Navigating Website Accessibility Claims

Mark S. Sidoti, Mitchell Boyarsky, and Ahmed J. Kassim

New York Law Journal, March 20, 2017

Increasingly, companies face threat of legal action based on the claim that their websites and/or mobile applications are inaccessible to disabled users. Title III of the Americans with Disabilities Act (ADA) requires places of public accommodation, such as hotels, shopping centers, retailers, health care providers, restaurants, and private educational institutions, to maintain facilities accessible to the disabled. Most businesses understand their obligations to make their physical facilities accessible under the ADA. What many do not realize is that in the Internet age, ADA accessibility involves more than compliance with architectural and structural requirements for physical facilities. Companies must also ensure their websites and mobile applications are accessible to the disabled. In 2016, more than 250 lawsuits were filed against companies, primarily in the retail, hospitality, and financial services industries, alleging that the companies' websites were inaccessible to disabled users. The exposure in these cases entails not only an injunction, but also defense costs and award of the claimants' attorney fees. Accordingly, it is important for businesses and defense counsel to understand the need for ADA website accessibility and strategies to mitigate exposure.

Title III and Website Accessibility

Title III of the ADA states in pertinent part: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation." 42 U.S.C. §12182(a). Also, §508 of the Workforce Rehabilitation Act requires that all federal agencies and federally funded programs reasonably accommodate people with disabilities in both internal and external communications. Though the ADA's statutory language does not address websites, the U.S. Department of Justice (DOJ), the agency responsible for regulating and enforcing the ADA, considers websites offering goods or services to consumers to be "places of public accommodation," which must be accessible to the disabled. See 75 Fed. Reg. 43, 463. The regulations implementing the ADA list examples of auxiliary aids and services, including Braille materials and displays, screen reader software, and other means of making electronic information available to hearing and visually impaired individuals. See 28 C.F.R. 36.303(b)(2). Websites that do not support these and similar adaptive or assistive technologies potentially

violate the ADA. Accordingly, unless a website is exempt, such as those of private membership clubs and religious organizations, all websites that transact business with the public are potentially vulnerable to legal scrutiny. The ADA and its implementing regulations can be enforced through private lawsuits and separately by the DOJ. 42 U.S.C. §12188. The DOJ also can intervene in private lawsuits. While private litigants may seek injunctive relief only, a successful plaintiff can seek recovery of attorney fees and costs. 42 U.S.C. §12205.

Federal website accessibility lawsuits assert fairly standard allegations. Hearing or visually impaired plaintiffs allege they use screen reading software or other assistive technologies to access website content, yet digital barriers on the defendants' websites limit their access. The complaints usually itemize the specific barriers encountered on the websites, oftentimes supported by analyses of deficiencies by purported website accessibility and compliance experts.

Typically, such a lawsuit is preceded by a detailed letter to the target entity, which outlines the alleged website accessibility violations, summarizes the law, details the expert's assessment of the purported violations, and demands pre-suit settlement in the form of injunctive relief and attorney fees. In fact, these demand letters usually append proposed consent orders or settlement agreements and urge the targets to sign to avoid suit. The expert analyses accompanying these demands are often generated by publicly available Web tools with questionable accuracy and often overstate the scope of the alleged violations. In short, while the claims generally have some degree of merit, deficiencies are typically magnified towards the end of extracting pre-suit settlements from companies reluctant to incur the burden of litigation and legal fees over what is considered a "fixable" issue. Moreover, in order to defend the claim, a website accessibility expert often is required, the cost of which is additional incentive to settle pre-litigation.

'ADA Trolls'

Not surprisingly, especially given the availability to recover attorney fees and expenses under the ADA, website accessibility lawsuits are a boon for plaintiffs' firms, sometimes labelled "ADA trolls," that have made a cottage industry out of pursuing these claims. See, e.g., http://chrishofstader.com/stop-the-ada-trolls/. In 2016, more than 250 lawsuits were filed regarding allegedly inaccessible websites and/or mobile applications. See http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016. For

every suit filed, plaintiffs have sent many more demand letters asserting potential website accessibility claims. The states with the most filings are Pennsylvania (37 percent), New York (30 percent), and California (19 percent). See http://www.dandodiary.com/2016/10/articles/employment-practices-liability-2/wave-ada-website-accessibility-lawsuits-grows-community-bankers-threatened. Many of the demand letters and subsequent complaints are generated by a handful of regularly identified plaintiffs and law firms. In fact, in 2016, a single law firm filed almost 50 percent of the website accessibility lawsuits. Popular target defendants are retail, hospitality, and, lately, financial services companies. Given the yearly increase in filings and the steady source of attorneys' fees, the escalating trend of website accessibility suits will likely continue.

Unclear Guidance on Standards

The trend is also furthered by the absence of formal standards from the DOJ. Currently, there is no final regulation establishing the standards for website or mobile application accessibility. This lack of guidance, combined with the relative ease in identifying inaccessible sites, fuels the proliferation of claims by private individuals. Furthermore, the DOJ's inaction in promulgating regulations has not stopped it from bringing enforcement actions or intervening in lawsuits against business websites that it deems inaccessible. See https://www.justice.gov/opa. In each of those actions and resulting consent decrees, the DOJ relied on and ultimately adopted a set of guidelines known as the Web Content Accessibility Guidelines (WCAG) 2.0 AA, which were developed by the World Wide Web Consortium. Id. In 2010, the DOJ issued an advanced notice of rulemaking, 75 Fed. Reg. 43460-01, which, among other things, sought input on whether the DOJ should adopt "the WCAG 2.0's 'Level AA Success Criteria' as its standard for website accessibility for entities covered by [T]itles II and III of the ADA." Id. at 43465. By repeatedly referencing the WCAG 2.0 AA as an "industry guideline" and an "industry standard" in non-binding, public settlement pronouncements, the DOJ signaled that it considers these accessibility guidelines applicable now. That said, in its latest pronouncements, the DOJ has indicated that a final rule will not likely be promulgated until 2018.

Federal Courts Split

Federal courts are not waiting on the DOJ to act. Though the ADA, implemented in 1990, did not expressly include websites, courts have interpreted "places of public accommodation" to include websites. In the absence of formal DOJ regulations, the courts have been left to decide whether the ADA applies to accessibility of websites for the disabled and related issues. For

example, federal courts are split on whether all websites must comply with the ADA or only those with a "nexus" to a brick-and-mortar operation. Plaintiffs' claims appear to have the greatest traction where there is a "nexus" between the defendant's retail operations and its website (Third, Sixth, Ninth, and Eleventh Circuits), but a "nexus" is not required (First, Second, and Seventh Circuits). Compare Morgan v. Joint Admin. Bd. , 268 F.3d 456 (7th Cir. 2001) and Cullen v. Netflix , 600 Fed. Appx. 508 (9th Cir. 2015).

Defense Strategies

To avoid being a target for website accessibility settlement demands and lawsuits, companies should analyze and take proactive measures to update their websites. In the current environment, companies should strongly consider the investment of reviewing the WCAG 2.0 AA guidelines to understand the types of issues the guidelines address, engaging third-party vendors, when necessary, to perform assessments of their sites and determine the levels of compliance with WCAG 2.0 AA, drafting and adopting Web accessibility policies, and training their employees on website accessibility requirements. While not a complete bar to lawsuits and settlement demands, if implemented correctly, these measures significantly fortify one's defenses, position a company to expeditiously resolve claims, and deter a possible DOJ inquiry. Often, an assessment by an independent compliance expert will differ significantly with a plaintiff's expert report, and this affords a significant advantage if accessibility is challenged. But if an assessment is commissioned, it should be acted upon. A failure to act promptly on an independent compliance assessment can severely impair the defense of a claim. Consulting with counsel experienced in this area to discuss a compliance and response strategy is also advisable.

As a final note, while there are many ways to respond to website accessibility demands, not responding at all could further complicate a defense. Among other unreasonable compliance and damages-related demands, demand letters usually contain overbroad document preservation directives (so-called "litigation hold" notices) that, if left unaddressed, might invite spoliation claims and increased defense costs if a lawsuit is filed. Moreover, careful consideration should be given to the response, the manner in which it is made, and whether it emanates from legal counsel, to ensure that the communications are considered inadmissible settlement discussions, and internal remedial discussions are protected from disclosure in a future lawsuit. In short, careful analysis and proactive measures can reduce the risk of website accessibility exposure and are worth the effort and expense.