

# Client Alert

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## The Next Wave of Accessibility Litigation in the Retail Industry: Braille Gift Cards

For the past few years, retailers have been confronted with a tidal wave of litigation alleging that their websites are inaccessible in violation of the Americans with Disabilities Act (ADA). Indeed, in 2018 alone, one analysis determined that there were at least 2,258 web accessibility cases filed in federal court, a 177 percent increase from the previous year.<sup>1</sup> Of these cases, a total of 1,564—over 69 percent—were filed in New York federal courts by just a handful of lawyers, including Jeffrey Gottlieb, Bradley Marks, C.K. Lee, Joseph Mizrahi, Jonathan Shalom and Doug Lipsky, with a surge following two unsuccessful motions to dismiss in cases involving Five Guys and Blick Art.

While improving website accessibility is certainly a laudable goal, Tom Stebbins, executive director of the Lawsuit Reform Alliance of New York (LRANY), has observed that these cases “are cut-and-paste lawsuits that are not about accessibility but about making money.”<sup>2</sup> Due to a number of factors, including an uncertain regulatory environment, inconsistent and often conflicting opinions, the unfavorable economics of individualized litigation and fears of negative public relations, many retailers opt to resolve these cases early in the litigation process as single-plaintiff settlements. Typically, according to LRANY, a successful plaintiff in such a settlement will receive only \$500 per case, but attorney’s fees average many times that amount, approximately \$16,000 per case or more,<sup>3</sup> depending on the law firm, the court and other factors, thereby giving plaintiff’s lawyers ample incentive to file as many cases as possible. This dynamic has led to the growth of a lucrative cottage industry of web accessibility litigation in New York, where the same group of attorneys and serial plaintiffs operate a litigation “mill” of cut-and-paste complaints that repeatedly target the same retailers and restaurants over and over again. One plaintiff’s attorney, according to LRANY, has made \$7.97 million in attorney’s fees between 2010 and 2017 by operating a litigation mill in just this manner using the same eight serial plaintiffs.

In response, the New York legislature has recently begun considering bills to protect New York-based businesses. Frustration also seems to be growing among the judges assigned to preside over these cases, with one judge recently warning in an opinion dismissing a case against Apple that “those who live by the photocopier shall die by the photocopier.”

Against that backdrop, the same New York-based law firms that have spearheaded the web accessibility litigation are now testing a new front: gift cards. Since October 24, 2019, this new tidal wave of accessibility litigation has generated at least 116 cut-and-paste complaints in New York federal courts by the same attorneys and serial plaintiffs, of which 94 were filed in the Southern District and 22 were filed in the

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<sup>1</sup> See Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018 (Jan. 31, 2019) (available at <https://www.seyfarth.com/news-insights/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018.html>).

<sup>2</sup> See Lisa Fickenscher, Lawyers Cash In On Suits Demanding ADA-Compliant Web Sites, N.Y. Post (July 11, 2017).

<sup>3</sup> See LRANY, Serial Plaintiffs: The Abuse of ADA Title III (March 3, 2018) (available at <https://lrany.org/wp-content/uploads/2016/07/ADA-STUDY-FINAL-3-13-2018.pdf>).

Eastern District. All of these complaints are nearly identical—23 pages long and only differing in the identity of the defendant—and all are premised on the same novel legal theory that the Americans with Disability Act requires all gift cards to be available in Braille. The targets selected by plaintiffs in this new wave run the full gamut of retail establishments, including big box retailers, grocery stores, movie theaters, restaurants, clothing brands, and online gaming and other services.

Emphasizing the size of the \$400 billion gift card market and how lucrative the gift card business is for retailers, the complaint expresses dismay that only Starbucks currently offers a gift card in Braille. The failure of every other retailer to offer the same, according to the complaint, denies plaintiffs equal access to the stores and furthers intentional discrimination against blind and visually impaired consumers in violation of the ADA, New York State Human Rights Law and New York City Human Rights Law. The complaint requests certification of a nationwide, New York state or New York City injunctive class, and/or a Rule 23(b)(3) damages class, of all legally blind individuals “who would like independent access” to retail store gift cards and have been denied that right. To remedy the alleged violation, plaintiffs are requesting several “simple and inexpensive” reforms, including a requirement that (1) the name and denomination of every retail gift card and its packaging be printed in Braille; (2) other pertinent information, such as terms of use, privacy policies, ability to ascertain gift card balance, restrictions, etc., be printed in Braille on the card, affixed to the card or inserted in the packaging; and (3) the size and texture of Braille gift cards be different from regular gift cards to allow blind and visually impaired consumers to find them. On top of that, plaintiffs are requesting compensatory damages, including all applicable statutory and punitive damages available under New York law.

This new wave of accessibility litigation in New York presents a number of issues for retailers to consider:

- Indemnity – Retailers do not typically manufacture gift cards themselves, but rather contract with a third party to design, manufacture and help run their gift card program. As such, the first question any retailer needs to examine is whether their claim is indemnified and, if so, does the retailer want to tender the defense of the claim and/or allow the manufacturer to assume the defense if the indemnity is accepted. There are a variety of considerations that affect this decision, but it is quite possible—perhaps even likely—that disputes could arise between retailers and gift card manufacturers and, if so, the possibility of satellite litigation over the indemnity is not out of the question.
- The Legal Issues – Even putting aside the obvious standing questions, the Braille gift card cases present a variety of novel issues. The ADA has never been held to require that gift cards be printed in Braille and, to date, the US Department of Justice’s ADA Standards have likewise never included such a requirement. While the ADA may require “auxiliary aids” in certain circumstances as a reasonable accommodation, there are a variety of types of such aids in addition to Braille materials, including qualified readers and “other effective methods of making visually delivered materials available to individuals with visual impairments,” 28 C.F.R. 36.303(b). For example, in *West v. Moe’s Franchisor, LLC*, No. 15CV2846, 2015 WL 8484567, at \*3 (S.D.N.Y. Dec. 9, 2015), a SDNY judge determined that it was sufficient that a restaurant made employees available as “qualified readers” to assist visually impaired customers in using a touchscreen fountain drink machine. The Braille gift card lawsuits, by contrast, seek to transform disability law so that Braille materials—and only Braille materials—must be used to satisfy the auxiliary aid requirement. The merits of this (and myriad other) novel legal arguments presented by this new wave will likely need to be assessed by an appellate court at some point and, as such, retailers would be wise to position their defense of the case with that eventuality in mind.
- The Feasibility of the Proposed Remedy – The Braille gift card cases also present numerous practical questions regarding the relief requested, particularly given the upcoming holiday season. While plaintiffs claim that it would be “simple” and “inexpensive” to print cards and associated packaging and documents in Braille and make the cards a different size, it is not clear that it would be as easy or cheap as plaintiffs suggest. As an initial matter, how would retailers address visually impaired people who cannot read Braille? How could denominations be printed in Braille for gift

cards that do not have pre-set denominations? If you change the size of Braille gift cards, would that require a change to endcap displays or POS systems and, if so, who would pay for that? Would gift card distribution agreements need to be amended and, if so, how would pricing change? Would the associated burden on retailers be relative, such as that it may not be unduly burdensome for, say, Starbucks but it would be for smaller struggling retailers subject to the so-called “retail apocalypse”? If a retailer makes gift cards available online via an accessible website, does it have to also make gift cards available in Braille in its brick-and-mortar locations? And how does the exponential growth of the digital gift card market play into a retailer’s analysis? Simply put, there is a lot for retailers to think through and, even if they were inclined to try to make the cases go away quickly by entering into single-plaintiff settlements akin to the web accessibility settlements, there may not be as much wiggle room in this context to make that possible.

- Copy Cats – Retailers must be mindful of the potential for “copy-cat” lawsuits by other plaintiff’s attorneys in other jurisdictions, most notably in California, Florida, Pennsylvania and other plaintiff-friendly jurisdictions. Since plaintiffs chose to raise the Braille gift card issue as a public complaint, rather than a demand letter, any voluntary single-plaintiff settlement will immediately gain the attention of other plaintiff’s attorneys around the country, thereby creating a wave of follow-on cases. Just as the number of website accessibility cases rose from 814 in 2017 to 2,258 in 2018, largely due to this copy-cat phenomenon, the number of Braille gift card class actions could explode just as quickly. Accordingly, retailers should consider the potential for copy-cat lawsuits before indulging the temptation to try to enter into a single-plaintiff settlement of one case ... because it is highly unlikely to be the only case.
- Slippery Slope – While a retailer may wish to offer gift cards in Braille as a customer service, there are potential far-reaching implications if plaintiffs were successful in establishing that it is legally required. Indeed, the same rationale that plaintiffs are using in the Braille gift card cases could be easily expanded and applied to other written documents, including store credit cards, advertising circulars, store signage, coupons, receipts, etc., which in turn could attract their own copy-cat lawsuits. As such, retailers would be wise to view these cases more holistically within this larger context.

In light of these concerns, retailers should consult with experienced counsel to evaluate the claims made by plaintiffs and explore the options for defending this new wave of accessibility litigation using a holistic approach. In retrospect, many retailers would likely acknowledge that they wished they handled the onset of the web accessibility litigation differently. Now they have that opportunity. Will the industry learn from the past ... or allow a repeat of the same dynamics that led to the explosion of website accessibility litigation?

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