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

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Overview of Program

These are generally not franchisee v. franchisor issues. What we’ll cover:

• A refresher on the ADA
• The emerging rules for digital accessibilities
• What to do when a python comes to dinner
• How to avoid the million (or billion) dollar text message or phone call
Disabilities by the Numbers

15% of the world’s population is living with a disability (WHO).

56.6 million Americans (approx. 1 in 5) are living with a disability. (2010 census)

People with disabilities living in U.S. represent $200 billion in discretionary spending power. (2010 census)

People with disabilities, their family and close friends represent $8 trillion in disposable income. (Gartner)
Types of Disabilities

- Vision
- Hearing
- Motor
- Cognitive
- Temporary & Aging
ADA by the Numbers

[Bar chart showing ADA Title III Lawsuits in Federal Court from 2013 to 2016]

Remedies

• Attorney General Actions:
  • up to $50,000 for first violation
  • $100,000 for subsequent violation
  • No punitive damages

• Private Right of Action:
  • Injunctive relief
  • Award of reasonable fees

• State Statutes
Top 10 States for ADA Title III Federal Lawsuits in 2016

- CA: 2,468
- FL: 1,663
- NY: 543
- AZ: 335
- TX: 267
- GA: 193
- UT: 124
- PA: 102
- MN: 96
- CO: 93

Physical Access to Facilities
New Technology, New Litigation
Digital Accessibility Legal Landscape

<table>
<thead>
<tr>
<th>Certain U.S. Federal and State Laws</th>
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<tbody>
<tr>
<td>• Americans with Disabilities (ADA)</td>
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<tr>
<td>• Section 508 of the Rehabilitation Act (Section 508)</td>
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<tr>
<td>• Section 255 of the Telecommunications Act</td>
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<tr>
<td>• Air Carrier Access Act (ACAA)</td>
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<tr>
<td>• 21st Century Communications and Video Accessibility Act</td>
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<td>• Unruh Civil Rights Act (California)</td>
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Core components of life in the 21st century exist in the digital space, and without accessibility, basic human rights can be diminished.
The effective communication rule: applies to entities that use the internet as a means of communication for their goods or services.

Today most DOJ consent decrees & settlements are requiring WCAG 2.0 Level AA compliance.

Most Consent Decrees with the DOJ regarding website accessibility meet a heightened standard of WCAG 2.0 Level AA compliance.

In 2016, the DOJ announced that they were "moving forward with Rulemaking under Title II" which would adopt WCAG 2.0 Level AA as the standard for ADA compliance. However, recent administration shifts could change the direction of these expected regulations.

What gets shaped for state and local governments will influence the law private companies will have to follow.
Web Content Accessibility Guidelines (WCAG) 2.0

Internationally recognized set of guidelines published by the Web Accessibility initiative (WAI) which is part of the World Wide Web Consortium (W3C).

Goal of making web content accessible to individuals with a disability.

Outlines best practices for making web content universally Perceivable, Operable, Understandable, and Robust (POUR principle).

All guidelines known as Success Criteria (SC) are written as testable criteria for determining if content satisfies them. Testable is understood to mean a combination of automated testing and manual testing.

Ascending levels of compliance (A, AA, and AAA).
## WCAG 2.0 Compliance Levels

<table>
<thead>
<tr>
<th>Level A</th>
<th>Level AA</th>
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<tr>
<td>• Establishes a minimum level of accessibility</td>
<td>• High impact for users</td>
</tr>
<tr>
<td>• Does not achieve broad accessibility for many situations</td>
<td>• Removes barriers and allows a broader range of the population to use digital assets</td>
</tr>
<tr>
<td>• Allows for some groups to use websites/documents</td>
<td>• Likely to require changes to a system’s presentation and/or business logic</td>
</tr>
<tr>
<td>• Lowest impact on the presentation and business logic of a website</td>
<td>• Legal foundation for recent lawsuit settlements</td>
</tr>
<tr>
<td>• “Typically” viewed as the easiest level of requirements</td>
<td>• Internationally recognized and adopted conformance level</td>
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Note: To be Level AA compliant one must also attain Level A compliance.
Executive Order on Reducing Regulation and Controlling Costs

Rulemaking in the public accommodation space is unlikely as two regulations would need to be repealed.

Gil v. Winn Dixie

First time a federal court found an inaccessible website violated Title III.

Gomez v. Bang & Olufsen America, Inc.

Website not covered by the ADA unless some function on the website hinders the full use and enjoyment of a physical space.
Digital Accessibility

It is more than just complying with a set of standards (e.g. WCAG 2.0). It is about how well your consumers with disabilities can access and interact with your digital content.
Assistive Technology

Devices/Software that allow those with a disability to perform a task they were previously unable to perform.

- **Screen Readers**
  (JAWS, NVDA, VoiceOver)

- **Screen Magnifiers**
  (Zoomtext)

- **Speech Recognition**
  (Dragon Naturally Speaking)

- **Alternative Keyboards**
  (Touch screen, wands, pointers)

- **Text to Speech**
  (Speech synthesizer, Kurzweil or Read&Write Gold)

- **Refreshable Braille Display**

- **Light signaler alerts**
  (use light signals to alert user)

- **Keyboard filters**
  (typing aid to reduce # of keystrokes)
Business Case for Accessibility

Legal Obligation/Risk Mitigation
- Federal regulations, corporate policy, lawsuits

Financial Considerations
- Increased product usage, competitive advantage, direct cost savings

User Satisfaction
- Improved usability, inclusive design, customers return to site

Search Engine Optimization
- Customers find sites more easily, search engines can index them more effectively

Social Responsibility
- Demonstrates equal opportunity and universal access for all people

Technical Factors
- Interoperability, quality, reduce development time
Service Animals
What are the Rules?

• Animals that qualify: dogs and miniature horses

• What questions can be asked?
  1. Is the animal required because of a disability?
  2. What work or task has the animal been trained to perform?
When is exclusion of a service animal permitted?

1. When the animal is not housebroken
2. When the animal is out of control and the handler does not take effective action to control it
3. When the presence of animal will fundamentally alter the nature of the service/facility
4. When the individual poses a direct threat to the health or safety of others
Real Life Client Questions
The TCPA—What is it?

- Statute, FCC regulations, and FCC opinions that regulate automated telephone calls and blast faxes
- Applies to text messages
- $500-$1,500 per violation
TCPA Math

• (10,000 customers) x (2 texts per month) x (6 months) x $500=$60,000,000 lawsuit
• If x $1,500=$180,000,000 lawsuit
• Largest TCPA Settlement: $75 million by Capital One
• Largest TCPA Verdict: up to $60 million against DirectTV
TCPA—God’s gift to the plaintiff’s bar

• Easy to violate for uninformed
• Intent only matters for punitive damages
• Ability to use form pleadings and discovery
• Class certification is easier than other consumer cases
• Individual claims can still have significant value
• ~5,000 cases last year (2% of all federal filings)
TCPA—What is an ATDS?

“automatic telephone dialing system” means 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.

• FCC’s basic answer: this covers everything but---
TCPA—Consent Rules

<table>
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<tr>
<th>Consent?</th>
<th>Type</th>
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<tbody>
<tr>
<td>Yes</td>
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<tr>
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<td>N/A</td>
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What is Prior Express Written Consent?

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.
Does this violate the TCPA?

Sign up now to receive autodialed text messages from us! Simply provide your name and phone number and we’ll send you coupons twice a week!

Name _______________

Phone _______________

Sign me up
Does this violate the TCPA?

Sign up now to receive text messages from us! Give us your name and phone number and we’ll send you coupons twice a week!

Name ________________

Phone ________________

Sign me up

See terms and conditions, including TCPA disclosures, by clicking here.
Does this violate the TCPA?

Sign up now to receive great offers from us! Give us your mobile phone number and we’ll send you exclusive coupons twice a week!

Name _______________

Phone _______________

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.

Sign me up [ _____]
Does this violate the TCPA?

Sign up now to receive great offers from us! Give us your name and phone number and we’ll send you coupons twice a week!

Name ________________

Phone ________________

Sign me up

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.
Defending TCPA Lawsuits

- Prove consent
- Show an autodialer wasn’t used
- Attack class certification
- Petition the FCC
- The long-shot arguments/being creative
Franchisor-Franchisee Issues

• Vicarious liability for calls/text violating TCPA
• *Thomas v. Taco Bell* and *Ange v. Papa John’s*
• More franchisor involvement = more franchisor risk
• Less franchisor involvement = more franchisee risk
Other TCPA Traps

• Recycled-reassigned phone numbers
• Revocations of consent
• Records retention
• Vendors
• Professional plaintiffs
THANK YOU!

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