



AXE-Con Digital Accessibility Legal Update

Kristina Launey

Partner, Seyfarth Shaw LLP

March 15, 2022

www.adatitleiii.com

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





Legal Disclaimer

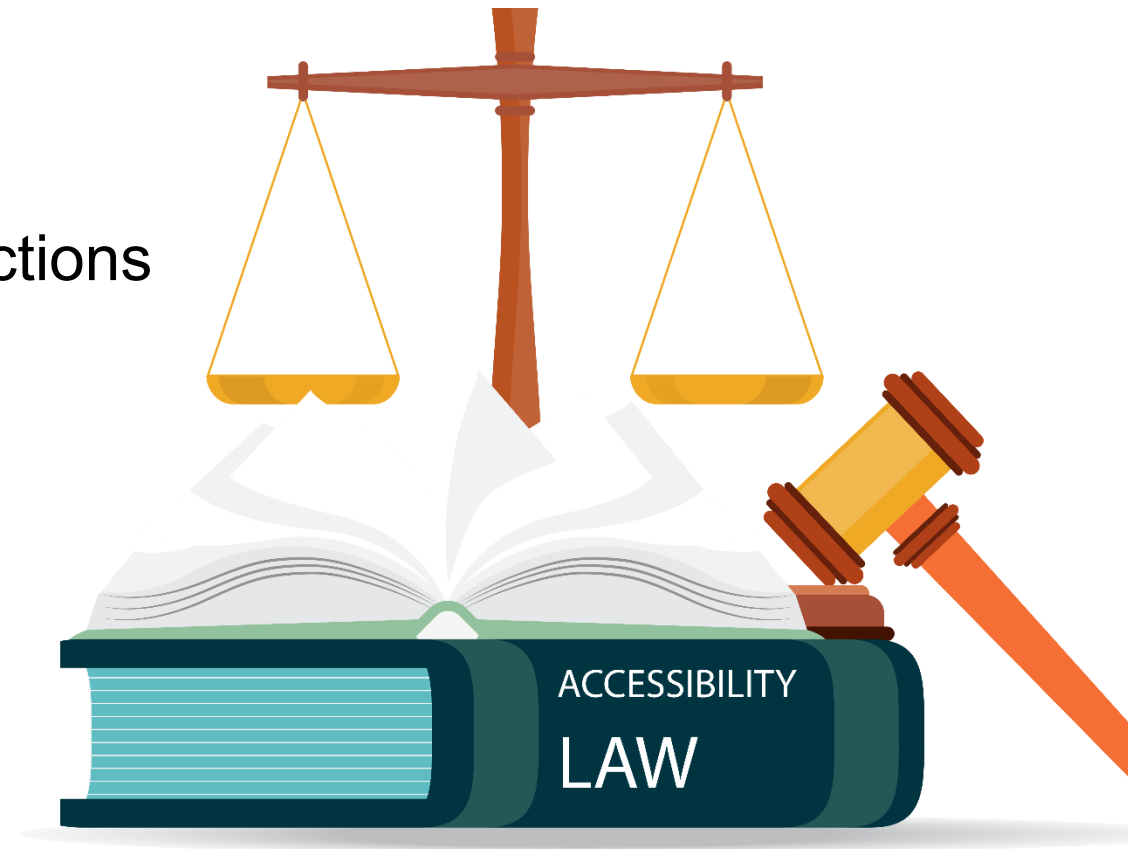
This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Agenda

- Legal Overview
- What is an accessible website?
- ADA Title III Website Lawsuit Data
- Key Lawsuits and Settlements
- Strategies for Avoiding & Defending Legal Actions
- Typical Roadmap to Accessibility



Legal Overview: What Laws May Require Accessible Technology

- **ADA Title II:** State & Local Governmental Entities
- **ADA Title III:** Public Accommodations
- **Section 504 Rehabilitation Act:** Recipients of Federal Funding
- **Section 508 Rehabilitation Act:** Technology sold to federal agencies may need to be Section 508 compliant under contract.
- **State Non-discrimination Laws:** Public Accommodations
- **Air Carrier Access Act:** Requires primary websites of airline carriers to conform to WCAG 2.0 AA.
- **ACA Section 1557, Medicare Regulations:** Healthcare

ADA Background

- The Americans with Disabilities Act (ADA) is a federal civil rights law that prohibits discrimination against individuals with disabilities.
- Signed into law by President George H.W. Bush on 7/26/90.
- Covers five key areas:
 - Employment (Title I)
 - State and Local Government Activities (Title II)
 - Public Transportation (Title II)
 - **Public Accommodations (Title III)**
 - Telecommunications (Title IV)

*** Today's focus = Title III

ADA Background

- Under Title III of the ADA, public accommodations must:
 - have facilities that are accessible to individuals with disabilities (*i.e.*, members of the public);
 - make reasonable modifications to policies, practices, and procedures when necessary to ensure that individuals with disabilities have equal access to public accommodations' goods, services, facilities, privileges, advantages, and accommodations; and
 - ensure effective communication with individuals with disabilities by providing them auxiliary aids and services (including “accessible electronic information technology”) at no additional charge.
- Remedies:
 - Private party: Injunctive relief, attorneys' fees & costs (possible damages/penalties under state corollary laws)
 - DOJ Action: Penalties \$96,384.00 for a first violation and \$192,768 for a subsequent violation; injunctive relief, damages

ADA Background: A Public Accommodation is:

- Private & Affects commerce
- Falls within at least one of the following 12 categories:
 - 1) Places of lodging (e.g., inns, hotels, motels)
 - 2) Establishments serving food or drink (e.g., restaurants and bars);
 - 3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
 - 4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
 - 5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
 - 6) Service establishments (e.g., laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
 - 7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
 - 8) Places of public display or collection (e.g., museums, libraries, galleries);
 - 9) Places of recreation (e.g., parks, zoos, amusement parks);
 - 10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);
 - 11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
 - 12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).
- ***Must it be a physical place? 9th, 11th, 3d Cir. say yes; 1st Cir. says no.***

What is an “accessible” website?

- One that can be used by people with various types of disabilities
- **Blind:** Screen reader compatibility
 - Alternative text for images
 - Properly labeled form fields
 - Proper use of headings
 - Keyboard-only access
 - Audio descriptions for videos
- **Low Vision:** Color contrast, text resizing
- **Deaf or Hard of Hearing:** Captions for audio content
- **Mobility:** Keyboard-only access; ability to slow down or turn off time outs
- **Epilepsy:** No flashing content
- **Color Blind:** Color not used as sole method of conveying information



Web Content Accessibility Guidelines (WCAG)

- Published by private group of experts, W3C
 - Adopted WCAG 2.1 AA in June 2018
 - Adds 17 Success Criteria to WCAG 2.0
 - Mobile Apps, Low Vision, Cognitive Impairments
- Not a legal standard under Title III of the ADA

Legal Overview: Obama DOJ Position

2010-2016: 2010 ANPRM pending

- “Equivalent” alternative means of accessing goods & services on website (e.g., 24-hour staffed phone service for all information and services available on website) is acceptable
- Public comment requested about:
 - How much time businesses should have to comply
 - Impact of requirement to caption all videos
 - What standard should be adopted as definition of accessible
- No proposed rule issued but aggressive enforcement

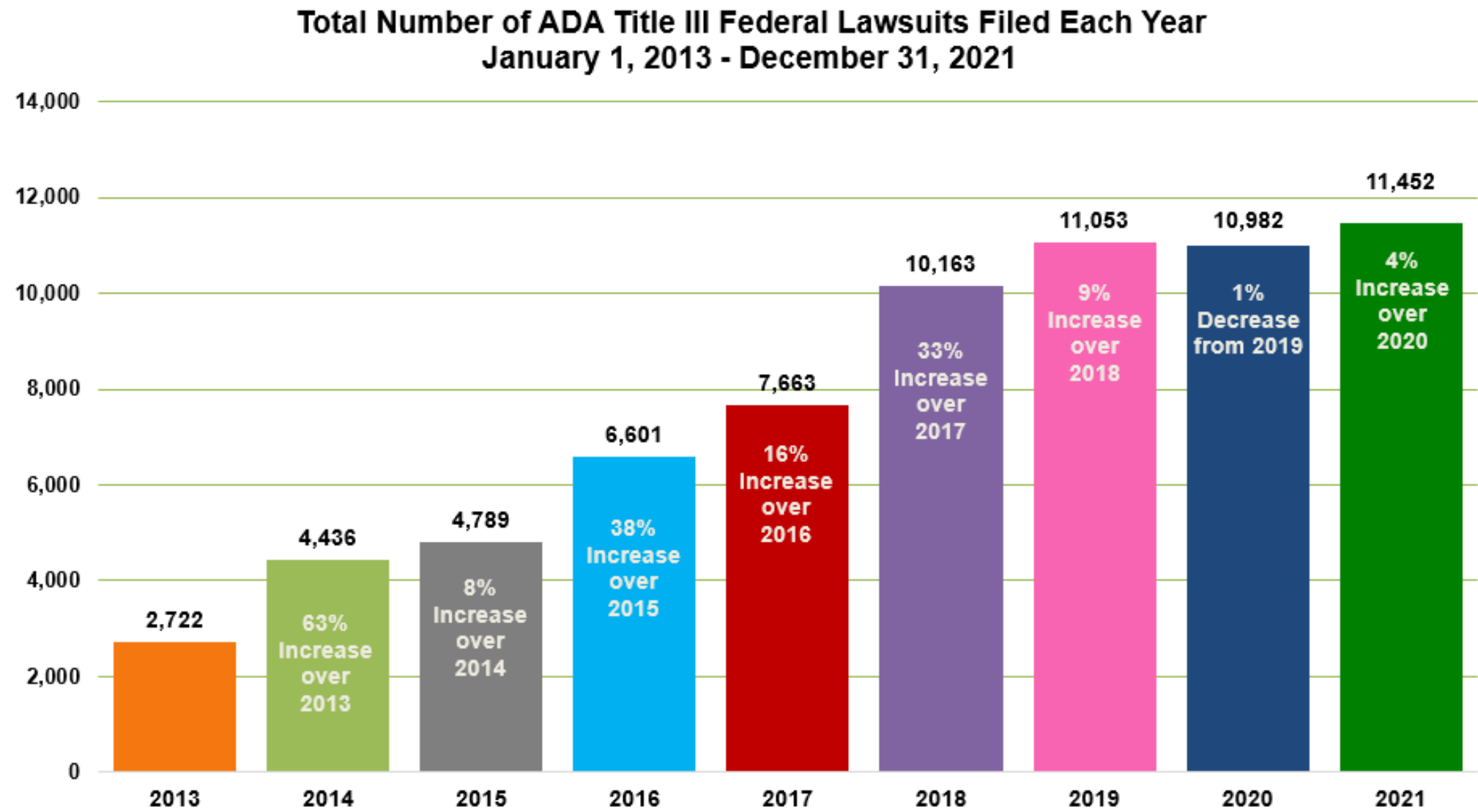
Legal Overview: Trump DOJ Position

- 2017: Withdrew website accessibility rulemaking begun in 2010
- Virtually no enforcement on website accessibility issues
- 2018:
 - Declined invitation to weigh in on *Robles v. Yum! Brands* (Pizza Hut) MTD
 - Response to congressional letter
 - ADA covers websites
 - There is “flexibility” in how to comply
 - “Absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. *Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.*”
 - “. . . the Department has consistently taken the position that the absence of a specific regulation does not serve as a basis for noncompliance with a statute’s requirements.”

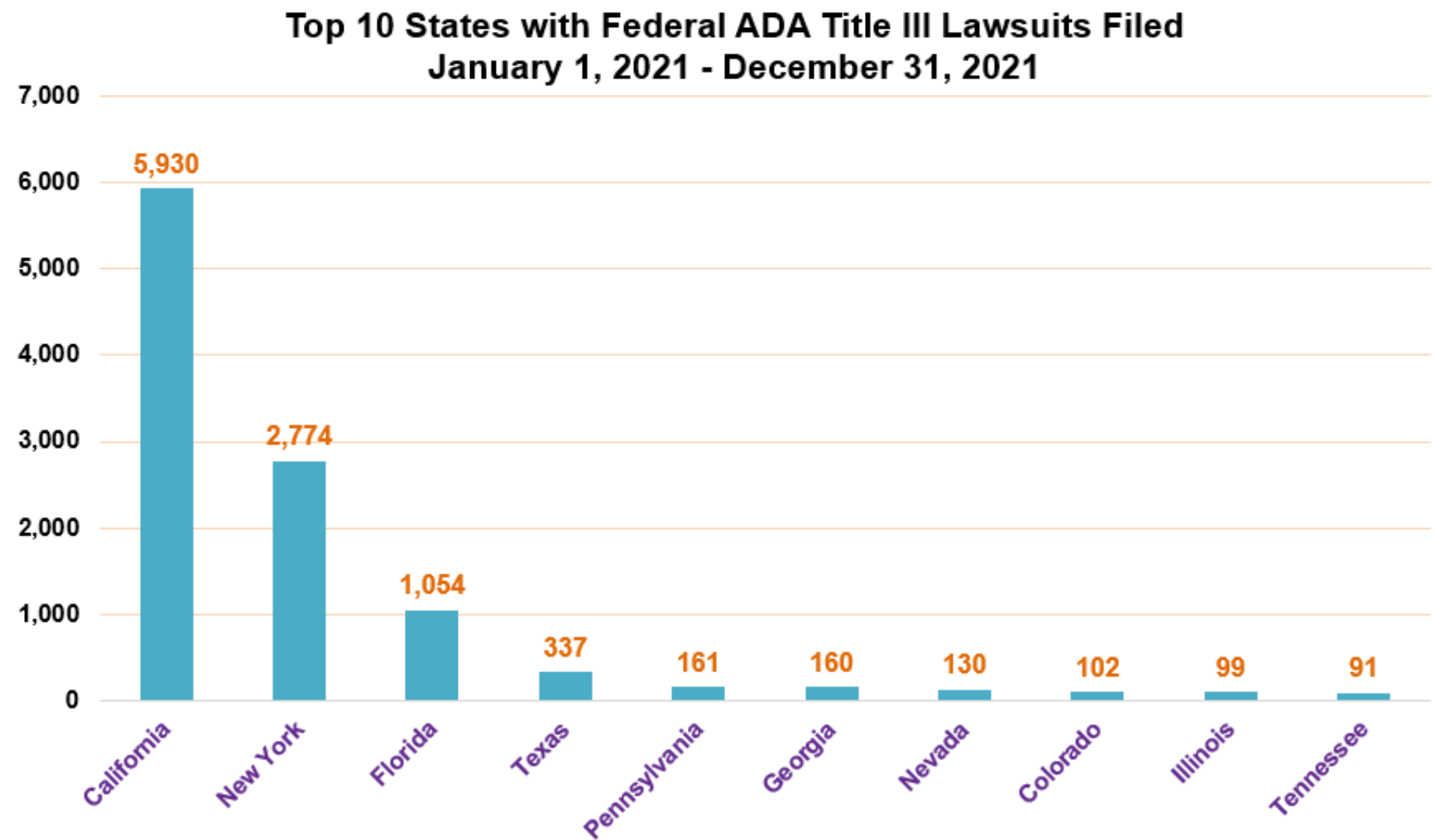
Legal Overview: Biden DOJ

- Kristen Clarke heads the Civil Rights Division
- Pattern & practice cases
- Demands for remediation, damages and monitoring
- Website accessibility cases
- More input on pending matters
 - Recent Statement of Interests filed about bed height, kiosks, plasma donation, TX anti-mask executive order in 2021
 - Feb. 28, 2022: Advocacy groups published “Joint Letter to Enforce Accessibility Standards” to Clarke asking DOJ to “adopt enforceable online accessibility standards by the end of the current Administration.”

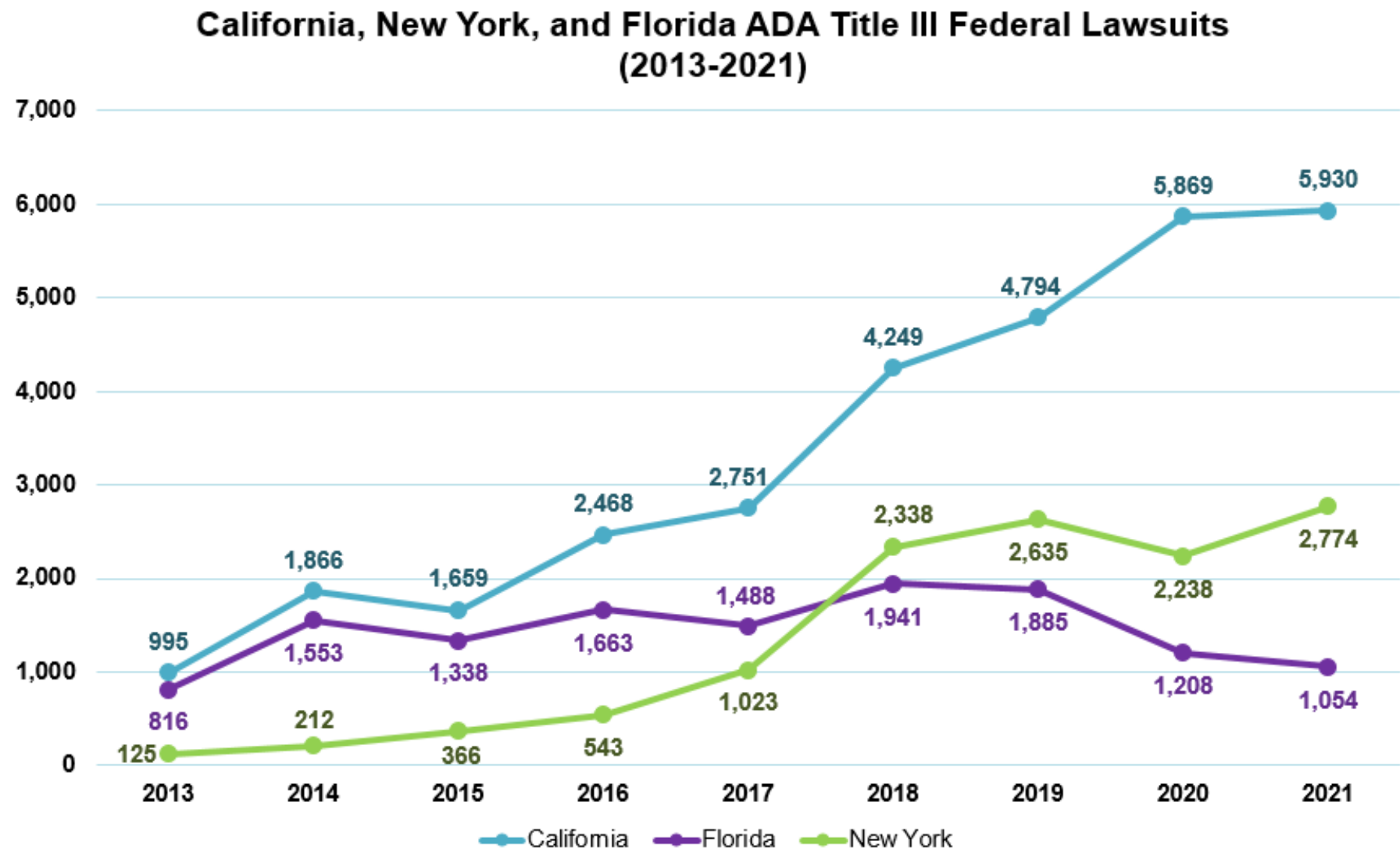
ADA Title III Accessibility Lawsuit Numbers (All Bases)



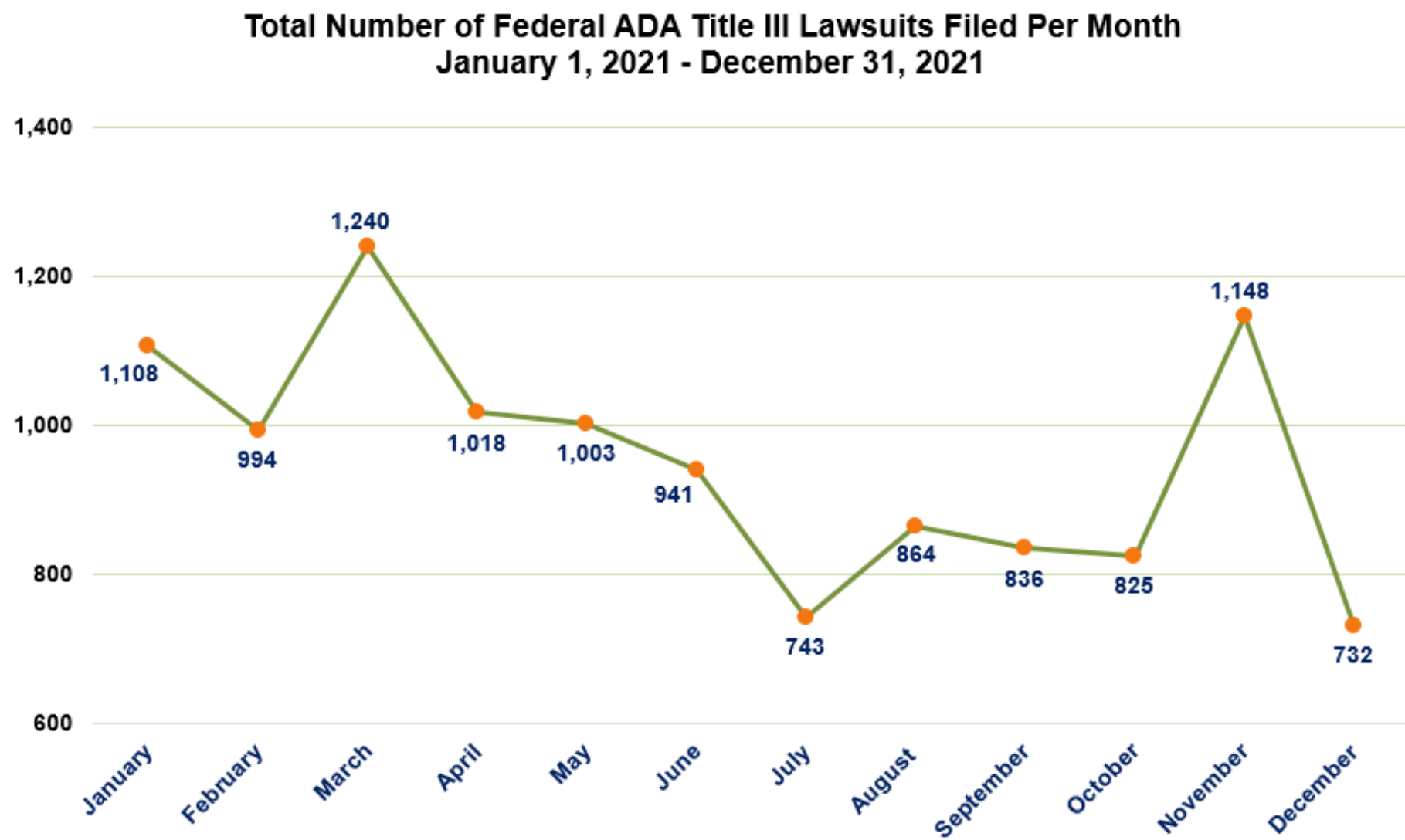
ADA Title III Accessibility Lawsuit Numbers (All Bases)



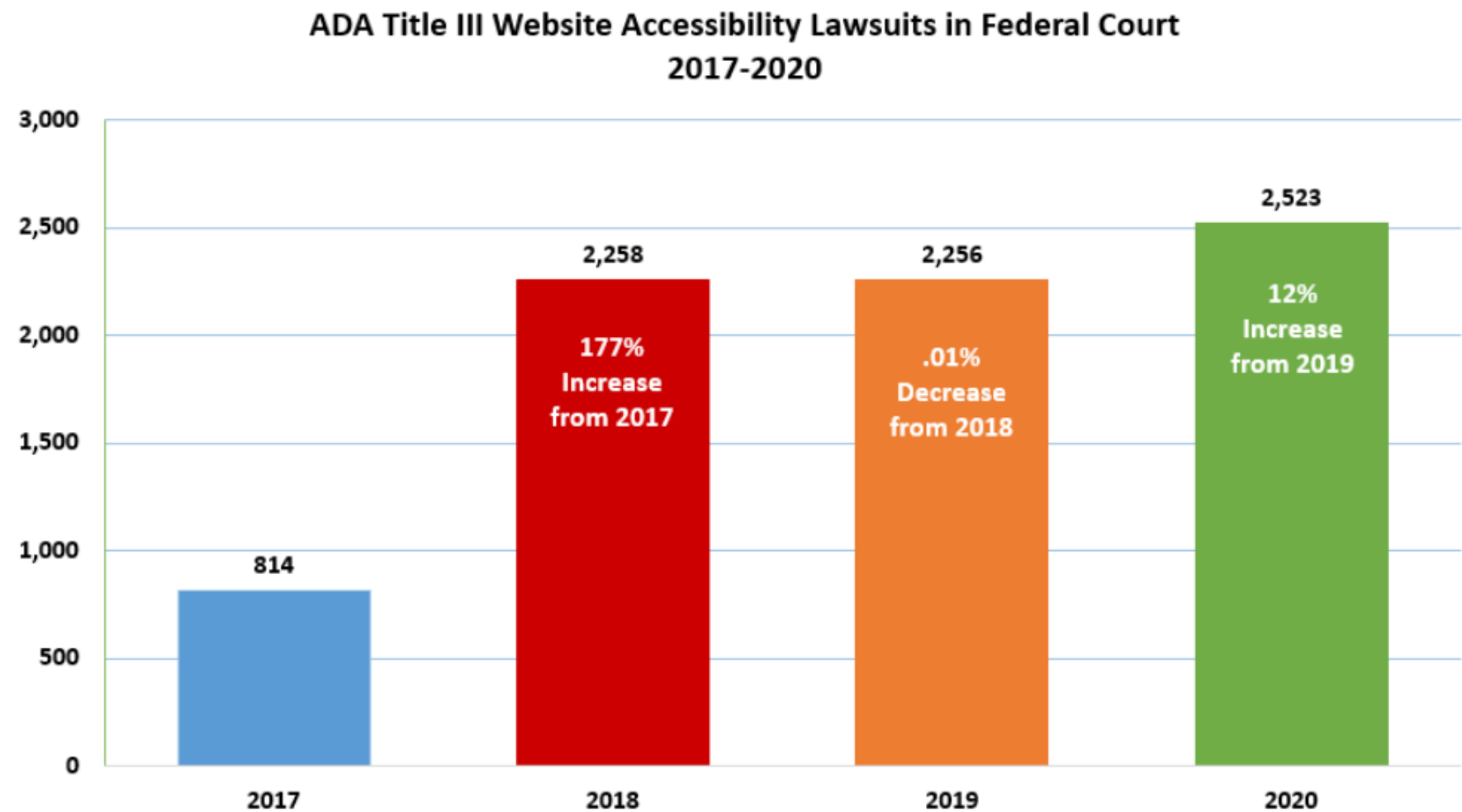
ADA Title III Accessibility Lawsuit Numbers (All Bases)



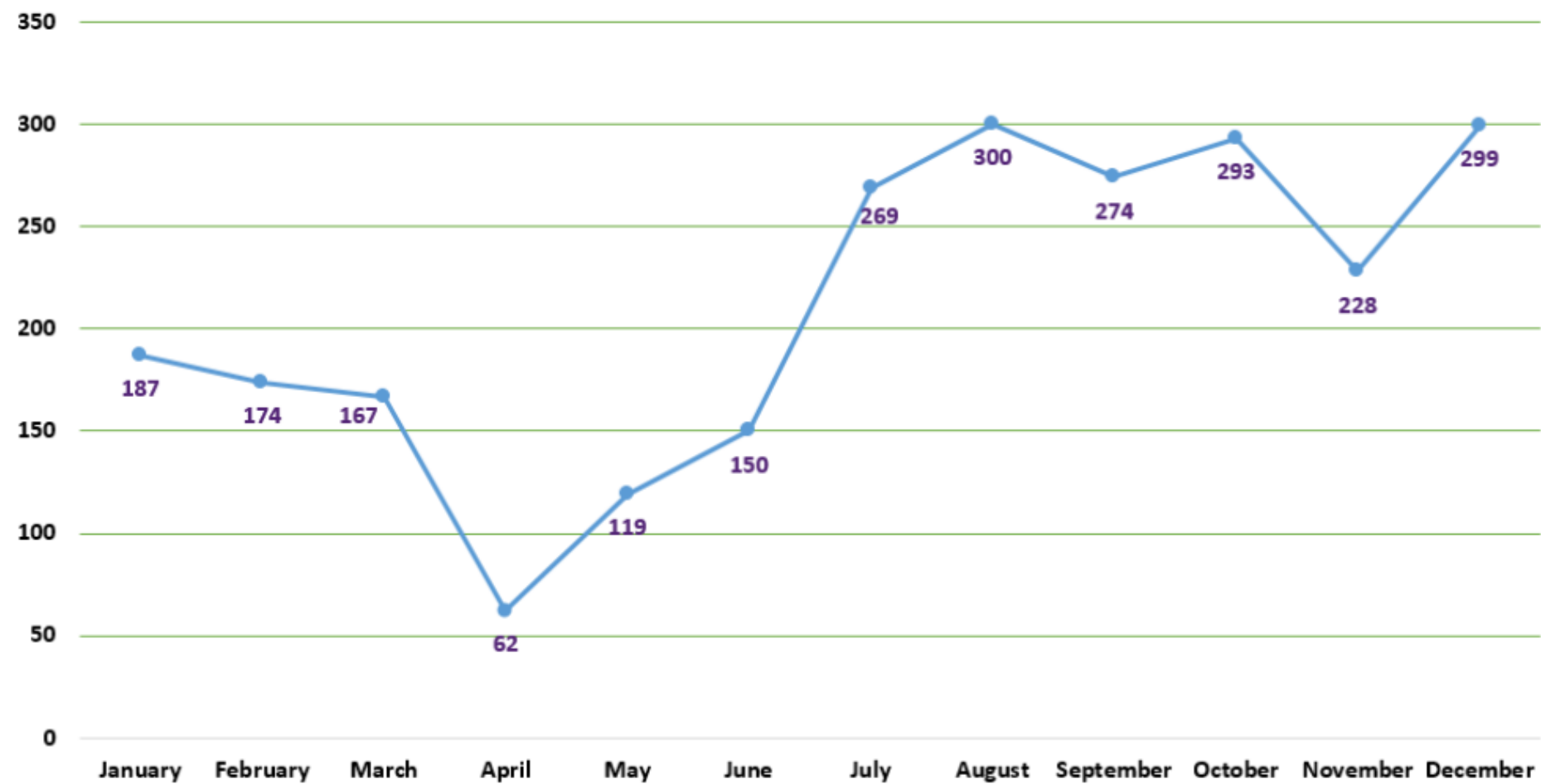
ADA Title III Accessibility Lawsuit Numbers (All Bases)



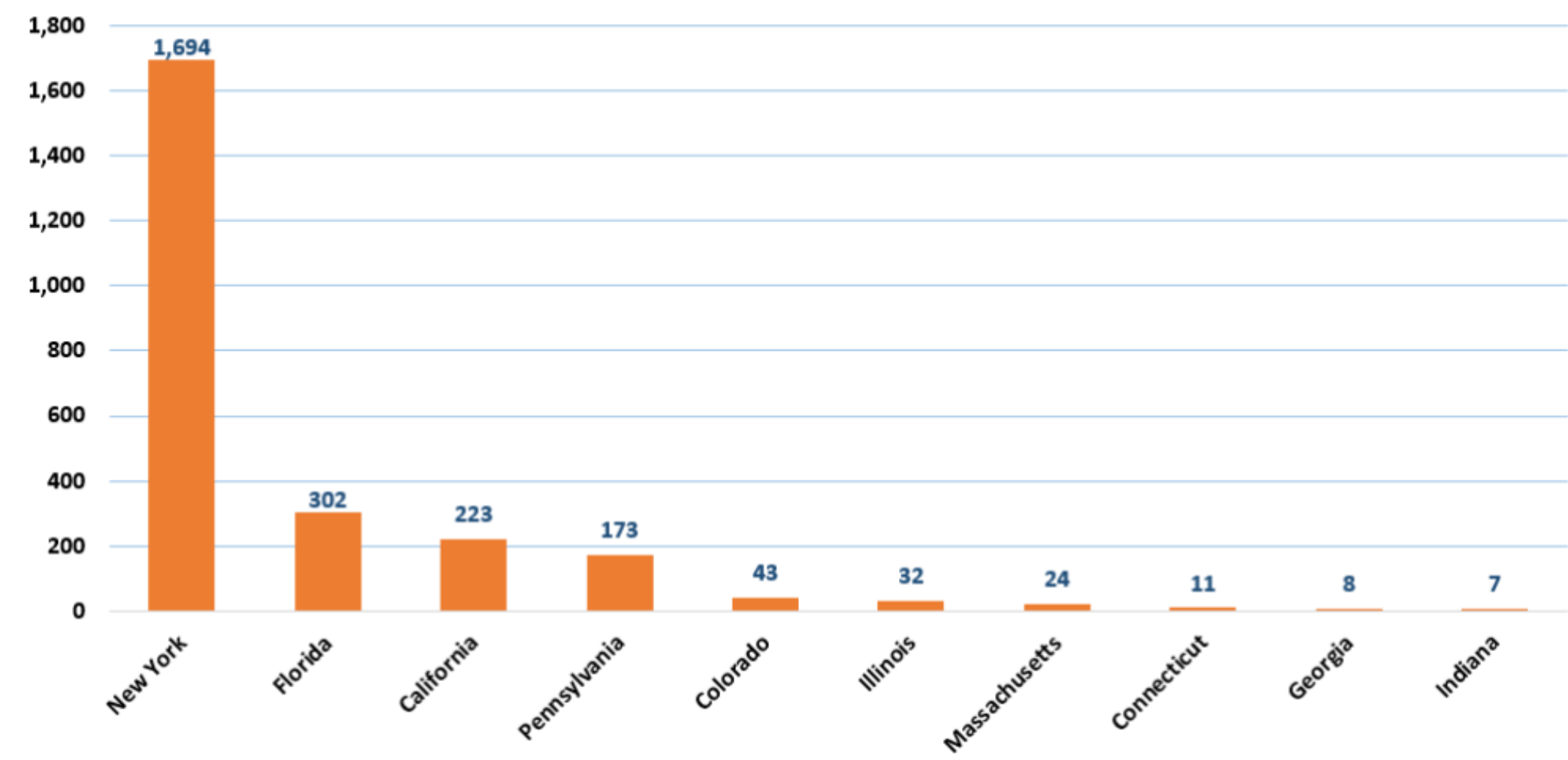
ADA Title III Website Accessibility Lawsuit Numbers



ADA Title III Website Accessibility Lawsuit Numbers: 2020 by the Month



ADA Title III Web Accessibility Lawsuits by State: Top 10 in 2020



Title III Website Litigation: Themes

- (1) Are web-only businesses are covered public accommodations? Federal Circuits disagree.
 - 9th Circuit & 11th Circuit: Web-only businesses not covered.
 - 9th Circuit follows “nexus” test
 - 11th Circuit (in Winn-Dixie**) said barrier on website must prevent access to goods/services at physical location
 - Note that some CA state courts disagree
 - 1st Circuit: Business does not have to have a physical location serving customers to be covered; district courts have applied this precedent to cover web-only businesses.
- (2) Prior settlement promising to make website accessible is not a bar to subsequent suit.
- (3) Being in the process of making your website accessible usually does not moot case.
- (4) If the plaintiff can’t ever use the services of the business whose website is inaccessible, case may be dismissed for lack of standing.

*** See below discussion on Winn-Dixie.*

Title III Website Litigation: Key Cases & Themes

***Robles v. Dominos Pizza LLC* (9th Cir. 2019)**

- Lawsuit alleged website and mobile app not accessible to the blind.
- Federal trial court granted early dispositive motion on due process and primary jurisdiction grounds.
- 9th Circuit reversed & remanded, finding:
 - ADA applies to websites & mobile apps that have nexus to physical place.
 - Rejected due process/primary jurisdiction arguments - Domino's had notice of the general requirements under ADA Title III.
 - Telephone service as an alternative could not be decided on a motion to dismiss.
- Domino's appealed to US Supreme Court; declined to review (October 7, 2019).
- On remand, partial summary judgment granted to Robles on the website, with judge finding that website is not fully accessible to plaintiff because future order can't be placed using a screen reader.

Title III Website Litigation: Key Cases & Themes

The Winn Dixie Saga

- ***Gil v. Winn Dixie* (SDFL 2017, 11th Cir 2022)**
 - Bench trial verdict for plaintiff, Court issued 3-year injunction:
 - Accessible website by 12/1/17(WCAG 2.0 AA)
 - Annual training for employees on website accessibility
 - Require third party content to be accessible
 - Adopt web accessibility policy by 12/1/17
 - Fees/costs totaling \$105,271 awarded to plaintiff
 - April 2021: 11th Circuit overturned trial court decision
 - found the website barriers in question did not prevent the plaintiff from accessing the goods and services offered at the retailer's stores
 - May 2021: Gil filed petition for rehearing en banc
 - December 28, 2021: 11th Circuit dismissed appeal as moot because the website was made accessible, and remanded case to trial court to dismiss as moot
 - January 18, 2022: Winn-Dixie filed a petition for rehearing by the en banc panel
 - January 25, 2022: 11th Circuit recalled the mandate and began processing the petition for rehearing
 - March 2, 2022: 11th Circuit denied petition for reconsideration of dismissal order

Title III Website Litigation: Key Cases & Themes

Few Courts Have Made Decisions on the Merits

- ***Gomez v. GNC* (SDFL 2018)**
 - Summary judgment for plaintiff on merits after expert reports submitted
 - Inaccessible website violates ADA
 - No injunction issued; parties agreed to stay case pending Winn Dixie appeal
 - Recent development: GNC bankruptcy

Title III Website Litigation: California Unruh Act

***Thurston v. Midvale Corp d/b/a Whisper Lounge* (CA State court 2018, aff'd 9/3/2019)**

- Appeals Court affirmed summary judgment against restaurant on grounds inaccessible website discriminates against blind customer under Unruh Act.
- Ordered restaurant:
 - Conform website with the WCAG Level 2.0 AA (App. Ct. found this not overbroad or uncertain).
 - Pay \$4,000 statutory damages.
- App. Ct. held:
 - Websites with physical nexus are subject to ADA Title III.
 - Third party content: “appellant offers no legal support for its theory that it cannot be liable for ADA discrimination if hires someone else to do the discrimination.”
 - Telephone and email not alternate effective communication because only available during restaurant hours of operation.

Title III Website Litigation: California Unruh Act

***Thurston v. Omni Hotels* (CA State court, aff'd 9/9/21)**

- Blind plaintiff alleged hotel website not accessible, in violation of Unruh Act.
- At trial, court instructed jury to determine if plaintiff “attempted to use [the hotel’s] website for the purpose of making a hotel reservation (or to ascertain the hotel’s prices and accommodations for the purpose of considering whether to make a reservation).”
- The jury found no intent, resulting in a verdict for the hotel.
- Appeals Court affirmed, finding that intent must be proven.

***Davis v. BMI/BND Travelware* (CA State court 2016)**

- Summary judgment against retailer granted.
- Inaccessible website discriminates against blind customer under Unruh Act.

Title III Website Litigation: Key Cases & Themes

Not on the Merits, But Informative on Injunctive Relief

- **Wright v Thread Experiment (SD Indiana January 22, 2021):**
 - Motion for default judgment granted.
 - Found allegations sufficient to state a claim against web-only business.
 - Followed 7th Circuit guidance in finding Title III applies to websites without a nexus to physical space.
 - Ordered defendant to bring website into compliance “with ADA and implementing regulations” within 90 days; failure to achieve full compliance within 90 days will result in permanent shutdown of the offending website.
 - Denied Plaintiff’s request that Defendant must comply with WCAG, that Plaintiff may monitor Defendant’s compliance (and get fees for that), that Defendant must retain ADASure, and that Defendant must adopt any policies/practices that go beyond compliance with ADA.

Title III Website Litigation: Key Cases & Themes

DOT v. Scandinavian Airline System

- Department of Transportation regulations under the Air Carrier Access Act (ACAA) required airlines to bring their websites into compliance with WCAG 2.0 Level AA by 2016.
- Rather than make its website accessible, SAS built a secondary “assistive” site that met WCAG 2.0 guidelines.
- DOT brought an action against SAS, challenging the use of a second website.
- SAS ultimately agreed to make its primary website accessible and to pay a fine of up to \$200,000.
- Separate but equal prohibited by ACAA (and not a good idea regardless)
 - Separate is never equal
 - Increased costs from maintaining multiple sites
 - Forgotten “separate” sites fall out of accessibility
 - Good design is accessible
- Take care with “widget” or “overlay” products.

Title III Website Litigation: Physical Nexus

- ***Haynes v. Dunkin Donuts* (11th Cir. 2018):**
 - Reversed district court dismissal of case because Plaintiff sufficiently alleged that the barriers on the website prevented him from accessing the services available in a physical store.
- ***Mahoney v. Bitrex* (ED Penn. 2020)**
 - Motion to dismiss granted for failure to state a claim because no physical nexus
- ***Martinez v. San Diego County Credit Union* (Ca. Ct. App. 4th Dist. 2020)**
 - Second CA Appeals Court to hold (in addition to ***Thurston v. Midvale***, above) that websites with a nexus to a physical place of business where customers go are covered by Title III of the Americans with Disabilities Act (ADA) (trial court did not think so and had dismissed the case on that basis).
- ***Martinez v. Kydia Inc.* (CA State Court 2019):**
 - State trial court disagrees with Ninth Circuit and holds that the ADA does not require a website to belong to a business with a physical place where customers go.

Title III Website Litigation: Mootness (“*we fixed it!*” (or not))

- ***Diaz v. Kroger* (SDNY 2019)**
 - Lawsuit dismissed as moot based on declaration Kroger submitted stating all barriers raised in complaint were fixed, it ensured no additional barriers existed, and was committed to access going forward
 - ***Paguada v. Yieldstreet* (SDNY 2021)**
 - Lawsuit not moot where there were conflicting declarations submitted about whether there were still barriers on the website.
 - ***Haynes v. Hooters* (11th Cir. 2018)**
 - Case dismissed by district court based on prior settlement with another plaintiff; reversed by 11th Circuit
 - Hooters was only *in process* of making website accessible so case was not moot
 - Relief Plaintiff requested not covered by prior agreement, including request for order directing Hooters to “continually update and maintain” website in accessible manner
 - Plaintiff was not a party to prior agreement and could not enforce it
- ***Mootness determinations are highly fact-specific***

Title III Website Litigation: Mootness & Standing

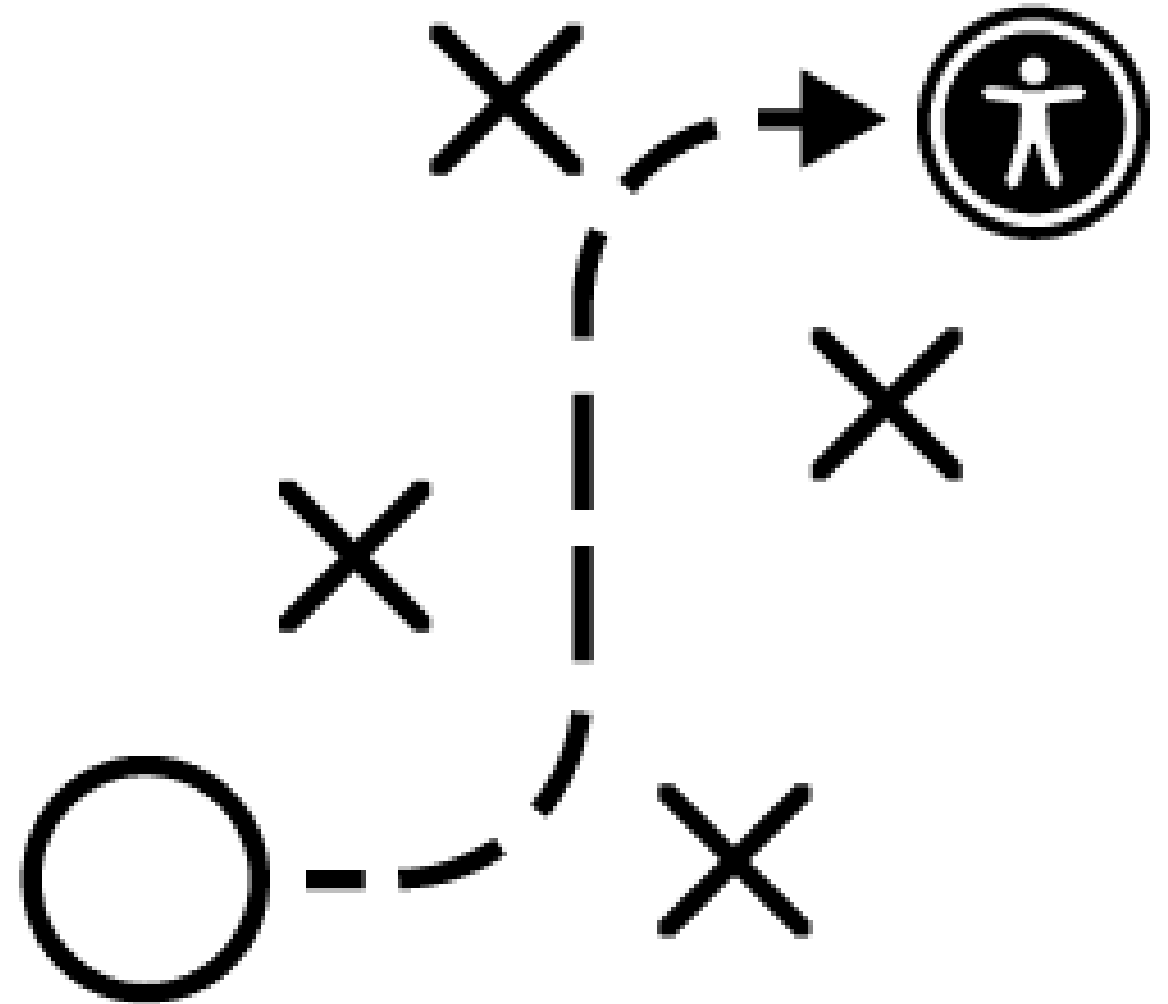
- ***Walters v. Simply Skinny Ties, LLC* (NDNY Dec. 9, 2020)**
 - Motion to Dismiss for mootness denied.
 - Court found there is an ongoing factual dispute over whether (1) Defendant's contention, supported by declarations, that it had already "made all reasonable modifications to the website" and "remedied all the ADA violations and ensured no additional barriers to accessing the website exist" in fact did remedy the alleged violation and (2) whether violations are likely to recur.
- ***Hilton v. Rizzi* (EDNY Aug. 2020):**
 - Plaintiff claimed the barriers prevented him from making a reservation. The Court ruled:
 - Plaintiff lacked standing because his allegations (and declaration) did not sufficiently explain how the alleged barriers on the websites impacted him personally.
 - ADA claim moot because Hilton submitted a declaration from reputable consultant, which Plaintiff did not contradict, that a blind person can use a screen reader to find a hotel and make a reservation on the website.

Title III Website Litigation: Standing

- ***Griffin v. Dept. of Labor Credit Union* (4th Cir. 2019)**
 - 4th Circuit affirmed district court dismissal for lack of standing.
 - No injury in fact and nor future imminent injury in the future.
 - “Inability to obtain information is sufficiently concrete to constitute injury in fact only when the information has some relevance to the litigant.”
 - The fact that the plaintiff could never be a member of the credit union whose membership was limited to current and former employees of the Department of Labor and their immediate families and households made the information on the website not relevant to him.
 - Injury not “particularized”: while everyone in the U.S. may have access to a particular allegedly inaccessible website, a plaintiff must demonstrate some connection between him/her and the business to establish standing to sue.
 - Plaintiff faced no “imminent” harm resulting from not being able to access the website for information because he could never be a member of the credit union in the first place.
- ***Carroll v. Northwest Federal Credit Union* (4th Cir. 2019)**
 - 4th Circuit affirmed district court’s dismissal of lawsuit on same grounds – plaintiff could never join the credit union he sued

Strategies for Avoiding/Defending Litigation

- Create and maintain website/mobile apps
- 24/7 telephone line
- Accessibility Statement, Policy, Procedure
- Training
- Vendor Contracts
- Third party content
- Consent decree?



Challenges

- Links to third party websites
- Third Party Content on your website:
 - Software licensed from third parties to perform functions (Google Maps, Recipes feature, circulars, Instagram feeds)
 - Advertising by third parties
 - Payment mechanism
- In the Title II SANPRM, DOJ said a state or local government entity:

that uses third-party social media Web site to implement its services, programs, or activities. . . is required to ensure access to that content for individuals with disabilities through other means. For example, if a public entity publishes information about an upcoming event on a third-party social media Web site, it must ensure that the same information about the event is also available to individuals with disabilities elsewhere, such as on the public entity's accessible Web site. Likewise, if a public entity solicits public feedback on an issue via a social media platform, the public entity must provide an alternative way to invite and receive feedback from person with disabilities on that topic.

Typical Roadmap to Accessibility

- Get help
 - qualified accessibility counsel
 - qualified digital accessibility expert
 - Privilege issues
 - Manual & automated testing
- Train
 - website team
 - content providers
 - IT
 - marketing
 - customer service



Typical Roadmap to Accessibility

- Make accessibility improvements to website/mobile app
 - WCAG 2.0/2/1 AA conformance
 - Prioritize
- Periodically re-audit website/mobile app
- Mechanism to receive and act upon accessibility user feedback



Questions?

www.adatitleiii.com

