Federal Appeals Court Limits ADA Website Accessibility Lawsuits

Insights
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A federal appeals court has just provided some much-needed relief to businesses facing a barrage of website accessibility lawsuits alleging that their sites do not comply with the nation's main disability discrimination statute. These lawsuits typically involve a prospective plaintiff, or their counsel, merely accessing a company's website and testing various screen reading software, filing suit if any portion of the website is not compatible with any of the assistive technologies. In the April 7 *Gil v. Winn-Dixie* decision, the Eleventh Circuit Court of Appeals struck a blow to these lawsuits by holding that a website is not a place of public accommodation subject to the Title III the Americans with Disabilities Act (ADA) and setting a high bar for website accessibility issues to rise to the level of a statutory violation. While yesterday's decision itself only directly impacts businesses in Alabama, Florida, and Georgia, it adds to a split among the various circuit courts and could result in the issue ultimately being decided by the U.S. Supreme Court. What should businesses do in response to this key ruling?

The Underlying District Court Case: *Juan Carlos Gill v. Winn-Dixie Stores, Inc.*

In an eye-opening ruling, a Southern District of Florida court entered a verdict against a business in 2017 because its website did not fully interface with the visually impaired plaintiff's computer access technology software. The company did not sell any products on its website, but allowed users to add coupons to their loyalty cards, find the nearest store, and refill prescriptions for in-store pick-up. Despite having successfully shopped at the store for over 15 years, the plaintiff complained that he was deterred from shopping at the store again because he could not review and select digital coupons (which were also provided in print form), could not easily locate a store online through the company's website (even though he could obtain that information from an accessible search engine), or refill his prescriptions online for in-store pick up.

The company argued that Title III only applied to physical "brick-and-mortar" locations and that there were no accessibility barriers preventing the plaintiff from visiting and shopping at any of its stores. The lower court side-stepped the company's argument that the website was not a place of public accommodation covered by Title III of the ADA. Rather than decide if the website was a public accommodation, the lower court held that since the website offered services, and that those services had a sufficient "nexus" to the physical stores (coupons, locations, and prescription refills), the

website was a service in connection with a place of public accommodation covered by Title III and required to be accessible. The business appealed the ruling shortly thereafter.

The Circuit Split

The lower court's decision further highlighted a circuit split across the country as to whether websites places of public accommodation and therefore required to be accessible. The First, Second, and Seventh Circuits (including Connecticut, Illinois, Indiana, Maine, Massachusetts, New Hampshire, New York, Puerto Rico, Rhode Island, Vermont, and Wisconsin) have concluded that websites may be public accommodations covered by Title III and must be accessible. On the other hand, courts in the Third, Sixth, and Ninth Circuits (including Alaska, Arizona, California, Delaware, Hawaii, Idaho, Kentucky, Michigan, Montana, New Jersey, Nevada, Ohio, Oregon, Pennsylvania, Tennessee, and Washington) have concluded that places of public accommodation must be physical "brick-and-mortar" locations. In those states, businesses with a purely online presence would not be covered by Title III in significant portions of the country.

The Eleventh Circuit Weighs In: Websites Are Not Places Of Public Accommodation

Siding with the Third, Sixth, and Ninth Circuits, the Eleventh Circuit yesterday overturned the lower court's decision in *Gil v. Winn-Dixie* and held that websites are not places of public accommodation within the meaning of Title III of the ADA. In reaching this conclusion, the court relied upon the plain language of the ADA and Department of Justice regulations defining public accommodations and rejected the "nexus" theory. The relevant statutory and regulatory definitions were limited to physical places and did not include websites. Therefore, under the court's decision, an accessibility barrier on a business's website is not sufficient, in and of itself, to amount to an ADA violation.

Website Access Barriers May Still Result In ADA Violations – But Not In This Instance

The Eleventh Circuit's determination, while welcome news for businesses, does not mean that a website accessibility issue could never result in an ADA violation. The appeals court recognized that the inaccessibly of portions of a website may amount to a violation of Title III of the ADA in the event that they amount to an "intangible barrier" that interferes with a customer's ability to communicate with a physical store and results in the customer being excluded, denied services, segregated, or otherwise treated differently from other individuals in the physical store.

The plaintiff and a dissenting appeals court judge argued that the inability to access the website was such an "intangible barrier" that it deprived him of comparable and like experiences in the store by depriving him of the online prescription refill coupon-linking capabilities that provided for a faster experience in the store and greater privacy. But the court rejected these arguments, reasoning that the ability to link coupons or submit online prescription refills did not result in such an intangible barrier as they did not prevent Gil from utilizing coupons or refilling prescriptions at the physical store. Additionally, the court reasoned that the ADA does not require identical experiences for disabled and non-disabled customers in all respects.

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However, the court limited its decision to the particular facts of the case. In distinguishing other cases, it noted that the most important fact was that customers could not purchase any items through the website and that all website interactions were concluded at the physical store. It remains uncertain how courts will handle websites that offer online ordering and facilitate curbside or in-store pick up at physical locations, especially where the transaction is paid for through the website.

What Should Businesses Do?

While the *Gil v. Winn-Dixie Stores* decision provides some welcome relief to businesses with websites located in Alabama, Florida, and Georgia, the decision is unlikely to put an end to the rising trend of lawsuits challenging businesses' websites in those locations and across the country. This is especially true if websites offer online ordering or additional services that were not offered in *Gil v. Winn-Dixie Stores*.

For this reason, the best approach to deterring and preventing such lawsuits remains consulting with legal counsel or an accessibility consultant to identify the existence of any barriers to access on your company's website (and physical locations), and preparing and implementing an appropriate remediation plan. As has always been the case, taking appropriate preventive measures is the best defense against Title III lawsuits and may better serve your customers.

Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Florida or Georgia offices.

[Ed. Note: On April 9, the Clerk of the Eleventh Circuit Court of Appeals entered an Order withholding the issuance of the mandate in this appeal. This means that at least one judge sitting on the appeals court has requested a poll of the other circuit judges to determine whether a rehearing *en banc* should be granted. If such a rehearing is granted, all 12 judges who currently sit on the Eleventh Circuit will have an opportunity to weigh in on the case and possibly reverse the decision before it becomes final. The original opinion was reached by only a three-judge panel. While a party to the lawsuit is normally responsible for petitioning the Court for a rehearing *en banc,* in certain circumstances the Court can do so on its own initiative. This order shows that there is at least some interest within the Court to review the Opinion. Under the Eleventh Circuit rules, the Chief Judge will now conduct a poll, and if a majority of active judges determines that they want to hear the case en banc, the Chief Judge will direct it. We will monitor this situation and provide updates as necessary.]

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