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“Testers” May Still Have Standing to File Web Accessibility Lawsuits

Article By:

Adam R. Bialek

Nicole Haimson

On December 5, 2023, just two months after oral argument, the Supreme Court of the United States issued its decision in Acheson v. Laufer. While it was expected that the Supreme Court would find the matter moot, it was hoped that the Court might resolve a circuit split regarding whether “testers” have Article III standing to challenge a public accommodation’s failure to provide disability accessibility information on its website (where the tester lacks an intention to visit the accommodation).

As feared, following the oral argument, the Court merely dismissed the case underlying the writ as moot. The Court did, however, remand and vacate the First Circuit ruling so that the underlying decision granting standing is no longer dispositive. Reserving judgment on the issue of tester standing for future cases, the Supreme Court essentially preserved the uncertainty created by holdings in the circuit courts. Nevertheless, in a concurring opinion, Justice Clarence Thomas made clear his views on the issue of standing, that Laufer and similar testers should not have standing.

Background
As detailed in our firm’s previous publications regarding this case, Laufer is a serial website accessibility plaintiff who through her former counsel, Tristan Gillespie, has filed hundreds of lawsuits based on nearly identical pleadings in district courts across the United States. Laufer routinely alleges that her mere observation of the fact that various defendant hotels’ online reservation sites are noncompliant with the ADA’s Reservation Rule (28 C.F.R. § 36.302(e)(1)(ii)) results in actionable injury to her.1

Critically, Laufer had no intention of ever visiting the defendants’ hotels, nor did she do so. Rather, she had only visited defendants’ websites because she was a self-proclaimed “advocate” and “tester” and “to ensure that these systems comply with ADA regulations […]"2

In the case underlying the Supreme Court’s review,3 the United States District Court for the District of Maine dismissed the suit for lack of Article III standing. On appeal, the U.S. Court of Appeals for the First Circuit reversed, concluding that the denial of accessibility information was an actionable Article III injury—and “[t]hat Laufer had no intent to use the information for anything but a lawsuit

doesn’t change things."4

The Supreme Court granted review as the circuit courts are split as to whether a tester plaintiff’s observation of an ADA accessibility violation on a business’s website, without intent to use or access the services or products offered, constitutes sufficient injury to confer standing to sue the website’s operator. However, after briefing began, Gillespie was investigated and subsequently suspended from the practice of law for allegedly lying in fee petitions and during settlement negotiations.5 As a result, Laufer voluntarily dismissed many of her lawsuits, including the underlying action against Acheson. A Notice of Voluntary Dismissal (Dismissal Notice) was filed in Laufer v. Acheson Hotels, LLC, No. 20-CV-00344 (D. Me. Jul. 20, 2023), ECF No. 45.

Laufer’s current counsel filed a Suggestion of Mootness with the Supreme Court, arguing that due to Laufer’s “abandonment of her claim against Acheson, there is no reason for this Court to expend further time or judicial resources on the [tester] standing question presented in the petition."6 In response, Acheson contended that “Laufer is abandoning her case to pave the way for Laufer and similar [tester] plaintiffs to resume their campaign of extortionate ADA suits against unwitting small businesses without the hindrance of an adverse ruling from this Court.”7 The Supreme Court initially denied Laufer’s Suggestion of Mootness, but added the question of mootness to be considered at oral argument.8

The Opinion

On December 5, 2023, the Supreme Court unanimously held that Laufer’s lawsuit against Acheson was in fact moot and remanded the matter to the First Circuit for vacatur and dismissal. Justice Barrett, delivering the opinion of the Court, noted that the bench was unconvinced that Laufer abandoned her case simply to evade the Supreme Court’s review. Rather, the lawsuit was seemingly dismissed because Gillespie had been sanctioned and Laufer had represented that she would not file any other similar lawsuits. The Court noted that while this lawsuit was moot, the split between the circuits regarding tester standing is still “very much alive,” and the Court was open to ruling on this issue in future cases.9

In a concurring opinion, Justice Thomas opined that the Court should have ruled on the issue of standing because standing and mootness are both jurisdictional issues falling under the Court’s purview under Article III, and there is no mandate requiring the evaluation of mootness prior to the evaluation of standing. Analyzing standing, Justice Thomas found that Laufer had no standing because “the ADA prohibits only discrimination based on disability—it does not create a right to information."10

Further, Justice Thomas stated Laufer’s “lack of intent to visit the hotel or even book a hotel room elsewhere in Maine eviscerates any connection to her purported legal interest in the accessibility information required by the Reservation Rule."11 Turning to the validity of testers initiating lawsuits, Justice Thomas noted that it is the function of government officials, rather than private plaintiffs, to ensure and monitor compliance with the law.

In addition, Justice Thomas noted that allowing tester plaintiffs sets a dangerous precedent:

An official could have informed Acheson Hotels that its website failed to comply with the Reservation Rule, and Acheson Hotels could have updated its website to explain it had no accessible rooms. Laufer, however, chose to “enforce” each technical violation of the ADA she could uncover with a lawsuit. Because she is a private plaintiff, no discretion was required or exercised. And, of course, Laufer has been willing to forgo her suits if a hotel pays up, even though the ADA provides for no

damages for private litigants. Laufer's aggressive efforts to personally impose financial penalties for violations of the Reservation Rule go far beyond the role that Congress envisioned for private plaintiffs under the ADA.12

Whereas a governmental agency might not be so willing to dismiss a claim for a monetary payment, Laufer's settlements routinely led to just that, dismissal in exchange for a monetary payment.

Impact

The major key takeaway from Acheson v. Laufer is that, to the disappointment of website operators, "testers" can still sit at home with no intent to visit a hotel and then sue the hotel in some jurisdictions. Disability advocates were undoubtedly relieved that the Court declined to rule on the issue of standing and that testers still have the right to sue and enforce the rights of the disabled community at large. However, Justice Thomas's pointed concurrence may be a preview of the Court's future decisions, and website testers' days might be numbered.

It also remains to be seen whether Justice Thomas's concerns about standing will extend beyond the Reservation Rule and impact the ever-increasing claims brought by disability advocates against disparate businesses with websites that fail to meet the current Web Content Accessibility Guidelines (WCAG).

In the meantime, while website operators await a definitive decision from the nation's highest court, website accessibility lawsuits continue to be filed at a staggering pace. To mitigate potential legal exposure, website operators are encouraged to monitor their websites' accessibility and work with their web developers to take steps to comply with the WCAG. Website operators should consider whether to have an accessibility statement on their webpage that provides resources to individuals with disabilities who have difficulty navigating aspects of a website. Further, website operators should review their vendor contracts and insurance policies to ensure they are properly protected in the event they are sued.

Wilson Elser continually monitors this important issue and will supplement its coverage of this topic as appropriate.

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1 Petition for Writ of Certiorari, 2022 U.S. S.Ct. Briefs LEXIS 3609, at p. 3, Acheson Hotels, LLC v. Laufer (22-429) (Nov. 4, 2022).

2 Laufer v. Acheson Hotels, LLC, No. 2:20-cv-00344-GZS, 2021 U.S. Dist. LEXIS 93703, at 4 (D. Me. May 18, 2021).

3 Deborah Laufer v. Acheson Hotels, LLC, No. 20-cv-00344- GZA (D. Me.) (appealed to the 1st Circuit (No. 21-1410).

4 Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 271 (1st Cir. 2022).

5 See, In re Gillespie, 2023 U.S. Dist. LEXIS 136952, D. Md. (July 5, 2023).

6 Suggestion of Mootness at p. 9, Acheson Hotels, LLC v. Laufer, (22-429) Jul. 24, 2023).

7 Petitioner's Opposition to Suggestion of Mootness at p. 3, Acheson Hotels, LLC v. Laufer, (22-429), Jul. 28, 2023).

8 Acheson Hotels, LLC v. Laufer, 2023 U.S. LEXIS 2871 (U.S., Aug. 10, 2023).

9 See, Acheson Hotels, LLC, v. Laufer, 601 U.S. ____ (2023).

10 Id. (Thomas, J., concurring in judgment.)

11 Id.

12 Id.

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