

## Expert Analysis

### Automated Teller Machine Accessibility

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Although the deadline for ATMs to comply with new standards under the Americans with Disabilities Act, 42 U.S.C. § 12101, was March 15, 2012, almost a year later class-action lawsuits are still being filed around the country. There is no indication that the filings are going to slow down anytime soon.

Carlson Lynch, the Pittsburgh-area plaintiffs' law firm that has been leading the charge in the ADA ATM litigation, has filed more than 100 class-action lawsuits in federal district courts in Pennsylvania, Texas and most recently Georgia. The first cases were brought in Pennsylvania in March 2012, less than two weeks after the new ADA standards took effect, and the filings have continued into 2013. Although over 100 cases have been filed, there are only a handful of named plaintiffs, all visually disabled individuals who claim they were denied services by certain banks and financial institutions as the result of ATMs that are not accessible. One plaintiff, Robert Jahoda, has sued 35 banks and financial institutions in federal district court in Pittsburgh. In some instances, advocacy groups for the blind have also joined the suits as plaintiffs.

Other than the names of the parties and the nature of the alleged ATM compliance issues, the complaints filed by Carlson Lynch are virtually identical and specifically reference a March 2012 Wall Street Journal article noting that approximately half of the estimated 409,000 ATMs in the United States were noncompliant just prior to the March 15, 2012, deadline.

Most of these lawsuits are being settled relatively quickly, privately and without class certification, with the banks agreeing to some or all of the following: completion of any remaining ATM modifications, upgrades or replacements; implementation or modification of the bank's ADA compliance policy; appointing an employee to serve as the ADA compliance manager; and periodic progress reports from the bank to the plaintiff during the "compliance period." This period usually runs for at least a year after the settlement of the case, during which time the banks agree that the plaintiff has the right to examine some or all of the bank's ATMs for verification of compliance.

Last, but certainly not least, settlement of these cases involves payment of the plaintiff's counsel's fee by the bank.

Of course, every bank or financial institution wants to be ADA compliant and accessible to customers with disabilities, including the visually impaired. In fact, many banks are compliant, and many already were, prior to the March 15, 2012, deadline.

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However, even banks and financial institutions that hired outside vendors to ensure ADA compliance prior to the deadline are now finding themselves defendants in ADA ATM lawsuits. In some instances, these banks may have received bad advice from their vendors, who simply were not fully aware of all the new ADA requirements. In other cases, following an investigation of the allegations in the complaint, banks are finding that there are either no alleged compliance issues or that there was possibly a temporary malfunction with the ATM in question on the date it was visited by the plaintiff.

Other banks continue to work toward compliance, particularly those that were unable to simply modify or upgrade existing ATMs and, as a result, had to replace large numbers of the machines. For these banks cost may be a factor as the cost to replace an individual ATM can range from \$20,000 to \$60,000. For large banks with tens or hundreds of ATMs to replace, the costs can be significant. Even small community banks without many ATMs can find the cost burdensome. As a result, some banks have simply chosen to remove certain ATMs and not replace them which, ironically, has the effect of making ATMs less available and accessible to all bank customers, including customers with disabilities.

Furthermore, despite the fact that the new ADA standards had been in the development stage for at least seven years prior to implementation (allowing banks and financial institutions time to plan for upgrades or replacement of their ATMs) many banks were unable to meet the deadline as a result of vendor delays or the inability of the ATM industry to meet the demand. In any event, banks or financial institutions that are still noncompliant should continue to work toward compliance, and even banks that believe they are compliant may want to double-check that all of their machines actually meet the specific ADA requirements. Otherwise, the bank may end up as just another defendant in an ADA ATM lawsuit.

### **ADA ATM REQUIREMENTS**

The first thing banks and financial institutions may want to do is ensure they are familiar with the specifics of the ADA ATM requirements.

The most common allegations in the lawsuits filed to date center on alleged problems with voice guidance features, the lack of privacy features and the lack of Braille instructions on how to activate the voice guidance feature. However, failure to comply with any of the ADA requirements can expose a bank to possible litigation. It may be worthwhile to keep in mind that if a bank or financial institution has more than one ATM at a given location, typically a branch, only one of the machines needs to be ADA compliant.

#### ***Voice guidance/speech output***

ATMs must be equipped with voice guidance features that can be accessed through the use of either an industry-standard audio jack or a telephone handset. Additionally, the method used to initiate the voice guidance feature must be easily discoverable. For example, the audio jacks on most ATMs with voice guidance are usually very conspicuous, often protruding from face of the machine.

As a general rule, if a function is offered to customers who are not visually impaired, it must be offered to customers who are visually impaired. The voice guidance feature must provide the same transactional information to all customers, as well as any additional functions, such as providing monthly statements or selling stamps or theater tickets. The exceptions to this rule include advertisements (unless they contain information that could be used by the customer in the transaction that is being conducted) and any visible output that is not displayed on the screen, such as

when asterisks appear on the screen when a customer enters his or her PIN, in which case audible tones can be used to signify the asterisks.

A customer who is visually impaired should also be able to control the volume of the voice guidance feature and should have the ability to have the information repeated or interrupted.

Finally, if the ATM provides printed receipts, the voice guidance feature must provide all of the information contained in a printed receipt that allows the customer to complete or verify the transaction, including the amount of any withdrawal or deposit, account balance or any error messages. Exceptions to this requirement include information on a printed receipt related to the location of the ATM, date and time of the transaction and customer account numbers.

While alleged deficiencies in voice guidance features are one of the most-common issues raised in the ADA ATM lawsuits, the complaints typically have not referenced a specific problem. Presumably, however, even an issue that may seem minor to a bank or financial institution, such as a lack of a working volume control, can lead to a lawsuit.

### **Privacy**

One of the biggest concerns for ATM customers who are visually impaired is privacy. Prior to voice guidance systems, blind customers who did not want to travel to a branch would often have to ask other customers — strangers — to enter their PIN and other transactional information. The new ADA standards require that ATMs “shall provide the opportunity for the same degree of privacy of input and output available to all individuals.” Typically, this means that once the voice guidance system is activated, the screen will go blank, preventing anyone from looking over the person’s shoulder and viewing their private information while they make their transaction. Plaintiffs in ADA ATM lawsuits frequently allege that the ATM in question is either not equipped with this feature or the feature was not working properly at the time of their visit.

### **Braille instructions**

The new ADA standards simply state: “Braille instructions for initiating the speech mode shall be provided.” While the ADA sets forth specific instructions for the size of the Braille to be used, it offers no examples of what, exactly, the instructions should say. As a result, ATMs from different banks or even the same banks may provide different instructions. Often, the instructions will state “insert headphones to initiate speech mode” on a sticker placed somewhere near the audio jack. Other ATMs provide even simpler Braille instructions, such as: “Talking ATM.” Since the ADA standards do not specify the language to be used, banks have some leeway. Obviously, the more detailed the instructions, the less likely it is to be an issue. In the end, the exact language a bank uses may be dictated by the amount of available space on the ATM.

### **Input controls**

ATMs must provide at least one “tactilely discernible” input control for each function, which simply means that the keys should be raised above the surrounding surfaces so they can be easily identified by the visually impaired. Additionally, function keys, such as the “enter” or “cancel” keys, must be designed to contrast visually from any background surfaces, and the symbols on the function key surfaces must contrast from the key surfaces.

### **Display screen**

The ADA requires that the display screen be visible from a point located 40 inches above the center of the clear floor space in front of the machine and provide detailed requirements for the size and font displayed on the screen.

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## DEFENDING AGAINST ADA ATM SUITS

The best way a bank or financial institution can defend against ADA ATM lawsuits is to ensure that all its ATMs are compliant. There is, however, no guarantee that even compliance will prevent a lawsuit.

### *Temporary malfunctions*

Many of the new ADA regulations, such as the voice guidance and privacy requirements, involve computer software and, as anyone who has ever worked on a computer can attest, computer software is not infallible. On occasion, the software may not function properly, and the ATM at issue may even require maintenance or repair.

While public accommodations such as banks and financial institutions are required to maintain facilities and equipment to be accessible under the ADA, the regulations do recognize that there may be “temporary interruptions in service or access due to maintenance or repairs.” 28 C.F.R. 36.211. Banks are allowed a reasonable period of time to make these repairs. If a customer visits a bank’s ATM for the primary purpose of verifying ADA compliance, it is unlikely the customer will notify the bank of any compliance issues, even if the alleged problems amount to nothing more than temporary malfunctions. Often, the first notification the bank receives of the alleged ADA violations is a legal complaint.

In many instances, when the bank subsequently investigates the allegations in the complaint, it finds the ATM in question to be functioning properly. Other than maintaining a schedule for routine maintenance and compliance checks, there is simply no way to prevent these sorts of lawsuits. However, in order to defend a matter on the basis of a temporary malfunction, the bank or financial institution must first actually be in compliance — the voice guidance software and associated privacy must have actually been installed on the ATM at issue.

### *Standing issues*

ADA lawsuits such as the ATM cases being filed often raise issues of standing. The U.S. Supreme Court has held that Article III of the U.S. Constitution requires a plaintiff to demonstrate three elements to establish standing:

- The plaintiff must have suffered a concrete and particularized injury-in-fact.
- The injury must be fairly traceable to the challenged action of the defendant.
- It must be likely, rather than speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

To establish standing under Title III of the ADA, a plaintiff must demonstrate that the injury-in-fact is actual or imminent, not merely conjectural, because the only available relief to a plaintiff for a defendant’s alleged violation of Title III of the ADA is prospective injunctive relief. *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

Courts have also held that, in order to establish standing for injunctive relief, past exposure to illegal conduct is insufficient: A plaintiff must establish an actual or immediate threat that he or she will be exposed to the alleged violations again. Furthermore, plans to return at some unidentified time in the future, without concrete plans, will not support a finding of actual or imminent injury.

Some courts have also applied the four-part “proximity test” to determine whether a plaintiff has sufficiently pleaded or established an injury-in-fact. The proximity test considers:

- The proximity of the place of public accommodation (the bank or financial institution) to the plaintiff's residence.
- The plaintiff's past patronage to the defendant's business.
- The definitiveness of the plaintiff's plans to return.
- The plaintiff's frequency of travel near the accommodation in question. *Access 4 All Inc. v. Boardwalk Regency Corp.*, 2010 WL 4860565 (D.N.J. Nov. 23, 2010).

As you can imagine, this test can present problems to plaintiffs who have traveled a significant distance from their home to an area they do not frequent, to visit a bank where they do not regularly conduct business, solely for the purpose of inspecting an ATM for ADA compliance. In the ADA ATM lawsuits filed to date, this is often the case.

In most, if not all, of the ADA ATM lawsuits filed to date, the plaintiff alleges only that he or she visited one ATM in the bank's network on a single occasion. In those instances, the defendant may also be able to argue that the scope of the claim should be limited to the one ATM that was actually visited, as opposed to the bank's entire network of machines.

## CONCLUSION

Every bank and financial institution wants to comply with the ADA and be accessible to customers with disabilities, and most have made every effort to do so. Certainly, no banks or financial institutions are intentionally creating barriers for the disabled. The reality is, however, that regardless of the efforts that banks and financial institutions take to satisfy the requirements of the ADA, they still are likely to be targets of lawsuits, even if the alleged violations are only temporary malfunctions or, in the case of many banks, nonexistent. The best that banks can do is to be aware of the requirements of the ADA and make an effort to ensure that the accessibility features on the ATMs are properly maintained and usable by the customers with disabilities.



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