

# Current Digital Accessibility Litigation and Regulatory Enforcement Landscape – How Can Risk Be Effectively Mitigated?

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**Presented by:**

Lori J. Sommerfield  
*Of Counsel*

Ballard Spahr

Direct: 612.371.2450

Mobile: 612.322.1767

[sommerfieldl@ballardspahr.com](mailto:sommerfieldl@ballardspahr.com)

Michelle McGeogh

*Partner*

Ballard Spahr

Direct: 410.528.5661

Mobile: 410.804.5785

[mcgeoghm@ballardspahr.com](mailto:mcgeoghm@ballardspahr.com)

## Co-Presenters



**Lori J. Sommerfield**

[sommerfieldl@ballardspahr.com](mailto:sommerfieldl@ballardspahr.com)

612.371.2450



**Michelle M. McGeogh**

[mcgeoghm@ballardspahr.com](mailto:mcgeoghm@ballardspahr.com)

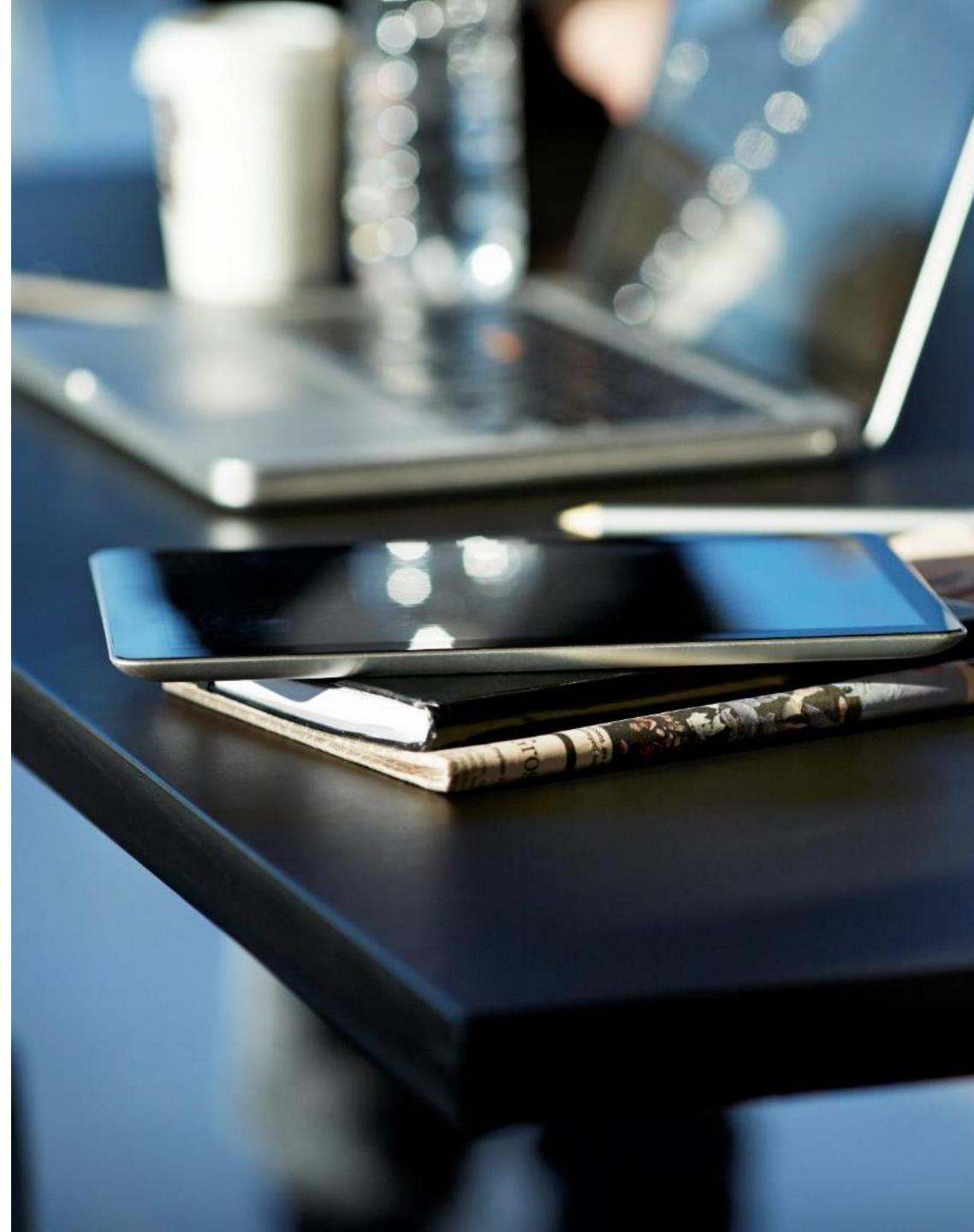
410.528.5661



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## Overview

- Introduction
- ADA Title III Legal & Regulatory Framework
- Increasing DOJ Enforcement Activity
- Recent Federal Legislation
- Continuing Rise in Demand Letters and Litigation
- Risk Management



## Website & Mobile Application Accessibility

- Why be concerned about accessibility?
  - Financial services industry has been hit in waves of demand letters and litigation since 2016
  - During COVID-19 pandemic, litigation is on an upswing
  - New legal theories of disability discrimination are arising
  - California Consumer Privacy Act recommends that online privacy notices meet the WCAG 2.1 standard for accessibility



# Why Digital Accessibility Matters



\*From Level Access (2020 ADA co-presentation with Ballard Spahr LLP)

## Worldwide

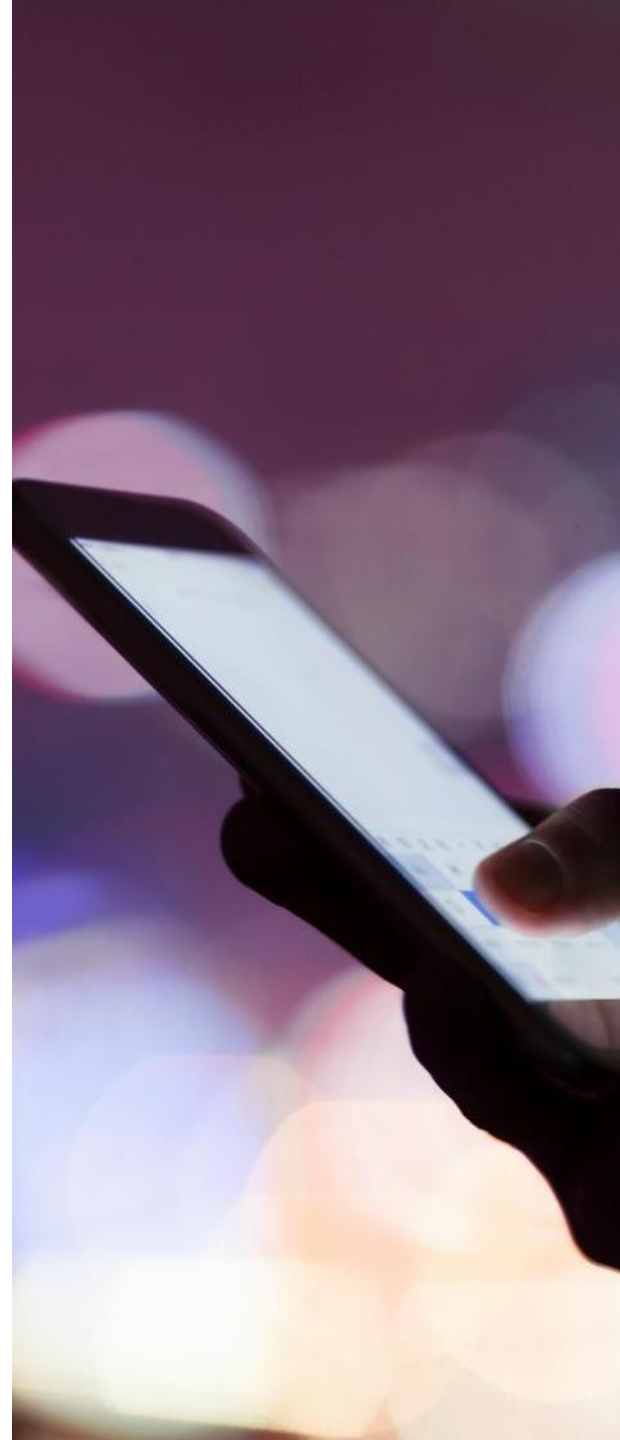
- One billion people (15% of the world population) have a disability

## In the United States

- Approximately 64 million people with disabilities
- Over 7.5 million are blind
- Studies in the US have shown 50% of people with disabilities are online every day. People with disabilities have a purchasing power of \$490 billion.
- When these users have a positive experience, they are more likely to become regular customers and recommend your organization to friends and family.

## Website & Mobile Application Accessibility

- Why is accessibility important now?
  - Consumers are increasingly turning to e-commerce channels
  - New websites and mobile applications are proliferating during the COVID-19 pandemic
  - Litigation shows no signs of ceasing without legislation or a uniform accessibility standard set by U.S. Department of Justice (“DOJ”) rules
  - During the Biden administration, DOJ has begun stepping up regulatory enforcement of Title III of the ADA again





## — Title III of the Americans with Disabilities Act

- The ADA, which was enacted in 1990, is enforced by the DOJ
- Title III of the ADA (42 U.S.C. 12182 *et seq.*) applies to places of “public accommodation”
  - Prohibits discrimination against individuals on the basis of disability from 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.”
- DOJ and federal/state courts have interpreted Title III to apply to websites
- Therefore, companies must make their websites accessible to individuals with disabilities



## DOJ's Rulemaking Saga – Title III of the ADA

- DOJ's Advance Notice of Proposed Rulemaking ("ANPR") (75 Fed. Reg. 43460, July 26, 2010)
- DOJ's Supplemental ANPR (81 Fed. Reg. 28657, May 9, 2016)
  - Posed 123 additional questions covering a broad range of website accessibility issues for public comment as a follow-up to its 2010 ANPR
- DOJ's withdrawal of ANPRs (82 Fed. Reg. 60932, Dec. 26, 2017)
  - President Trump issued Executive Orders 13771 and 13777, requiring agencies to reduce outdated or inactive regulations. In response to this directive, DOJ withdrew its two ANPRs and placed the Title III rulemaking on its list of "inactive" regulations in 2017
- Currently, no timeline for DOJ to resume its rulemaking process (but that could change)





## DOJ Steps Up ADA Title III Enforcement

- Since President Biden took office, the DOJ has increased its efforts to enforce Title III of the ADA, leading to heightened enforcement risk:
  - Kristen Clarke confirmed as head of DOJ's Civil Rights Division
  - DOJ press release dated 7/26/2021 issued on 31<sup>st</sup> anniversary of the ADA underscored the agency's enforcement approach. According to AG Merrick Garland, "*The Justice Department will keep working tirelessly — marshalling all tools... — to realize the ADA's promise of equal opportunity for all people with disabilities.*"
  - DOJ has opened new investigations concerning inaccessible websites
  - DOJ has filed Statements of Interest in three Title III cases
  - Currently piloting a new version of its ADA.gov website, which makes filing an ADA complaint easier



## Recent DOJ Digital Settlements

- During late 2021, DOJ entered into settlement agreements with Rite Aid Corporation and the Hy-Vee grocery store chain in response to the agency's concern that the companies' COVID-19 vaccine registration websites were not accessible to individuals with vision and other disabilities
- The DOJ also entered into a website and mobile application accessibility settlement with the Champaign-Urbana Mass Transit District in December 2021
- These settlements were the result of compliance reviews conducted by the DOJ in the course of enforcing Title II and III of the ADA.
- Importantly, all three settlements require compliance with WCAG 2.1, Level AA for the first time
- Each company was also required to train employees, develop policies and procedures, test for compliance, and report results to the DOJ, among other things

# Technical Standards for Digital Accessibility

Web Content Accessibility Guidelines (“WCAG”) are international voluntary technical standards developed by the World Wide Web Consortium (“W3C”)

- WCAG 2.0, published in 2008, has been adopted by the DOJ in its consent orders and many judicial decisions
- WCAG 2.1 was released in 2018 and builds on, but does not supersede, WCAG 2.0 standards
  - Expands accessibility for individuals with mobility, low vision, cognitive and learning disabilities.
- Both contain same “success criteria” – Level A, AA and AAA
- First draft of WCAG 3.0 was released by W3C in January 2021; evolving standard



## Recent Federal Legislation

- On Feb. 19, 2021, Congressmen Lou Correa (D-CA) and Ted Budd (R-NC) re-introduced the **Online Accessibility Act** (H.R. 1100)
- Bill seeks to provide guidance to help businesses ensure their websites and mobile applications are in technical compliance
  - Adopts older WCAG 2.0 A and AA standard
- Also sets limitations on an individual's right to bring a lawsuit without first exhausting all available administrative remedies
  - Requires prior notice to operator of website
  - If after 90 days operator fails to bring website into compliance, individual may file a complaint with the DOJ
  - After investigation within 180 days, DOJ may bring an enforcement action
  - If DOJ does not act, individual may file suit as "sole and exclusive remedy"





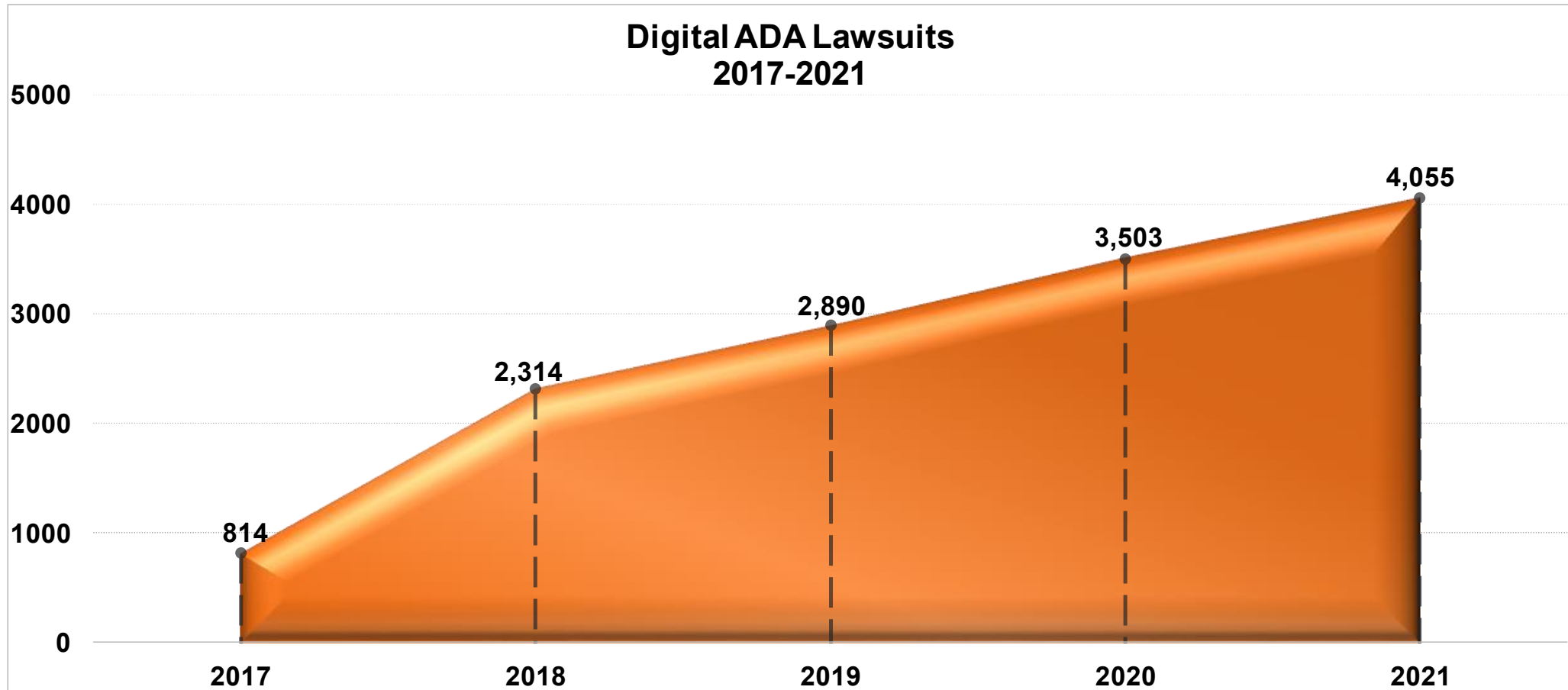
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## Digital Accessibility Lawsuits – Litigation Continues to Increase

- Beginning in 2016, website accessibility lawsuits have increasingly been on the rise and litigation risk remains high
- There has also been a consistent uptick in demand letters
- As a result, we are seeing more businesses seek legal representation and advice relating to digital accessibility risk management



## Digital ADA Lawsuits - Continued Legal Pressure



## Digital Accessibility - Litigation

- Sample demand letter:
  - May be general or specifically identify accessibility barriers
  - States that compliance with WCAG 2.0/2.1 is required
  - Monetary request (may attach settlement agreement)
- Typical complaint:
  - Lists alleged accessibility barriers
  - Seeks injunctive relief and court order requiring consultant to improve website accessibility following a website audit
  - Demands training, testing and other periodic audits
  - Requests attorneys' fees and costs



## Common Litigation Issues



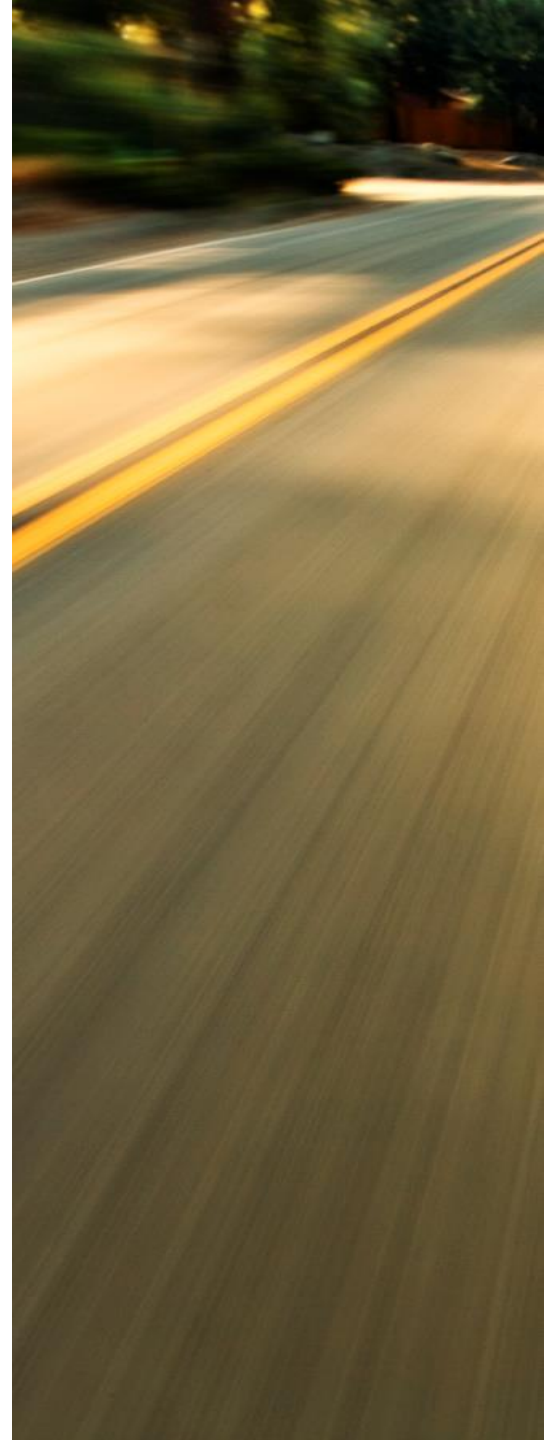
- Statutory defenses of undue burden and fundamental alteration
- Standing
- Mootness
- Connection to physical location (nexus requirement)
- *Places* of public accommodation / informational websites



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## Example Case – A Long and Turbulent Road (*Robles v. Domino's Pizza LLC*)

- United States District Court for the Central District of CA, March 2017: Trial Court granted Domino's Motion to Dismiss
- Plaintiff appealed in April 2017
- Ninth Circuit reversed in 2019
- On October 7, 2019, the Supreme Court denied certiorari
- Case was then remanded to the district court to determine whether the website and mobile application provided effective communication and full and equal enjoyment of Domino's goods and services
- On remand, the district court granted partial summary judgment to in favor of Plaintiff, but allowed the case to proceed as to other claims



## Risk Management

- Begin working toward ADA compliance now
- Educate key stakeholders, develop a budget, and obtain appropriate staffing to manage ADA risk management program
  - Appoint an Accessibility Coordinator
- Settle on an appropriate level of technical compliance
  - WCAG 2.1 AA recommended
- Conduct a website accessibility audit/assessment
  - Can informally self-assess using available tools; or
  - Engage an experienced ADA accessibility consultant to conduct a comprehensive, formal accessibility audit (preferred)
  - We often recommend conducting audits under attorney-client privilege to protect the results until issues can be remediated



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## Risk Management

- Provide ADA accessibility training for website team and appropriate employees (call centers, compliance, etc.)
- Draft and post an Accessibility Statement on website and mobile applications
- Draft and implement an internal Digital Accessibility Policy
- Implement monitoring and audit routines to ensure ADA compliance for all digital assets
- Embed ADA compliance requirements in vendor agreements
- Ensure consumer complaints raising accessibility issues are promptly addressed and escalated, if needed



— Questions?







Thank you for  
joining us today!

Lori J. Sommerfield  
*Of Counsel*  
Ballard Spahr  
Direct: 612.371.2450  
Mobile: 612.322.1767  
[sommerfieldl@ballardspahr.com](mailto:sommerfieldl@ballardspahr.com)

Michelle McGeogh  
*Partner*  
Ballard Spahr  
Direct: 410.528.5661  
Mobile: 410.804.5785  
[mcgeoghm@ballardspahr.com](mailto:mcgeoghm@ballardspahr.com)



# Appendix

Recent ADA Title III Cases

—— *Robles v. Domino's Pizza LLC* (2021 U.S. Dist. LEXIS 124356)

- On June 23, 2021, a CA federal district court held that Domino's website violated both ADA Title III and CA's Unruh Civil Rights Act ("Unruh Act") because it was not fully accessible to a blind individual.
- The same court had initially dismissed the case in 2017, invoking the doctrine of primary jurisdiction and finding that imposing liability would violate the company's due process rights due to lack of regulatory accessibility standards.
- Ninth Circuit reversed in 2019, holding that Title III of the ADA did apply to both Domino's website and mobile application.
- Domino's filed a petition for certiorari with the U.S. Supreme Court, which was denied. Case was then remanded to the district court to determine whether the website and mobile application provided effective communication and full and equal enjoyment of Domino's goods and services.
- On remand, the district court granted summary judgment to plaintiff, finding that Domino's website violated the ADA and the CA Unruh Act, and ordered Domino's to bring its website into compliance with WCAG 2.0 and to pay plaintiff \$4K. However, court denied plaintiff's motion with regard to the accessibility of Domino's mobile application; case is proceeding as to those claims.

—— *Gil v. Winn-Dixie*, 993 F.3d 1266 (11<sup>th</sup> Cir., April 7, 2021)

- On April 7, 2021, the Eleventh Circuit ruled that Winn-Dixie grocery stores' websites are not "public accommodations" and thus not subject to Title III of the ADA.
- Court held that, to be actionable, a website barrier must prevent access by an individual with a disability to a good or service at the store. Although blind plaintiff Gil could not access the website because it was incompatible with his screen reader software, he could still access goods or services at the store and pharmacy, as he had done for many years. The Eleventh Circuit vacated the judgment and remanded the decision to the trial court.
- This decision reversed a 2017 FL federal district court opinion that required the grocery store chain to make its websites and third-party components accessible to individuals with visual disabilities, provide accessibility training to employees, and adopt an Accessibility Policy. Court also awarded fees of \$105,271 to the plaintiff.
- Plaintiff's petition for rehearing filed on April 15, 2021 remains pending in the Eleventh Circuit.
- Could set the stage for the U.S. Supreme Court to potentially grant certiorari and resolve circuit split.



——— *Suris v. Gannett Co., Inc. et al*, 2021 U.S. Dist. LEXIS 131341 (E.D.N.Y. July 14, 2021)

- Deaf plaintiff filed a lawsuit against defendants, which own and manage USA Today's website, stating that he could not access various videos on the website due to lack of closed captioning and alleging that the inaccessible website violates Title III of the ADA.
- On July 14, 2021, a NY district court held that newspaper USA Today's website was not a "place of public accommodation" under Title III of the ADA.
- The court found that neither a newspaper publisher nor a digital media content provider falls within the 12 enumerated places of public accommodation categories under Title III of the ADA and defendants' website is not a good or service of a place of public accommodation. Therefore, the court granted defendants' motion to dismiss.
- While the court acknowledged the precedent of applying Title III to retailers' websites, it did not extend that legal analysis to a standalone content website.
- Notice of appeal filed by plaintiff on August 12, 2021, was subsequently withdrawn by joint stipulation of the parties on August 27, 2021.

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*Murphy v. Eyebobs, LLC, Case No. 1:21-cv-00017-RAL* (U.S. District Court, Western District of Pennsylvania)

- On October 6, 2021, U.S. Magistrate Judge Richard Lanzillo approved a class action settlement between visually impaired plaintiffs and Eyebobs eyewear company to resolve allegations that the company's website was inaccessible. The judge granted lead plaintiff Murphy's unopposed motion to certify class for settlement purposes and for preliminary approval of a class action settlement.
- The proposed settlement commits Eyebobs to ensuring 'blind or visually disabled individuals full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations provided by and through its digital properties' and ensuring that 'the U.S. portion of the website is accessible' within 24 months of the effective date of the settlement agreement.
- Lead plaintiff Murphy was awarded a \$1K incentive payment and an unspecified amount of attorneys' fees. Eyebobs is required to make changes to policies, procedures and personnel to ensure that its digital assets are accessible within 3 years of the effective date of the settlement, with a possible extension to 5 years, with ongoing compliance monitoring and reporting.