

Guest Commentary

Avoiding ADA Website Liability



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More than 20 million individuals in the United States suffer from hearing or visual impairments, a large pool of potential plaintiffs. Ambiguities in Title III of the Americans with Disabilities Act provide plaintiffs' attorneys with low-hanging fruit to file suit against banks for failing to provide website accessibility for disabled persons (also known as "surf-by" suits).



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Title III of the ADA states that certain businesses of "public accommodation," such as banks, may not discriminate based on disability and must provide disabled individuals with equal access to goods and services. The Department of Justice, charged with the enforcement of the ADA, expanded the traditional definition of "place of public accommodation" to include websites and mobile applications.

However, the DOJ failed to enact any formal regulations on the enforcement of Title III for websites. Lack of guidance created a circuit split among the courts on (1) whether a business' website must be connected to a physical location for the ADA to apply and (2) if the ADA does apply, what the accessibility standard is. In deciding whether a website falls under the ADA, the 1st, 2nd and 7th Circuits have all held that a website does not need to be connected to a physical location to be covered if the business offers any goods or services to the public. On the other hand, the 3rd, 6th, 9th and 11th Circuits have developed a nexus standard, finding that a place of public accommodation is limited to a physical structure. As such, a public website offering goods and services must have a "nexus" to a physical location to fall under the ADA. Because most banks tend to operate from

some sort of physical structure, a bank's website is likely to face liability, regardless of the standard adopted by the court. So, what can banks do to ensure their website is accessible to those with disabilities?

As of date, the DOJ has not provided any specific guidelines to help businesses determine when a website is accessible. Courts must decide what website accessibility standards to apply. Fortunately, there seems to be a consensus as many courts have favored application of the Web Content Accessibility Guidelines ("WCAG") 2.0, specifically level AA. WCAG 2.0 is the most widely accepted standard throughout the nation and has been adopted by several federal agencies. Several courts have ordered compliance with the WCAG 2.0 as part of equitable relief, and at least one defendant has been successful in dismissing the claim by showing its website followed the level AA standards. Finally, the DOJ itself has required businesses under the ADA to comply with WCAG 2.0 level AA standards in consent decrees and settlement agreements. In sum, the best defense for banks hoping to survive "surf-by" suits is to adhere to WCAG 2.0 level AA standards.

Absent guidance from the DOJ, the number of website accessibility claims against banks and other businesses will continue to grow. In 2018 alone, the number of Title III website accessibility claims nearly tripled from 814 lawsuits in 2017 to 2,258. Although compliance with WCAG does not provide an absolute shield, it will reduce the risk of litigation and make it more difficult for plaintiffs' attorneys to successfully argue that the website is inaccessible.

Banks should task the IT team or a qualified outside vendor with revising the website to comply with WCAG 2.0 level AA standards and draft and post a website accessibility statement that describes the bank's commitment to accessibility, the standard applied (e.g. WCAG 2.0 AA) and contact information for site accessibility issues. Posting a

statement makes the bank a less attractive target for plaintiffs' attorneys, but only if it is accurate. If the website does not meet the WCAG standards, the statement could constitute a deceptive trade practice.

If you receive a demand letter, contact legal counsel immediately. Some plaintiffs cast a very broad net on these claims hoping to achieve quick settlements but rarely file lawsuits. Others do file claims and pose more of an immediate threat. Most of these cases do settle but delays in response can result in additional expenses on the plaintiff's side, driving up the cost of settlement. Make website ADA compliance a priority now because it takes time, and follow-on claims sometimes pop up after a business has settled but before they are able to correct the deficiencies. Finally, if you use an outside vendor to develop your website, try to negotiate a representation and warranty that the website complies with WCAG 2.0 AA. ■

Editor's Note: This article was submitted by MBA associate member Stinson LLP. Working closely with community, regional and large national banks throughout the U.S., Stinson attorneys have vast experience handling mergers and acquisitions, regulatory and operations matters, new product development, commercial lending deals, prepaid cards and payment systems, creditors' rights, bankruptcy issues and commercial and class action litigation. We stay informed on federal and state regulations to aid clients in effective compliance measures. Our attorneys provide sophisticated counsel on M&A transactions and the tax, ERISA, regulatory, real estate and antitrust issues involved. For more information, visit stinson.com.

Strategically positioned at the intersection of technology, finance and law, Steve Cosentino negotiates technology transactions in the software, mobile, health care and fintech industries. His primary focus is on technology-related transactions and compliance, with an emphasis on software licensing and services, banking technology, data center services, outsourcing, data privacy, e-commerce, advertising, cloud computing and cybersecurity. Cosentino also is a Certified Information Privacy Professional, advising clients on the privacy and data security implications of various technologies.

Fluent in both English and Spanish, Paulina Escobar has gained valuable experience working one-on-one with clients on various litigation issues in diverse legal settings. She has experience representing clients in matters of employment law involving discrimination, disability, breach of contract and unemployment benefits. Escobar also is working to focus her practice in claims under the Americans with Disability Act of 1990 and the Fair Labor Standards Act.