

## Publications

### *Financial Services Alert: Key Updates: Financial Institutions, Websites and the Application of the Americans with Disabilities Act*

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Over the past year, various plaintiff-side law firms sent aggressive demand letters on behalf of activist organizations and individuals to financial institutions – typically community banks – asserting that the Americans with Disabilities Act (ADA) applies to websites; that a particular set of website accessibility standards set the “floor” or minimum that a website must provide (the [Web Content Accessibility Guidelines or WCAG 2.0 level AA](#)); that the financial institutions’ websites did not meet those standards; and offering to settle the dispute without filing litigation in exchange for, among other things, substantial settlement dollars, a signed settlement agreement setting a timeframe for the website to meet defined accessibility standards and an ongoing monitoring and auditing relationship of the website.

As organizations have taken action in response to demand letters or proactively in the absence of receipt of demand letters, there have been several recent key updates.

#### **1. Settlement by the Independent Community Bankers of America (ICBA) for its members but also for banks eligible to become members with assets of \$50 billion or less.**

In November 2017, the ICBA issued a [press release](#) indicating that it reached a settlement with one of the major activist organizations (Access Now) and associated counsel (the Carlson Lynch Sweet Kilpela & Carpenter LLP law firm based in Pittsburgh, Pennsylvania) on behalf of not just its members, but for all banks eligible to be ICBA members with assets of \$50 billion or less.

The Carlson Lynch law firm has publicly confirmed that it is not pursuing litigation against such banks and recently sent letters to many banks it threatened this past year with litigation, citing the ICBA settlement and indicating that it considered those particular disputes resolved on behalf of the firm’s clients. Importantly, the ICBA settlement only covers claims and threats by Access Now through the Carlson Lynch law firm. Thus, ICBA members and member-eligible

banks are still susceptible to threats or lawsuits from claimants of other law firms.

## 2. Rulemaking on ADA and website accessibility.

The Department of Justice (DOJ) has progressed from describing rulemaking on the application of the ADA to websites and setting accessibility standards from proposed rules to be issued the following year, to long-term rulemaking goals, to an inactive list as of July 2017, to **notice of official withdrawal from rulemaking plans** as of December 26, 2017. There are no federal government regulations applicable to private businesses anywhere on the horizon.

## 3. Court rulings across the United States.

Courts across the U.S. continue to reach different legal conclusions with similar facts on ADA accessibility cases, even among different judges within same federal district court. Some courts continue to find that without formal rules from the DOJ, it would be unfair (due process) to apply an unknown standard to banks in website accessibility cases, or that the ADA does not apply to websites under certain fact patterns. Other courts find the complete opposite: that the ADA applies to websites of all kinds or under broader fact patterns and that the WCAG 2.0 level AA accessibility standard applies. The only known completed trial on the subject occurred in 2017 and resulted in a decision in favor of the plaintiff. See June 13, 2017 Verdict and Order in *Carlos Gil v. Winn-Dixie Stores, Inc.*, Civil Action No. 16-23020 (S.D. Fla.). That case is now on appeal to the 11th Circuit with briefing well underway by both named parties and “friends of the court” advocacy groups, including the American Bankers Association.

## What do I do with this?

The immediate litigation threat from claimants of the Carlson Lynch law firm was eliminated by the ICBA settlement for ICBA members and banks eligible to become ICBA members with \$50 billion or less in assets.

That settlement does not protect organizations from claimants associated with non-Carlson Lynch law firms, nor does it protect non-ICBA-member banks with assets over \$50 billion.

The lack of rulemaking on ADA accessibility issues arguably cuts both ways. Businesses may point to an intentional lack of rulemaking on the subject arguing that the ADA should not be applied to websites or if it does, that the lack of clear regulations would make its application unfair. Disabled individuals and their attorneys may argue that the ADA applies to websites, even without express rules, and that it is up to a court to find the correct standard of accessibility. These opposing arguments are reflected in contrary court decisions across the U.S. in 2017.

Given the contrary decisions on the subject, organizations would be wise to continue to prioritize investment for accessibility of their websites, mobile apps and any other electronic business options for customers.

Vorys attorneys have the experience and unique knowledge on these issues that comes from first-hand experience representing a variety of financial institutions, business industries and website providers in ADA compliance, negotiation and litigation. We continue to monitor key developments as we enter 2018.

Involving counsel is vital to establishing the attorney-client privilege, which may also include website accessibility analysis and remediation evaluation. Contact your Vorys attorney if you have any questions about the application of the ADA to your website and electronic business tools.