Website Accessibility Lawsuits on the Rise: What You Need to Know

Your company has just been sued in federal court for operating a website that allegedly prevents individuals with vision impairments from fully accessing the site. The plaintiff bringing the lawsuit purports to bring the case as a "class action," meaning he or she represents every visually impaired individual who has ever visited your website. According to the plaintiff's complaint—the document that initiated the lawsuit—you must fix your website and pay significant damages, fines, and legal costs for engaging in "intentional discrimination" against the visually impaired.

Sounds scary, right? This scenario has become all too familiar for thousands of early and growth stage companies who have been sued due to alleged flaws in their websites. We've defended a number of these suits, and if you're facing one, here is what you need to know:

1. You're Not Alone.

For companies that are not used to being sued, being served with a lawsuit can be jarring, particularly when that lawsuit is brought as a class action and alleges that you have engaged in intentional discrimination. Know, however, that you are far from alone, as plaintiffs have filed thousands of these website-related lawsuits across the country. While the specific allegations may differ from case to case, the plaintiffs in these suits generally allege that the screen reading software relied upon by visually impaired individuals to surf the web cannot access certain pages, features, and/or content on the defendant's website.

Moreover, it's possible, if not likely, that the plaintiff in your case has filed similar cases against many other companies. In fact, some plaintiffs' lawyers have brought hundreds of website-related lawsuits on behalf of the same visually impaired plaintiff. Each time the plaintiff visits a new website that allegedly denies equal access, the plaintiff's lawyers can easily turn that visit into a new lawsuit. All they have to do is add the name of the new website and the company that operates it to the same stock complaint they have filed dozens of times before.

2. Your Monetary Exposure Is Probably Not as Significant as the Complaint Makes It Seem.

The plaintiff's lawsuit makes it sound like your company is facing an existential threat to its existence—how can the company pay damages to an entire group of plaintiffs, as well as significant fines and legal costs (i.e., the attorneys' fees incurred by the plaintiffs' lawyers in bringing the case)? This sounds daunting to any company, and especially to early and growth stage companies that have no in-house legal counsel or prior experience with litigation.

The reality is that the company's monetary exposure is probably not as significant as the Complaint makes it seem, and you should consult with a lawyer to confirm whether that is the case. For example, the plaintiffs in these cases often bring claims under the

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federal Americans with Disabilities Act ("ADA"), but that law does not permit private plaintiffs to recover damages or fines. Instead, the ADA only allows a plaintiff who has been subjected to discrimination to obtain "injunctive" relief (e.g., a court order requiring the company to fix the website) and, if the Court decides it is appropriate, a monetary award covering the attorneys' fees incurred by the plaintiff's lawyers in bringing the case.

But there is no guarantee that a plaintiff can recover attorneys' fees in connection with an ADA claim and, in fact, some courts have openly questioned the appropriateness of awarding fees to plaintiffs' lawyers who "have created a cottage industry by bringing multiple [website-related] cases against small businesses on behalf of the same plaintiff when that plaintiff has no genuine intention of using the services of so many businesses." In such cases, courts may be warranted in reducing the amount of an attorneys' fees award or in disallowing a fee award entirely.

Separate from the ADA, some plaintiffs will bring claims under analogous state laws and seek damages in connection with those state-law claims. However, potential damages may be limited under state law as well. For example, N.Y. Exec. Law § 297 allows victims of discrimination to seek damages, but the prevailing view taken by courts in New York is that damages are minimal—between $500 and $1,000—when the plaintiff's only allegation is that he or she visited a website and was denied equal access.

The takeaway: have an attorney evaluate the claims filed against you. Odds are, your exposure is more limited than the plaintiff would have you believe, and knowing the value of the plaintiff's case will allow you to make a more informed decision as to whether you should attempt to settle the case or fight it.

3. Evaluate Your Website Carefully.

If your lawsuit has been brought by a serial plaintiff who has filed hundreds of similar cases, it would be understandable for you to dismiss the plaintiff's allegations as an unfair attack on your business. You should, however, examine the plaintiff's allegations carefully and consider hiring a third-party to audit your website for compliance with federal, state, and local laws protecting the disabled. It's possible that the plaintiff's complaint has identified a legitimate issue that needs to be corrected in order to ensure equal access, and you'll want to talk with a lawyer about when and how to implement any fixes suggested by the auditor. If there is an issue with your website and you fail to fix it, you could be sued multiple times by different visually impaired plaintiffs.

And when you make changes to your website, make sure you do not inadvertently destroy any information regarding your website that may be relevant to the plaintiff's lawsuit. Deleting evidence, known as "spoliation," can lead to serious adverse consequences in a civil suit.

4. Ask Your Website Developer to Ensure Your Site Complies with the Law.

Many early and growth stage companies use a third-party developer to design their websites. If you have decided to use a third party to build your website (or redesign your website in response to a lawsuit), make sure that your contract with the developer requires the developer to make the site compliant with Web Content Accessibility Guidelines 2.0, Level A and Level AA. Courts may look to those guidelines, which were developed by the World Wide Web Consortium, to determine whether a website is compliant with anti-discrimination laws. You may also want to include a provision in your contract requiring the developer to "indemnify" you (i.e., reimburse you for any costs and damages that you sustain) should a plaintiff bring a lawsuit against you alleging that your website fails to comply with applicable laws.

Facing a discrimination lawsuit that challenges your website? We've represented a number of clients in your situation and are here to help. ■

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Endnotes

[1] 42 U.S.C. §§ 12188; 12205.

[2] *Chavez v. L2 Liu Inc., 2021* WL 1146561, at *8 n.8 (E.D.N.Y. Feb. 26, 2021) (quoting *Adams v. 724 Franklin Ave. Corp.,* 2016 WL 7495804, at *2 (E.D.N.Y. Dec. 30, 2016)), report & recommendation adopted in relevant part by 2021 WL 1146040 (E.D.N.Y. Mar. 25, 2021).

[3] *See Thorne v. Formula 1 Motorsports, Inc., 2019* WL 6916098, at *4 (S.D.N.Y. Dec. 19, 2019).