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**MEMORANDUM**

TO: National Apartment Association

FROM: Anthony A. Mingione
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DATE: November 20, 2018

RE: ADA Website Accessibility Litigation

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## I. Introduction

Owners and operators of consumer-facing websites are facing a rising wave of lawsuits alleging violations of Title III of the 1990 Americans with Disabilities Act ("ADA"), a federal civil rights law that requires places of public accommodation (*e.g.*, retail stores and restaurants selling to the public) to meet certain standards of accessibility for disabled visitors. The plaintiffs claim that the defendants' websites are not accessible to the blind and visually impaired, and seek court-ordered remediation of the websites, attorneys' fees, and monetary compensation.

These cases have come to be called "surf by" lawsuits—so-named after the classic ADA "drive-by" lawsuits, in which plaintiffs would actually drive from business-to-business searching for technical ADA violations, and then file lawsuits seeking a similar array of remedies. The present legal landscape contains a continuing drumbeat of newly filed surf-by cases. This memorandum discusses the root causes and effects of this phenomenon, provides practical insight to guide informed decisions about websites and their design, and explains some of the available courses of action to employ in the unfortunate event of a lawsuit.

## II. ADA Website Accessibility Lawsuits Are on the Rise

Over 800 federal website accessibility lawsuits were filed in 2017, an unprecedentedly-high number, and a total that is on track to more than double in 2018. Indeed, as of mid-year, more than 1,000 such lawsuits had already been filed in 2018 alone. This recent explosion of ADA website accessibility cases comes from a new cottage industry of plaintiffs' lawyers of varying sophistication, who use software tools that scan the internet in search of websites with purported accessibility issues. Upon finding potential issues, these lawyers file boilerplate complaints on behalf of "professional plaintiffs" that include cut-and-paste claims. Filing identical lawsuits against multiple defendants, sometimes several per day, costs the plaintiff firm a minimum investment of time and resources. But these lawsuits (even the mere threat of such a lawsuit) will cost the defendant-website owner much more. The cases are designed to "sue and settle," *i.e.*,

produce a quick cost/benefit analysis-driven settlement—with all significant costs (litigation defense and/or settlement, and remediation) borne by the defendants, and likely passed-on to consumers.

No industry is safe. Websites belonging to retailers, universities, wineries, luxury goods brands, financial institutions, publishers, tour companies, restaurants and hotels, among many others, have all been targeted. As discussed below, any entity with a website is at risk. And websites promoting luxury apartments sales and rentals have not been spared.

## III. What These Website Accessibility Lawsuits Are About

Title III of the ADA and its implementing federal regulation[1] prohibit discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations by any private entity that owns, leases (or leases to), or operates any place of "public accommodation." The ADA lists several types of public accommodations, but because the statute predates the internet, websites are not specifically included. As every business entity now has web presence, the United States Department of Justice ("DOJ"), which enforces the ADA's requirements, has pursued enforcement actions against companies with allegedly inaccessible websites and mobile applications. Plaintiffs acting as "private attorneys general" have taken a cue. In the last several years scores of private ADA enforcement actions have been filed accusing websites of being inaccessible to the blind and visually impaired.

The archetypical complaint includes a primary claim that the defendant's website fails to incorporate screen reader technology and, as a result, visually impaired individuals who use JAWS or other screen reading software/devices to access and "read" content on websites are unable to access the website, or can access only certain portions. The defendant is thus accused of erecting "barriers" that deny the visually impaired plaintiff full and equal access to all of the services the website offers, and deter him from attempting to use the website. Common examples of alleged barriers include: *images cannot be "read" because of lack of alt text*; *drop down menus do not work; color-coded maps cannot be comprehended*; and *video not closed-captioned (hearing impaired)*.

The main reason behind the explosion of these cases is that the government (through its inaction) has left it unclear as to what it takes for a website to be "accessible" for ADA purposes. In 2010, the DOJ under President Obama announced its intention to issue formal rules providing official guidance on the requirements for making a website accessible. With good reason, most legal and industry experts were expecting this process to result in the issuance of rules adopting guidelines promoted by the World Wide Web Consortium (W3C) as the minimal standard needed to make one's website ADA complaint.

The W3C is a non-governmental international consortium devoted to the development of protocols and guidelines for the World Wide Web. Its Web Content Accessibility Guidelines 2.0

[1] Title III of the ADA is codified at 42 U.S.C. §§ 12181-12189, and its implementing regulation at 28 C.F.R. pt. 36,

Level AA Success Criteria (WCAG 2.0 AA) have emerged as the most widely-accepted industry standard on what makes a website accessible to the visually impaired and other disabled individuals. WCAG 2.0 AA is made up of certain principles and guidelines, testable success criteria, and advisory techniques, all of which provide the framework to assist designers to understand the criteria and implement the techniques to render the website "accessible."

The federal government adopted WCAG 2.0 AA as the standard for its own websites. For its part, the DOJ has itself previously stated that WCAG 2.0 AA were the "well-established industry guidelines" to strive for in making one's web content accessible, and has insisted that every private sector defendant with whom it settles an enforcement action agree to meet this standard. But unfortunately, this standard was not formally implemented by regulatory promulgation or legislative enactment. In fact, no rules whatsoever were ever issued to clarify the technical requirements for public sector website accessibility. In late-2017, the DOJ under President Trump officially suspended the rulemaking process and announced that it was "*evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate.*"

The lack of an officially-established standard has left businesses exposed to lawsuits without a safe harbor. Opportunistic plaintiffs' lawyers have seized advantage by monetizing the prevailing uncertainty into quick-hitting litigation.

## IV. The Legal Landscape

Most ADA website lawsuits end in settlement. Here is why. Aside from not getting targeted in the first place, the best-case scenario for a defendant facing an ADA website lawsuit is prevailing on a motion to dismiss—a point at which the legal fees are still relatively minimal. Despite their boilerplate nature, however, these complaints have proven generally difficult to dismiss because of the factual issues that almost invariably exist regarding the website's accessibility. On a motion to dismiss the court is forced to accept all allegations in the plaintiff's complaint as true. If a defendant argues that it has taken steps to remediate its website to make it ADA-compliant, the plaintiff can deny the efficacy of the remediation, sometimes supplementing that position with an affidavit from an "expert" claiming that its tests of the website demonstrate that it is still inadequate as stated in the complaint. The court will then likely deny the motion, due to the unclear regulatory landscape and competing factual allegations, and send the case into the discovery phase, which can be costly.

Anecdotal evidence suggests that the going range to settle a New York ADA website accessibility case is somewhere in the $15,000-$40,000 range, inclusive of legal fees. A cost-benefit analysis thus often counsels against litigating a case to completion because the costs of defense (with an uncertain outcome) may far outweigh what is often perceived as a ransom demand to resolve the case quickly. Some defendants settle in lieu of moving to dismiss (or otherwise litigating past the initial stage of the lawsuit), while others take a shot at dismissal, and then revert to a settlement posture if they lose the motion – being mindful that the settlement demand is usually adjusted upwards to account for the plaintiff law firm having to brief and argue the motion.

Defense is not futile. Cases have been dismissed in certain jurisdictions on a variety of legal theories (although some of those cases are now on appeal). One key consideration in a proper litigation defense is the jurisdiction in which the lawsuit is filed. There is a split among the federal courts and Circuits regarding whether (and/or when) the ADA applies to a website, and as to how (and/or when) a person can state a claim. For example, there is no uniformity in how website accessibility claims comport with the text of the law limiting the ADA's applicability to places of public accommodation. Courts in the Third, Sixth, Ninth and Eleventh Circuits have held that the ADA applies only to physical places, and thus does not apply to websites wholly unconnected to a physical location. These courts require a plaintiff to demonstrate that, at a minimum, the challenged website facilitates the use of a brick and mortar location; *i.e.*, the so-called "nexus" requirement. *See, e.g., Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (finding that eBay was not subject to the ADA because eBay's services are not connected to any actual, physical place); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018) (plaintiff sufficiently alleged a nexus between Jo–Ann's website and its brick-and-mortar stores); *Gomez v. Bang & Olufsen Am., Inc.*, 2017 WL 1957182 (S.D. Fla. Feb. 2, 2017) (plaintiff failed to state ADA claim because he only alleged that he planned to order goods online).

On the other hand, courts in the First (covering Boston), Second (covering New York City), and Seventh (covering Chicago) Circuits have found that the ADA can apply to a website independent of any connection between the website and a physical place. *See, e.g.*, *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 400 (E.D.N.Y. 2017) (finding that defendant's website was itself a place of public accommodation); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (video streaming website was place of public accommodation event though the website could only be accessed in private residences).

While many jurisdictions have been affected by the surge of surf by lawsuits, the highest concentration of cases have been filed in the federal courts of New York City and the Southern District of Florida, which has territorial jurisdiction over the metropolitan area of Miami, Fort Lauderdale, and West Palm Beach. Despite being one of the "nexus" requirement courts, the Southern District of Florida has emerged as a popular venue because it was the first federal court to conduct a trial in one of these cases, upon which the court issued a verdict finding grocery retailer Winn-Dixie liable under the ADA for having an inaccessible website. The court rejected Winn-Dixie's defense that its website did not prevent the plaintiff's access to the physical store because "the ADA does not merely requir[e] physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided 'full and equal enjoyment of the goods, services, facilities privileges, advantages, or accommodations of any place of public accommodation.'" *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017). The court noted that the online features (e.g., online pharmacy management system, ability to access digital coupons linking automatically to a customer's rewards card, and ability to find store locations) were especially important for visually impaired consumers who may have trouble reading coupons at the store or otherwise locating stores. Accordingly, the ADA was violated because visually impaired persons were denied the same full and equal enjoyment that all others received. *Id*. at 1349.

Not surprisingly, *Win Dixie* opened the floodgates for identical lawsuits in that district. Judge Jack B. Weinstein's decision in *Andrews v. Blick Art Materials, LLC* is likely most-responsible for making New York federal courts an equally sought-after venue. There, the court adopted a broad and contemporary interpretation of the ADA premised on the ADA's "broad mandate" and "comprehensive character," which the court found to be "resilient enough to keep pace with the fact that the virtual reality of the Internet is almost as important now as physical reality alone was when the statute was signed into law." 268 F. Supp. at 400.

## V. ADA Website Cases Have Been Filed Against Businesses in the Apartment Housing Industry

In July of 2018, Aimco Properties, L.P. ("Aimco"), a real estate investment trust that owns apartment properties in California, Colorado, D.C., Florida, Georgia, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Minnesota, Pennsylvania, Tennessee, Virginia, and Washington, was sued in the Southern District of New York in connection with www.aimconyc.com, the Aimco website that promotes its luxury rental units in New York City. The same serial plaintiff (and lawyer) filed identical complaints against apartment building owners in the popular neighborhoods of Long Island City, New York (e.g., Gantry Park Landing https://gantryparklanding.com, The ARC https://arclivinglic.com); and Bushwick, Brooklyn (Denizen Bshwk www.denizenbushwick.com).[2]
Each such complaint includes similar allegations describing the defendants' connection to the websites:

> Defendants, Their Website and Their Website's Barriers
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> X. Defendants own and manage buildings throughout the United States, including [the Building], located at [Address]. They rent within these buildings, studio apartments, and apartments with one or more bedrooms.
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> Y. Defendants' Website is heavily integrated with their building, serving as its gateway. Through the Website, Defendants' tenants and prospective tenants are, inter alia, able to: learn information about [the Building], including its location, apartment features and building amenities; view images and floorplans of the apartments; learn about the neighborhood; and search availabilities through third party website www.on-site.com.
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> Z. It is, upon information and belief, Defendants' policy and practice to deny Plaintiff [] and other blind or visually-impaired users access to their Website, thereby denying the facilities and services that are offered and

[2] *Fischler v. 50-01 2nd Street Associates LLC et al.*, Case No. 1:18-cv-05162-DLI-VMS (S.D.N.Y.); *Fischler v. 30-02 Associates LLC et al.*, Case No. 1:18-cv-05318-JBW-SJB (S.D.N.Y.); *Fischler v. All Year Management LLC et al.*, Case No. 1:18-cv-04704-ENV-RML (S.D.N.Y.)

> integrated with their apartment building. Due to their failure and refusal to remove access barriers to their Website, Plaintiff [] and visually-impaired persons have been and are still being denied equal access to Defendants' apartment building and the numerous facilities, goods, services, and benefits offered to the public through their Website.[3]

## VI. Key Takeaways

If your website is not accessible, you may be targeted for non-compliance with the ADA. If you get sued or receive a demand letter, you should immediately contact a website accessibility defense attorney. The law in this space is rapidly developing, and the most effective strategies to address surf-by lawsuit are neither static nor one-size-fits-all. Nor are the preferred courses of action mutually exclusive. Below are a few significant considerations.

**Remediation is Paramount**. To be sure, making a website accessible may be an expensive proposition. Your website provider may be equipped to identify any ADA compliance issues. Alternatively, you may have to retain a digital accessibility consultant to conduct an audit of the content and code for the website. Following the audit, the consultant and/or website provider will identify the steps to make your website accessible to the visually impaired, outline the timeline to administer the fixes and estimate the costs, all of which can be a significant five-figure expense. Nevertheless, the best—and probably only—way to protect yourself is to bring your website into reasonable compliance with the ADA. And, if sued, remediation will almost certainly be a part of your resolution of the case. Accordingly, an audit of your website and an effective remediation plan (where appropriate) is strongly advised.

**Defenses Exist**. If you are sued, you are not without weapons to fight the lawsuit. The relief sought in ADA cases is primarily injunctive since the statute does not provide for monetary damages. Plaintiffs seek judicial directives requiring businesses to remediate their websites and prohibiting any additional alleged discriminatory activity. One way to defend against these claims is to argue that the case is moot because the website has already been remediated. A claim for injunctive relief is rendered moot where there is no reasonable expectation that the alleged violation will recur, and where events have eradicated the effects of the alleged violation. The DOJ recently sent a letter to Congress stating that "[a]bsent the adoption 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 … *noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA*." While this unofficial decree does not carry the force of law, it may be persuasive to support a mootness argument based on remedial efforts that may not have to rise to the level of the expensive WCAG 2.0 AA standard (which in June

[3] *Fischler v. 50-01 2nd Street Associates LLC et al.*, Case No. 1:18-cv-05162-DLI-VMS (S.D.N.Y.) (Complaint, dated Sept. 13, 2018, ECF No. 1).

2018 was refreshed as version 2.1 and added 17 new criteria).

As discussed above, how to best attack a surf-by lawsuit depends on the jurisdiction. For example, complaints filed in the Southern District of Florida can be analyzed for allegations that the plaintiff, among other things, actually intended to explore renting in the building promoted by the website. Lack of such allegations may warrant dismissal. In *Gomez v. Knife Mgmt., LLC*, the court recently granted a restaurant operator's motion to dismiss because, even if defendant's website was a public accommodation, the plaintiff failed to allege that he intended to visit one of defendant's restaurants in the near future, or ever. No. 17-cv-23843, 2018 U.S. Dist. LEXIS 159178 (S.D. Fla. Sept. 14, 2018). Nor did the plaintiff allege that the website impeded his ability to access the restaurant. A similar defense may be tailored in the apartment rental context. In New York, this defense may prove more difficult. In *Kathy Wu v. Jensen-Lewis Co., Inc.*, in denying defendant's motion to dismiss, the court noted that plaintiff did not allege that Jensen-Lewis's website itself was a place of public accommodation, but instead alleged that Jensen-Lewis's brick-and-mortar stores were public accommodations and that its website was "*a service, privilege, or advantage of its stores*." No. 17 CIV. 6534 (ER), 2018 WL 5723122, at *3 (S.D.N.Y. Nov. 1, 2018). Allegations of the inaccessibility of the website itself were thus enough to avoid dismissal. Aimco's approach in attempting to dismiss the above-referenced lawsuit against it involved arguing that its website was not subject to the ADA because the company did not sell or provide any goods and services to the public that were covered by the ADA. The company's business focuses on *investing* in multifamily residential real estate properties and communities, and *leasing* units within those communities to members of the public. Aimco asserted that the ADA does not apply because residential real estate does not fall under the umbrella of the ADA. Recognizing, however, that the rental or leasing offices through which it meets tenants and shows the properties could fall under the ADA's express inclusion of "sales or rental establishment[s]" as places of public accommodation, Aimco argued that the website was not such an office because people cannot apply for residency, rent a unit, or interact with rental office staff through the website. As of this writing, the motion is still pending.

Some defendants have effectively sought to transfer cases to more defense-friendly jurisdictions. The availability of this strategy depends on the facts of the particular case, but it is most effective where the plaintiff has stretched the allegations to acquire jurisdiction in a plaintiff-friendly forum, when in actuality jurisdiction is more appropriate elsewhere.

**Pursue an Effective Settlement.** If you are sued and decide to settle, you should try to get as much mileage as possible out of your settlement. A private settlement agreement with one plaintiff will make that one case go away, but it will not moot a new claim by a new plaintiff. Thus, as part of any settlement, it is advisable that the settlement take the form of a publicly filed "Consent Decree," to be entered by the court and placed on the docket. At a minimum, such a settlement should include (1) a stipulated injunction to maintain your website ADA/screen-reader compliant, which should include a requirement to continually update the website as content is added over time; and (2) an agreement that the court retain jurisdiction to hold you accountable. Doing so should provide a strong mootness argument if sued again (some entities have been sued

multiple times).

**Inaction Can be Costly.** The incidence of ADA accessibility lawsuits is expected to continue to rise. No industry is immune. A coordinated strategy is the best approach to manage risk before, during, and even after a lawsuit. Successful strategies involve internal decisionmakers, solid legal advice, and qualified web design professionals.