

Q&A: Waller partner talks websites and ADA

Financial services specialist on community banks and handicap accessibility online

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The impacts of the Americans with Disabilities Act loom largest in the public consciousness in the form of handicap-accessible parking spaces and entrance ramps — accommodations for physical access to public premises.

But under the law, it also appears that businesses must make sure their websites and mobile apps are ADA-compliant.

Derek Edwards is a partner at Waller Lansden Dortch & Davis, where he specializes in financial services litigation. He said he is aware of at least four community banks in Middle Tennessee who have received Letters of Demand to adhere to new website regulations, which could result in lawsuits in the coming weeks.

Post reporter Stephen Elliott spoke with Edwards about banks, their websites and ATMs and compliance with the ADA.

Is this the first time that the Americans with Disabilities Act compliance has affected financial services companies? What is your prior experience with similar ADA lawsuits?

Congress enacted the ADA in 1990 to ensure that individuals with physical and other disabilities can access “public accommodations,” and financial institutions have been affected by the law since its inception. In 2010, regulations specific to ATMs were implemented, and additional regulations related to websites have been introduced in recent years. Waller has a long history of defending businesses in a wide range of litigation, including class action lawsuits alleging that the businesses have “barriers” that violate the ADA and its regulations — from physical barriers to ATM controls and now websites and mobile apps.

What makes websites and mobile apps ADA-compliant?

What the ADA means for websites and mobile apps compliance remains an open issue. As is the case with many federal laws, the details for ADA compliance were left to regulations to be promulgated by federal agencies, which, in the case of websites and mobile apps, is the U.S. Department of Justice. The DOJ, however, will not issue regulations for accessibility to websites and mobile apps until 2018, and the change of administration may delay that further.

Even in the absence of official guidance, however, in recent years, the DOJ has filed a handful of enforcement actions against nationwide businesses, including online retailers. To settle such actions, the DOJ has required the retailers to consent that their websites and mobile apps comply with unofficial design standards — called the Web Content Accessibility Guidelines (WCAG) 2.0 — disseminated by the international website standards organization, W3C.

What are litigation trends in this space?

Undeterred by the absence of official guidance, class action lawyers have urged courts to adopt WCAG 2.0 as the standard for compliance in class action lawsuits. Retail banks inform us that class action lawyers are targeting their websites, complaining that they are not accessible by the blind and visually impaired. This trend began a couple years ago when class action lawyers followed the DOJ's lead targeting online retailers' websites. Lawyers behind the class actions are the same ones that sued retail banks over ATMs after DOJ regulations had made them subject to the ADA several years ago, and copycat lawyers abound.

These lawyers send demand letters, threatening lawsuits if businesses do not enter a settlement agreement (often enclosed), agree to use their consultant to make the website accessible, and pay attorneys' fees. The proposed settlements subject the business to automated monthly testing for years afterwards.

Other than in consent decrees and court-sanctioned class action settlements, however, the courts have not ruled that WCAG 2.0 provides a legal standard for what is required by websites and mobile apps. As such, WCAG 2.0 is neither official guidance nor a regulation for businesses, and the new administration may reverse any trend in DOJ enforcement. Businesses that receive such demand letters would be well served to consult with their legal counsel to determine the best way to proceed.

What are financial institutions missing? How can they better comply with the ADA?

Although WCAG 2.0 is not official guidance, businesses should not dismiss class action lawyers as making idle threats. Lawsuits have been filed, and the risk remains that a court may adopt WCAG 2.0 as a legal standard. And anyone doing business online should be aware of what's happening as these actions may spread to other industries.

Among its many facets, WCAG 2.0 requires providing text alternatives for non-text content so it can be changed into other forms (such as large print or Braille), which are accessible to the blind or visually impaired. Other requirements are quite technical. As a result, businesses should consider hiring an accessibility consultant to evaluate their websites and propose design changes. Businesses should also consider adopting a website and mobile apps accessibility policy that monitors operability for disabled users and ensures that website privacy policies and terms and conditions are accessible to disabled users.