CAUGHT IN A TRAP: DEALING WITH CUSTOMER AND PATRON CLAIMS UNDER THE TCPA AND ADA AGAINST FRANCHISORS AND FRANCHISEES

Laura Danysh
Hilton
Mclean, Virginia

and

John M. Doroghazi
Wiggin and Dana LLP
New Haven, Connecticut

and

Heather Carson Perkins
Faegre Baker Daniels, LLP
Denver, Colorado

October 18-20, 2017
Palm Desert, California
TABLE OF CONTENTS

I. INTRODUCTION ....................................................................................................... 1

II. THE TELEPHONE CONSUMER PROTECTION ACT ............................................... 1
   A. What’s a TCPA and Why Should I Care? ............................................................. 1
   B. Restrictions on Telephone Calls ........................................................................... 4
      1. Autodialed, Prerecorded, or Artificial Voice Calls to Cell Phones ................. 4
      2. Autodialed, Prerecorded, or Artificial Voice Calls to Residential Lines ......... 6
      3. Notice and Opt-Out Requirements for Prerecorded or Artificial Voice Telemarketing Calls to Cell and Residential Lines ............................................. 7
      4. Do-Not-Call and Other Limitations ............................................................... 8
      5. Vicarious Liability ...................................................................................... 8
   C. Fax Restrictions .................................................................................................... 8
   D. Strategies for Defending TCPA Individual and Class Claims ............................... 9
      1. Attempting to Compel Arbitration ............................................................... 9
      2. Challenging Whether the TCPA Applies and Litigating Consent .................... 9
      3. Arguing that an ATDS Was Not Used ....................................................... 10
      4. Arguing that Class Certification is Not Appropriate .................................... 12
      5. Petition the FCC ...................................................................................... 14
      6. The Less Common Defenses ......................................................................... 14
         a. The Spokeo Defense ............................................................................. 15
         b. Depositing Funds with the Court ......................................................... 16
         c. Personal Jurisdiction ........................................................................... 16
         d. Due Process Challenges ...................................................................... 17
   E. Franchise-Specific TCPA Cases and Their Lessons ........................................... 17
   F. Practical Guidance for the TCPA ........................................................................ 19
      1. Sample Consent Language .......................................................................... 19
      2. The Recycled/Reassigned Number Trap ....................................................... 20
      3. Records Retention .................................................................................... 21
      4. Revoking Consent/Opt-Out Language ....................................................... 21
      5. Vendor and Insurance Issues ..................................................................... 22
      6. Take TCPA Complaints Seriously ................................................................ 23

III. ACCESS TO PLACES OF PUBLIC ACCOMMODATION UNDER THE ADA ....... 23
   A. Access to Physical Facilities ........................................................................... 25
      1. Buildings and Barriers ............................................................................ 25
a. Franchisor as “Operator” Under the ADA .......................................................... 25
b. “Construct and Design” Liability ..................................................................... 27

2. Service Animal Access to Places of Public Accommodation .......................... 28
   a. What is a “Service Animal”? ....................................................................... 28
   b. When May a Service Animal be Excluded from a Place of Public
      Accommodation? ..................................................................................... 30
   c. And What About the Turkeys, Reptiles, Pigs, and Alpacas? .................. 31

3. The Overlay of State Anti-Discrimination Statutes .......................................... 32
   a. California’s Unruh Civil Rights Act and Disabled Persons Act ............ 32
   b. Other Notable State Statutes ................................................................... 35

B. New Technology, New Frontiers for ADA Litigation ................................... 35
   1. Disabilities and Improved Software to Consider ....................................... 36
   2. Legal Framework for Digital Accessibility ................................................. 36
      a. Review of Proposed Rulemaking and Applicable US Regulations .... 36
      b. DOJ’s Position and Prosecutions .......................................................... 38
      c. Civil Litigation Isn’t Waiting on the Government ............................... 39
      d. Other Laws to Consider ..................................................................... 42
         i. Federal Laws .................................................................................. 42
         ii. State Laws ..................................................................................... 43

C. Is Onsite Technology Receiving a Different Treatment? ............................... 43

D. Some Takeaways For Managing Risk Under the ADA ................................. 45

IV. CONCLUSION ................................................................................................. 45
I. INTRODUCTION

Franchisors, franchisees, and the franchise bar often focus much of their collective legal energy and efforts on the statutes, regulations, and case law governing the franchisor-franchisee relationship. This focus is not surprising considering the federal and state regulatory schemes that undergird franchising and the tensions that often arise between franchisor and franchisee, especially when one side’s performance does not meet the other’s expectations. Yet, this focus sometimes leads franchisors and franchisees to overlook potentially significant litigation risks that come from seemingly innocent interactions with consumers, such as the sending of a text message, the design of a website, or whether a dog (or parrot or lizard) can come through the door.

Two examples of often overlooked risks associated with these kinds of innocent interactions are the requirements of the Telephone Consumer Protection Act (“TCPA”) and the Americans with Disabilities Act (“ADA”). As detailed below, the costs of defending cases brought under these statutes are often high, and the potential liability in TCPA cases brought as class actions can pose an existential threat to a franchise system. Thus, franchisors and franchisees alike must understand the rules and regulations associated with these laws to avoid falling into the ADA and TCPA traps.

This paper will first discuss the TCPA’s requirements, potential defenses, and risk mitigation strategies. After providing a brief overview of the ADA’s consumer facing requirements, the paper will then discuss two areas of rising ADA activity—service animals and website accessibility for visually impaired customers.

II. THE TELEPHONE CONSUMER PROTECTION ACT

A. What’s a TCPA and Why Should I Care?

The TCPA is a federal statute that regulates the calls made with automatic dialing equipment, calls using prerecorded or artificial voices, blast faxes, and calls to individuals on the Do-Not-Call registry. Importantly, text messages are considered “calls” under the TCPA. Accordingly when this paper refers to “calls”, it means both telephone calls and text messages. The TCPA contains a private right of action and provides for statutory damages of $500 to $1,500 for each call, text, or fax made in violation of it. Intent is largely irrelevant in TCPA cases—it only matters when determining the amount of statutory damages. In short, a text message advertising

---

1 47 U.S.C. § 227; 47 C.F.R. § 64.1200.
4 See, e.g., Krakauer v. Dish Network L.L.C., No. 1:14-CV-333, 2017 WL 2242952, at *1 (M.D.N.C. May 22, 2017) (“The TCPA ... does not require any intent for liability.”). The default statutory damage amount is $500 per violation, but that amount may be increased to no more than $1,500 per violation if the defendant “willfully or knowingly” violated the TCPA. 47 U.S.C. § 337(b)(3).
campaign to even a small number of customers can create an astonishing amount of liability for a company in an exceedingly short period of time. For example, if just 5,000 customers receive 1 text message each that, by accident, is not TCPA compliant, the potential liability is $2,500,000.\(^5\) It is worth noting at the outset that the Federal Communication Commission (“FCC”) is the government agency charged with issuing regulations under the TCPA. Because it issues the TCPA regulations, the vast majority of courts have held that the FCC’s interpretations of the TCPA are entitled to Chevron deference\(^6\) and can only be reviewed in the D.C. Circuit due to the Hobbs Act.\(^7\)

When Congress first enacted the TCPA in the early 1990’s, its goal was noble—to create legislation that would limit nuisance phone calls and faxes to consumers. Congress appears to have reflexively included a private right of action in the law—the primary legislative history says nothing about why a private right of action was included or what the effects of its inclusion would be.\(^8\)

This lack of forethought is unfortunate. The class action plaintiff’s bar could not have dreamt up a better statutory cause of action. The TCPA is easy to violate and many companies, both sophisticated and otherwise, are not aware of it at all or do not pay sufficient attention to its requirements. The statutory damages add up quickly. Certifying a class in a TCPA case is easier than in many other types of consumer class action cases because there is no need to demonstrate causation or intent; there are often precise calling records available to identify potential class members; and there is no need to apply the laws of various states. Moreover, the costs of litigating a TCPA class action for the plaintiff and his counsel are often lower than many other types of consumer class action claims. Unlike a consumer class action claim that challenges a sales method or advertising practice, which usually requires tailored pleadings and

\(^5\) Congress could mitigate much of the risk of TCPA class actions by simply adding a cap on class action liability. That kind of provision would not be novel—the Truth in Lending Act has one. See 15 U.S.C. \(\text{s} 1640(a)(2)(B)\) (capping liability in “any class action or series of class actions” under the Truth in Lending Act to the lesser of $1 million or 1% of the lender’s net worth).

\(^6\) In short, Chevron deference is the principle that an agency’s interpretation and implementation of a statutory provision is entitled to deference by courts when it appears that Congress has delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in exercise of that authority. See, e.g., Estate of Landers v. Leavitt, 545 F.3d 98, 104-05 (2d Cir. 2008).

\(^7\) See, e.g., CE Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443, 449-50 (7th Cir. 2010) (noting that “Congress vested the power of agency review of final FCC orders exclusively in the courts of appeals”); Jamison v. First Credit Servs., Inc., 290 F.R.D. 92, 97 (N.D. Ill. 2013) (in a TCPA case, the court is “bound by the FCC’s orders, which are final and controlling”); Metropahones Telecomm., Inc. v. Glob. Crossing Telecomm., Inc., 423 F.3d 1056, 1067 (9th Cir. 2005), aff’d, 550 U.S. 45 (2007) (FCC interpretation of ambiguous statute entitled to deference); Leyse v. Clear Channel Broad., Inc., 545 F. App’x 444, 452 (6th Cir. 2013) (same). But see Lozano v. Twentieth Century Fox Film Corp., 702 F. Supp. 2d 999, 1006 (N.D. Ill. 2010) (FCC’s interpretation that was not issued subject to notice and comment not entitled to “complete deference”).

\(^8\) Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 at § 2 (explaining that Congress’ purpose for enacting the law was that autodialed calls and faxes had become a “nuisance” to consumers and were an “invasion of privacy.”); H.R. REP. No. 102-317, at 5 (1991) (“The purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment.”); S. REP. No. 102-178, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969 (explaining that bill was created in response to consumer frustration about receipt of autodialed calls). Notably, the legislative history does not even discuss the potential ramifications of the TCPA’s private right of action or statutory damages provision.
significant, wide ranging discovery, TCPA plaintiffs rely largely on form pleadings and
discovery requests because the potential matters at issue are often limited and
predictable. And unlike many consumer class actions, the discovery needed from
the defendant is not particularly voluminous and therefore not as costly for the plaintiff’s
lawyer to review. The plaintiff mainly needs information about the dialing equipment
used, the consent (if any) obtained from consumers, the content of the calls, and the
records of when and to whom the calls were made. In short, the TCPA has lower
litigation costs and higher potential payouts than almost any other type of consumer
class action.

Predictably, the class action plaintiff’s bar has gorged itself on TCPA cases. In
2016, there were 4,860 TCPA cases filed nationwide, an increase of almost 32 percent
from the previous year. Examples of some notable class settlements in TCPA cases
since 2012 include: Capital One for $75 million; JPMorgan Chase for $34 million; AT&T
for $45 million; MetLife for $23 million; Bank of America for $32 million; and Walgreen’s
Pharmacy for $11 million. Recently, DirectTV chose to take a TCPA class action to
trial and lost. It now will have to pay out up to $61 million. Franchisors haven’t
avoided TCPA claims either, with Papa John’s settling a TCPA class action for $16
million, Caribou Coffee for $8.5 million, and Rita’s Water Ice for $3 million.

Another differentiating feature of TCPA claims from other types of consumer
claims is that even individual TCPA claims are often worth pursuing for plaintiffs and
their counsel. In most consumer class actions, the named plaintiff’s individual claim is
worth no more than a few hundred dollars, making the claim uneconomical to pursue if
a class is not certified. On the flipside, because the TCPA provides for up to $1,500 in
statutory damages per call, individual claims can be incredibly lucrative for plaintiffs and
their counsel. For example, in one case an individual plaintiff was awarded $571,000
after receiving 1,142 calls that violated the TCPA.

---


10 Adonis Hoffman, Does TCPA stand for “total cash for plaintiff’s attorneys”?, THE HILL, (Feb. 17, 2016),

11 Specifically, a jury found that DirectTV had made 51,119 calls in violation of the TCPA and awarded $400 per call.
The court tripled the amount after concluding that DirectTV had repeatedly looked the other way to the violations of its
third party marketing company. Krakauer, 2017 WL 2242952, at *10. The court, however, later decided that it should
not enter a $61 million judgment (51,119 calls x $1,200). Instead, it concluded that there would be a claim process

(final approval order). Mr. Doroghazi was defendant’s counsel in Rita’s. Ms. Perkins’ firm is defendant’s counsel in
Caribou Coffee.

2013 WL 5377280 (W.D. Wis. June 7, 2013)). The decision included a ruling about whether a “preview dialer” was
an ATDS. Evidently seeking to avoid have precedent created on that issue, the parties agreed to a confidential
settlement and joint stipulation that the opinion be vacated. See Charles Kennedy, Wisconsin Autodialer Decision Quietly Withdrawn, June 10, 2013, http://www.kennedyonprivacy.com/wisconsin-autodialer-decision-quietly-
Accordingly, it is no surprise that the plaintiff’s bar aggressively solicits potential TCPA clients on the internet and in other media, including one lawyer who used a mobile app called “Stop Calls Get Cash.”14 And when finding real plaintiffs becomes too much effort, some plaintiffs’ lawyers partner with professional plaintiffs, who sometimes file dozens of lawsuits.15

B. Restrictions on Telephone Calls

The TCPA contains different restrictions based on the type of phone line being called and the call’s content.

1. Autodialed, Prerecorded, or Artificial Voice Calls to Cell Phones

The TCPA prohibits the making of a call to a cellular telephone number “using an automatic telephone dialing system or an artificial or prerecorded voice” unless the caller has the “prior express consent of the called party.”16 Stated differently, the TCPA does not prohibit calling cellphones using an automatic telephone dialing system (“ATDS”) or using an artificial or prerecord voice; rather, it prohibits doing so without the “prior express consent of the called party.”17

The FCC has established different levels of consent depending on the call’s purpose. If the call delivers “a telemarketing message to [a] wireless number[,]” the caller must obtain “prior express written consent.”18 FCC regulations define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services, which is transmitted to any person.”19 The FCC and courts have further made clear that if a call has a mixed purpose (i.e., it is partially an advertisement and partially informational), the telemarketing consent standard applies.20

withdrawn/. In another case, an individual plaintiff was awarded $229,500. King v. Time Warner Cable, 113 F. Supp. 3d 718 (S.D.N.Y. 2015).


15 For example, according to www.pacer.gov, Gorss Motels, Inc. has filed 21 TCPA lawsuits in the last year.


19 47 C.F.R. § 64.1200(f)(12).

20 See In re Rules & Regulations Implementing the Tele. Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14097 (2003) (explaining that the “purpose of the message” is what governs whether an autodialed call is a prohibited solicitation or advertisement); see also Chesbro v. Best Buy Stores, L.P., 705 F.3d 913 (9th Cir. 2012) (call qualified as an unsolicited advertisement or telephone solicitation if the call provided information to a consumer and encouraged the recipient of the call to make future purchases); Salmon v. CRST Expedited, Inc., No. 14-CV-0265-CVE-TLW, 2015 WL 1395237, at *5 (N.D. Okla. Mar. 25, 2015) (call did not qualify as an unsolicited advertisement because it only offered recipient information about possible employment).
FCC regulations define “prior express written consent” as:

an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.21

“Clear and conspicuous” is defined as “a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures.”22 Thus, before making a call that qualifies as telemarketing, the caller must receive consent from the consumer that:

1. Is in writing;
2. Bears the consumer’s signature;
3. Clearly and conspicuously authorizes the caller to call or cause to be called advertisements using an automated dialing system;
4. Specifies the number to which such messages will be sent; and
5. Clearly and conspicuously informs the consumer that he or she is not required to agree to receive messages as a condition of the rental.

The FCC adopted the “prior express written consent” standard for telemarketing calls in 2012, though the rule did not take effect until October 2013.23 Because the “prior express written consent” standard has only been in effect for four years and there are easier TCPA cases to bring (i.e., where no consent was obtained at all), there are fewer opinions than one might otherwise expect on what kind of consent does, and does not, meet this standard. Considering some of the decisions on this standard, it is likely to be litigated frequently going forward and callers should take care to make sure that every element of the standard is met. For example, one court just held that the defendant had not obtained prior express written consent because, by placing the

22 47 C.F.R. § 64.1200(f)(3).
necessary disclaimers below “the sign-me up” button on a website, the disclaimers were not clear and conspicuous. Another court said that there was no prior express written consent when the sign-up box on the website was checked by default.

For cell phone calls that do not qualify as “telemarketing,” the consent standard is “prior express consent,” a less stringent consent standard. The FCC has explained that under this standard, “no specific method” of obtaining consent is necessary, and it can be oral or in writing. Courts have generally held that the knowing release of a phone number is sufficient to demonstrate consent to be called at the number provided. However, the FCC has emphasized in more recent orders that the “mere giving of a telephone number as a contact number satisfies the consent requirement so long as the call or text is closely related to the purpose for which the consumer gave the number.”

2. **Autodialed, Prerecorded, or Artificial Voice Calls to Residential Lines**

The TCPA prohibits any “telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the party.” Thus, only calls using an artificial and prerecorded voice to a residential line require prior express consent (i.e., autodialed calls to residential lines that have a live caller are permitted without obtaining any particular consent, although they are still subject to do-not-call restrictions). Prior express written consent, as explained above, is required for artificial or prerecorded voice calls to a residential line.

---


25 Snyder v. iCard Gift Card, LLC, No. 0:15-CV-61718-WPD, 2016 WL 7507994, at *5 (S.D. Fla. May 16, 2016). There was also a lack of consent in Snyder because the sign-up website failed to include the proper disclosure language.

26 47 C.F.R. § 64.1200(a)(1).


29 In In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 31 F.C.C.R. 9054, 9062 (2016); July 2015 Order, 30 F.C.C.R. at 8029 (discussing consent standard and saying “the call must be closely related to the purpose for which the telephone number was originally provided.”); see Blow v. Bijora, Inc., 855 F.3d 793 (7th Cir. 2017) (providing number to receive discounts allowed retailer to text consumer advertisements for its products).


31 47 C.F.R. § 64.1200(c)(2) (stating that all telephone solicitations to a residential number are prohibited if that number appears on the do-not-call list and the caller does not have a signed, express written permission from the consumer to call that number).
number unless the call “is not made for a commercial purpose” or “is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing.” If a call to a residential line falls within one of the exemptions, then there is no consent requirement even for calls using artificial or prerecorded voices. Stated differently, only advertising and telemarketing calls using a prerecorded or artificial voice to a residential telephone number require prior express written consent. All other artificial voice, prerecorded voice, and autodialed calls made to a residential line do not require any particular form of consent. For example, an autodialed advertisement to a residential line by a franchisor does not require any particular form of consent if the advertisement is provided by a live speaker. Similarly, a prerecorded call from a franchisee/franchisor to a customer’s residential line to provide a delivery update for a product that the customer ordered would likely not require prior consent because it is a commercial call that does not include telemarketing.

3. Notice and Opt-Out Requirements for Prerecorded or Artificial Voice Telemarketing Calls to Cell and Residential Lines

Calls using prerecorded voices and artificial voices, regardless of purpose, are subject to additional technical requirements. It is worth noting, however, that one court has held that the TCPA does not authorize a private right of action for violation of these technical requirements. According to the regulations, at the beginning of the call, there must be a message stating the identity of the business or individual making the call. In addition, at some point during or after the call’s message, a telephone number (which is not a 900 number) for the caller must be provided.

Telemarketing calls using a prerecorded or artificial voice also must provide “an automated, interactive voice- and/or key press-activated opt mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism.” This automated system must be made available to the called person within 2 seconds after the statement identifying the caller at the beginning of the call. The TCPA also has specific requirements about the number of calls that can be abandoned (i.e., where a recipient is not connected with a live sales person within 2

32 47 C.F.R. § 64.1200(a)(3)(ii)-(iii). There are other exceptions, but they are not likely to be applicable to franchisors or franchisees.

33 See, e.g., Leyse v. Bank of Am., No. CV1107128SDWSCM, 2016 WL 5928683, at *5 (D.N.J. Oct. 11, 2016) (generally explaining that FCC, pursuant to statutory authority, has created exemptions to consent requirements for certain residential telephone calls that use a prerecorded or artificial voice).


36 47 C.F.R. § 64.1220(b)(1). For a business, the name used must be the “name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority).”

37 47 C.F.R. § 64.1200(b)(2).

38 47 C.F.R. § 64.1200(b)(3). The regulations also specify how quickly any opt-out may occur and what kind of message must be left on an answering machine.
seconds of answering the phone) and on what information needs to be provided to a consumer when the call is abandoned.\textsuperscript{39}

4. **Do-Not-Call and Other Limitations**

The TCPA also contains limitations on the times of day when telephone solicitations can be made to residential phone numbers and prohibits calls to any residential phone number on the national Do-Not-Call registry.\textsuperscript{40} It also contains a number of requirements on the removal of names from call lists when a do-not-call request is made, as well as a good faith defense that prevents liability when the caller can prove it has created a sufficient policy for preventing calls to individuals on the do-not-call list.\textsuperscript{41} The FCC has extended these requirements in most situations to telemarketing calls to cell phones as well.\textsuperscript{42} In general, do-not-call claims are not particularly popular TCPA claims due to the good faith defense and because companies are simply more aware of them and mostly comply.

5. **Vicarious Liability**

For TCPA claims related to calls (as opposed to fax claims, which are briefly discussed below), there are two ways that a party can be held liable. First, the maker of the call is liable (i.e., the person who actually places the call).\textsuperscript{43} In addition, the FCC and courts have held that the TCPA also provides for vicarious liability, and courts are to apply “common law agency principles” to determine whether a defendant will be held liable for a call placed by another.\textsuperscript{44} These principles include actual agency, apparent agency, and ratification. As detailed below (see section II.E), vicarious liability is the issue where the unique nature of the franchise system can create the most potential for TCPA risk.

C. **Fax Restrictions**

Because the fax machine is mostly a device of the past (except for doctor’s offices and insurance companies), this paper will not focus on the TCPA’s various fax advertising requirements. That being said, the basic rules of the road are that informational faxes can be sent to anyone, while unsolicited advertisements can be sent by fax if the recipient has provided “prior express invitation or permission” to the

\textsuperscript{39} 47 C.F.R. § 64.1200(a)(7).
\textsuperscript{40} 47 C.F.R. § 64.1200(c).
\textsuperscript{41} 47 C.F.R. § 64.1200(d).
\textsuperscript{42} 47 C.F.R. § 64.1200(e).
\textsuperscript{44} See, e.g., \textit{Campbell-Ewald Co. v. Gomez}, 136 S. Ct. 663, 673 (2016) (the FCC “has ruled that, under federal common-law principles of agency, there is vicarious liability for TCPA violations ... and we have no cause to question it”); \textit{In re Joint Petition filed by Dish Network, LLC}, 28 F.C.C.R. 6574 (2013) (a seller may be liable for violations by its representatives under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification).
sender. Unsolicited advertisements can also be sent by fax if there is a preexisting business relationship between the sender and recipient, the fax number was obtained in one of the ways listed in the regulation and the fax contains a proper opt-out notice. The circuits are split about when a party is liable for an unsolicited fax advertisement sent on its behalf. Conversely, a fax broadcaster (i.e., the person who merely transmit the faxes) is not liable unless the fax broadcaster “demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent” the improper fax transmission.

D. Strategies for Defending TCPA Individual and Class Claims

1. Attempting to Compel Arbitration

Because many consumer facing arbitration clauses call for individual arbitration only, getting the case into arbitration will end the class action threat. The defendant should therefore determine if there is an arbitration clause that covers the TCPA claim. A full discussion of how to best go about getting the matter into arbitration is beyond the scope of this paper.

2. Challenging Whether the TCPA Applies and Litigating Consent

If arbitration isn’t an option, the first step in a TCPA defense is to determine what kind of number was called. That will determine whether the TCPA even applies. For example, a call to a business landline is not covered by the TCPA’s prohibition on autodialed, prerecorded, or artificial voice calls.

45 47 U.S.C. § 227(a)(5), (b)(1)(c); 47 C.F.R. § 64.1200(a)(4). The regulations state that a fax to a recipient who has provided prior express written consent must also include a specific opt-out notice. The D.C. Circuit recently held that this regulation exceeds the FCC’s authority. Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078, 1082 (D.C. Cir. 2017) Mr. Doroghazi’s firm represented an intervening party in Bais.


47 The majority view is that the person on whose behalf an unsolicited fax advertisement is sent or whose goods and services are advertised in the unsolicited fax advertisement is automatically liable. See Imhoff Invs., LLC v. Alfocciino, Inc., 792 F.3d 627, 634 (6th Cir. 2015) (the “plain language of the TCPA and the FCC’s accompanying definition of ‘sender’ together establish that under the TCPA direct liability attaches to the entity whose goods are advertised as opposed to the fax broadcaster.”); Physician’s Healthsource, Inc. v. Vertex Pharm. Inc., --- F. Supp. 3d ----, 2017 WL 1534221, at *10 (D. Mass. Mar. 28, 2017) (noting that common law vicarious liability principles are not relevant when determining liability under the TCPA’s fax provisions). Conversely, the Seventh Circuit has said that this rule leads to “absurd results” and that common law principles of agency should apply to determining whether a fax was sent “on behalf of” another. Bridgeview Health Care Ctr., Ltd. v. Clark, 816 F.3d 935, 938 (7th Cir.), cert. denied, 137 S. Ct. 200 (2016).

48 47 C.F.R. § 64.1200(a)(4)(vii).

49 That being said, one way of compelling arbitration—through the use of a non-signatory argument—is often overlooked. For example, a plaintiff recently sued T-Mobile for sending customers text messages containing a Subway coupon and included the Subway franchisor as a co-defendant. The customer agreement between the plaintiff and T-Mobile contained an arbitration clause. Both T-Mobile and Doctor’s Associates Inc. (the Subway franchisor) moved to compel arbitration. Doctor’s Associates argued that it could enforce the arbitration clause against the plaintiff even though it was not a signatory to the customer agreement under an equitable estoppel theory. The court compelled arbitration for both T-Mobile and Doctor’s Associates. Rahmany v. T-Mobile USA, Inc., No. C16-1416 JCC, 2017 U.S. Dist. LEXIS 9638 (W.D. Wash. Jan. 5, 2017). The case is currently on appeal to the Ninth Circuit.
Assuming that the call is subject to the TCPA, the defendant should determine exactly what was said during the call and, using that information, identify what level of consent was required. The defendant should then determine how the defendant’s consent process works and get copies of any records regarding consent. If it is not provided in the complaint, the defendant also should ask the plaintiff to provide information on the phone number at which he claims to have received the offending calls.

The defendant should keep in mind potential proof problems. Specifically, if the consent language was on a website or contained in an advertisement’s fine print, the defendant needs to obtain copies of the relevant webpage or advertisements in use at the time. Ideally, the defendant should have a document management system that allows for easy retrieval of past advertisements or webpages with the consent language on it. Similarly, if the defendant only has to provide “prior express consent,” as opposed to “prior express written consent,” then the defendant does not have to produce a written consent signed by the plaintiff. That being said, keeping written documentation is advisable regardless of the standard. Establishing oral consent is not easy and is likely to create a “he said, she said” situation. In the franchise context, a defendant franchisor may want to determine which franchise locations the plaintiff patronized and to contact the relevant franchisees to determine if there is any evidence of consent that may be relevant.

3. Arguing that an ATDS Was Not Used

The TCPA defines ATDS as “equipment which has the capacity--(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” The FCC has recently said that “in order to be considered an automatic telephone dialing system, the equipment need only have the capacity to store or produce telephone numbers,” and that “even when dialing a fixed set of numbers, equipment may nevertheless meet the auto-dialer definition.” The FCC has also stated that the defining characteristic of an ATDS is “the capacity to dial numbers without human intervention,” and that the definition of an ATDS covers “equipment that has the specified capacity to generate numbers and dial them without human intervention . . .”


51 In any event, non-written consent is only acceptable in narrow commercial circumstances—where, although commercial, the call does “does not include or introduce an advertisement or constitute telemarketing.” 47 C.F.R. § 64.1200(a)(3)(ii). To avoid having to prove that a call was not an advertisement, getting “prior express written consent” is the safest course.


The FCC, however, was not particularly clear about how the “human intervention” and the “capacity” concepts work in practice. Instead, the FCC said that “[h]ow the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination.”\(^{56}\) It has also said that, as it relates to the capacity element, that “a piece of equipment can possess the requisite ‘capacity’ to satisfy the statutory definition of ‘autodialer’ even if, for example, it requires the addition of software to actually perform the functions described in the definition.”\(^{57}\) However, the FCC has further said that “there must be more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’ definition. Thus, for example, it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of ‘autodialer,’ but such a possibility is too attenuated for [the FCC] to find that a rotary-dial phone has the requisite ‘capacity’ and therefore is an autodialer.”\(^{58}\)

As expected, these mealy mouth statements have created considerable confusion about what is and is not an ATDS. For example, some courts have debated how broadly to read the capacity requirement.\(^{59}\) Defendants have also focused on the “human intervention” language to argue that an ATDS was not used if there were any human acts involved in the process, no matter how slight.\(^{60}\) It is beyond this paper’s scope to catalogue all of the permutations of these arguments or how they apply to the specific equipment used to make the calls at issue. Rather, the takeaway is that at the start of any case, the lawyers should devote a significant amount of time to understanding exactly how the calls are made, how the equipment that is used works, and what human actions were needed to make the calls. Once armed with those facts, the lawyers can construct an argument that the calls were not made using an ATDS. It is also worth noting that the proper interpretation of ATDS is before the D.C. Circuit, so

\(^{56}\) July 2015 Order, 30 F.C.C.R. at 7975. The FCC’s interpretation is counter to what many courts had previously concluded: that the TCPA requires some showing that the autodialer function had been used. See, e.g., Gragg v. Orange Cab Co., Inc., 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014); Marks v. Crunch San Diego, LLC, 55 F. Supp. 3d 1288, 1291-92 (S.D. Cal. 2014); Glauser v. GroupMe, Inc., No. C-11-2584 PJH, 2015 WL 475111, at *3-4 (N.D. Cal. Feb. 4, 2015).

\(^{57}\) July 2015 Order, 30 F.C.C.R. at 7975.

\(^{58}\) Id.


the entire landscape in this area could change once the D.C. Circuit issues its decision.\footnote{ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Nov. 25, 2015).}

4. **Arguing that Class Certification is Not Appropriate**

In a TCPA case, defeating class certification often stops the case from continuing to be an existential threat. Thus, careful thought should be given to how to attack class certification. In federal court, Fed. R. Civ. P. 23 governs certification of class actions. The rule has two subsections addressing the standards for certification: Rule 23(a) and (b). Rule 23(a) requires the plaintiff to demonstrate numerosity, commonality, typicality, and adequacy of representation. Rule 23(b)(3), which is the provision used to certify a money damages class, requires that the plaintiff demonstrate that common issues of law or fact predominate over individual questions and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Because each case is unique, the defendant should evaluate each carefully. In TCPA class actions, much of the certification analysis focuses on the issues of ascertainability, common proof (or lack thereof) of consent, and typicality/adequacy of representation.

Of the class certification arguments, a lack of commonality due to individualized issues of consent is the most common argument made by TCPA defendants. This argument generally has a good chance of succeeding where a large portion of the class may have consented, the consent process was not static over time, or where consent must be proven by something like the provision of a cell phone number in conversations that were different (as opposed to receiving the detailed disclosure needed for prior express written consent).\footnote{For example, see \textit{Blair v. CBE Grp., Inc.}, 309 F.R.D. 621, 630 (S.D. Cal. 2015).} When making this kind of argument, the defendant needs to come forward with specific evidence of individual consent issues—relying on vague and generalized assertions is usually not enough.\footnote{\emph{Jamison v. First Credit Servs., Inc.}, 290 F.R.D. 92, 106–07 (N.D. Ill. 2013).} A defendant might, for example, defeat class certification by reviewing a sample of the calls made to members of the proposed class and demonstrating, based on call records, that at least some individuals in the sample consented to receiving calls.\footnote{ACA Int’l v. FCC, No. 15-1211 (D.C. Cir. filed Nov. 25, 2015).} Another tactic is to provide evidence that the caller did not uniformly follow its call script, thus soliciting consent (or not), in a non-uniform manner, or at least in a manner that can give rise to non-uniform interpretations among proposed class members as to whether they were in fact consenting to receiving calls.\footnote{\emph{Stein v. Monterey Fin. Servs., Inc.}, No. 2:13-CV-01336-AKK, 2017 WL 412874, at *5 (N.D. Ala. Jan. 31, 2017).} It is worth noting that these type of arguments may be harder to make in a case where prior express written consent is needed due to the more exacting nature of the consent required.

Another argument is to contend that the claim is not ascertainable—that there is no way of knowing who is in the class. This argument may work, for example, in a
situation where no list of calls was maintained or likely to be found. However, not all courts have accepted ascertainability arguments in the TCPA context. In addition, the ascertainability argument has started to fall out of favor generally.

Finally, some defendants have used typicality as an effective defense against a TCPA class action claim. In Ryan v. Jersey Mike’s Franchise Systems, the plaintiff claimed that Jersey Mike’s had sent him promotional text messages even though he had never provided his phone number and sought to represent a class of all individuals who received unauthorized text messages. The court held that the plaintiff could not satisfy the typicality requirement because he had testified that he never gave his number to Jersey Mike’s (therefore making his claim not typical of putative class members who had provided their number) and then had later provided a declaration saying that he may have given his number, but couldn’t remember (making his claim not typical of putative class members who had never provided their numbers).

Moreover, some courts have begun to push back on the use of professional TCPA plaintiffs by holding that their claims are not typical and they are not adequate class representatives. For example, a district court refused to certify a TCPA class action for lack of adequate representation because the named plaintiff was simply a professional plaintiff who collected faxes it received, provided them to counsel, and had no knowledge whatsoever about any of the cases for which it was a named plaintiff. The court held that this kind of abdication of responsibility was so problematic as to make class certification impossible. These cases are a reminder that courts do not

67 See Sherman v. Yahoo! Inc., No. 13CV0041-GPC-WVG, 2015 WL 5604400, at *7 (S.D. Cal. Sept. 23, 2015) (class not ascertainable where phone numbers were often reassigned to new users, the texter’s database of numbers could not be used to determine who had received the text and more than 40% of numbers were on group plans, so the account holder for a particular number may not be the person who received the allegedly prohibited text).
68 Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016) (rejecting notion that ascertainability imposes a “requirement that plaintiffs prove at the certification stage that there is a ‘reliable and administratively feasible’ way to identify all who fall within the class definition”; improper for “courts [to] have moved beyond examining the adequacy of the class definition itself to examine the potential difficulty of identifying particular members of the class ….”); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1133 (9th Cir. 2017) (“Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification…”).
70 Id. at *6-8.
71 Nghiem v. Dick’s Sporting Goods, Inc., 318 F.R.D. 375, 381–83 (C.D. Cal. 2016) (finding plaintiff’s behavior as professional plaintiff and enrollment in multiple text advertising programs and therefore the apparent lack of invasion of privacy made him atypical plaintiff); CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 727 (7th Cir. 2011) (remanding to district court to consider whether purported class representative was adequate given apparent credibility issues around representative’s assertion in deposition that he did not consent to receiving unsolicited fax); Physicians Healthsource, Inc. v. Allscripts Health Solutions, Inc., No. 12 C 3233, 2017 WL 2406143, at *12 (N.D. Ill. June 2, 2017) (class representative inadequate because of formulaic, untruthful discovery responses by named plaintiff, who was a professional TCPA litigant).
like professional plaintiffs and will look for ways to discourage the practice whenever possible.

5. **Petition the FCC**

As previously mentioned, the FCC is the government agency charged with issuing regulations under the TCPA and courts are generally deferential to its interpretations of the TCPA. Thus, if a party is faced with an unusual factual circumstance, a circumstance where the rule's application is unclear, or the party would like a different interpretation of the rules to apply, the party can petition the FCC and ask for a ruling about the TCPA’s meaning and application. Moreover, while that petition is pending, the party can move to have the case stayed pending review.

In some circumstances, the FCC will issue retroactive waivers of its regulations. For example, in its July 2015 Order, the FCC concluded that it had been unclear about whether consent obtained before October 2013 remained valid after a new consent standard went into effect in October 2013. It therefore issued an order retroactively waiving application of the rule for the petitioner. Unless the FCC says otherwise, a waiver applies only to the petitioners before it. Thus, a defendant should always seek its own waiver, even if the FCC has already put out a ruling saying it would waive a particular rule for another similarly situated party. For example, Papa Murphy’s failed to seek a tag-along waiver in a TCPA case and, when it went to move for summary judgment based on the FCC’s waiver for another person, was denied summary judgment because it had not obtained a waiver itself.

Finally, while asking the FCC for clarification seems like a panacea, in reality, the FCC often takes a long time to reach a decision and is often unpredictable and unclear in its decisions.

6. **The Less Common Defenses**

In many cases, there will be little room to argue that a device isn’t an ATDS, or that there was consent. In those cases, defendants are forced to come up with creative defenses. Below is a non-exhaustive discussion of the kinds of defenses that can be used. Many times these do not work, but they are worth considering.

---

73 Information on how to petition the FCC can be found at 47 C.F.R. § 1.3.

74 See cases infra note 105.


76 Id.; see also In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 F.C.C.R. 11643 (2016) (granting retroactive waiver). Mr. Doroghazi represented one of the petitioners receiving a retroactive waiver.


78 Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc., 847 F.3d 92, 100 (2d Cir. 2017) (Leval, J., concurring) (characterizing an FCC fax ruling as “a rambling 22-page discussion, in which some sentences assert normative rules and definitions, others describe arguments that have been submitted to the agency by commentators and the Commission’s responses to them, and yet others explain the Commission’s observations and reasoning that led it to its conclusions.”).
a. The Spokeo Defense

Last year, the Supreme Court decided Spokeo v. Robins, a case that addressed Article III standing in the context of private rights of action authorizing individuals to sue for violations of federal statutes. In the case, the plaintiff claimed that the defendant had violated the Fair Credit Reporting Act by making inaccurate information about him available on the internet. The Ninth Circuit said that this statutory violation provided Article III standing. The Supreme Court reversed, and explained that the “injury in fact” needed for Article III standing “must be both concrete and particularized.” It then said that while the Ninth Circuit had adequately concluded that the plaintiff had a “particularized” injury, it had not shown that the injury was concrete and remanded for further consideration of the question. The Court also explained that while a concrete injury is required, the injury need not be tangible to be concrete, and it reiterated prior decisions holding that Congress may “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate at law.” Despite this statement, the Court then stated that “Article III standing requires a concrete injury even in the context of a statutory violation,” which meant that alleging “a bare procedural violation, divorced from any concrete harm,” would not satisfy the injury-in-fact requirement of Article III. For example, a meaningless violation—such as reporting an errant zip code—would not satisfy Article III. The Court said it was for the Ninth Circuit to determine whether “the particular procedural violations alleged in this case entailed a degree of risk sufficient to meet the concreteness requirement.”

Since Spokeo, defendants have been asserting Article III standing arguments in TCPA cases. So far, most courts have held that a violation of the TCPA is sufficient to allege an injury in fact. A minority of courts, however, have gone the other way. One court held that when the plaintiff did not even pick up the calls that violated the TCPA, she had not demonstrated a sufficient injury in fact because she could not show that the fact that the ATDS was used caused her injury over and above the annoyance she would have experienced if the calls had been made by a human. Another court, in the context of a TCPA fax claim, said that the failure to include the precise opt-out notice on

---

80 Id. at 1548.
81 Id. at 1549 (quoting Lujan v. Defs. Of Wildlife, 504 U.S. 555, 578 (1992)).
82 Id.
83 Id. at 1550.
85 Romero v. Dep’t Stores Nat’l Bank, 199 F. Supp. 3d 1256 (S.D. Cal. 2016); see also Ewing v. SQM US, Inc., 211 F. Supp. 3d 1289 (S.D. Cal. 2016) (use of autodialer did not make call more harmful than if it was manually dialed and therefore there was no standing).
a fax did not confer Article III standing, when the opt-notice was otherwise clear. A court found that a serial plaintiff who owned 35 cell phones for the purpose of manufacturing TCPA claims did not satisfy Article III’s standing requirements because the TCPA had been enacted to prevent nuisance and invasions of privacy by the caller, but the plaintiff admitted that her “business” was trying to find and bring TCPA lawsuits. Thus, a Spokeo argument, in the right case, can work.

b. Depositing Funds with the Court

A tactic that many defendants previously tried was to make an offer of judgment before the plaintiff moves for class certification in the amount of the individual plaintiff’s potential claim and then argue that, even if unaccepted, the offer of judgment mooted the case. In 2016, the Supreme Court ruled that an unaccepted offer of judgment could not moot a case. However, the Supreme Court left for another day the question of whether a claim could be mooted “if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.” Since then, defendants have attempted to moot class claims early in the case by depositing the potential amount of the plaintiff’s individual claim with the court. This tactic has met with mixed success.

c. Personal Jurisdiction

The usual rule is that if a TCPA defendant meant to make a call into a particular jurisdiction, then jurisdiction exists. However, if the defendant did not mean to make a call into a particular jurisdiction, then some courts have been willing to find that there is

---

86 ARcare v. Qiagen N. Am. Holdings, Inc., No. CV 16-7638 PA (ASX), 2017 WL 449173, at *3 (C.D. Cal. Jan. 19, 2017) (“had the faxes fully complied with the TCPA, Plaintiff would have lost the same amount of ink, toner, paper and time.”).


88 Gomez, 136 S. Ct. at 672.

89 Id.

90 Compare Price v. Berman's Auto., Inc., No. 14-763-JMC, 2016 WL 1089417, at *3 (D. Md. Mar. 21, 2016) (stating that it will dismiss the plaintiff’s claim as moot if the defendant “reissues an unconditional cashier’s check equal to the [requested relief]”); Leyse v. Lifetime Entr’n Servs., LLC, No. 13 CIV. 5794 (AKH), 2016 WL 1253607, at *2 (S.D.N.Y. Mar. 17, 2016) (“[i]nce the defendant has furnished full relief, there is no basis for the plaintiff to object to the entry of judgment in its favor.”), with Fulton Dental, LLC v. Bisco, Inc., No. 16-3574, 2017 WL 2641124, at *1 (7th Cir. June 20, 2017) (holding claim is not mooted); Bais Yaakov of Spring Valley v. Educ. Testing Serv., No. 13-14-4577 (KMK), 2017 WL 1906890, at *14–15 (S.D.N.Y. May 8, 2017) (holding claim is not mooted); Bais Yaakov of Spring Valley v. Graduation Source, LLC, No. 14-cv-3232, 2016 WL 872014, at *1 (S.D.N.Y. Mar. 7, 2016) (concluding that a plaintiff’s TCPA class claims remained live even after the defendant deposited a check with the court and assented to the requested injunctive relief because the plaintiff was entitled to “a fair opportunity to show that class certification is warranted”); Brady v. Basic Research, LLC, 312 F.R.D. 304, 306 (E.D.N.Y. 2016) (“[g]iven the Supreme Court’s directive that a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted,” the court did not allow the defendants to deposit a check with the court consistent with the defendants’ offer of judgment).

no personal jurisdiction. Thus, a TCPA defendant should consider the circumstances in which a call was made to decide whether there is a personal jurisdiction argument can be made.

d. Due Process Challenges

Defendants have tried to argue that the TCPA’s statutory damage provision amounts to an unconstitutional penalty. Those arguments have failed. However, courts have said that if aggregate damages in a case were so large that they would violate due process, the remedy would be to reduce the damages. While we do not recommend relying on this argument, it should always be asserted as a defense and then, if a damage award is entered, asserted as an argument of last resort.

E. Franchise-Specific TCPA Cases and Their Lessons

In the scenario where the franchisor is making the calls, there is no question that the franchisor can be held liable. And when the franchisor is working directly with a vendor, then it is logical that a plaintiff will attempt to hold the franchisor vicariously liable. However, it is often the case that a franchisee is making calls on its own or working with vendors that make calls for the franchisee. The question then becomes whether the franchisor can be held liable for the calls made in those situations. This determination, as previously mentioned, will turn on the common law of agency, which governs whether one party can be held vicariously liable for the TCPA violations of another.

In virtually all cases involving a call made by a franchisee regarding a franchise brand, plaintiffs will include the franchisor as a defendant because the franchisor has the deeper pockets and there is often not an appreciation by the plaintiff of the full contours of the franchisor-franchisee relationship. In response, franchisors have often filed motions to dismiss for the failure to properly allege vicarious liability. Those motions have met with mixed results. In Friedman v. Massage Envy Franchising, LLC, the franchisor successfully argued that merely asserting that there was a franchise relationship between the franchisor and franchisee was not enough to state a TCPA claim against the franchisor based on vicarious liability. However, when the plaintiff makes something more than conclusory allegations, courts have generally been willing

---

92 See, e.g., Sojka v. Loyalty Media LLC, No. 14-CV-770, 2015 WL 2444506, at *3 (N.D. Ill. May 20, 2015) (Colorado restaurants did not avail themselves of Illinois when their loyalty card vendor sent mistaken texts to an Illinois phone number, where the restaurants did not intend to serve an Illinois market nor target a national audience).

93 Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 778 (N.D. Ill. 2008) (rejecting argument that TCPA’s $500 damage provision violated due process, but also explaining that if defendant could show that the damage award was so excessive as to be improper, the appropriate remedy would be reduction of the award); Pasco v. Protus IP Solutions, Inc., 826 F. Supp. 2d 825, 835 (D. Md. 2011) (same); Texas v. Am. Blastfax, Inc., 164 F. Supp. 2d 892, 900 (W.D. Tex. 2001) (after finding defendants violated TCPA 937,500 times per month for four months, but then reducing award to 7 cents per fax ($459,000 total) because “it would be inequitable and unreasonable to award $500 for each of these violations …This would amount to an award of about $2.34 billion against two individuals and a fifteen-employee company.”).

to allow vicarious liability claims to go forward against franchisors. For example, one court held that there were plausible allegations that Domino’s caused calls to be made by its franchisee because the franchise agreement obligated the franchisee to participate in Domino’s national advertising campaigns and the script of the call was generic and appeared to be part of a national advertising campaign.95

The two most important decisions in this area are *Thomas v. Taco Bell* and *Agne v. Papa John’s International*. In *Thomas*, the plaintiff filed a putative class action lawsuit against Taco Bell and a Chicago-based Taco Bell franchisee advertising association claiming that text message advertisements sent to her by the association violated the TCPA. Taco Bell argued that it was entitled to summary judgment because it could not be held vicariously liable for the association’s actions under traditional agency principles. The district court agreed, explaining that Thomas had to prove that the association “acted as an agent of Taco Bell; that Taco Bell controlled or had the right to control them and, more specifically, the manner and means of the text message campaign they conduct.” To show the necessary control, Thomas argued that (1) Taco Bell had approved the use of funds from a common franchisee advertising fund for the text message campaign; (2) a Taco Bell employee was on the advertising board; and (3) Taco Bell knew the text messages would be sent as part of an advertising campaign. The district court found that none of these facts demonstrated the necessary level of control and granted summary judgment to Taco Bell. After making clear that apparent agency and ratification were viable theories to prove liability, the Ninth Circuit affirmed the district court’s findings regarding actual agency and went on to conclude that on the facts before it, there was no apparent agency or ratification.98

Conversely, *Agne v. Papa John’s International, Inc.* shows the dangers of a franchisor having too much involvement in the making of calls by its franchisees. There, the plaintiff alleged that Papa John’s and certain of its franchisees had violated the TCPA by sending promotional text messages to consumers without their express consent. The district court certified plaintiff’s proposed class, despite Papa John’s objection that whether it was liable for the conduct of its franchisees was not a common question. The court rejected this argument because there was evidence that Papa John’s had some role in encouraging the franchisee’s use of the text message vendor at issue—namely that it had encouraged franchisees to use the text message vendor and had allowed the vendor to present at the franchisee annual convention—which in turn

---

95 *Spillman v. Domino’s Pizza, LLC*, Civ. A. No. 10-349-BAJ-SCR, 2011 WL 721498 (W.D. La. Feb. 22, 2011); *see also Keim*, 2015 WL 11713593, at *7-8 (allegation that Pizza Hut “approved or authorized” of the franchisee’s third party vendors and that one of vendors sent messages promoting the Pizza Hut brand nationally was sufficient to state claim that Pizza Hut was vicariously liable for calls made by these vendors); *but see Anderson v. Domino’s Pizza, Inc.*, No. 11-cv-902 RBI, 2012 WL 1684620 (W.D. Wash. May 15, 2012) (holding that under Washington statute prohibiting automatic dialed calls, mere fact that franchisor required use of certain software for tracking orders and storing customer phone numbers did not make franchisor liable for franchisee’s calls that may have violated the statute).


97 Id. at 1084.

98 582 F. App’x. 678 (9th Cir. 2014).

created a single common question as it related to Papa John’s: did Papa John’s actions make it vicariously liable for the vendor and its franchisees sending text messages that consumers had not agreed to receive.100

The first takeaway from these cases is that a franchisor can minimize the risk of TCPA liability by not taking an active role in the efforts related to the calls (like in Taco Bell). By abdicating this responsibility, however, the franchisor may leave unsuspecting franchisees more vulnerable to attack, especially if the franchisees are unaware of the TCPA and its requirements. In addition, because the franchisor will be viewed as the deeper pocket, plaintiffs are likely to sue the franchisor anyway and take a run at a vicarious liability TCPA claim. Also, ceding authority will make the franchisor less likely to monitor TCPA compliance, content, and frequency. That could have negative business effects on the brand. If, for example, a customer is getting too many text messages, the customer is likely to develop a negative view of the entire brand, not just the local franchisee’s store. The franchisor, therefore, must make its own determination, weighing the risks of damage to the brand with the potential for TCPA liability.

The second takeaway is if the franchisor is going to be directly involved, it should go all-in. Papa John’s left itself vulnerable by allegedly steering the franchisees to a specific vendor, but then seeming to not monitor what the vendor or its franchisees did. Considering all of the possibilities, the best approach is likely for the franchisor to retain control of any calling program, but to make sure that as the program is executed, the TCPA is followed to the letter.

F. **Practical Guidance for the TCPA**

Hopefully the takeaway from reading the above discussion is that the best defense to a TCPA case is to have scrupulously followed all of the TCPA’s regulations and requirements. The other takeaway is that a franchisor should, at minimum, educate its franchisees about the dangers of the TCPA, and, if necessary, take full control of a calling program to ensure the TCPA is followed. These obvious points aside, below are various pieces of advice about how best to mitigate TCPA risk. Against the backdrop of the lessons described above, we offer the following practical suggestions for TCPA compliance and risk management.

1. **Sample Consent Language**

There are various ways that the necessary consent language can be phrased. In our view, it is better to err on the side of being overly inclusive and making sure to explicitly hit each element of the “prior express written consent” standard. For example, a consent disclosure that simply says there will be “10 calls per month” does not specifically say that the calls will be autodialed, will include marketing, or that purchase is not required. Therefore, there is a high risk of a consumer being found to not have provided “prior express written consent” when agreeing to that language. A sample

---

100 *Id.* at 568.
consent disclaimer for a website sign-up list that is likely to pass muster would be: “by providing your mobile phone number and clicking 'sign me up,' you are agreeing to receive up to 10 autodialed marketing messages per month. Your consent is not a condition of making any purchase.”

2. The Recycled/Reassigned Number Trap

Each year, millions of phone numbers are reused and reassigned. The result is that, over time, any customer database will have an increasing percentage of phone numbers that are no longer associated with the person who originally gave consent. As a result, consumers who did not provide consent will receive calls subject to the TCPA’s consent requirements. In turn, TCPA plaintiffs’ lawyers often look for consumers with recently obtained phone numbers and then bring claims based on these calls.

To date, the consent of a prior subscriber has not been a particularly successful defense. In 2012, the Seventh Circuit held that “called party” under the TCPA meant the person subscribing to the called number at the time. A number of parties then went to the FCC and asked it to interpret “called party” as the party who originally provided consent. In 2015, the FCC ruled that it is the caller’s responsibility to ensure that it has consent to send a text or make a call to a given number, even if that wireless phone number has been reassigned without the sender being informed. According to the FCC, once a number is reassigned, the caller can make one call without liability, but any calls thereafter violate the TCPA. There is currently a challenge to this interpretation before the D.C. Circuit, and the rules in this area could change any day depending on what the D.C. Circuit decides. The best litigation approach at the moment to deal with these kinds of claims is to seek a stay of the case pending a decision by the D.C. Circuit.

On a practical level, we recommend that, at least quarterly, the call list should be checked against a list of reassigned numbers and all reassigned numbers should be removed from the call database. There are a number of vendors who offer this service (for a fee of course).

---

101 There is no legal requirement to limit the consent to 10 calls per month, though we do believe as a practical matter that most consumers do not want to receive more than 10 calls or text per month.


103 July 2015 Order, 30 F.C.C.R. at 7999-8012; see also Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637 (7th Cir. 2012) (holding that “called party” within meaning of TCPA provision making it unlawful for making automated calls to a cell phone without called party’s consent meant the person subscribing to the called number at the time the call was made).

104 ACA Int’l v. FCC, Case No. 15-1211 (D.C. Cir. filed Nov. 25, 2015).

3. Records Retention

Proper record retention is very important in TCPA cases because the defendant has the burden of providing that consent was obtained.106 If the defendant fails to maintain records of consent, it will be unable to assert the strongest defense to a TCPA claim it may have. Because the TCPA has a four-year statute of limitations,107 franchisors and franchisees must make sure that all records related to consent are kept for at least four years after the date that the last call to a particular phone number was made. This may involve working with vendors to ensure proper record maintenance.

4. Revoking Consent/Opt-Out Language

Courts have repeatedly held that TCPA consent is revocable by the consumer,108 and the FCC has said that a caller cannot mandate a specific method for the consumer to revoke consent (opt-out) but instead must honor any revocation of consent conveyed in "any reasonable manner."109 Thus, companies should have mechanisms to ensure that all reasonably conveyed revocations of consents are honored. This includes, for example, instructing customer service representations on how to honor an opt-out or checking customer complaint in-boxes for attempted opt-outs.

The FCC’s revocation ruling has created a particular type of method where plaintiffs attempt to manufacture TCPA claims. A person will sign up to receive text message advertising. The universally-used method for opting-out of receiving text messages is to text “STOP.” However, the person will not text “STOP,” but will instead text something like “I don’t want these,” “cease sending these to me,” “quit it,” or “leave me alone.”110 In many situations, the automated system will not recognize these texts,
and will continue to send messages after the person has revoked consent. There is no surefire way to defend against this problem, but there are some steps that can decrease risk. First, the caller should work with its text message vendor to make sure words other than “STOP” are recognized as attempts to opt-out. Examples would be words like “cease,” “quit,” and “don’t.” Second, the caller should see if there is a way for a vendor to search through a non-recognized message inbox on a periodic basis to see if there are any opt-outs that fell through the cracks. This is probably not feasible to be done manually, but perhaps could be done by creating a list of key words to search for.

This is another area where there are indications that the rules may be shifting back in favor of callers. First, there is currently a challenge to the FCC’s revocation ruling before the D.C. Circuit.111 Next, courts have begun to narrow how and when consent can be revoked. The Second Circuit recently held that consent obtained as part of a binding contract (such as an auto lease) cannot be revoked.112 Similarly, a district court has held that a consumer faxing a revocation to a fax number that was not usually used by the defendant for consumer communications was not a valid method of revoking consent.113 Finally, another court held a revocation in a text message case was not valid where the plaintiff purposely decided not to text “STOP” to opt-out, but “chose instead to respond with long sentences—ones she knew the automated system would not understand—in order to bring [the] suit.”114

5. **Vendor and Insurance Issues**

Most companies use vendors to make calls on their behalf. There are a few rules of the road that we suggest to help mitigate risk. First, the company hiring the vendor should read the contract with the vendor carefully, as vendors often request that it be indemnified for TCPA violations. While an indemnification could be reasonable if it relates to the hiring company providing consented-to numbers, it must be carefully reviewed. Similarly, the hiring company should insist on an indemnification from the vendor for its wrongful acts (i.e., sending text messages to the wrong phone number, software glitches). That being said, the hiring company should make sure to have active oversight of the vendor, as the potential damages in a TCPA case are so large that an indemnification may not actually offer much protection. The hiring company also should not plan on relying on insurance as a way to defend a TCPA case. Insurers

---

111 ACA Int’l v. FCC, Case No. 15-1211 (D.C. Cir.). Even if the D.C. Circuit upholds the FCC’s interpretation, the opt-out request must actually have occurred. In Self-Forbes v. Advanced Call Center Techs., LLC, No. 16-1088, 2017 WL 1364206 (D. Nev. Apr. 12, 2017), the court entered summary judgment against a plaintiff who, despite offering an affidavit claiming otherwise, had never revoked her consent to be called, based on defendant’s call records.


litigate TCPA coverage aggressively and many have added specific TCPA exclusions to policies.\textsuperscript{115}

6. **Take TCPA Complaints Seriously**

Not every person who calls with a complaint about getting calls or text messages is a professional plaintiff. Oftentimes, the person is just annoyed to be receiving the call or text. If the problem is fixed or complainant receives a modest amount of compensation, you will likely never hear from him or her again. TCPA complaints can quickly turn into TCPA lawsuits if the complainants are not given sufficient attention or feel shortchanged. When the complainant feels wronged, that drives him to find an attorney or complain to a governmental regulator. For this reason, TCPA complaints and demands should immediately be sent to the legal department so that it can assess whether there was a TCPA violation and if the complainant is a professional plaintiff, a plant for a lawyer, or just an angry person. The legal department—rather than the customer service department—should be making the decision on how to proceed. At minimum, the complaint should be investigated to determine if there is a process change that needs to be made. Finally, this is one area where simply paying a person a few hundred dollars to go away is probably the better business decision than daring that person to find a lawyer and sue you.

III. **ACCESS TO PLACES OF PUBLIC ACCOMMODATION UNDER THE ADA**

In the United States, approximately one in five people are living with a disability, according to the 2010 U.S. Census.\textsuperscript{116} Of the people in the United States living with a disability, about 8.1 million have a visual disability and 7.6 have an auditory disability.\textsuperscript{117} Recent studies indicate that in the U.S. the discretionary spending power of people living with disabilities is $200 billion.\textsuperscript{118} Thus, understanding and complying with law governing the rights of disabled consumers is not only required, it is good for business.

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation.\textsuperscript{119} Section 12182(a) provides:

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

\textsuperscript{115} Insurance Coverage for Claims of Violations of the Tel. Consumer Protection Act, 3 A.L.R. 6th 625.

\textsuperscript{116} See MATTHEW W. BRAULT, AMERICANS WITH DISABILITIES: 2010 at 4 (U.S Census Bureau, 2012).

\textsuperscript{117} \textit{Id.} at 8.

\textsuperscript{118} \textit{Id.} at 1 (citing DIVERSE PERSPECTIVES: PEOPLE WITH DISABILITIES FULFILLING YOUR BUSINESS GOALS (U.S. Dep't of Labor, 2005)).

\textsuperscript{119} 42 U.S.C. § 12182(a).
any person who owns, leases (or leases to), or operates a place of public accommodation.\textsuperscript{120}

Discrimination under the statute includes “a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable.”\textsuperscript{121} Discrimination also includes a “failure to make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”\textsuperscript{122}

The Attorney General has the power to investigate and bring actions for violations of the ADA. In actions brought by the Attorney General, a court may grant equitable relief and award monetary damages to persons aggrieved, as well as assess civil penalties not exceeding $50,000 for a first violation and $100,000 for subsequent violation.\textsuperscript{123} A court may not award punitive damages in an Attorney General action.\textsuperscript{124} The ADA also provides a private right of action for “preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order” for any person who is being subjected to discrimination on the basis of disability in violation of Title III.\textsuperscript{125} As an incentive to bring private rights of action, the ADA also allows for an award of reasonable attorney’s fees to a prevailing party.\textsuperscript{126}

When the ADA first was enacted, there was a wave of Title III lawsuits. While this initial wave eventually subsided, lawsuits under Title III of the ADA are on the rise again. In 2016, plaintiffs filed 37\% more ADA Title III cases than in 2015. That trend seems to be continuing into 2017; claimants filed 18\% more cases from January 1 through April 30, 2017 than in the same period during 2016.\textsuperscript{127} In certain jurisdictions, a relatively small stable of professional plaintiffs and their attorneys have created a cottage industry of filing ADA accessibility cases.\textsuperscript{128} In addition to cases involving

\textsuperscript{120}Id. § 12182(a). A detailed discussion of the law and regulations around access to facilities is beyond this paper’s scope. For a comprehensive discussion, see Kathryn M. Kotel, C. Geoffrey Weinrich, The New Era of ADA Compliance: What Does it Mean for Your Franchise System, American Bar Association 34\textsuperscript{th} Annual Forum on Franchising W-4, (2011).

\textsuperscript{121}42 U.S.C. § 12183.

\textsuperscript{122}28 C.F.R. § 36.302(a).

\textsuperscript{123}42 U.S.C. § 12188.

\textsuperscript{124}42 U.S.C. § 12188(b)(4) (“For purposes of subsection (b)(2)(B), the term ‘monetary damages’ and ‘such other relief’ does not include punitive damages.”).

\textsuperscript{125}28 C.F.R. § 36.501(a).

\textsuperscript{126}28 C.F.R. § 36.505.


\textsuperscript{128}See Minh Vu, Kristina M. Launey & Susan Ryan, ADA Title III Lawsuits Increase by 37 Percent in 2016, SEYFARTH SHAW ADA TITLE III NEWS & INSIGHTS (Jan. 23, 2017) (identifying plaintiffs filing more than 100 Title III lawsuits in 2016).
access to physical facilities, recent advances in technology have created new areas for ADA litigation, including ADA claims regarding self-service kiosks and website accessibility.

Before discussing recent trends in ADA litigation, this paper will briefly discuss the now well-developed case law regarding physical access claims in the franchise context, as well as the developing law around service animals and emotional support animals. Because franchisee liability is clear in most circumstances (after all, it is the owner and operator of the business), the paper will focus on franchisors.

A. Access to Physical Facilities

1. Buildings and Barriers

Most franchise systems operate facilities or offer services that fall within the ADA’s definition of a “public accommodation.” A franchisor’s responsibility for ADA compliance is clear when the facility in question is a company-owned location, or where the franchisor owns or leases the location or leases the location to a franchisee. Where the franchisor does not own or lease the facility or lease it to the franchisee, however, franchisor liability under the ADA is less clear. In the franchise context, private litigants and the Department of Justice have pursued a variety of theories to hold franchisors liable for ADA violations, including alleging that a franchisor is liable as an “operator” of franchised units (generally with a theory of control through use of the system) or through a theory that the franchisor constructed or designed the franchise facility. A few key cases on franchisor ADA liability are discussed below.

a. Franchisor as “Operator” Under the ADA

While the ADA requires entities that operate a place of public accommodation to comply with Title III, the ADA does not define the term “operator.” The Fifth Circuit addressed the issue of whether a franchisor is an operator of franchise locations under the ADA in Neff v. American Dairy Queen Corp. There, the plaintiff, who required a wheelchair for mobility, filed suit against the Dairy Queen franchisor, American Dairy Queen Corporation (“ADQ”), under the ADA. She alleged that Dairy Queen franchise locations in and around San Antonio, Texas were inaccessible due to numerous barriers, and sought an injunction requiring ADQ to modify the franchises to eliminate the barriers, a declaration that ADQ had violated the ADA, and an award of attorneys’ fees.

ADQ moved for summary judgment, arguing that it did not own, lease, or operate the San Antonio stores, and therefore, it was not responsible for removing the alleged

---

131 58 F.3d 1063 (5th Cir. 1995).
132 Id. at 1064.
barriers. ADQ supported the motion with affidavits of personnel who attested that ADQ neither owned nor operated the stores, as well as copies of the franchise agreements which, according to ADQ, demonstrated that ADQ did not “operate” the stores as a matter of law within section 302 of the ADA. Plaintiff responded that the franchise agreements demonstrated that ADQ retained sufficient control over the operations of the stores to make it an “operator” under section 302. The district court granted ADQ’s motion for summary judgment.133

On appeal, the Fifth Circuit framed the issue as “whether a franchisor with limited control over a franchisee’s store ‘operates a place of public accommodation’ within the meaning of section 302(a).”134 The court held that “the relevant inquiry in a case such as this one is whether ADQ specifically controls the modification of the franchises to improve their accessibility to the disabled.”135 The court then analyzed the franchise agreements for the stores and noted that, while the franchise agreement demonstrated that ADQ retained the rights to set standards for building and equipment maintenance and to veto proposed structural authority, that supervisory authority was insufficient, without more, to support a holding that ADQ operated the stores.136

Courts have widely followed Neff for the proposition that a franchisor must exercise a degree of specific control over franchisees to be considered an operator under the ADA.137 For example, a judge in the Northern District of California, relying on Neff, held in 2014 that the Ace Hardware franchisor was not liable for ADA violations because it lacked control over the physical aspects of a store that violated the ADA.138 The plaintiff had tried to avoid this conclusion by pointing to provisions in the franchise agreement requiring the franchisee to abide by all federal and state laws, including those pertaining to disability access, and granting the franchisor the right to terminate the agreement if the franchisee failed to comply.139 The court rejected that argument and concluded that, while the contractual terms incentivized compliance with those laws, they did not grant the franchisor the “specific control” necessary to impose liability on the franchisor.140 In the absence of evidence that Ace Hardware retained authority under the franchise agreement to dictate the physical layout of the store, or that it otherwise participated in the acts of discrimination against the plaintiff, the court refused

133 Id. at 1065.
134 Id. at 1066.
135 Id.
136 Id. at 1066-70.
139 Id. at *21.
140 Id.
to conclude that Ace had control over the franchised location for purposes of the ADA.\footnote{Id.}

b. \textit{“Construct and Design” Liability}

In addition to potential “operator” liability, a franchisor can be held liable if it fails to “design and construct” compliant facilities. The Eighth Circuit, in \textit{United States v. Days Inns of America, Inc.} reversed a district court’s summary judgment order holding that a hotel franchisor was not liable under the ADA on this basis.\footnote{151 F.3d 822 (8th Cir. 1998).} In that case, the United States sued Days Inns of America and its former parent company (collectively “DIA”) and claimed DIA had violated the ADA by failing to design and construct compliant facilities in South Dakota. The district court granted summary judgment, holding that DIA did not design or construct the hotel, and did not serve as the owner, lessor, or operator of the hotel.\footnote{Id. 823-24.} The Eighth Circuit reversed in part, concluding that while DIA did not “operate” the hotel, it might still bear liability under § 303’s “design and construction” provisions, and remanded for further proceedings on that issue.

In reaching this decision, the appellate court noted that DIA possessed extensive authority to control the design and construction process through its license agreement with the franchisee. For example, the agreement required the franchisee to comply with DIA’s design and construction standards (which expressly stated that the hotel must comply with ADA requirements) and permitted DIA to terminate the franchise if the franchisee failed to comply with DIA’s standards or the ADA’s requirements. Moreover, the court found that “DIA established an elaborate mechanism for enforcing its design and construction standards” through a requirement that franchisees submit architectural and design plans for review, to allow inspection of construction sites, to obtain a written certification from DIA that their hotels met the DIA’s standards, and to permit DIA to inspect the hotels after they opened for business. Thus, the court reasoned, the parties’ agreement “provided DIA with a significant amount of authority (power to terminate franchise) which would have enabled DIA to ensure ADA compliance.”\footnote{Id. at 826.}

Despite having that significant authority to control design and construction, the court noted that DIA chose to exercise only a small part of its influence in the case before it. For example, while DIA reviewed and approved preliminary design plans, it never received or demanded the final plans and its review did not play much, if any, factor in the franchisee’s final design.\footnote{Id. at 827.} The court held “[a] franchisor with no knowledge that a franchisee has constructed a facility in violation of the ADA should not suffer liability under section 303, regardless of the franchisor’s available authority to ensure ADA compliance.”\footnote{Id.}

Because the court concluded that it was unclear whether
DIA had actual knowledge that the hotel did not meet ADA compliance, the court remanded to the district court to determine whether DIA had actual knowledge that the final design and construction plans violated the ADA. The Eighth Circuit made clear that if it did, it would be liable; if it didn’t, it would not be liable.147

2. **Service Animal Access to Places of Public Accommodation**

Service and emotional support animals are becoming increasingly familiar in public spaces. And those animals aren’t always dogs; recent press coverage includes stories of snakes, spiders, turkeys, and reptiles in a variety of public venues.148 Animal accessibility issues are also implicated under other statutes that don’t directly impact franchisors, but can nevertheless spill over into franchising, because patrons don’t draw a distinction between access under the ADA and access under other federal statutes.149 Franchisees can make the news—in a bad way—or face litigation potentially reaching the franchisor if they ask a patron with an animal to leave the premises.150 In this section, we discuss the general rules applicable to service and emotional support animals.

a. **What is a “Service Animal”?**

The applicable ADA regulations define a “service animal” as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.”151 Although miniature horses are not included in the statutory definition of service animal, more recent ADA regulations contain a specific provision which cover miniature horses.152

---

147 Id.


149 For example, under the FHA, housing providers are not permitted to “discriminate against any person . . . in the provision of services or facilities in connection with [his] dwelling, because of a handicap.” 42 U.S.C. § 3604(f)(2). Similarly, under the Air Carrier Access Act, an air carrier “must not refuse to provide transportation to a passenger with a disability on the basis of his or her disability.” 4 C.F.R. 382.141(a)(1–2). See also Crowell v. Am. Airlines, Docket No. DOT-OST02014-0146 (Dept. of Transp. Jan. 11, 2017) (ruling an airline violated the ACAA by failing to train employees to accommodate a veteran’s service animal that related to his PTSD); 28 C.F.R. § 36.302(c)(9); Scott McCartney, Flight Attendant to Horse: Why the Long Face, WALL ST. J. (May 21, 2003, 1:50 PM), https://www.wsj.com/articles/SB10528459734771100.


151 28 C.F.R. § 36.104.

152 28 C.F.R. § 36.302(9)(i) (“A public accommodation shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been
Under the ADA, a place of public accommodation may not require documentary proof that the animal has been certified, trained, or licensed as a service animal. Nor may a place of public accommodation require a person with a disability to pay a surcharge for a service animal, even if it otherwise applies surcharge for pets. Instead, places of public accommodation may ask only two questions to determine if an animal is a service animal: (1) is the animal required because of a disability; and (2) what work or task has the animal been trained to perform? These inquiries may not be made where “it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability.”

Some animals may qualify as service animals if they provide support for symptoms of mental disabilities, such as PTSD or depression. For example, in *Cordoves v. Miami-Dade County*, a plaintiff brought claims against a Miami-area mall, its security company, county law enforcement officials, and the county itself, after a mall security officer ejected the plaintiff and her dog from the mall and plaintiff was arrested. The defendants sought summary judgment on plaintiff’s ADA claims, contending that plaintiff’s dog, which she acquired as a puppy from a pet store and had trained at home, did not qualify as a service animal. The court disagreed, holding that the testimony about the dog’s training and the tasks that it performed to assist the plaintiff with her PTSD were sufficient. The court noted when deciding summary judgment motions on ADA claims, courts “have set a low bar for demonstrating a genuine issue of fact regarding a [service animal’s] status as a service animal.” The court further noted “[t]here are no requirements as to the amount or type of training that a service animal must undergo, nor the type of work or assistance that a service animal must provide, but the animal must be trained to perform tasks or do work for the benefit of a disabled individual.” The court also explained that there are no federally

---

153 28 C.F.R. § 36.302(c)(6).
154 28 C.F.R. § 36.302(c)(8).
156 Notably, many organizations serve to connect veterans to service dogs as treatment for PTSD or other mental disabilities, including Hounds and Heroes, K9s for Warriors, This Able Veteran, and Patriot PAWS.
158 Id. at 1231–32 (finding that limited, at-home training adequately prepared a dog to help prevent against panic attacks as a result of PTSD); see also *Ascencio v. ADRU Corp.*, No. C 12-04884 LB, 2013 U.S. Dist. LEXIS 182463 (N.D. Cal. 2013) (granting default judgment for the plaintiff in a Title III action against a Burger King operator who refused to serve a woman with service dogs that alleviated symptoms of deep depression and anxiety).
159 *Cordoves*, 92 F. Supp. 3d at 1231.
mandated animal training standards for service animals. Accordingly, the Court denied the defendants’ motion for summary judgment.

While the bar is low for a plaintiff to demonstrate that a service animal qualifies under the ADA, there is a bar. For example, in Davis v. Ma, the plaintiff alleged ADA claims based on a Burger King franchisee’s exclusion of a thirteen week old puppy. The court granted the franchisee’s motion for summary judgment, finding that the plaintiff failed to present evidence creating a triable issue of fact as to whether the puppy was a trained service animal. The court reached this conclusion because the puppy was thirteen weeks old, not fully trained as a service animal, and had only some basic obedience training. The court also rejected the plaintiff’s argument that “service dog” tags given out by a municipality on an “honor system” created an issue of fact.

b. When May a Service Animal be Excluded from a Place of Public Accommodation?

A service animal may be excluded from a place of public accommodation only if the “animal is out of control and the animal’s handler does not take effective action to control it;” or if the “animal is not housebroken.” And a public accommodation is not required “to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.” It is worth highlighting that the ADA specifies that exclusion is permitted when the individual, and not the accommodation (i.e., the service animal), is a threat to others. Nonetheless, in determining whether an individual poses a threat to health or safety, courts view service animals as extensions of their disabled owners. The ADA also allows exclusion where permitting the animal will fundamentally alter the nature of the services/facilities. Applying these rules, one court has held that a blanket ban on service animals is permissible in “limited-access areas that employ general infection-control measures” such as areas that require gowns, masks, and gloves to maintain

161 Id. (citing Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245, 1256 (D. Haw. 2003)).
164 Id. at 1115.
165 28 C.F.R. § 302(c)(2).
166 28 C.F.R. § 36.208 (emphasis added).
167 See generally id.
168 See Lockett v. Catalina Channel Exp., Inc., 496 F.3d 1061, 1066 (9th Cir. 2007).
hygienic conditions. But outside of this context, courts have generally considered the exceptions case by case and without establishing any bright line tests.

In *Lockett v. Catalina Channel Exp., Inc.*, for example, the Ninth Circuit affirmed summary judgment in favor of the defendant ferry operator where a legally blind plaintiff was not permitted to bring her service animal into a particular part of the ferry because it had been designated a dander-free zone at the request of another passenger with severe allergies. The appellate court held while the entity asserting the “direct threat” exception “bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others,” the defendant had met this burden on the specific facts in that case. Conversely, the Ninth Circuit also affirmed a district court’s ruling that a theater could not bar a concert-goer from bringing her service dog because, despite the dog previously barking at that venue, allowing the dog to return would not fundamentally alter the nature of the services provided to its patrons.

c. And What About the Turkeys, Reptiles, Pigs, and Alpacas?

“An animal that simply provides comfort or reassurance is equivalent to a household pet, and does not qualify as a service animal under the ADA.” These animals are typically referred to as comfort or emotional support animals that provide a therapeutic benefit to its owner through companionship. Unlike a service animal, an emotional support animal is not necessarily granted access to places of public accommodation.

Nevertheless, business owners, including franchisees, are often confused about the extent of their obligations under Title III. Although not franchise-specific, a recent article from The New Yorker perfectly illustrated the confusion. The author detailed how, despite there being no requirement for businesses to allow emotional support animals, the author was able to bring a fifteen-pound turtle to the Frick museum, take a snake named Augustus shopping at Chanel and to lunch at Balthazar, ride with a turkey named Henry on the Hampton Jitney, browse at CVS and tour a museum and historic home with Sorpresa the alpaca, and fly with a thirty-pound pig named Daphne to

---

170 See 28 C.F.R. § 36 app. A, subpt. C; but see *Day v. Sumner Reg'l Health Sys.*, Case No. 3:07-0595, 2007 U.S. Dist. LEXIS 94615 (M.D. Tenn. Dec. 26, 2007) (finding a plaintiff stated a cognizable Title III claim after her “extremely unclean” dog was barred entry to an emergency room); *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077 (N.D. Cal. 2013) (finding a psychiatric hospital could not exclude a service dog because the animal would not fundamentally alter the nature of the facility and would not pose a direct threat to the health or safety of others).

171 496 F.3d 1061 (9th Cir. 2007).

172 *Id.*

173 *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837 (9th Cir. 2004).


175 See Frequently Asked Questions about Service Animals and the ADA, U.S. Department of Justice Civil Rights Division, https://www.ada.gov/regs2010/service_animal_qa.html (defining emotional support animals as distinct from service animals because “they have not been trained to support a specific job or task”) (emphasis in original).
Boston—all after securing a letter saying she needed the animals for emotional support.176 These experiences are not unusual.177

Notwithstanding the relative ease with which the author brought the companion animals along, with animals other than dogs and miniature horses, a franchise system is permitted under Title III of the ADA to prohibit those animals from places of public accommodation.178

3. The Overlay of State Anti-Discrimination Statutes

As noted above, the ADA does not provide for statutory damages. Rather, the ADA creates a private right of action for “preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order” for any person who is being subjected to discrimination on the basis of disability in violation of Title III.179 But some states, most notably California, have enacted their own statutes that make private litigation more attractive.

a. California’s Unruh Civil Rights Act and Disabled Persons Act

California law adds to the remedies available to plaintiffs suffering disability discrimination in that state through two statutes: (1) Section 51 of the California Civil Code, commonly referred to as the Unruh Civil Rights Act, and (2) Section 54 of the California Civil Code, referred to as the California Disabled Persons Act or “CDPA”.


177 Id. See also, e.g., Yanan Wang, Someone Just Used a Federal Law to Bring a Live Turkey on a Delta Flight, WASH. POST (Jan. 15, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/01/15/someone-just-used-a-federal-law-to-bring-a-live-turkey-on-a-delta-flight/?utm_term=.72ab47bb96e20; Denby Fawcett, Emotional Support Chickens are Ruffling Feathers, HONOLULU CIVIL BEAT (Mar. 20, 2017), http://www.civilbeat.org/2017/03/denby-fawcett-emotional-support-chickens-are-ruffling-feathers/ (describing that pet owners can get their animals certified as emotional support animals for as little as $64); A. Pawlowski, Pig on a Plane? The Era of Emotional Support Animals on Flights May be Ending, TODAY (Sep. 21, 2016, 10:23 AM), http://www.today.com/health/pig-plane-era-emotional-support-animals-flights-may-be-ending-t103065 (including one video about ease of registering emotional support animals and another video about certifying Sammy, a turkey, as an emotional support animal).

178 Although states could extend protection to emotional support animals, they generally have not. There are a few exceptions. For example, California’s Fair Employment and Housing act requires that (1) employers who employ five or more people to allow their employees to bring their emotional support animals to work, with exceptions for where making a reasonable accommodation will work hardship on the behavior or if the dog is badly behaved or dirty; and (2) landlords must allow tenants to keep emotional support animals in apartments unless the specific animal poses a direct threat to the health or safety of others, or if the specific animal would cause damage to the property of others. In addition, while Massachusetts does not have a statutory protection for emotional support animals, but the Massachusetts Commission against Discrimination interpreted an existing law to protect emotional support animals in housing. See Massachusetts Commission Against Discrimination, et al. v. Brighton Gardens Apartment, LP (Lawyers Weekly No. 22-007-11). And a few states have more restrictive regimes. New Mexico, limits service animals to dogs and horses, and provides for a criminal penalty for anyone who "knowingly present[s] as a qualified service animal any animal that does not meet the definition of "qualified service animal" under the statute. N.M.S.A. § 28-11-6. Washington requires that service animals have specialized training, which by definition excludes emotional support animals. WASH. REV. CODE § 49.60.040.

Both statutes “prohibit discrimination on the basis of disability in the full and equal access to the services, facilities and advantages of public accommodations.”\(^\text{180}\) Under these statutes, a prevailing plaintiff is entitled, among other relief, to statutory minimum damages regardless of whether the plaintiff has suffered any actual damages.\(^\text{181}\) The statutory, per-offense minimum damages are $4,000 for each violation of the Unruh Act and $1,000 for each violation of the CDPA. The Unruh Act is quite broad. Its list of the classes of people covered is illustrative instead of exhaustive, and it defines business establishments “in the broadest sense reasonably possible.”\(^\text{182}\)

All buildings in California constructed or altered after July 1, 1970 must comply with state standards governing the physical accessibility of public accommodations.\(^\text{183}\) California’s standards appear in the California Code of Regulations, and require places of public accommodation to maintain in operable working condition those features of facilities and equipment that are necessary for the facility to be accessible to, and usable by, persons with disabilities. As one court explained, “[t]he California standards set forth a comprehensively detailed list of design specifications prescribing the minimum standards for all manner of architectural elements, which are similar but not identical to the requirements in the DOJ standards for the ADA.”\(^\text{184}\)

A violation of a California standard violates both the CDPA and the Unruh Act. And an ADA violation is a violation of both California statutes.\(^\text{185}\) But it may be possible for an accessibility barrier to violate the California statutes without violating the ADA. However, even in the absence of an ADA violation, the specific feature of the property or specific could still be an Unruh Act violation if the plaintiff can show intentional discrimination.\(^\text{186}\) Because of the per access violation damages and attorneys’ fees available under the California statutes, California saw the most ADA lawsuits of all states in 2016.\(^\text{187}\)

Two recent cases involving Burger King demonstrate the risk for a franchisor. In 2010 and 2012, Burger King settled cases for $5 million and $19 million, respectively, brought in the Northern District of California.\(^\text{188}\) In both of these cases, the plaintiffs

\(^{180}\) Castaneda v. Burger King Corp., 264 F.R.D. 557 (N.D. Cal. 2009) (“Castaneda I”) (citing CAL. CIV. CODE §§ 51(b), 54.1(a)(1)).

\(^{181}\) Id. (citing Botosan v. Paul McNally Realty, 216 F.3d 827, 835 (9th Cir. 2000) (“proof of actual damages is not a prerequisite to recovery of statutory minimum damages” under the Unruh Act and the CDPA)).


\(^{183}\) CAL. HEALTH SAFETY CODE §§ 19956, 19959.

\(^{184}\) Castaneda I, 264 F.R.D. at 561.

\(^{185}\) CAL. CIV. CODE §§ 51(f), 54(c).

\(^{186}\) See Munson v. Del Taco, Inc., 46 Cal. 4th at 661, 208 P.3d 623 (2009).


sued only the franchisor, who settled and then pursued indemnification claims against its franchisees.

In *Castaneda*, the first of the cases, three mobility-impaired plaintiffs filed a putative class action complaint alleging that they had encountered barriers at 92 Burger King restaurants where the Burger King Corporation owned the location and leased it to the franchisee, who operated and maintained the actual Burger King store. Plaintiffs sought injunctive relief, as well as statutory penalties under the Unruh Act and the CDPA. The complaint alleged that the locations “were built according to ‘one or a limited number of architectural design prototypes developed by Burger King’” and that some locations were “remodeled in conformance with Burger King’s construction and design plans and specifications.” Plaintiffs moved the district court to certify a state-wide class of disabled Burger King customers, arguing that Burger King maintained substantial control over the leased restaurants.

The district court certified a class, but limited the class’ scope to customers of restaurants that one of the plaintiffs had actually visited. The court noted that a “normal class in an ADA action proceeds against a single store on behalf of all disabled persons using that store,” whereas the case before it sought to proceed against 92 different stores throughout California on behalf of a class of all mobility-impaired persons at all 92 locations. In limiting the class’ scope, the court held:

> Although the class claims would share Burger King Corporation as a common target, the physical differences among the 92 locations would predominate over the common issues, there being no common blueprint among them (or even among any subset of them). Whether or not any store was ever out of ADA compliance would have to be determined store by store, feature by feature, before turning to the easier question of whether defendant as the franchisor/landlord, would have a duty to force the franchise to remediate.

Characterizing such an analysis as alternatively “bone crushing” and “bone crunching,” the court declined to certify such a sweeping class. Instead, it certified separate classes against each of the ten individual restaurants where a named plaintiff encountered alleged access barriers. Not long after, Burger King settled the *Castaneda* case for $5 million in what was said by the parties to be “the largest ever [settlement] on a per class member basis and per facility basis in a disability case involving public accommodations.” The follow-on case, *Vallabhapurapu*, involving the remaining 86

---


190 *Id.* at 562 (italics omitted).

191 *Id.* at 560.

192 *Id.* at 564, 569.

Burger King locations leased by the franchisor to franchisees was subsequently settled for $19 million and agreed injunctive relief.\textsuperscript{194}

b. \textbf{Other Notable State Statutes}

A number of states have adopted civil rights laws governing disability rights in public accommodations. There is a great deal of variation from state to state in the definitions of the individuals protected, the entities required to company, and the requirements or prohibitions of individual statutes. To the extent that a state law conflicts with the ADA and provides for less protection than federal law, the state law is preempted. However, if a state law provides protections similar or greater than the ADA, as California law does with the Unruh Act and CDPA, a person with a disability may pursue causes of action under both the federal and state statute.

Some are less protective than the ADA and do not provide for private rights of action.\textsuperscript{195} But some states permit an individual to recover compensatory and punitive damages in addition to the remedies of the ADA. For example, Florida permits individuals to sue in state court, after filing a complaint with the Florida Human Relations Commission, and a state court to order compensatory and punitive damages for discrimination, as well as injunctive relief\textsuperscript{196} Not surprisingly, Florida was the number two state, behind California, for ADA Title III lawsuits in 2016.\textsuperscript{197} Cataloging the various states’ statutes and their differences from the ADA is beyond the scope of this paper. But suffice it to say that a franchisor is well advised to be aware of the state statutes in the states where its franchisees operate, and to require franchisee compliance with state and local statutes in franchise agreements.

\textbf{B. New Technology, New Frontiers for ADA Litigation}

The ADA applies not only to the physical space that customers utilize and the types of accommodation that must be offered to permit that access, but also to the virtual spaces that customers access, such as company websites. While most businesses have become used to the many nuances of the ADA’s physical accessibility rules, navigating the digital world is fraught with confusion for most. The confusion stems from both the lack of clear regulations on the topic and the myriad disabilities that could be impacted when using websites and mobile devices. In addition, franchisors and franchisees (like other businesses) may not immediately grasp that self-serve kiosks and other newer automating innovations can likewise create unexpected liability.


\textsuperscript{195} See, e.g., Ala. Code § 21-4-1 et seq. (smaller protected classes, no private right of action).

\textsuperscript{196} Fla. Stat. Ann. §§ 760.06, 760.11.

1. Disabilities and Improved Software to Consider

There are many types of disabilities that should be taken into account when considering whether a barrier exists on a website or mobile device. There are five main groups of disabilities to plan for:

- Vision (blindness, partial/low vision, color blindness, and deaf-blind);
- Hearing (deafness, partial hearing loss, and deaf-blind);
- Motor (issues with manual dexterity, fine motor control/tremors, muscle fatigue, and body shape and deformities);
- Cognitive (memory/distractibility, reading, Attention Deficit Disorder, reduced reasoning capacity, dyslexia, autism, and traumatic brain injury); and
- Temporary and Aging (illness, accidents, vision, and dexterity issues).  

Continued updates in devices and software allow those with a disability to perform a task they were formerly unable to perform. Examples include screen readers, speech recognition, text to speech, light signaler alerts, screen magnifiers, alternative keyboards, refreshable braille display, and keyboard filters.

2. Legal Framework for Digital Accessibility

As discussed above, Title III applies to businesses that are places of public accommodation. The Department of Justice (“DOJ”) “effective communication rule” requires businesses that use the internet as a means of communication for their goods or services to be prepared to present these communications through an accessible medium.

a. Review of Proposed Rulemaking and Applicable US Regulations

In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (“ANPRM”) to address website accessibility, but did not issue any regulations regarding this notice. As a result, the DOJ issued a Supplemental Advance Notice of Proposed Rulemaking (“SANPRM”), soliciting public comment for state and local website rulemaking in order to “shape and further its rulemaking efforts” regarding public accommodations for websites. In 2016, the DOJ announced they are “moving forward with Rulemaking under Title II” which would adopt WCAG 2.0 Level AA as the

200 28 C.F.R. pt. 36, App’x F.
standard for ADA compliance for digital accessibility. Although Title II applies to state and local governments only, it is likely that this standard will expand to cover public accommodations under Title III.

As background, the Web Content Accessibility Guidelines ("WCAG") are a set of guidelines published by the Web Accessibility Initiative ("WAI"), which is part of the World Wide Web Consortium, an international community that sets website norms and standards. The WCAG were originally published in December 2008 and in October 2012 became a standard of the ISO, a nongovernmental international organization that sets standards in norms industries. The internationally recognized guidelines have the goal of making web content accessible to disabled individuals. WCAG outlines the best practices for making web content universally acceptable under the POUR (Perceivable, Operable, Understandable, and Robust) principle. The guidelines are written as testable criteria for determining if the content satisfies basic levels of compliance, which are referred to as the “Success Criteria.” Both automated testing and manual testing are utilized to determine if the Success Criteria are met.

The Success Criteria currently measure three levels of compliance for WCAG 2.0: A (low), AA (medium), or AAA (high). Each level includes compliance with the levels below it, i.e., Level AA also meets Level A. Critics assert that Level A provides only minimal web accessibility tools and does not actually afford broad scale web accessibility. Level AA facilitates broad web accessibility by addressing the most common obstacles to users with disabilities. Level AAA denotes the highest level of web accessibility, but is not recommended by the WCAG document as a general conformance standard because it is impossible to achieve for certain content.

To understand the variances in the compliance levels, specific examples are helpful. For a website to meet Level A compliance for audio content, the website must include captions for all prerecorded audio content. For the website to reach Level AA compliance, all live audio content on the website would need captions. Finally, for Level AAA compliance, the website would make sign language interpretations available for all prerecorded audio posted.

---

203 Id.
204 WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.0 (2008), https://www.w3.org/TR/WCAG20/.
206 WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.0 (2008), https://www.w3.org/TR/WCAG20/.
207 Id.
208 Id.
209 Id.
211 HOW TO MEET WCAG 2.0 (2008), https://www.w3.org/WAI/WCAG20/quickref/.
212 Id.
b. DOJ’s Position and Prosecutions

In the absence of finalized regulations directed at websites and other digital devices, the DOJ has aggressively prosecuted ADA website accessibility claims. The DOJ’s aggression seems somewhat divorced from the ADA’s text, as websites were not expressly included in Title III and the internet was not widely used when Congress first enacted the ADA. However, and likely driven by the internet’s widespread growth as a market for goods and services, the DOJ has pursued the argument that company websites qualify as public accommodations and are covered by Title III’s requirements.

In response, many companies have entered into Consent Decrees with the DOJ. Hilton entered into a Consent Decree agreeing to comply with WCAG 2.0 Level A in 2010. In 2011, Wells Fargo entered into a similar Consent Decree after the DOJ received complaints from individuals who were deaf or had speech disabilities about Wells Fargo’s need to enhance their public accommodations. Recently, almost every company, including H&R Block, Peapod, Carnival, and Greyhound, that has entered into a Consent Decree with the DOJ regarding website accessibility has agreed to meet a heightened standard of WCAG 2.0 Level AA compliance.

Because of the adoption of WCAG 2.0 Levels A and AA for state and local government websites, the DOJ is likely to continue applying the same standard for websites of public accommodations. The SANPRM deadline discussed above for public accommodations was in late October of 2016, with new regulations to be issued in 2018. However, these actions occurred under President Obama’s Department of Justice. Recent administration shifts could change the direction of these expected regulations.

---


214 Press Release, Department of Justice Office of Public Affairs, Justice Department Reaches Agreement with Hilton Worldwide Inc. Over ADA Violations at Hilton Hotels and Major Hotel Chains Owned by Hilton, (Nov. 9, 2010); see also Gregory P. Care, Amanda Maisels, Eric Singleton, & Joshua A. Stein, ABA Section of Labor and Emp’ t Law Webinar Presentation: Most Websites are not ADA Compliant: Is Yours One of Them? (Mar. 9, 2016).


On January 30, 2017, President Trump issued the “Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs.” The Executive Order stated in part that “whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.” If this Executive Order is found to be legal (it has already been challenged in court), then under the Trump administration, moving forward on rulemaking in the public accommodation space is unlikely as two regulations would need to be repealed. Thus, there is a real question about whether the regulations will ever become law.

c. Civil Litigation Isn’t Waiting on the Government

Private litigants are not waiting on the DOJ. Instead, they are pushing forward the broad expectation of a WCAG Level 2.0 AA standard. At least 300 lawsuits were filed in 2015 and 2016 concerning website accessibility. Some defendants have fought back in court against claims that allege their websites violate Title III of the ADA. So far, that battle has not gone well. Recent cases involving the lack of web content accessibility for the visually impaired have resulted in courts finding that the plaintiffs’ claims fall squarely within Title III.

Winn Dixie Stores recently litigated one of the first bench trial cases concerning an ADA Title III claim related to website accessibility. In *Gil v. Winn Dixie*, the district court, ruling on dispositive motions, held that the stores’ websites had sufficient nexuses to their physical locations to be classified as places of public accommodation. Notably, the Department of Justice issued a Statement of Interest in *Gil* supporting the

---

219 Id.
224 Id.
225 See e.g., *Gil v. Winn-Dixie*, No. 16 Civ. 16-23020, 2017 WL 2609330 (S.D. Fla. May 31, 2017), finding a retail website was a place of public accommodation because it allowed customers to buy products and search for brick-and-mortar store locations; *see also Gomez v. Lindenberg USA, LLC*, No. 16 Civ. 22966, 2016 WL 9244732 (S.D. Fla. 2016) (finding a retail website was a place of public accommodation because it allowed customers to buy products and search for brick-and-mortar store locations); *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (holding a digital library website was a place of public accommodation even though it is not associated with a brick-and-mortar store); *Netlix*, 869 F. Supp. 2d. 196 at 200-02 (D. Mass. 2012) (finding that on-demand video streaming is a place of public accommodation, despite the fact that it is exclusively available from a digital source).
notion that websites are places of public accommodation. Following a two day bench trial, the district court then entered a judgment finding that Winn Dixie’s stores inaccessible websites violated Title III. This is the first judgment by a federal court finding that an inaccessible website violated Title III. Because the visually impaired plaintiff had shown that he was unable to use Winn Dixie’s screen readers to access digital coupons, the court found that a nexus was established between the website and Winn Dixie’s stores sufficient to hold that an inaccessible website deprived the plaintiff of “full and equal enjoyment” of the store itself. Additionally, the court found that Winn Dixie has a duty to ensure that third-party vendors (including Google and American Express in this case) who operated parts of the website are also offering services that are accessible and ADA compliant.

However, not all courts agree that websites are places of public accommodation. In Gomez v. Bang & Olufsen America, Inc., the court held a website is not covered by the ADA unless some function on the website hinders the full use and enjoyment of a physical space. Even though the website in that case allowed customers both to buy products and to search for physical locations, it was not a public accommodation within the meaning of Title III. Therefore, failing to provide an accessible website did not violate the ADA. Similarly, in Robles v. Domino’s Pizza, LLC, the court found that Title III does not require website providers to meet WCAG 2.0 guidelines.

There is also current litigation about web content accessibility for the hearing impaired. The National Association of the Deaf (“NAD”) filed parallel cases against Harvard University and Massachusetts Institute of Technology alleging the universities failed to properly caption online video content. These cases have survived motions to dismiss based on Harvard and MIT’s respective failures to show that the “[p]laintiffs’ claims under the ADA and Section 508 were facially implausible.” Stated differently, in the light most favorable to the plaintiffs as the non-moving parties, the plaintiffs in the respective cases had sufficiently pleaded that (1) the plaintiffs have disabilities and qualify for the institutions’ online programs, (2) the institutions receive federal funding and are public accommodations, and (3) the institutions had discriminated against them on the basis of their disabilities. Similarly, Netflix, in an effort to avoid litigation,

---

226 See Gil, 2017 WL 2609330 (U.S. Statement of Interest).
228 Id. at *7-8.
229 Id. at *6.
231 Id. at *4.
232 Id.
reached an agreement with NAD to provide captioning on all shows by 2014 and “make good faith, diligent efforts” for the captions to be available on all devices.236

In March of 2017, the University of California at Berkeley removed more than 20,000 uncaptioned videos from its public access website after the DOJ sent it a letter claiming that the university was not complying with Title II.237 Interestingly, although the university has an obligation to provide accessible communications to students with disabilities under Title II, normally such obligations do not extend to non-students.238 Despite that fact, the DOJ based its letter on complaints by the public.239 Nonetheless, the DOJ claimed that failure to caption the public web content violated Title II and that the university’s obligations extended to the public.240 This theory has not been tested in court.241

When entering into a settlement agreement, it is important to clarify which parties are agreeing to resolve the matter.242 For example, when two lawsuits were initiated against Party City, Party City reached a confidential settlement with the plaintiff in one case and filed a motion for summary judgment based on res judicata in the other.243 Although the cases involved similar facts, legal claims, and relief sought, the court denied the motion, finding that the second suit was not barred because the first plaintiff never claimed to represent the other plaintiffs.244 Tellingly, Party City did not argue the settlement in the first case provided the relief that the other plaintiffs sought for website accessibility.245 The case has two lessons: first, Party City should perhaps have negotiated a broader settlement in the first case and then made a mootness argument in the second. Second, the best defense against future litigation may be likely remains compliance with WCAG 2.0 Level AA, the de facto industry standard.246

238 Id.
239 Id.
240 Id.
241 Id.
244 Id. at *9-10, 12.
245 Id. at *11-12.
246 Launey & Vu, supra note 242.
d. **Other Laws to Consider**

i. **Federal Laws**

Two other federal statutes touch upon website accessibility: the Rehabilitation Act of 1973 and the Telecommunications Act of 1996. The Rehabilitation Act was amended in 1998 to include section 508, which requires federal agencies to make all electronic and information technology (“EIT”) accessible to employees and members of the public who have disabilities.\(^{247}\) EIT includes all information on websites run by a federal agency. In section 508 also applies to private businesses that supply EIT goods and services to the federal government.\(^{248}\)

The Telecommunications Act was amended in 1996 to include section 255, which requires manufacturers and service providers of telecommunication equipment to make their equipment accessible to people with disabilities.\(^{249}\) Section 255 covers telecommunication equipment including telephones, fax machines, call waiting, and voicemail.\(^{250}\)

In January 2017, the United States Access Board updated both section 508 of the Rehabilitation Act of 1973 (the Electronic and Information Technology Accessibility Standards) and section 255 of the Communications Act of 1943 (the Telecommunications Act Accessibility Guidelines) by announcing a final rule to harmonize accessibility standards.\(^{251}\) “The Revised 508 Standards and 255 Guidelines incorporate by reference the Web Content Accessibility Guidelines (WCAG) 2.0, a globally recognized and technologically-neutral set of accessibility guidelines for Web content.”\(^{252}\) The new requirements address accessibility challenges and require federal agencies with websites and electronic content to update to the WCAG 2.0 AA by January 2018.\(^{253}\)

There are other federal laws about websites of which franchisors should be aware. The 21st Century Communications and Video Accessibility Act (“CVAA”), enacted in 2010 to expand the scope of section 508 of the Rehabilitation Act and section 255 of the Telecommunications Act,\(^{254}\) requires communication technology manufacturers and service providers to make their technology accessible to people with disabilities. CVAA extended coverage to new communication technology, such as

---


\(^{248}\) 29 U.S.C. § 794(d).

\(^{249}\) 47 U.S.C. § 255.

\(^{250}\) Id.

\(^{251}\) ICT Standards and Guidelines, 36 C.F.R. §§ 1193, 1194.

\(^{252}\) Id.

\(^{253}\) Id.

\(^{254}\) 111 Pub. L. No. 260.
email, text messaging, video communications, and web browsers on mobile devices.\textsuperscript{255} Additionally, the Air Carrier Access Act requires all domestic and foreign airlines to make their websites and electronic kiosks accessible to people with disabilities.\textsuperscript{256} While these laws are not directly applicable to franchisors and franchisees, what the federal government does with its own websites and what it requires of other businesses is likely to drive the standards that are more generally applicable.

\textbf{ii. State Laws}

Likewise, the Unruh Act, discussed above in Section III(A)(3)(a), applies to all business establishments in California.\textsuperscript{257} The Unruh Act provides that people with disabilities, along with many other listed groups of people, are entitled to equal accommodations and services in all business establishments.\textsuperscript{258}

As discussed above, section 508 of the Rehabilitation Act only applies to the federal government, but multiple states have adopted similar laws requiring their state governments to abide by federal accessibility requirements.\textsuperscript{259} Currently, these states include Alabama, Arizona, California, Connecticut, Illinois, Indiana, Kansas, Louisiana, Minnesota, Missouri, New York, Oklahoma, Virginia, and Washington.

\section*{C. Is Onsite Technology Receiving a Different Treatment?}

New customer-facing technology also presents new frontiers for litigation. The advent and use of different types of self-services kiosks—such as beverage dispensers, touchscreen ordering kiosks, and price scanners—have spawned recent Title III litigation, albeit with little success.

For example, in a trio of cases involving beverage-dispensing kiosks, federal courts in New York have dismissed cases brought by blind plaintiffs, alleging discrimination.\textsuperscript{260} In each case, the court held that the stores meet the requirements of the ADA if they effectively train their employees to assist disabled customers in using the machines.\textsuperscript{261}

\textsuperscript{255} Id.
\textsuperscript{256} 49 U.S.C. § 41705.
\textsuperscript{257} CAL. CIV. CODE § 51.
\textsuperscript{258} Id.
\textsuperscript{259} Emily Griffin, \textit{Do Your State's Laws Require Section 508 Accessibility Compliance?}, 3PLAYMEDIA (Mar. 3, 2015), http://www.3playmedia.com/2015/03/03/do-your-states-laws-require-section-508-compliance/.
\textsuperscript{261} Id.
In the first of these three cases, *West v. Moe’s Franchisor LLC*, two named plaintiffs filed suit on behalf of themselves and a putative class of other blind individuals under Title III and New York state and city antidiscrimination statutes.\(^{262}\) The plaintiffs claimed that “Freestyle” touchscreen beverage dispensers, which provide customers with the ability to select from a large number of distinct beverages using a touchscreen interface, denied them a full and equal opportunity to enjoy the services defendant provides.\(^{263}\) Plaintiffs were unable to use the dispensers and were unable to secure employee assistance to use the machine and filed suit claiming violations of Title III of the ADA and New York State and City statutes, alleging that Moe’s should have provided technology, such as tactile or Braille controls and audible instructions, to permit them to use the machines.\(^{264}\)

Moe’s moved to dismiss, which the court granted after holding that Moe’s had appropriately met its flexible obligation to provide auxiliary aids and services to its disabled patrons. The court noted that Title III’s regulations expressly contemplated that one type of auxiliary aid or service could be provision of employees trained to read menus to guests who are blind. Because this kind of alternative accommodation satisfied the ADA, the court rejected plaintiff’s theory by stating “nothing in the ADA or its implementing regulations supports Plaintiffs’ argument that Moe’s must alter its Freestyle machines in a way that allows blind individuals to retrieve beverages without assistance.”\(^{265}\) The court acknowledged that, while providing dispensers enabled for independent usage by guests with disabilities might be preferable to the patrons, Moe’s provision of training of employees to provide assistance to guests with disabilities who had difficulties operating the dispensers was sufficient to meet the flexible standard, notwithstanding the fact that in one instance plaintiffs did not promptly obtain such assistance.\(^{266}\)

Other cases have followed *Moe’s* reasoning.\(^{267}\) In all three cases, the courts held that one incident of an employee failing to assist was insufficient to state a claim under the ADA because it did not demonstrate that the place of public accommodation failed to train its employees to provide effective assistance to disabled patrons. Cases challenging price scanners\(^{268}\) and iPad touchscreen ordering kiosks\(^{269}\) have also settled quickly.

---

\(^{262}\) *West*, 2015 U.S. Dist. LEXIS 165070, at *5.

\(^{263}\) *Id.*

\(^{264}\) *Id.*

\(^{265}\) *Id.*

\(^{266}\) *Id.*


D. Some Takeaways For Managing Risk Under the ADA

As noted above, a franchisor will be responsible for ADA compliance at company stores, or where it owns or leases locations to its franchisee. But for cases of operator or “design and construct” liability, the lines are not as bright. As in many areas of the franchise relationship, a franchisor must be thoughtful in how it exerts control over franchisees’ facilities. In the Title III context, the issue is whether the franchisor controls the aspects of the business that are not in compliance with the ADA. Thus, a franchisor that imposes design requirements or specifies store layouts must recognize that there is greater risk that it will be held liable, along with the franchisee, for any violations of the ADA.

This is especially true for franchisors who are landlords. Lessor-franchisors should consider ADA compliance when requiring franchisee tenants to place technology in franchise locations. Be sure to think of accessibility of equipment, such as touch screen kiosks and the like.

The franchise agreement can be a useful tool in mitigating risk. Franchise agreements should include requirements that franchisees abide by all applicable laws, including the ADA. The franchise agreement should also contain a provision stating that if the franchisor’s requirements and other federal, state or local laws conflict, including the ADA, that the franchisee must abide by the law. Franchisors should also consider ADA-specific provisions requiring the franchisee certify to a franchisor that its franchised business is designed, constructed, and/or altered in accordance with the ADA. For example, a franchisor could consider a certification of compliance by the franchisee as a condition of approval for the franchisee to begin operation, whether the establishment is newly opening to the public or has been remodeled.

Finally, franchisors and franchisees should carefully review their vendor contracts. For example, vendor contracts to procure electronic kiosks or point of sale devices should contain provisions requiring them to be accessible.\textsuperscript{270} Unless the vendor provides the franchisor and franchisee with that protection, the franchisees or franchisors are more likely to face liability, rather than manufacturers of noncompliant equipment, because sellers and/or manufacturers of these types of equipment do not themselves qualify as places of public accommodation. Franchisors should also require franchisees to make equipment accessible and/or require them to train employees to offer effective assistance to customers requiring it.\textsuperscript{271}

IV. CONCLUSION

In addition to paying attention to the complex federal and state regulatory schemes that underlie franchising, franchisors and franchisees and the professionals who support them should remember to be mindful of legal risks outside of the realm of traditional franchising. Given the potential existential threat posed by violations of the

\textsuperscript{270} Vu & Sarnoff, supra n. 223 at 462.

\textsuperscript{271} A comprehensive discussion of the subject can be found at Vu & Sarnoff, supra note 223 at 462.
TCPA in particular, and the liability risk and potential for brand damage posed by the new waves of ADA litigation, the industry is well advised to familiarize itself and comply (or require franchisees to comply) with the law in these customer-facing arenas.
LAURA DANYSH

Laura Danysh is Vice President & Senior Counsel of Global Regulatory at Hilton, one of the world’s preeminent hospitality companies with over 5000 hotels operating under 14 brands in over 100 countries and territories. In her current role, Laura leads and coordinates global regulatory affairs and disputes. Laura created and led the legal and compliance training program, developing programs relating to anti-corruption, anti-money laundering, trade sanctions, and internal investigations. She led the global implementation of the Records Management program, administering a network of over 100 Records Coordinators. Laura also served as a member of Hilton's Global Policy Committee for responsible for creating and implementing company policies.

When Laura first joined Hilton to manage dispute resolution, she led the team that negotiated and implemented a Consent Decree with the Department of Justice regarding compliance with the Americans with Disabilities Act. Laura also executed on Hilton's compliance of a permanent injunction with a competitor, which led to an order dismissing the case.

Laura chairs Hilton’s Global Pro Bono Committee and serves as a board member for the Legal Services of Northern Virginia. Prior to joining Hilton, she was a member at Eckert Seamans Cherin & Mellott, where her practice focused on commercial litigation. Laura received her JD from the George Washington University Law School and her BA from the University of South Carolina Honors College.

JOHN M. DOROGHAZI

John M. Doroghazi is a litigation partner in the New Haven, Connecticut office of Wiggin and Dana LLP and is a member of the firm’s Franchise and Distribution, Class Action, and Consumer Protection Practice Groups. Aside from defending franchisors in all types of franchise-related litigation and arbitration, he routinely represents franchisors and others, including hospitals, banks, insurance companies, and online travel retailers, in various types of consumer class actions, including Telephone Consumer Protection Act cases, in courts across the country.

John is a member of the Forum’s Litigation and Alternative Dispute Resolution Committee and is the co-author of the Connecticut chapter in the 2017 edition of the Franchise Desk Book. John has also authored numerous articles for the Franchise Law Journal and previously presented on consumer class actions at the 2014 Forum on Franchising. For the last two years, Chambers USA has ranked John as an “Up and Coming Practitioner” for Franchise Law-Nationwide, and he has been named by Benchmark Litigation to its “Under 40 Hot List.”

John graduated magna cum laude from Boston College and received his J.D., Order of the Coif, from Washington University School of Law. After law school, he was a law clerk to the Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

HEATHER C. PERKINS

Heather Perkins is a litigation partner in the Denver office of Faegre Baker Daniels LLP and a member of the firm’s Franchise and Distribution team. Heather also serves as the managing partner of the Denver office. She specializes in franchise and distribution litigation, trade secret litigation and counseling, and litigating complex commercial matters. Heather has
represented manufacturers, franchisors, dealers, and distributors in federal and state proceedings, arbitrations, and mediations around the country.

Heather currently serves as the Editor in Chief of The Franchise Lawyer, and has previously served on The Franchise Law Journal as an Articles Editor and an Associate Editor. Heather frequently writes and speaks on franchising matters. Heather was a contributing author to the Covenants Against Competition in Franchise Agreements, Third Edition. Her recent presentations include The Judicial Update, Co-Present, International Franchise Association Legal Symposium (2017); Is This Really the End? Dealing With Renewal and Nonrenewal of Franchise Relationships, Co-presenter, International Franchise Association Legal Symposium, (2015); and Protection of Franchise System Trade Secrets and Confidential Information, and Enforcement of Non-Disclosure Agreements, in the Digital Age, Co-presenter and Co-author, American Bar Association Forum on Franchising (2012).

Heather graduated with honors from the University of Colorado School of Law in 1998. She graduated with honors from the University Colorado School of Business with a bachelor of science degree with emphases in accounting and finance in 1993. Between college and law school, she practiced as a Certified Public Accountant in Colorado and Chicago. Immediately after graduating from law school, she served for two years as a law clerk to the Honorable Edward W. Nottingham, United States District Judge for the District of Colorado.