Your Insurance May Not Cover Website Disability Claims

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Steven Becker, a partner in the Vorys Washington, D.C. office, authored a column titled "Your Insurance May Not Cover Website Disability Claims" for the September 14, 2015 edition of *Retail Law360*.

According to the article, many businesses are taking proactive measures to reduce accessibility liability. However, there are also businesses that are choosing to forego action because they believe that clauses in their contracts and leases will shift the financial burden of disability discrimination and other claims to their vendors and lessors. According to Becker, reliance upon such indemnification clauses may be misguided. The full text of the article is included below.

Your Insurance May Not Cover Website Disability Claims

Last October, I wrote a *Law360* guest column on the coming tide of website disability claims under the ADA. Since then, the Department of Justice has entered into settlements with the likes of Carnival Corp., grocers Ahold USA and its affiliate, Peapod LLC, and the Museum of Crime & Punishment, to make their websites more accessible to the disabled.[1] New Department of Justice website accessibility regulations are scheduled to be released in April 2016. Those regulations are intended "to expressly address the obligations of public accommodations to make the websites they use to provide their goods and services to the public accessible to and usable by individuals with disabilities under the legal framework established by the Americans with Disabilities Act." However, the proposed regulations have been delayed several times over the past few years and there is no assurance that they will be published next April. Still, we are seeing greater interest from companies that want to know if their websites are subject to Title III of the ADA and what can be done to make them more accessible to the disabled.

While interest in taking proactive measures to reduce accessibility liability is increasing, there are businesses that may be choosing to

forego action because they have indemnification and hold harmless clauses in their contracts and leases, which purport to shift the financial burden of disability discrimination and other claims to their vendors and lessors. Unfortunately, reliance upon such indemnification clauses may be misguided.

Indemnification and Contribution

Say you are a business that is sued because your website allegedly does not comply with the ADA. After an initial visceral reaction to the lawsuit, your next likely thought is that you shouldn't be liable, because you relied on an experienced website developer to design the website. Although your company controlled and provided the content for the website, all details concerning functionality and accessibility were left in the hands of your trusted developer. Better yet, you even had a contract with the developer that required it to design a website that complied with all laws, including the ADA, and to indemnify and hold your company harmless from any claim arising out of the developer's design of your website. Your lawyer advises you that the web designer may be liable to the plaintiff because, as a matter of law, vendors may have such exposure under the ADA if they drew up designs that the owner relied upon and which rendered the website inaccessible to people with disabilities.[2] You breathe a sigh of relief and prepare to tell your litigation counsel to convince the plaintiff to dismiss your company and sue the website developer. If that doesn't work, then you instruct counsel to file a third-party complaint against the developer for indemnification, contribution, breach of contract and professional negligence. While you may have to endure some expense and aggravation to defend the ADA lawsuit, at least you have the comfort of knowing that someone else ultimately will be responsible for your legal fees, as well as any settlement or damages that may be assessed in favor of the plaintiff.

Not so fast. A consensus is developing in the case law that effectively renders contractual and common law indemnification claims unenforceable in ADA and Fair Housing Act accessibility litigation.

A case that is often cited for this proposition is Equal Rights Center v. Niles Bolton Associates, 602 F.3d 597 (4th Cir. 2010). Niles Bolton Associates was an architectural firm that designed multifamily apartment buildings for a builder known as Archstone. Archstone and Niles Bolton were sued by the Equal Rights Center for alleged accessibility barriers at the apartment units. Archstone filed a cross-claim against Niles Bolton and asserted claims for express indemnity, common law (implied) indemnity, breach of contract and negligence. In support of its cross-claims, Archstone had a contract with Niles Bolton that required the latter to correct at its own cost any designs or specifications found to be negligent. Under the contract, Niles Bolton was also responsible to Archstone for all damages resulting from defective designs and specifications.

Despite the logic of and factual support for Archstone's claims against Niles Bolton, the architect nevertheless was able to obtain dismissal of Archstone's claims. The Fourth Circuit held that compliance with the ADA was nondelegable and the third-party claims were preempted by the statute, under the following rationale: "If a developer of apartment housing, who concededly has a nondelegable duty to comply with the ADA and [FHA], can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing. Such a result is antithetical to the purposes of the FHA and ADA."[3] Subsequent federal court decisions have fallen in line with Niles Bolton Associates and further extended the doctrine to claims for contribution, too.[4] In so ruling, the courts have rejected business owners' well-founded arguments that the

accessibility regulations are highly technical and require reliance on outside experts to ensure that their facilities are in compliance.

The only exception to this rule is when the claims against the professional or vendor are not "in substance reiterations of claims seeking indemnification or contribution for proven FHA [and ADA] violations."[5] Although one court permitted such a cross-claim to go forward, no explanation was given of the specifics of the claim or for how it fell within the exception.[6] Indeed, unless the business owner is suing under contract for a return of fees paid for deficient design services, it is difficult to fathom any other claim that might satisfy the rule that it not be a de facto claim for indemnification or contribution for alleged violations of the accessibility statutes.

This puts businesses with websites in a tough spot. Unless the business has staff who are versed in website functionality programming and accessibility guidelines and features, it has little choice but to "delegate" that design responsibility to an outside vendor in order to comply with its obligations under the ADA. But, under the case law, the company effectively is denied any protection for having tried in good faith to comply with its obligations, because it remains liable for design-related accessibility barriers and is left without recourse against the website designer.

Insurance

These developments highlight the need for website owners to ensure that they have insurance against accessibility discrimination claims. Of course, one might contend that insurance is just another form of indemnification for ADA violations and, therefore, should not be permitted. However, those few courts that have touched upon the question have decided, without much analysis, that liability insurance is different than the type of indemnification that is preempted by the ADA.[7]

It is, therefore, important for businesses to review their policies for coverage and for potential gaps in coverage. There is insurance that expressly covers ADA public accommodation discrimination claims. One example is a "third-party liability" endorsement to employment practices liability insurance policies. Purchasers of these policies need to be aware that although their insurance may provide coverage for defense costs and monetary judgments for Title III claims, they do not necessarily cover the costs to bring one's facilities in compliance with the ADA. Compliance often is the most expensive element of a Title III ADA lawsuit. Some specialty lines now also provide stand-alone policies for ADA public accommodations claims that include coverage for costs to achieve compliance with the statute.

Whether a particular policy covers an accessibility discrimination claim is a fact-specific inquiry that depends upon the allegations presented in the complaint. Public accommodation discrimination lawsuits come in different forms, depending upon the anti-discrimination laws of the forum state. Many cases involve claims under Title III of the ADA and join a claim under the state's or local government's anti-discrimination statutes. Title III provides for declaratory and injunctive relief and attorney's fees, but not for compensatory damages. The state laws often permit an award of monetary damages, sometimes in the form of compensatory damages and sometimes in the form of fines in a specified amount for each violation. Many insurance policies do not include fines within the scope of covered damages. Business owners need to review their policies to see if they cover or exclude public accommodation discrimination claims and the assortment of remedies that can be imposed against them.

For instance, in *Yates v. Jumbo Seafood Restaurant Inc.*, the court upheld the denial of coverage for alleged violations of Title III and its California state law counterparts, because the comprehensive general liability policy contained an exclusion for bodily injury or property damage arising out of "Any federal, state, county, municipal or local law ... barring discrimination, including but not limited to those based on ... physical disability."[8] By comparison, the court in *Trammell Crow Residential Co. v. Virginia Surety Co. Inc.* concluded that the CGL policy involved in that case provided coverage for alleged violations of the ADA. The Trammell Crow court determined that the plaintiff's claim for damages arising out of disability discrimination fell within the policy's coverage for damages for "personal injury" and that the complaint did not allege an intentional violation of the statutes that would permit denial of coverage under the policy's "intentional acts" exclusion.[9] The Trammell Crow policy apparently did not have a specific exclusion for violations of federal and state statutes, like the one in Jumbo Seafood Restaurant.

Website disability claims essentially are just another variety of accessibility discrimination claims. In that sense, businesses should make sure that their insurance policies cover accessibility discrimination claims encompassing all of their facilities, including their websites. Perhaps a more difficult task for the business owner will involve undertaking a cost-benefit analysis of purchasing additional coverage for ADA-related claims. While there certainly are instances where egregious barriers to accessibility exist, oftentimes lawsuits are brought by "serial" plaintiffs who seek out and sue for technical violations of the ADA regulations that present de minimus or no true barriers to accessibility. Depending upon the nature and extent of the alleged violations, the costs of bringing the facilities into compliance can become significant, even for technical violations of the ADA. Thus, in determining the type and level of insurance coverage to purchase, businesses will need to weigh the costs of such insurance against their perceived risk of being sued for public accommodation discrimination, as well as the potential costs of becoming ADA-compliant if they ever are sued.

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[1] Settlement agreement between the United States and Carnival Corp., DJ No. 202-17M-206; Settlement agreement between the United States and The National Museum of Crime and Punishment, DJ No. 202-16-189; Settlement agreement between the United States and Ahold U.S.A. and Peapod LLC, DJ 202-63-169; Settlement agreement between the United States and City of Vero Beach, Florida, DJ 205-18-16.

[2] See *United States v. The Bryan Company*, 2012 U.S. Dist. LEXIS 78407, *16 (S.D. Miss., June 6, 2012) (liability under Fair Housing Act for inaccessible building plans); *Baltimore Neighborhoods Inc. v. Rommel Builders Inc.*, 3 F. Supp. 2d 661, 665, n.2 (D. Md. 1998) (same).

[3] 602 F.3d at 602.

[4] E.g., *United States v. The Bryan Company*, 2012 U.S. Dist. LEXIS 78407 (S.D. Miss., June 6, 2012); *United States v. Dawn Properties Inc.*, 2014 U.S. Dist. LEXIS 165946 (S.D. Miss., Nov. 26, 2014); *Independent Living Center of Southern California v. City of Los Angeles*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013) (ADA Title II); Rolf Jensen & Associates v. Eighth Judicial Dist. Court of Nevada, 282 P.3d 743 (Nev. 2012). Another oft-cited case is *United States v. Murphy Developers LLC*, 2009 U.S. Dist. LEXIS 100149 (M.D. Tenn., Oct. 27, 2009).

[5] *Miami Valley Fair Housing Center Inc. v. Campus Village Wright State LLC*, 2012 U.S. Dist. LEXIS

137922, *23-24 (S.D. Ohio, Sep. 26, 2012) (FHA case).

[6] *United States v. Quality Built Construction Inc.*, 309 F. Supp. 2d 767 (E.D.N.C. 2003).

[7] Id. at *18 ("The situations (insurance contracts, etc.) involving other indemnity arrangements — the slippery slope Campus Village cross-claimants point to — do not involve issues analogous to issues arising under the FHA or to the FHA's anti-discrimination goals. Consequently, the lack of indemnification or contribution in the present FHA context says nothing about whether indemnification or contribution are warranted in other contexts.")

[8] 2012 U.S. Dist. LEXIS 15185, *12 (N.D. Cal. Feb. 1, 2012).

[9] 643 F. Supp. 2d 844, 852-54 (N.D. Tex. 2008).