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**T**he DOJ has not issued regulations explaining website accessibility obligations, and it is not clear exactly what those obligations might entail.

# Should Utilities Worry About Having ADA-Compliant Websites?



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In the last few months, the Carlson Lynch law firm has sent hundreds of letters to utility companies, retail businesses, and businesses in other industries across the United States threatening to file lawsuits, alleging that the

companies' websites are not accessible to disabled individuals in violation of the Americans with Disabilities Act (ADA). The Carlson Lynch attorneys claim that if companies have a website available to the public, the ADA requires the website to meet the technical standards known as

Version 2.0 of the Web Content Accessibility Guidelines (WCAG 2.0), published by the World Wide Web Consortium. These standards require such accessibility functions as having closed captioning for audio and making all text screen readable for screen readers for the sight impaired. To

avoid a lawsuit, the Carlson Lynch attorneys are demanding that companies agree to a settlement that includes both a payment to the firm and a requirement that the company hire the law firm's technical expert to assist in making sure that the websites meet the purported requirements of the ADA. This is not the first time that Carlson Lynch or other firms have attempted to force such a settlement based on the very unclear requirements of the ADA. This alert provides some background information on the law at issue and how some companies are addressing these demand letters.

### **Title III of the Americans with Disabilities Act**

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 135 Cong. Rec. 19,803 (1989) (statement of Sen. Harkin); 42 U.S.C. §12101(b)(1). Title III of the ADA prohibits discrimination in places of public accommodation: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §12182 (a).

The ADA specifically identifies 12 particularized categories of "places of pub-

### **The DRI Public Utility Task Force**

was recently founded to address the public utility industry's unique legal issues and risks. For more information about the task force and how to become involved, please contact Kevin Pearson at [kpearson@southernco.com](mailto:kpearson@southernco.com) or DRI Director of Committees Shawn Kaminski at [skaminski@dri.org](mailto:skaminski@dri.org).



lic accommodation,” all of which are physical, real (not virtual) places. See 42 U.S.C. §12181(7). These include, among other places,

a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment... laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe

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repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.

Needless to say, because at the time that the ADA was enacted the World Wide Web was still under development and no business had websites, the ADA did not specifically address websites. Since enactment of the ADA, however, most businesses have established websites for marketing and sales purposes. Advocacy groups for people with disabilities argue that under Title III of the ADA, these websites should be accessible to people with disabilities. There are two legal bases by which these advocacy groups typically allege a website is subject to Title III: (1) the website itself is a place of public accommodation, and (2) the website is one of the “goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” See *Nat’l Fed’n of the Blind v. Target Corp.*, 425 F. Supp. 2d 946 (N.D. Cal. 2006); *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

### The Law Is Unsettled

At this time, no legally binding rules or regulations state whether a business has to have an accessible website, much less define what “accessible” means or requires. In addition, the courts have issued mixed decisions, although many of them have not squarely addressed these issues. For online-only businesses, such as eBay or Netflix, the trend appears to be that they are not covered by Title III because they are not places of public accommodation.

For companies with physical places of public accommodation, (such as a store or business office), most courts (but not all) hold that whether a website must be accessible depends on whether there is a “nexus” or connection between the website and the physical place of public accommodation. One example is *Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), in which a California federal court allowed the ADA claim filed against Target by the National Federation of the Blind to proceed past the motion to dismiss stage because although under Ninth Circuit law “a ‘place of public accommodation’... is a physical place,” a “nexus” may be established between such a place and a *challenged service*. *Id.* at 952–53 (emphasis added). The court summarized:

[T]o the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied. To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.

*Id.* at 956.

In a later opinion, the court granted the plaintiffs’ motion for class certification. *National Federation of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007). After class certification, Target settled the case for over six million dollars and agreed to make its website accessible in accordance with certain guidelines.

While the court never held that Target was required to make its website accessible to individuals with disabilities under the ADA, this case was significant in that

the court found that the plaintiffs stated a claim under the ADA for which relief could be granted because there was a potential “nexus” between the use of the website and the enjoyment of the goods and services offered at the retailer’s physical store.

Other cases similar to *Target* have also settled. The Attorney General of New York filed a lawsuit against both Priceline.com and Ramada.com, alleging that the websites were inaccessible to blind individuals in violation of the ADA and New York law. As part of the settlements, the defendants agreed to reimburse the state for its costs in investigating and filing the lawsuit and also to make their websites accessible to blind and visually impaired individuals.

At least one court has held that a website simply is not a place of public accommodation. That was the conclusion of the court in *Access Now, Inc. v. Southwest Airlines, Co.*, in which a blind individual and an advocacy group sued Southwest Airlines, alleging that the airline’s website was inaccessible to blind individuals, in violation of the ADA. 227 F. Supp. 2d 1312. The plaintiffs argued that the website was a place of public accommodation. Granting Southwest Airlines’ motion to dismiss, the court held the airline’s website was *not* a “place of public accommodation” as defined by the ADA:

In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit had recognized Congress’ clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation. Where Congress has created specifically enumerated rights and expressed the intent of setting forth “clear, strong, consistent, enforceable standards,” courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover “virtual spaces” would be to create new rights without well-defined standards.

*Id.* at 1318 (internal citations omitted). See also *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 U.S.



Dist. Lexis 67223, 2014 WL 1920751, at \*8–9 (C.D. Cal. May 14, 2014) (holding a website was not a place of public accommodation because it was not a physical place); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 U.S. Dist. Lexis 52570, 2011 WL 1882780, at \*4–5 (D. Mont. Mar. 31, 2011) (same).

The court also held the plaintiffs failed to establish a nexus between the website and “a physical, concrete place of public accommodation.” 227 F. Supp. 2d at 1321 (“Thus, because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.”).

In contrast is Judge Posner’s decision in *Doe v. Mutual of Omaha Ins. Co.*, in which the Seventh Circuit held:

The core meaning of this provision [Title III of the ADA’s nondiscrimination provision], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space,... that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do. 179 F.3d 557, 559 (7th Cir. 1999), (emphasis added).

### The Department of Justice’s Position

In a 2010 notice, and in subsequent court filings, the U.S. Department of Justice (DOJ) said that it would develop website standards for non-governmental entities by 2016. However, in December 2015, the DOJ announced that it will not issue regulations for private sector public accommodations websites until at least 2018. Instead, it will implement similar regulations in 2016 for state and local governments (Title II), and then learn from the implementation of the Title II regulations before finalizing regulations for Title III businesses. Despite these actions, the DOJ has intervened in and supported two lawsuits brought against two universities for failing to caption videos posted to their websites. The DOJ’s position now is that it considers businesses obligated to make

websites accessible and it will continue to pressure business by joining in similar lawsuits. In other words, according to the DOJ, the obligation to make public accommodation websites accessible exists *right now*.

### The Demand Letters

The Carlson Lynch demand letters claim that businesses that offer goods and services to the public through websites and the websites are public accommodations that must comply with the ADA and the WCAG 2.0 guidelines. Such a letter then explains that the firm’s expert has reviewed the companies’ websites and found a number of inaccessible pages on the websites. It appears that this analysis was conducted using some form of website accessibility evaluation tool, although it is not exactly clear which features or functions it checks or how it calculates the number of inaccessible pages. Next, these letters state the settlement demand, which includes payment of the firms’ attorneys’ fees and implementation of a burdensome compliance program, which requires the company receiving such a letter to hire an expert consultant, (approved by the law firm, but paid by the company), who will (1) evaluate the company website, (2) implement the WCAG 2.0 standards, (3) develop policies and practices for the company, (4) train employees, and (5) conduct regular reviews and testing of the company website. These steps must be approved by the consultant and the lawyers, who no doubt will expect to be paid for monitoring the progress after the settlement. These letters also demand that a company preserve all data related to the website.

### Fighting Back

After receiving a demand letter as described above, one Oklahoma business decided not to wait to be sued. Instead, it filed a declaratory judgment action against the plaintiffs’ attorneys. Mazzios, LLC, an Italian restaurant with a website through which its customers can order online, asked the court to identify the legal standard that governs its obligation to comply with the ADA and to determine whether or not it can be liable for failing to comply with that legal standard when it has not been clearly defined by the courts so as to afford Mazzios, LLC

its right to due process. *Mazzios’s, LLC v. Carlson Lynch Sweet, et. al.*, No. 4:16-cv-00059-CVE-TLW (N.D. Ok. filed Feb. 2, 2016). Mazzios, LLC also alleged fraud in connection with the plaintiffs’ attorneys’ refusal to identify their clients in demanding a settlement that included attorneys’ fees. *Id.* ¶¶ 36-37.

This turnabout likely came as a surprise

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to Carlson Lynch; the firm’s attorneys have filed numerous ADA website-access lawsuits against companies such as Patagonia, Ace Hardware, Aeropostale, Bed Bath & Beyond, and Estee Lauder. Ultimately, Mazzios, LLC dismissed its lawsuit before any of the defendants could answer or otherwise respond to its complaint.

### Conclusion

As set forth above, the law in this area is far from settled, the DOJ has not issued regulations explaining website accessibility obligations for non-governmental entities, and it is not clear exactly what those obligations might entail. On the other hand, many businesses want their websites to be fully accessible to their disabled customers. However, as with most technical issues, the extent to which a utility may be able to make its website accessible (e.g., whether it addresses all disability issues or just some) will depend on a number of factors.

All of these issues, including the costs of defending a case or settling claims, should be considered in determining the appropriate action to take in response to these “demand” letters.

