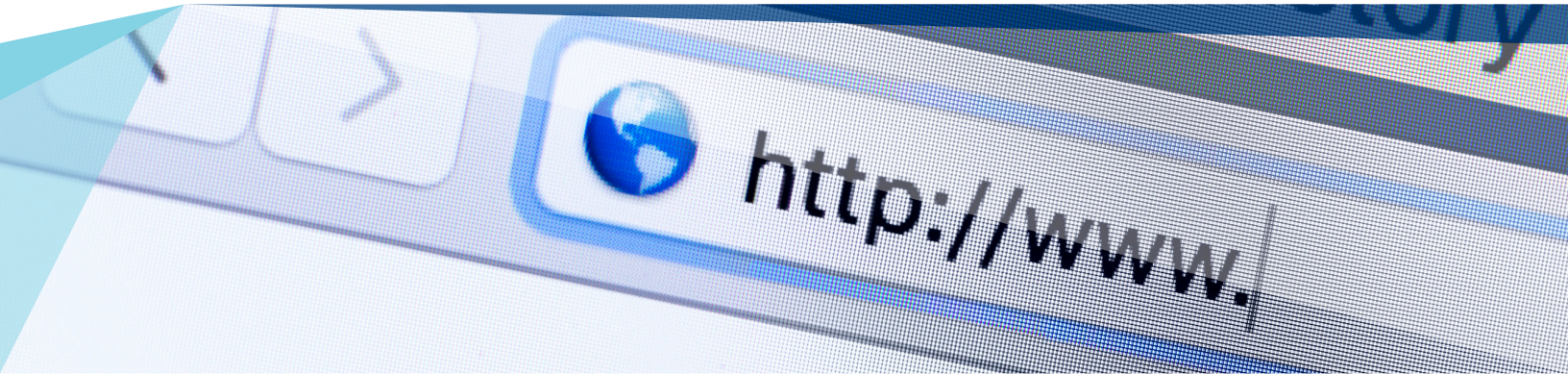


TAKING STOCK

A PERIODIC EXAMINATION OF KEY ISSUES AND TRENDS FROM MARSH'S RETAIL/WHOLESALE PRACTICE



RETAILERS' WEBSITES FACE SCRUTINY UNDER THE AMERICANS WITH DISABILITIES ACT

A recent court ruling in California has put retailers and other companies with a web presence on notice about compliance with the Americans with Disabilities Act (ADA).

The lawsuit, *Edward Davis v. BMI/BND Travelware*, targeted a retailer for allegedly violating the ADA, but not for its brick-and-mortar operations. Rather, the lawsuit took aim at the retailer's website, arguing it lacked screen-reading software and other accommodations to enable the plaintiff, who is blind, to browse and shop online.

A San Bernardino Superior Court judge ruled for the plaintiff, and ordered the retailer to pay \$4,000 plus legal fees, and to change its website to make it accessible to customers with visual impairments and other disabilities. The case is seen by some legal experts as potentially opening the door to similar ADA litigation against an array of corporate websites.

LAWSUITS MULTIPLYING

Disabled people and their advocates have filed a number of ADA lawsuits targeting websites over the past few years. However, while there have been significant out-of-court settlements — including a \$6 million payout by a major department store chain in 2008 — there had not been a federal or state court decision in favor of the plaintiffs in an ADA website lawsuit until the ruling in *Edward Davis v. BMI/BND Travelware*.

The lawyer for the visually impaired California man successfully argued that the luggage retailer's website was an extension of its physical store, not a separate venue. Under the ADA, stores and other places of public accommodation are required to provide access to the disabled with such provisions as wheelchair ramps and self-opening doors.

While the settlements, with some exceptions, have to date been relatively modest, the cost of mounting a legal defense and paying the plaintiff's legal fees can be high. For example, in the California case, attorney's fees, which the retailer has been ordered to pay, could be more than \$100,000, according to *The Wall Street Journal*. Beyond the financial impact, there is also the danger of adverse publicity for companies targeted by ADA lawsuits.



That said, companies in the retail, wholesale, and food and beverage sectors have long experience meeting ADA requirements at stores, warehouses, and plants. Many companies have for years installed ramps, built doorways wide enough for wheelchairs, made restrooms accessible, and provided other accommodations.

The challenge now is ensuring that websites are equally accessible, which may require adding the digital equivalents to ramps and wider doors. Websites can be made more accessible through such measures as using audio description of photos for the visually impaired and captions and subtitles on videos to assist those with hearing loss. Being able to move around a website without a mouse can be crucial for those with motor disabilities. And easily understood language, short paragraphs, and clear, strong, design can help meet the needs of the developmentally disabled or cognitively impaired.

EVALUATING YOUR WEBSITE

Determining whether your website is accessible is not a simple exercise. The US Department of Justice (DOJ) has considered issuing binding regulations, but has pushed that effort off until 2018. The uncertainty surrounding the issue, in turn, has provided fertile legal ground for lawsuits.

But companies aren't completely without guidance. For example, the DOJ has referred to the international Web Content Accessibility Guidelines (WCAG) to measure compliance. Reviewing the guidelines is a good first step in determining if your website has an accessibility problem, and, if it does, where to focus your remediation efforts. The guidelines are divided into four major headings:

Perceivable: Can your website be used by the visually impaired or deaf? Do you have written text or transcripts that can provide an alternative to audio content on your site? Do the videos on your site have captions or subtitles?

Operable: Can someone access your website using the keyboard instead of a mouse? Are they given enough time to read content?

Understandable: Is your text written in simple, clear language that can be understood by those with cognitive impairments or disabilities? Is the design strong and clear so that it is easy to understand how to navigate around the site?

Robust: Is your website compatible with various technologies now being used by the disabled to access the internet? Is it compatible enough to accommodate new upgrades and additional tools?

If you reviewed your site and found it lacking, you may want to work with a consultant to assess options. You will want to consider the cost of a potential upgrade, and examine whether you have insurance coverage should your company face an ADA lawsuit.

A number of different insurance policies could come into play. Any review of potential insurance coverage should include, but not be limited to, commercial general liability, employment practices liability, and errors and omissions policies. At the same time, you may have coverage through policies held by vendors, including those that work with you on your internet presence.

Websites for retailers and others have long since ceased to be novelties and are now an integral part of business. With the benefits come challenges, including ensuring compliance with the ADA and other applicable laws.

This briefing was prepared by Marsh's Retail/Wholesale Practice, in conjunction with Marsh's FINPRO Practice.

For more information about website ADA compliance and other insurance solutions, visit marsh.com, contact your Marsh representative, or contact:

MAC NADEL
Retail/Wholesale, Food & Beverage Practice Leader
+1 203 229 6674
mac.d.nadel@marsh.com

Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman.

This document and any recommendations, analysis, or advice provided by Marsh (collectively, the "Marsh Analysis" are not intended to be taken as advice regarding any individual situation and should not be relied upon as such. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting, or legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as actuarial, tax, accounting, or legal advice, for which you should consult your own professional advisors. Any modeling, analytics, or projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. Marsh makes no representation or warranty concerning the application of policy wording or the financial condition or solvency of insurers or reinsurers. Marsh makes no assurances regarding the availability, cost, or terms of insurance coverage. Although Marsh may provide advice and recommendations, all decisions regarding the amount, type or terms of coverage are the ultimate responsibility of the insurance purchaser, who must decide on the specific coverage that is appropriate to its particular circumstances and financial position.