

## IS YOUR INSURED'S WEBSITE COMPLIANT WITH THE AMERICANS WITH DISABILITIES ACT?

### CONTACT

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### ABOUT THE AUTHOR

This article was authored by Charles Sharp, member of AmWINS National Professional Lines Practice.



In 1990, the Americans with Disabilities Act (ADA) was signed into law to give disabled people the same access to American life as those without disabilities. The Act is intended to give equal access to all Americans to all public spaces. The law was initially thought of as only applying to brick and mortar locations and couldn't address access to the Internet, since the Internet wasn't fully commercialized until 1995. However, in response to a landmark case in Florida (*Gil v. Winn Dixie*), the court declared that Title III requirements of the law apply if the website is 'heavily integrated' with and serves as a 'gateway' to physical stores/services. The verdict was entered on June 12, 2017. As a result, companies are now finding themselves targets for ADA claims based on the inaccessibility of their websites and media by those who are disabled.

Consider this example: A blind or visually impaired person is currently able to navigate some websites using a 'screen reader' which will convert the content to a useable format. Their access could be audio or braille. However, not all websites have this functionality that would give them equal access to online information.

Another problem with some websites is the inability for keyboard navigation as an alternative to mouse navigation, which can be problematic for people with physical disabilities. This can be mitigated by adapting websites to allow for keyboard navigation.

However, in both of these examples, the challenge is that the website must be set up with software that enables the disabled person to navigate the site. Many, if not most, websites are not set up to handle this need. An additional challenge for ADA and website compliance is that the regulations that determine the level of ADA compliance have not yet been finalized by Congress.

The opening for ADA claims arising from website accessibility comes from several sources: job application procedures, hiring, firing, career advancement, job training, and use of online content. The question now becomes, "Is this an insurable risk, and if so, where can I find insurance coverage?"

Initially, since it relates to access, an insured might think this is covered by their General Liability policy. This is incorrect, as the personal/advertising liability does not extend to online access.

Since the claim appears to derive from the media the insured has put online, an insured might understandably think that the Media or Website Liability policy would be the answer. However, the Media Policy may deny coverage for this type of claim. This denial will most likely be based on the fact that the medium itself is not the issue; rather, it is the functionality or performance of the website. Media policies are generally designed to cover allegations of libel, slander, defamation, and copyright infringement.

Someone may look at a Professional Liability policy since this could be construed as a failure to provide a service. That could be a challenge because the service is being provided, but not everyone can see it. The claim may only address access and not the failure of a service, so that is not the ideal fix. Also, there may not be a professional service being provided to the point where the client can buy an E&O policy.

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Another option could be Cyberliability coverage. Some carriers have accepted ADA website claims on the basis that the claim can trigger their Privacy and Security Wrongful Act definition of "violations of laws that govern accessibility." In some ways, this is similar to how some cyber markets will pick up Social Engineering, seeking to differentiate their products in a crowded marketplace. However, due to the lack of a breach or loss of PII/PHI, it may be a stretch for Cyber coverage to respond.

One insurance policy that can potentially provide some defense coverage would be Employment Practices Liability. If an insured has Third-party Coverage, including Third-party Discrimination Coverage, it might be able to trigger the EPL policy. If an insured is providing something to the population at large, with the exception of the disabled, that could be alleged to be discriminatory towards the disabled. The EPL policies do not cover the expenses to modify property to make it ADA compliant, but they do cover defense costs. A similar approach would be expected if an EPL policy were to respond to these claims.

Even under the best of circumstances, the insured needs to consider the cost of upgrading their site to be ADA compliant. Fixing the problem is always preferred over waiting for a claim to hit.

Website compliance under the ADA will continue to evolve, especially considering the fact that official regulations have not come out yet. This issue only underscores the need for constant vigilance and understanding of a complex issue in the marketplace.

