

Does Your Business Use E-Commerce To Sell Goods or Services Online? *Is Your Company's Website ADA Compliant?*

By George Thompson, *Esq.*

Marsh & McLennan Agency | Director of Compliance & Regulatory Affairs

March 2017

Introduction

It has been reported that in 2015, over 250 businesses across the United States, including colleges and universities of all sizes, were sued by a vision or hearing impaired plaintiff, or public interest group representing the same, who alleged that the business websites violated Title III of the Americans With Disabilities Act (ADA) because they lacked tools that can accommodate visually or hearing impaired consumers. The companies at potential risk range from plumbers to the most sophisticated technology companies. The key issues for these companies are: (1) Can a consumer buy their service or product online and (2) is their website ADA compliant?

In Massachusetts, two federal district courts recently denied Motions to Dismiss filed by entities engaged in online e-commerce and that had been sued under the ADA. One court specifically found that company websites are places of public accommodation *regardless* of their nexus to a physical location, and another federal court has potentially extended the compliance responsibilities to universities and their available online courses. What is particularly maddening for employers is that this relatively new ADA litigation risk reality is primarily the product of the federal courts (although some federal courts outside of the northeast have ruled differently), and any uniform, technical guidance from the federal government has been delayed until 2018, in regards to what exactly a company's website should be equipped with to assure compliance with the ADA.

Under the ADA, plaintiffs can obtain injunctive relief (the court orders you to make your website ADA complaint) and attorney's fees and costs, including expert fees. Compliance could be expensive for the entity engaged in e-commerce and could require that their website be equipped with assistive technologies such as screen reader software, large-print software, and braille output devices – tools that help blind or low-vision individuals navigate digital content.

The Netflix Case

Netflix was sued by a public interest group that argued that the Netflix website failed to provide equal access to its video streaming web site, "Watch Instantly", for deaf and hearing impaired individuals. The web site allowed Netflix subscribers to stream available videos through the Internet on a computer, television or other device. The plaintiffs sought injunctive and declaratory relief requiring Netflix to provide closed captioning for all of its "Watch Instantly" content. Netflix filed a motion to dismiss the

lawsuit. In support of their attack on the Netflix website, the plaintiffs emphasized that Netflix provides closed captioning which allows deaf and hard-of-hearing individuals to view television shows and movies by reading captioned text that they can activate on the display, for only a small portion of the titles available on “Watch Instantly”. The plaintiffs alleged that the lack of closed captioning allowed a claim under Title III of the ADA and the ADA's prohibition of discrimination on the basis of disability. [42 U.S.C. § 12182\(a\)](#).

The *Netflix* court denied the motion to dismiss on a number of grounds. In regards to the issue of whether a commercial website had to comply with the ADA in general, the court agreed that the subscription to a service of internet based streaming video was analogous to a brick-and-mortar store, or other venue that provides similar services, such as a video rental store. This conclusion found support in the First Circuit Court of Appeals decision in *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.*, which held that “places of public accommodation” are not limited to “actual physical structures.” [37 F.3d 12, 19](#) (1st Cir.1994). Specifically, the *Netflix* court opined that:

“ [i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result. *Carparts* 's reasoning applies with equal force to services purchased over the Internet, such as video programming offered through the “Watch Instantly” web site. In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages available indiscriminately to other members of the general public.”

The *Netflix* court rejected additional Netflix arguments that a website accessed by a consumer in his or her home was not a place of public accommodation, as that term is defined under the ADA.

Consequently, while the home is not itself a place of public accommodation, entities that provide services in the home may qualify as places of public accommodation. Under Defendant's reading of the statute, many businesses that provide services to a customer's home—such as plumbers, pizza delivery services, or moving companies—would be exempt from the ADA. The First Circuit held in *Carparts* that such an interpretation is absurd [37 F.3d at 19](#) (extending the ADA to businesses that offers services to customers in their homes through the telephone or mail). Under the *Carparts* decision, the “Watch Instantly” web site is a place of public accommodation and Defendant may not discriminate in the provision of the services of that public accommodation—streaming video—even if those services are accessed exclusively in the home.

The Harvard College and Massachusetts Institute of Technology Cases

In 2015, the National Association of the Deaf (NAD) filed lawsuits against Harvard College and MIT claiming that the two schools violated Title III of the ADA and section 504 of the Rehabilitation Act by denying individuals who are deaf and hard of hearing equal access to the thousands of free online videos and audio files (programming). The schools sought to dismiss the lawsuit, and were opposed by the plaintiffs and the U.S. Department of Justice. The schools lost with the court holding in part, that the

responsibility to be ADA complaint could not be deferred until an unknown date in the future when more specific regulations were in place, and among the various discriminatory effects Congress intended the ADA to remedy, were those resulting from communication barriers faced by individuals with communication disabilities, including hearing, vision and speech impairments. [Read the Court's opinion here regarding the Harvard case.](#)

DOJ Guidance and The Future

Aside from intervening in several ADA lawsuits between private parties, DOJ had long ago announced its position that all websites engaged in e-commerce ***should be accessible to consumers with disabilities***. Starting as far back as 2010, the DOJ started the rulemaking process on this topic by issuing an Advanced Notice of Proposed Rulemaking. DOJ has recently stated that:

“... The inability to access web sites puts individuals at a great disadvantage in today's society which is driven by a dynamic electronic marketplace and unprecedented access to information. On the economic front, electronic commerce, or "e-commerce," often offers consumers a wider selection and lower prices than traditional, "brick-and-mortar" storefronts, with the added convenience of not having to leave one's home to obtain goods and services. And, as also stated above, for individuals with disabilities who experience barriers to their ability to travel or to leave their homes, the Internet may be their only way to access certain goods and services. Beyond goods and services, information available on the Internet has become a gateway to education, socializing, and entertainment.”

Of particular interest, DOJ has advised in proposed rulemaking that a website can become ADA compliant and “accessible” if it satisfies the Level AA standards of the Web Content Accessibility Guidelines (WCAG) 2.0. During the past several years, however, DOJ has repeatedly canceled tentative release dates for the Final Notice of Proposed Rulemaking concerning website accessibility. Finally, In December 2015, the DOJ announced that it will not issue private sector website accessibility regulations under Title III until sometime during the fiscal year 2018. Time will tell whether the reality of the new Trump administration will further delay the release of any guidance, or even reverse earlier guidance, regarding website compliance with the ADA.

Is There Insurance Coverage For These ADA Discrimination Claims?

There is not a specific insurance product available for businesses to cover the cost of rebuilding their website to ADA compliance subsequent to a lawsuit. Insurers generally consider this type of situation to represent a “moral hazard”, and are fearful that if they did offer coverage it would deter companies from being in compliance on their own since the insurer would pay for any damages stemming from a non-compliant website.

One item to explore with your broker, however, is if an EPLI policy will cover these claims if they are filed by individual customers (as opposed to a group or class of consumers) as long as the definition includes discrimination of a customer under the third party coverage. This may trigger at least a duty to

defend against the claim. Another possibility to explore with your broker is the feasibility of finding a cyber market/product that will provide a specific sublimit of coverage for companies that have already taken “appropriate action” to make sure their website is ADA compliant to the best of their ability via the resources available in the marketplace prior to coverage being implemented.

What to Do?

1. Determine if a consumer can currently purchase your goods or services through the internet via your website.
2. Talk to your website developer in order to gauge his or her awareness of the issue and familiarity with WCAG 2.0 guidelines.
3. Talk to an insurance broker to see if there is an insurance product or strategy that can help reduce your potential liability for ADA non-compliance.

George Thompson, Esq. *Director of Compliance & Regulatory Affairs | Employee Benefits*
Marsh & McLennan Agency LLC
100 Front Street, Suite 800, Worcester MA 01608
+1 508-595-7964 | Mobile: +1 508-736-0070 | Fax: +1 508-757-1869
George.Thompson@MarshMMA.com | www.MMA-NE.com