

# Americans with Disabilities Act: Insurance Coverage Considerations

The Americans with Disabilities Act of 1990 (ADA) has had a profound impact on the US regulatory and legal environment, particularly for retailers, real estate companies, and organizations with significant web presences. The unique nature and evolution of claims citing the ADA makes it difficult to determine how insurance policies will respond, and increasing claims trends underscore the need for organizations to secure appropriate coverage.

## THE ADA'S ORIGINAL INTENT

The ADA was passed by Congress and signed into law with intentions that mirror those of the Civil Rights Act of 1964. The purpose of the law is to prohibit discrimination based on disabilities and hold institutions accountable for equal opportunity.

The ADA is best understood when broken down into its five titles, or sections:

- Title I addresses equal employment opportunities. Often these regulations are enforced by the Equal Employment Opportunity Commission (EEOC).
- Title II addresses state and local governments and services of public entities.
- Title III addresses public accommodations for privately held businesses, holding them to minimum standards for physical aspects of their property. In terms of insurance, the section focuses

on premises exposures related to the ownership and operation of properties, including in the retail, real estate, and hospitality industries.

- Title IV governs telecommunications, including requiring internet and phone service providers to provide services to those with hearing or speech disabilities.
- Title V includes several miscellaneous provisions. Among other items, this section of the law makes clear that the ADA does not invalidate other preexisting local, state, or federal laws governing disability protections. It also precludes any claims being made on the basis of “reverse discrimination.”

Each title of the ADA represents a unique challenge for businesses and others. And each provides a different avenue through which claims can arise.

## EVOLUTIONS AND AMENDMENTS

Since the ADA's introduction in 1990, the law has evolved. In doing so, it has affected companies in certain industries, particularly real estate and retail, largely due to their high foot traffic.

Significant changes to the ADA include:

- The 2008 amendment designed to broaden the definition and interpretation of “disability,” clarifying that the law applies to an individual with “disability or impairment that substantially limits one or more major life activities.” Broadening this definition has widened the exposure for potential claims to be filed, using the ADA as a basis.
- The Department of Justice’s (DOJ) “final rule” — implemented in October 2016 — changed the 2008 amendment, further expanding coverage under Titles II and III with broad interpretations of disability.
- Detailed specifications for public properties that are subject to the ADA. This can include precise mandates on how properties must be structured, parking space length, ramp height, curb width, mirror height, and signage. Violating these mandates can be grounds for a suit alleging failure to comply with the ADA.

## TRENDS AND CASE LAW

The types of damages asserted in these claims — and how commercial general liability (GGL) and other insurance policies respond — can vary. ADA claims often include multiple factors and assertions. If a claim results in an actual bodily injury or property damage — meaning a tangible loss suffered by a third party — a CGL policy will generally respond. But claims citing intangible injuries — including the inability to access a website or storefront, and the resultant upgrades required by law — are often not covered under CGL policies.

As claimants and attorneys better understand the nuances of the ADA, the frequency of claims alleging violations of the law is increasing. In 2016, 6,601 ADA Title III lawsuits were filed in federal court, a 37% increase from 2015, according to law firm Seyfarth Shaw (see Figure 1). More than 70% of these suits were filed in California, Florida, and New York; local laws and legal climates

in these states often contribute to higher judgements.

In addition to a rise in the frequency of ADA suits, there has also been a noted shift in plaintiffs' interpretation of language within the law. For example, claims citing Title III of the ADA due to non-compliance of a business website have surged in recent years. Until very recently, website accessibility had been unregulated. With revisions introduced in 2016, the ADA now presupposes that an internet domain functions in the same capacity as a "public space" — and because there is no cohesive federal or state standard, a door has been opened for litigation.

The US Department of Justice (DOJ) has considered issuing binding regulations on website accessibility, but has delayed that effort until 2018. The DOJ has, however, referred to the international Web Content Accessibility Guidelines (WCAG) to measure compliance, with a handful of courts following suit.

## RECENT ADA LAWSUITS

### *J. Carlos v. Winn-Dixie Stores Inc.*

The plaintiff filed suit against a retail chain, citing his disability (blindness) and his inability to access information, goods, and services on the retailer's public website. Because the website was not compatible with "screen reader technology," the plaintiff argued he is physically unable to access the information and that the website non-compliant under Title III of the ADA. In June 2017, the US District Court of the Southern District of Florida delivered a verdict in favor of the plaintiff.

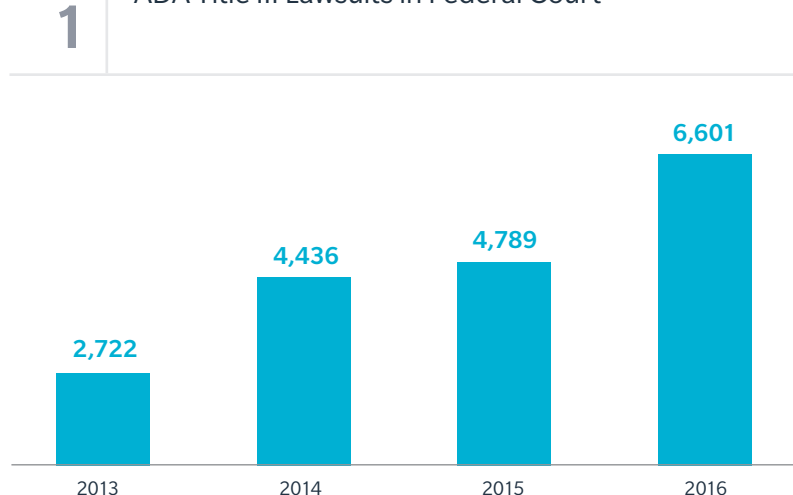
### *Heinzl v. Cracker Barrel*

A former basketball player alleged that a national restaurant chain's handicapped parking spaces did not meet code and thus violated federal law. In May 2017, the company settled the class-action suit, agreeing to address specific issues in its parking lots over the next several years.

### *S. Nowak v. UC Berkeley*

Two members of the National Association of the Deaf complained about the inaccessibility of UC Berkeley's online audio and video content. The Department of Justice concluded that the university violated Title II of the ADA because "significant portions of its online content are not provided in an accessible manner when necessary to ensure effective communication with individuals with hearing, vision or manual disabilities." The university subsequently removed public access to its online content and said that it will "work to create new public content that includes accessible features."

FIGURE 1 ADA Title III Lawsuits in Federal Court



***T.B. v. Arrowhead Medical Center***

The plaintiff alleged that the hospital staff failed to provide a qualified sign language interpreter when necessary to ensure effective communication with her while her husband was a patient at the hospital. The suit was filed under Title II of the ADA. In August 2015, the hospital entered into with the Department of Justice to resolve the allegations. Among other actions, the hospital agreed to provide video remote interpreting or an in-person interpreter to deaf patients.

***Alvey v. Gualtieri***

The plaintiff alleged that when she was admitted to a Pinellas County, Florida, homeless shelter, she “requested a raised bed at the shelter as she had difficulty lifting herself from her assigned mat on the floor.” The shelter did not provide her with a raised bed; she later fell and was injured, and was denied reentry to the shelter after being taken to the hospital. In October 2016, the US District Court for the Middle District of Florida granted the defendant’s motion to dismiss for lack of subject matter jurisdiction.

## INSURANCE COVERAGE

The insuring agreement in the standard ISO CGL form states it will pay “those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.” The same concept applies for personal and advertising injury.

Based on this language, it might appear that some level of coverage for ADA claims exists under a CGL policy in cases where there is a tangible and evident loss to a third party. However, this assumes the absence of exclusions and the presence of tangible bodily injury. Generally, most insurers will include some type of “discrimination exclusion,” which excludes bodily injury or personal and advertising injury arising from discrimination based upon race, creed, color, sex, age, disability, handicap, or religion. Theoretically, this largely excludes any claim that cites the ADA as the basis for relief.

The remediation costs that often accompany such claims — including the costs required for property owners to update their property to meet ADA specifications — are also generally not covered under the standard CGL policy.

Still, some coverage for ADA claims may exist under a CGL policy. For example:

- A policyholder could secure a positive coverage grant for discrimination, elimination of the discrimination exclusion, or a modified definition that omits discrimination pertaining to physical disability or handicap. This would provide coverage

for such claims, regardless of whether a physical bodily injury or property damage loss is present.

- Insurers are often able to expand upon the traditional ISO language of bodily injury to include humiliation, mental injury, mental anguish, and shock. Thus a CGL policy could respond to claims alleging inaccessibility of company websites if the “electronic data” exclusion is removed or amended.

A more definitive solution for ADA claims is offered under employment practices liability (EPL) policies with coverage for third-party violations. However, there are limitations to coverage. For example, the costs an owner incurs to bring a property or website into compliance, as well as any non-monetary or injunctive relief that a court might award or is agreed to in settlement, are not typically covered. In constructing a program with affirmative coverage, policy wording is critical. Although EPL insurers generally use consistent definitions, organizations should pay close attention to the following terms:

- Employment practices violations: Among other items, this should be defined to include both “actual and alleged” harassment and discrimination.
- Third-party violation: This can be defined to mean any “actual or alleged” harassment or unlawful discrimination or the “violation of the civil rights of a person relating to such harassment or discrimination.”
- Loss: A broader definition could offer greater coverage for insureds.

## MANAGING YOUR INSURANCE PROGRAM

It can be difficult for insurers to quantify their potential exposure to ADA claims and to underwrite such risk. Most insurers seek to exclude coverage completely (via the discrimination exclusion). But as litigation continues to increase in frequency, insurers will need to adapt and offer new products to address policyholder demands.

For now, insurance buyers — particularly those in the retail and real estate industries or with significant web presences — should work with their insurance advisors to:

- Understand available coverage options.
- Identify potential gaps and areas where they may be underinsured.
- Secure effective CGL and EPL coverage and seek to remove exclusions that could limit coverage under these policies.

## ABOUT THIS BRIEFING

This briefing was prepared by Marsh's Casualty Practice, with contributions from the Employment Practices Liability Group within Marsh's FINPRO Practice.

For more information, contact:

### BLAKE KINSLER

Vice President  
US Casualty Practice  
+1 617 385 0248  
blake.kinsler@marsh.com

### KELLY THOERIG

Employment Practices Liability  
Coverage Leader  
+1 804 344 8975  
kelly.thoerig@marsh.com

This document and any recommendations, analysis, or advice provided by Marsh (collectively, the "Marsh Analysis") are not intended to be taken as advice regarding any individual situation and should not be relied upon as such. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting, or legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as actuarial, tax, accounting, or legal advice, for which you should consult your own professional advisors. Any modeling, analytics, or projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. Marsh makes no representation or warranty concerning the application of policy wording or the financial condition or solvency of insurers or reinsurers. Marsh makes no assurances regarding the availability, cost, or terms of insurance coverage. Although Marsh may provide advice and recommendations, all decisions regarding the amount, type or terms of coverage are the ultimate responsibility of the insurance purchaser, who must decide on the specific coverage that is appropriate to its particular circumstances and financial position.

Copyright 2017 Marsh LLC. All rights reserved. MA17-15094 USDG 21091