Federal Court Decision Approves New Class Of "Surf-By" Lawsuits

IS YOUR WEBSITE SUSCEPTIBLE TO ADA TITLE III CHALLENGES?

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A federal court in Florida issued a potentially groundbreaking decision earlier this week that could open the floodgates when it comes to a new trend in litigation filed under Title III of the Americans with Disabilities Act (ADA): the "surf-by" lawsuit. While businesses have been forced to deal with so-called drive-by lawsuits for some time now – those claims filed by plaintiffs who spot technical ADA violations such as inaccessible entrances by simply driving down the street – recent years have seen an explosion when it comes to the digital equivalent of such suits. Surf-by lawsuits, on the other hand, are initiated when someone simply logs onto your company's website to search for possible accessibility violations, and if any are found, follows through by filing an ADA lawsuit against you, sometimes without prior warning.

The June 13 decision from the Southern District of Florida decision paves the way for a new type of surf-by lawsuit, where an enterprising plaintiff or plaintiffs' attorney searches for technical ADA violations on your website regardless of whether any sales are conducted on the site. The troubling decision should motivate you to review your digital presence to ensure you comply with the latest ADA standards no matter what kinds of business is transacted on your website, if any at all (*Gill v. Winn-Dixie Stores, Inc.*).

Website Visit Leads To Courtroom Battle

The eye-opening ruling stems from the website of a supermarket chain headquartered in Florida, Winn-Dixie Stores, which operates approximately 500 locations throughout the southeastern United States. The company does not sell any products on its website, but allows users to add coupons to their loyalty cards, find the nearest store, and refill prescriptions for in-store pick-up, among other things.

The visually impaired plaintiff visited the store's website and found it did not interface properly with his computer access technology software. He filed suit against the company under Title III of the ADA, complaining that he was deterred from shopping at the store because he could not review and select digital coupons (which were also provided in print form), could not easily locate a store on-line 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 court side-stepped the company's argument. Rather than decide if the website was a public accommodation, the judge held that the website was a service in connection with a place of public accommodation covered by Title III because it offered services that had a sufficient nexus to the physical stores: coupons, locations, and prescription refills.

For this reason, the court ruled in the plaintiff's favor at the conclusion of a bench trial, concluding that Title III of the ADA required the website be accessible. He ordered Winn-Dixie to pay the plaintiff's attorneys' fees and to agree on a plan to upgrade the website. The business has vowed to appeal the ruling.

Courts Differ On Legal Standards

This decision highlights a circuit split across the country as to whether websites are required to be accessible. The 1st, 2nd, and 7th Circuit Courts of Appeals have concluded websites may be public accommodations covered by Title III and therefore must be accessible. These jurisdictions hear federal cases arising from Massachusetts, Maine, New Hampshire, Rhode Island, Puerto Rico, New York, Connecticut, Vermont, Illinois, Indiana, and Wisconsin.

On the other hand, courts in the 3rd, 6th, and 9th Circuits have concluded that places of public accommodation must be physical "brick-and-mortar" locations. The federal jurisdictions covered by these circuits include New Jersey, Pennsylvania, Delaware, Ohio, Kentucky, Michigan, Tennessee, California, Washington, Oregon, Arizona, Nevada, Idaho, Montana, Hawaii, and Alaska. Businesses with a purely online presence located in these jurisdictions would therefore not be covered by Title III.

Nevertheless, if your business has physical locations, the decision in *Gill v. Winn-Dixie Stores* has the potential to change the equation. Regardless of your business's jurisdiction, your company website may be subject to a Title III lawsuit if it provides services connected with any physical locations.

What Should Businesses Do?

The rise of "surf-by" lawsuits challenging businesses' websites is inevitable and the *Gill v. Winn-Dixie Stores* decision will only further the trend. While the Department of Justice has not yet set forth any requirements or regulations for website accessibility, courts have looked to the Web Content Accessibility Guidelines (WCAG), published by the World Wide Web Consortium (W3C), for guidance when ruling on such cases.

One approach to deterring and preventing these lawsuits is to consult with legal counsel or an accessibility consultant to identify the existence of any barriers to access on your company's website, and prepare and implement an appropriate remediation plan. As has always been the case, taking appropriate preventive measures is the best defense against Title III lawsuits and may, in fact, open doors to a brand new customer base.

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For more information about how this case might affect your business, visit our website at www.fisherphillips.com or contact your regular Fisher Phillips attorney.

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Related People

Scott Fanning
Partner
312.346.8061
Email

Steve A. Miller
Partner
312.580.7817

Email

Service Focus

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