Wrapping Paper Update: ADA Claims Coming for Retailers This Holiday Season for Inaccessible Websites

THIS SERIES OF UPDATES contains information regarding issues and trends facing the retail industry during the holiday season.

The Department of Justice takes the position that websites are covered by the Americans with Disabilities Act (ADA). More claims are being filed by plaintiffs targeting retailers whose websites are inaccessible to consumers who are blind or have low vision. With more than $72 billion to be spent online this holiday season, retailers that do not address accessibility issues may be on the receiving end of claims—and may look more like the Grinch than Santa Claus.

Blind consumers navigate the Internet through the use of assistive technologies, such as screen readers, which essentially "read" onscreen text out loud. Websites using certain graphics and other features that are not adequately described in associated text are frequently inaccessible to these assistive technologies, but usually can be made screen-reader-friendly without materially altering a website's visual effects.

Although the ADA does not mandate the use of specific standards to ensure that websites and other technologies are accessible to disabled consumers, Title III of the ADA generally requires that "places of public accommodation" ensure equal access to the goods and services they offer. Several claims have been brought against retailers over the past few years for failing to make their websites accessible to blind consumers. For the most part, courts have ruled that websites are covered by the ADA if there is a "nexus" with a physical facility that is a "place of public accommodation." But recent cases have been filed against purely web-based businesses, raising the question of whether Internet websites themselves can be considered a "place of public accommodation" under the ADA or applicable state laws.

The Department of Justice began a proceeding in 2010 to adopt technical standards to govern websites and other technologies used to offer goods and services to the public. Although the proceeding has been delayed repeatedly and no rules have yet been adopted, the Department of Justice has filed statements of interest in several cases brought by private litigants against retailers and other businesses on the basis that they violated the ADA by failing to provide equal access to goods and services offered via their respective websites. In these statements, the Department of Justice has argued that entities covered by Title III have obligations to make their websites accessible, notwithstanding the absence of technical standards and rules. The Department of Justice expects to release proposed rules in 2015.

Advocacy groups and individual plaintiffs are not waiting for new standards to be promulgated. They are bringing ADA claims and class action lawsuits under state law, claiming that inaccessible websites (and other technologies, such as certain point-of-sale devices) discriminate against disabled consumers. As the laws continue to develop and plaintiffs increasingly rely on impact litigation to raise awareness of the issue, there are several things retailers can do to avoid becoming the target of an ADA claim or to minimize exposure if a claim is filed.

SEVEN THINGS RETAILERS CAN DO NOW

1. ENSURE GOLD-PLATED CUSTOMER SERVICE

One of the most effective ways of reducing the risk of an ADA lawsuit and the unfavorable publicity that comes with it is to ensure that customer service lines are available —and able—to assist customers who may have difficulty utilizing your website for purchases or who experience other problems with your website due to blindness, low vision, or other reasons.

2. MAKE CONSCIOUS PROCUREMENT DECISIONS TO UTILIZE ACCESSIBLE TECHNOLOGIES

If you are in the process of procuring third-party technology for your retail website or mobile app, review the language in your procurement agreements carefully to ensure that the applications already enable accessible technology solutions, can be updated quickly to enable such solutions, and that the vendor provides adequate support for these adaptations. Similarly, if you are in the process of procuring new POS devices, ensure that the device you select enables or can be adapted to enable accessible technology solutions.

3. RETAIN ACCESSIBILITY EXPERTS

Retain outside legal counsel and a reputable technology vendor specializing in website accessibility to review your website, assess your litigation risk, and assist you in your remediation efforts. Technological assessments can be completed relatively quickly—usually within a month or two—but updates and accessibility-focused fixes can take more than a year to implement throughout an entire website. The assessment should include manual testing as well as automated testing. It should also include a review of internal processes (i) to ensure that continuous website updates and upgrades do not undo any work that has already been done to make your website accessible, and (ii) to sensitize management and in-house web developers to accessibility issues, legal obligations, and litigation risks. Retention of outside legal counsel at the outset of this process is particularly important to ensure that the report generated by the technology vendor may be considered privileged if a lawsuit is pending or threatened.

4. SET A GOAL DATE TO COMPLY WITH INTERNATIONAL WEB ACCESSIBILITY GUIDELINES

Web Content Accessibility Guidelines (WCAG 2.0) have been developed under the auspices of the World Wide Web Consortium by individuals and organizations around the world with the goal of providing a shared, technology-neutral standard to address web accessibility. Although these guidelines have not been adopted in the United States as a general legal requirement, the Department of Justice is likely to incorporate the guidelines into the rules it proposes in 2015 to apply to places of public accommodation. The WCAG 2.0 are already referenced in the rules that will apply to U.S. and foreign airlines that market transportation to the public in the United States beginning in November 2015. Moreover, nearly all of the settlement agreements in recent cases incorporate compliance with WCAG 2.0 (Level AA) within a reasonable amount of time. Some foreign jurisdictions have already incorporated these guidelines into their own laws.

5. INCLUDE ACCESSIBILITY LEGAL REVIEW AND SOFTWARE UPGRADES IN BUDGET

Even if it takes the Department of Justice another year to adopt specific rules governing websites, the threat of potential class action lawsuits counsels in favor of advance planning. Modifying your website to meet accessibility guidelines will take time and money, but there are several advantages to starting the planning process now. The foremost advantage is that if a plaintiff files a lawsuit, you will be in a much better position to negotiate a settlement knowing that you have a plan in place and a target date for your remediation efforts. Having a plan in place can also help diffuse potential impact litigation by advocacy groups. Speaking with legal experts and technology advisers now will ensure that you do not have to rush through the procurement process with a lawsuit pending and that you can implement your plan on your own schedule, not an externally imposed one. Also, while technology firms typically can offer to provide additional resources to assist you in your website remediation efforts, the process can be much more costly if the deadline is tight.

6. REVIEW ALL POTENTIALLY RELEVANT SOURCES OF INSURANCE

ADA claims may trigger many different types of coverage and a retailer should review its entire insurance portfolio prior to becoming the target of an ADA claim. The policy review should include, but not be limited to, the following: Commercial General Liability policies (“CGL policies”), Employment Practice Liability Policies (“EPL policies”), Errors and Omissions Policies (“E&O policies”), and policies where your company is an additional insured. As discussed below, all of these are potential recovery avenues for retailers facing ADA claims. However, keep in mind while reviewing your policies that case law in this area is in its infancy. If you are unable to assess whether your company has adequate protection after a review of your policies, reach out to coverage counsel and your broker to ensure that you are properly insured.

CGL POLICIES

Standard CGL policies contain two separate coverage grants. The first grant provides coverage for damages the policyholder becomes legally obligated to pay because of "bodily injury" or "property damages." Coverage for an ADA claim may be available under this coverage grant if the claimant alleges any emotional distress as a result of the inability to access your website. The second coverage grant in a CGL policy provides coverage for damages the policyholder becomes legally obligated to pay because of "personal injury" or "advertising injury." "Personal injury" under a CGL policy often includes injury arising out of discrimination based on a physical disability. Thus, both coverage grants provide potential defense cost and indemnity coverage for ADA claims and should be reviewed. Retailers should also review their umbrella and excess liability policies that sit directly above their CGL coverage since sometimes these policies provide even broader protection.

EPL POLICIES

Retailers should ensure their EPL policies contain a "third-party liability" endorsement and do not contain ADA exclusions. If purchased, this endorsement provides an extension of coverage that may provide coverage for ADA claims based on discrimination. If your company does have a third-party liability endorsement, ensure that it contains a "duty to defend" clause and prior acts coverage. If your company does not have this coverage, speak with your broker to discuss options for adding this coverage grant either now or at the next renewal.

E&O POLICIES

E&O policies apply when a claimant alleges that the policyholder was negligent in providing services. In some jurisdictions, courts have found coverage under E&O policies and insurers have conceded coverage for traditional ADA discrimination cases. Depending on how the courts resolve the issue of whether a website is a "place of public accommodation," all traditional insurance avenues for ADA coverage should be explored, including E&O policies.

POLICIES UNDER WHICH A COMPANY MAY BE AN ADDITIONAL INSURED

In assessing policies that may apply to a future ADA claim, retailers should not forget to look for potential coverage they may have as additional insureds under insurance policies purchased by other companies. Vendors employed by retailers to assist with website design and implementation may be contractually obligated to add the retailer as an additional insured to their liability policies. If the website is determined to be in violation of the ADA as a result of vendor negligence, then coverage may be available under these policies.

7. IMPLEMENT INTERNAL PROCEDURES TO ENSURE LEGAL AND RISK MANAGEMENT KNOW OF ALL POTENTIAL ADA CLAIMS

Retailers should ensure that internal procedures require all employees to immediately notify legal and risk management if a potential ADA claim is made. This is important regardless of how the claim is made. Under some policies, a phone call from a customer on the retailer's hotline that alleges discrimination may be a "claim" and thus require notice to a carrier. Under claims-made policies, if a claim is not reported to an insurance carrier during the policy period (or, in some instances, in a short time after the policy expires), all coverage may be lost. Thus, for example, if an ADA claim is made via a phone call on August 25, the relevant claims-made policy expires on September 1, and legal and risk management are not notified until September 5, there is a possibility under certain policies that all coverage will be lost.

As soon as an ADA claim is made, all potentially applicable insurers should be notified in accordance with the procedures and deadlines in the policies. While the consequences of late notice vary based on the jurisdiction and the policy language, this is a coverage dispute that, with foresight, policyholders can and should avoid on the front end by ensuring internal procedures exist to immediately notify legal and risk management of potential claims. Retailers should consider bringing experienced coverage counsel in at the beginning of a claim in order to protect and maximize insurance coverage. Communications with your broker are not privileged in many jurisdictions and how a retailer frames the initial notice letter may ultimately impact your coverage.

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