NATIONAL

ADA IMPLICATIONS FOR SERVICER WEBSITES

By: Olivier J. Labarre and T. Robert Finlay

When George H.W. Bush signed into law the Americans with Disabilities Act in 1990 (ADA), it was intended to provide equal access to those with disabilities. At the time, the internet as we now know it did not exist. As a result, no one could have predicted how the ADA would interact with online services. According to a November 2018 story by the Los Angeles Times ("Lawsuits Target Access to Website"), there were nearly 5,000 ADA lawsuits filed in Federal Court for alleged website violations in the first half of 2018 alone. At this point, the number is expected to rise nearly 10,000 for the calendar year, an increase of 30 percent over the number of similar suits in 2017. As more providers tout their web access, one can expect those numbers will continue to increase in the future.

While many of the website-access ADA complaints targeted retailers, restaurants, and universities, a number of our servicer and lender clients have been recently hit with a rash of demand letters and, in some instances, lawsuits under the ADA alleging that public accommodations' websites are not accessible to blind individuals. The claimants contend that they visited our clients' website and were denied full and equal access to the client's services, as well as the ability to enjoy the services offered to the public through the website. The demand letters and lawsuits allege various violations of both Federal and State law. Generally, these demands and lawsuits seek early settlement with the proviso that the client remediates its website. A brief overview of the law in this area, as well as potential exposure for clients, is set forth below.

There is no longer any meaningful dispute that business websites are places of public accommodation under the ADA. The Department of Justice (DOJ), charged with implementing regulations for compliance with ADA mandates, has stated as much on numerous occasions and courts across the country have rejected arguments that websites do not fall under the ADA. Moreover, courts in California have held that a website's noncompliance with the ADA is, in and of itself, sufficient to trigger a violation of the ADA without requiring the claimant to first establish that he or she genuinely sought the goods or services of the business. Such a violation calls for a statutory penalty of $4,000 and, more importantly, potentially triggers the claimant's right to recover attorneys' fees under the ADA and various state law corollaries.

To further complicate matters, there are no firm guidelines on exactly how a website must be formatted

or implemented to comply with current ADA mandates against nondiscrimination and communication. The DOJ has yet to issue formal guidelines for website compliance under the ADA and, based upon its most recent public statements, has no plans to do so and instead has taken the position that such guidelines are the responsibility of the legislature or the Attorney General. Courts have generally accepted that compliance with the privately developed Web Content Accessibility Guidelines (WCAG) 2.0 technical standards are sufficient to satisfy current ADA mandates, but the DOJ announced in October 2018 that "public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA," indicating, at the very least, that noncompliance with WCAG 2.0 is not in and of itself a violation of the ADA, but again refusing to establish firm guidelines for private businesses to follow.

Based on the state of the law and the right to recover attorneys' fees under the ADA and its state law corollaries, plaintiffs' attorneys are scouring websites for potential violators. Most attorneys first send demand letters, but, if their demands are not met, quickly file suit against businesses and service providers. These demands and lawsuits pose a significant risk in the terms of statutory damages, remediation costs, and potential attorneys' fees.

With the law in this area developing on a near daily basis, there are several defenses that loan originators, servicers or other providers can assert. However, the best defense is to take preventative measures now to avoid these demands and lawsuits in the future. We encourage you to take this opportunity to evaluate your own websites and, if necessary, work towards updating them in an effort to both avoid these demands and lawsuits, and to ensure a viable defense in the event such a demand or lawsuit is served on you.

Olivier J. Labarre was admitted to the California Bar in 2009 and has been with Wright, Finlay & Zak since 2014. While in law school, Labarre was an Articles Editor of the Western State University Law Review and a VP of the Moot Court Team. Prior to joining Wright, Finlay & Zak, he worked at Hershorin & Henry, LLP, specializing in title insurance matters. Labarre focuses primarily on mortgage banking litigation, including loan servicer and trustee defense, title insurance litigation, bankruptcy, and eviction matters.

T. Robert Finlay is one of the three founding partners of Wright, Finlay & Zak. Since 1994, Finlay has focused his legal career on consumer credit, business, and real estate litigation and has extensive experience with trials, mediations, arbitrations, and appeals. Finlay is at the forefront of the mortgage banking industry, handling all aspects of the ever-changing default servicing and mortgage banking litigation arena, including compliance issues for servicers, lenders, investors, title companies, and foreclosure trustees.