



# RAISING THE BAR

IFA LEGAL SYMPOSIUM  
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# How to Best Avoid or Defend an ADA Drive-By Lawsuit

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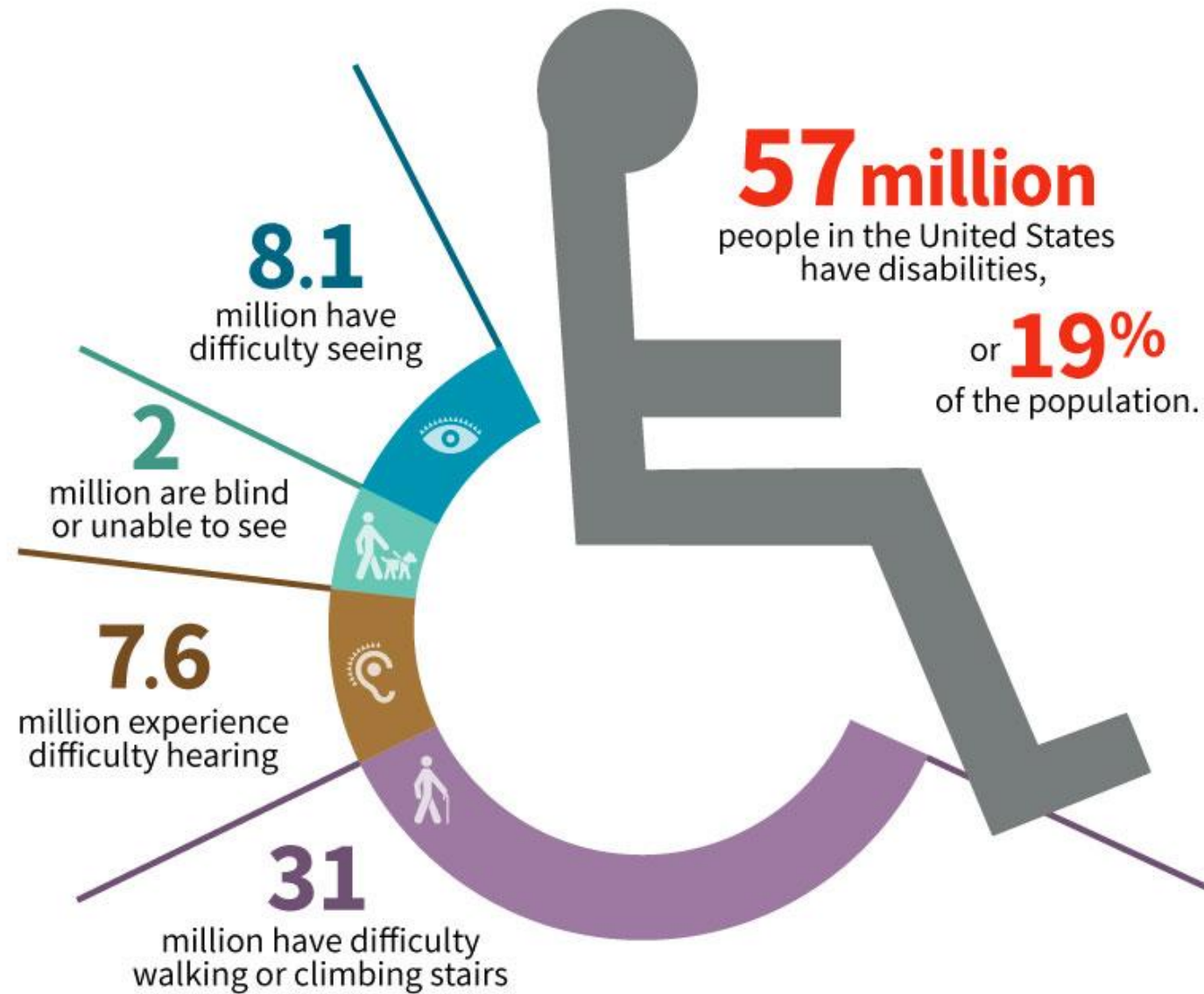
# The Americans with Disabilities Act

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*No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.*



# American Disabilities



- “**Disability**” means “physical or mental impairment that substantially limits one or more major life activities of such individual”
- “**Major life activities**” includes all major bodily functions
- “**Substantially limits**” is defined narrowly

# Title III ADA

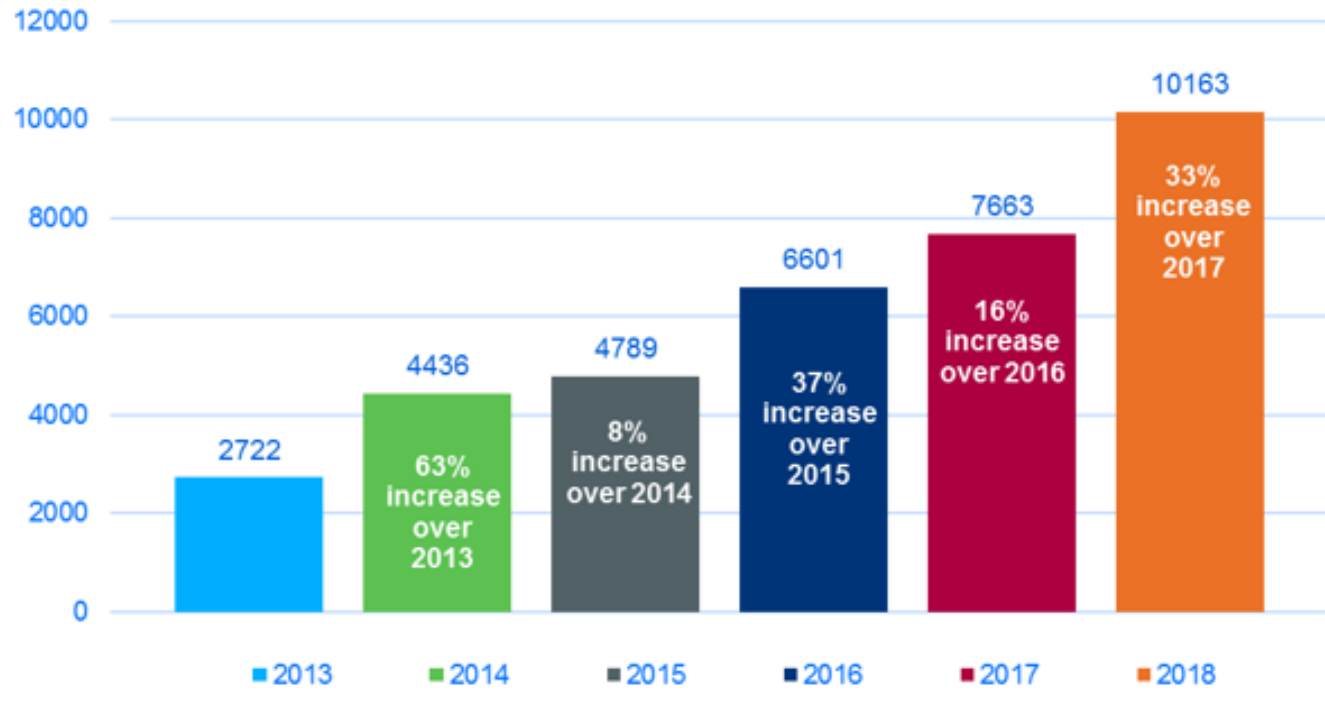
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- “Public accommodation”
  - Includes most types of businesses and franchise systems
  - Applies to: new construction, alterations, and removal of barriers
- Essentially strict liability
- Technical compliance standards
- No notice or demand requirement
- Remedies



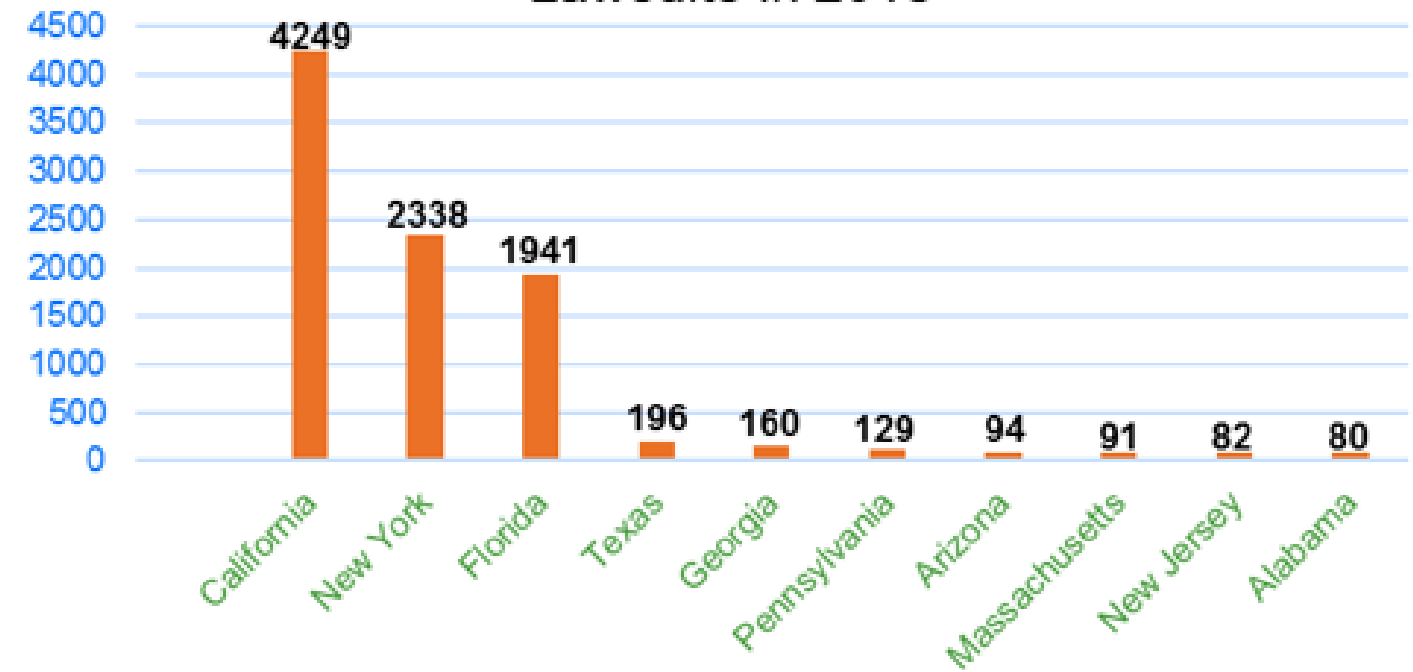
# ADA Lawsuit Epidemic

ADA Title III Lawsuits in Federal Court: 2013 - 2018



\*Seyfarth Shaw

Top 10 States for ADA Title III Federal Lawsuits in 2018



\*Seyfarth Shaw

# The Drive-By

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Dear Franchisor/Franchisee,

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 (details in the accompanying Complaint).

...

If you will bring the property into compliance with the laws and regulations the Complaint identifies as 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. . . .

# The Drive-By

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- Plaintiffs often bring the suit after merely driving by
- Some states allow minimum and actual damages
- Some states have passed laws addressing serial litigation



*Hillesheim v. RVD Real Estate Properties LLC*, 2019 WL 631396, at \*1 (D. Neb. Feb. 14, 2019)

# Top 5 Drive-By Physical Barriers

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1. Parking
2. Accessible Route
3. Curb Ramps
4. Doors
5. Signage



# Top 5 Walk-In Physical Barriers

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1. Customer Service Counters
2. Customer Seating/Tables
3. Drinking Fountains
4. Bathrooms
5. Visual Alarms

# Latest Drive-By Brand Targeting Gasoline Franchises



- *Johnson v. RSJ Investments*, No. 1:18-cv-24431-CMA (S.D. Fla. Oct. 24, 2018).
  - More than 20 lawsuits filed in the last year by one plaintiff alone
  - Screen has no closed captioning option
  - Plaintiff does not demand remediation, just \$\$\$

# Service Animals

- Must perform specific tasks for disabled persons
- “Therapy” animals do not qualify



# The Surf-By

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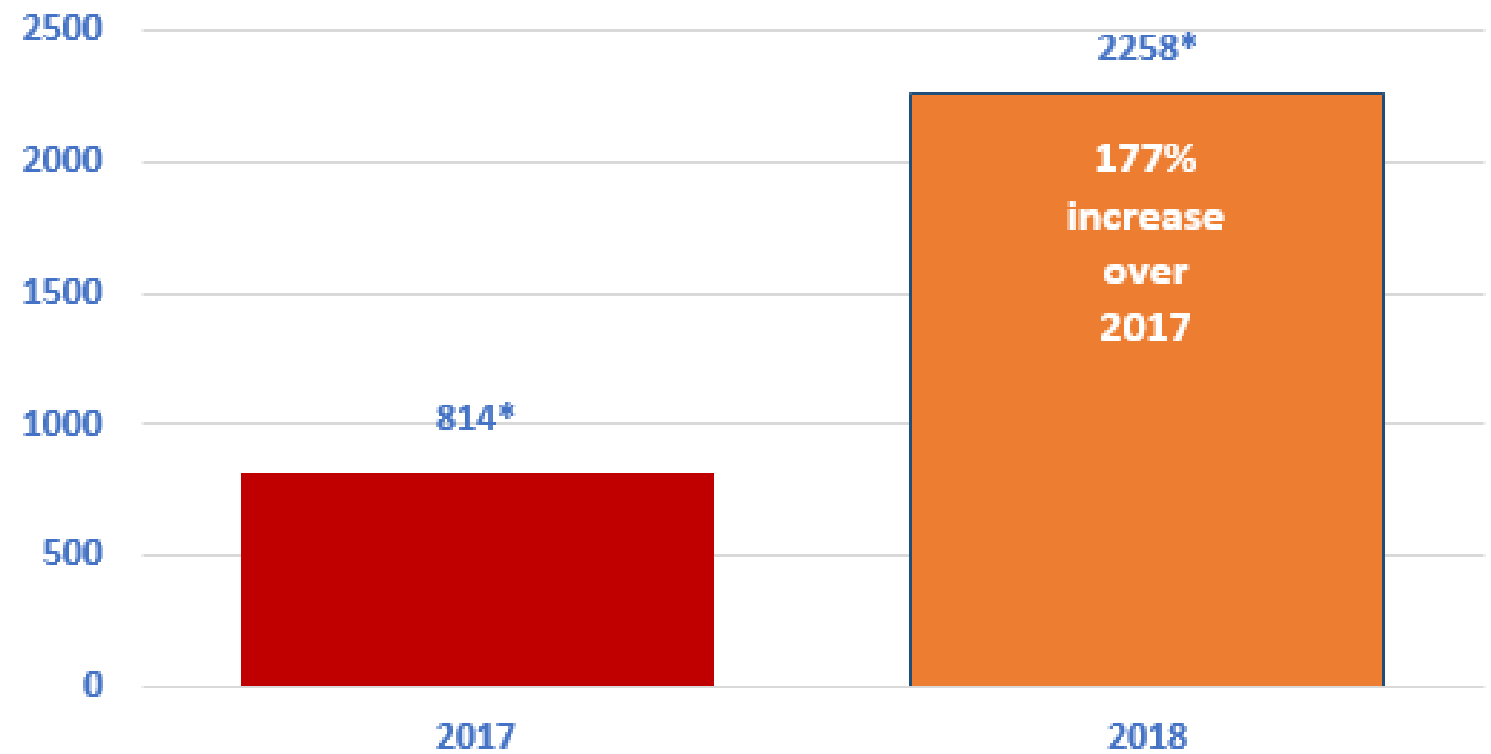


- “Places of public accommodation”
  - Websites
  - Mobile Applications
- Department of Justice
- Domino’s Pizza, Famous Dave’s, Five Guys, Dunkin Donuts, GNC, and more
- Not if, but when...

# The Surf-By

- Website accessibility lawsuits in federal court *tripled* last year

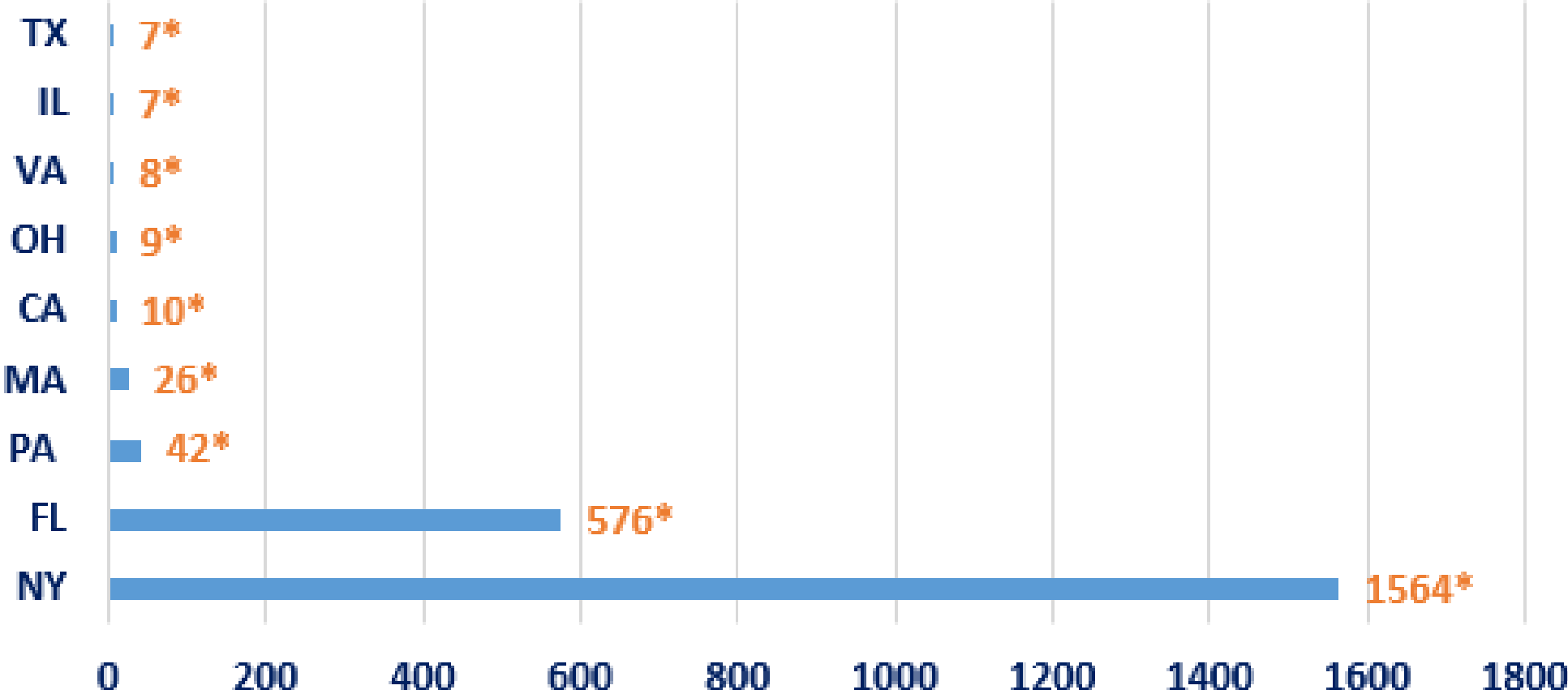
ADA Title III Website Accessibility Lawsuits in Federal Court (2017-2018)



\*Seyfarth Shaw

# The Surf-By

Top 10 States for ADA Title III Website Accessibility Lawsuits



\*Seyfarth Shaw

# The Surf-By

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- 10 law firms filed 82% of all website accessibility lawsuits
  - Cohen & Mizrahi LLP
  - Lipsky Lowe, LLP
  - The Leal Firm, P.A.
  - Shaked Law Group, P.C.
  - Lee Litigation Group, PLLC
  - Gottlieb & Associates
  - Shalom Law Group, PLLC
  - Scott R. Dinin, P.A.
  - Garcia-Menocal & Perez, P.L.
  - The Marks Law Firm, P.C.



# The Circuit Split

- 1st, 2nd, and 7th
  - Websites themselves are a “place of public accommodation”
- 3rd, 6th, 9th, and 11th
  - Require “nexus” between website and physical location
- 5<sup>th</sup> seems likely to require a “nexus”



**If I would have used hay (instead of “bricks and mortar”), would I still have to comply with the ADA?**

*Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-CV-30023-KAR,  
2019 WL 1409302, at \*6 (D. Mass. Mar. 28, 2019).

# Virtual & Website Barriers

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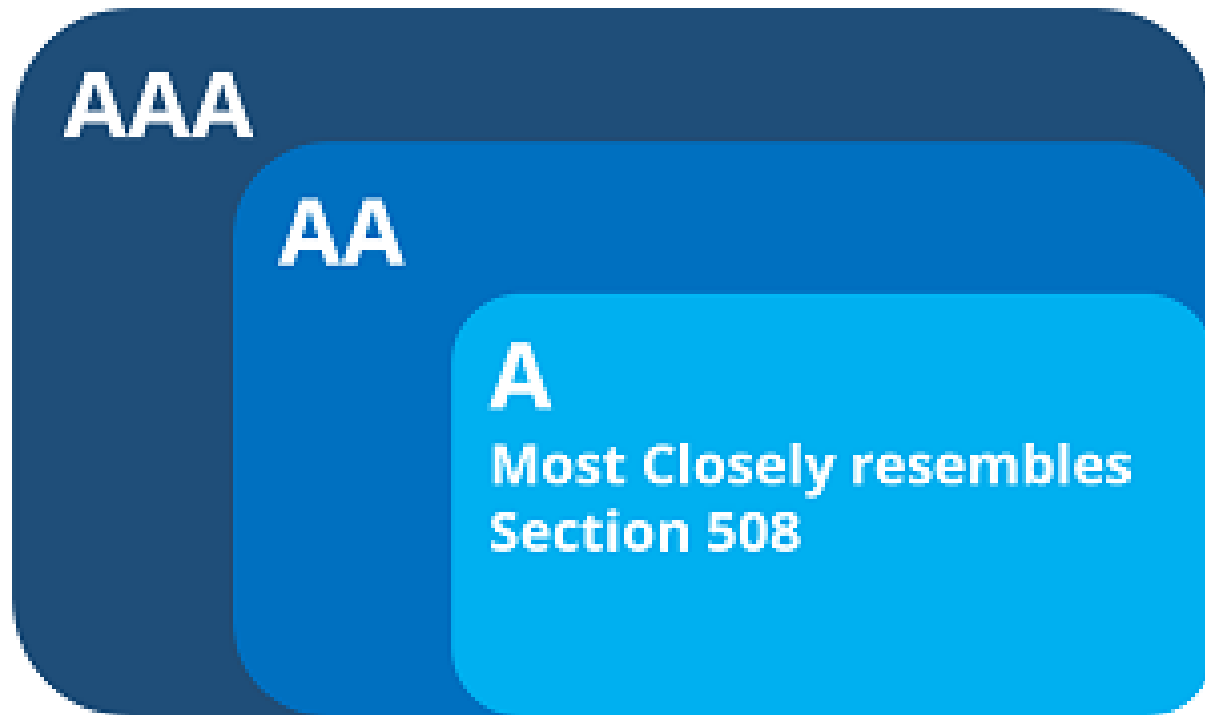


*[P]ublic accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA. . . . Given Congress' ability to provide greater clarity through the legislative process, we look forward to working with you to continue these efforts.*

*- Dept. of Justice to House of Representatives*

# WCAG

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- World Wide Web Consortium (WC3)
- Web Content Accessibility Guidelines (WCAG)
- Version 2.1 Released 2019
- Principles > Guidelines > Success Criteria
- Levels AAA, AA, A

# WCAG

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## 1. Perceivable

- Screen readers
- Captions

## 2. Operable

- Navigation with Tab & Arrow keys

## 3. Understandable

- Predictable navigation

## 4. Robust

- Functionality with assistive technologies



## Web Content Accessibility Guidelines (WCAG-2)

Checkpoint	Level	Checkpoint Title	# failed pages	% failed pages
1.1.1	A	All non-text content (with certain exceptions) presented to the user should have an equivalent text alternative.	504 (of 530)	95%
1.3.1	A	Information about the meaning and structure of your content must be conveyed by more than the visual presentation of your content.	508 (of 530)	96%
1.4.4	AA	Except for captions and images of text, text can be resized without assistive technology up to 200 percent without loss of content or functionality.	492 (of 530)	93%
2.2.1	A	If the content enforces a time limit, the user should be able to extend, adjust or disable it, unless the time limit is part of a real time activity or would invalidate the activity.	510 (of 530)	96%
2.4.2	A	Web pages have titles that describe topic or purpose.	504 (of 530)	95%
2.4.4	A	The purpose of each link can be determined from the link text alone or from the link text and its programmatically determined link context, unless the purpose of the link would be ambiguous to users in general.	504 (of 530)	95%
3.2.2	A	Changing the setting of any user interface component doesn't automatically cause a change of context unless the user has been informed before using the component.	504 (of 530)	95%
3.3.2	A	Labels or instructions are provided when content requires user input.	504 (of 530)	95%

# Website Accessibility Scans & Audits

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- Software Scans
- Live-User Tests

*Automated 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.*

*- U.S. General Services Administration*



# Design & Content Prioritization

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- Interactive Assistance
  - Telephone or Chat
  - *Robles v. Domino's Pizza*
- Accessible “Alternative” Sites
- Legal Content
- Critical Website Functions
  - Purchasing/booking platforms
  - Login pages, account settings

Contact our ADA  
comment line at  
**1-877-644-7819**

Or call us via TDD/TTY at  
**1-800-877-4833**

## Job seekers with disabilities

We can help with accessibility  
assistance during the  
application process.

[Our Hiring Process >](#)

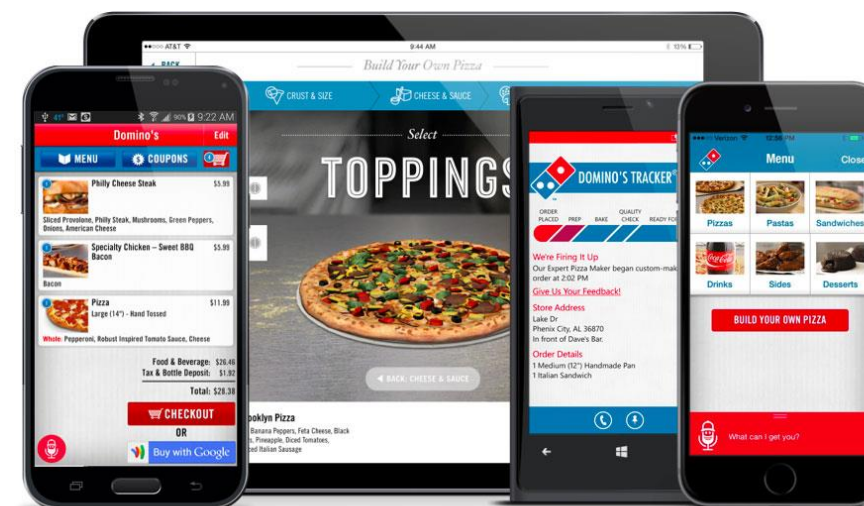
Was this content helpful?

Yes

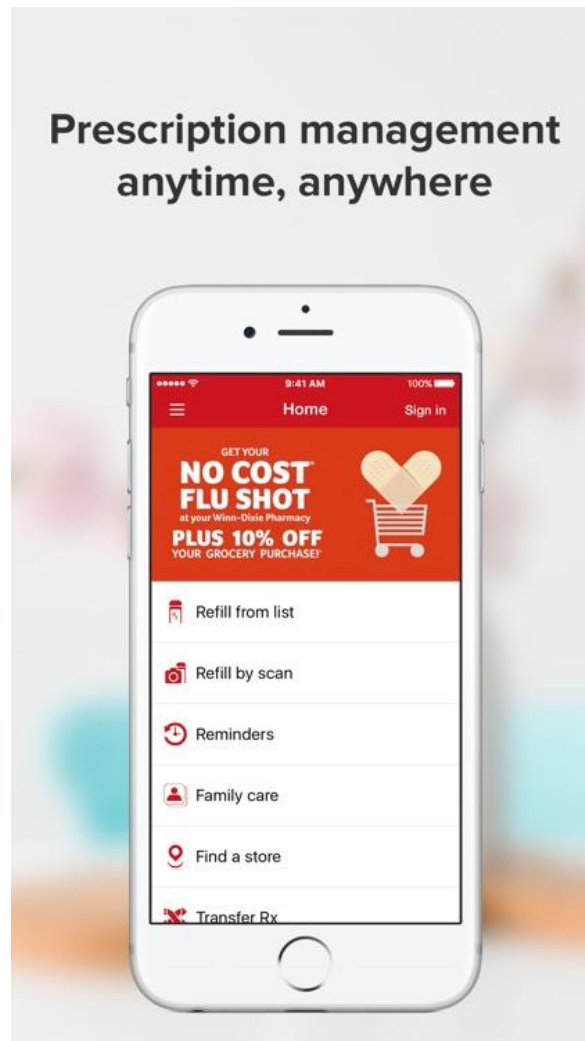
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# Robles v. Domino's Pizza, 913 F.3d 898 (9th Cir. 2019)

- Sight-impaired plaintiff complained that Domino's website and mobile app was not WCAG compliant
- District court dismissed lawsuit under the primary jurisdiction doctrine because no ADA regulation requires WCAG compliance
- 9<sup>th</sup> Circuit reversed and remanded
  - ADA applies to Domino's website and mobile app even though customers "predominantly access them away from the physical restaurant"
  - "The [ADA] applies to services *of* a place of public accommodation, not services *in* a place of public accommodation."
  - Court left open question of whether telephone number on website or mobile app is sufficient for sight-impaired customers



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



- Rare website accessibility case to go to trial
- Sight-impaired plaintiff was unable to use Winn-Dixie's website to refill prescriptions
- Court ruled for plaintiff and entered injunction requiring Winn-Dixie to make its website WCAG 2.0 compliant, among other relief
- Court did not state whether an ADA disclosure notice & phone number would have been sufficient
- Appeal before Eleventh Circuit

# Franchisor-Franchisee Liability

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- **Operator**

- “An ‘operator’ must have a significant degree of control over the access-related aspects of the facility in question.”
  - *Johnson v. Winchester Campbell Properties, LLC*, No. 18-CV-04153-VKD, 2018 WL 6619940, at \*3 (N.D. Cal. Dec. 18, 2018).
- The “relevant inquiry . . . is whether [the franchisor] **specifically controls** the modifications of the franchises to improve their accessibility to the disabled.”
  - *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1063 (5th Cir. 1995) (emphasis added).

- **Designer**

- Design and construct provisions of 42 U.S.C. § 12183
- In *U.S. v. Days Inn of Am., Inc.*, the court held that Days Inn of America was liable for accessibility violations at the hotel because it “designs and constructs hotels in that it carefully licenses and regulations and contributes to the planning of, and building of hotels. . . .”
  - *U.S. v. Days Inn of Am., Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998).

- **Lessor**

- Anyone who leases to or from another



# Risk Allocation

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- Franchisees
- Professionals & Vendors
- Representations & Warranties
- Indemnification
- Insurance



**“Today we are going to decide who to blame.”**

# Compliance Policies: Franchisee Compliance

- *Mielo v. Steak 'n Shake Operations, Inc.*
  - Policy would have avoided claims
- *Castaneda v. Burger King Corporation*
  - Policy helped avoid class certification
- *Heinzl v. Cracker Barrel Old Country Stores, Inc.*
  - Not following policy created standing
- *Badger v. Burger King Corporation*
  - Policy requiring ADA certificates of compliance helped resolve claims in Burger King Corp.'s favor
- Hilton Worldwide Consent Decree



# Compliance Policies: Franchisee Compliance

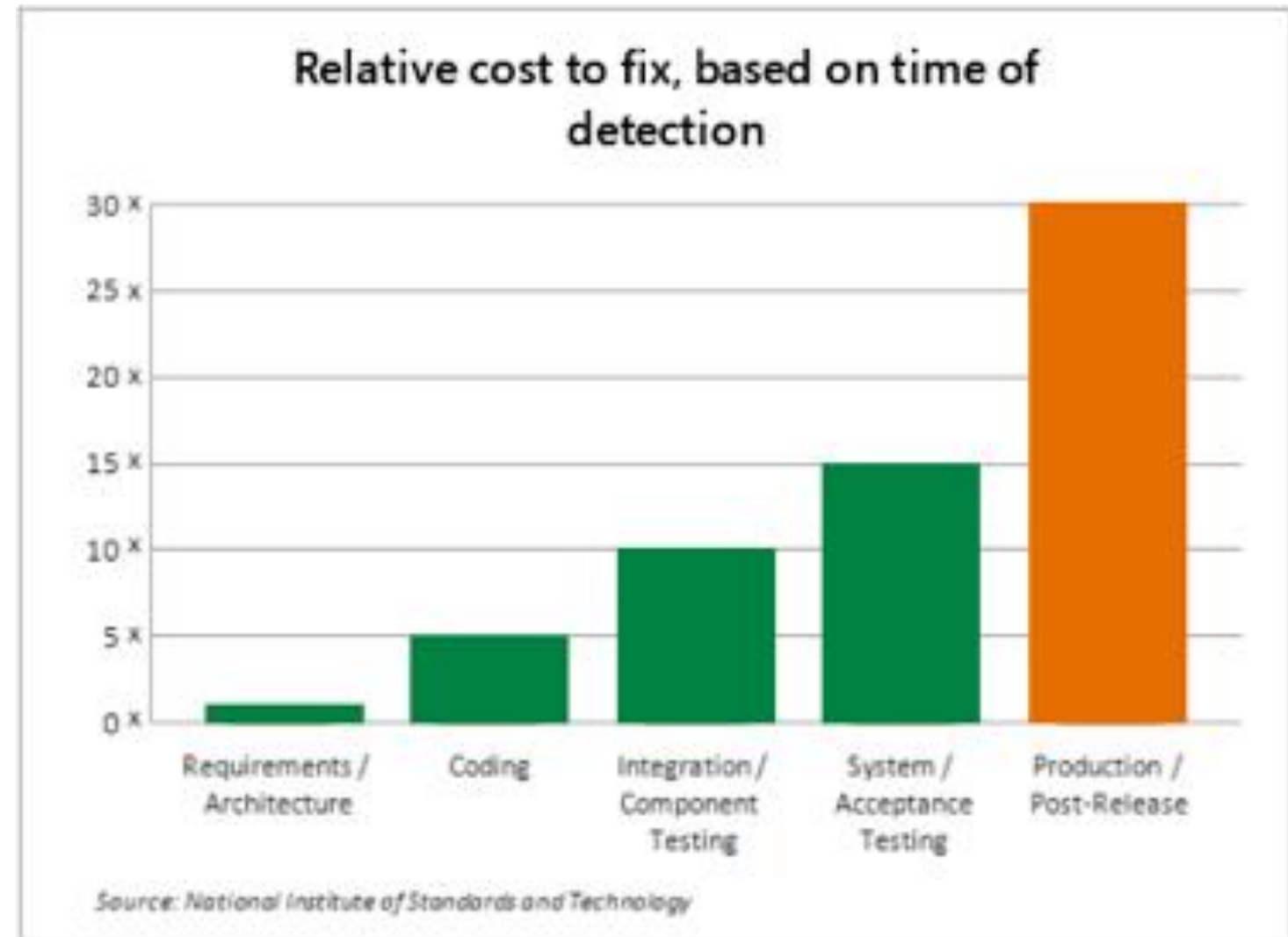
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- Require ADA compliance, but no common architectural design
- Require franchisees to retain qualified architects and contractors
- Appoint a compliance officer
- Retain accessibility consultants
- Perform audits and surveys
- Offer training

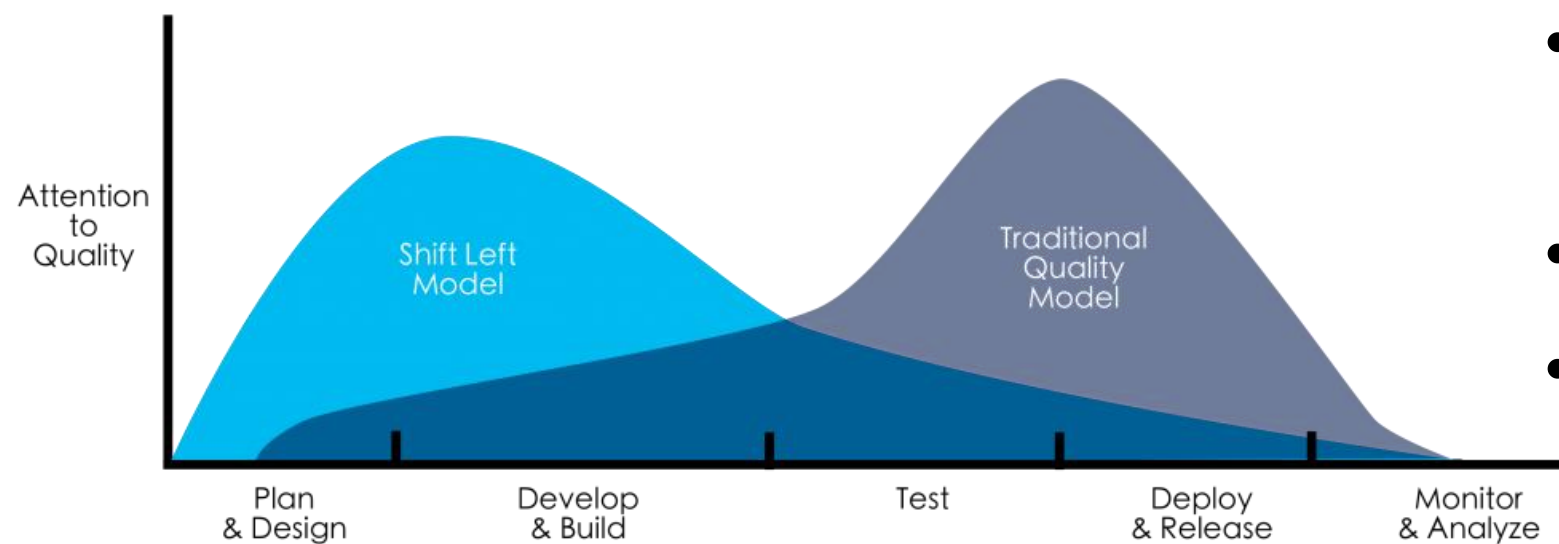
# Compliance Policies: Website Compliance

- Perform regular audits
- Appoint a compliance officer
- Retain accessibility consultants
- Train internal IT managers
- Accessibility statement
- Implement accessible design



# Compliance Policies: Website Compliance

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- Most businesses do not address accessibility until after they are sued
- Cost of remediation is higher later on
- Implementing accessible design at the outset is more cost efficient



# WEBSITE AND TECHNOLOGY ACCESSIBILITY STATEMENT

Effective February 3, 2017



## ACCESSIBILITY ASSISTANCE

If you have difficulty using or accessing any element of this website or on any American Dairy Queen Corporation ("ADQ") mobile app or tool, please feel free to [contact us](#) and we will work with you to provide the information, item, or transaction you seek through a communication method that is accessible for you consistent with applicable law (for example, through telephone support).

## GOAL OF ACCESSIBILITY FOR ALL

ADQ desires to provide a positive customer experience to all our customers, and we aim to promote accessibility and inclusion. Our goal is to permit our customers to successfully gather information and transact business through our website and other technology platforms.

Whether you are using assistive technologies like a screen reader, a magnifier, voice recognition software, or captions for videos, our goal is to make your use of ADQ's technology a successful and enjoyable experience.

## ACTIONS

We are actively taking a variety of steps and devoting resources to further enhance the accessibility of our website and other technology.

## ONGOING EFFORT

Although we are proud of the efforts that we have completed and that are in-progress, we at ADQ view accessibility as an ongoing effort.

## FEEDBACK

Please [contact us](#) if you have any feedback or suggestions as to how we could improve the accessibility of this website or our other technology.

# Settlement Considerations

- Settling website accessibility cases with accessibility statements
  - “At \_\_\_\_\_, we are committed to ensuring that individuals with disabilities can access all of the goods, services, facilities, privileges, advantages, and accommodations offered by \_\_\_\_\_ through its website. If you are having trouble accessing the website, please call our Customer Service Team at [phone number to be inserted] for assistance.”
- Party agreement that websites are compliant with applicable ADA standards
  - “[A]s a compromise of all Released Claims . . . Defendant shall use commercially reasonable efforts to cause all portions of the Website and Mobile App and any subsequent version . . . That are covered by Title III of the ADA to substantially conform to any existing and applicable legal standard(s) within 12 months of the Effective Date of this Agreement.”



# *Haynes v. Hooters*, 893 F.3d 781 (11th Cir. 2018)

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- Whether settlement agreement should retain court's jurisdiction
- Move to stay, not dismiss when facing a duplicative website complaint
- Ensure website is made accessible quickly



**HOOTERS**™ **MAKES YOU HAPPY**

# Litigation Strategies: Mootness

- Strategy: Moot the claim by remediating as many violations as possible
- Key Considerations
  - Time for remediation
  - Certify compliance with an expert
  - State law damages
- Plaintiffs' Arguments
  - Unalleged or ambiguous violations
  - Policy-related allegations
- Website Issues
  - Lack of compliance standards
  - WCAG is not as objective



# Staying the Case

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- *Haynes v. Burlington Stores, Inc.*, No. 0:17-cv-61640-DPG (S.D. Fla. Aug., 16, 2017) (Gayles, J).
  - Some courts are staying ADA cases *sua sponte*

# Litigation Strategies: Standing

- Requirements
  - Actual Injury
  - Threat of present or future harm
- Intent to Return
- Websites and mobile applications
- Deterrent Effect

*[A] plaintiff can demonstrate sufficient injury to pursue injunctive relief when discriminatory architectural barriers deter him from returning to a noncompliant accommodation.*

– *Chapman v. Pier 1 Imports (U.S.) Inc.*
- Awareness of violation serves as injury-in-fact and threat of future injury



I've never even eaten here and I hate it already. I'm planning to bring my entire family this weekend so that we can experience this loathsome hovel in person and properly register our disdain.

Was this review ...?



# Arbitration

- Agreements
  - Membership-based services
  - Websites and mobile applications
- Potential benefits
  - Arbitration may deter drive-by claims
  - Arbitrator expertise
  - Limits on claims

