

Lawsuits Mount Over Website Accessibility

By Alexis Kramer

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Nov. 27 — Many of the country's top retailers are being hit with lawsuits alleging that their websites are violating the civil rights of sight-impaired Internet users.

So far in 2015 over 40 website accessibility cases under the Americans With Disabilities Act have been filed against well-known companies such as the National Basketball Association, Sprint Corp., J.C. Penney Co., and Home Depot Inc.

And there's more bad news for website operators: the U.S. Department of Justice announced Nov. 19 that it will not be publishing website accessibility regulations until 2018 (20 ECLR, 12/9/15).

Disabilities law experts say that the lack of regulations governing website accessibility have encouraged these lawsuits and put businesses in a quandary over what, if anything, they should be doing to mitigate legal risks in this area.

Home Depot the Latest Target

The most recent case is a putative class action against the Home Depot for allegedly failing to operate a website fully accessible to those who are legally blind (*Diaz v. The Home Depot Inc.*, No. 1:15cv09178, S.D.N.Y. *complaint filed* 11/20/15).

The plaintiff, a visually impaired individual, alleged that Home Depot's website relies on an exclusively visual interface despite the existence of technologies that, if employed, would have allowed him to access the hardware and building materials retailer's website. These technologies include alternative text accompanying images, accessible forms, descriptive links and resizable text. However, as currently constructed, Home Depot's website denies blind persons full and equal access to Home Depot's website.

Plaintiff Robert Jahoda, a legally blind Pennsylvania resident, has filed 68 similar suits since January 2012. Five of those cases remain open, including a recent complaint against the National Basketball Association (*Jahoda v. Nat'l Basketball Ass'n*, W.D. Pa., No. 2:15cv01462, *complaint filed*, 11/6/15).

Title III of the ADA, 42 U.S.C. §12182(a), prohibits discrimination in the full and equal enjoyment of public accommodations on the basis of disability. The statute defines a place of public accommodation as a facility whose operations affect commerce and that falls within at least one of 12 types of establishments.

Title III doesn't specifically address access to websites. Courts are split on whether websites qualify as "places of public accommodation" under Title III.

Uncertain Landscape

The recent spate of lawsuits and demand letters is the product of legal uncertainty, Minh Vu, a partner at Seyfarth Shaw LLP, told Bloomberg BNA Nov. 24. That's because there is no clear mandate in the ADA for website accessibility, she said, adding that the U.S. Department of Justice will not be issuing regulations for at least three more years.

The uncertain environment has put businesses in a predicament. Most websites are still predominantly inaccessible because businesses have been waiting to see what the regulations will be before expending resources to make their websites accessible, Joshua Stein, a member of the firm at Epstein Becker & Green PC in New York told Bloomberg BNA Nov. 25.

“When technology and society advance faster than the Department of Justice can issue regulations, businesses are trapped in a position as to how they should provide their services in an accessible manner,” Stein said. “And the plaintiffs in these cases are exploiting this gray area and the gap in the law between the ADA's broad mandate and the delayed regulations.”

It can be more complicated and costly for companies to defend themselves when there are no regulations to point to and very little case law in this novel and still developing area of the law, Stein added.

Not only does legal uncertainty fail to give businesses a clear path toward compliance, it also gives ADA plaintiffs leverage, Vu noted.

So far, the vast majority of cases have ended via summary ruling or a settlement agreement. Stein predicted that that will change in the next year.

“We will see an uptick in judicial decisions that go beyond a motion to dismiss, resulting in decisions that provide more guidance,” Stein said.

Position of the DOJ

The Department of Justice released an advance notice of proposed rulemaking (ANPRM) in July 2010, indicating that it was considering amending its ADA regulations to address website accessibility.

The agency expressly stated in its ANPRM that the ADA's broad nondiscrimination mandate reaches goods and services provided by covered entities on websites. It also observed that covered entities with inaccessible websites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line.

According to Vu, the agency has taken a different position on this issue since 2010.

For example, in June 2015, the agency filed statements of interest in two cases against Harvard University and the Massachusetts Institute of Technology, arguing that the defendants had preexisting obligations to make their websites accessible.

Earlier, in November 2014, the Department of Justice reached a settlement with Peapod.com over allegations that the online grocer's website violated Title III of the ADA by being inaccessible to blind customers (19 ECLR 1523, 11/26/14).

The Department of Justice continues to pressure businesses—through enforcement actions and investigations— into making their websites accessible.

All of this activity suggest a change from the agency's 2010 position that websites don't necessarily have to be accessible as long as an equivalent alternative method of access exists, Vu said.

Notwithstanding the agency's enforcement efforts, the Department of Justice announced Nov. 19 that it will put off until 2018 the release of proposed website accessibility regulations for businesses (20 ECLR,12/9/15).

The Department of Justice has become more aggressive and consistent about asserting that Title III fully applies to ecommerce, Daniel Goldstein, a partner at Brown Goldstein & Levy LLP in Baltimore, Md., told Bloomberg BNA Nov. 25.

“The delay of the regulations is an anomaly in terms of the approach by the agency's civil rights division,” Goldstein said.

“The Department of Justice effectively tries to walk a fine line,” Stein said. “On the one hand, it says websites must be accessible. But how and to what extent, the agency says, is very complicated and is still being worked through.”

What Should Businesses Do?

Vu and Stein agreed that companies should start working now to make their websites accessible, by using the web content accessibility guidelines set out by the World Wide Web Consortium (W3C) as a guide. The W3C guidelines recommend that websites:

- provide text alternatives for any non-text content so that it can be changed into other forms, such as large print or braille;
- provide alternatives to prerecorded video-only or audio-only content;
- create content that can be presented in different ways without losing information or structure;

- make it easier for users to see and hear content, including separating the foreground from the background; and
- make all functionality available from a keyboard.

Goldstein said that small businesses setting up or redesigning their websites should use a tool like WordPress that will guide users through accessibility along with other issues.

Large companies that regularly update complex, multifaceted websites, according to Goldstein, must have:

- policies insisting that accessibility be a design consideration from the outset;
- procedures implementing that policy;
- policies calling for user testing to ensure that the site is accessible; and
- plans to assess current accessibility barriers and remove those barriers as the website is updated.

“It's always better to make changes on your own accord than to have to go back as part of a settlement,” said Stein.

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For More Information

The U.S. Department of Justice's July 2010 Advance Notice of Proposed Rulemaking on website accessibility issues is available at

<https://www.federalregister.gov/articles/2010/07/26/201018334/nondiscriminationonthebasisofdisabilityaccessibilityofwebinformationandservicesofstate>

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ISSN 15235661

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