
CONSUMER FINANCE PODCAST – RECENT DEVELOPMENTS IN ADA WEBSITE ACCESSIBILITY COMPLIANCE**AIRD: AUGUST 25, 2022****HOST: CHRIS WILLIS****GUESTS: KIM PHAN, LORI SOMMERFIELD, MATT ATER****Chris Willis ([00:05](#)):**

Welcome to The Consumer Finance Podcast. I'm Chris Willis, the co-practice leader of Troutman Pepper's Consumer Financial Services Regulatory Practice, and I'm really glad you've joined us today. We have a great episode for you about something that just keeps coming up time and time again as something important to our clients, and that's ADA website accessibility.

But before we jump into that topic, let me remind you to visit and subscribe to our blog at consumerfinancialserviceslawmonitor.com, where you're going to see daily updates about all the important happenings in the consumer financial services marketplace. And don't forget to check out our other podcasts. Our group has a lot of them. We have *FCRA Focus*, which of course is based on credit reporting. We have a new one called *The Crypto Exchange*, which is all about all things cryptocurrency, and we have *Unauthorized Access*, our privacy and data security podcast. Check them out. They're all available on all popular podcast platforms. And if you like this podcast, let us know. Leave us a review on your podcast platform of choice.

Now, today, as I said, we're going to be talking about ADA website accessibility, and I'm joined by two of my partners, Kim Phan and Lori Summerfield. Kim and Lori are both experts on ADA regulatory compliance issues, but Kim is also a subject matter expert in privacy and data security, and we work regularly with her and our financial institution clients in that regard. And Lori specializes in the full suite of anti-discrimination laws that impact financial services companies, including fair lending and responsible banking laws, of course, in addition to the ADA.

But our special guest today is Matt Ater, who is the Vice President of Enterprise Sales at Vispero, and he's a highly accomplished person in the website accessibility, technology, and software space. Matt, I wanted to welcome you to today's podcast and ask you to tell us a little bit about your company.

Matt Ater ([01:45](#)):

Thanks, Chris, and thank you for having us here today. It's interesting. When I look at Vispero, a lot of folks, they say, "Well, that's not a recognizable name in the field," and partially it's because we're more of a group of companies underneath Vispero. And when you look at it from a high level, you'll see a lot of technology for blind and visually impaired customers who need to be able to read print material or read computers or read content of some sort, and it could be a screen reader, a screen magnifier, a camera, an OCR device. And when we look at the companies, three of them make hardware and some software for blind and low vision, and the third, or fourth I should say, is TPG Interactive, and that's going to be one of the companies that we talk about today when it comes to web and mobile accessibility. And probably the other recognizable name in this space would be Freedom Scientific, who makes the software called JAWS for Windows.

Chris Willis ([02:42](#)):

Well, thanks a lot, Matt. And obviously from that background, there's no better person to join us in a conversation about ADA website accessibility, so thank you again for being on today.

I'd like to start the conversation by just going over some background. And Kim, I'd like to start with you. We know that ADA website accessibility lawsuits have been proliferating in federal and state courts since about 2015, and it doesn't look like there's any end in sight. In fact, it seems like they're increasing. Can you briefly explain why that is happening?

Kim Phan ([03:12](#)):

Yeah, Chris, it's interesting. The ADA is now over 20 years old, but there's so many open questions and risk factors, and I think litigation is the big reason why we're here today. The reality is that, so far in 2022, almost a hundred ADA lawsuits have been filed per week, and that's just a huge number and a big risk for companies. And specific to websites and mobile apps, we've seen a very high uptick in that area specifically because, the reality is, during COVID-19, that was the primary way that consumers were engaging with companies is through their websites and through their mobile apps, not in store or other types of engagement. So, it's a big risk area, and it's an area that is, I think, not going away anytime soon. We've seen increases not only in lawsuits filed, actual complaints, but also demand letters.

Demand letters typically take the form of a generic statement that there's some sort of accessibility barrier, either using the website or the mobile app, states that there's some non-compliance with the general industry standard, which is the WCAG 2.0 or 2.1 standard, and usually makes some sort of monetary request.

Complaints follow a very similar pattern, that there's some sort of alleged accessibility barrier, seek some sort of injunctive relief, such as taking down the website or making the mobile app inoperative, demanding enhanced training and testing and other periodic audits by the company, and then of course, asking for attorneys' fees.

It's interesting to note that, as far as attorneys' fees go, the ADA is a very attractive law for plaintiffs' attorneys. The top 10 plaintiff law firms in the ADA space actually make up more than 80% of all filed cases. So, it is definitely of attraction to them because they can make back their attorneys' fees, even if there's no other monetary settlement with their individual consumer clients.

Some of the issues that usually come up in litigation are just things that are not resolved yet because there's an absence of clear guidance. Lori's going to talk a little bit about what the DOJ is doing in this space, but until there's some more clarity, we're going to continue to have circuit splits across the country, and there are going to continue to be lawsuits that try to pin down some of these issues. One I'll just highlight really quickly is this question that, whether or not websites and mobile apps should be considered subject to the ADA at all if they're not associated with a company that has brick-and-mortar physical locations. The ADA generally prohibits discrimination against individuals with disabilities in places of public accommodation, and there's an open question that's split across the circuits on whether or not websites should be considered places of public accommodation, especially if they're static, meaning just informational websites only, there's no interactive functionality to apply for a loan or otherwise get other types of products and services through the website.

So those are some of the high-level issues going on in the litigation space. But again, that's probably the big reason a lot of folks are listening today because the ADA website and mobile app litigation is so sensitive right now and very much increasing.

Chris Willis ([06:20](#)):

Kim, one just follow-up about the litigation landscape. Are there any litigation trends that we should tell the listeners about, or are there particular jurisdictions where we're seeing the most lawsuits filed?

Kim Phan ([06:32](#)):

Well, with regard to litigation trends, I would want to flag that the litigation tends to follow specific patterns based on industry. For example, if there are a series of cases that tend to be successful against mortgage companies, you'll see an uptick in that type of litigation, and plaintiffs' attorneys will quickly follow similar types of suits against other types of companies. We've seen that same pattern emerge, not just with mortgage, but with retail, hospitality, restaurants. So once an industry gets targeted, there will be an uptick across the board in ADA litigation filed.

As far as geographic distribution, I want to make sure that it's clear that cases can be filed anywhere. The reality is a website can be accessed from any state, from any city, any jurisdiction, but with regard to where we're seeing the most litigation, there has been an increase in filing specifically in New York, California, and Florida.

Chris Willis ([07:37](#)):

Got it. Thanks very much, Kim. Now Lori, turning to you, I want to cover sort of the Department of Justice angle here because, during the current administration, we've seen the DOJ become fairly active on this issue, with two website accessibility consent orders last Fall, the Fall of 2021, and a new set of guidance that came out in March of 2022 on this topic. Can you briefly tell the audience about those enforcement developments and whether the DOJ's guidance breaks any new ground that we should keep in mind?

Lori Sommerfield ([08:06](#)):

Sure, Chris. Before we get started, I would like to note that it was just the 32nd anniversary of the enactment of the ADA on July 26th, so this is certainly an opportune time for a podcast on this topic.

First of all, with regard to the Biden Administration's enforcement efforts, they have definitely revitalized the DOJ in terms of its enforcement of the ADA after four years of silence and inactivity by the Trump Administration. Last year, in fact, on the 31st anniversary of the ADA, the DOJ issued a press release stating that ADA enforcement was one of its top priorities. This past year, the ADA enforcement activities at DOJ have really focused on removing barriers that prevented people with disabilities from booking COVID-19 vaccine appointments on the internet, and also finding critical vaccine information.

Since November of 2021, the DOJ has entered into settlements with five companies. Two were pharmacies, CVS and Rite Aid, and the other three were grocery chains that had pharmacy arms, specifically Hy-Vee, Kroger, and Meijer, I think is how it's pronounced, grocery stores. And the objective of those enforcement actions were to ensure that individuals with disabilities could book their COVID-19 vaccine appointments easily and obtain vaccine information online. Specifically, these companies were required to conform their web content, including any forms that were necessary to be filled out in order to schedule a COVID-19 vaccine information, to the web content accessibility guidelines, specifically version 2.1 level AA, and the companies were

also required to regularly test their webpages to make sure that they were accessible to individuals with disabilities.

So, what's really notable I think about these consent orders is that they all explicitly mention the WCAG 2.1 AA technical standard. We haven't seen that before until the new Biden Administration, and so that's likely going to be a trend in any new DOJ settlements. But I think it's also important to know that a lot of businesses have already begun adopting and moving toward that WCAG 2.1 AA standard as a best practice because the DOJ hasn't issued a rulemaking yet that would set a technical standard for accessibility compliance.

However, I did want to note that this past Spring DOJ announced that it is undertaking a rulemaking, not with regard to Title III that affects public accommodations and thus businesses, but instead, Title II of the ADA that impacts state and local governments. I think it's interesting that they would go in this direction. It certainly is a step in the right direction, but businesses have really been clamoring for a rulemaking that would set a technical accessibility technical standard. It's a little disappointing that the agency would choose to focus on state and local governments first when relief is really needed for the business community.

But just on a technical note, according to the DOJ's rulemaking agenda, they would plan to issue that notice of proposed rulemaking next Spring, April of 2023, and publish it for a 60-day comment period.

Also, this March, this DOJ unexpectedly issued some guidance on ADA requirements for website accessibility. It focused on both state and local governments under Title II, as well as public accommodations under Title III of the ADA. The guidance talks about the importance of website accessibility for people with disabilities and provides examples of common barriers that can be found on websites. It also offers a lot of plain language and user-friendly advice that can be followed by people who don't have a legal or a technical background.

Although the guidance explicitly states that it's designed to describe how both state and local governments and businesses can ensure that their websites are made accessible to individuals with disabilities, the guidelines really aren't that prescriptive. For example, they don't specify use of a particular technical accessibility standard, and although they talk often about the fact that businesses have flexibility and a choice about how they go about complying with Title III of the ADA in offering their products and services on the web, the DOJ unfortunately really doesn't offer any guidance about how businesses can go about doing that.

It's been a bit disappointing I would say that the guidance did not offer more, and I think it really just doesn't break any new ground. We were hoping for new insights here, and particularly guidance on a technical accessibility guidance, but in my view, the guidance just merely reiterates what experienced practitioners in this area already know based on the DOJ's prior statements and actions. So, it's not terribly helpful.

Chris Willis ([12:37](#)):

Got it. Well, that's disappointing, Matt, what are your thoughts on that recent DOJ guidance? What impact, if any, does it have on businesses, and what next steps should they be thinking about taking in reaction?

Matt Ater ([12:48](#)):

I struggle with the guidance because it wasn't much. The big part that a lot of people talked about was more the plain language side of it, and as well as that might have been nice, to have that, I worry that without some real adjustment to the law itself or regulations even coming down

from Congress, which is probably difficult to expect anytime soon, we will have challenges around this for a long time to go because it could go back and forth between administrations, between different congresses, and things of that nature.

And so right now, without that better judgment, we have customers who come to us and don't know what to do. And as a service provider to companies who are trying to solve their problems and they need assistance, we can provide them guidance on going towards the standards that WCAG 2.1, and eventually soon to be 2.2, but they still want to know what their risk level is, and that comes down to proper guidance from DOJ. And basically, the way we looked at it is, it's great what they're doing with Title II, but they're not done enough with Title III yet.

And then I would also say that there's still a gap on the employment side, but that's really not DOJ's problem. It's going to be more focused on probably EEOC or someone like that, and how employees need the same kind of level of access when they're working at a company to access that content as well.

Chris Willis ([14:11](#)):

Well, setting aside the DOJ guidance, what does Vispero's website accessibility consulting company, TPG Interactive, typically recommend when a client reaches out about website accessibility compliance?

Matt Ater ([14:23](#)):

The way I kind of look at things today, there's obviously the need to both audit your assets and make sure that ... and audit's, in my opinion, a terrible term because it's more financial feeling than it is technical feeling, to me, but the term in this industry tends to be audit, and that's kind of looking at the content to figure out if it's accessible and make recommendations towards solving those problems, and those are very technical things. I'd say they're technical to me. If you want to call it plain language again, it's give me a good label for a button.

But what we need to do with each customer is we have to look at, in our view of it, what are the functional things that you need to do on those websites and mobile apps to be able to use the app for the purpose of the app? Compliance, from our perspective, will never be 100%. If anybody says they're a hundred percent compliant, that's not possible, unless your website never changes.

From an angle of compliance, it's tough for a lot of people to understand that, how do you not become 100% compliant? So, from our perspective, we need to focus on, can people functionally use the assets or the applications that they're using? So, if that means I'm on a website and I want to purchase a plane ticket, can I go through the entire purchase process and complete it, get my reservation sent to me in an email, and be able to still follow along with any updates to that reservation? Can I check in on that reservation? Can I get my boarding pass? And all the things that you have to do all the way through completion of getting off that plane from a digital content perspective, and that's what the focus of most companies should be first.

I think that there's things in compliance that focus on a very broad, a lot of requirements that, you know, be good and we need to do them, but they don't stop you from functionally using something. Our auditors in my field who are going to listen to this podcast will say to me, "Really? You said don't have to do everything." I'm not saying that. I'm just saying that there are things that functionally are more important than others, and I think of those as blockers. Can I complete the task? And if that's the purchase of an item, if that's the research of an item, if that's, can I start and stop a video? Will the video auto play, and can I stop it so I can actually

figure out where I am on the page? You know, whatever those functions are that are critical to your website, that's the part that we need to focus on.

What's unique about our organization compared to others is that, with our connection and sister company, if you want to look at TPGI and Freedom Scientific as sister companies, there's an opportunity where we have the expertise of the user community. Being the fact that we have JAWS for Windows, which is the most popular screen reader on computers in the Windows environment, we have a lot of users that access the content that you're concerned about. And so, some of the value we can bring is we can get feedback from users about content. We can bring in users for that review. We have access to look and see, is it not a bug in your website, but is it a bug in the application, either JAWS or the browser, and provide feedback, and we can make corrections if it's JAWS, whereas other vendors can't do those kinds of things.

So, the tie to the user, I think, is an important one because we spend a lot of time thinking about the content rather than can the user complete the task. And the more we get involved with the user and we see if it's something as usable, we're going to be closer to accessible, and we want to focus more on the user in the future.

Chris Willis (18:05):

That makes complete sense. I'd like to ask you about another phenomenon that seems to be happening in the marketplace right now. And that is, are there any silver bullet or quick fix solutions to achieving website or mobile app accessibility compliance? And in particular, what I'm thinking about is there are some website accessibility companies that offer overlays or widgets that promise quick achievement of technical accessibility through the use of AI or programming code in the browser to basically fix websites, and those are appealing, I think, to some in the industry because they're less expensive than a full website or mobile app assessment and remediation, but can you give us your thoughts on the viability of these overlays and widgets? Do they work and are they effective?

Matt Ater (18:52):

As a user of this technology myself, and I'm not talking about the overlays, but as a user of assistive technology, I'm actually a user of JAWS on Windows, and I use it in iPhone, so I use a voiceover on my phone, when I run into those instances where I have the option to enable an overlay or not, I choose not to enable the overlay.

The challenges that I have when I have gone through the process is that, when we think about what a automated tool can find, we have to think that an AI generated tool that's going to go catch things is going to be finding the same amount of things. And so, some of those examples is ... the concept around automated tools is that they find 35% of the issues, and I'm rounding. It could be up or lower than that, but depending on who you talk to. If you look at it from that perspective, then you say, "Well, where's the other 65% being caught by these tools?" And it's not.

I don't have a problem with AI from a concept that people should invest in finding out, can AI solve some problems in the future? Where my problems and our concerns are that AI today, without some verification at the end, may leave a user stuck somewhere. So, if AI looks at something and says, "This control appears to be this type of thing," and it switches from ... I'm just going to use a list box to a combo box, and I'm just pretending whatever those are. And that changes the entire experience of the user, but now they can't interact with it. That's where our

concerns would be, is that we let something in the community go because we said a machine can fix it without any verification.

It reminds me a lot of security in that, the concept was don't just do security, but you have to also have independent verification that it actually worked. In this world of accessibility, if you enable something and don't test and verify every single thing, but you're having tools in the background just solving problems without some level of verification, who's to say it actually solved the problem?

Additionally, we see sometimes where it's adding too many changes to a site that weren't needed. I've also seen sites when we don't enable it and the site's completely usable, but that company, who was a small business, chose to do it because of fear. They chose to enable this overlay at the time because they were fearful that they were going to get sued or they had gotten sued and this was a solution for it, but their website was perfectly accessible, and it wasn't changing a lot.

And if it had been worked with somebody who would just go through and verify, "Can you use it?" they may have had some opportunity to solve that problem. But when you think about small businesses, and when we talked about Title III, we didn't focus on the size of the business, but when we think about the small businesses and the impacts that they're having in this, number of lawsuits that have been hitting them, it's very impactful to their businesses. They can't afford to solve some of these problems because they're using tools to develop their websites that they probably don't spend time developing themselves. They're paying a third party to kind of put up a site.

It's a very difficult time in all this, whether the right tools, and going back to the overlays, are being used. As a screen reader user, if I get to a website and it has an overlay and I cannot interact with a website, it's no different than going to a website that's not accessible at all. I might as well just walk away from it.

Chris Willis ([22:20](#)):

Got it. Well, that makes good sense, and thank you very much for those comments with regard to that new technology. Kim and Lori, let me turn back to you and see if you have any additional thoughts on what businesses can do to manage their ADA and other compliance risks for digital assets. So, Lori, let me give you the first shot on that.

Lori Sommerfield ([22:38](#)):

Thanks, Chris. I'd be happy to take that question. First, as Matt just pointed out, it's critical that companies undertake the step of assessing and remediating their consumer facing websites. But concurrently, companies should also consider developing an ADA risk management program, and you should think of this just like any other compliance risk management program that your company implements and maintains.

Let me just touch on four or five of the critical elements of an effective ADA risk management program. First of all, it's critical to have in place a governing policy, and that's a digital asset accessibility policy that is internal facing. That policy basically sets forth the framework of your program, it articulates roles and responsibilities, and explains how you'll manage those ADA risks for digital assets going forward.

Secondly, another critical document is drafting an accessibility statement that will be posted on the main page or linked to your main page of your website or mobile app. An accessibility statement basically states the company's commitment to the ADA and ADA compliance, and

then offers individuals with disabilities technical support and assistance in case they encounter any difficulties in accessing website or a mobile application. This can include things like an 800 number or an email address to make it easier for the individual with disability to communicate with the company.

The accessibility statement also provides a feedback loop so that that individual can provide helpful information about how your digital assets could be made more accessible to individuals with disabilities.

So, in my view, those are the two key governing documents. You need that digital asset accessibility policy, and then the accessibility statement posted on each of your consumer facing websites or mobile apps.

Secondly, it's important that you designate someone who's responsible for managing your ADA risk management program, and typically that's called an accessibility coordinator. But you should think about management of these ADA risks more holistically and bring in others from a cross-functional perspective who might form a committee to help manage those risks. That can be people from legal, compliance, product managers, and marketing. But it's important to think about this in a more macro sense, rather than just being a responsibility of legal or compliance.

A couple of other important issues I'll just touch on, think about ongoing monitoring after you establish your program. How are you going to ensure that your digital assets are continuously available to individuals with disabilities and made accessible? Whether that's through manual processes or tools. Vendor agreements, make sure that any of your expectations about technical standards or accessibility requirements are embedded in your vendor contracts. And finally, make sure that you're responding promptly to any consumer complaints from individuals with disabilities that deal with accessibility deficiencies of your digital assets. Make certain that you're reviewing those complaints, responding to them quickly, and escalating concerns within the company if needed to make sure that those issues are remediated.

So those are my thoughts, Chris, on what would be the effective components of an ADA risk management program.

Chris Willis ([25:47](#)):

Kim, I'm going to give the parting shot to you. What are your last additional thoughts on what businesses can do to manage these risks? And maybe with a little bit of a privacy angle thrown in.

Kim Phan ([25:59](#)):

I would just really emphasize that Lori is spot on, that your efforts have to be both internal and external. I would say that many companies sometimes focus on one without the other. They'll post an accessibility statement to their website without building out the internal processes to actually respond to some of those incoming communications from those with disabilities, or they will build out this internal process, but they don't communicate how to trigger that process to those who might want to take advantage of some of these processes they build out to respond to ADA need.

The one last parting thing that I will share, Lori went over the DOJ and what's happening on the federal level, but companies should also be mindful that, on the state level, ADA is not far from their minds either. Accessibility is certainly an issue that has popped up in some of the state privacy laws that we've seen in recent years. For example, the California Consumer Privacy Act expressly requires that privacy disclosures that are being made to consumers have to be made

available in an accessible format. And while they point to the WCAG 2.1 standard for accessibility, they stop short of actually requiring it. But the reality is that, since they've pointed it out, it's a safe harbor if you are implementing that standard internally so that you can make these external communications to those with disabilities in a way that they can access them. So that's my little parting tip, is it's not all federal. There are some state activities.

Chris Willis ([27:31](#)):

Thanks very much, Kim, and so I want to thank you and Lori for being on the podcast today, and also very special thanks to Matt Ater from Vispero for sharing his insights with our listeners today. And then of course, thank you to our listeners themselves for tuning into this episode.

Don't forget to visit our blog consumerfinancialserviceslawmonitor.com, and hit that subscribe button so that you can get all of the updates that we post on the blog. And don't forget to go visit us over at troutman.com and add yourself to our consumer financial services email list so that you can get our alerts and notices of our webinars. And of course, stay tuned for a great new episode of this podcast every Thursday. Thank you all for listening.

Copyright, Troutman Pepper Hamilton Sanders LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at troutman.com.