

## Hot Topics in Title III Litigation

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### I. Overview of ADA Title III

Congress passed the Americans with Disabilities Act (“ADA”) in 1990 based on findings that society isolates and segregates people with disabilities and that discrimination against individuals with disabilities is a serious and pervasive social problem.<sup>2</sup>

Title III prohibits private entities that own, operate, or lease places of public accommodation from discriminating against people with disabilities.<sup>3</sup> It states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>4</sup>

In addition to its general non-discrimination requirements, Title III restricts covered entities from:<sup>5</sup>

- Imposing or applying unnecessary eligibility criteria that screens out or tends to screen out an individual with a disability;
- Failing to make reasonable modifications to policies, practices and procedures;

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<sup>2</sup> The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(8) (1990).

<sup>3</sup> Title III also prohibits: 1) discrimination in new construction and alterations of facilities by public accommodations or commercial facilities, 42 U.S.C. § 12183; and 2) discrimination by private entities that provide transportation services. 42 U.S.C. § 12184. For further discussion of the latter provision, see Section IV, *infra*.

<sup>4</sup> 42 U.S.C. § 12182(a).

<sup>5</sup> *Id.* § 12182(b)(2)

- Failing to remove architectural and communication barriers when it is readily achievable to do so;
- Failing to provide alternate methods of access when barrier removal is not readily achievable; and
- Failing to provide auxiliary aids and services necessary for effective communication.

There are limits to what the ADA requires. Title III entities are not required to take actions that would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved. Nor does it require covered entities to provide auxiliary aids and services that would pose an “undue burden,” which is defined as “significant difficulty or expense.”<sup>6</sup> Title III entities are not required to provide personal devices or services “such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.”<sup>7</sup> Finally, Title III entities are not required to take actions that would result in a direct threat to the safety of other people.<sup>8</sup>

This legal brief discusses these non-discrimination requirements and the limitations thereto in the context of a number of developing and emerging legal issues: definition of place of public accommodation, website accessibility, transportation network companies (Uber/Lyft), service animals, architectural access, communication access (particularly in the healthcare and entertainment settings), and pre-litigation notification.

## II. Definition of a Place of Public Accommodation

Title III defines a “public accommodation” as a private entity that owns, operates or leases (or leases to) a “place of public accommodation,” which must fall within one of the following twelve categories:

- (A) an inn, hotel, motel, or other place of lodging;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store . . . shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy,

<sup>6</sup> *Id.* §§ 12182(b)(2)(A)(3); 28 C.F.R. § 36.104.

<sup>7</sup> 28 C.F.R. § 36.306.

<sup>8</sup> *Id.* § 36.208.

insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.<sup>9</sup>

Courts have reviewed this definition to evaluate whether a claim of inaccessibility falls within the scope of the law. One interesting example comes from *Magee v. Coca-Cola Refreshments USA*, in which a plaintiff, who is blind, filed a lawsuit against Coca-Cola alleging that its vending machines are not accessible because they lack either a tactile or oral indicator.<sup>10</sup> The plaintiff brought his case against Coca-Cola itself, as the manufacture of the vending machine, instead of against the hospital or the bus station where the vending machine was housed. Coca-Cola filed a motion to dismiss, asserting that the vending machine is not a place of public accommodation under the ADA, and the Fifth Circuit agreed. The Fifth Circuit explained that the ADA requires places of public accommodation to fall within one of twelve enumerated categories and disagreed with the plaintiff's argument that it fell within the category of "other sales establishment." The court noted that all of the entities in the ADA's list of sales establishments occupied a physical store, while vending machines are generally found inside a listed entity. Therefore, while a vending machine may have ADA accessibility requirements, such requirements attach from its location within a place of public accommodation, not because it is a place of public accommodation *per se*.<sup>11</sup>

Nonetheless, there are many non-traditional entities that have been found to be places of public accommodation. For instance, in *Levorsen v. Octapharma Plasma, Inc.*, the Tenth Circuit heard a case involving a Title III discrimination claim brought by an individual with borderline schizophrenia against a plasma donation center.<sup>12</sup> Defendant's business involved drawing blood from paid donors, separating and reserving the plasma,

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<sup>9</sup> *Id.* § 12181(7); 28 C.F.R. § 36.104.

<sup>10</sup> *Magee v. Coca-Cola Refreshments USA*, 833 F.3d 530 (5th Cir. 2016).

<sup>11</sup> The plaintiff petitioned for Supreme Court review, but in 2017 the Court declined to hear this case.

<sup>12</sup> *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016).

returning the blood to the respective donors, and selling the plasma to pharmaceutical companies. Plaintiff filed suit after he was denied the opportunity to donate when an employee who learned of his psychiatric disability. The Tenth Circuit found for plaintiff, reversing the district court's ruling that defendant did not qualify as a place of public accommodation. Reviewing the relevant ADA language, the court found defendant's facility to be a place of public accommodation insofar as it was a "service establishment" in the ordinary meaning of the word. Specifically, the court noted that defendant was a place of business whose work benefited or assisted others, even if it produced no tangible goods in the course of its operations. The court expressly rejected defendant's argument that it was not a service establishment because it received no direct payment from its donor "customers" finding nothing in the ADA language to support such an interpretation.

### III. Website Accessibility

#### A. Title III Coverage of Websites

The ADA was enacted before the Internet became a mainstream public resource and is thus silent as to whether websites must be accessible. Case law analyzing the extent to which websites and Internet-based services are covered by Title III has evolved, recently increasing dramatically, and, to some degree, conflicting. Most of the relevant authority concerns whether websites and Internet-based services are covered at all by Title III as "places of public accommodation," even if they are not physical facilities.

There is a recognized split in the circuits on this issue. The First, Second, and Seventh Circuits have adopted a broad approach and held that websites and Internet-based services are themselves places of public accommodation regardless of whether they have any connection with physical facilities. The Third, Sixth, Ninth, and Eleventh Circuits have favored a narrower approach, holding generally that websites are covered as places of public accommodation only to the extent they impede access to, or otherwise have a close nexus with, a physical facility.

This split in authority started from a group of cases challenging disability-based limits to insurance policies, which were brought early in the Internet age and had nothing at all to do with the Internet or websites. In those cases, the First, Second, and Seventh Circuits rejected insurance company arguments that Title III covers only access to physical insurance offices and held that Title III covers all goods and services offered by defendants, inside or outside of their physical offices.<sup>13</sup> The Third, Sixth, and Ninth

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<sup>13</sup> See, e.g., *Carparts Distrib. Ctr. v. Auto Wholesaler's Ass'n*, 37 F.3d 12, 19 (1<sup>st</sup> Cir. 1994); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31-32(2<sup>nd</sup> Cir. 1999); *Doe v. Mutual of Omaha*, 179 F.3d 557, 558-59 7<sup>th</sup>

Circuits adopted a variation of defendants' theory, denying Title III coverage to anything without a "nexus" to a physical place of public accommodation.<sup>14</sup> The Eleventh Circuit was the first to extend this the brick-and-mortar-nexus requirement beyond the insurance realm in *Rendon v. Valleycrest Productions, Ltd.* The *Rendon* Court found sufficient nexus between a physical television game show studio and its pre-qualifying telephone quiz such that the telephone quiz was covered by Title III, because that the phone quiz was required for people to appear in the studio.<sup>15</sup> After these early non-Internet cases, these parallel lines of authority began to be applied to cases involving websites and Internet-based goods and services.

## 1. Broad Application

Courts in the First and Second Circuits<sup>16</sup> have continued their broad approach to Title III coverage and have required accessibility of Internet-based operations, regardless of any nexus with brick-and-mortar establishments.<sup>17</sup> The October 2017 *Andrews v. Blick Art Materials* decision reaffirmed this broad approach, after an extensive review of the relevant case law, statutory and regulatory texts, and legislative history. *Blick* specifically rejected the "nexus" approach and as being contradicted by the ADA's text, structure and legislative history, and as being "practically unworkable."<sup>18</sup> Some district courts in the these circuits have gone as far as to assign Title III coverage to Internet-only operations

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Cir. 1999). *Doe* involved limits to Title III health insurance policies, not websites, but Judge Posner stated (arguably in dictum) that websites would also be covered by Title III. He reasoned that Title III's plain text dictates coverage "in physical or electronic space," regardless of connection to any physical facility. *Id.* at 558-59. He later reaffirmed this statement in *Morgan v. Joint Admin. Bd., Retirement Plan of the Pillsbury Co.*, 268 F.3d 456, 459 (7<sup>th</sup> Cir. 2001), another insurance policy case.

<sup>14</sup> See, e.g., *Ford v. Schering-Plough*, 145 F.3d 601, 612-13 (3<sup>rd</sup> Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6<sup>th</sup> Cir. 1997) (*en banc*); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9<sup>th</sup> Cir. 1999).

<sup>15</sup> 294 F.3d 1279, 1284 (11<sup>th</sup> Cir. 2002).

<sup>16</sup> No major cases on website access have emerged from the Seventh Circuit since the *Doe* and *Morgan* decisions were issued.

<sup>17</sup> E.g., *Andrews v. Blick Art Materials*, 268 F. Supp. 3d 381, 393-97 (E.D.N.Y. 2017) (website of retail art supply store was covered by Title III); *Markett v. Five Guys Enters., LLC*, 2017 WL 5054568 (S.D.N.Y. Jul. 21, 2017) (website of restaurant chain was covered by Title III); *Nat'l Federation of the Blind v. Scribd, Inc.*, 97 F. Supp. 3d 565, 571-75 (D. Vt. 2015) (online-only e-reader book library was covered by Title III); *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 200-03 (D. Mass. 2012) (online-only streaming service was covered by Title III).

<sup>18</sup> *Blick*, 268 F. Supp. 3d at 393-97.

without *any* physical locations, such as Netflix, as long as these businesses function as one of the categories of places of public accommodation.<sup>19</sup>

## 2. Nexus Requirement

Courts in the Third, Sixth, Ninth, and Eleventh Circuits have continued to require some type of nexus between the website or Internet service and a physical structure. There has, however, been some variation within this requirement, with some courts requiring a very close relationship and others permitting a more remote connection. Some district courts within these circuits even appear to be directly at odds with each other in their approaches.

Third Circuit jurisprudence to date is somewhat unsettled. A related 2010 Third Circuit Court of Appeals decision in a non-website context has resulted in two opposite district court interpretations in the website context. The appellate decision, *Peoples v. Discover Financial Services*,<sup>20</sup> dismissed a Title III claim against a credit card company on the grounds that the credit card charging terminal was not located in a place of public accommodation owned or operated by the credit card company.<sup>21</sup> Two years later, *Discover* was first applied to website access in *Anderson v. Macy's, Inc.*,<sup>22</sup> in which the court dismissed the website-specific claims of discriminatory pricing and features of plus-sized clothing, while sustaining the same claims regarding Macy's brick-and-mortar stores.<sup>23</sup> More recently, however, in the 2017 *Gniewkowski v. Lettuce Entertain You Enterprises* case,<sup>24</sup> another court in the same district as *Macy's* upheld a plaintiff's claim regarding the inaccessibility of a bank's website, solely because the bank (admittedly a public accommodation) owned and operated the website. Neither decision discusses –

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<sup>19</sup> See *Scribd*, 97 F. Supp. 3d at 571-75 (online-only e-reader book library was covered by Title III); *Netflix*, 869 F. Supp. 3d at 393-97 (online-only streaming service was covered by Title III).

<sup>20</sup> *Peoples v. Discover Financial Services*, 287 Fed Appx. 179 (3d Cir. 2010), *cert. denied*, 562 U.S. 1180, 131 S.Ct. 1008, 178 L.Ed.2d 829 (2011).

<sup>21</sup> *Id.* at \*2-\*3. *Discover* involved the claim of a blind person credit card holder who had claimed that the credit card company failed to take his blindness into account when it refused to overturn the some charges he claimed were fraudulent. This decision is curious, because it focuses on the credit card charging terminal, characterizing the discriminatory act as the overcharging instead the company's refusal to reverse the overcharges. *Id.* ("the communication between [the merchant's] credit card processing terminal and [Discover], . . . is not a "public accommodation under the ADA."")

<sup>22</sup> *Anderson v. Macy's, Inc.*, 2102 WL 3155717 (W.D. Pa. Aug. 2, 2012).

<sup>23</sup> *Id.* at \*4.

<sup>24</sup> *Gniewkowski v. Lettuce Entertain You Enters.*, 251 F. Supp. 3d 908 (W.D. Pa 2017).

or even mentions – any connection between the websites and physical facilities, with one court adopting a very narrow approach and the other adopting a very broad approach.

In the Sixth Circuit, only one, very recent (2018), website access opinion has been issued, *Castillo v. Jo-Ann Stores, LLC*.<sup>25</sup> That opinion affirmed the requirement for a nexus between the website and physical stores, but it held in favor of website coverage, carefully distinguishing the potentially narrower holdings of the earlier pre-Internet Sixth Circuit decisions.

Ninth Circuit case law has held uniformly that Title III coverage requires some type of nexus to a physical place of public accommodation, including in two appellate opinions.<sup>26</sup> The earliest, and most-cited, case from this circuit interpreting the nexus requirement in the context of website access is the 2006 *National Federation of the Blind v. Target* decision.<sup>27</sup> In *Target*, the Northern District of California held that Target’s website had the requisite nexus with a physical place of public accommodation because the website was “heavily integrated” with the physical stores – through, for example, its store locator function -- and that website inaccessibility impeded access to the full and equal enjoyment of the goods, services and privileges offered in those stores.<sup>28</sup> Subsequent decisions in this circuit reaffirmed the nexus requirement, denying coverage of several popular online sites, such as Facebook, eBay, YouTube,<sup>29</sup> and two online streaming services, Redbox and Netflix.<sup>30</sup>

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<sup>25</sup> *Castillo v. Jo-Ann Stores, LLC*, 2018 WL 838771, \*3-\*9 (N.D. Oh. Feb. 13, 2018).

<sup>26</sup> See, e.g., *Earll v. eBay, Inc.*, 2011 WL 3955485, \*2 (N.D. Cal. Sept. 7, 2011), aff’d, 599 Fed. Appx. 695, \*696 (9<sup>th</sup> Cir. Apr. 1, 2015) (on-line only auction service was not covered by Title III); *Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012), aff’d, 600 Fed.Appx. 508, \*2 (9<sup>th</sup> Cir. Apr. 1, 2015) (on-line only streaming service was not covered by Title III); *National Federation of the Blind v. Target*, 452 F. Supp. 2d 946, 951-55 (N.D. Cal. 2006) (retail department store’s website was covered by Title III); *Young v. Facebook*, 790 F. Supp. 2d 111, 1115-16 (N.D. Cal. 2011) (online social networking site was not covered by Title III); *Oullette v. Viacom*, 2011 WL 1882780, \*5 (D. Mt. Mar. 31, 2011) (online only entertainment sites YouTube, MySpace not covered by Title III); *Jancik v. Redbox Automated Retail, LLC*, 2014 WL 1920751, \*8-\*9 (C.D. Cal. May 14, 2014) (online movie streaming service was not covered by Title III); *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, \*3 (C.D. Cal. Oct. 3, 2017) (pharmacy and convenience store website was covered by Title III).

<sup>27</sup> *National Federation of the Blind v. Target*, 452 F. Supp. 2d 946.

<sup>28</sup> Defendant Target later entered into a settlement agreement in which it agreed to make its entire website accessible and to pay \$6 million dollars to blind individuals in California who had tried unsuccessfully to navigate its website.

<sup>29</sup> See *eBay, Inc.*, 2011 WL 3955485 at \*2; *Facebook*, 790 F. Supp. 2d at 1115-16; *Viacom*, 2011 WL 1882780 at \*5.

<sup>30</sup> *Redbox*, 2014 WL 1920751 at \*8-\*9; *Netflix*, 880 F. Supp. 2d at 1023-24. In the *Redbox* decision, the court noted some connection between Redbox’s online streaming service and its physical kiosks, which it assumed to be places of public accommodation, but found the two not sufficiently “heavily integrated” to

A 2017 decision, *Robles v. Dominos Pizza, LLC*, added a new wrinkle in the jurisprudence when it held that, even where Title III coverage of the website was not in dispute (the requisite nexus existed with physical restaurants), Title III does not necessarily require that the website be accessible. The *Dominos* Court reasoned that Title III only requires Dominos to provide “effective communication,” which it could do via its phone line.<sup>31</sup> This same argument was raised a few months later, in, *Gorecki v. Dave & Busters, Inc.*, but there, the court found that plaintiff had raised an issue of fact as to whether the website’s notice referring people to a phone line was itself accessible.<sup>32</sup>

Eleventh Circuit courts have similarly continued to require some level of nexus between a website and a physical place, but have shown some variance in their application of this requirement. A district court in this circuit was the first in the nation to address a website access challenge, in *Access Now v. Southwest Airlines*, back in 2002.<sup>33</sup> The *Southwest* Court held that southwest.com was not itself a place of public accommodation and thus did not have to be made accessible. Notably, though, the only issue addressed was coverage of the website itself as a place of public accommodation; the issue of nexus to any physical place of public accommodation was not before the court.<sup>34</sup>

Since this early case, district courts within Southern District of Florida have issued decisions on website access that appear somewhat inconsistent, but that may point, as a whole, in the same general direction as the courts in the Ninth Circuit.<sup>35</sup> In two strikingly

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cover the streaming service. *Id.* at \*9. The *Netflix* decision explicitly rejected the parallel *Netflix* decision from Massachusetts. *Netflix (CA)*, 880 F. Supp. 2d at 1023 (distinguishing *Netflix (MA)*, 860 F. Supp. 2d at 200-01).

<sup>31</sup> *Robles v. Dominos Pizza, LLC*, 2017 WL 1330216, \*6 (C.D. Cal. Mar. 20, 2017). The court based this finding on the Department of Justice’s failure as yet to adopt any website-specific standards, declaring that in the absence of specific standards defining “effective communication” via website, there was no reason to prefer that to telephone “effective communication.” *Id.*

<sup>32</sup> *Gorecki v. Dave & Buster’s, Inc.*, 2017 WL 6371367, \*3 (C.D. Cal. Oct. 10, 2017).

<sup>33</sup> *Access Now v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), appeal dismissed, 385 F.3d 1324, 1326-27 (11th Cir. 2004).

<sup>34</sup> The 11<sup>th</sup> Circuit, in dismissing Plaintiff’s appeal, emphasized that plaintiff had only urged the district court to find the website itself to be a place of public accommodation and had not raised the nexus theory until appeal. *Access Now v. Southwest Airlines Co.*, 385 F.3d 1324, 1319-21 (11<sup>th</sup> Cir. 2004).

<sup>35</sup> See, e.g., *Gil v. Winn-Dixie*, 242 F. Supp. 1315, 1320-21 (S.D. Fla. Mar. 15, 2017) (supermarket’s website was covered by Title III); *Gomez v. J. Lindeberg, USA, Inc.*, 2016 WL 9244732, \*1 (S.D. Fla. Oct. 18, 2016) (clothing retailer’s website was covered by Title III). But see *Gomez v. Bang & Olufsen America, Inc.*, 2017 WL 1957182, \*3-4 (S.D. Fla. Feb. 2, 2017) (audio retailer’s website was not covered by Title III because it’s inaccessibility did not impede plaintiff’s access to the physical store); *Kidwell v. Florida Comm’n on Human Relations*, No. 16-403, 2017 WL 176897, at \*4 (M.D. Fla. Jan. 17, 2017) (Busch Gardens and

contrasting cases involving the same plaintiff, *Gomez v. J. Lindeberg, USA* and *Gomez v. Bang & Olufsen*, the *Bang & Olufsen* Court required the plaintiff to show that he used the website in order to visit the physical store – that the website’s inaccessibility actually impeded his access to the physical store – while, just one year earlier, the *J. Lindeberg* Court had not.<sup>36</sup> One month after *Bang & Olufsen*, the *Gil v. Winn-Dixie* court implicitly rejected *Bang & Olufsen*’s interpretation in favor of a broader approach.<sup>37</sup> The *Winn-Dixie* decision interpreted Eleventh Circuit precedent, *Rendon*, to require only that plaintiff be impeded from the “opportunity to access” any “privilege . . . afforded by the” store, not the physical store itself. Following the language of the Northern District of California’s *Target* opinion, the *Winn-Dixie* Court required defendant’s website to be accessible because it was “heavily integrated” with its store locations through, for example, its store locator function, its online pharmacy management system and its digital coupons.<sup>38</sup>

## B. Standards for Accessible Web Design

There are two widely recognized web accessibility standards in the United States: (1) the voluntary Web Content Accessibility Guidelines (WCAG) promulgated by the World Wide Web Consortium (W3C);<sup>39</sup> and (2) the federal web accessibility standards contained in Section 508 of the Rehabilitation Act, which are mandatory for federal government agencies.<sup>40</sup> The federal government has not, as yet, adopted any mandatory web accessibility standards under the ADA, although the Department of Justice (DOJ) has noted the need for such standards for years.<sup>41</sup> DOJ took steps to adopt ADA standards

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Seaworld websites were not covered because they were not, and their inaccessibility did not impede access to, places of public accommodation).

<sup>36</sup> Compare *Gomez v. J. Lindeberg, USA*, 2016 WL 9244732, \*1 (website covered because it has a nexus to a physical store); with *Gomez v. Bang & Olufson*, 2017 WL 1957182, \*3-4 (website not covered because this particular Plaintiff only sought to purchase clothing online and thus its inaccessibility did not impede his access to the physical stores). One important distinction between the cases is that the *J. Lindeberg* decision was issued on a motion for a default judgment against Defendant, and thus some of the *Bang & Olufsen* arguments may have not been asserted in the earlier case. However, in light of the *Winn-Dixie* Court declining to follow *Bang & Olufsen*, it is possible that *Bang & Olufsen* will have limited influence.

<sup>37</sup> *Gil v. Winn-Dixie*, 242 F. Supp. 1320-21.

<sup>38</sup> *Id.*

<sup>39</sup> <http://www.w3.org/TR/WCAG20/> (last visited March 28, 2018).

<sup>40</sup> 29 U.S.C. § 794d (2006); 36 C.F.R. § 1194.22 (2008).

<sup>41</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43464 2010 WL 2888003 (July 26, 2010). In 2016, DOJ decided to split off the issue between Titles II and III when it issued a Supplemental Advance Notice of Public Rulemaking covering only websites of Title II entities. Department of Justice, Statement Regarding Rulemaking on Accessibility of Web Information and Services of State and

in 2010, by issuing an Advanced Notice of Proposed Rulemaking (ANPRM).<sup>42</sup> However, no rules were adopted during the Obama administration, and the Trump administration formally abandoned the effort in December 2017.<sup>43</sup>

The lack of such official ADA-required standards has led some defendants to challenge website accessibility lawsuits against them under due process principles. They have argued that businesses have insufficient notice of applicable requirements such that holding them in violation would deny their right to due process. So far, these claims have been successful in only one decision, *Robles v. Dominos*,<sup>44</sup> and unsuccessful in most, including two from the same district as *Dominos*.<sup>45</sup> These decisions can be harmonized, though, because the *Dominos* plaintiff alleged that non-compliance with WCAG 2.0 was a direct ADA violation and sought an injunction requiring WCAG 2.0 compliance. In contrast, plaintiffs in the other decisions pled that inaccessible websites violated Title III's more general applicable requirements, such as the obligation to provide effective communication, and left to the remedy stage examination of how that should be achieved.<sup>46</sup> It remains to be seen whether or how the official removal of the ANPRM will affect similar claims in future cases.

## C. Structured Negotiations and Website Accessibility

Many companies have avoided litigation by making their websites accessible, either on their own initiative or as the result of structured negotiations. Structured negotiations are

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Local Government Entities (Apr. 29, 2016) (“a clear requirement that provides the disability community consistent ccess to Web site and covered entities clear guidance of what is required under the ADA does not exist.”).

<sup>42</sup> Id. at 43465.

<sup>43</sup> *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60932-01, 2017 WL 6555806 (Dec. 26, 2017).

<sup>44</sup> *Robles v. Dominos*, 2017 WL 1330216 at \*3-\*8 (“The Court concludes by calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary.”).

<sup>45</sup> E.g., *Jo-Ann Stores*, 2018 WL 838771 at \*10; *Blick*, 268 F. Supp. 3d at 403-04; *CVS*, 2017 WL 4457508 at \*5-\*6; *Hobby Lobby*, 2017 WL 2957736 at 4-6.

<sup>46</sup> Courts addressing the due process issue have ruled correspondingly on the companion defense -- that courts should defer ruling on the issue of website accessibility because it is in the primary jurisdiction of a federal agency -- with *Dominos* upholding this defense and the others rejecting it. *Compare Dominos*, 2017 WL 1330216 at \*8; with *Blick*, 268 F. Supp. 3d at 401-03; *CVS*, 2017 WL 4457508 at \*6; *Hobby Lobby*, 2017 WL 2957736 at \*6-\*7.

an alternative dispute resolution tool pioneered by California disability rights attorneys Lainey Feingold and Linda Dardarian.<sup>47</sup>

Some examples of settlement agreements addressing website accessibility, which were achieved through structured negotiations, include:<sup>48</sup>

- 2016: E\*Trade: agreement to make website and mobile application accessible (uses WCAG 2.0, Level AA as its accessibility standard)
- 2016: Massachusetts Eye and Ear and Bay State Council of the Blind: agreement includes requirement that website comport to WCAG 2.0, A
- 2013: Bank of America Online and Mobile Security Solutions: agreement requires accessibility of website and iOS applications.

## IV. Transportation Network Companies

Ride-hailing services such as Uber and Lyft, commonly referred to as Transportation Network Companies (TNCs), have recently faced a number of class lawsuits alleging noncompliance with Title III.<sup>49</sup> Plaintiffs in these lawsuits allege one of two areas of ADA noncompliance: refusal to accommodate people who use service animals<sup>50</sup> and lack of provision for wheelchair-accessible vehicles.<sup>51</sup>

### A. Coverage Issues

One legal issue facing courts in the early stages of these cases is whether TNCs are covered by Title III—i.e., whether they are: 1) private entities providing specified transportation services primarily engaged in the business of transporting people (42 U.S.C. § 12184) (“transportation providers”; 2) owners, operators, lessors, or lessees of places of public accommodation (42 U.S.C. § 12181) (“public accommodations”); 3) both; or 4) neither.

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<sup>47</sup> For more information about structured negotiations, visit <http://lflegal.com/faqs/#structured-negotiations>.

<sup>48</sup> These and others are available at <http://www.lflegal.com/negotiations/>.

<sup>49</sup> Rachael Reed, Disability Rights in the Age of Uber: Applying the Americans with Disabilities Act of 1990 to Transportation Network Companies, 33 Ga. St. U. L. Rev. 517, 518 (2017) (hereinafter “Reed”),

<sup>50</sup> See *National Federation of the Blind v. Uber Techs.*, Case No. 14-cv-04086 (N.D. Cal. filed Sept. 9, 2014).

<sup>51</sup> See *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, (W.D. Tex. Filed Jun. 2, 2014); *Brooklyn Ctr. for Independence for the Disabled v. Uber Techs.*, 17-cv-6399 (S.D.N.Y. filed July 18, 2017); *Equal Rights Ctr. v. Uber*, 17-cv001272 (D.D.C. filed June 28, 2017); *Crawford v. Uber Techs., Inc.*, 17-cv-02664 (filed May 9, 2017); *Access Living of Metro. Chicago v. Uber Techs.*, 16-cv-09690 (N.D. Ill. Filed Oct. 13, 2016)

# Hot Topics in Title III Litigation



Uber and Lyft have moved to dismiss Title III lawsuits against them by characterizing themselves as technology companies not covered in any respect by Title III. They have asserted that they provide only an application that connects riders to drivers, rather than providing transportation itself.<sup>52</sup> To date, no courts have decided whether TNCs fall under the ADA as a matter of law, but two courts have denied their motions to dismiss, preserving the possibility that factual discovery will demonstrate coverage.

In one of the first cases on this issue, *Ramos v. Uber Technologies, Inc.*, plaintiff challenged the TNC's failure to provide services for individuals who need wheelchair-accessible vehicles.<sup>53</sup> The plaintiffs asserted that Uber and Lyft are transportation providers within the meaning of Title III. Lyft and Uber both moved to dismiss, arguing that they simply provide mobile-based ridesharing apps, not actual transportation services. The court rejected this argument, finding both companies plausibly subject to this part of the ADA and noting that the ADA can apply to situations not expressly anticipated when it was passed in 1990.<sup>54</sup> This case settled under confidential terms before the court had an opportunity to substantively evaluate how the ADA applies to TNCs.

More recently, in *Crawford v. Uber Techs., Inc.*, Uber again argued that it merely facilitates connections between two sides of the ridesharing market, likening its model to how Expedia connects patrons to hotel rooms.<sup>55</sup> The court disputed Uber's analogy, explaining that it "obscures the fact that Uber arguably *created* a market for this type of transportation" rather than merely connecting entities in a pre-existing, separate marketplace.<sup>56</sup> Thus, it concluded that plaintiffs have plausibly alleged that Uber is "primarily engaged in the business of transporting people" within the meaning of Section 12184.

In other cases, plaintiffs have asserted that TNCs fall within Title III's definition of public accommodation. In *National Federation of the Blind of California v. Uber*, plaintiffs brought

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<sup>52</sup> See, e.g., *Crawford v. Uber Technologies, Inc.*, 2018 WL 1116725, \*3-4 (N.D. Cal. Mar. 1, 2018); *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*10 (W.D. Tex. Feb. 20, 2015); *Nat'l Fed'n of the Blind of California v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073, 1081 (N.D. Cal. 2015).

<sup>53</sup> *Ramos v. Uber Technologies, Inc.*, 2015 WL 758087 (W.D. Tex. Feb. 20, 2015).

<sup>54</sup> *Id.* at \*6. Uber also argued that Title III covers transportation providers only if they are also public accommodations. The court rejected this argument, explaining that Title III covers transportation providers separately from, and in addition to, public accommodations. *Id.* As the *Ramos*' complaint alleged only that Uber is a transportation provider, the court did not address whether Uber is also a public accommodation.

<sup>55</sup> *Crawford v. Uber Techs., Inc.*, 2018 WL 1116725, at \*3-4 (N.D. Cal. Mar. 1, 2018).

<sup>56</sup> *Id.*

claims regarding service animals under both 42 U.S.C. § 12182 (public accommodation) and 42 U.S.C. § 12184 (transportation provider).<sup>57</sup> Uber filed a motion to dismiss, arguing that it is not a public accommodation. The court, however, found that Uber plausibly qualifies as a “travel service” within the ADA’s twelve categories of places of public accommodation.<sup>58</sup>

## B. Requirements for TNCs

If courts ultimately find that TNCs are covered by Title III, they will need to determine exactly what Title III requires TNCs to provide for people who need wheelchair-accessible vehicles. The operative Title III sections contain no specific requirements for automobile accessibility or for mobile apps.<sup>59</sup> However, those sections do list more general requirements that could be applied depending on the facts of each case.<sup>60</sup> *Crawford* provided perhaps the most substantive discussion of this question to date.<sup>61</sup> In *Crawford*, in addition to arguing that it was not covered by the ADA, Uber asserted that the plaintiffs’ claim could not proceed because Section 12184 does not require transportation providers to “furnish” or “acquire” wheelchair accessible automobiles. The court found this argument “unavailing in light of the broad language of the ADA . . . [which requires] . . . an affirmative obligation to make reasonable accommodations, to provide auxiliary aids and services, and remove barriers to access.”<sup>62</sup> “Uber could very well be required to provide WAV service through some mechanism in order to comply with the anti-discrimination provisions of Section 12184(b)(2).”<sup>63</sup> Other courts may weigh in on this issue soon in any of the cases currently pending.<sup>64</sup>

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<sup>57</sup> *National Federation of the Blind of California v. Uber*, 103 F.Supp.3d 1073 (N.D. Cal. 2015).

<sup>58</sup> *Id.* at 1083. Curiously, this decision does not include any discussion of Ninth Circuit cases requiring nexus to a physical facility and only cites the expansive First Circuit *Carparts* decision, which required no such nexus. *Id.* (citing *Carparts*, 37 F.3d at 13). For detailed discussion of the nexus issue, see Section III, Website Access, *supra*.

<sup>59</sup> See 42 U.S.C. §§ 12181, 12184.

<sup>60</sup> *Id.* at 12181 (e.g., ensuring the “full and equal enjoyment” of goods and services,” making reasonable modifications to policies and practices); 12184 (same).

<sup>61</sup> *Crawford*, 2018 WL 1116725, at \*3–4.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Brooklyn Ctr. for Independence for the Disabled v. Uber Techs., Inc.* 17-cv-6399 (S.D.N.Y. filed July 18, 2017); *Equal Rights Ctr. v. Uber Techs., Inc.*, 17-cv001272 (D.D.C. filed June 28, 2017); *Crawford v. Uber Techs., Inc.*, 17-cv-02664 (filed May 9, 2017); *Access Living of Metro. Chicago v. Uber Techs Inc.*, 16-cv-09690 (N.D. Ill. Filed Oct. 13, 2016).

## C. TNC Settlements

Parties in TNC ADA lawsuits have reached two settlements of note, both of which have concerned provision of services to people who use service animals. The *National Federation of the Blind of California v. Uber* Court approved a class settlement in 2016.<sup>65</sup> As a result, Uber now requires drivers to expressly confirm that they understand their legal obligations to transport rides with service animals; adopted a robust enforcement mechanism to remove drivers who refuse to transport people with service animals; and has implemented an enhanced complaint response system to track data. In 2017, the National Federation of the Blind resolved a group of similar complaints against Lyft though settlement. This settlement, which was reached through structured negotiations, requires Lyft to follow procedures similar to the 2016 Uber settlement.<sup>66</sup>

## V. Service Animals

Title III requires covered entities to make reasonable modifications to policies, practices, and procedures when necessary for people with disabilities.<sup>67</sup> This general provision has long been interpreted to require the modification of a “no pets” policy to permit the use of service animals, but became explicit when DOJ published an updated Title III regulation, which became effective on March 15, 2011.<sup>68</sup> The updated DOJ regulation provide abundant new detail about the right of people with disabilities to use service animals, including a revised definition of “service animal,” strict restrictions on the questions businesses are permitted to ask about service animals, and limitations on imposing surcharges.

### A. Rights of Individuals with Service Animals

The updated DOJ regulation redefines “service animal” as “any *dog* that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”<sup>69</sup>

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<sup>65</sup> *National Federation of the Blind of California v. Uber Technologies, Inc.*, Settlement agreement available at: <http://dralegal.org/case/national-federation-of-the-blind-of-california-et-al-v-uber-technologies-inc-et-al/>.

<sup>66</sup> This settlement is available at <http://dralegal.org/case/lyft-access-riders-service-animals/>.

<sup>67</sup> 28 C.F.R. § 36.302(a).

<sup>68</sup> 28 C.F.R. § 36.101 *et seq.*

<sup>69</sup> 28 C.F.R. § 36.104 (emphasis supplied).

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Through this definition, DOJ confirmed that “*other species of animals, whether wild or domestic, trained or untrained, are not service animals* for the purpose of this definition.”<sup>70</sup>

As the regulation explains, the ADA does not protect the rights of individuals who use untrained animals. For example, in *Davis v. Ma*, an individual with a back impairment was restricted from entering a Burger King restaurant with his 13-week old puppy, which was learning to assist him with balance and mobility.<sup>71</sup> The court concluded that the puppy was not a yet a “service animal,” as he had not been fully individually trained yet, other than basic obedience training. It is important to remember, however, that although not covered by the ADA, many state and local laws do protect the rights of individuals with service animals in training.<sup>72</sup>

There is often confusion about the difference between a “service animal” and an animal that provides other assistance, such as an emotional support, well-being, comfort, or companionship animal. The former is a service animal covered by the ADA, while the latter is not. The difference is that emotional support (and similar) animals do not do work or perform a task.<sup>73</sup> The DOJ regulation provides that “the crime deterrent effects of an animal’s presence” is not the type of “work or tasks” that would satisfy the service animal definition.<sup>74</sup> Emotional support animals, under certain situations, are permitted in housing and on airplanes under the Fair Housing Act and Air Carrier Access Act, issues outside the scope of this brief.<sup>75</sup>

Covered entities may confirm whether an individual’s dog is a service animal by asking two questions: (1) whether an animal is required because of a disability; and (2) what task

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<sup>70</sup> *Id.* (emphasis supplied).

<sup>71</sup> *Davis v. Ma*, 848 F.Supp.2d 1105, 1115 (C.D.Cal. 2012).

<sup>72</sup> See, e.g., Service Animal Access Act, (720 ILCS 5/48-8) (Illinois state law ensuring protections for both individuals with disabilities who use service animals and trainers who are training service animals).

<sup>73</sup> 28 C.F.R. § 36.104.

<sup>74</sup> *Id.*

<sup>75</sup> For more information about the right to service or other support animals under the Fair Housing Act and the Air Carrier Access Act, see the following resources: (1) U.S. Department of Transportation, Service Animal Matrix, [https://www.transportation.gov/sites/dot.gov/files/docs/P3.SA\\_.HUD%20Matrix.6-28-6.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/P3.SA_.HUD%20Matrix.6-28-6.pdf); (2) U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, [https://www.hud.gov/sites/documents/SERVANIMALS\\_NTCFHEO2013-01.PDF](https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF); (3) Service Animals and Emotional Support Animals, ADA National Network, <https://adata.org/publication/service-animals-booklet>

or work the animal has been trained to perform.<sup>76</sup> DOJ regulations confirm that covered entities cannot ask any other questions about the nature or extent of an individual's disability and may not ask even these two questions when it is "readily apparent that an animal is trained to do work or perform tasks for an individual with a disability."<sup>77</sup>

If an individual refuses to answer these two permitted questions, the covered entity does not violate the ADA by refusing to accommodate the service animal. One example of this principle comes from *Lerma v. California Exposition*, where a police officer asked an individual who entered the state fair with a puppy to identify the tasks the dog had been trained to perform.<sup>78</sup> In response, the individual stated: "all I have to tell you is it's a service dog and I'm going to sue you."<sup>79</sup> The officer also asked the owner whether the dog was housebroken, and how it would relieve itself, to which the owner reiterated her threat of litigation. The court concluded that the officer's questioning was permissible and, because the individual's resistance prevented the office from ascertaining whether the puppy was a service animal, the officer did not violate the law by excluding the animal.<sup>80</sup>

It is also clear that covered entities may not require an individual to provide animal documentation, such as proof of certification, training or licensure.<sup>81</sup> The DOJ entered into a settlement agreement with The Learning Clinic (TLC) after TLC required documentation about a service animal's training, in addition to other records such as certificate of liability insurance and signed indemnification form.<sup>82</sup> Per the settlement, TLC will implement a comprehensive service animal policy and will no longer require documentation of the animal's training.

The ADA prohibits covered entities from imposing surcharges or other burdens on individuals using service animals, including those are imposed on people with pets.<sup>83</sup> This

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<sup>76</sup> 28 C.F.R. §36.302(6).

<sup>77</sup> *Id.*

<sup>78</sup> *Lerma v. California Exposition*, 2014 WL 28810 (E.D. Ca. Jan. 2, 2014).

<sup>79</sup> *Id.* at \*4.

<sup>80</sup> *Id.* at \*5. During the plaintiff's deposition, she admitted that her dog was not individually trained beyond basic obedience training, but she "needed the dog to be able to get through the day" and her children wanted her to bring the dog.

<sup>81</sup> 28 C.F.R. §36.302(c)(6).

<sup>82</sup> Settlement Agreement, United States and The Learning Clinic. Available at: [www.ada.gov/tlc.htm](http://www.ada.gov/tlc.htm) (March 25, 2013).

<sup>83</sup> 28 C.F.R. § 36.302(c)(8).

rule was confirmed in the recent case *Johnson v. Yashoda Hospitality, Inc.*<sup>84</sup> In *Johnson*, a hotel employee required a deaf patron to pay a \$20 pet fee per night for his service animal. The patron explained that the service animal was not a pet, but the hotel still refused to waive the fee. The court confirmed that hotels may not charge pet fees for service animals under the ADA.

Similarly, because individuals are not required to provide medical documentation, hotels and other covered entities may not require a pet deposit if the individual refuses to provide medical documentation. The DOJ resolved a case on this issue after receiving a complaint from a hotel patron who was required to either provide medical records for his service animal or pay a \$50 pet fee.<sup>85</sup> The DOJ reached an agreement with Budget Saver Motel prohibiting the company from imposing surcharges, as well as requiring medical documentation for patron's service animals.

## B. Defenses

Although the general rule is that covered entities must modify policies to permit the use of a service animal by an individual with a disability,<sup>86</sup> there are limited exceptions. The Title II regulation explicitly exempts from accommodation a service animal who is “out of control and the animal’s handler does not take effective action to control it” or who “is not housebroken.”<sup>87</sup> However, if a service animal is properly excluded for these reasons, the individual handler must be permitted to obtain goods, services or accommodations without the service animal.<sup>88</sup>

In addition, Title III's more generally applicable limitations allow the exclusion of service animals when to do would: (1) fundamentally alter the nature of the entity's goods, services, facilities, privileges, advantages, or accommodations; or (2) jeopardize the safety of the entity's operation. The bar to establish a fundamental alteration is high, as illustrated by a case about service animals in psychiatric facilities. In *Tamara v. El Camino Hospital*, an individual sued a hospital after it refused to allow her service dog to accompany her during stays in its psychiatric ward.<sup>89</sup> The hospital's policy categorically banned service animals, citing a memorandum concerning the Rehabilitation Act that had

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<sup>84</sup> *Johnson v. Yashoda Hosp., Inc.*, 2016 WL 6681023, at \*2 (M.D. Fla. Nov. 14, 2016).

<sup>85</sup> Settlement Agreement between the United States and Budget Saver Corp., D.J. No. 202-22-36 (Jan. 27, 2012), available at: [www.ada.gov/budget\\_motel\\_settle.htm](http://www.ada.gov/budget_motel_settle.htm)

<sup>86</sup> 28 C.F.R. § 36.302(c)(1).

<sup>87</sup> 28 C.F.R. § 36.302(c)(2).

<sup>88</sup> 28 C.F.R. §36.302(c)(3).

<sup>89</sup> 964 F.Supp.2d 1077 (N.D. Cal. 2013).

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been issued before the ADA. The memo stated that the presence of an animal would fundamentally alter the hospital because a psychiatric setting is “notoriously an area of risk for agitation and stress.”<sup>90</sup> It also noted that the presence of an animal would negatively impact some of its therapies and that sedated patients would fixate on the animal. The court found that while a service animal might “affect” the psychiatric ward, it would not “fundamentally alter its nature.”<sup>91</sup> The court was also persuaded by evidence presented by the patient that she had frequently observed an occupational therapist bringing a pet dog into the psychiatric ward, and that psychiatric wards in other hospitals allowed for the presence of service dogs.

Older cases have also analyzed whether a service animal’s presence would cause a fundamental alteration in other settings, including musical performances or breweries. In *Lentini v. California Center for the Arts, Escondido*, the California Center for the Arts refused to allow a patron with quadriplegia to continue attending music performances with her service dog because the dog had previously yipped or barked during the intermission of two concerts.<sup>92</sup> The district court found for the patron and ordered the Center to modify its “policies, practices and procedures” such that they did “not exclude a service animal who has made a noise on a previous occasion, even if such behavior is disruptive, if the noise was made and intended to serve as a means of communication for the benefit of the disabled owner or if the behavior would otherwise be acceptable to the Center if engaged by humans.”<sup>93</sup> The Center appealed and argued that the modified policy would fundamentally alter the Center’s services because permitting a dog to make noise may deter patrons and artists from coming to the Center. The Ninth Circuit affirmed the decision, and stated that whether an accommodation causes a fundamental alteration is an “intensively fact-based inquiry” and the facts of this case showed that although the patron’s service dog did yip or bark twice, no patron ever complained and the two incidents did not cause a significant disturbance.<sup>94</sup> The Center’s speculation of potential future disturbances was undercut by evidence that demonstrated otherwise.

Further, covered entities need not engage in an action that amounts to a direct threat, and this defense applies to service animals as well.<sup>95</sup> Like all situations where covered entities attempt to show direct threat, covered entities excluding service animals must

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<sup>90</sup> *Id.* at 1084.

<sup>91</sup> *Id.*

<sup>92</sup> *Lentini v. California Center or the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004).

<sup>93</sup> *Id.* at 842.

<sup>94</sup> *Id.* at 845.

<sup>95</sup> 28 C.F.R. §36.208(a).

base their conclusion on actual risks rather than speculation, stereotypes, or generalizations about individuals with disabilities.<sup>96</sup> In *Tamara v. El Canino Hospital*, discussed above, the court rejected the hospital's direct threat claim because it was based on generalizations and speculation, not an individualized assessment.<sup>97</sup> Although the hospital argued that having a dog in the psychiatric unit would be unsafe because its harness could be used as a weapon and the dog might dangerously upset patients, the court noted that all of these arguments were based on speculation as opposed to the individual circumstances of the case. The court noted that the patient had provided individualized facts relating to her service dog's training, harness, and layout of the psychiatric ward that challenged the generalizations made by the Hospital.

## VI. Architectural Access

Title III requires covered entities to meet certain architectural accessibility standards in new construction, alterations to facilities, and even to some extent in pre-ADA, non-altered areas. In 2010, after several years of notice-and-comment rulemaking, the Department of Justice revised Title III's architectural standards.<sup>98</sup> This was a top-to-bottom revision of the original ADA architectural standards and aligned them to more current national and international accessibility standards, as well as adding technical standards for many types of facilities that had not originally been included.<sup>99</sup> These standards became mandatory for new construction or alteration of facilities on March 15, 2012, but provide a safe harbor for any facilities or elements that had been in compliance with previous ADA architectural standards.<sup>100</sup>

For pre-ADA, unaltered, places of public accommodation, Title III entities to remove architectural barriers to access where their removal is "readily achievable."<sup>101</sup> Though the new construction standards do not apply strictly to pre-ADA facilities, except any features altered post-ADA, they "provide valuable guidance for determining whether an existing facility contains architectural barriers."<sup>102</sup>

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<sup>96</sup> 28 C.F.R. §36.301(b).

<sup>97</sup> *Tamara v. El Canino Hospital*, 964 F.Supp.2d 1077 (N.D. Cal. 2013).

<sup>98</sup> 28 C.F.R. pts. 35, 36, 1194, app. B & D. These standards are also applicable to Title II of the ADA.

<sup>99</sup> 28 C.F.R. pt 1194, app. B at § 1001 (amusement parks, fishing piers and various other types of recreational facilities, and for Title II-covered facilities such as detention and correctional facilities (§ 807), courtrooms (§ 808), residential units (§ 809), and transportation facilities § (810).

<sup>100</sup> 28 C.F.R. § 406(a).

<sup>101</sup> 42 U.S.C. § 12181(9).

<sup>102</sup> *Hubbard v. 7-Eleven, Inc.*, 433 F.Supp.2d 1134 (S.D. Cal. 2006); see also *Access Now, Inc. v South Florida Stadium Corp.*, 161 F.Supp.2d 1357 (S.D. Fla. 2001).

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Under the ADA, the term readily achievable means “easily accomplishable and able to be carried out without much difficulty or expense.” The law strives to create a reasonable balance between meeting the needs of the entire disability community and creating hardship on businesses. One commentator, an advocate for the ADA legislation who created the term “readily achievable,” noted that the concept provides a reasonable standard which requires existing facilities to remove only those obstacles that can be removed without considerable difficulty, but that as a group these minor changes may increase substantially the architectural and communication accessibility for people with disabilities.<sup>103</sup>

The ADA lists factors for determining whether a measure is readily achievable, looking at the difficulty and expense of the measure as balanced against the resources available to the covered entity. These factors are:

- the nature and cost of the action needed under the (ADA);
- the overall financial resources of the facility or facilities involved in the action;
- the number of persons employed at such facility;
- the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;
- the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.<sup>104</sup>

Though there is no clear mathematical formula for assessing the achievability of barrier removal, courts will consider both the level of need and the level of resources available. Where a Title III entity has a parent entity that can allocate resources to the local facility, courts also might consider the parent entity’s resources, size, and operations, but only to the extent appropriate in light of the geographic separateness and the fiscal or administrative relationship of the site or sites in question to any parent corporation.

Both tenants and landlords have obligations to ensure that facilities and operations are ADA compliant, and neither can contract their way out of these obligations. The court in *Grove v. De La Cruz* held that it was readily achievable for a tenant corporation to install

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<sup>103</sup> Burgdorf, Robert L. “*Equal Member of the Community*”: the Public Accommodations Provisions of the Americans with Disabilities Act, 64 Temple L. Rev. 551 (1991).

<sup>104</sup> 42 § U.S.C. 12181(9); 28 C.F.R. § 36.304.

toilet grab bars, even though the lease prohibited the tenant from making any physical alterations without the landlord's consent. The court explained that although a landlord and tenant were free to contract the allocation of compliance duties between themselves, this contract did not affect their obligations to third parties seeking removal of a barrier.<sup>105</sup>

Further, a Title III entity cannot offer alternatives to barrier removal if it would be readily achievable to remove the barrier. In *Yates v. Sweet Potato Enterprise, Inc.*, the plaintiff brought an ADA case asserting that the entrance to a Popeye's Chicken restaurant was inaccessible.<sup>106</sup> Although the district court found that it was readily achievable to install an automatic door, the court allowed the store to forgo installing the door and merely post a sign and offer employee assistance. The Ninth Circuit reversed, holding that if the district court found barrier removal – installation of an automatic door -- to be readily achievable, it must enter an order requiring barrier removal, instead of a lesser alternative.

## VII. Communication Access

The ADA states that Title III entities must provide people with disabilities “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.”<sup>107</sup> Discrimination under Title III includes the failure to provide auxiliary aids and services to ensure effective communication with people with disabilities.<sup>108</sup> The ADA defines “auxiliary aids and services” as “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments... [and] qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments...”<sup>109</sup> The statutory limits on these obligations are where providing such auxiliary aids would pose an undue burden on the covered entity, or where it would fundamentally alter the nature of the good or service being offered.<sup>110</sup>

Two different settings – health care providers and entertainment venues – have been sources of significant Title III litigation.

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<sup>105</sup> *Grove v. De La Cruz*, 407 F.Supp.2d 1126 (S.D. Cal. 2005).

<sup>106</sup> *Yates v. Sweet Potato Enterprise, Inc.*, 684 Fed. Appx. 655, 658 (9<sup>th</sup> Cir. 2017).

<sup>107</sup> 42 U.S.C. §§ 12182-12189; 28 C.F.R. § 36.303(c).

<sup>108</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>109</sup> *Id.* § 12103(1)(A)-(B).

<sup>110</sup> *Id.* §§ 12182(b)(2)(A)(iii).

## A. Healthcare Settings

Hospitals and the professional offices of health care providers are places of public accommodation under Title III.<sup>111</sup> They are thus required to provide auxiliary aids and services – such as sign language interpreters – where necessary to ensure effective communication with patients, their families, and any other associates of patients with whom they would typically communicate.

Much of the legal activity in this area has involved failures of hospitals and medical providers to provide sign language interpreters to deaf patients or their companions. Generally, two types of legal issues arise in decisions: (1) whether the deaf person has sufficiently alleged a likelihood of future harm to satisfy the constitutional threshold for standing; and (2) whether a health care provider's use of videoconference, rather than in-person, interpretation afforded effective communication.

### a. Standing to Sue: Likelihood of Future Harm

Plaintiffs cannot receive damages in actions under Title III, only future injunctive relief and legal fees.<sup>112</sup> For this reason, in order to possess adequate standing to obtain relief, plaintiffs must prove that they face a likelihood of future harm that could be forestalled by injunctive relief. Generally, this has meant that courts require plaintiffs to allege a specific likelihood of visiting the business again. This can be difficult when suing over past denials of access to health care, especially hospital care, because the medical conditions leading to the need for health care are often discrete and unforeseeable.

Consequently, courts have dismissed a substantial number of ADA claims by deaf patients against health care providers for lack of standing.<sup>113</sup> For instance, in *Perez v. Doctors Hospital at Renaissance, Ltd.*, the Fifth Circuit dismissed the claim of a deaf 82-year-old woman against a rehab facility at which she had stayed after hip replacement surgery.<sup>114</sup> The woman merely cited to her age and past hip surgery in attempting to show that she was likely to end up in the rehab facility in the future, but the court found such speculation insufficient to show the requisite likelihood of future harm. The Ninth

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<sup>111</sup> *Id.* § 12181(7)(F).

<sup>112</sup> See 42 U.S.C. § 12188(a); *Ervine v. Desert View Reg. Med. Ctr.*, 753 F.3d 862, 867 (9<sup>th</sup> Cir. 2014).

<sup>113</sup> For this and other reasons, plaintiffs often add a claim under Section 504 of the Rehabilitation Act. Section 504 allows compensatory damage awards for past intentional discrimination, thus avoiding the need to demonstrate future harm to establish standing. 42 U.S.C. § 794.

<sup>114</sup> 624 Fed. Appx. 180, \*6 (5<sup>th</sup> Cir. Aug. 28, 2015)

Circuit echoed this theory in *Ervine v. Desert View Reg. Med. Ctr.*<sup>115</sup> In *Ervine*, the deaf husband of a woman who had been treated at defendant’s hospital prior to her death sued the hospital for failure to provide him with interpreters during her treatment. The Ninth Circuit found the husband to lack standing, because he had never been patient at the hospital and could not show any impending need to return, even though it was the only regional hospital in his area and, he alleged, his need for its services was a matter of “when,” not “if.”

Other plaintiffs, however, are able to cite enough facts demonstrating their intent to return to establish standing. For example, plaintiffs in *Silva v. Baptist Health South Florida* met the threshold for standing where they had gone to defendant’s hospital often in the past and testified that they were likely to go back, given the proximity to their home, and the location of their doctors and medical records.<sup>116</sup> A California district court recently upheld plaintiffs’ standing with far less factual support in *Alexander v. Kujok*, a case alleging the failures of six affiliated doctors to provide interpreters for two deaf plaintiffs.<sup>117</sup> This decision, which stressed that the ADA is a civil rights law and should be broadly construed, found a likelihood of future harm, even though plaintiffs had found new doctors, because the plaintiffs believed financial considerations might force them to return to defendant doctors at some point in the future.

## **b. Effectiveness of Communication via Video Remote Interpretation**

The past decade has seen a growing reliance by hospitals and health care providers on the use of video remote interpretation (“VRI”) instead of in-person sign language interpreters. In VRI, a remotely located sign language interpreter is made available to the health care location on a computer or television screen, using video teleconferencing equipment and a high-speed Internet connection. VRI, while available and convenient, can pose significant downsides in health care communication. It requires robust staff training and precise technical capabilities that may be unavailable in many health care rooms and locations – such as: (1) a strong, consistent, fast connection; (2) a large screen and camera that can show the faces, arms, hands, and fingers of all people communicating, plus clear audio to detect all of the communication in that room; and (3) screen and audio and that can be viewed and heard by a patient who may be in a non-standard position during an examination.<sup>118</sup>

<sup>115</sup> 753 F.3d 862, 867-68 (9<sup>th</sup> Cir. 2014)

<sup>116</sup> 856 F.3d 824, 832 (11<sup>th</sup> Cir. 2017)

<sup>117</sup> 158 F. Supp. 3d 1012, 1018-19 (E.D.Cal. 2016)

<sup>118</sup> See National Association of the Deaf, *Minimum Standards for Video Remote Interpreting Services in Medical Settings* (available at <https://www.nad.org/about-us/position-statements/minimum-standards-for->

# Hot Topics in Title III Litigation



Recognizing these problems, some recent decisions have criticized health care defendants' over-reliance on VRI. For instance, in *Silva v. Baptist Health South Florida*, the Eleventh Circuit held that the defendant's "frequently inoperable" VRI raised an issue of fact as to whether defendant had afforded the plaintiffs effective communication.<sup>119</sup> Plaintiffs had testified that the equipment frequently could not be turned on at all, the image quality was unclear, or the signal was weak, causing the image to freeze or appear in slow motion.<sup>120</sup>

Similarly, the Fifth Circuit recognized problems with VRI in *Perez v. Doctors Hospital at Renaissance, Ltd.*, a case brought by the deaf parents of an infant diagnosed with cancer. The parents had been denied live interpreters and had experienced frequent problems with VRI, including total inoperability and staff who were not trained to administer it.<sup>121</sup>

The Department of Justice has reached settlements with numerous hospitals and health care providers regarding the provision of auxiliary aids to persons who are deaf or hard of hearing as part of its Barrier-Free Health Care Initiative.<sup>122</sup> These settlement agreements provide detailed guidance for covered entities and persons with disabilities, and they highlight the need for qualified, in-person interpreters in the healthcare setting.

A 2016 DOJ settlement with Mountain States Health System incorporates detailed guidance regarding the use of in-person interpreters, as well as the use and limitations of VRI. This agreement resolved a complaint from two deaf parents of an adult daughter

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video-remote-interpreting-services-in-medical-settings/) (Arguing that VRI should only be used as a last resort in health care settings and recommending detailed technical standards for VRI set-up, staff training)

<sup>119</sup> *Silva v. Baptist Health South Florida*, 856 F. 3d 824 (11<sup>th</sup> Cir. 2017).

<sup>120</sup> *Id.* at 837-38. Significantly, the Eleventh Circuit also held that in order to show an ADA violation, the plaintiffs needed only to show that they experienced an impaired ability to communicate medically relevant information with staff, not that the lack of communication caused adverse medical treatment; nor were they required to articulate exactly what information they could not understand. *Id.* at 835-36.

<sup>121</sup> *Perez v. Doctors' Hospital at Renaissance, Ltd.*, 624 Fed. Appx. 180, \*183 (5<sup>th</sup> Cir. Aug. 28, 2015). The Fifth Circuit cited these VRI problems as raising an issue of fact of: 1) intentional discrimination Section 504 of the Rehabilitation Act, to support an award of damages; and 2) likelihood of future harm to establish standing under the ADA. See also *Shaika v. Gnaden Huettgen Memorial Hospital*, 2015 WL 4092390 (M.D. Pa. July 7, 2015) (permitting plaintiff's case to move forward for ineffective communication when hospital's VRI did not work so staff used written notes to communicate to the plaintiff that her daughter had passed away).

<sup>122</sup> These agreements and other information about this initiative are available at <https://www.ada.gov/usao-agreements.htm>.

who had been in the hospital during the last six months of her life.<sup>123</sup> The hospital, located in remote area, was not equipped to provide VRI and procured an interpreter only 12 times during the daughter's 115-day treatment. At all other times the hospital required the daughter, who was not deaf, and other family members to interpret for the parents.

The settlement agreement prescribes 14 circumstances under which interpreters will be presumed to be required for effective communication, including the taking of medical histories and provision of diagnoses. Regarding VRI, it specifies:

- That VRI may only be used if the hospital provides sufficient bandwidth video connection, short image, clear transmission of voices, and adequate training.
- That VRI is ineffective and cannot be used when a patient has a limited ability to move his head, hands or arms, has vision or cognitive issues, is in significant emotional distress or pain, or when there are space limitations in the room.
- That if VRI is not functioning and attempts to fix it have been unsuccessful for 30-minutes, staff are required to provide an in-person interpreter, and must also document and repair the VRI.

The agreement also imposes restrictions on the use of non-qualified individuals for communication, training requirements for various groups of employees, and payment requirements (\$50,000 in civil penalties as well as an undisclosed amount of compensatory damages to the family in a private lawsuit).

## **B. Entertainment Industry**

There has also been a significant amount of recent litigation about effective communication and access to the entertainment industry.

The issue in one recent case, *McGann v. Cinemark USA, Inc.*, was whether a movie theater had to provide a deaf-blind customer with an ASL tactile interpreter.<sup>124</sup> In this case, the Third Circuit held that an ASL tactile interpreter falls comfortably within the scope of "auxiliary aids and services." In so doing, it rejected the theater's argument that an ASL tactile interpreter was a "special" service not required by the law because, to find otherwise, would effectively eliminate the requirement to provide auxiliary aids and services. The court also rejected the theater's argument that providing an interpreter would be a fundamental alteration on the business. Because the lower court had not addressed the issue of undue burden, it remanded the case for this determination. Note that as of the date of this legal brief, the theater has asked the Third Circuit to rehear the case *en banc*, which could lead to a different outcome.

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<sup>123</sup> Settlement available at [www.ada.gov/mountain\\_state\\_sa.html](http://www.ada.gov/mountain_state_sa.html)

<sup>124</sup> *McGann v. Cinemark USA, Inc.*, 873 F.3d 218 (3d Cir. 2017).

Individuals who are blind have also had success litigating cases against movie theaters. In *Blanks et al v. AMC Entertainment Inc. et al*, the plaintiffs brought a case asserting that although the theaters had audio description equipment, such equipment was often inaccessible to due to maintenance and customer service issues.<sup>125</sup> After filing, the parties reached a nationwide settlement to improve the experience of movie goers who are blind or have low vision. Specifically, managers and staff will be trained on how to use the equipment; the parties will develop information guides for better service; managers will regularly check the equipment for problems; and equipment will be available before the movie begins, which will allow customers to test and troubleshoot equipment ahead of time.

It is important that companies, including companies offer new technologies, remember the needs of people with disabilities. A 2016 settlement agreement between the American Council of the Blind, Bay State Council of the Blind, Robert Baran and Netflix will help ensure that Netflix provides audio descriptions for its services.<sup>126</sup> The agreement requires audio descriptions both for its original content and will make reasonable efforts to ensure the availability of audio descriptions for its third party content.

## VIII. Pre-Litigation Notice

Currently, Title III contains no requirements for exhaustion of administrative remedies or notice before filing in federal court.<sup>127</sup> However, in February, 2018, the House of Representatives passed the ADA Education and Reform Act (“HR 620”), which, if enacted, would impose several pre-litigation filing requirements on potential plaintiffs. H.R. 620, 115<sup>th</sup> Cong. (2018). As currently drafted, this bill would require pre-litigation written notice to the potential defendant, specifying: (1) the barriers to access complained of, with specific citations identifying code sections violated; (2) how the potential plaintiff encountered the barriers; and (3) whether the potential plaintiff requested assistance in removing the barrier. Potential plaintiffs would then be barred from suit unless the business failed to respond within 60 days with a description of how it would remove the barrier or if the business responds but does not make “substantial progress” toward removing the barrier within 120 days. In addition, the bill would require the Department of Justice to develop an ADA educational program for businesses and governments, and

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<sup>125</sup> *Blanks et al v. AMC Entertainment Inc. et al*, 16-cv-00765 (N.D. Cal. Agreement reached April 27, 2017). Settlement available at: *Blanks et al v. AMC Entertainment Inc. et al*, 16-cv-00765 (N.D. Cal. Agreement reached April 27, 2017), <https://rbgg.com/wp-content/uploads/Blanks-v-AMC-Settlement-FINAL-04-27-17-1341-1.pdf>

<sup>126</sup> [http://dralegal.org/wp-content/uploads/2016/04/Settlement\\_Agreement\\_FOR\\_WEBSITEv2.docx](http://dralegal.org/wp-content/uploads/2016/04/Settlement_Agreement_FOR_WEBSITEv2.docx)

<sup>127</sup> *Molski v. Conrad's La Canada Restaurant*, 2009 WL 166931 (9<sup>th</sup> Cir. Jan. 14, 2009).

it would require promotion of an alternative dispute resolution program by the federal judiciary. This bill will now proceed to the Senate, where it has not yet been scheduled for any action.

Many in the business community, citing repeat plaintiffs and detailed technical standards, support a requirement that would give Title III entities an opportunity to address accessibility issues before undue litigation expenses are incurred. Conversely, many in the disability community note 25-plus years that businesses have already had to learn and comply with Title III, and they fear this bill will only further deter compliance, especially in light of Title III's prohibition on damage awards. Further, they argue that no other class protected by federal civil rights law is required to provide notice before filing suit.

## **IX. Conclusion**

Litigation under Title III of the ADA for businesses, non-profit organizations, schools, on-line services and other organizations in the 21-century economy continues to evolve and raise a number of complex and novel issues, especially regarding the ADA's application to new technologies. This legal brief analyzed a sampling of hot topics arising in Title III litigation, and highlighted key issues interested stakeholders should be aware of. Entities covered by Title III and individuals protected by the ADA are both encouraged to utilize effective resources and to keep abreast of all the legal requirements and changes under Title III.