2015 saw an explosion of claims against companies alleging that their websites do not comply with the Americans With Disabilities Act (ADA) because they are not accessible to the disabled, primarily the blind and visually impaired. 2016 has brought us more of the same.

The Carlson Lynch Sweet & Kilpela1 law firm in Pittsburgh is behind many of these. This is a sequel of sorts for the firm. Carlson Lynch previously brought numerous similar claims against banks, alleging that ATM machines are not accessible to the disabled.

Carlson Lynch has sent out hundreds of letters to companies alleging that their websites fail to comply with the ADA. The letters appear to be based on a form that the firm makes minimal changes to each time it is sent to another company.

The Allegations in the Claims

The letters state that they are “confidential settlement communications” designed to avoid “formal litigation,” and suggest a “pragmatic approach” to resolving the problems identified.
The demand letters:

1. Assert that the firm has consulted with “prominent national experts” and determined that the company’s website “has significant failures which limit accessibility for individuals with various disabilities.”

2. May discourage companies from retaining their own experts to evaluate the websites because “most (if not all) of the most reputable national experts are backlogged as a result of our clients’ web accessibility efforts.”

3. Explain what the alleged failures are and the legal basis for the claim.

4. Tout Carlson Lynch’s experience with ADA claims, and even list a number of recent suits filed by the firm. You can find one of Ms. Sipe’s suits here; other suits filed by the firm are very similar. Carlson Lynch reportedly has filed at least 66 lawsuits (not all related to website accessibility) on behalf of Mr. Jahoda alone. The firm apparently isn’t embarrassed by that at all. A number of the cases listed in its demand letters were filed on behalf of Ms. Sipe and Mr. Jahoda.

No Settlement for You!

Well, despite how convenient Carlson Lynch makes it for companies to settle, quite a few have declined the firm’s invitation to adopt its “pragmatic approach.” As a result, according to one report, at least 40 lawsuits were filed in 2015.

Carlson Lynch apparently knows some people who love to litigate. A handful of individuals, notably Robert Jahoda and Michelle Sipe, both of whom are blind, are plaintiffs in many suits filed by the firm. You can find one of Ms. Sipe’s suits here; other suits filed by the firm are very similar. Carlson Lynch reportedly has filed at least 66 lawsuits (not all related to website accessibility) on behalf of Mr. Jahoda alone. The firm apparently isn’t embarrassed by that at all. A number of the cases listed in its demand letters were filed on behalf of Ms. Sipe and Mr. Jahoda.

Not surprisingly, the blizzard of demand letters from Carlson Lynch has made a lot of people angry. The letters strike many as drive-by shakedown attempts that should to be stopped. The National Restaurant Association, for example, seems to view the letters that way.

At least two companies are taking the fight directly to Carlson Lynch. Both have filed lawsuits against the firm, several of its lawyers, and against another firm and its lawyers working with Carlson Lynch. The lawsuits allege that the defendants may have acted fraudulently by making demands on behalf of unnamed and potentially nonexistent individuals. (Each company asked Carlson Lynch to identify the claimants and their disabilities. The firm refused.) This allegation takes on added weight and importance in light of a recent ruling (not in a website case) affirming that an ADA plaintiff cannot merely be a “tester,” and must instead be a “bona fide patron” of an establishment to bring a claim. If the companies can establish that no client of Carlson Lynch was a bona fide patron of their websites, then the ADA claims should fail.

Interestingly, the letters do not identify the individuals who could not access the company’s website, nor do they identify the disabilities possessed by those individuals.
The companies also ask the courts to find that no enforceable standard exists for website accessibility by the disabled. There is a good chance they’re right. While the US Department of Justice (DOJ) takes the position that the ADA applies to all websites, no regulations have been issued that would establish a legal standard for what constitutes adequate accessibility. None will be issued until 2018.

Taking the fight one ironic step further, counsel for one of the companies investigated Carlson Lynch’s website and discovered that it suffers from some of the same deficiencies highlighted in the firm’s demand letter.

**Insurance Coverage for Website ADA Claims**

Whether or not the claims being made by Carlson Lynch are valid, it is clear that companies must incur costs to respond to them. Some of those costs may be covered by insurance.

Employment practices liability (EPL) policies are the ones that respond most often to website ADA claims. Those policies typically cover claims brought by employees, but can be broadened with optional coverage for discrimination and harassment claims brought by customers and other third parties. If a company’s EPL policy includes third party coverage, it should cover the cost to defend a website ADA claim.

Defense costs might also be covered under a media liability policy. Those policies exist to cover claims arising out a company’s media (including websites) and media activities. Most media policies include exclusions for discrimination by the company though. While some exclusions are limited to discrimination in the employment context, others are much broader. A broad exclusion probably would eliminate coverage for a website ADA claim.

Would a cyber policy apply? Possibly.

As I noted earlier, the demand letters from Carlson Lynch allege that the recipients obtained and misused private information of disabled users of websites. The firm alleges that disabled users are unable to read the privacy policies on websites or exercise the choices offered regarding the collection and use of personal information. Specifically, Carlson Lynch alleges that individuals’ internet use is tracked, and that website code is used to override users’ privacy settings so that tracking data can be collected. Similar allegations are made in at least one complaint filed by the firm.

A cyber policy that covers the wrongful collection of information and/or the failure to implement privacy policies and procedures to ensure those policies are followed could conceivably cover the cost to defend a website ADA claim from Carlson Lynch. That coverage is not included in all cyber policies though. Cyber policies may also have broad discrimination exclusions that could apply.
While insurance policies might cover the cost to defend a website ADA claim, it is less certain that they would cover settlements. Policies typically exclude costs to comply with injunctive or other equitable relief and agreements to provide non-monetary relief. Insurers may take the position that the cost to make changes to a company’s website and other internal expenses are not covered for that reason. If any settlement includes damages, which arguably would include attorneys’ fees paid to Carlson Lynch, those amounts could be covered.

Managing the Risk of Website ADA Claims

Although insurance may make it easier to resist website ADA claims, every company obviously would prefer to avoid them altogether. What can a company do? Lawyers handling ADA matters recommend that companies implement the Web Content Accessibility Guidelines 2.0 (WCAG)\textsuperscript{10} published by the World Wide Web Consortium. The WCAG Accessibility Principles\textsuperscript{11} provide specific suggestions about how websites can be configured for greater accessibility.

This Is Not Just a US Problem

Readers outside the US might be tempted to conclude that these claims are just another example of litigiousness in the US and decide that website accessibility claims aren’t a problem elsewhere in the world. That would be a mistake. Many countries have laws concerning website access by the disabled. Lawsuits aren’t unique to the US either. For example, consumer suits have been filed in Australia.\textsuperscript{12}

What’s Next?

Mobile app accessibility claims may be on the horizon. The US DOJ has already required mobile apps to be made accessible to the blind and visually impaired in settlements with Peapod\textsuperscript{13} and H&R Block.\textsuperscript{14} While there are legal barriers to consumer ADA suits concerning mobile apps, it seems likely that those claims will come.

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