

# Americans with Disabilities Act: Recent Trends that Could Affect Your Association

by  
Mark D. Alcorn, J.D., M.B.A.

The Americans with Disabilities Act was adopted some years ago, and is still the source of controversy and change today. Some of that change – particularly change relating to website access and so-called “drive-by lawsuits” could have a direct effect upon your association.

## **Website Access**

The association industry is likely to be significantly affected by court battles over the accessibility of websites to blind persons.

Barnes and Noble, Target, Southwest Airlines and other major companies are being sued by visually impaired persons under the Americans With Disabilities Act (ADA) because their websites do not provide the same access to blind persons that it provides for sighted customers. The court battles have yet to be decided, but the cases have implications association with websites regardless of the outcome of the cases. If the courts find that the defendant’s websites must be accessible to visually impaired persons, the decisions will have widespread implications for most websites, even small websites operated by nonprofit organizations.

The ADA prohibits discrimination on the basis of disability where access to goods and services of “places of public accommodation” is concerned. Historically, the ADA has applied to brick-and-mortar facilities, but the boundaries of the ADA might be changing with the times. The issue is whether a website will be interpreted as “place(s) of public accommodation” by the courts. It is unlikely that Congress considered whether the Internet could be regarded as a place of public accommodation – the Internet was relatively unknown in 1990 -- but expanded interpretation of law is not unusual.

Associations that have websites will almost certainly be viewed as public accommodations if commercial websites like those of Target and Southwest Airlines are held to be places of public accommodation. Although associations are generally private organizations, portions of their websites are frequently intended for public use, and restricted portions of their websites (member only areas) may need to be as available to visually impaired members as they are for other members. Even if the courts determine

that websites are not places of public accommodation, many associations will want to make their websites as accessible as possible.

Websites are frequently accessible by sight-impaired persons by screen-reading software that interprets an HTML page for a user. Web pages with heavy graphic content or confusing coding are difficult for screen-reading software to interpret, and this may limit or prevent access. For an excellent outline of guidelines for accessible web page coding, see “World Wide Access: Accessible Web Design” at

<http://www.washington.edu/doi/Brochures/Technology/universal.design.html>.

Application of these or similar guidelines will improve the accessibility of your association’s website, and possibly help keep it out of court.

### **Drive-By Lawsuits**

Another trend connected with the ADA is the filing of numerous lawsuits by persons with physical disabilities, frequently targeting small entities with even the slightest technical violations of ADA parking, walkway or bathroom access. Some plaintiffs – usually lawyers or persons employed by lawyers -- simply drive from business to business, looking for defects in access. More often than not, no significant notice is given prior to the filing of such suits in Federal court. The concern is not over entities that refuse to comply with the ADA; they may well deserve to be sued. Rather, entities eager to comply are being sued over minor violations, and forced to pay thousands of dollars to attorneys willing to bring such suits. (By the way, very few attorneys are willing to bring such suits, despite it being a profitable enterprise, because they regard it as plainly unethical and offensive.)

The key problem is economic: the cost of defending such suits far exceeds the amount for which the suits can generally be settled. In short, a plaintiff files a suit and – regardless of merit – the defendant is compelled to settle the suit because the cost of defense is so high. Some call this a “shake-down” suit or “legalized extortion”, but to a large degree it is legal under the ADA. The ADA imposes serious penalties even for the slightest violations, and provides no notice requirements to give potential defendants, large or small, the opportunity to be informed of an access defect and the opportunity to correct that defect. Efforts are underway to correct this flaw in the ADA through Federal legislation.

Associations should be mindful of this trend for their own buildings, and on behalf of their members who own businesses. Associations and their members should take steps to understand ADA access guidelines, organize in a manner calculated to limit liability (incorporation), and reduce risks from leases. More information concerning ADA suit abuse can be found at [www.ADAabuse.com](http://www.ADAabuse.com), [www.ADAreform.com](http://www.ADAreform.com), and [www.SDCALA.org](http://www.SDCALA.org).

### **Closing**

This article attempts to update readers concerning a complicated regulatory scheme (the ADA) in a very brief and informal manner. It must not be read or used as legal advice. Questions concern the topics addressed in this article may be referred to Mark Alcorn, Alcorn & Associates, via e-mail at [Mark@AlcornLaw.com](mailto:Mark@AlcornLaw.com).

*Copyright 2006, Mark D. Alcorn, J.D., M.B.A. All rights reserved.*

*Mark Alcorn is a Sacramento-based lawyer and management consultant and founded Alcorn Associates in 1997. Mark holds a Juris Doctorate from the McGeorge School of Law, University of the Pacific, and a Master of Business Administration from California State University at Sacramento. Alcorn Associates focuses on meeting the legal and management consulting needs of non-profit organization executives and their boards. Mark can be reached at (916) 444-5959, or via e-mail at [mark@alcornlaw.com](mailto:mark@alcornlaw.com).*