Baritz & Colman LLP

COLLISION COURSE: INTERNET ACCESS AND THE ADA

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"The power of the Web is in its universality. Access by everyone regardless of disability is an essential aspect."

Tim Berners-Lee,
inventor of the World Wide Web

THE ADA: THEN AND NOW

The Americans With Disabilities Act is a civil rights statute designed to prohibit discrimination against the disabled by assuring them equal access to places of public accommodation. It is an outgrowth of the disability rights movement that found its legal voice with the passage of Section 504 of the 1973 Rehabilitation Act, which prohibited disability-based discrimination by recipients of federal funds. The enactment of the ADA also followed determined efforts by the disability community during the 1980's to generate Congressional support (and more enlightened decisions by the U.S. Supreme Court).

Title III of the ADA mandates that all businesses serving the public remove all "access barriers" that would hinder a disabled individual from accessing the goods and services offered by those businesses. The Department of Justice is charged with enforcing the provisions of this Title.

When the ADA arrived, the Internet was still in its infancy. At that time, "access barriers" meant just that. The reference was too literal, i.e., physical barriers, such as stairs that impeded a wheelchair-bound customer from accessing a store. As Internet usage exploded, however, courts (starting with a lawsuit against Bank of America in the year 2000) began empathizing with the plight of visually- and hearing-impaired people facing different kinds of barriers: those posed by "unfriendly" websites that lacked assistive technologies.

THE DOJ WAFFLES

In 2010, the DOJ asserted in an Advance Notice of Proposed Rulemaking that business websites are effectively an extension of a place of public accommodation under the ADA, and that Title III would be amended to ensure its applicability to websites. In 2016, the DOJ went further still by vigorously supporting a visually-impaired plaintiff's position in a Federal Court case filed against Winn-Dixie Stores, Inc., a Florida supermarket chain. In the first case of this kind to reach trial, the Judge found for the plaintiff. The matter, however, is currently on appeal to the 11th Circuit Court of Appeals. The Florida Justice Reform Institute, comprised of a diverse group of industries, has joined the battle on the side of Winn-Dixie to demonstrate that the language of the ADA does not require websites to accommodate the disabled.

So far, the DOJ has not, as promised, updated its regulations this year. This past January, the Trump Administration apparently pressured the DOJ to move its ADA guidelines agenda to an "inactive" list. This action begs the question as to whether the DOJ, at some point, will be compelled to withdraw its prior support for the disability community and formally impose regulatory constraints on businesses acting (at least in part) through websites. If that happens or if the DOJ simply backs away, the plaintiffs' bar will likely rush in.

A legal landscape devoid of clear and comprehensible guidance from the DOJ (or, for that matter, from Congress) poses a challenge for our judiciary. Courts, facing an expected surge of lawsuits by disabled plaintiffs alleging discrimination in website accessibility (well over 600 such cases have been filed since 2015), will be asked to render decisions without the benefit of any statutory or regulatory framework.

One large law firm that has been involved in this controversy has responded to the DOJ's latest pronouncement that it will not issue guidelines for website accessibility anytime soon:

"This is an unfortunate development for the disability community and covered businesses alike. Instead of having clear rules to follow, businesses will have to look to the constantly evolving patchwork of decisions coming out of the courts for guidance. Meanwhile the number of website accessibility lawsuits continues to surge as businesses scramble to make their websites accessible."

THE ADA'S REACH EXPANDS, LEADING TO A LITIGATION ALERT

A serious litigation risk, a by-product of the Digital Revolution, has emerged for businesses dealing with the general public. While expanding their reach via the Internet, these businesses have exposed themselves to a new universe of potential plaintiffs: individuals whose access to the Internet is compromised by their physical, mental or emotional disabilities and who seek recourse under the ADA. This exposure can be quite costly – both financially and from a public relations perspective.

By taking note of the prescient pronouncement by Sir Berners-Lee, we arrive at the current-day intersection of the Internet and the ADA, and what has become an avalanche of claims under the ADA by disabled individuals claiming barriers to website accessibility.

The litigation floodgates are open and the torrent of website accessibility lawsuits has already begun. While the cases in play now deal, for the most part, with plaintiffs suffering visual or hearing impairments, what is to prevent others with, e.g., dyslexia, ADD/ADHD, cognitive issues and paralysis from entering the fray?

What is particularly concerning about such a prospect – a dilemma, actually – is that modern-day, technologically-driven businesses, like those before them, predicate their very existence on a philosophy of cost-consciousness. That mindset, however, will be thwarted in a legal minefield. While monetary damages are not available to successful plaintiffs under ADA Title III, a losing defendant may still confront very significant legal fees – both its own and those incurred by the plaintiff. And that financial exposure is further increased by the high cost of repairing the offending website.

The ADA legal terrain, as it relates to Internet websites, is uneven. Courts are divided. The first issue before them is the applicability of the ADA to websites. If it is, the next question is whether all Internet businesses are covered (as a Massachusetts State Court held in a case against Netflix which led to a settlement of $750,000) or just those which also operate through physical (brick-and-mortar) locations (as was held by the 9th Circuit Court of Appeals in another Netflix case).

Businesses have wisely expanded their scope via the Internet, but they have now learned that the Internet is hardly risk free. It is that reality that must be confronted. Defending website accessibility litigation is daunting enough. Doing so in a climate where the ground rules are lacking - or are, at best, uncertain - only exacerbates the problem.

For more information, please contact:

Baritz & Colman LLP
1075 Broken Sound Parkway, NW
Suite 102
Boca Raton, Florida 33487
Tel: 561-864-5100
Fax: 561-864-5101
www.baritzcolman.com

Baritz & Colman LLP
The Woolworth Building
233 Broadway, Suite 2020
New York, NY 10279
Tel: 212-886-1693
Fax: 212-886-1694
www.baritzcolman.com

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