Understanding the
ADA Website Lawsuits

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A **CU\*Answers** Whitepaper

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# Executive Overview

*The Americans with Disabilities Act of 1990 (“ADA”) is a well-intentioned law designed to help individuals with disabilities enjoy access to public accommodations. Title III of the ADA allows both the Department of Justice and private persons, individually and collectively, to enforce ADA provisions. Although the law does not specifically mention websites, as the world has become more dependent on the Internet for commercial activity, court cases have leaned towards including websites as areas of public accommodation that must provide access to people with disabilities (primarily visually impaired persons).*

*Unfortunately, credit unions and other business have been the targets of letters, many of which appear to be mass-mailed, that threaten class action lawsuits due to alleged ADA accessibility barriers. These letters typically put heavy pressure on businesses to either confidentially settle, or to face the risk of a serious class action lawsuit. The following factors are the core reasons for the sudden rush of these threat letters:*

1. *Failure of the Department of Justice to provide ADA standards for websites;*
2. *Ability to run software scans on websites remotely to look for possible accessibility barriers, and where these scans have varying degrees of accuracy;*
3. *A few court cases that have found for the plaintiff (party bringing the lawsuit), at least at the threshold stage, alleging website accessibility barriers in violation of the ADA;*
4. *A low standard of requirements to file lawsuits in American courts;*
5. *A cost-benefit analysis for every defendant as to whether the cost of defending the suit is greater than the cost of reaching a settlement;*
6. *The potential risk of negative publicity for a business under an accusation that the business discriminates against the visually impaired.*

*There is no way to determine whether a class action lawsuit will actually be filed against a credit union that receives a threat letter. Credit unions should always check with their counsel, their insurer, and their league before taking action or responding. In addition, until a lawsuit is filed it is impossible to know whether any remedial action taken to remediate protentional accessibility barriers would eliminate liability under the ADA.*

# Key ADA Talking Points for Credit Unions

**Defense: Some court cases have held that in the absence of website accessibility standards from the Department of Justice, business cannot be expected to be in compliance with ADA.**

**Tools: There are ways to evaluate whether a website might have accessibility barriers, and to take remedial action before a letter is received.**

**Advocacy: Both CUNA and state credit union leagues are placing pressure on Congress and the Department of Justice to either exempt credit union websites and to publish ADA website compliance guidelines.**

**Assistance: Many credit unions and business publicly offer to help remediate access issues and provide assistance via phone or other means for persons with disabilities.**

**Settlement is not “forever”: Settlement with a particular plaintiff is not necessarily a settlement for future plaintiffs, especially if the settlement takes place before a lawsuit is filed or if conditions change.**

# ADA and Websites: Background

ADA was passed in 1990, and required individuals with a disability be offered the “full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.”[[1]](#footnote-1) Title III of the ADA requires organizations to make reasonable modifications to provide equal enjoyment of public accommodations. The federal Department of Justice has the authority to enforce the ADA and to develop regulations around compliance. In addition, the ADA allows for private individuals to sue individually or as a class action to enforce ADA requirements.

Websites were not referenced in ADA, for the obvious reason that the Internet did not exist in its current, commercially driven form at the time ADA was passed. The evolution of case law in this area was jumpstarted by *National Federation of the Blind v. Target Corp*.[[2]](#footnote-2), a class action lawsuit by an advocacy organization that alleged Target’s website did not allow visually impaired persons to browse the website or order goods. Target’s asked the court to dismiss the case on the grounds that the ADA did not specifically cover cyberspace; that motion was denied and the case was allowed to proceed. Ultimately, Target settled the case.

There was very little litigation over websites and ADA compliance in the decade or so after *National Federation of the Blind*. In addition, federal courts did not have a unified view of whether websites were places of public accommodation, and how broadly ADA should be read. During this time, the Department of Justice was supposed to be instituting new standards and regulations for website ADA compliance. However, the Department of Justice’s failure to set these regulations has caused a sudden wave of ADA Title III litigation over the past three years.

The frontline argument used by law firms promulgating these cases is that failure of a company to meet the World Wide Web Consortium’s (“W3C”) Web Content Accessibility Guidelines (“WCAG 2.0 AA”) is a violation of ADA, even in the absence of Department of Justice guidelines. Because this argument has seen some success in the courts to a varying degree, it has opened the door to a flood of copycat lawsuits and boilerplate demand letters. However, this argument has also been defeated in court as well, and has not seen uniform success throughout the court system. The Department of Justice has stated it will not issue any guidance, if at all, until January 18, 2018.[[3]](#footnote-3)

# Developing ADA Website Compliance Cases

ADA allows disabled Americans to demand injunctive relief (i.e. a court order) and attorney’s fees if the plaintiff filed a successful ADA discrimination lawsuit. The idea was to give people with disabilities a day in court in the event that the Department of Justice was unwilling or unable to take action against an organization denying access to public accommodations. However, this right did not take into consideration the advancement of technology and how it might be used or misused 25+ years later.

All a plaintiff or the law firm has to do is run an accessibility scan against a public website. If the website shows lack of adherence to WCAG 2.0 AA standards, the plaintiff can now establish a claim that the site is not compliant with ADA, even if those standards are not necessarily preventing a disabled person from equal access to the site. Because Americans have relatively easy access to the courts, a report showing that the WCAG 2.0 AA standards are not being met satisfies “good faith” requirements for filing a lawsuit. From a court’s perspective, the fact that the scan may be unreliable is an issue for discovery and trial, and not a barrier to filing the case.

Once the scan is complete, the law firm will now send a demand letter. As long as the law firm does not have any facts in the letter it knows to be untrue (e.g. the scan shows the website to be in compliance but the law firm sends the demand letter anyway), the law firm can threaten to sue. The hope that most law firms or plaintiffs have is that the defendant will do a cost-benefit analysis of the cost of settlement versus the cost of defending the suit, and will agree to a settlement to make the case go away. Lawsuits, especially class actions, can get very expensive quickly for both parties, while demand letters and settlement negotiations are very cheap. However, the law firm might still sue some or all of the potential defendants in an effort to get settlement dollars from them. In addition to the financial pressure a defendant may face from a lawsuit, credit unions may fear that a public lawsuit accusing the institution of discriminating against the visually impaired may hurt the credit union’s reputation in the public.

Unfortunately, settlement of a particular lawsuit is not a guarantee that future lawsuits will not be filed. If the website services change or the bar for compliance changes, that might open a whole new set of potential litigation on other grounds.

# ADA Cases Split

Two cases reaching diametrically different conclusions underline the problem analyzing the real risk of an ADA demand letter or lawsuit. On June 12, 2017 in the Florida federal court case of *Gil v. Winn-Dixie Stores[[4]](#footnote-4)*, the court ruled that Winn-Dixie’s website was incompatible with WCAG 2.0 AA standards. In addition, the court ruled that due to the website’s heavy integration with Winn-Dixie brick-and-mortar stores, the website was a service to a public accommodation. The court held that plaintiff Gil was entitled to injunctive relief, and that by a date to be agreed upon between Gil and Winn-Dixie, the website would be compliant with WCAG 2.0 AA standards. Gil was also entitled to attorney’s fees.

Yet earlier in 2017, a California federal court ruled quite differently. In *Robles v. Dominos Pizza LLC[[5]](#footnote-5),* the court dismissed an ADA class action alleging that Domino’s Pizza failed "to design, construct, maintain, and operate its website [and mobile application] to be fully accessible to and independently usable by [himself] and other blind or visually-impaired people" using screen readers pursuant to WCAG 2.0 AA. This lack of compatibility was alleged to preventing plaintiffs from completing purchases. This California court essentially accepted the same premise as the *Winn-Dixie* case, that the tight integration with brick-and-mortar stores meant Domino’s website could be construed as a service to a public accommodation and thus subject to the ADA.

However, the California federal court dismissed the case against Domino’s on due process grounds, specifically that failure by the Department of Justice to promulgate meaningful regulations around website ADA compliance put Domino’s in a position of not being able to be compliant with the law. The court quoted Domino’s argument that "the [Department of Justice] has not promulgated concrete guidance regarding the accessibility standards an e-commerce webpage must meet, much less required that companies operating such webpages comply with the specific standards Plaintiff references in his Complaint." The court held that to force Domino’s to be in compliance with non-existent regulations "flies in the face of due process."

There is no real way to square these rulings, other than they come from different jurisdictions.

# ADA Backlash

Website compliance is only a small part of the total number of Title III ADA cases in 2017. For example, Utah had only eight total Title III ADA cases from 2013-2015, but had 249 filed in just eighteen months[[6]](#footnote-6):



This spike in litigation has caused several states in the Southwest to intervene and dismiss the lawsuits. The Attorney General for the State of Arizona consolidated approximately 1,700 lawsuits, and had them dismissed[[7]](#footnote-7). The Nevada Attorney General is attempting to do the same thing[[8]](#footnote-8). In New Mexico, a judge recommended dismissal, while calling the lawsuits a “carnival shell game” and that the plaintiffs were “using the judicial process to harass defendants into settlements to obtain financial gain …. and not to remedy ADA violations.”[[9]](#footnote-9) The judge noted that the 99 lawsuits filed by this plaintiff were copy and pasted, with the only difference being the names and addresses of the defendants.

The Omaha Steaks company is taking a different approach[[10]](#footnote-10). Omaha Steaks received a demand letter from counsel representing Access Now. This January 4, 2017, letter claimed that www.omahasteaks.com “has substantial access barriers” making it “difficult or impossible for our clients and similarly situated stakeholders to access the site’s privacy-related information and legal terms and conditions, and to exercise privacy and legal

choices available to person who enjoy full access to the website.” The demand letter claimed that the barriers violated WCAG 2.0, and that Access Now would “work constructively” with Omaha Steaks in lieu of “immediately” filing a lawsuit.

Omaha Steaks response was to file a case in a Nebraska federal court, asking whether the company “can be held liable for having failed to timely comply with that standard, in the absence of any federal regulation dictating an applicable deadline, particularly in light of the Federal Government’s self-imposed future deadline of January 18, 2018.”[[11]](#footnote-11) Omaha Steaks’ argument is essentially the same as Dominos Pizza, except that Omaha Steaks is filing the lawsuit to stop a possible future lawsuit from being filed. Omaha Steaks may have believed that, in light of other ADA litigation filed by Access Now, a lawsuit was inevitable and therefore aggressive action to kill the potential litigation was the best strategy. If successful, other companies may follow Omaha Steaks’ lead.

The sheer volume of recent litigation is spurring notice by the press, trade associations, state governments, and even Congress that ADA is being abused. Many organizations are reaching out to their visually or hearing-impaired customers by testing whether there are problems with WCAG 2.0 standards, and ensuring there are notices on their websites that allow consumers assistance if there are problems with website access. Many states are well aware of the recent wave of ADA litigation clogging the court system, and are on guard for serial plaintiffs and law firms who are harassing businesses with ADA claims. At the federal level, CUNA and other organizations are working with Congress and the Department of Justice to help remedy the wave of ADA litigation.

1. 42 U.S.C. § 12812(a). [↑](#footnote-ref-1)
2. 452 F.Supp.2d 946 (2006) [↑](#footnote-ref-2)
3. Note that the Executive Order by the Trump Administration requiring two regulations to be disbanded for every new regulation promulgated makes the January 18, 2018 goal of the Justice Department unlikely. [↑](#footnote-ref-3)
4. No. 1:16-cv-23020 (S.D. Fla., slip op. June 12, 2017). [↑](#footnote-ref-4)
5. Case No. 42 CV 16-06599 SJO (C.D. Cal. Mar. 20, 2017). [↑](#footnote-ref-5)
6. Data and chart from “[Utah Is a New Hotbed of ADA Title III Federal Suits](https://www.adatitleiii.com/2017/06/utah-is-a-new-hotbed-of-ada-title-iii-federal-suits/)” Mihn N. Vu and Susan Ryan, *ADA Title III News and Insights*, June 27, 2017. [↑](#footnote-ref-6)
7. “[Arizona Attorney General Secures Dismissal of 1,700 Lawsuits By Serial Plaintiffs](https://www.adatitleiii.com/2017/02/arizona-attorney-general-secures-dismissal-of-1700-lawsuits-by-serial-plaintiffs/)” Kathryn Palamountain, *ADA Title III News and Insights*, February 28, 2017. [↑](#footnote-ref-7)
8. “[Nevada Attorney General Takes Dramatic Action to Stop Serial Plaintiff’s ADA Title III Lawsuits](https://www.adatitleiii.com/2017/08/nevada-attorney-general-takes-dramatic-action-to-stop-serial-plaintiffs-ada-title-iii-lawsuits/)” Minh N. Vu, *ADA Title III News and Insights,* August 10, 2017. [↑](#footnote-ref-8)
9. “[Serial ADA suits operated like 'a carnival shell game,' depriving plaintiff of proceeds, judge says](file:///C%3A%5CUsers%5Camacmillan%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CTemporary%20Internet%20Files%5CContent.Outlook%5CRZ0GITJ1%5CSerial%20ADA%20suits%20operated%20like%20%27a%20carnival%20shell%20game%2C%27%20depriving%20plaintiff%20of%20proceeds%2C%20judge%20says)” By Debra Cassens Weiss, *ABA Journal*, July 13, 2017. [↑](#footnote-ref-9)
10. “[Omaha Steaks among companies facing ADA compliance lawsuits over websites](http://www.omaha.com/omaha-steaks-among-companies-facing-ada-compliance-lawsuits-over-websites/article_65f8f074-5400-54ba-ba36-12ff3aa49274.html)” By Russell Hubbard, Omaha World-Herald, February 26, 2017. [↑](#footnote-ref-10)
11. [OmahaSteaks.com v. Access Now, Inc](https://www.adatitleiii.com/wp-content/uploads/sites/121/2017/02/17cv60.pdf)., 8:17-cv-00060, (Nebraska, February 17, 2017). [↑](#footnote-ref-11)