

Community Banks Threatened with Lawsuits for Alleged Inaccessible Websites

By Steven E. Helland and Karla L. Reyerson

Activist law firms such as Carlson Lynch and Lee Litigation Group have begun sending aggressive demand letters to community banks around the country, alleging that the recipient-bank's website is inaccessible to blind or otherwise disabled users, and that such inaccessibility violates the Americans with Disabilities Act ("ADA"). The demand letter is typically over ten pages in length, attaches a proposed settlement agreement, and invites the bank to engage in settlement negotiations with the law firm.

Community banks are only the most-recent industry sector targeted since a dramatic increase in lawsuits and demands beginning in November 2015. Other sectors targeted include online retail, restaurants and education. In the past twelve months, we estimate that Carlson Lynch and similar law firms have sent thousands of demand letters and have filed approximately 100 federal ADA lawsuits related to websites, mobile applications, and similar technology.

The ADA prohibits discrimination against individuals "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." The Department of Justice ("DOJ") has interpreted this to mean that business websites are required to be "accessible" to visually impaired individuals, who tend to use technology such as screen readers to read aloud the text content of websites for them. If a website is not designed and formatted appropriately, the screen-reader program will not be able to effectively "read" the website and the blind consumer will not be able to utilize the website.

Although the DOJ and plaintiff-firms have taken the position that the ADA applies to websites and requires them to be accessible, often referencing the Web Content Accessibility Guidelines ("WCAG") standards, the ADA, which was adopted in 1990, does not explicitly address its applicability to various technologies. Courts disagree on the application of the ADA to websites: Some court opinions, such as *Access Now v. Southwest Airlines*, conclude that the ADA applies only to physical locations and not to websites, whereas other courts have held that the ADA does apply to websites (e.g., *National Association of the Deaf v. Netflix*).

The recent uptick in ADA claims related to websites is similar to what banks faced a few years ago when numerous claims were made against ATM owners because the ATMs were not accessible to the visually impaired. Ultimately, the industry updated ATMs with features to meet the needs of disabled consumers.

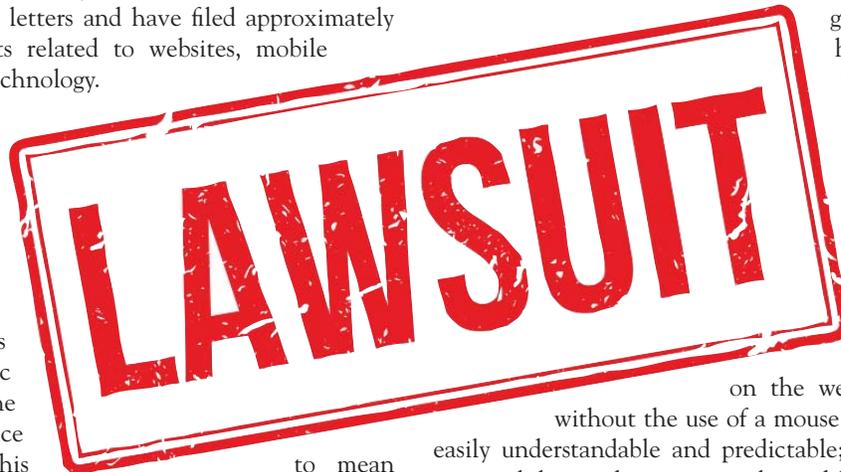
The DOJ was expected to provide some greater clarity on these issues in the fall of 2015 by issuing regulations, but they announced at that time that regulations would be deferred until 2018. The absence of regulations, however, has not stopped plaintiff firms, the DOJ, or multiple courts from taking the position that action is required now and that failure to make a website screen-reader friendly violates the ADA. In terms of what specific actions a website owner can take now, many experts look to the WCAG, version 2.0

AA, as providing a useful guideline – a guide that has been advocated by the DOJ in a number of its public statements and settlement agreements. These standards are designed to make websites (1) perceivable to text readers by embedding text into each visual feature on the website; (2) maneuverable without the use of a mouse (i.e., keyboard only); (3) easily understandable and predictable; and (4) robust in their compatibility with various tools used by disabled consumers to access website content.

Specific action-items include: ensuring that all images or photos are accompanied by an "alt-text" element describing in words the contents of the image, and ensuring that the site may be navigated by using keyboard (such as the "tab" function) rather than only by use of a mouse.

To mitigate the legal and reputational risks of becoming the subject of a legal claim alleging ADA violations, banks and other businesses should first assess the extent to which their websites currently comply with WCAG standards. To the extent the website does not meet these standards, it may be a good time to make enhancements. Banks with websites that are at least partially compliant with these standards are less likely to become the targets of legal claims or demands.

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For banks that work with third-party vendors to design or operate their website, a first step may be to contact the vendor to inquire whether the website meets WCAG 2.0 AA standards. If the vendor cannot confirm these standards are met, then the bank should review its vendor agreement to determine whether it includes a representation that the services will be compliant with applicable law, as well as the extent to which the vendor is obligated to indemnify the bank for claims made related to website noncompliance. Pointing out any such provisions to the vendor may prompt the vendor to consider updates to comply with WCAG standards. Regardless of whether the vendor agreement contains these protections, the bank should work with the vendor toward compliance with the WCAG standards.

For banks renegotiating vendor agreements related to their websites (or mobile applications), the vendor should specifically commit to compliance with the ADA, WCAG standards, and any replacement to such standards that the DOJ may set forth in regulations. The bank should also seek indemnification from its vendors with respect to claims of noncompliance with the ADA.

Finally, if you receive a demand letter alleging ADA violations and offering a settlement, contact legal counsel. Some demand letters are of a “robo-sign” variety and may lack the requirements for a valid ADA claim, while others may raise more significant legal or reputational concerns.

Key Takeaways

- Now is the time to take steps to protect your bank from ADA claims related to website accessibility (and mobile application accessibility) for the visually impaired.
- Do not ignore or throw away demand letters from Carlson Lynch or others related to website accessibility and the ADA. Work with legal counsel on any response.
- Consider engaging a specialized website accessibility testing or consulting firm to improve the accessibility of your website. ■



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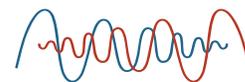


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