FEATURE STORY

The ADA & Website Accessibility

BY ROBERT J. SNIFFEN

Businesses and governmental entities across the country have been caught in the web of a relatively new kind of lawsuit: claims brought under Titles II and III of the Americans With Disabilities Act ("ADA") alleging that plaintiffs with a disability could not use websites because they were not coded to work with assistive technologies like screen readers, or otherwise accessible to them. The increase in the number of lawsuits filed in federal court under Title III of the ADA against private sector entities skyrocketed in 2018 to roughly 2258, an uptick of 177% from 814 such lawsuits in 2017. The number of Title III lawsuits during 2019 will almost assuredly eclipse 2018 figures, as a cottage industry of lawyers, expert witnesses and plaintiffs (some of whom have filed hundreds of lawsuits using the same lawyer) has grown almost overnight. Perhaps not surprisingly, the number of Title III lawsuits filed in Florida is among the highest in the nation.

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An Overview of Title III

How did we get to this place? In 1990, Congress passed the ADA. And while most association executives are likely conversant with the employment discrimination provisions of Title I of the ADA, a less infamous provision of the ADA – Title III – is also a part of the statute. Title III prohibits discrimination against disabled individuals in places of "public accommodation" such as offices, retail outlets, and events. Commercial websites, both those used to transact e-commerce and those that are more informational in nature, are considered "public accommodations" for purposes of Title III.

Indeed, the application of Title III to websites was a largely dormant issue until in 2015 when the United States Department of Justice ("DOJ") made it clear that it considers a company's website to be a place of "public accommodation" subject to the ADA, and announced that it would propose website accessibility standards under Title III by 2018. Then, in December 2017, the DOJ withdrew all pending rules implementing Title III of the ADA, indicating that it would be evaluating how to address the availability of next-generation services that provide text, pictures, and video capabilities. In this regulatory void, the plaintiff's bar and advocacy groups have picked up the ball and run with it, filing thousands of lawsuits against entitles with websites, using technologies that search the internet for non-compliant websites and filing suit accordingly. Even more frustrating is the lack of any uniform, agreed upon standard for what level of accessibility is required. And, unless or until the DOJ sets that standard, website owners are left to speculate.

The Future

Private sector businesses have responded in a number of ways. Some have simply taken down their website. Others have engaged consulting services to test and re-code their website, a service that, depending on the size of the website, can easily cost tens of thousands of dollars. Still others have removed their website from public view, opting instead to limit their website to specific users, although if a specific user requires accommodation, the company is arguably required to provide it.

Some businesses, typically those with adequate resources, have turned the issue into an opportunity to communicate to users of its website, and the public at large, that they value their disabled customers and constituents, and will devote substantial resources to website accessibility initiatives designed to provide the highest level of compliance possible. Thus, these businesses have used the risk of being on the wrong side of a Title III lawsuit as a chance to distinguish themselves among their competitors and garner favorable public relations.

There are several steps associations should take in light of the Title III lawsuit epidemic:

1. Checking applicable insurance policies to determine whether coverage exists for Title III claims.
2. Obtaining an opinion from counsel regarding whether the content of its website renders the website a "public accommodation" for purposes of Title III.
3. Give strong consideration to engaging a website accessibility vendor to test and, if possible, modify the association's website.

It is doubtful the DOJ will reengage the rulemaking process this year to provide guidance on what standard of accessibility satisfies the ADA. Thus, this issue, and the risk of litigation will not subside until 2020 at the earliest.

Robert J. Sniffen is the Managing Partner of Sniffen & Spellman, P.A.. He practices in the areas of labor and employment law, civil rights defense, insurance defense and administrative law. The Firm represents several statewide associations in a variety of transactional and litigation matters. He received his undergraduate degree from the University of Florida and his J.D. from Stetson University College of Law. He may be reached at rsniffen@sniffenlaw.com or (850) 205-1996.