example, in *Mielo v. Steak 'n Shake Operations, Inc.*, the court held that "the adoption of a policy similar to the three examples offered by Plaintiffs would likely remedy Plaintiffs' alleged injuries," which included "'training protocols' intended to 'ensure' that Steak 'n Shake's maintenance employees 'are aware of the ADA's structural requirements and know how to identify access violations for prompt repair'" and "annual ADA-specific inspections to ensure accessibility has been maintained" as opposed to its policy of "performing ADA inspections only in response to complaints brought to the company's attention by patrons."¹⁴⁸ Thus, the absence of a policy can allow ADA plaintiffs to create standing based on the allegation that not having one, or having a bad one, creates a continuing threat of future harm.¹⁴⁹

Castaneda v. Burger King Corporation is another case in point. The plaintiffs sued BKC claiming that its 92 California franchise restaurants leased by BKC should be certified as a statewide class action for injunctive relief under the ADA and sought millions of dollars of damages under California UNRUH Act due to purportedly common violations in each restaurant.¹⁵⁰ Due to the absence of a centralized BKC plan or policy causing such problems, and existence of an actual policy requiring ADA compliance, the court denied class certification.¹⁵¹

The court noted that BKC exercised some controls to assure conformance to brand standards, **but held that the fact that the leases and franchise agreements obligated the tenants/franchisees to assure compliance with the ADA and accessibility laws, was dispositive:**

Although Burger King Corporation required that new restaurants be constructed, equipped and furnished in accordance with approved plans and specifications, the **franchisees/lessees were required to** contract independently at their own expense for architectural and engineering services, to create their own blueprints and construction plans for each of their restaurants, and to **ensure that they complied with applicable building codes and accessibility laws.** Burger King Corporation provided new restaurants with a set of standard plans and specifications which were described as "generic masters" that "require[d] confirmation and revisions to comply with all local governmental standards." These

¹⁴⁷ See 42 U.S.C.A. § 12188 (providing only that "injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities," as well as "modification of a policy," but not the creation of one).

¹⁴⁸ 897 F.3d 467, 481 (3d Cir. 2018).

¹⁴⁹ *Hernandez v. AutoZone, Inc.*, 323 F.R.D. 496, 503 (E.D.N.Y. 2018) (holding that "class action discrimination claims may present a 'conceptual gap' between an individual's claim of discrimination and 'the existence of a class of persons who have suffered the same injury'" that "can be bridged by proof that the defendant 'operated under a general policy of discrimination'"),

¹⁵⁰ *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (S.D. Cal. 2009).

¹⁵¹ *Id.* at 562.

referenced the features subject to the ADA standards only generally without delving into requisite dimensional measurements or specifics of compliance requirements, and required no particular feature that would constitute an ADA violation. **These types of details were left to the architects hired locally by each franchisee.** After each franchisee/lessee's architect made necessary modifications, as required by governmental bodies and the particular configuration of the property on which the new restaurant was to be located, Burger King Corporation reserved the right to review the building type, site layout, signage, and overall adherence to current building standards and brand identity, and to require modifications. **In other words, Burger King Corporation insisted that the franchisees build out their stores in compliance with disability laws and did not dictate the specifics.**^{152 153}

The elements of an ADA compliance program might include adopting a policy, appointing a compliance officer, retaining and working with consultants, and performing regular audits and surveys. One example of what an ADA policy might look like comes from the precedent-setting consent decree entered into between the Department of Justice and Hilton Worldwide, which required Hilton to hire an ADA compliance coordinator to carry out the settlement, select an ADA inspector to survey and verify compliance, appoint point-persons at each hotel to resolve accessibility complaints, and train staff on ADA compliance, among other requirements.¹⁵⁴ Obviously, the elements will vary based on the needs of the franchise system.

Other policies that franchisors should consider include having their franchise agreement require compliance with all accessibility laws, including the ADA. Some franchisors retain an expert to review all prototypical plans and policies to ensure they themselves are fully compliant with the ADA. Franchisors should also consider providing regular training to franchisees at franchise association events. Lastly, franchisors should consider a proactive policy set forth in franchise agreements or operations manuals requiring franchisees to provide at regular intervals certificates signed by licensed architects or experts attesting that the place of public accommodation is in fact ADA compliant at designated critical periods during the franchise relationship, including inception, renewal, renovations, reimagining, etc.

A website accessibility compliance program which regularly tests the franchisor's methods of accessibility on its website likewise can provide a particularly effective defense against a surf-by claim. If warranted, a website accessibility policy could designate a coordinator responsible for working with outside consultants and design professionals, performing and supervising audits, providing training to other employees,

¹⁵² *Id.* at 562-63 (emphasis added).

¹⁵³ With respect to standing, the Court also agreed with BKC that the class plaintiffs lacked standing to sue any restaurant no unnamed plaintiff had visited to maintain a class action only with respect to the restaurants plaintiffs actually visited, and dismissed 82 restaurants from the lawsuit. See Standing section, *infra*.

¹⁵⁴ See <https://www.ada.gov/hilton/hilton.htm>

ensuring third-party compliance, reviewing existing and future content, and implementing modifications.

A website accessibility policy might also include publication of a “mission statement” expressing a commitment to accessibility, adopt WCAG 2.1 Level AA standards, establish guidelines for working with outside consultants and design professionals, a timeframe for periodic audits, and practices for compliance with third-party contractors and vendors through the development of standard contract language and certifications of compliance. A website accessibility policy might also establish standards for determining prioritization of accessible content and a procedure for evaluating undue hardship exceptions. While there is no guarantee that adopting a policy can eliminate exposure to website accessibility claims entirely, it evidences a credible, good faith effort to improve website accessibility, which would be meaningful in court, and reduce a business’s exposure to surf-by lawsuits.

C. Arbitration Agreements

ADA claims are arbitrable so long as the arbitration agreement does not deprive plaintiffs of their statutory rights.¹⁵⁵ Indeed, the ADA promotes alternative forms of dispute resolution.¹⁵⁶ As mentioned above, however, arbitration agreements formed with website users through “clickwrap” or “browsewrap” agreements must be accessible in order to bind the user.¹⁵⁷ Thus, so long as the arbitration agreement itself is accessible, it is usually enforceable against ADA claims.¹⁵⁸

Serial ADA litigants may be unwilling to participate in arbitration since the cost is inconsistent with their business model, and as a result, a motion to compel arbitration may be a sufficient deterrent to their claims. Another benefit of an arbitration agreement is that the parties can select an arbitrator with experience in accessibility suits, and possibly reach a more efficient and equitable result. Finally, class action waivers are sometimes easier to enforce in arbitration agreements, as are forum selection clauses, which can be important considerations in surf-by lawsuits. Where there is an opportunity to enter into an agreement with a customer or a user of website, arbitration agreements can provide a way to limit exposure to serial ADA claims.

V. Litigating ADA Claims

The fundamental economic issue with litigating drive-by and surf-by lawsuits is that the cost of settling is almost always cheaper than their defense, even if you win.

¹⁵⁵ *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 552 (1st Cir. 2005) (holding that the “inquiry focuses on whether the agreement to arbitrate is enforceable with respect to the particular statutory claim at issue (here, the plaintiff’s ADA claim)” and “nothing in the text or legislative history of the ADA indicated an intent to preclude arbitration”).

¹⁵⁶ 42 U.S.C.A. § 12212 (“Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.”).

¹⁵⁷ See *Container Store, Inc.*, 2016 WL 4027711 at *1 (D. Mass. July 27, 2016).

¹⁵⁸ *Whitt v. Prosper Funding LLC*, 2015 WL 4254062, at *1 (S.D.N.Y. July 14, 2015) (holding that clickwrap arbitration agreement was enforceable for ADA claim arising from individual’s inability to access video service required by auditory disability).

Seasoned litigators will tell you that they obtain the most optimal settlement positions for their clients by preparing their cases aggressively for trial, and for some ADA claims, litigation is the only way to resolve an unreasonable demand.

The first considerations in defending ADA claims are constitutional challenges to mootness and standing. After that, trial preparation requires a concerted defense between the franchise and franchisor, critical expert discovery and disclosure issues, and careful balancing of settlement negotiations with exposure to attorneys' fees and damages. The latter is highly dependent on state law, so it is important to work with local counsel having knowledge of the applicable state accessibility statutes.

A. Mootness & Standing

Serial ADA claims typically present two common issues that inform the major legal strategies for avoiding and defending them—mootness and standing—which both arise from courts' limited constitutional authority to hear only actual "Cases" and "Controversies."¹⁵⁹ These two issues affect courts' subject matter jurisdiction to hear a claim, and thus, may be raised at any time. However, they are most often on a motion to dismiss or motion for summary judgment.

Standing requires a plaintiff to have suffered an injury-in-fact, which can present challenges for a plaintiff who has not even attempted to visit or purchase goods or services from a defendant's business. Mootness requires a sustained "live" dispute between the parties and a legally cognizable interest in the outcome. Thus, remediating an ADA violation during the lawsuit or in manner such that the violation is unlikely to reoccur, can deem the controversy moot.

Mootness and standing are related concepts. The Supreme Court has "defined mootness as 'the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'"¹⁶⁰

1. Mootness

If only injunctive relief and attorneys' fees are at issue, as they typically are unless state law damages are available and sought, a defendant in an ADA lawsuit can raise mootness as a defense by remediating the violations alleged in the complaint. As a result, the first thing that the defendant should try to do in defending a serial ADA claim is to moot out as many violations as possible, even before mounting a legal challenge to any standing issues, because mooting violations cuts off the plaintiff's primary leverage, attorneys' fees.¹⁶¹ Mootness is a particularly effective defense to drive-by claims because easy to spot violations are also usually the easier ones to remedy.

¹⁵⁹ *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) ("Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'").

¹⁶⁰ *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1384 (1973)).

¹⁶¹ It is, however, still unclear whether the plaintiff's fee claim is reduced at all, so long as even one barrier remains.

“A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—‘when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’”¹⁶² “[T]he only remedy available for a violation of the ADA under a private right of action is injunctive relief; if no ADA violations exist at the time the court is asked to provide injunctive relief, the ADA claim is moot.”¹⁶³

The strategic considerations are different if damages are available and sought under state law, because damages cannot be mooted simply by remediation. But mooted the claim for injunctive relief can still help reduce exposure to attorneys’ fees, the reasonableness of which are measured, in part, by the amount in controversy, which is usually relatively small in the typical serial ADA claim. Mooting the ADA claim can also divest a federal court of subject matter jurisdiction, resulting in a remand to state court, if that forum is deemed to offer a strategic advantage; for example, in California where there are additional pleading requirements for “high-frequency litigants.”¹⁶⁴

Serial ADA litigants have their own strategies in responding to a mootness defense. Often, they point out that “a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”¹⁶⁵ Courts have articulated “four exceptions to the mootness doctrine, so that a court will not dismiss a case as moot if: (1) secondary or ‘collateral’ injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit.”¹⁶⁶ Plaintiffs frequently respond to mootness defenses in two ways.

First, serial ADA litigants will evasively argue that they are entitled to seek injunctive relief for violations not specifically alleged in the complaint, which they instead allege exist upon information and belief, and they have yet to actually encounter. Sometimes plaintiffs will attempt to amend their complaint to assert additional violations, including those discovered after having filed the original complaint. The success of this argument varies depending on the jurisdiction. For example, in *Davis v. Anthony, Inc.*, the Eighth Circuit rejected a plaintiffs attempt to rely on violations not alleged in the complaint.¹⁶⁷ However, this is in contrast to *Doran v. 7-Eleven, Inc.*, where the Ninth Circuit held that once a plaintiff establishes that he or she encountered a barrier which

¹⁶² *Id.* at 91.

¹⁶³ *Heatherly v. Malika*, No. C-11-04125 DMR, 2013 WL 5754106, at *1 (N.D. Cal. Oct. 23, 2013).

¹⁶⁴ Cal. Civ. Proc. Code § 425.50 (requiring “high frequency litigants” to identify themselves in a verified complaint and allege the reason why she was in the geographic rea of the defendant’s business and why she desired access to the defendant’s business); Cal. Civ. Proc. Code § 425.55 (defining a “high frequency litigant” as one who has filed 10 or more complaints alleging a construction-related accessibility violation within the 12-month period).

¹⁶⁵ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

¹⁶⁶ *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001).

¹⁶⁷ 886 F.3d 674, 679 (8th Cir. 2018) (“A plausible claim must plead ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’”).

deterred him from use and enjoyment of the facility, that plaintiff can then send an expert into the store to discover other ADA violations.¹⁶⁸

Second, serial ADA litigants will argue that the defendant has a policy, or even a lack of one, that precludes the defendant from establishing that another violation is unlikely to occur. Once again, the success of this argument varies depending on the jurisdiction. In *Hillesheim v. Buzz Salons, LLC*, the court held that “the absence of such a policy alone does not . . . ‘seriously undermine[] a finding of mootness’ when considering the uncontroverted evidence that the conduct complained of has been remedied.”¹⁶⁹ On the other hand, some plaintiffs have experienced success maintaining their claims based solely on policy-related grounds. For example, in *Heinzl v. Cracker Barrel Old Country Stores, Inc.*, the court held that the plaintiff’s claims were not moot because the defendant’s “ADA compliance policy has missed numerous stores that were out of compliance,” evidencing a possibility that a violation could reoccur.¹⁷⁰

Websites present their own mootness issues. Since there is no official set of standards for accessible website design, it is difficult to remediate alleged violations and be confident that doing so will moot the plaintiff’s claim.¹⁷¹ Moreover, while it is easy to objectively determine the slope of a wheelchair ramp or the height of a service counter, website accessibility often requires more subjective analysis. In one recent decision, a court held that a defendant’s attempt to delete its own website and start over did not moot the plaintiff’s claim.¹⁷²

Regardless of the practical challenges in remediation or legal obstacles of each jurisdiction, when it is possible to identify and address an ADA violation, mootness remains the most efficient strategy available to defend an ADA claim. Based on the dynamics involved in ADA litigation, it is usually more expensive to litigate than remediate the violations. After as many violations have been addressed as economically and practically possible, a defendant can turn to challenging the serial litigant’s standing to assert those that remain.

2. Standing

As discussed above, mootness and standing are related concepts. A defendant, however, can challenge an ADA plaintiff’s standing to assert a claim even without remediating any of the alleged violations. A defendant should always first consider whether it is possible to moot the violations in order to cut off the claim for attorneys’ fees. But when an alleged violation is not specifically identified, or cannot be economically or practically addressed, then a defendant should next consider whether it is possible to challenge any alleged violations that the plaintiff lacks standing to pursue.

¹⁶⁸ 524 F.3d 1034, 1039 (9th Cir. 2008); *Nekouee v. Captain D’s, LLC*, 2019 WL 846048, at *4 (M.D. Ala. Feb. 21, 2019) (permitting amended complaint to allege additional violations discovered by expert but not alleged in the original complaint).

¹⁶⁹ 2017 WL 3172870 at *6 (D. Minn. June 19, 2017).

¹⁷⁰ 2016 WL 2347367 at *25 (W.D. Pa. Jan. 27, 2016).

¹⁷¹ See *infra* Section III.B.

¹⁷² *Wu v. Jensen-Lewis Co.*, 345 F. Supp. 3d 438, 442 (S.D.N.Y. 2018) (“If Jensen-Lewis’s new website suffers from the same defects as its old website, then Wu continues to suffer the discrimination in services alleged in her ADA claim.”).

To have Article III standing, a “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”¹⁷³ The injury in fact element is the “[f]irst and foremost’ of standing’s three elements,” and the one typically at issue in a drive-by claim.¹⁷⁴ In order to establish an injury in fact, “a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”¹⁷⁵

Since ADA plaintiffs are limited to injunctive relief, in order to establish their standing to such relief they must further show “a threat of present or future harm.”¹⁷⁶ Even if the plaintiff has previously suffered an injury-in-fact, there is no current case or controversy necessary to support an injunction if there are no “continuing, present adverse effects.”¹⁷⁷ All of this might sound like a serious obstacle for the typical serial ADA plaintiff. However, the concept of actual and imminent injury has been eroded to mere lip service in many jurisdictions. There are two ways that plaintiffs are frequently successful in establishing their standing to obtain injunctive relief.

First, “an ADA plaintiff can show a likelihood of future injury when he intends to return to a noncompliant accommodation and is therefore likely to reencounter a discriminatory architectural barrier.”¹⁷⁸ This “intent to return” standard is, for the most part, universally accepted as a way to establish standing for an ADA claim.¹⁷⁹

Intent to return is easy enough to allege, but serial ADA litigants sometimes have problems establishing this standard when the realities of their case contradict their alleged intent. For example, courts have held that a plaintiff cannot establish standing when she fails to establish intent to return with sufficient specificity,¹⁸⁰ when the place she allegedly intends to return is thousands of miles away from her residence,¹⁸¹ when she is legally prohibited from returning because she is not a member of the defendant’s business,¹⁸² or when she has simply failed to allege an intent to return because she has

¹⁷³ *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Deutsch v. Travis Cty. Shoe Hosp., Inc.*, 721 F. App’x 336, 340 (5th Cir. 2018).

¹⁷⁷ *Id.*; *Scherr v. Marriott Int’l, Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013).

¹⁷⁸ *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 947 (9th Cir. 2011).

¹⁷⁹ *See id.*

¹⁸⁰ *Gastelum v. Phoenix Cent. Hotel Venture, LLC*, 2019 WL 498750 at *4 (D. Ariz. Feb. 8, 2019) (“[A]lthough Plaintiff avows that he intends to ‘book a room’ at Defendant’s hotel . . . , he fails to articulate any specific plan to return or explain why he is likely to want to stay at or visit Defendant’s hotel in the future. Absent a showing that he likely would visit Defendant’s hotel, Plaintiff has not demonstrated a real and immediate threat of repeated injury.”).

¹⁸¹ *Winkle v. Kings Mall Ct. LLC*, 2018 WL 679466 at *2 (N.D.N.Y. Feb. 1, 2018).

¹⁸² *Griffin v. Dept. of Lab. Fed. Credit Union*, 2019 WL 80704 (4th Cir. Jan. 3, 2019) (“Griffin is not a member of the Credit Union, he is not eligible to become a member of the Credit Union, he has no plans to become eligible to be a member of the Credit Union, and no action we take could possibly make him eligible to become a member of the Credit Union. Under these specific circumstances there can be no injury in fact.”).

filed hundreds of similar lawsuits.¹⁸³ Generally speaking, however, the plaintiff's status as a serial ADA litigant alone will not affect standing if she would otherwise have it.¹⁸⁴

Second, “a plaintiff can demonstrate sufficient injury to pursue injunctive relief when discriminatory architectural barriers deter him from returning to a noncompliant accommodation.”¹⁸⁵ This “deterrent effect” standard originated in the Ninth Circuit, was first announced in *Pickern v. Holiday Quality Food, Inc.*,¹⁸⁶ and has been applied elsewhere, including in the First and Eleventh Circuits.¹⁸⁷ It is not universally accepted, however, and last year it was expressly rejected by the Eighth Circuit in *Davis v. Anthony, Inc.*,¹⁸⁸ and implicitly rejected by the Fifth Circuit in *Deutsch v. Annis Enterprises, Inc.*¹⁸⁹

The deterrent effect standard is even easier to allege than intent to return, and serves as the legal theory enabling many serial ADA lawsuits because the mere awareness of a violation serves as both the injury-in-fact and threat of future injury. In essence, the deterrent effect test presumes that because the plaintiff is aware of one ADA violation that serves as her injury-in-fact, even if the violation is corrected, she has standing to sue for other, un-encountered violations that she was deterred from discovering, even if they did not actually prevent her from accessing the public accommodation, so long as the violations relate to her particular disability.¹⁹⁰

¹⁸³ *Deutsch v. Annis Enterprises, Inc.*, 882 F.3d 169, 174 (5th Cir. 2018) (“Deutsch has filed nearly 400 lawsuits in just over 300 days and could not remember a single establishment that he sued and then returned to.”).

¹⁸⁴ *Gilkerson v. Chasewood Bank*, 1 F. Supp. 3d 570, 582–83 (S.D. Tex. 2014) (“Several courts have found that where a plaintiff is a frequent or serial litigant challenging various defendants' ADA compliance and has mixed motives, i.e., seeking to avail himself personally of services provided by an ATM machine and verifying ADA compliance, his standing to sue is not affected if it otherwise existed.”).

¹⁸⁵ *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 950 (9th Cir. 2011).

¹⁸⁶ 293 F.3d 1133 (9th Cir. 2002) (“[O]nce a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury.”).

¹⁸⁷ *Disabled Americans For Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64 (1st Cir. 2005) (“[A] disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA” and “who is threatened with harm in the future because of existing or imminently threatened noncompliance with the ADA” suffers actual or imminent harm sufficient to confer standing.”); *Gomez v. Dade Cty. Fed. Credit Union*, 610 F. App'x 859, 863 (11th Cir. 2015) (“In Title III cases, plaintiff must prove he is likely to suffer discrimination in the future, either because he intends to return to a noncompliant establishment, or because defendant's misconduct deterred his patronage.”).

¹⁸⁸ 886 F.3d 674, 678 (8th Cir. 2018) (“This court has not adopted the deterrent effect doctrine and declines to do so.”).

¹⁸⁹ 882 F.3d 169, 174 (5th Cir. 2018) (holding that the plaintiff lacked standing because he had “not shown how the supposed ADA violations at [the defendant's business] will ‘negatively affect [his] day-to-day li[fe].’”).

¹⁹⁰ *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1042 (9th Cir. 2008) (“[W]hen a disabled individual knows that a facility is noncompliant with the ADA in at least some respects but does not know the full extent of the noncompliance, he or she is likely to be deterred from returning to that facility, even if some of the violations are corrected, until he or she can get more information about the extent of the violations.”).

Of course, this is fiction for serial ADA litigants because their repeated lawsuits suggest that they are not actually deterred by ADA violations, and instead actively seek them out. Nevertheless, this different effect “gets him inside the courthouse door,” allowing the use of an expert to discover additional violations, and preventing the defendant from immediately remedying the unalleged violations that would otherwise moot the plaintiff’s claim.¹⁹¹

Websites also present their own unique standing issues. Whether a plaintiff can establish standing often turns on whether a website is a public accommodation itself, or merely a service with a sufficient nexus to a public accommodation. If the website itself is the public accommodation, establishing intent to return is just a click away.¹⁹² But if the website is a conduit for accessing the goods and services of a physical location, then an intent to return to the physical location is necessary, which sometimes presents an obstacle for the serial ADA litigant.¹⁹³ The ability to access a website from anywhere, and thus the ease by which a serial ADA litigant can manufacture a claim, has led some courts to push back against conferring standing merely through awareness of violations and their purported deterrent effect.¹⁹⁴

Challenging the plaintiff’s standing can serve as an effective defense to serial ADA claims, particularly ones that are poorly allegedly and factually deficient. But courts apply pleading standards inconsistently, and the law on standing varies greatly from jurisdiction to jurisdiction, and even from judge to judge. As a result, challenges to standing are best reserved for whatever follows the defendant’s effort to moot as many ADA violations as possible.

In addition, a standing challenge can be very effective in dismissing claims against multiple locations when the plaintiff has visited less than all the defendant’s restaurants. In *Clark v. Burger King Corp.* for example, despite having only visited a handful of restaurants, plaintiff Clark filed a putative class action against defendant BKC and all of its franchisees seeking injunctive relief under the ADA and damages under various state accessibility laws for purported accessibility violations at all 10,000 Burger King® restaurants in the United States, whether franchisee or franchisor-owned and operated.¹⁹⁵ The court ultimately held that Clark’s standing to assert ADA and state law accessibility violations against Burger King restaurants was limited to those restaurants he visited prior to filing the underlying action.¹⁹⁶ Accordingly, the court dismissed all

¹⁹¹ *Id.*

¹⁹² *Honeywell v. Harihar Inc.*, 2018 WL 6304839 at *3 (M.D. Fla. Dec. 3, 2018) (“Plaintiff’s ADA claim is based upon the Palm City Motel’s website failing to identify the accessible features of the motel and its rooms, in violation of 28 C.F.R. § 36.302(e)(1)(ii). Therefore, the relevant ‘future injury’ inquiry relates to the motel’s website and reservation system, rather than the motel’s physical property.”).

¹⁹³ See, e.g., *Price v. Orlando Health, Inc.*, 2018 WL 6434519 at *4 (M.D. Fla. Dec. 7, 2018) (“[C]ourts in this Circuit routinely find that websites are not covered by the ADA where the website is unconnected to a physical location. Therefore, Plaintiff’s standing depends on the probability that Plaintiff would patronize Defendant’s physical location in the future.”).

¹⁹⁴ See, e.g., *Carroll v. New People’s Bank, Inc.*, 2018 WL 1659482 at *3 (W.D. Va. Apr. 5, 2018) (“I decline to broaden the standing requirements under Article III in such a manner. Doing so would effectively eliminate standing requirements altogether in the context of the Internet.”).

¹⁹⁵ 255 F. Supp. 2d 334 (D.N.J. 2003).

¹⁹⁶ *Id.* at 344.

“claims related to Burger King restaurants not visited by Clark,” leaving only a handful of restaurants at issue.¹⁹⁷

Practitioners should be aware that even if the court initially denies a motion to dismiss for lack of standing as to locations no named plaintiff visited, most courts will ultimately grant the defendant summary judgment or deny class certification for this reason.¹⁹⁸ Additionally, since standing is determined as of the date of the initial complaint, visits to the restaurant or hotel during the lawsuit are likely insufficient to cure lack of standing as to unvisited locations.

Defendants can challenge a plaintiff’s mootness and standing together to prevail against serial ADA litigation. The first step includes remediating the ADA violations and then moving for a judgment on the grounds that the violations have been remediated and, therefore, the case is moot. However, if the plaintiff then claims newly discovered, unpled additional violations, defendants should argue that standing is determined as of the date the plaintiff filed the complaint and that a plaintiff’s standing is limited to the accessibility barriers the plaintiff encountered and alleged in the complaint. Accordingly, defendants should argue that the plaintiff lacks standing as to any newly “discovered” violations and an amended complaint cannot be used to cure the standing issue. The plaintiff may, following dismissal of the initial complaint, file a new complaint that includes the additional violations. However, plaintiff will not be able to recover any of the attorney’s fees from the first lawsuit. Since attorney’s fees are often the driver of serial ADA litigation, this strategy often incentivises the plaintiff (or plaintiff’s counsel) to settle.

B. Motions to Stay as a Defense Strategy

Franchisors and franchisees should consider the option of moving to stay a case pending remediation of alleged ADA violations. It is the cheapest option as the violations are remediated without the expense of attorney’s fees and court costs. Additionally, moving to stay provides defendants with a way to make their place of public accommodation accessible, thereby increasing revenues from disabled customers and increasing customer satisfaction. Secondly, moving to stay stops attorney’s fees on both plaintiffs’ and defendants’ sides. Lastly, this gives defendants an opportunity to render the claims moot. Moving to stay the case should be an important strategic step that franchisors and franchisees consider, especially in terms of website accessibility lawsuits.

¹⁹⁷ *Id.*; see also *Clark v. McDonald’s Corp.*, 213 F.R.D. 198, 230 (D.N.J. 2003) (The same New Jersey resident plaintiff asserted a nationwide class action against McDonald’s Corp. as to all McDonald’s® restaurants in the United States. With respect to claims against 38 restaurants in Wisconsin which the complaint identified as having been visited by professional ADA inspectors, the court held that plaintiff “lacks standing to assert claims as to those restaurants because he has not alleged (and is not excused from alleging) that he would visit the Wisconsin restaurants but for the violations of which he has actual notice.”¹⁹⁷ Accordingly, the court dismissed these ADA injunctive and state law damages claims for lack of standing.).

¹⁹⁸ *Compare Castaneda v. Burger King Corp.*, 597 F. Supp. 2d 1035 (N.D. Cal. 2009) (denying BKC’s motion to dismiss for lack of standing) with *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009) (denying class certification as the 82 restaurants no plaintiff actually visited).

For example, in 2017, Judge Gayles of the United States District Court for the Southern District of Florida stayed an ADA lawsuit alleging website accessibility barriers pending Burlington Stores' ongoing remediation efforts.¹⁹⁹ In the order staying the case, Judge Gayles ordered that Burlington file a report every ninety days updating the court on the status of the remediation efforts.²⁰⁰ Plaintiff's attorneys appealed the stay order to the Eleventh Circuit who denied the appeal. As a result, Burlington was able to use the stay period to make its website WCAG compliant, thereby mooting Plaintiff's claim.

As the *Burlington* case makes plain, moving to stay a case where the judge does not do so *sua sponte* can be very effective. Franchisors should argue that by not staying the case pending remediation (1) judicial resources will be wasted since the remedial measures will be completed prior to any ruling on the merits of the case, and (2) undue expenses will be incurred by way of attorney's fees and costs to both litigants. Further, the intent of the ADA, namely that remedial measures be taken within a reasonable time so that places of public accommodation are in compliance with ADA requirements, can and will be accomplished without further need of judicial involvement or expense by either party.

C. Default as a Strategy

It is often the case that defendants dealing with serial ADA litigants face the same exposure no matter how hard they try to defend themselves. This has led some commentators to observe that default might be the most efficient strategy for some business owners. As crazy as it may sound, there is some logic to the strategy, which is borne out by default judgments that result in an injunction and nominal monetary award that likely would have been similar to a negotiated resolution, just without the cost of hiring an attorney.²⁰¹

Default might be a viable strategy for some small business owners, particularly those with limited resources who do not have other contractual relationships establishing rights and obligations that could intersect with their liability under the ADA; however, this is unlikely to be the case for most franchisors and franchisees. The franchise agreement, if properly drafted, contains terms allocating risk for ADA claims. If a franchisor or franchisee allows a default judgment to be entered against them, it could impact their co-party's contractual rights. The same concerns can arise in landlord-tenant relationships.

¹⁹⁹ Endorsed Order, *Haynes v. Burlington Stores, Inc.*, No. 0:17-cv-61640-DPG, (S.D. Fla. Sept. 1, 2017), ECF No. 12.

²⁰⁰ *Id.*

²⁰¹ *Lopez v. Macca Corp.*, 2018 WL 5310770, at *6 (C.D. Cal. Oct. 22, 2018); *Johnson v. Shri Jai Ranchhodrai, Inc.*, 2018 WL 5617228, at *10 (N.D. Cal. Oct. 29, 2018); *Brooke v. S.A.V. Texas LLC*, 2:18-CV-1252-TLN-EFB, 2018 WL 4907967, at *1 (E.D. Cal. Oct. 10, 2018); *Acosta v. Sadik*, 117CV01533DADSKO, 2018 WL 4182586, at *4 (E.D. Cal. Aug. 30, 2018); *The Midwest Disability Initiative v. NelMatt, LLC*, 2018 WL 4616455, at *6 (D. Minn. Sept. 26, 2018).

D. Discovery

1. Discoverability of Surveys

An important issue for consideration by franchisors is the discoverability of restaurant surveys that franchisors and franchisees will want to immediately commission upon receiving any accessibility violation demand or complaint. Such surveys are necessary to assess the scope of the problem, decide upon a defense strategy, as well as to make any remediations, which as discussed elsewhere, typically should be done as soon as possible for a number of reasons. Plaintiffs often seek such surveys in discovery, despite their work-product nature, since they provide plaintiffs with a roadmap to defense counsel's issues and concerns. Accordingly, great care should be taken to ensure that the work product and attorney-client privileges are not waived.

Significantly, the reach of the work product privilege is fairly broad. And “even factual portions of documents may be withheld, so long as the document as a whole was created in anticipation of litigation.”²⁰² Notwithstanding, work product protection of such surveys is not absolute. The privilege can be waived by sharing surveys with others. Accordingly, the franchisor should ensure that everyone who will need to see such surveys, including the franchisees, their architects, contractors and others who the franchisor may hold responsible for the lawsuit, or for remediating the accessibility issues, executes an appropriate “common interest” agreement.²⁰³ Assuming adherence to these precautions, a court shall not order the surveys produced.

2. Discoverability of Construction Documents, Maintenance Documentation and More

ADA cases often involve factual elements related to the date of construction, the date of any modifications, and whether or not a local building official participated in approving certain elements. All original construction documentation is potentially discoverable, along with any documentation stemming from any physical alterations of the premises. Moreover, the case may include allegations that the defendant's policies and practices concerning maintaining accessible elements caused the violations. Documents tending to show the history of the efficacy of those efforts may also be discoverable. They could include any invoices or receipts from any maintenance work on the premises, any photographs of the premises, or any reports generated concerning the status of the facilities.

²⁰² *Equal Rights Ctr. v. Post Props., Inc.*, 247 F.R.D. 208, 211 (D.D.C.2008) (quoting *Gen. Elec. Co. v. Johnson*, No. CIV.A.00-2855 (JDB), 2006 WL 2616187, at *12 (D.D.C. Sept. 12, 2006)) (citing also *Tax Analysts v. I.R.S.*, 117 F.3d 607, 621 (D.C.Cir.1997) (holding that “[a]ny part of a [document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine”). See also *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1261-62 (3d Cir.1993) (rejecting, as overbroad, “argu[ment] that the work product doctrine should not apply to [consultant's] report because it contained purely factual material”) (citing *U.S. v. Nobles*, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and other authority).

²⁰³ Perlman, *supra* note 38, at 74.

E. Expert Witnesses

ADA experts and expert witnesses play important roles in ADA cases. As a pre-emptive measure, franchisors may want to consider employing an ADA expert to ensure all prototypical plans, construction, remodeling, rebranding, policies, and procedures are compliant with ADA guidelines and state accessibility laws. This measure ensures that when faced with an ADA lawsuit, franchisors can use the expert to prove the issues alleged comply with state accessibility laws, meet the ADA guidelines, demonstrate that the policies and procedures of the franchise are compliant, and minimize costs once litigation has ensued.

If a franchisor does not hire an expert proactively, it should retain an expert immediately once an ADA lawsuit has been filed. The expert should assess the allegations in the complaint, determine if the franchisor is ADA compliant, establish remediation measures if any are necessary, and create compliance guidelines to minimize the costs of litigation.²⁰⁴

For a website accessibility claim, an expert is critical to assess whether a website is accessible by the disabled, especially since the DOJ has yet to issue guidelines surrounding website accessibility issues. An expert can provide guidance to franchisors on alternative means of attaining accessibility with their websites, as well as establish measures to ensure the websites maintain compliance. It is important to ensure that the expert has sufficient knowledge and experience.²⁰⁵

F. Attorneys' Fees

In ADA actions, 42 U.S.C. § 12205 governs the award of attorneys' fees, litigation expenses, and costs. The statute provides that:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.²⁰⁶

Thus, this statute permits courts, in its discretion, to award attorney's fees, litigation expenses, and costs to the prevailing party. 42 U.S.C. § 12205 does not distinguish between a plaintiff or defendant when awarding a prevailing party attorney's fees, costs, and litigation expenses.²⁰⁷

Nonetheless, courts have held that Title III ADA defendants, like defendants under other anti-discrimination and civil rights statutes, are only entitled to prevailing party attorneys' fees if the plaintiff's claim was frivolous. Courts have adopted general

²⁰⁴ *Shaw v. Kelley*, 2019 WL 497620 (N.D. Cal. Feb. 7, 2019).

²⁰⁵ *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368 (S.D. Fla. 2018) While GNC did hire an expert to opine on its web accessibility, the court determined that the expert's lack of experience and unreliability of the opinions outweighed any potential "helpfulness."

²⁰⁶ 42 U.S.C. § 12205.

²⁰⁷ *Kennedy v. Solano*, No: 6:17-cv-605-Orl-41GJK, 2018 WL 6202260 (M.D. Fla. Nov. 9, 2018).

guidelines in line with *Christiansburg* to determine whether a plaintiff has brought a frivolous claim.²⁰⁸ Factors considered in making this determination include: (1) whether plaintiff has established a prima facie case; (2) whether defendant offered to settle; and (3) whether the trial court dismissed the case proper to trial or a full trial was held on the merits.²⁰⁹ Franchisors should know, however, that these guidelines are not hard and fast rules, and determining whether a plaintiff's claim is frivolous is done on a case-by-case basis. The courts focus on whether "the case is seriously lacking in arguable merit."²¹⁰

To qualify as a prevailing party, a litigant must show that a material alteration of the parties' legal relationship has taken place as a result of the litigation. Therefore, it is possible for defendants to be awarded attorney's fees in ADA lawsuits, however, they must obtain relief based "on the merits of at least some of [the] claims."²¹¹ Oftentimes, this means that a voluntarily dismissal does not meet such threshold if the court never addressed the merits of the claims.

G. Managing the Franchisor-Franchisee Relationship During Litigation

A franchisor sued for accessibility violations at a location operated by a franchisee is in an awkward position. Essentially, a franchisee is a business partner (albeit in an independent contractor relationship) of the franchisor. The franchisor wants to maintain a good relationship with the franchisee, but, at the same time, protect its own interests, which may mean taking action against the franchisee including forcing the franchisee to remediate and defend or pay for the franchisor's defense costs and damages.

1. Joint Defense Agreements

Regardless of whether both the franchisor and franchisee are named as defendants in an accessibility lawsuit, it is likely advantageous to enter into a joint defense agreement. A joint defense agreement allows defendants and their counsel to share information with each other and develop a unified strategy for defending the lawsuit. A joint defense agreement derives from the "joint defense" privilege or "common interest" doctrine and extends the attorney-client privilege to confidential communications amongst co-defendant's counsel, so long as the communications are related to the defense of both defendants.²¹² Because the interests of a franchisor and franchisee have the possibility of diverging to the point where they become adverse, the joint defense agreement should contain language permitting either party to cancel the agreement by providing written notice to the other party. Additionally, it should provide that the franchisee will not seek to disqualify franchisor's counsel in this case or in future matters based upon its representation in this matter.

²⁰⁸ *Kennedy v. Solano*, No: 6:17-cv-605-Orl-41GJK, 2018 WL 6202260 (M.D. Fla. Nov. 9, 2018); *Suarez-Torres v. Sandia, LLC*, No. 16-1882, 2018 WL 4677667.

²⁰⁹ *Id.*

²¹⁰ *Jerelds v. City of Orlando*, 194 F. Supp. 2d 1305, 1311 (M.D. Fla. 2002).

²¹¹ *Race v. Toleda-Davila*, 391 F.3d 857, 859 (1st Cir. 2002).

²¹² See Black's Law Dictionary 1236 (10th ed. 2014), available at Westlaw.

2. Communications with Franchisees

Franchisors should always be careful in sending correspondence to franchisees about potential litigation or accessibility issues. To play it safe, it should be assumed that all correspondence will eventually end up being produced in response to a discovery request. Franchisors should be especially careful to ensure that non-lawyers do not use “loose” language in communications that could be construed as an admission that (1) an accessibility violation exists; or (2) that the franchisor is responsible or assuming responsibility.

If faced with a multi-unit or class action lawsuit, regular communications with the franchisees are essential and inevitable. The franchisor needs its franchisees’ cooperation throughout the process. Equally important, in order for franchisees to remain focused on their successful operation of their business, they must be assured of the suit’s progress and that it is being handled properly and effectively.

3. Adding Franchisees as Defendants

Plaintiffs often sue franchisors for violations of accessibility laws present at a location operated by a franchisee without naming the franchisee as a defendant. Sometimes this is a deliberate strategy. Other times the plaintiff’s attorney may simply have made a mistake. Regardless, this presents an issue for the franchisor.

Most plaintiffs will agree to substitute in the franchisee if the franchisor does not own, lease, or operate the location(s). However, if both the franchisor and franchisee have ADA liability, the plaintiff will likely refuse to drop the franchisor as a party defendant. If it is a single unit case, and the franchisee agrees in writing to fully indemnify the franchisor, this may be sufficient. The calculus changes when the lawsuit is over many franchised locations, especially when they belong to many franchisees and damages are being sought as well. In such instances, the presence of the franchisees as party defendants becomes essential for a number of reasons, including to ensure that effective relief will be granted; to ensure that the franchisees’ insurance coverage is triggered; and to ensure that all damages, fees and costs will ultimately be paid by franchisees, not the franchisor.²¹³

A franchisor may bring the franchisee into the action by seeking to compel the plaintiff to join it as an indispensable or necessary party under Fed. R. Civ. P. 19, by adding them directly pursuant to Fed. R. Civ. P. 14, or by filing a third-party complaint seeking indemnification. However, it is preferable that the plaintiffs sue the franchisees (either voluntarily or pursuant to Rule 19(a)), as some insurance carriers will take the position that otherwise, coverage under their policy for a “claim against the franchisee” insured is not triggered.²¹⁴ For these reasons, as discussed above, it is important that franchisors require in their franchise agreements that franchisees’ insurance policies list the franchisor as an additional named insured, and that the franchisor review these

²¹³ Perlman, *supra* note 38, at 67.

²¹⁴ *Id.*

policies regularly.

Jurisdictions have different tests for applying Rule 19. In some jurisdictions, the franchisor should be successful in adding the franchisee as a necessary party while in others it may not.²¹⁵

H. Damages

1. DOJ Remedies

While the ADA does not authorize damages, it does empower the DOJ to launch investigations and, through the Attorney General's office, file a lawsuit where it believes that (1) there exists a pattern or practice of discrimination on the basis of disability, or (2) any person or groups of persons have been discriminated against on the basis of disability and that discrimination raises an issue of public importance.²¹⁶ In such actions, the court may award monetary damages and civil penalties, ranging from \$55,000 for a first violation to \$110,000 for subsequent violations.²¹⁷ The DOJ has obtained monetary judgments against numerous franchise systems over the years including Hilton®, Days Inn®, Hampton Inn®, Subway®, International House of Pancakes®, Shoney's®, Sunoco®, Taco Bell®, McDonald's®, Cold Stone Creamery®, and many others.²¹⁸

2. Damages Available To Individuals Filing Accessibility Lawsuits Under State Laws

Numerous states have enacted their own laws allowing individual plaintiffs to bring suits **for damages**, in addition to injunctive relief. At last count, 23 states and the District of Columbia had such laws.²¹⁹ Some state laws allow automatic minimum damage claims per visit to the place of public accommodation (without a requirement that the individual show or quantify the harm), making these lawsuits especially amenable to class action lawsuits.²²⁰

For example, in California, a disabled person may be entitled to \$4,000 for every visit he or she makes to a place of public accommodation where he or she encounters a barrier to access or is "deterred from accessing" an accommodation because of an

²¹⁵ The Ninth Circuit employs a three-part test. The first step is to determine whether the absent parties are "necessary" parties who should be joined under Rule 19. Second, the court determines whether it is feasible to order that the necessary parties be joined. Third, if the court determines that joinder is not feasible, the court then determines whether the case can proceed without the absentees. The "necessary party" analysis under Rule 19(a)(1)(A) is "concerned with consummate rather than partial or hollow relief as to those already parties." In support of such a conclusion, a franchisor should argue that the franchisees are so situated as a practical matter as to impair the effectiveness of any injunctive relief a court may grant with respect to the public accommodations at issue, unless they are joined as parties. This is because the franchisees/lessees control the premises at issue, both as a practical matter and under language in the leases and franchise agreements.

²¹⁶ 28 C.F.R. § 36.503.

²¹⁷ *Id.*

²¹⁸ See https://www.ada.gov/enforce_activities.htm

²¹⁹ See Perlman, *supra* note 38, at "Exhibit 1."

²²⁰ Perlman, *supra* note 38, at 30.

access barrier.²²¹ In some instances, plaintiffs and class members claim to have visited restaurants multiple times per week, for years, and thus individually claimed entitlement to hundreds or thousands of dollars in damages per person.²²²

3. Class Action Damages

Class action lawsuits alleging violations of the ADA, as well as state accessibility laws, are especially attractive to plaintiffs' attorneys in states that have laws which provide for statutory minimum damages. This is because a class has a much better chance of being certified if the damages inquiry is not an individualized inquiry.²²³ Class action lawsuits under state accessibility laws have proven extremely expensive for franchisors that have been unlucky enough to have faced them. Any state with statutory minimum damages should be considered a "plaintiff-friendly state."²²⁴

a. California

California has two applicable disability rights laws, the Unruh Civil Rights Act ("Unruh")²²⁵ and the California Disabled Persons Act ("CDPA").²²⁶ Cal. Civ. Code § 52 provides, in pertinent part:

Whoever denies . . . or makes any discrimination or distinction contrary to Section 51, 51.5 or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court . . ."²²⁷

Historically in California, "proof of actual damages was not a prerequisite to recovery of statutory minimum damages."²²⁸ Rather, to maintain an action for statutory minimum damages, a plaintiff needed to only show that she was denied full and equal access, not that she was wholly excluded from enjoying the establishment's services.²²⁹

California's disability access laws attempt to curb litigation abuses by certain plaintiffs and attorneys. Indeed, Cal. Civ. Code § 55.56, which applies to all Unruh and CDPA actions filed after January 1, 2009, states that part of its purposes is to "protect[]

²²¹ Cal. Civ. Code § 52(a); §55.56(b).

²²² *Castenada v. Burger King Corp.*, 264 F.R.D. 557 (S.D. Cal. 2009).

²²³ Cal. Civ. Code § 52(a); §55.56(b); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 04, 613-14 (N.D. Cal. 2009); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994).

²²⁴ Perlman, *supra* note 38, at 30.

²²⁵ Cal. Civ. Code § 51 *et seq.*

²²⁶ *Id.* §§ 54-55.2.

²²⁷ Cal. Civ. Code § 52(a). Under the CDPA, however, the statutory minimum damage is \$1,000. *Id.* § 54.3.

²²⁸ *Hubbard v. Twin Oaks Health & Rehab. Ctr.*, 408 F. Supp. 2d 923, 932 (E.D. Cal. 2004) (quoting *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000)).

²²⁹ *Id.*

businesses from abusive access litigation.”²³⁰ Section 55.56 adds the requirement that plaintiffs seeking statutory damages show that an access violation denied them “full and equal access to the place of public accommodation on a particular occasion,” by putting on evidence that they “personally experienced difficulty, discomfort, or embarrassment because of the violation.”²³¹

Thus, to obtain statutory damages under the CDPA and Unruh, an individual should now have to establish that he or she actually encountered a specific architectural feature that violated an accessibility standard, **and** that the violation actually caused him/her difficulty, discomfort, or embarrassment because of the violation.²³² The mere fact that one feature at a particular restaurant was noncompliant when a named plaintiff visited should no longer be of assistance to putative class members who seek damages on account of a **different** architectural feature that allegedly impeded their access. Even for a class member who encountered the **same** architectural feature, determining that it was in violation of a standard should be of no moment, if a reasonable alternative was available, or if that person could still use that feature without difficulty, discomfort or embarrassment.²³³

Mundy is instructive. There, Mundy, a wheelchair user filed a complaint subject to the newly enacted damages standards in Section 55.56. Mundy sought statutory minimum damages because he unsuccessfully tried to use a restroom mirror at a car wash, which was mounted too high, in violation of the access standard. Mundy testified that he tried to use the mirror to check his appearance.²³⁴ Defendant introduced evidence that there were “other reflective surfaces at the location that he could have used for that purpose, including an exterior window and a sales display of rearview mirrors.” Mundy did not attempt to use these alternatives, nor did he bring the issue to defendant’s attention that day.²³⁵ The trial court entered judgment for defendant because plaintiff “did not present any evidence showing that he suffered any actual injury, embarrassment, humiliation, or discomfort as a result of the mirror’s placement and size, and the appellate court affirmed.”²³⁶ *Mundy*, the first decision to address the proof required under § 55.56, thus makes plain that each class member in a proposed class will be required to individually establish that she truly encountered access

²³⁰ *Mundy v. Pro-Thro Ents.*, 121 Cal. Rptr. 3d 274, 277 (Cal. App. Super. 2011) (quoting *Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 677 (2009)).

²³¹ Cal. Civ. Code § 55.56(c).

²³² Cal. Civ. Code §§ 55.56(a)-(c), (e); *Mundy*, 121 Cal. Rptr. 3d at 277.

²³³ *Mundy*, 121 Cal. Rptr. at 277. Even previously, plaintiffs must actually have encountered an access barrier as a precondition for statutory damages. See *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1226 (2009) and *Urhausen v. Longs Drug Stores Cal., Inc.*, 155 Cal. App. 4th 254, 265 (2007). Thus, a plaintiff who goes to a dining area in a restaurant that has less than the required number of handicapped seating is able to assert a claim for damages only if he was not able to sit at handicapped seating on that particular visit. See *Reycraft*, 177 Cal. App. 4th at 1222. Likewise, a disabled person who is injured crossing over a curb at a disabled parking space has no claim for damages under CDPA or Unruh, even though the curb cut next to the curb was unlawfully steep. *Id.* (discussing *Urhausen*).

²³⁴ *Id.* at *3.

²³⁵ *Id.*

²³⁶ *Id.*

violation(s) on particular occasions, and that on each occasion, the violation truly caused her injury.

The Ninth Circuit decisions in *Chapman v. Pier 1 Imps. (U.S.) Inc.*²³⁷ and *Oliver v. Ralphs Grocery Co.*,²³⁸ also demonstrate California’s attempts to thwart abusive access litigation by requiring that, to have standing to assert discrimination claims under the ADA and its California analogs, a plaintiff must allege in the complaint specifically which architectural features purportedly violate an access standard and identify “how any of the alleged violations threatens to deprive him of full and equal access due to his disability if he were to return, or how any of them deter him from visiting the Store due to his disability.” The Ninth Circuit held as a result that a plaintiff no longer has standing “to perform a wholesale audit of the defendant’s premises.”²³⁹

The importance of this rule of law, which brings the Ninth Circuit in line with several other circuits, should not be discounted. The typical accessibility complaint is brought by a “drive by” plaintiff who may not have even entered the store. The complaint thus often mentions a parking violation, and seeks an injunction for anything else an audit might reveal. Lacking a list of alleged access violations, the franchisee-franchisor has no way to immediately fix all of plaintiff’s issues until well into discovery – dramatically driving up plaintiff and defense attorneys’ fees – both of which defendant must pay. Decisions such as these will hopefully end that abusive practice.

b. New York

The New York Civil Rights Law is of significant concern to franchising systems, as violations of its anti-discrimination provision may result in the award of statutory minimum damages, making it conducive for class action lawsuits.²⁴⁰

Under New York’s Civil Rights Law § 40:

All persons . . . shall be entitled to the full and equal accommodations . . . and privileges of any places of public accommodations . . . subject only to the conditions and limitations established by law and applicable alike to all persons.²⁴¹

For violations of the accessibility statute, Section 41 (“Penalty for violation”) provides:

Any person . . . corporation or association which shall violate any of the provisions of sections forty, forty-a . . . shall each and every violation thereof

²³⁷ 631 F.3d 939 (9th Cir. 2011).

²³⁸ 654 F.3d 903 (9th Cir. 2011).

²³⁹ *Chapman*, 631 F.3d at 955 (citation omitted); see also *Meggs v. MHD Vegas Realty Corp.*, No. 214CV1798JCMCWH, 2016 WL 1048014, at *4 (D. Nev. Mar. 10, 2016); *Johnson v. Gallup & Whalen Santa Maria*, No. 17-CV-01191-SI, 2018 WL 2183254, at *5 (N.D. Cal. May 11, 2018).

²⁴⁰ See *Panzica v. Mas-Maz, Inc.*, No. 05-2595, 2007 WL 1732123 (E.D.N.Y. June 11, 2007) (class action filed by disabled individual against restaurant, alleging violations of the ADA and New York state accessibility laws).

²⁴¹ N.Y. Civil Rights Law § 40.

be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby . . .²⁴²

Section 41 “establishes a private cause of action to recover a statutory penalty against those who violate their rights or who aids or incites such a violation.”²⁴³

Additionally, franchise systems should be aware of New York’s Executive Laws. New York Executive Law § 296, like the statute cited above, prohibits discrimination in places of public accommodation.²⁴⁴ In order to state a claim under § 296, a plaintiff must allege that (1) he has a disability, (2) that a person who owns, leases (or leases to) or operates a place of public accommodation discriminated against him, (3) on the basis of his disability.²⁴⁵ Subsection 297 provides for “damages . . . and such other remedies as may be appropriate, including any civil fines and penalties...”²⁴⁶ The City of New York also has an ordinance prohibiting discriminatory practices providing for attorneys’ fees, injunctive relief, compensatory damages and punitive damages.

Because New York’s laws provide multiple avenues for collecting attorneys’ fees and damages awards, it is extremely appealing to the plaintiffs’ attorneys bar and should be a state of concern to franchisors.

c. New Jersey

New Jersey is a hotbed for Title III class action lawsuits against franchisors, including against the McDonald’s® and Burger King® systems to name a few.²⁴⁷ The New Jersey Law Against Discrimination (“LAD”) provides a variety of protections to people at risk for discrimination including people with physical disabilities.²⁴⁸ “It is well-established that the LAD is intended to be New Jersey’s remedy for unacceptable discrimination and is to be construed liberally Among its other objectives, the LAD is intended to insure that handicapped persons will have ‘full and equal access to society’”²⁴⁹

The LAD provides a private cause of action for any individual who has faced barriers to access at places of public accommodation.²⁵⁰ An aggrieved individual also has the

²⁴² *Id.* § 41 (emphasis added).

²⁴³ *Feacher v. Intercontinental Hotels Grp.*, 563 F. Supp. 2d 389, 407 (N.D.N.Y. 2008) (quoting *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 79 N.Y. 2d 227, 234 (1992)).

²⁴⁴ See *Romano v. SLS Residential, Inc.*, 246 F.R.D. 432 (S.D.N.Y. 2007) (former patient brought class action against treatment facility asserting claims under the ADA and NY Exec. Law § 296).

²⁴⁵ *Romano*, 246 F.R.D. at 440-41.

²⁴⁶ N.Y. Exec. L. § 297.

²⁴⁷ See *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334 (D.N.J. 2003) (wheelchair user and handicapped advocacy group sued restaurant chain and franchisees, claiming violations of Americans with Disabilities Act); *Clark v. McDonalds*, 213 F.R.D. 198 (D.N.J. 2003); *Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 193 F.3d 730 (3d Cir. 1999) (class of wheelchair users maintained class action under Title III of the ADA against concert venue); *Access 4 All, Inc. v. ANI Assocs., Inc.*, Case No. 04-6297, 2007 WL 2793373 (D.N.J. Sep. 25, 2007).

²⁴⁸ N.J.S.A. 10:5-1 *et seq.*

²⁴⁹ *Franek v. Tomahawk Lake Resort*, 333 N.J. Super. 206, 217, 754 A.2d 1237 (App. Div. 2000) (quoting *D.I.A.L., Inc. v. N.J. Dep’t of Cmty. Affairs*, 254 N.J. Super. 426, 439, 603 A.2d 967 (App. Div. 1992)).

²⁵⁰ N.J.S.A. § 10:5-13.

option of filing a complaint with the New Jersey Division of Civil Rights.²⁵¹ All remedies available in common law tort actions, such as compensatory damages and damages for emotional distress, are available to prevailing plaintiffs under the LAD.²⁵²

d. Colorado

Colorado is yet another state that permits damages, and in particular for statutory minimum damages, for “discrimination in places of public accommodation.”

The fact that Colorado’s statutory minimum damage amount (\$50) is lower than some other states with statutory minimum damages has not deterred classes of disabled individuals from filing lawsuits. For example, in *Lucas v. K-Mart Corp.*, the Colorado district court certified a class action and approved a settlement in which K-Mart agreed to pay \$13 million in damages to the class, \$3.25 million in attorneys’ fees, \$125,000 in costs, as well as to make the K-Mart stores and their parking lots accessible.²⁵³ In 1999 the same plaintiffs’ firm brought an accessibility lawsuit against Taco Bell in Colorado alleging that Taco Bell’s Colorado restaurants had queue lines which did not comply with the ADA or Colorado law. This matter settled in 2003 with Taco Bell agreeing to alter its queue lines and to pay \$210,000 in attorneys’ fees and costs and \$50 for each class member affected, not to exceed \$5,700.²⁵⁴ Additionally, Taco Bell agreed to pay a coalition official \$25 per hour, not to exceed \$3,500 total, to monitor Taco Bell’s compliance with the agreement.²⁵⁵

e. Other States

Franchise systems should also pay special attention to locations in the following states: Massachusetts, Nevada, Ohio, Oregon, Arizona, Florida, Georgia, Iowa, Kentucky, Maine, Michigan, Minnesota, Nebraska, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, and Washington, D.C. These are states where the state’s accessibility statute provides for private causes of action for damages and/or where established class action activity already exists.

I. Negotiation, Remediation, and Settlement

1. Requirements for Pre-Suit Demand and Waiting Period

Franchisors and franchisees can greatly benefit from advance notice of ADA violations and an opportunity to cure such violations before being held liable and paying plaintiff’s attorney’s fees. Below are some examples of states that have passed notice and cure periods as part of their accessibility laws, as well as an attempt to create a notice and cure period for the ADA, itself.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Lucas*, 2006 WL 2729260.

²⁵⁴ *Colorado Cross-Disability v. Taco Bell*, 184 F.R.D. 354.

²⁵⁵ *Id.*

a. ADA Education and Reform Act of 2017

In 2018, the U.S. House of Representatives passed the ADA Education and Reform Act of 2017, H.R. 620, which would prohibit a plaintiff from filing a federal ADA lawsuit based on failure to remove architectural barriers unless the plaintiff first gave the business notice of the alleged violations and an opportunity to provide a plan to remediate the violations. However, the Senate has taken no action on H.R. 620.

b. Ohio House Bill 271

Ohio recently passed a law which will require that a plaintiff, in order to be eligible for attorney's fees, provide notice of the alleged accessibility violation in advance of filing any action.²⁵⁶ Once notice has been served, the property owner, agent, or other responsible party has fifteen business days to respond to the plaintiff.²⁵⁷ Then, the responsible party of the property where the alleged violation occurred shall have sixty days to remedy the alleged violation. This sixty-day period may be extended an additional sixty days if a reasonable explanation is given as to why the improvements require more than sixty days to complete. Reasonable explanations include demonstrated need for extension, such as construction and permitting-related issues.²⁵⁸

If the responsible party fails to timely make the improvements or provide a reasonable explanation as to why those improvements are not completed, the plaintiff may then file a civil action.²⁵⁹ Significantly, if the responsible party makes the improvements, the plaintiff shall not receive any damages or attorney's fees for any action arising out of the same or similar facts.

Notably, a plaintiff who provides notice but fails to allow the responsible party the opportunity to remediate the violations, as specified in the new law, may forfeit his or her right to attorney's fees. However, a plaintiff may be able to still recover attorney's fees even if notice was not provided if the court determines that fees are appropriate if violations are outrageous. Ohio House Bill 271 will not affect the remedies and procedures available under the federal ADA.

c. Minnesota Human Rights Act

The Minnesota legislature also recently passed an amendment to the Minnesota Human Rights Act, requiring that before commencing any litigation alleging a place of public accommodation is not in compliance with state accessibility laws, a plaintiff must first provide the place of public accommodation written notice of "architectural barriers" and a reasonable time to remedy the alleged violation (at least 60 days).²⁶⁰ Under this new amended statute, the cure period will automatically be extended if the noticed recipient responds in writing that it intends to remove the architectural barrier, but

²⁵⁶ Ohio HB271.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Amends Minn. Stat. § 363A.331 on May 24, 2017.

weather permits it from doing so immediately.²⁶¹ A represented plaintiff (the notice requirement does not apply to pro se litigants) may not advance with litigation if the notice has not been provided.²⁶² Remediation within the notice period can be used as an affirmative defense in the event that a plaintiff still chooses to proceed with litigation.²⁶³

d. California Civil Code Section 55.3

California Civil Code Section 55.3 attempts to reduce “drive-by” litigation and at the same time encourage compliance with disability access laws. For example, section 55.3 bans pre-litigation demand letters that demand a specific amount of money without actually filing suit (a demand letter may still offer pre-litigation settlement negotiations and reference potential liability, but not set forth a specific amount).²⁶⁴

If litigation is filed, section 55.54 reduces the Unruh Civil Rights Act’s \$4,000 minimum statutory damages to \$1,000 per violation provided that the allegations are regarding “(a) a new construction or improvement [that] was approved pursuant to the local building permit and inspection process on or after January 1, 2008 and before January 1, 2016,” or “(b) the new construction or improvement was approved by a local building department inspector who is a Certified Access Specialist (“CASp”), if all violations identified in the complaint are brought into compliance within 60 days after service.”²⁶⁵ Section 55.56 also requires a court hearing a disability access complaint to consider the reasonableness of a plaintiff’s conduct in awarding damages for “stacked claims” where a plaintiff repeatedly visits a non-compliant location in order to claim damages for multiple visits.²⁶⁶

In addition, California Civil Code Section 1938 requires the owner or lessor of a commercial property to state on every lease form or rental agreement executed on or after July 1, 2013, (i) whether the property being leased or rented has been inspected by a CASp, and (ii) if so, whether the property has or has not been determined to meet all applicable construction-related disabled access standards under California Civil Code Section 55.53.²⁶⁷ Section 1938 is silent with respect to any consequences for failure to make this disclosure, or remedies available for tenants.

Such pre-suit demand and cure periods provide a means to limit the number of ADA and state accessibility lawsuits and minimize the fees available to a plaintiff. Also, they incentivize business owners to rectify accessibility violations within a reasonable amount of time, as doing so will lessen the expense of a costly lawsuit or a demand letter for a monetary settlement. Lastly, these periods facilitate the removal of accessibility barriers to ensure better access for the disabled within short periods of

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Cal. Civ. Code § 55.31.

²⁶⁵ Cal. Civ. Code §§ 55.54; 55.56.

²⁶⁶ Cal. Civ. Code § 55.56(i).

²⁶⁷ Cal. Civ. Code § 1938.

time, which accomplishes the goal of the ADA and state accessibility laws much faster than a quick payoff that does nothing to remediate the access issues. Franchisors should consider lobbying to pass legislation that would require these pre-suit notice and cure periods for their own states.

1. Remediation

Remediating violations is money well spent, because it not only moots existing claims, it also reduces the likelihood of future ones. Courts have dismissed cases as moot when plaintiffs' allegations of ADA violations have been remedied by the defendant and the court determines that the alleged violations are not likely to reoccur in the future.²⁶⁸

2. Settlement Agreements

It can be difficult to moot a website claim because the standards are not concrete. Settlement may not prevent other challengers. By way of example, following settlement of a website accessibility case in which Hooters agreed to make its website WCAG compliant, a different plaintiff sued Hooters for the same accessibility issues before Hooters had completed its changes to the website pursuant to the settlement agreement.²⁶⁹ The trial court dismissed the complaint as moot and plaintiff, represented by Thomas Bacon, appealed.²⁷⁰ The Eleventh Circuit reversed the district court, holding that the case was not moot. The court held that there was a live case and controversy because (1) Hooters had not yet remediated the website issues; (2) the district court in the first case, pursuant to that settlement agreement, did not retain jurisdiction and that court, therefore, could not order Hooters to abide by the settlement agreement; and (3) part of the relief plaintiff requested – that Hooters “continually update and maintain” its website – was not part of the first case.²⁷¹

Significantly, the Eleventh Circuit may have ruled for reasons other than those stated in the opinion. The Eleventh Circuit opinion was handed down twelve months after Hooters was sued in the first case and twenty-one months after it agreed, in the initial settlement, to remediate the website. Most importantly, at that time, Hooters was in breach of the settlement agreement for failing to have completed the improvements to its website within twelve months as required. In light of that fact, not only had Hooters not complied with the ADA, but it had also not complied with the settlement agreement. The court was within its right to consider plaintiff's request that Hooters be required to maintain compliance in the future as a possible reasonable remedy.

²⁶⁸ *Burningham v. Teton Toys Lehi, Inc.*, No. 2:17-cv-00542-DBP, 2018 WL 6267310, at *1 (D. Utah Nov. 30, 2018) (dismissing the matter as moot because defendant had remedied the ADA violation alleged in plaintiff's complaint and the court found that the alleged violations are not likely to reoccur).

²⁶⁹ *Haynes v. Hooter of Am., LLC*, No. 17-13170, 2018 WL 3030840 (11th Cir. June 19, 2018).

²⁷⁰ *Id.*

²⁷¹ *Id.*

However, the court did not rule out that a settlement agreement with appropriate terms, could bar future “copycat” lawsuits from a different plaintiff.²⁷² *Haynes* teaches franchisors and franchisees to carefully consider what should be included in a settlement agreement in order to put the parties in the best position to argue that future lawsuits should be barred.

Franchisors should consider including settlement terms that provide an opportunity for notice and cure in the event future allegations arise dealing with non-compliance. Also, ensuring that the court retains jurisdiction over the settlement agreement may provide a better chance of precluding future claims seeking the same relief. Franchisors could also settle the case on a class wide basis and including a bar order that precludes anyone else from bringing a similar lawsuit. However, risks lie with this route as well in that a settlement on a class-wide basis needs notice to the class and court approval. Also, attorney’s fees and expenses are higher in such cases.

Conclusion

The ADA has improved the lives of millions of disabled persons, reducing discrimination and making public life more accessible. Business owners can rationalize the costs of ADA compliance as making their goods and services accessible to more customers, regardless of ability. But drive-by and surf-by lawsuits arising from technical violations of accessibility design standards that never really prevented an actual customer from accessing a business’s goods or services impose a heavy compliance and transactional cost in exchange for only minor improvements in accessibility for the disabled.

Statutory fixes such as pre-suit notice requirements have been proposed, and many have passed or are working their way through legislatures across the country, but drive-by lawsuits are likely to continue until Congress passes legislation under the ADA. Website and mobile application claims will also continue to rise until the Department of Justice adopts a set of website accessibility standards. These claims are simply exploiting an undefined area of the law to extract settlements that primarily benefit the lawyers.

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²⁷² The National Law Review, *11th Circuit Holds Prior Settlement in Website Access Case Does Not Moot Identical Second Lawsuit Seeking the Same Injunctive Relief*, (June 22, 2018) <https://www.natlawreview.com/article/11th-circuit-holds-prior-settlement-website-access-case-does-not-moot-identical> (last visited April 25, 2019).