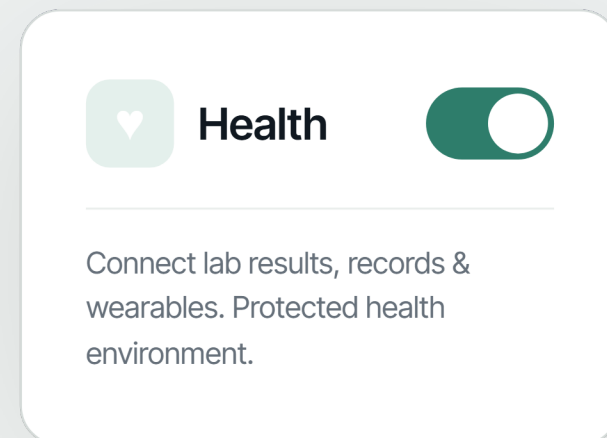


The Counterfeit Toggle

Deceptive health-feature design as disability discrimination under ADA Title III and Section 5 of the FTC Act

Consumer AI platforms now ship gated "health" features that signal the protection of clinical care. The signal is false: HIPAA follows the actor holding the data, not the data's sensitivity, so it cannot attach to a company-to-consumer relationship at all. One fact pattern is reachable through two doctrines at once, and for the protected class whose defining trait the design exploits, the deception and the discrimination are not two harms but one, seen from two sides.



PROTECTION: NONE

The toggle signals a protected clinical space. The signal is false.

The name, the marketing, and the ritual of the switch all say: this is a health space, and health spaces are protected. What the consumer actually receives is a revocable privacy-policy commitment, **not** the enforceable regime the same company provides to its enterprise customers.

HIPAA follows the actor holding the data, not the sensitivity of the data.

ENTERPRISE · HOSPITALS & PAYERS

A business associate agreement binds the company to protect the data at the statutory grade. Real, enforceable, advertised.

CONSUMER · THE INDIVIDUAL USER

No agreement, and none possible, an individual cannot be a business associate of themselves. Governed by a privacy policy the company may change at will.

Trust laundering: the credibility of the regulated enterprise product, and the reputation of the statute, are borrowed and spent on a consumer product that carries neither.

The deception is not adjacent to the disability harm. The deception operates through the disability.

HANDLE ONE · SECTION 5

Unfair & deceptive practice

A net impression of clinical-grade protection, false and material to the disclosure decision. Deceptive to everyone.

HANDLE TWO · ADA TITLE III

Denial of meaningful access

A facially neutral design that exploits the trait defining an anxiety or paranoia disability. Discriminatory to the protected class.

For that class, the deception and the discrimination are not two harms but one, seen from two sides.

Handle One: Section 5

Deception, unfairness, and an injury the population cannot reasonably avoid

The injury is "not reasonably avoidable", and that is exactly where the protected class lives.

Deception. A net impression of clinical-grade protection, false and material to the disclosure decision. Material, the Commission recognizes, precisely where the maker knows the recipient's "own peculiarities" make it important.

Unfairness. Substantial injury, not reasonably avoidable, not outweighed by benefits. Avoidance would demand the exact vigilance the disorder strips away in the presence of a doctor-grade trust cue.

The Commission has already moved on this: **GoodRx** (falsely claimed HIPAA regulation) and **BetterHelp** (displayed a HIPAA-compliant seal), both treating the false invocation of clinical-grade trust as itself deceptive.

Handle Two: Disability Discrimination Under Title III

Meaningful access, the mechanism, and the eggshell skull answer

Not a boundless disparate-impact rule. The narrower, sturdier standard: meaningful access.

In *Alexander v. Choate* the Court rejected "the boundless notion that every disparate-impact showing states a prima facie case," and resolved the case on **meaningful access to the benefit in question**.

The actionable wrong: a facially neutral practice that, because of disability, disproportionately denies meaningful access to a public accommodation. And the wrong **need not be intentional**, settled, and recently reaffirmed.

It calms the disabled user by lying to them, because their condition makes them depend on the signal that was counterfeited.

A truthful clinical-grade assurance would lower the anxiety that is the disability; that is an accommodation. The toggle offers the feeling without the substance. **The exploited vulnerability is the disability.** The false calm is a diving board; the truth is the board snapping back past where the anxiety began, panic, depressive spiral, paranoid decompensation.

THE EGGHELL SKULL ANSWER

"A reasonable user would not have decompensated" assumes an able-minded baseline. The wrongdoer takes the victim as it finds them, and the rule **already reaches psychological fragility, including a predisposition to mental illness.** The magnitude is not an add-on; it is what the rule takes as given.

Defeating the Defenses, and the Question It All Rests On

Three independent defeats, the injunctive menu, and the nexus dependency

Three separate defeats, each mapped to a remedy the defendant may choose among.

01 · DISCLOSE Honest disclosure Telling the truth is neither burden nor fundamental alteration by definition. No proof of feasibility required at all.	02 · PROVIDE Affirmative provision Fails on proven feasibility: it already builds the identical protection for enterprise. Plead last, <i>Davis</i> evenhandedness caution.	03 · CEASE Cessation A defendant cannot call stopping its own unlawful conduct a cognizable burden. But it injures the class the claim protects, prefer disclosure.
--	---	---

All three are available and not one is an undue burden, **so the burden defense has no ground left to stand on.**

Sources 42 U.S.C. §12182(b)(2)(A)(ii)–(iii); 28 C.F.R. §§36.302–36.303, 36.504(a); S.E. Cmty. Coll. v. Davis, 442 U.S. 397 (1979); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001); Gilly, sec. VI.

The whole disability handle stands on one contested question: does Title III reach a purely digital service?

The circuits divide on whether a website with no physical place is a public accommodation, or must bear a nexus to one. If Title III does not reach the digital product, the disability handle has no forum and the argument collapses to its consumer-protection half.

Stated as a premise, defended in a companion work: a functional reading of the statutory categories reaches a consumer-facing digital service, and the physical-nexus requirement lacks a statutory basis.

Deceptive design is not new. This corner of it is substantially unoccupied.

DIFFERENCE 01	DIFFERENCE 02	DIFFERENCE 03
U.S. law, ADA Title III and Section 5, not the U.K. Equality Act 2010.	A false reassurance exploiting the defining trait of a disability, not third-party sorting functions.	Two mechanisms with no analogue elsewhere: antecedent illegality bounding the duty, and the eggshell skull measuring the injury.

A forward note: because antecedent illegality converts idiosyncratic reliance into cognizable harm, highly individual plaintiffs may be unusually effective vehicles for reaching unlawful design that has evaded disability framing.

A single artifact that two bodies of law reach at once: deceptive to everyone, discriminatory to the protected class whose defining trait it exploits. For that class, the deception and the discrimination are not two harms but one. The remedy is neither exotic nor burdensome, the truth, plainly stated, or the protection, actually provided.

What the law cannot allow is the counterfeit: the reassuring click that delivers the feeling of safety and none of its substance, sold hardest to the people it will hurt worst.

Table of Authorities • Cases & Enforcement

All authorities as cited in Gilly, T. (2026), The Counterfeit Toggle, Working draft, July 2026 (v6). Reproduced verbatim from the article's footnotes.

A.J.T. v. Osseo Area Schools, No. 24-249, slip op. (U.S. June 12, 2025).

Alexander v. Choate, 469 U.S. 287 (1985).

Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996).

Figueroa-Torres v. Toledo-Davila, 232 F.3d 270 (1st Cir. 2000).

In re BetterHelp, Inc. (F.T.C. Mar. 2, 2023).

Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997).

McKinnon v. Kwong Wah Rest., 83 F.3d 498 (1st Cir. 1996).

Olmstead v. L.C., 527 U.S. 581 (1999).

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004).

S.E. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

United States v. Easy Healthcare Corp. (Premom) (N.D. Ill. 2023).

United States v. GoodRx Holdings, Inc., FTC Matter No. 2023090 (N.D. Cal. Feb. 17, 2023).

STATUTES & REGULATIONS

15 U.S.C. § 45(a), (n).

42 U.S.C. § 12182(a), (b)(2)(A)(ii)–(iii).

29 U.S.C. § 794.

28 C.F.R. §§ 36.105(d), 36.301(c), 36.302(a), 36.303(a), 36.504(a).

45 C.F.R. §§ 160.103, 164.104, 164.500.

16 C.F.R. pt. 318 (Health Breach Notification Rule).

Wash. Rev. Code ch. 19.373 (My Health My Data Act).

Restatement (Second) of Torts §§ 461, 538(2) (Am. L. Inst. 1965).

AGENCY & SECONDARY AUTHORITIES

FTC, Policy Statement on Deception (Oct. 14, 1983), 103 F.T.C. 110.

FTC, Policy Statement on Unfairness (Dec. 17, 1980), 104 F.T.C. 949.

FTC, Bringing Dark Patterns to Light (Staff Report, Sept. 15, 2022).

HHS, Off. for Civ. Rts., Health App Use Scenarios & HIPAA (Feb. 2016).

Anthropic, Advancing Claude in Healthcare and the Life Sciences (Jan. 2026).

Anthropic, Business Associate Agreements (BAA) for Commercial Customers.

Jamie Luguri & Lior Jacob Strahilevitz, Shining a Light on Dark Patterns, 13 J. Legal Analysis 43 (2021).

Ryan Calo, Digital Market Manipulation, 82 Geo. Wash. L. Rev. 995 (2014).

Ari Ezra Waldman, Cognitive Biases, Dark Patterns, and the Privacy Paradox, 31 Current Opinion in Psych. 105 (2020).

Philipp Hacker, Manipulation by Algorithms, 29 Eur. L.J. 142 (2024).

Fabiana Di Porto & Alessandro Egberts, The Collective Welfare Dimension of Dark Patterns Regulation, 29 Eur. L.J. 114 (2024).

Mark R. Leiser, Dark Patterns, Deceptive Design and the Law (2025).

Jonathan Meers, Discrimination at the Interface: The Equality Act 2010 and Platform Interface Design, 87 Mod. L. Rev. 640 (2023).