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Civil Rights

Attorneys' Fees

Attorneys from Baker & McKenzie note that after the Department of Justice decided the Americans with Disabilities Act requires companies to provide equal access to websites for people with disabilities, demand letters surged for accessibility suits. The driving force behind the surge, according to the authors, is the ADA's provision for attorneys' fees. They suggest, however, that those fees may be avoided if the alleged accessibility deficiencies are promptly and successfully remediated.

ADA: Equal Access, Company Websites and Attorneys' Fees



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Title III of the Americans with Disabilities Act ("ADA") requires equal access for persons with disabilities in all places of "public accommodation."

This access includes the provision of auxiliary aids and services to patrons with hearing, vision or cognitive disabilities. A "public accommodation" clearly encompasses a company's brick and mortar facilities.

Yet, many companies are unaware that the U.S. Department of Justice ("DOJ") has taken the position that Title III also applies to their website operations.

And the plaintiffs bar and several federal courts have echoed the DOJ's sentiment.

Although there are differing views as to whether a business's website must have a nexus to a physical location to fall under the purview of Title III (assuming websites fall under Title III in the first place), all businesses that maintain an online presence should be aware of the DOJ's increased focus on website accessibility.

The DOJ's position has triggered a surge of attorney demand letters and lawsuits filed by private litigants against companies alleging that their websites do not comply with Title III's accessibility requirements.

The driving force behind these private enforcement actions is the statute's provision of attorneys' fees to prevailing parties, as individual plaintiffs are limited to non-monetary relief for accessibility violations.

The plaintiffs bar incentive to recover attorneys' fees, together with the DOJ's aggressive stance on website

accessibility, have rendered those brick and mortar companies that maintain an online presence easy targets for non-compliance litigation.

Notwithstanding its position that Title III applies to consumer facing websites, the DOJ has yet to promulgate regulations pertaining to website accessibility and has indicated that it does not intend to do so until 2018.

This lack of explicit direction from the DOJ has created uncertainty among businesses as to how to render their websites ADA compliant to avoid targeted enforcement actions.

Fortunately for these companies, there are proactive steps that may be taken to prevent, foreclose and promptly resolve private Title III enforcement actions.

Creating Websites Accessible to Disabled Individuals

Although the DOJ has not provided any concrete guidance with respect to compliance, it has endorsed the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 ("WCAG") for web-based services.

While technical in nature, the WCAG has twelve basic guidelines organized under four principles: perceivable, operable, understandable and robust.

To be perceivable, websites should provide text alternatives for non-text content, captions and other options for multimedia and content that can be presented in different ways without losing its meaning.

To be operable, all functionality should be available from a keyboard, should give users enough time to read and use content and should help users navigate and find content.

To be understandable, websites should contain text that is readable and content should appear and operate in predictable ways to assist in the navigation and location of website content.

And to be robust, websites must maximize compatibility with current and future user tools. Websites should also allow users to provide feedback in the event that they have difficulty accessing or using the site.

Preventing Title III Accessibility Enforcement Actions

Companies with consumer facing websites should carefully review the WCAG guidelines to gain a better understanding of its accessibility requirements.

These businesses should also consider hiring an outside consultant that specializes in website access to conduct an audit of their websites to determine what functions, if any, must be modified or added to allow equal access to disabled users and to comply with the WCAG.

These outside consultants can also provide businesses with a strategic plan for how to remedy or eradicate functionality issues and equal access obstacles.

If a company does modify its website to make it more accessible, it should consider including a website accessibility statement on its site.

This statement would describe the accessibility features of the site and provide users a point of contact at the company should they have difficulty accessing the site.

Businesses that elect to forgo a third party assessment should at the very least consult with outside counsel experienced in Title III litigation to assess potential risk factors.

Finally, businesses should consider reviewing settlement agreements entered into between the DOJ and companies that it has targeted for non-compliance.

These agreements may provide valuable insight as to the web-based functions the DOJ considers crucial to the implementation and management of a Title III compliant website.

Companies may locate these settlement agreements on the DOJ's website.

Resolving and Foreclosing Title III Enforcement Actions

In the event a company receives an attorney demand letter or is named in a Title III website enforcement action or lawsuit, the company should evaluate potential preemptive measures that it can immediately take to remedy any alleged infractions.

Because the attorney demand letters and complaints will articulate the deficiencies in the website's operations, some companies may simply wish to correct those deficiencies and pay the requested attorneys' fees to promptly settle the dispute.

Targeted companies may also want to evaluate the possibility of mooted a plaintiff's Title III claims, thereby foreclosing the collection of any attorneys' fees incurred in the preparation and submission of a lawsuit.

In fact, in a recent ADA public accommodation lawsuit, the Southern District of California held that a restaurant's actions in remediating a plaintiff's ADA claim rendered that claim moot and the plaintiff could not collect fees under the statute.

In *Rush v. Islands Restaurants, LP*, No. 3:11-cv-01312-LAB-DHB (S.D. Cal. Oct. 11, 2011), the plaintiff sued a restaurant under Title III, claiming that the restaurant's parking lot was not compliant with the ADA due to the size of the handicap parking spots.

After receiving the plaintiff's complaint, the restaurant repainted the lines to bring the lot into compliance with the ADA.

The plaintiff claimed that the restaurant's remedial action caused a spoliation of evidence and, in addition, the plaintiff was entitled to fees under the statute.

The court held that the purpose of ADA litigation is to prevent and remediate discrimination against disabled individuals, rather than "litigation for its own sake."

Because the restaurant's action in remediating the ADA claim rendered the plaintiff's claims moot, the plaintiff had not achieved a judgment and could not collect fees under the statute.

Additionally, the court held that the remediation was not spoliation of evidence because the previously existing conditions had been well-documented before the remediation effort.

Therefore, at least in some jurisdictions, businesses might successfully moot an ADA website accessibility claim and avoid the imposition of attorneys' fees if the deficiencies alleged in a complaint are promptly and successfully remediated.

Those businesses, however, must assess whether the expense of litigation over whether a plaintiff's claim

was successfully mooted outweighs the practicality of simply correcting alleged deficiencies and paying the requested attorneys' fees to settle the dispute.

Conclusion

Companies with consumer facing websites will be well-served to review the accessibility of their sites to ensure that they at least conform with the WCAG guidelines (or at least key portions of them) until the DOJ introduces further guidance in this area.

Taking proactive and remedial steps may potentially foreclose future website accessibility claims and eliminate or drastically reduce the amount of time and resources a company must expend to defend a private Title III enforcement action.

Creating and maintaining an accessible and user-friendly website will have the added benefit of attracting and retaining a broader base of customers, resulting in a "win-win" for online businesses.