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Regional and Community Banks are the Latest Targets of ADA Cyber Accessibility Attacks

Is Your Website Accessible To Persons Who Are Blind Or Have Vision Impairments?

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In January, 2016, the law firm of Carlson Lynch Sweet & Kilpela (“CLSK”) sent hundreds of near-identical form letters to national retailers, hotels, restaurants, and other businesses, claiming that their internet-based services (retail websites) discriminate against persons who are visually disabled under the Americans with Disabilities Act (“ADA”). The letters contend that the Department of Justice (“DOJ”), the federal agency responsible for adopting ADA standards, requires businesses to make their websites compliant with the ADA, even though the DOJ has not formally adopted any specific website accessibility guidelines. Additionally, those letters demanded that the

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recipients bring their websites into compliance with international standards for web accessibility.

A new round of demand letters has recently been sent to regional and community banks demanding website compliance. The letters seek structured settlements, similar to the “Talking ATM” settlements with financial institutions in 2000 and threaten litigation against those who do not respond promptly, typically within 21 days of the letter. The remedial measures sought include the designating of one or more persons to manage the company’s website and other digital assets and content development personnel on WCAG 2.0 programming, design and functionality, creating and adopting a policy to develop and maintain website accessibility, training IT staff, contractually requiring third-party software providers to represent and warrant that their products meet WCAG 2.0 A and AA Success Criteria (good luck on that one), conduct independent third-party periodic testing and to implement policies for programming, designing and maintaining accessible websites. Attached to the letter is a “Confidential Settlement Agreement” which sets out the above terms and demands, damages, investigative and attorneys’ fees. Actual settlements differ widely as do the monetary terms. See attached letter template of the demand letter.

These letters must be taken seriously. A number of lawsuits have been filed in various federal courts against companies which either ignored the letters or refused to negotiate settlements. Such cases eventually settled. Recently, several lawsuits were filed in the Northern District of California. A number of demand letters have been withdrawn for a variety of reasons.

While lawsuits have been filed, CLSK claims to have utilized a website testing tool which supposedly assesses whether a given website meets the WCAG 2.0 standards. If a website test shows discrepancies with WCAG 2.0, a letter is generated. The letters we have seen are identical except for certain references to alleged WCAG 2.0 shortcomings.

What you need to know about website accessibility for blind and low vision customers.

Millions of visually impaired consumers rely on the Internet for banking, shopping, reserving hotel rooms, and conducting personal business. For years, the Internet all but eluded them. DOJ, the government agency responsible for enforcing the ADA, has determined that website accessibility falls within Title III of the ADA. The DOJ has been working to implement standardized website accessibility standards for over a decade. The DOJ projected these standards would be adopted by April 2016. Website standards have not yet been adopted and the speculation is that the DOJ will implement comprehensive website regulations in the first quarter of 2018. These criteria focus on screen reader software technology, keyboard versatility, accessibility for touch screens, point-of-sale technologies, and streaming video services. Whether the DOJ's proposed regulations will clarify ADA requirements for websites or create more confusion,

remains to be seen. Either way, an increase in website accessibility lawsuits is sure to follow.

2016 brought a dramatic rise in the number of ADA website lawsuits and threats of litigation. While the hotbed of ADA website litigation has been the Western District of Pennsylvania, where several dozen lawsuits were filed against some of the nation's top retailers, website litigation is nationwide. In a recent California state court decision, *Davis vs. BMI/BND Travelware*, (San Bernardino Superior Court CIVDS 1504682, March 29, 2016), the Court granted plaintiff's summary judgment motion holding that Title III of the ADA applies to plaintiff's use of the defendant's website which was inaccessible to blind customers. The Court held that the plaintiff's use of the website to purchase goods and services was closely related to the defendant's retail store operations, a critical issue in California. The 9th Circuit requires the webhost to have brick and mortar retail stores in order for the ADA website accessibility requirements to apply. Other Circuits do not require a brick and mortar nexus with a website sales channel. The Court ordered the defendant to pay plaintiff \$4,000 minimum statutory damages under state law. While the amount of damages for this customer was relatively inconsequential, the implications for internet banks are significant. Had the plaintiff been a bank customer who regularly makes internet banking transactions, the damages could have been exponentially higher, \$4,000 for each visit to the website or deterred visit.

Web Content Accessibility Guidelines 2.0.

The World Wide Web Consortium ("W3C") published its Web Content Accessibility Guidelines ("WCAG 2.0 A and AA Success Criteria") which the DOJ and others use as a

baseline for assessing website accessibility. Although W3C is not a government agency without regulatory powers, it has been in the forefront of website accessibility. The DOJ adopted the WCAG 2.0 AA Success Criteria for federal agencies under Section 508 of the Rehabilitation Act. The DOJ has not officially adopted any formal standards for website accessibility in the private sector, but existing requirements of the ADA already apply. It is widely expected that the DOJ will require businesses to conform to standards mirroring the Web Content Accessibility Guidelines 2.0 A and AA Success Criteria. Many websites do not currently meet these standards, but banks have seen the “coding on the wall” and are proactively performing analyses of their websites in anticipation of the new standards.

Addressing the complexities of website accessibility regulations before becoming a target for ADA litigation is prudent. Banks and other businesses should consider hiring a web accessibility consultant through legal counsel to maintain privileges and confidentiality protections. Once a complaint letter is received from a potential Plaintiff, measures should be taken to protect electronically stored information (ESI) in anticipation of litigation.

The information contained in this CBA Regulatory Compliance Bulletin is not intended to constitute, and should not be received as, legal advice. Please consult with your counsel for more detailed information applicable to your institution.