

Site Check: Are Your Website and Mobile App Exposing You to Liability?

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January 30, 2020



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Webinar Features

- **Real-time Captioning:** Captions are provided by a third-party in the captioning panel. In the event we experience any issues with the pod, we will ensure that the recording of today's session is closed captioned.
- **Today's Session Will Be Recorded:** A follow-up email will be sent with a link to the recorded presentation.
- **Questions:** Time will be provided at the end of the webinar to answer audience questions, which can be submitted in the Q&A panel (Keyboard: Ctrl + H)

Introducing Our Speakers



William M. Jay (Goodwin) - Partner and Co-Chair, Appellate Litigation Practice

Willy Jay is a partner in and co-chair of Goodwin's Appellate Litigation practice and is head of the Litigation Department in the firm's Washington, D.C. office. A former Assistant to the Solicitor General, Mr. Jay uses his deep experience litigating before the U.S. Supreme Court and U.S. Courts of Appeals to help clients formulate winning appellate strategy. He has argued 17 cases before the Supreme Court, briefed 50 Supreme Court cases on the merits, and briefed more than 150 cases at the certiorari stage.



Andrew Kim (Goodwin) - Associate, Appellate Litigation Practice

Andrew Kim is an associate in the firm's Appellate Litigation practice. His work focuses on appellate matters and complex civil litigation in federal and state courts. Mr. Kim has experience in a wide range of areas including administrative law, consumer financial services, disability law, gaming and gambling law, intellectual property (patent and copyright), labor and employment law, and white-collar defense.



Tim Springer (Level Access) - Founder and CEO

Tim Springer has dedicated nearly two decades to ensuring that technology will not only meet regulatory standards but also support real world use by individuals with disabilities. As a leader in the digital accessibility industry, he's provided compliance solutions to thousands of organizations and advised enterprise class organizations and government agencies on technical challenges and best practices required to successfully achieve accessibility.

Topics

- Demographic Considerations
- Legal Environment
- Litigation Trends
- Program Roadmap
- Contacts

The Big Picture

Basic Concepts Relating to Digital Accessibility



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What is a disability?

Statutory – 42 USC §12102 (1)

- *The term “disability” means, with respect to an individual—*
 - *(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;*
 - *(B) a record of such an impairment; or*
 - *(C) being regarded as having such an impairment (as described in paragraph (3)).*
 - *An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.*

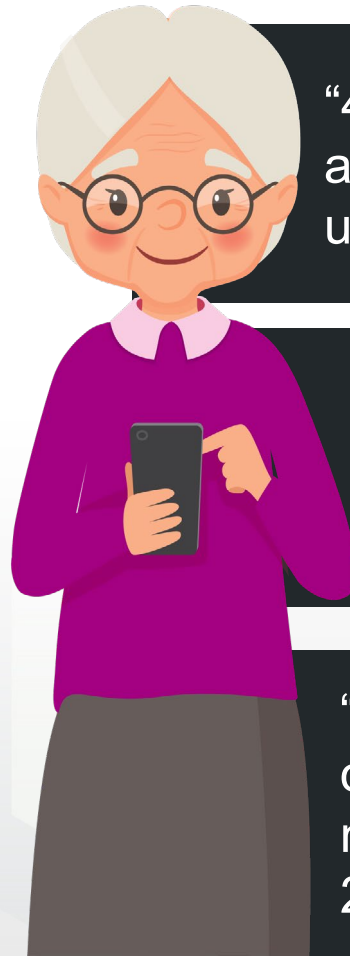
Practical Categories

- Sensory – An impairment of one of the five senses
- Cognitive – An impairment of the cognitive process
- Mobility – An impairment of an access of motion
- Speech – An impairment in the ability to speak

A Graying Globe

- The number of people worldwide **aged 80 and over will quadruple** to 400 million
- For the first time in history, there will be more people **over the age of 65 than under the age of 14**

Sources: United Nations World Population Prospects, U.S. Census Bureau's 2017 National Population Projections, McKinsey & Co., Pew Research Center Tech Adoption Climbs Among Older Adults

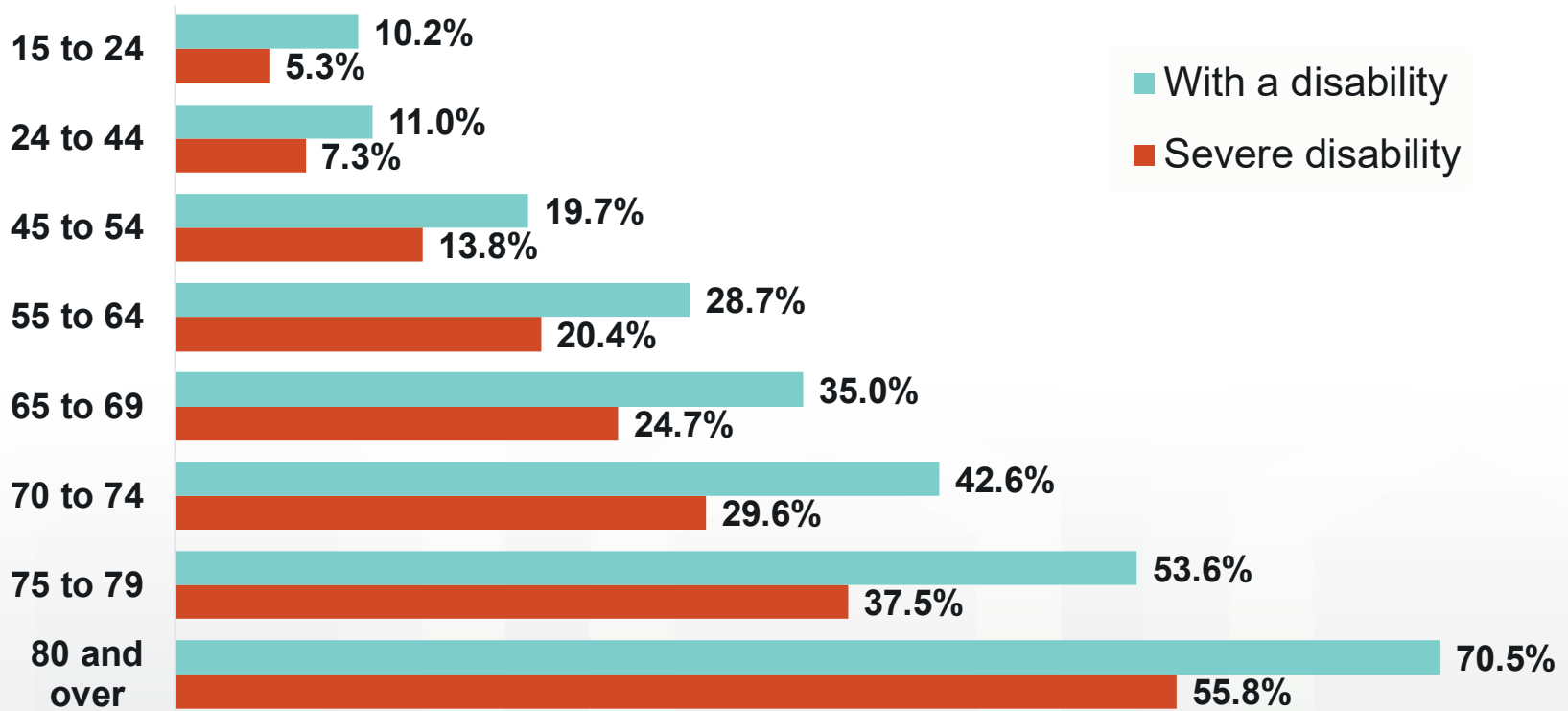


“42% of adults ages 65 and older owning smartphones is up from just 18% in 2013.”

“67% of seniors use the internet – a 55-percentage-point increase in just under two decades.”

“45% of seniors under the age of 75 say they ... use social networking sites, compared with 20% of those ages 75 and older.”

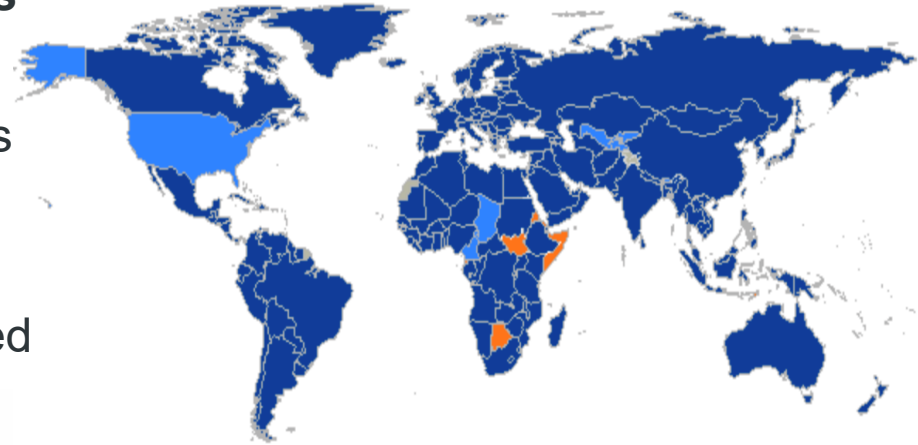
Disability Prevalence by Age



Source: U.S. Census Bureau, Survey of Income and Program Participation

Digital Accessibility is a Global Issue

- **UN Convention on Rights of Persons with Disabilities**
- Core aspect of the global Convention is access to information
- Level Access is proud to have worked with UNESCO, GAATES, and presented at the UN
 - We understand the accessibility challenges of emerging and developing nations, and access through mobile devices at a deep level.
- Contributed to establishing standards at the W3C
 - WCAG 2.1, ARIA, Low Vision TF, Mobile a11y TF
 - Accessibility conformance TF; EU accessibility studies
 - Trusted tester and harmonized processes US Federal government



 State Party Ratified	177
 State Signatory	11
 No Action	10

Map: UN Office of the High Commissioner on Human Rights (OHCHR) Status of Ratification Dashboard.

Legal Environment

The risk is now real.



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Core Legal Obligations

- Federal Accessibility Laws
 - Title III of the ADA: goods and services offered at “places” of “public accommodation”
 - Section 504 of the Rehabilitation Act: recipients of federal funding
- State and Local Accessibility Laws
 - Unruh Act (California)
 - New York City Human Rights Law
- Other Laws with Accessibility Components
 - California Consumer Privacy Act

State of the Law

- 2,000+ digital accessibility cases filed in 2019
- Different judges, different cases, different rulings
- Mostly cases about visual accessibility (use of screen readers), but some cases about other forms of accessibility (lack of captions)
- Few decisions on how the law applies in the web accessibility context, and no decisions on which technical standards to apply.
- Vast majority of cases settle, even before a lawsuit is filed

State of the Law

- Web/mobile presence allows for consumers to access brick-and-mortar goods and services: ADA likely applies
 - Domino's
 - Winn-Dixie
 - Target
- Online-only web/mobile presence, no brick-and-mortar: mixed bag
 - eBay (does not apply)
 - Facebook (does not apply)
 - Netflix (mixed decisions)
 - Uber (mixed decisions)
 - Blue Apron (applies)
 - Scribd (applies)

State of the Law

- Courts are split on whether the ADA applies if your website/mobile app is “online only,” and your company has no brick-and-mortar retail presence.
 - “Place” of “public accommodation” under the ADA: interpreted as a nexus requirement by most courts, but not all.
- Outcomes are largely determined by where suit is filed.
 - Less risk for online-only businesses in the Ninth Circuit (California, Oregon, Washington, Nevada, Arizona, Montana), Eleventh Circuit (Florida, Georgia, Alabama)
 - More risk for online-only businesses in the First Circuit (Massachusetts, Rhode Island, New Hampshire, Maine), Second Circuit (New York, Connecticut, Vermont)
- State courts are starting to chime in, too.

42 U.S.C. § 12182

- No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any **place** of **public accommodation** by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12181: “Public Accommodation”

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, . . .

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

. . .

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

State of the Law

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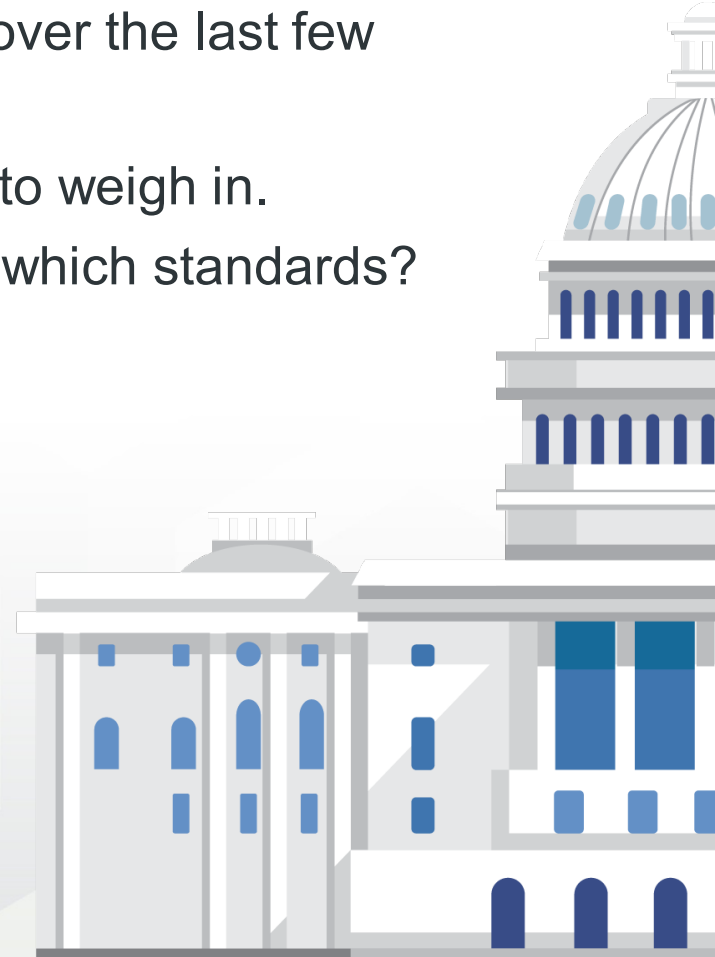
Why do so many of these cases settle?

- Hard to win at an early stage of the litigation—most effective defenses are raised at summary judgment, after the expense of discovery.
- Fee-shifting: avoid risk of paying attorneys' fees for plaintiffs
- Damages: none under the ADA, but may be available under state law
 - Damages class actions creating significant exposure
- Volume business for plaintiffs' lawyers
 - “Sue first, talk settlement later.”

Legislative and Regulatory Changes?

Digital Accessibility in 2020

- Attempts to fix this in Congress have stalled over the last few years.
- DOJ has gone back and forth about whether to weigh in.
 - ADA “applies to websites,” but which? And which standards?
- Limited state intervention
 - That may change, as plaintiffs are now suing governmental entities (covered by Title II of the ADA).



Legal FAQs

- What counts as a web accessibility “violation”?
 - One visit? One visit per plaintiff? Every technical issue?
- What if I fix my website while a lawsuit is pending?
- I settled a web accessibility case once—doesn’t that mean I’m immune from other suits?
- Wasn’t the Supreme Court going to rule on this?
 - If the Supreme Court takes up a web accessibility case, what might that case look like?
- Does the law require that I follow the WCAG standards?
- Can I provide an “accessible” alternative website?
 - SAS and the Department of Transportation

Litigation Trends

The risk is growing.



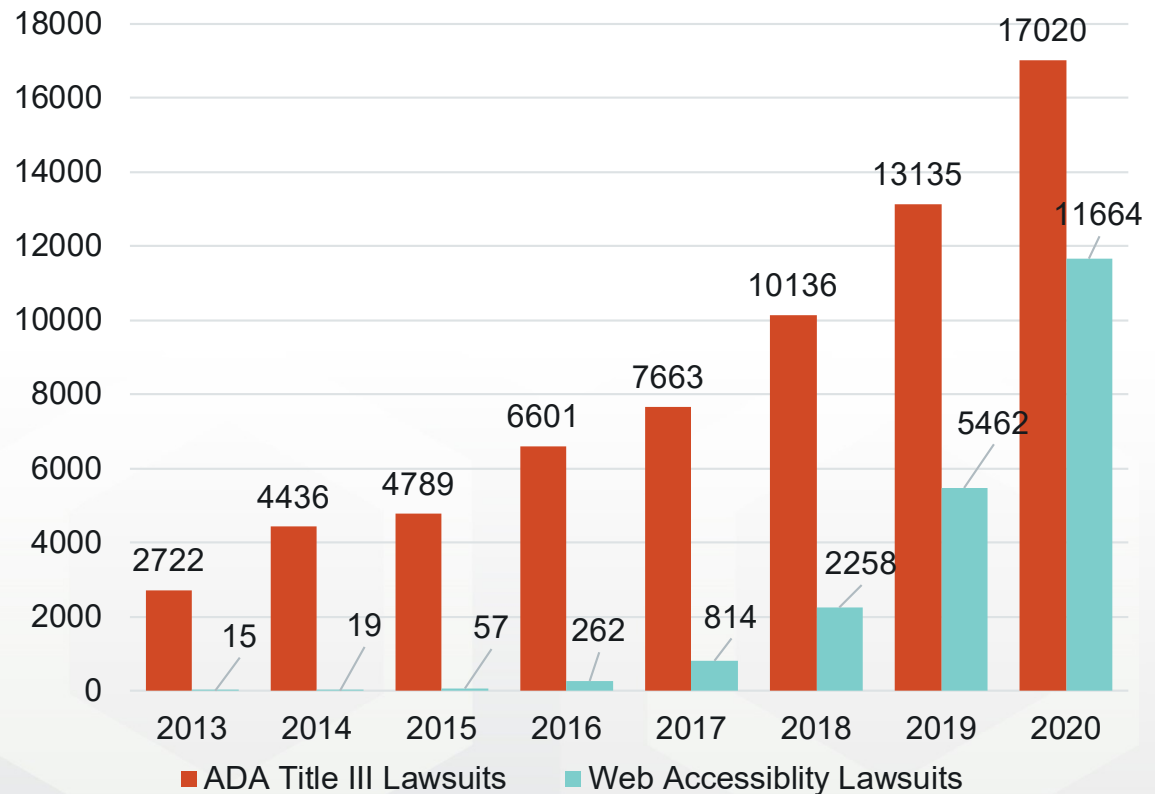
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ADA Lawsuits

- ADA digital accessibility litigation continues to accelerate dramatically
- Increased 210% YoY in 2017 and 177% YoY in 2018
- Still a small percentage of overall ADA Title III lawsuits
- **Takeaway: We expect growth will slow but still be robust going forward**
- Supply of lawsuits is governed by the number of active plaintiff's counsel in the space

ADA Title III Lawsuit Breakout



Source: [ADA Title III](#)

Which firms are responsible?

- The top twenty plaintiff firms accounted for 87% of the lawsuits filed
- Some firms are particularly prodigious
- We've tracked another forty-one firms active in filing lawsuits in 2019
- If the firms filing fewer suits catch up with the firms filling more suits, we expect ongoing growth in the number of lawsuits
- **Takeaway: We still see much room for growth in plaintiff firms filing suits of this type**

Firm	Lawsuits
Cohen & Mizrahi LLP	372
The Leal Law Firm, P.A.	97
Scott R. Dinin P.A.	86
Lipsky Lowe LLP	78
Law Office of Johnathan Shalom	69
Shaked Law Group, P.C.	68
Gottlieb & Associates	60
Lee Litigation Group, PLLC	45
Law Office of Drew M. Levitt	39
Roderick V. Hannah, Esq., P.A.	36

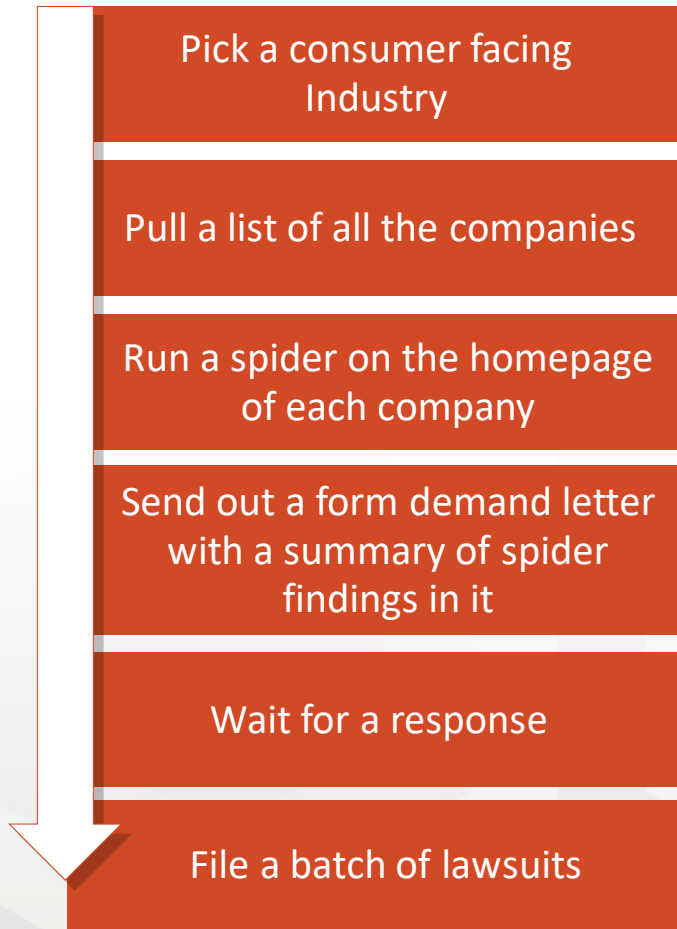
Firm	Lawsuits
Garcia-Menocal & Perez, P.L.	35
Law Office of Pelayo Duran, PA	33
Thomas Bacon Law Firm	28
The Advocacy Group, LLC	24
Law Offices of Nolan Klein, P.A.	21
Adams & Associates, P.A.	20
The Marks Law Firm, PC	19
Jessica L.Kerr, P.A. dba The Advocacy Group	17
Houston Law Firm, PL	16
Carlson Lynch Sweet Kilpela & Carpenter, LLP	15

Target Industries

- List of industries with their percentage share of lawsuits
- We look at 55 industries
- Retail and consumer facing services dominate
- As we start to reach saturation in some industries expect new industries to be opened
- **Takeaway: Outsize risk in industries that are (i) consumer targeted and (ii) relates to a physical place of business**

Industry	% of Lawsuits
Retail	20.2%
Hotels	18.0%
Consumer Products Manufacturers	12.8%
Consumer Services	12.6%
Restaurants	6.7%
Real Estate	4.3%
State and Local Government	4.0%
Food	3.1%
Hospitals and Healthcare Providers	2.8%
Colleges	2.6%
Automotive & Transport	2.1%
Banking	1.8%
Beverages	1.0%
Media	1.0%
Financial Services	1.0%
Education Services	0.8%
Managed Care	0.8%
Brokerage and Asset Management	0.5%
Business Services	0.4%
Telecommunications Services	0.4%
Transportation	0.4%
Computer Software	0.3%
Cultural & Religious Institutions	0.3%
Computer Hardware	0.2%
Insurance	0.2%
Associations	0.1%
Computer Services	0.1%
Industrial Manufacturing and Machinery	0.1%
Law Firms	0.1%
Oil and Gas	0.1%
Other	0.1%
Utilities	0.1%
Agriculture	0.1%
Basic Materials and Chemicals	0.1%
Biotech and Pharmaceuticals	0.1%
Construction	0.1%
Electronics	0.1%
Environmental Services & Equipment	0.1%
K-12	0.1%

How do these lawsuits work?



- Specific plaintiff attorneys, specific industries
- The data suggests firms target lists of companies and file lawsuits in “waves”
- Lawsuits typically only cite automated testing results directly generated from tools
 - Lawsuits discuss usability of the site by people with disabilities – Which is very different
- Follow-on discussions limited to automated testing results



Takeaway: Automated testing results (good or bad) strongly correlated with risk of digital accessibility lawsuit filing

Industry-Specific Considerations

- Financial Services – UDAP?
 - Open discussion around the interaction of UDAP and digital accessibility issues
- Healthcare – Section 1557 of the ACA
 - Requires digital accessibility for specific parts of health care programs
- Technology – Section 508 of the Rehabilitation Act
 - Requires all technology purchased by the U.S. Federal Government to be accessible

Compliance Roadmap

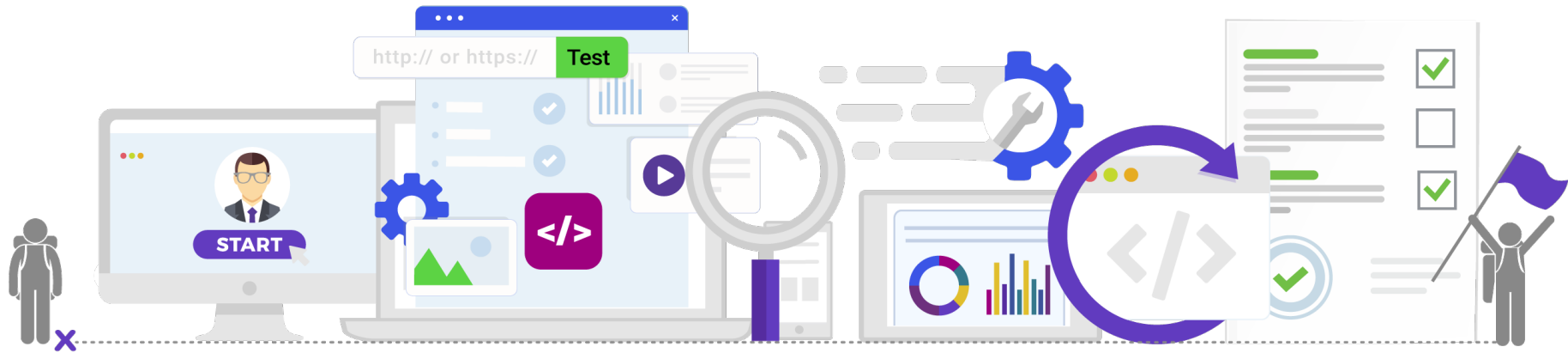
Where do we go from here?



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Roadmap Overview



Webinar

Scan

Fix

Structure

Unknown Risk

Known Risk

Addressed Risk

Managed Risk

Reactive

Proactive

No Legal Standard

Effective Communication

Roadmap Overview: Goals for Today's Webinar

- Educate
- Inform
- Provide General Framework for Mitigation Planning

Roadmap Overview: Scan

- **Evaluate the website or digital asset against high risk accessibility compliance issues**
 - Utilize Access Analytics to continuously track issues and remediation requirements
 - Hold a delivery meeting to review results and jointly work to prioritize remediation work and further actions to be implemented

The information gathered from the above activities will inform a compliance, priority, and risk model that can be used to guide remediation activities and accessibility goals forward

Roadmap Overview: Fix

- Identify the **overall compliance of the website or digital asset with key digital accessibility requirements**
 - Ensure technical compliance – manually inspect code
 - Ensure key workflows support Assistive Technology (Functional Testing)
 - Utilize Access Analytics to continuously track issues and remediation progress
- Provide option to deploy Access Alchemy (web overlay that can deliver fixes to certain accessibility issues on websites upon page load), while implementing code level enhancements
- Map and implement structured remediation plan in line with dev/feature enhancement schedule

Roadmap Overview: Structure

- **Build out and provision organizational structure and policy**
 - Tooling
 - Training
 - Strategic Consulting
- Required to maintain compliance levels that will afford indemnification from future accessibility lawsuits

Getting Started

- Start by monitoring your site
- Engage via your Goodwin primary contact point
- They'll connect your technical team with Level Access and setup the privilege for the monitoring records
- Based on that, you may wish to move forward with other activities

Controls and Governance

- Your team likely has some digital accessibility activities in place
- Ultimately, you'll want to prove that those activities support a defense for providing Effective Communication for the covered goods and services and relevant technology
- The best way to provide that defense is in a robust, data supported fashion
- So you'll want to gather data from your development and production systems to see if internal efforts support such claims

Frequently Asked Questions

Compliance and Implementation



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Frequently Asked Questions

- Do we really have to do this?
 - Didn't the administration shut this down?
 - Since there are no regulations governing this, do we still have to do it?
- Can we just provide phone number for people to call into?
- What do we do with company owned devices in the field for accessibility?
- What's the situation look like in mobile apps?
- What are the implications for online signing applications and digital transformations?

Why Now?

- Things have changed
- **Three years ago:** fluid situation, not much guidance, not much litigation
- **Now:** Clarifying situation, consistent ruling at circuit level, materially higher levels of litigation
- **Three years from now:** stable situation, fairly clear guidance, huge amounts of litigation
- Now is the right time to act and the RoI is justified

Questions?

Please submit your questions in the Q&A panel (Keyboard: Ctrl + H)



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Thank You/Contact Us

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