Accessibility: It's All We Do

Digital Accessibility
Crystal Ball 2019
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Introduction

Digital accessibility lawsuits have grown rapidly, nearly tripling in 2018 from the year prior. Increased media attention on web accessibility lawsuits are leading to increased awareness of the issue. For those seeking clarity in the realm of digital accessibility law, 2018 provided some answers, but left many questions unanswered. With the volume of new digital accessibility lawsuits filed under Title III of the Americans with Disabilities Act (ADA) and the Rehabilitation Act continuing to rise, Level Access asked some of the legal sages at the forefront of the issue to peer into their Crystal Balls and tell us how recent developments have changed the digital accessibility status quo—and what the future has in store.

Our Crystal Ball panelists provided us with their takes on a broad variety of issues, including:

- Whether digital accessibility litigation is likely to increase and what industries are likely to be hit next
- How major decisions like Robles v. Dominos Pizza LLC and the pending decision in Gil v. Winn Dixie Stores, Inc. will affect the legal environment
- Why class actions have become so popular and how that trend will impact organizations
- What legal arguments are likely to pop up in court next
- Whether the Department of Justice (DOJ)’s September 2018 letter reiterating that the ADA applies to websites will have any impact on litigation
- If the newly-elected Congress is likely to address digital accessibility in the absence of DOJ action
- Whether state laws designed to limit ADA suits will have their desired effect
- And more!

Once again, join us this year as we peer into the Digital Accessibility Crystal Ball!

What Is the State of Digital Accessibility Litigation?

Going into 2018, many people expected to see a significant increase in digital accessibility litigation. What was surprising was just how significant that increase turned out to be. According to an analysis by law firm Seyfarth Shaw LLP, at least 2258 website accessibility lawsuits were filed in federal court in 2018, a 177% increase from 2017. Two states—New York and Florida—represented the vast majority of these filings, with 1564 and 576 lawsuits, respectively.
This is in addition to all of the cases that aren’t filed, that are resolved by the parties after a prospective defendant receives a demand letter. With several Crystal Ball participants suggesting roughly half of cases are never actually filed, the true volume of digital accessibility claims is quite staggering.

But what happens to all of these cases, and why are there so few cases result in a decision? As in other areas of the law, the vast majority of digital accessibility cases settle long before trial, limiting the volume of written case law in a field where there is no dearth of litigation.

**The timeline of a typical case usually looks something like this:**

1. A lawsuit is filed by a plaintiff who cannot access a website.
2. The defendant files a motion to dismiss the lawsuit, alleging that the ADA does not require websites to be accessible to people with disabilities.
3. The court rules to either grant or deny the motion to dismiss.
4. If a motion is denied, it just means that the case can move forward in court; at this point, however, most cases are settled.

### Why Are So Many Lawsuits Settled Before They Go to Court?

Although there is an increasing amount of case law in digital accessibility, it’s hard to argue that the digital accessibility requirements are clear. The overwhelming majority of lawsuits are settled before they go to court for two major reasons:

1. it is often cheaper to settle than to go to court, and
2. arguing against a plaintiff with a disability could lead to bad publicity for the defendant.

In addition, many of the court decisions that we have are from lower courts and some are very fact-specific decisions. Although courts have not reached consistent verdicts, many courts have been sympathetic to the plaintiffs in these cases.
Olabisi Ladeji Okubadejo,
Ballard Spahr LLP

“For an accessibility issue that goes before a judge, a jury, or any kind of decision-maker, there is some risk because most people know someone with a disability or have someone in their family who has a disability, if they don’t have one themselves. There is some level of empathy for someone who is trying to navigate the world not being able to see it. And many of the tools that are online are even more meaningful for people who cannot drive because they are blind or may have some difficulty getting around. There are some things that just make sense, and I think that are intuitive to a decision-maker as they are thinking about accessibility.”

How Could the Pending Appeal in Winn Dixie Change the Digital Accessibility Status Quo?

Until recently, appellate decisions have been rare in the digital accessibility context, meaning that lower courts have not had guidance when deciding whether to grant or deny a motion to dismiss. But, in 2018, the Eleventh Circuit Court of Appeals, which reviews cases from Alabama, Florida, and Georgia, issued a trio of decisions, *Haynes v. Dunkin Donuts LLC*, *Haynes v. Hooters of America, LLC*, and *Sierra v. City of Hallandale Beach, Florida*, in which the it reversed lower court dismissals of digital accessibility lawsuits. While the three cases largely supported the ability of plaintiffs to challenge inaccessible websites, they left open the question of when a website violates the ADA and what remedies the court should impose.

The answers to these questions may come in 2019, however, with the long-awaited appellate decision in *Gil v. Winn Dixie Stores, Inc.* The case, which was the first website accessibility lawsuit to go to trial, was decided for the plaintiff in 2017. A panel of judges from the Eleventh Circuit heard Winn-Dixie’s appeal in fall of 2018, with a final decision expected sometime in 2019. That decision could have a major impact on digital accessibility litigation going forward.

Lainey Feingold,
Law Office of Lainey Feingold

“There will initially be a lot of hubbub. If the case is affirmed, we could see more cases filed in Florida. If the case is overruled, fewer in Florida. Depending on how the opinion is written, defense and/or plaintiff lawyers might be able to make new legal arguments.”

Mendy Halberstam,
Jackson Lewis P.C.

“If the Eleventh Circuit reverses the district court’s decision in Winn Dixie, however, this may change the landscape significantly, certainly in Florida (one of the hotbeds of web access litigation).”
What Impact will the Ninth Circuit’s Decision in Domino’s Pizza Have on Digital Accessibility Litigation?

The Eleventh Circuit is not the only appellate court to weigh in recently on digital accessibility, however. In January 2019, the Ninth Circuit Court of Appeals, which covers a number of western states including California, issued its decision in Robles v. Dominos Pizza, LLC. There, the Ninth Circuit reversed the controversial district court decision, which had dismissed the plaintiff’s complaint on due process grounds.

But, did Robles shift the status quo on digital accessibility, or did it merely reverse an outlying lower court opinion?

Lainey Feingold, Law Office of Lainey Feingold

“The Robles district court decision was an outlier—most district courts around the country had already recognized that the ADA covers websites even without specific regulations addressing web accessibility. One impact of the Ninth Circuit decision is that there will be fewer motions to dismiss based on the lack of regulations. (Only the most aggressive defense lawyers were filing such motions anyways.)”

Donald Brown, Manatt, Phelps & Phillips, LLP

 “[The Ninth Circuit’s decision] was not unexpected. It was a somewhat unexpected result, albeit welcome for the defense bar, at the district court level. And I would have been very pleasantly surprised if it had been affirmed on appeal. But there’s so much room to maneuver within the ADA that it’s easy to arrive at a result where the general obligations to provide auxiliary methods of communication [means] that there’s some freestanding obligation [to make websites accessible], and the courts are just consistently arriving at that conclusion.”
Olabisi Ladeji Okubadejo, Ballard Spahr LLP

“It wasn’t what some defendants had hoped for or some businesses had hoped for in the sense that it didn’t endorse the lower court’s approach, which had been to say, ‘Hey, we don’t have enough information from the DOJ to side the direction in which to go here. And it’s the DOJ’s responsibility to take action and it hasn’t.’ Instead, it seems to sort of nod to the DOJ’s most recent guidance, which suggested that you could take this more flexible approach and this undefined flexible approach and that maybe everybody wasn’t required to make their websites accessible but wasn’t really completely clear. It didn’t feel to me that we have a very clear resolution.”

What Does the Future Have in Store for Digital Accessibility Litigation?

With digital accessibility lawsuits at record numbers, it can be hard to know what’s coming next. So we turned to our legal sages to offer us their expert advice on what they believe is coming in 2019 and beyond. They offered their takes on whether the number of new lawsuits would continue to grow, what types of cases we’re likely to see more of, whether the trend to file cases as class actions will continue, and how courts will react to the broader use of standing claims by defendants.

Will Digital Accessibility Lawsuits Continue to Rise?

Nearly everyone agreed that, in the absence of regulations or a higher court decision, we are going to continue to see continued growth in digital accessibility litigation, as plaintiffs look to the courts for relief.
Robert Duston,  
Saul Ewing Arnstein & Lehr LLP

“No, they’re not plateaued off. They’re increasing. I don’t think it’s evenly distributed right now, and I think that there are a lot of parts of the country where there is still room for further explosion.

“The biggest explosion right now is in New York and New York City. There are all kinds of new attorneys who don’t have a background in ADA Title III who have jumped into digital accessibility, and they’re finding it a very low bar to entry. And in some cases it’s not even clear that the plaintiff even has a disability. Or if they do, they certainly had no intention to do anything other than getting on a website. There is a lot of movement on that. And they are hitting a lot both public accommodations and all kinds of other businesses who don’t deal directly with the public.

“We’ve seen a rise in websites of consumer product manufacturers that don’t have retail outlets, of financial institutions that don’t sell direct to the public, and are just B2B businesses, just a wide variety. I see that as increasing.”

Olabisi Ladeji Okubadejo,  
Ballard Spahr LLP

“I do think that we will continue to see a rise in litigation in federal court as we’ve seen over the last couple of years simply because there continues to be a lack of clarity with regard to the ADA requirements and I think until there’s clear guidance this trend will continue. And we’ve also seen some court victories for plaintiffs that will I think continue to push plaintiff firms and other advocacy entities to file complaints.”

Mendy Halberstam,  
Jackson Lewis P.C.

“I think we will definitely see an even greater increase in web accessibility litigation in the short term, nationally, particularly now that the Ninth Circuit has reversed the dismissal in Robles and rejected the various defense arguments made in that case. However, if the Eleventh Circuit reverses the trial court’s plaintiff-friendly finding in the Winn Dixie case, this may lead to a reduction in litigation (or an increase in dismissals), particularly within the Eleventh Circuit. Indeed, some courts within the Eleventh Circuit have already sua sponte stayed web accessibility cases pending the Eleventh Circuit’s ruling. Ultimately, the issue may end up before the Supreme Court, and a number of Justices have been known to disfavor the application of laws with no set standard and/or ones with constantly shifting standards.”
Will We See Different Types of Cases in 2019 and Beyond?

With digital accessibility litigation expected to increase, we also asked our Crystal Ball panelists where we could expect that growth to come from. They offered a number of suggestions, including:

Increased Litigation Focused on Mobile Apps and Other Digital Platforms

Robert Duston, Saul Ewing Arnstein & Lehr LLP

“I’ve seen increased attention on mobile apps and related digital platforms, and I think that’s going to continue to expand. I’m seeing wording of things [in complaints] that is different trying to get a broader scope of platforms that they’re looking at.”

Olabisi Ladeji Okubadejo, Ballard Spahr LLP

“Interestingly, I think we might see more of a focus on mobile apps as targets of litigation. We’ve seen lots of websites and with all the plaintiff’s firms simultaneously suing everybody that they can and as many jurisdictions as they can, at some point they’ll start to tap out and so I think they’ll have to branch out a little bit and mobile apps are more of the things we’ll see them focus on.”

Complaints Brought by Employees Under ADA Title I

Shanti Atkins, NAVEX Global

“We all talk about in the ethics and compliance world, is it safe, is it welcoming, is it fair? Those are words and concepts that we typically associate with classic social justice issues like harassment, like discrimination, like pay-level, like advancement opportunities.

“When you think about is it safe, is it welcoming, is it fair, those are all terms that, I think, apply to accessibility, because the world is so digital, even in a job that classically 5, 10 years ago had no digital component, now with mobile and IOT, you could be in a job that once very tactile and non-digital, that’s not a good word, but that was very not connected online, now has very much as an online component, whether it’s with a tablet or with sensors or some kind of interaction that you have online.

“Imagine being a worker in an environment where a fundamental piece of how you’re supposed to get your job done, maybe how you’re evaluated, how you interact with customers, is not accessible to you. That doesn’t feel safe, fair, or welcoming.”
Olabisi Ladeji Okubadejo, Ballard Spahr LLP

“Employment claims typically are handled on an individualized basis so you’re looking at the individual employee what they’re specific disability is. You’re engaged in an interactive process with them. You can offer them alternatives and it’s such a process unique to the individual that it seems like a claim that would be hard to make on a cost wide basis and you also wonder how many impacted employees there actually are. So how many people on whose behalf are you filing this? It seems like a more difficult legal argument because the individual plaintiffs are likely to be so different in terms of their disabilities and their needs and how they could be accommodated and whether they were accommodated and what they were offered. It seems like a more difficult claim than saying, ‘I used JAWS and I can’t read your website and I’m planning this on behalf of everybody in America who uses JAWS.’

“It seems a lot less clear, but I think it’s definitely a trend to watch just to see how they’re handling the employment context and we haven’t really seen much from the EEOC in terms of how it interprets Title I with regard to websites and softwares used by employees, and whether it is expecting on sort of a nationwide basis that employers take certain actions. So, that’s definitely an area to watch but if this administration is not going to put forward guidance or rules related to web accessibility, I’m not sure if the EEOC will do that.”

Increased Litigation Against Consumer Products Manufacturers

Donald Brown, Manatt, Phelps & Phillips, LLP

“I’ve seen it sort of go industry by industry. For example, 2017 there were a lot of these types of claims involving financial institutions. And in the past year, I’ve seen it hit the websites of companies that are consumer products manufacturers. They have a large retail presence and a brand presence, and their products are sold sometimes through their own flagship stores, but also the products show up in lots of different retail contexts, including through their own website.”
Universities and Higher Education

Olabisi Ladeji Okubadejo, Ballard Spahr LLP

“It seems like every once in a while there’s this wave against colleges and universities, which have vulnerability under Title III and under Section 504. And I think we’ll probably continue to see colleges and universities targeted on some level. Colleges and universities, in addition to having potential obligations to the public, also have very specific requirements for students, and the plaintiffs that we’ve seen so far have mainly been generic serial plaintiffs as opposed to actual students attending the institutions who have suffered some kind of alleged harm.

“While we may see more of these mass filers targeted at colleges and universities, I think they don’t have always quite the same impact as an actual student filing the complaint, but I imagine that we’ll continue to see branching out because we’re seeing many plaintiff’s firms cropping up, targeting the same business entities over and over again. At some point they’ll start to branch out industry wise, also.”

More Cases Are Being Filed as Class Actions—How Will This Affect Digital Accessibility Litigation?

While class actions in the digital accessibility realm are not unheard of—National Federation of the Blind v. Target Corp. was certified as a class action in 2007, for instance—the bulk of cases have traditionally been filed as lawsuits by a single plaintiff. This changed in 2018, with a large number of lawsuits in New York and Florida filed as class actions. We asked the panel about the class action trend, as well as the effects it is likely to have on digital accessibility litigation.
Lainey Feingold, Law Office of Lainey Feingold

“A class action lawsuit is a tool that allows many individuals to come together and pursue claims in one lawsuit for reasons of efficiency and to protect rights that might otherwise not be protected. In the web accessibility legal space, a class action is often not needed because one affected individual often has the same experience as other disabled site users, and a settlement of an individual case can remediate an entire site or mobile application.”

Olabisi Ladeji Okubadejo, Ballard Spahr LLP

“Truth be told, I think we see many cases filed as class actions because it tends to make the business entities sit up and take notice because the potential harm or risk is very large. So, I suspect that the plaintiff’s firms will continue to file these as class actions. It seems like some of them are meeting some success using their current framework, so I imagine that they’ll just continue until there’s a successful court challenge that causes them to change their current methodology.”

Donald Brown, Manatt, Phelps & Phillips, LLP

“Styling it as a class action probably exerts phenomenal additional pressure on the defendant. Of course, it depends which direction the defendant takes it after that. If it goes directly to settlement, then the fact that it was styled as a class action doesn’t necessarily move the needle. But if the litigation proceeds—either they’re not interested in the settlement or they’re unable to settle early on—then I think it just takes on a little bit of a different flavor if it’s nominally a class action.”

Mendy Halberstam, Jackson Lewis P.C.

“I do not think there is a strong likelihood of a class being certified, because of the differing standards of technology, the lack of numerosity, fact specific questions relating to the alleged lack of access and how visually impaired people use specific areas of websites, and other factors.”
Two Crystal Ball panelists compared the trend to prior waves of class actions in physical accommodations and wage-and-hour cases.

**Robert Duston,**  
*Saul Ewing Arnstein & Lehr LLP*

“The interesting thing about the class action trend is that the ADA Title III brick-and-mortar guys 25 years ago were doing that for a long period of time. It was a very popular tool in the mid- to late-90s when suing shopping centers and retail stores and everything else. And eventually they figured out that by suing on a class action basis, it became more complicated to settle on an individual plaintiff basis sometimes. And that it was almost, when somebody decided to fight it, it was difficult and expensive, and they could get most of the same damages and attorneys’ fees on single plaintiff cases as trying to bring these punitive class actions.

“It’s a trend that is a little surprising, but I guess there’s a learning curve. Some of the guys that have been doing this for 30-odd years stopped bothering [with class actions] decades ago.”

**Shanti Atkins,**  
*NAVEX Global*

“It should be worrying to organizations if you start to become more regular class actions, because the exposure is just dramatically higher. It’s the economic calculus of the legal system in this country that if you can get class cert on something as a plaintiff’s lawyer, that’s what you’re going to do, because you’re going make a lot more money. I mean, it’s just, you can bemoan it, but that’s the world we live in. If you look at other workplace litigation trends, that’s happened repeatedly.

“A good example of this is wage-and-hour litigation, being misclassified for overtime eligibility and proper tracking of hours, and there’s a whole lot of other really micro-regulation in that area, both federally and state. In the ‘90s and in the early 2000s, wage-and-hour exposure was how people viewed safety issues in the ‘80s. Like, ‘Oh, you hire some mid-level safety person at a plant and let us know if someone dies, but other than that, it’s not getting a lot of our focus.’

“Fast forward to now and there’s this whole idea of culture of safety, zero tolerance for accidents, death, and it’s totally elevated in importance. You saw the same thing with wage-and-hour. It was this niche area that was not particularly lucrative for lawyers. It wasn’t something that when you went to go talk to a general council they were like, ‘Oh, this is really a top concern.’”
Will More Defendants Raise a Standing Defense—And Will Courts Buy It?

One area where courts were more willing to side with defendants in 2018 was on the issue of standing. Under the United States Constitution, a court may only hear a case if the plaintiff has “standing” to bring the suit by showing that they have a sufficient connection to the alleged harm, usually by having suffered an injury-in-fact.

In 2018, defendants were able to get cases dismissed on standing grounds in two circumstances. First, a number of credit unions successfully argued that plaintiffs did not having standing to bring suit because they were not eligible for credit union membership. Second, in *Caroll v. New Peoples Bank, Inc.*, the court dismissed a suit on standing grounds where the plaintiff lived 300 miles from the nearest bank branch.

We asked our Crystal Ball panel whether these decisions would lead to more arguments that plaintiffs lacked standing, as well as how courts would respond to those claims.

*Lainey Feingold,*
*Law Office of Lainey Feingold*

“The standing argument will be broadly used if people without standing bring lawsuits. Can I predict that people without standing will stop filing lawsuits? Sadly, I cannot. Standing is a well-established legal principle that basically says you can’t bring a lawsuit if you’re not affected by the problem you’re suing about. It’s not unique to web access. I hope people without standing stop filing lawsuits.”

*Donald Brown,*
*Manatt, Phelps & Phillips, LLP*

“The standing argument is equally valid in other contexts. If things reach the point where the ADA plaintiff’s bar are running out of obvious targets and are filing lawsuits like *New Peoples Bank*, which seem a bit more desperate—how is it any legitimate harm for someone who lives 300 miles from the nearest branch and claims to have had difficulty accessing the website? I think those types of defenses will have currency in at least some courts. And I think they might become more frequent as the envelope continues to be pushed by the plaintiff’s bars on what types of website accessibility claims they’re filing.”
Two panelists cited the 2016 Supreme Court decision in Spokeo, Inc. v. Robins, which held that plaintiffs must allege an injury-in-fact that is “concrete and particularized” in order to have standing, in their answers, noting the Spokeo decision could have a significant impact on digital accessibility litigation.

**Mendy Halberstam,**
Jackson Lewis P.C.

“The standing argument is likely to gain more prevalence in 2019, and we have seen a number of judges adopt this argument around the country. This is similar to an argument which has been used very effectively in the physical barrier arena and, as a number of courts have found, there is no sound basis to choose not to apply it in the website context. Standing is a constitutional requirement, and if a plaintiff cannot meet that standard, courts are willing to dismiss cases. Similarly, I think that the Supreme Court’s Spokeo ruling, in which the Court said that harm must be concrete and material to support constitutional standing (even in the face of a statutory violation), may gain some traction.”

**Robert Duston,**
Saul Ewing Arnstein & Lehr LLP

“The broader case law is going a different way than I anticipated on Spokeo and what constitutes injury in fact and how long and how well that applies. Ultimately that’s going to be a Supreme Court interpretation issue—possibly this year, possibly next—because you’re getting more courts taking a very limited interpretation of what that said than a more expansive one. I’m a big proponent of the more expansive what it takes to show injury in fact and that the technical violation actually prevented you in some way from doing something.

“[Right now,] some courts are basing decisions on Spokeo, some are basing it on pre-Spokeo standing principles. The New Peoples Bank decision is very similar to the standing cases you saw back in again the ’90s, early 2000s where there was no reasonable likelihood that you were going to go to this particular facility or this place again based on where you were. The pendulum swung way to the left and I think is now swinging back.”
Can We Expect Any Administrative or Legislative Clarifications in 2019-2020?

In December 2017, the Department of Justice announced it had withdrawn its long-pending website accessibility rules, which had been pending since 2010. While not entirely unexpected given the tone of the current administration, the announcement was greeted with some distress by the business community, legislators, and the accessibility bar.

After a series of requests from legislators, the DOJ issued a letter in September confirming that it still believes ADA Title III applies to websites, but declining to endorse a specific standard for web accessibility, noting that “public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication.”

Will the DOJ’s Letter Have Any Effect on Digital Accessibility Litigation?

Donald Brown, Manatt, Phelps & Phillips, LLP

“I actually found that very puzzling. Because I would have thought they would have taken the opposite tack, which is to say that the WCAG is, for all practical purposes, a widely shared standard in that it’s one that everyone should readily look to as a benchmark. And they sort of went in the opposite direction. I suppose that would allow for an argument of the type that was made by Domino’s, how can you hold the defendant liable for a failure of accessibility in the absence of any agreed upon standards? And that statement by the DOJ would seem to support that kind of defense.”

Lainey Feingold, Law Office of Lainey Feingold

“The letter might help cut down on bogus defense arguments—assuming there are any defendants out there still willing to throw away money on the due process argument that the absence of regulations means plaintiffs can’t file web access cases.

“On the other hand, the letter might encourage some new defenses that plaintiffs have brought claims based on failure to meet WCAG success criteria only, and not on a lack of effective communication or a barrier to participation or information. Maybe the letter will help limit lawsuits brought with insufficient research based solely on missing WCAG success criteria without adequate proof of an absence of effective communication or a barrier to participation or information.”
Olabisi Ladeji Okubadejo,
Ballard Spahr LLP

“I think everybody will reference it for their own side of this legal battle. So, the plaintiffs will say, ‘Yes, the ADA applies to websites. This has been the DOJ’s long-standing position and they’re reinforcing it here.’ And then business will say, ‘The ADA may apply but it’s unclear what we’re supposed to do and what the standard is and we have flexibility and so we’ve done these three things and that should be enough.’ And so I think the battle then will be over what the flexibility is and how much or how little is required to be done to make a website accessible.”

While general website accessibility regulations are unlikely in the short term, one panelist did note several related areas where the DOJ could act:

Robert Duston,
Saul Ewing Arnstein & Lehr LLP

“I do see a possibility of some kind of guidance or rule making or shift from Justice that might indirectly affect web accessibility. We have always wondered if the Trump administration was going to do something to somehow curb drive-by lawsuits in some way or fashion, and that hasn’t been a high priority. And with no confirmed head of Civil Rights Division, no one is taking on new strategic areas. But there’s rumors floating out that they’re going to come out with new guidance on service animals and emotional support animals. And I could see the possibility of some new guidance, either about standing issues or injury or something on some kind of initiative on what it takes to make a Title III action, or potentially some amicus interventions that could shift the playing field across the board.

“But the most likely outcome is absolutely nothing out of Justice one way or another that’s going to affect litigation. But there’s just enough possibility that the wave as things get frustrated and become newsworthy, there could be some response.”
Will Congress Intervene in the Absence of DOJ Action?

With DOJ regulations unlikely, there has been some pressure for Congress to act on the issue of accessibility lawsuits, and some members of Congress have shown a willingness to act to limit so-called drive-by lawsuits. In February 2018, the House of Representatives passed the ADA Education and Reform Act, which would have imposed a waiting period before plaintiffs could file Title III suits in cases involving structural barriers. The bill was not considered by the Senate after threats of a filibuster.

We asked our panelists if they believed Congress would try to act, as well as how the Democratic takeover of the House of Representatives affects the prospect of legislation being passed.

**Mendy Halberstam,**
*Jackson Lewis P.C.*

“I doubt it, particularly given that the Senate never took action on the ADA Education and Reform Act, which passed the House in 2017. That Act would have significantly impacted Title III litigation, and it did not pass. With a new Congress, passage of such legislation appears unlikely.”

**Lainey Feingold,**
*Law Office of Lainey Feingold*

“No. I expect another push by some in certain industries to limit the ADA’s enforcement powers in web cases, but I also see the disability community and its allies pushing back against any attempt to limit the ADA.”

**Olabisi Ladeji Okubadejo,**
*Ballard Spahr LLP*

“It’s hard in this climate to predict what will happen. I’m not sure there’s anyone who can answer that, if the Democratic Congress were to push for more specificity with regard to website accessibility. That kind of action may not get beyond or get past the Senate. Who knows? I think anybody who’s in the business of making political predictions is probably sort of rethinking all their views in the last couple of years because it’s a little bit of a political free for all right now.”
Will State Legislation Reduce the Volume of Digital Accessibility Litigation?

In the absence of action by the federal government, some states have considered—and in a few cases passed—legislation designed to limit the ability of plaintiffs to bring ADA Title III suits. In late 2018, for instance, Ohio passed a law similar to the proposed ADA Education and Reform Act, which barred plaintiffs from being eligible for attorney’s fees unless they provided advanced notice of alleged accessibility violation before the suit was filed. Because the ADA is a federal statute, however, it is unclear if these state laws will have any impact on litigation.

Olabisi Ladeji Okubadejo,
Ballard Spahr LLP

“If the states were able to successfully implement a waiting period, that could give a meaningful opportunity to cure. It could potentially have an impact but, as you know with websites, you would have to have a two or three year waiting period for businesses to really get its arms around a large website and make it WCAG conformed. So, I think the state laws may end up just sort of complicating businesses’ responses to this because, as you know, websites stretch across states and across the world so if you have multiple obligations in different jurisdictions it can also make life complicated of businesses in terms of compliance.”

Mendy Halberstam,
Jackson Lewis P.C.

“I don’t think this will impact federal law, and, therefore, I do not think we will see any reduction in cases under the ADA until Congress or the DOJ take action, or until a federal appellate court takes issue with the lack of regulations and guidance on web access, and the shifting standards under WCAG.”

Lainey Feingold,
Law Office of Lainey Feingold

“Organizations don’t have different websites for different states. Plaintiffs will go elsewhere.”
Will the Department of Education’s Mass Filer Rule Make a Comeback?

In March, the Department of Education’s Office for Civil Rights (OCR) issued a revised Case Processing Manual which, among other things, adopted a new rule allowing OCR to dismiss complaints brought by anyone who had filed multiple complaints against multiple educational organizations.

The change, which became known as the Mass Filer Rule, was quite controversial, both because of the effect it had on the ability of individuals to bring complaints under Section 504 of the Rehabilitation Act and because it was adopted without first going through the public comment process required under the Administrative Procedure Act. After a lawsuit from the National Federation of the Blind, the NAACP, and other organizations, the DOE rescinded the Mass Filer Rule in late November and reinstated cases previously dismissed under it.

But is the Mass Filer Rule gone for good?

"I suspect that it’s dead for now. I think that the Department has its hands full with the campus sexual assault rule that it’s trying to push through and don’t imagine that they will take the time to try to limit the filing of these mass complaints any time soon. And so, I do anticipate that we’ll have the current absence of the rule in the case processing manual that will allow people to continue to file these complaints. . . .

“They’re likely to file in the Office for Civil Rights under Section 504 in part because it doesn’t cost you anything to file a complaint with OCR. You just fill out a form online, hit submit and you have initiated a federal complaint, whereas if you are going to go through the litigation process you’d have to have an attorney. Well, you don’t have to have an attorney, but most people choose to have an attorney and there are obviously costs associated with that and defending the civil action. And with OCR, students are filing under Section 504 and also Title II of the ADA for public institutions."

Olabisi Ladeji Okubadejo,
Ballard Spahr LLP
What Else Do You See in Your Crystal Ball?

Finally, we also asked our panelists what else they saw when peering into their crystal balls, and they offered some intriguing insights into the state of digital accessibility law, as well as how organizations could get out of the litigation-centric focus on accessibility.

Everyone Benefits from Accessibility and Litigation Isn’t the Only Option

While many organizations and legal practitioners currently think about digital accessibility through the lens of litigation, Lainey Feingold emphasized that there are alternatives to the current antagonistic relationship between individuals with disabilities and organizations, and that accessibility ultimately helps everyone:

Lainey Feingold,  
Law Office of Lainey Feingold

“In the end, it is my crystal ball wish, hope, prayer, and blessing that once the hubbub dies down, organizations will realize that accessibility is good for business, the right thing to do, and required by the ADA because accessibility barriers discriminate against people with disabilities. Accessibility is good for the aging population. Everyone loves captions in a noisy room. No one is clamoring for crowded messy pages with flashing content. The court cases will come, the court cases will go. Lawyers will make arguments, some will see dollar signs, some will care about civil rights and fairness. But the web (and mobile and kiosk and tomorrow’s technology) are here to stay. Organizations should stop spending money on legal arguments and make their technology accessible. Only then will the lawsuits go away.

“And don’t forget—lawsuits are not the only way to enforce the ADA. Aggressive defenses are not the only way to protect legitimate rights of businesses large and small. Collaboration strategies, including Structured Negotiation and pre-suit mediation have been successful and can be introduced by any party. Carefully researched and well implemented lawsuits have been crucial to advancing the accessibility needle. Don’t let the influx of new lawsuits tarnish the rights of disabled people to participate in the digital world.”
Public Sector Procurement Could Become an Important Driver of Digital Accessibility

Robert Duston of Saul Ewing Arnstein & Lehr LLP noted that he was seeing a trend of public sector procurement contracts requiring compliance with Section 508 of the Rehabilitation Act—which largely adopts the WCAG 2.0 framework—and that government RFPs could catch organizations that thought they didn’t need to worry about accessibility laws unprepared.

“Robert Duston,
Saul Ewing Arnstein & Lehr LLP

“I’m starting to hear about more procurement contacts and relationships with different government agencies on Section 508 compliance or even broader certifications of website compliance. Where Section 508 may not be required, but people are being asked to make certifications about website accessibility even if it’s just in support of the contract. And that could create some additional tensions. At least the ones I’ve seen so far, there’s no nuances and it’s either can you certify this or not.

“We’ve been wondering over the years whether we were going to start seeing that on the government side or on the commercial side more often. I’m hearing some rumblings about it on the government side, even though [the organization isn’t] selling goods and services that are controlled by Section 508.”

Organizations Need to Focus More on Digital Accessibility

Shanti Atkins of NAVEX Global emphasized that organizations need to take digital accessibility seriously, and not just treat it as something handled by someone in an office somewhere, a lesson especially poignant after the Southern District of Florida’s decision in Gomez v. General Nutrition Corp., where the court ruled that the defendant’s internal e-commerce and IT executive was not an expert on digital accessibility. Treating digital accessibility as a major priority—and ensuring it has been entrusted to qualified experts—is critical for organizations that want to minimize their legal liability while doing the right thing.

“Shanti Atkins,
NAVEX Global

“[At the recent Our People-Centered Digital Future conference] Vint Cerf, who’s known as the father of the internet, made this commentary about how critical accessibility is as a holistic theme when you think about a company’s digital assets. It should be at the very top layer of issues that a company’s concerned about and it’s trying to be best practices or doing the right thing, however you want to frame that. It’s an issue that needs a much higher level of awareness; it should be a much more important macro issue that the higher levels and the highest levels of an organization are concerned about, instead of these niche compliance concerns where it’s like, ‘Oh, someone in random office in X city is dealing with that. That’s not a top-level concern.’”
Atkins also noted that too many organizations think of digital accessibility as a one-and-done proposition, when in reality it requires an ongoing investment. By shifting thinking about digital accessibility to ongoing needs, organizations can ensure their sites remain accessible in the future and can minimize the risk of repeat lawsuits.

**Shanti Atkins,**  
**NAVEX Global**

"The stick of litigation may get the budget approved, but make very clear and push from the outset, this is not a one-and-done problem, because digital assets are changing and metamorphosing and are in a fluid state, probably more than any aspect of the business. You think of the number of changes, like think of even a midsize organization, what it’s web properties and apps might look like and how often those are being changed within a 365-day timeframe. It’s happening all the time, so it’s really important that that is made clear to the person that’s granting the budget. ‘This is an ongoing issue, so thank you for approving this and we should start having a placeholder for this ongoing.’ We should get into a subscription, annualized spend mindset around it. Otherwise, we’re just chasing our tail on trying to fix a problem.

"I think sometimes the people who secure a budget and go through that battlefield to do it, they don’t take that extra step or they don’t set up the spend that way out of the gates, and then they find themselves going to sing for their supper 10 months later when the budget’s getting put together again. That’s something that you want to be thinking about very much right from the get-go of creating that expectation of this being an ongoing area of focus and spend.

"When I’ve seen critical effective compliance and ethics programs get cut, it’s not some evil person that’s like, ‘Oh, that, we don’t care about that. That doesn’t matter. No, we’re not gonna fund that.’ It’s that they’re surprised and there’s no money left. They put their hands up and say, ‘I’m sorry. We can’t fit that in. We had to place our bets and there’s just nothing we can do. The pot is empty.’

"We need to look at this from a global cross-functional perspective and not just, ‘Oh, this is just some fringy technical issue, and when there’s a fire, we’ll go put it out and not think anymore about it.’"
Key Takeaways

- Digital accessibility continues to be a thorny legal issue. Many businesses are faced with demand letters and lawsuits, while many plaintiffs find their best legal recourse is through the courts.

- More cases than ever before are being filed as class actions, which could substantially increase the costs of litigation for defendants if cases are not dismissed or settled early.

- Clear regulations for digital accessibility had been stalled for years before being withdrawn by the DOJ. New regulations are unlikely to be promulgated under the Trump administration, and federal legislation amending the ADA is unlikely with control of Congress divided.

- The DOE is unlikely to attempt to reinstate the controversial Mass Filer Rule that was rescinded in November.

- 2018 and early 2019 brought a string of appellate court decisions that have broadly found in favor of the ability of plaintiffs to bring digital accessibility lawsuits, but the legal community continues to wait for the Eleventh Circuit’s pending decision in Gil v. Winn Dixie Stores, Inc. to address questions of liability, remedies, and the role of WCAG 2.0.

- Digital accessibility lawsuits are unlikely to cease in the future if nothing changes, and the volume of new cases will likely increase as plaintiff’s lawyers bring suits to new states and industries.

- But, courts may be more willing to dismiss lawsuits on standing grounds where plaintiffs are unable to demonstrate an injury-in-fact.

- Most businesses would prefer clear digital accessibility regulations, as it gives them time to plan their remediation efforts and makes it explicit which standards are required.

- “Separate but equal” websites for individuals with disabilities—like SAS’s website challenged by the DOT under the Air Carrier Access Act—are not a viable accessibility solution and inevitably leave some users behind. Separate is never equal.

- The safest bet for organizations is to be proactive about accessibility: build it into your software development lifecycle on an ongoing basis—instead of treating it as a one-time-fix—and you will mitigate the risk of legal actions against you.

- Retaining a firm specialized in all aspects of digital accessibility will not only help you implement accessibility best practices that make sense for your organization, it will also help you avoid a situation like Gomez v. General Nutrition Corp., where the court rejected testimony from the defendant’s expert due to lack of expertise in digital accessibility.
Bios

Shanti Atkins  
Founder  
NAVEX Global

Shanti Atkins was the driving force behind the creation of NAVEX Global, and has been an innovator in the governance, risk and compliance (GRC) space for more than fifteen years. A former attorney, she has specialized in the design of powerful ethics and compliance solutions for employers that create a culture of ethics, inclusion and respect. Shanti received her Masters of Law (LL.M.) from Harvard University, specializing in alternative dispute resolution (ADR) and corporate risk management. At Harvard she was a Viscount Bennett Fellow and served on the Harvard Negotiation Law Review. Well-known in the legal, ethics and HR industries, Shanti has been a featured expert in The New York Times, The Wall Street Journal, CNN, Corporate Counsel, Inside Counsel and HR Magazine, among others. Shanti is also a frequent lecturer and writer for several prominent professional associations.

Donald R. Brown  
Partner  
Manatt, Phelps, & Phillips LLP

Don Brown handles complex commercial litigation at the regulatory, trial, and appellate levels, focusing on defending e-commerce, direct marketing, and media companies in consumer class actions and FTC investigations. In addition, Don advises a diverse clientele regarding compliance with the Americans with Disabilities Act, the Fair Housing Act, and state disability access laws. He helps retailers, banks, media companies, property developers, lodging companies, health insurers, nonprofit foundations, educational institutions, and interactive media manufacturers address disability access issues in a variety of contexts, including stores, housing, lodging, websites, interactive media and media streaming, ATMs, kiosks, point-of-sale devices, and health plan benefits. Don also defends disability access lawsuits and helps clients navigate and resolve prelitigation demands and federal and state government investigations.
Robert L. Duston  
Partner  
Saul Ewing Arnstein & Lehr LLP  

Rob Duston is a business lawyer and litigator who helps a wide range of businesses, schools and other entities in three areas of the law: compliance with the public access requirements of the Americans with Disabilities Act (“ADA”), Fair Housing Act (“FHA”), Section 504 of the Rehabilitation Act and similar laws; employment and labor issues likely to significantly impact operations or lead to negative media attention; and legal issues affecting higher education and schools in these and other compliance matters, including Department of Education’s Office of Civil Rights ("OCR") investigations. Rob’s ADA/FHA/504 work is informed by his personal experience with children and adults with disabilities and practical experience managing a major church building project. Over his 25 years of handling these legal matters, Rob has dealt with innumerable types of accommodations and accessibility questions and complaints.

Lainey Feingold  
Law Office of Lainey Feingold  

Lainey Feingold is a disability rights lawyer who focuses on digital accessibility, an author, and an international speaker. In 2017 Lainey was selected as one of 13 “Legal Rebels” by the ABA Journal, the national flagship magazine of the American Bar Association. In 2017 Lainey was also the individual recipient of the John W. Cooley Lawyer as Problem Solver Award, given annually to one individual and one organization by the Dispute Resolution Section of the American Bar Association. In 2014 Lainey was honored with a California Lawyer Attorney of the Year (CLAY) award. She also received a CLAY Award in 2000. Lainey is a frequent and highly regarded speaker and trainer at conferences, webinars, law school classes, and other programs and events and is author of Structured Negotiation, A Winning Alternative to Lawsuits.
Mendy Halberstam
Principal
Jackson Lewis P.C.

Mendy Halberstam has extensive experience in both state and federal civil rights litigation matters. Prior to joining Jackson Lewis, Halberstam represented various municipalities and police officers in defending complex civil rights lawsuits. Halberstam also litigated numerous cases in federal court arising under the Fair Housing Act and the Americans with Disabilities Act. Halberstam has experience representing parties before the Equal Employment Opportunity Commission (EEOC), and he has handled cases involving claims of race, age, disability and sex discrimination, as well as sexual harassment, retaliatory discharge, wage and hour, and non-compete/ restrictive covenant issues.

Olabisi Ladeji Okubadejo
Of Counsel
Ballard Spahr LLP

Olabisi Ladeji Okubadejo represents institutions of higher education and business entities in civil rights and employment matters, with a particular focus on matters arising from alleged discrimination on the basis of race, disability, age, religion, and sex, including sexual harassment and sexual violence. She has experience both as an attorney in private practice and with the U.S. Department of Education’s Office for Civil Rights (OCR). She advises clients on complying with various federal laws, including the Americans with Disabilities Act (ADA), Titles VI and VII of the Civil Rights Act, Title IX, the Clery Act, the Violence Against Women’s Act, FERPA, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. At the Department of Education, Bisi was most recently an OCR Supervisory General Attorney, managing civil rights attorneys and equal opportunity specialists who investigated discrimination complaints against educational institutions.
Since 1997, Level Access has been developing software, training and consulting solutions to address the specific challenges presented by accessibility requirements. We’re proud to have a diverse team of engineers, programmers and consultants, many of whom have disabilities themselves. This gives us a real edge in testing and creating products and services with accessibility and usability in mind.

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