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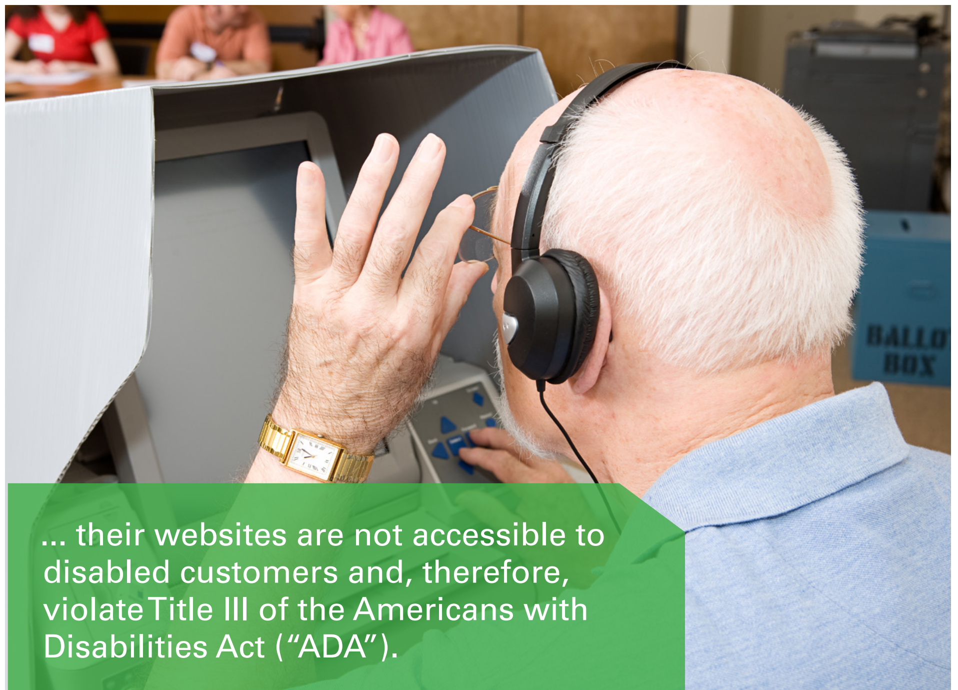
Disabled Users' Access to your Website:

A New Litigation Threat

By Robert A. Koenig

Over the last year, demand letters have been received by a diverse group of Shumaker clients asserting that their websites are not accessible to disabled customers and, therefore, violate Title III of the Americans with Disabilities Act ("ADA").

Certain members of the Plaintiff's bar appear to have created a cottage industry which fishes for any and all businesses that have websites offering any kind of "products or services" and proposes negotiating "on an expedited basis" a settlement agreement related to ADA accessibility to the business' website. The draft settlement agreement requires injunctive relief (and, of course, payment of "reasonable attorney's fees" and costs), initiation of a needs assessment on the website, monthly third-party testing and monitoring, as well as initiation of new ADA accessibility policies and staff training.



... their websites are not accessible to disabled customers and, therefore, violate Title III of the Americans with Disabilities Act ("ADA").

Entering into such a settlement agreement would **not,** however, protect your business from other disabled claimants or class actions suits brought by other disabled customers (the draft settlement agreement expressly states that the release of claims **is only from "Claimant's claims"**) or an enforcement suit brought by the Department of Justice ("DOJ"). There is a provision in the draft agreement that appears to provide indemnification from other ADA claims but in reality it is only a commitment for the claimant's law firm to "use best efforts" to assist in preventing additional potential website claims from being brought against your company.

The draft settlement agreement would require 18 months of continued monitoring of the website and paying fees to third-party web monitors, as well as claimant's "reasonable attorney's fees." The draft agreement demands

"**Confidentiality**" as to the terms of the agreement, the negotiations leading up to the agreement, and any disputes related to the agreement. Obviously, the confidentiality provision is focused on preventing companies from comparing the terms of their individual agreements. The demand letter lists 18 cases filed by the claimant's attorneys in U.S. District Courts asserting violations of the ADA for access limitations on websites against companies such as Sears, Toys "R" Us, Brooks Brothers, and Adidas. Note that 16 of these cases were settled as part of a single mediation in February 2016 and the other two were settled within 6 months of filing and before answers were filed.

Unfortunately, there is little clarity today as to what standard of ADA accessibility actually applies to the websites of private businesses and non-profit organizations. We can however make recommendations to reduce the potential exposure of defending against individual or class action ADA claims or enforcement actions brought by the DOJ.

Websites, the ADA and Available Accessibility Standards

The Americans with Disabilities Act provides that"[n]o 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 . . . a place of public accommodation." See 42 U.S.C. § 12182. To date, few courts have concluded that the ADA applies to private commercial websites, however, several have denied motions to dismiss finding that: **"In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.'"** [*National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass 2012)]. Such courts have concluded that websites **could** be considered a public accommodation because of the ever expanding role of the internet in our business and social lives.

Under the ADA, individuals can bring private actions under Title III for injunctive relief and if an injunction is issued, the court can award attorney's fees. See 42 U.S.C. § 12188(a)(2). Also the DOJ can initiate an enforcement action under the ADA to obtain monetary damages and/or equitable relief. See 42 U.S.C. § 12188(a)(1).

Most of the uncertainty as to what standard of ADA accessibility actually applies to the websites is the result of the DOJ's inaction in issuing regulations identifying website accessibility obligations in the private sector under Title III. Back in 2010, the DOJ issued an advance Notice of Proposed Rulemaking that it would issue new regulations under Title III of the ADA to address the accessibility of public accommodations websites. However, no rules were forthcoming. Instead, in November 2015, the DOJ announced that such rulemaking will be further **delayed until fiscal year 2018.** Without express regulatory guidance from the DOJ, the Level AA standards which are a part of the Web Content Accessibility Guidelines ("WCAG2.0"), published by the World Wide Web Consortium ("W3C") are the best set of standards to work with to achieve ADA compliance based upon information and statements made by the DOJ.

The W3C is an international community that develops open accessibility standards and is the main international standards organization for the internet. The W3C created guidelines for making content accessible, primarily for people with disabilities, but also for all software operating systems, including mobile phones. The current version of the Guidelines, WCAG 2.0, was published in December 2008.

Primarily, these Guidelines require that information and its user interface components be presented in ways they can perceive regardless of individual disabilities. Therefore, the guidelines require that websites: (1) Provide text alternatives for any non-text content so that it can be changed into other form such a large print, braille, speech or simpler language; (2) Make all functionality available from a keyboard; and (3) Make text content readable and understandable. The WCAG 2.0 Guidelines have been adopted by the legislatures or courts as creating "legal standards" in the United Kingdom, Canada, and Israel. In the US, the DOJ has used these Guidelines as the minimal standard that must be met under the ADA in settlement agreements with private entities.

What Can Be Done to Limit Exposure?

With the DOJ pushing back the date for issuance of regulations setting the accessibility standards for websites until 2018, we recommend the following steps be taken to position your business or non-profit to limit exposure to ADA accessibility challenges:

a) Review primary web pages and make sure they are consistent with the Level AA accessibility guidelines (standards) of the WCAG2.0;

b) Identify and offer accessible alternatives, such as a staffed telephone line, or on-line chat function, for disabled users to access the goods and services on your website;

c) Create an Accessibility Policy for your website, outlining your plan to address the accessibility issues and monitor your website monthly for issues or errors;

d) As website pages are revised and new pages developed, make certain that your web-developer is contracted to provide pages that are compliant with Level AA of the WCAG-2.0; and

e) Conduct annual accessibility audits to determine failure to conform with the Level AA of the WCAG-2.0 standards.

For additional information, contact Robert A. Koenig at rkoenig@slk-law.com or 1-800-444-6659, ext. 1305.