

CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | June 5, 2015

New ADA Lawsuits Target Website Accessibility

From the Experts

Michael J. Chilleen and Brad Leimkuhler

Claims asserted under the Americans with Disabilities Act have been a frequent source of litigation for retail, hospitality and food service companies. Under the ADA, companies that offer products or services to the public are required, at their physical locations, to comply with a series of specific architectural requirements that are designed to ensure equal access to these locations by persons with disabilities. When a company's facility is not constructed in accordance with these standards, they can be sued under the ADA and may be forced to modify their property.

While these claims often are frustrating for companies that normally use their best efforts to make their properties accessible and may perceive these alleged violations as being hyper-technical in nature, fortunately it often is clear what standard a particular physical element needs to meet. For instance, if an accessible sales counter must be no more than a certain number of inches high, it is usually clear based on a simple measurement whether the counter is compliant.

The same is not true of the latest frontier



Photo by D Sharon Pruitt, via Flickr

of ADA litigation: websites. When the ADA was enacted in 1990, the Internet was only in its nascent stage, and e-commerce as we think of it today was unheard of. Nevertheless, some courts have extended the ADA's reach to websites that offer and sell goods or services to the public, mandating that websites are accessible to persons with disabilities.

It was first extended to companies that had a physical presence in addition to a website, under the logic that the ADA only applies to "places of public accommodation" and the understanding that this language refers to actual physical places. As a result, the

website had to have some connection to an actual physical place in order to be covered by the ADA. More recently, some plaintiffs have argued that the ADA applies to all websites, including those of web-based companies. In *Earll v. eBay Inc.*, the U.S. Court of Appeals for the Ninth Circuit just became the first circuit court of appeals to hold that online-only companies are not subject to the ADA; however, a district court in Vermont recently has held the opposite.

Putting aside the merits of whether the ADA, in its current form, should apply to websites at all, the question that is then raised is: how do companies

make their websites fully accessible? Unfortunately, there currently are no generally accepted ADA standards for website construction.

Many plaintiffs have argued that courts should apply the Web Content Accessibility Guidelines 2.0 (WCAG) that were developed by Web Accessibility Initiative of the World Wide Web Consortium. However, these guidelines are more properly understood as principles that leave much to interpretation and can be difficult to test for. This leaves little certainty for companies that are constantly modifying their websites and want to minimize their exposure to litigation. It also may be the case that a modern website is completely and independently operable by blind, visually impaired or deaf users but may not fully comply with the WCAG. In addition, these guidelines were issued in December 2008, which is an eternity ago in Internet years. (For context, the first iPhone was only entering its second year on the market.)

The U.S. Department of Justice is in the process of promulgating accessibility guidelines for websites, but these have not yet been issued. Even when (or if) these guidelines are issued, it is not clear how these standards will be applied to the ever-changing Internet and the unceasing development of new products and services that are sold online. In addition, new software and devices are continually being developed to overcome accessibility hurdles. At one point, it was considered unthinkable that a touchscreen device could ever be made fully accessible. Innovation and creative solutions have begun to address that problem.

Due to this lack of guidance, plaintiffs and the courts have relied on the general provisions of the ADA. These general provisions include the requirement of “effective communication” with the blind and deaf. This puts the burden on the court in each individual case to make a determination whether a particular website feature is accessible and, if the court determines it is not, how the company must modify that feature. These are not always easy questions.

As a result, a conflicting and murky body of law is developing with no clear guidelines. At this time, determining whether a particular website complies with the ADA requires a fact-intensive, feature-by-feature inquiry.

Several website features are potential targets of ADA lawsuits. For instance, individuals who are blind or have low vision sometimes use screen-reading software to navigate websites. However, screen-reading software currently cannot read an image and relies on the background programming of a website to work accurately. This is the most common alleged “barrier” to website accessibility: an image or photograph without corresponding text describing the image. If the information is not provided or is not provided properly, the screen reader is unable to accurately describe the image.

Another problem might be navigational headings that fail to provide information that can be interpreted by a reader. Similarly, individuals who are deaf may be unable to access information that is broadcast by a website through web videos or other multimedia presentations that do not provide captions.

These are just a few of the common allegations involving website accessibility. The number of ADA lawsuits targeting websites only will grow as courts begin to grapple with the question of what a website must and must not do to comply with the ADA.

Target Corp.’s recent settlement of a class action lawsuit alleging that its website in California was not accessible to the blind provides a good example of the potential exposure businesses face. As part of the settlement, Target agreed to pay \$6 million to eligible class members and to make modifications to its website. The court also awarded plaintiffs approximately \$3.7 million in attorney fees and litigation costs.

Until some clarity is brought to the legal landscape, it would be prudent for businesses to assess the accessibility of their websites. Businesses should ask themselves how their websites can be used independently by individuals with a variety of disabilities. In doing so, not only will they be able to manage their exposure to ADA lawsuits, they also may increase the number of potential customers who can effectively purchase their goods and services.

Michael J. Chilleen and Brad Leimkuhler are senior lawyers in Sheppard Mullin’s Orange County office in California. They specialize in defending disability access class action claims under the ADA and state law. They can be reached at MChilleen@SheppardMullin.com and BLeimkuler@SheppardMullin.com.