Website Accessibility Claimants Targeting Pharmaceutical Companies

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Porzio Client Alert

There has been an upsurge of claims against entities leveling accusations that websites are inaccessible to persons with disabilities. Recently, the targets of these claims include pharmaceutical companies, and we are expecting more. The common scenario involves law suits or claim letters alleging violation of the Americans with Disabilities Act ("ADA"). The claims seek monetary damages and threaten injunctions alleging, for example,

"Defendant's policy and practice to deny Plaintiff, along with other blind and visually-impaired users, access to Defendant's website, and to therefore specifically deny the goods, services, and information offered. Defendant's failure and refusal to remove access barriers to its website, have denied Plaintiff and visually-impaired persons equal access to products, services, and benefits offered to the public through the Website."

The claims or suits usually describe a tool, referred to as a "screen-reader," which does just that for the visually impaired. Screen readers read the information and describe the content contained in websites, but unfortunately not all website content, design, and features easily translate to screen-reader use, producing the allegation of denied access for the visually impaired.

Nationally, the Federal Districts vary in how these claims are handled with regard to several key questions, including whether a website constitutes a place of public accommodation, and what precisely constitutes compliance with the ADA. These claims can arise wherever your company does business. And, state law may be implicated as well. In California, for example, these claims can also arise under the Unruh Act, which gives rise to certain damages.

To date, the United States Government has not issued regulations. While accessibility claims may be viewed initially as an annoyance, or as frivolous, courts take them seriously. While those who have handled such claims have seen certain patterns, the business case for fighting these claims as opposed to resolving them quickly, leads little opportunity for developing clarity in the case law, or addressing differing treatment across federal districts. Once one is resolved, the risk for another filing remains, and arguably increases.

The case law that we do have largely accords the Web Content Accessibility Guidelines, ("WCAG") as the compliance standard with the ADA, in the absence of regulations. WCAG was developed by the Web Accessibility Initiative "and in cooperation with individuals and organizations around the world, with a goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally." The Guidelines "define how to make Web content more accessible to people with disabilities, including visual . . . disabilities." For each guideline, there are testable success criteria, which are at three levels: A, AA, and AAA. *Id.* The A level is the minimum level of compliance recommended.

Accessibility claims have been challenged on several fronts. We have gleaned recommendations for our clients from the case law, which, while not full-proof, do lend to managing the risks involved in these lawsuits. First and foremost, recognizing that accessibility is good business, and integrating the WCAG into your website development, maintenance, and vender contracts is important. In those venues where the defense of "mootness" has grown legs, defendants must show that the “voluntary cessation of allegedly illegal activity” by “demonstrating that there is no reasonable expectation that the alleged violation will recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation” according to *Clear Channel*, 594 F.3d at 110. Reviewing, inspecting, correcting, and training on website accessibility, for those in your company who are responsible for web design, updating, maintaining of the website should be considered. Think in terms of making the case that your company has been diligent and has made its best effort for accessibility.

Remediating your website(s) can be an expensive proposition. The take-away here is to address this issue in advance of receiving a claim – assess your current websites, consider the risks, train your relevant teams and establish standards that conform to applicable legal requirements and standards.