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Credit Unions Face Website Accessibility Claims Under ADA

By **Nancy Rigby** (March 29, 2018, 4:40 PM EDT)


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Across the country, credit unions are facing a wave of litigation claiming that their websites are inaccessible to blind or low-vision plaintiffs, allegedly in violation of Title III of the Americans with Disabilities Act, which applies to public accommodations and commercial facilities. Notably, however, websites are not among the 12 categories specifically identified in the ADA as "places of public accommodations." Nor do any guidelines or regulations promulgated by the U.S. Department of Justice presently exist to inform credit unions on how to make their websites ADA-compliant.

For the past several years, it appeared that regulations would be forthcoming in 2018, but the DOJ recently rescinded two advanced notices of proposed rulemaking related to website accessibility under Title II (applicable to state and local governments), and under Title III (applicable to private businesses open to the public). As a result, it appears unlikely that any guidelines or regulations from the DOJ will be published.

Into this vacuum of missing detailed website accessibility guidelines have come several plaintiffs firms who have filed numerous, virtually identical lawsuits against credit unions across the country, often involving the same plaintiff suing multiple credit unions within one state. Typically, the plaintiffs allege:

> Despite several attempts to use [the credit union's website] in recent months, the numerous access barriers contained on [the credit union's website] have denied Plaintiff's full and equal access, and deterred Plaintiff on a regular basis from accessing [the credit union's website]. Similarly, based on the numerous access barriers contained on [the credit union's website], Plaintiff was deterred from visiting [the credit union's] physical locations that Plaintiff would have located by using [the credit union's website].

The plaintiffs also consistently allege that despite the absence of DOJ regulations applicable to website accessibility, the DOJ has made its position clear in the past that the ADA applies to websites where business is done. The plaintiffs then argue that businesses should therefore follow the standards for web content issued by a private entity, the World Wide Web Consortium (W3C) Web Accessibility Initiative, consisting of the Web Content Accessibility Guidelines (WCAG) version 2.0. Generally speaking, these guidelines provide information concerning how to make websites functional with aids, and more useable to persons with disabilities, such as including text alternatives that describe pictures; providing guidance on color, contrast and font size; making functions available from the keyboard so that using a

mouse is not necessary; and avoiding content that might cause seizures, such as flashing.

Credit unions, of course, serve defined, limited fields of membership where the potential members share a common bond of occupation or association, or are located within a defined geographic area, depending upon the credit union's particular charter. Recently, two suits filed against credit unions in Virginia alleging website accessibility violations under the ADA culminated in court orders granting the credit unions' motions to dismiss based on the plaintiff's failure to satisfy the threshold issue of standing under Article III of the U.S. Constitution, among other reasons, because the plaintiffs had not shown, and could not show, that they were within the credit union's particular field of membership.

In Keith Carroll v. Northwest Federal Credit Union, the court granted the credit union's motion to dismiss on the grounds that (1) a website is not a place of public accommodation within the meaning of Title III of the ADA; and (2) the plaintiff had not alleged any facts in his complaint to suggest that he was within the specific membership field of the credit union. As a result, the plaintiff was "unable to show that he has suffered an injury in fact or that there is certain impending future harm" because he had not "established that he is entitled, or would ever be entitled, to utilize any services provided by" the credit union. Therefore, the court dismissed the plaintiff's complaint without prejudice.[1]

Similarly, in Clarence Griffin v. Department of Labor Federal Credit Union[2], the court granted the credit union's motion to dismiss on the grounds that the plaintiff had not alleged and could not allege that he was a member of the credit union, within the credit union's field of membership, or that he could ever be a member of the credit union. The court held that as a result, "[w]ithout membership or even the ability to become a member, there is no harm to plaintiff resulting from his inability to access information about [the credit union's] services … [b]ecause plaintiff is not permitted to utilize [the credit union's] financial services, he has suffered no concrete injury as a result of being denied access to [the credit union's] website."[3]

Recent legal filings suggest that the hospitality industry is the next one to be targeted by this type of litigation, and some believe that accessibility claims regarding mobile applications are not far behind. Although the "field of membership"/Article III standing defense that is available to credit unions may not be available to a particular business, depending upon a complaint's allegations a business may still be able to argue that the plaintiff has not alleged an injury-in-fact sufficient to confer standing. In addition, other defenses to these types of claims are available, including that a website is not a place of public accommodation; insisting on applying guidelines developed by the private sector entity W3C violates the business' rights to due process; applying Title III of the ADA to websites in the absence of any DOJ regulations renders the statute impermissibly vague; and the court should dismiss the matter and refer it to the DOJ pursuant to the "primary jurisdiction doctrine," and allow the DOJ to resolve the matter rather than through piecemeal litigation across the country (which has led to wildly inconsistent results, even within the same state).

Faced with a letter threatening litigation or a lawsuit alleging website accessibility violations under the ADA, the cost to defend the case oftentimes is cost-prohibitive to not-for-profit credit unions, particularly those with limited resources. Insurance coverage may, however, assist in covering the cost to defend such litigation. Where coverage is afforded, it is generally for only the cost of defense and not for any settlement, particularly if the settlement includes any equitable or injunctive relief, or the costs to update the company's website to comply with WCAG 2.0.

The types of insurance that may afford insurance coverage for ADA website accessibility claims include the following policies:

- **Employment Practices Liability (EPL):** There is optional coverage for discrimination and harassment claims brought by customers and other third parties; if the policy provides this optional third-party coverage, it may cover the cost to defend an ADA website accessibility lawsuit.

- **Management Liability Policies:** Usually these policies cover third-party harassment acts and operate similarly to EPL policies, providing coverage for a defense.

- **Cyber:** Sometimes the demand letters or the lawsuits allege that the plaintiff cannot access the company's privacy policy on its website, or effectively exercise their choices concerning the website's collection and use of personal information; if the policy covers wrongful collection of information and/or the failure to implement privacy policies and procedures to ensure that those policies are followed, it may cover the cost of defense if these kinds of allegations are included in the complaint. A discrimination exclusion in the cyber policy could, however, bar any otherwise potentially available coverage.

- **Media Liability:** These policies provide coverage for a company's media activities, including its website; oftentimes there is a discrimination exclusion, however; if it is broadly written, it could bar any otherwise potentially available coverage, but if it is more narrowly written to exclude discrimination in only the employment context, coverage may be available.

- **Commercial General Liability:** Generally speaking, coverage is unlikely to be available under these policies because there is unlikely to be any allegation of bodily injury or property damage, or any enumerated offense within the definition of personal and advertising injury.

Rather than waiting to receive a letter threatening litigation or a lawsuit alleging website accessibility violations under the ADA, a company can proactively mitigate the risk by taking certain steps. Even though there is no law or regulation identifying website accessibility standards, nor any requirement that a business comply with WCAG 2.0, it is important that all customers of a business, including those who may have a disability, be able to interact with and transact business on the company's website, if only because it makes economic sense. In addition, avoiding a lawsuit saves a business time, money, unnecessary inconvenience and limited resources. In other words, despite no law or regulations requiring that a business' website be accessible (and it is unclear precisely what that term means), it makes good business sense to have an accessible website.

First, consider whether the company's website vendor understands and can comply with WCAG 2.0 guidelines; if not, it may be time to consider a different vendor. Next, review the website to determine whether there are any barriers to its use by a blind or low-vision individual. This can be accomplished by using scans that are readily available (which are imperfect at best and themselves indicate they do not guarantee their use ensures the accessibility of the website), or using screen reader software, or by engaging live-user accessibility testers, and/or by hiring a competent vendor with whom to consult. If upon evaluating the website, it is determined that certain changes need to be made, if the changes cannot be accomplished in-house by the company's own information technology staff (assuming there are any), then consideration should be given to engaging a vendor who can make any necessary or recommended changes to comply with WCAG 2.0, to include ongoing accessibility testing and monitoring. These options need to be considered in conjunction with the company's available budget and marketing concerns.

Should a threat letter be received, or a lawsuit filed, all available policies of insurance should be

reviewed for any potential coverage that may be available, particularly for covering the cost of defense. Despite the credit unions' recent success in the Virginia cases, it does not appear that these claims are going away anytime soon.

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Disclosure: The author has defended credit unions against Americans With Disabilities Act claims regarding their websites.

[1] Civil Action File No. 1:17-cv-01205, E.D. Va., Jan. 26, 2018 Order, Doc. 25, (since the date of the judge's order, the plaintiff filed an amended complaint, and the credit union filed a motion to dismiss the amended complaint).

[2] Clarence Griffin v. Department of Labor Federal Credit Union, Civil Action File No. 1:17-cv-1419.

[3] Civil Action File No. 1:17-cv-01419, E.D. Va., Feb. 21, 2018, Order, Doc. 19. (the plaintiff appealed the court's ruling to the Fourth Circuit, where the case has been docketed under number 18-1312).