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Is your ATM a Lawsuit Risk?

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First Suits Filed Over ADA Compliance

You may have missed it last week. Not long after it issued its opinion on the Affordable Care Act, the Court announced its decision in *First American Financial v. Edwards,* the decision every banker had looked forward to as a cure for the recent epidemic of EFTA "statutory damages" class actions. So, how did the court rule? It didn't. Rather than issuing a decision the Supreme Court dismissed the case, effectively spitting the hook on this important question. And now, I have more bad news. The same lawyers who vigorously pursued the EFTA "class actions" for lack of a second sign on your ATM have found a new non-compliance issue: are your ATMs accessible to the blind and persons with disabilities?

These lawyers say "no" and already have started filing "class actions" seeking injunctions and damages to enforce their position. A check of Court records shows that one set of firms has filed no less than ten such lawsuits in federal courts for the Northern and Eastern District of Texas since June 13. Experience teaches that these are the first of many such suits; it also teaches that how our industry reacts to these first cases will have a large impact on whether more are filed.

The legal background for this new wave of suits comes from federal and state statutes and regulations designed to remove architectural barriers for the disabled. These statutes generally

track Title III of the Americans with Disabilities Act [the "ADA"], which requires places of public accommodation, a term defined in the ADA to include banks, to provide disabled customers with reasonable and appropriate accommodations that enable them to partake of the bank's services to the same extent as non-disabled customers because of their disability.

To implement the ADA, the Department of Justice established advisory committee to create accessibility guidelines that became known as the ADA Accessibility Guidelines, usually referred to as ADAAG. There are two comprehensive sets of these ADAAG, one issued in 2004 and another issued in 2010. The 2010 Standards, which incorporate the 2004 standards and include provisions governing ATMs, became effective on March 15, 2012. Under the ADAAGs, at least one ATM at every location must meet the specific requirements in ADAAG; the ADAAGs treat lobby ATMs and drive-up ATMs at the same facility as two different locations; therefore, say the Plaintiffs, machines at both locations must comply. The issue will be particularly acute at drive-up ATMs, where it is more difficult to provide a reasonable alternative service.

As with the EFTA cases, there are potential responses and defenses; they are "potential" at this point because the 2010 ADAAGs have only been in effect since March, and there is virtually no case law addressing where the main statutory language meets the ADAAGs. It also appears to be reasonably probable that these cases probably will not proceed as "class actions," although that is relatively little solace for those who are affected: an injunction requiring the Bank to take action requires the same action regardless of whether there are one or a million plaintiffs.

So what do you do? Just as it was with the EFTA signage cases, the best way to avoid a problem is to make sure your ATMs are compliant; if they provide audible services for visually-impaired users, check the functionality from time to time to make sure it works. The response for many banks will be that they have ordered new, compliant equipment but that the manufacturer has not been able to deliver it yet because of high demand. That's good as far as it goes, but some judge will ask, "What are you doing in the meantime?" What are you doing in the meantime?

And if you're sued? No one wants the publicity of being the "bad guy" in a suit by a blind or disabled individual, but ADA and the companion Texas Act include words like "reasonable" and "undue," which mean there are defenses. Those words are important but work best when you have taken steps in advance to create accommodations for disabled customers. It is not improper or unreasonable to make a plaintiff prove their case and to show that their injury is real rather than self-directed for profit. Our work with EFTA cases suggests it may be possible to resolve these claims early and proactively.

The other issue is insurance. Here, the fact that ADA does not provide a remedy in damages may initially prompt insurers to deny coverage. Nonetheless, this is an issue that should be carefully considered. To ensure that coverage is not lost because of late notice, submit the claim early; it may be possible to start a dialogue with the insurer that leads to some support, just as occurred when IBAT members and IBAT Financial Services worked with insurers to secure coverage for EFTA suits.

The Supreme Court's non-decision in *First American* and this new wave of suits ultimately carry a simple, overarching message: there aren't going to be any "silver bullets" we can use to resolve these issues. We will have to roll up our sleeves, work on compliance, respond appropriately and forcefully to litigation and work with our insurance professionals to resolve risk management issues.

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