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Are Your Clients' Web Sites Accessible?

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Most businesses have Web sites. Many do not realize their Web sites may be a potential source of litigation. That is why attorneys who counsel clients with regard to their Web sites, including but not limited to intellectual property rights, Web site terms of use and privacy policies, may want to take a look at an onslaught¹ of nationwide lawsuits alleging violations of Title III of the American Disabilities Act² (ADA) and related state law claims.³ In fact, as one court stated in 2017, there have been “at least 750 lawsuits concerning access to the internet by visually impaired individuals” in the past several years.⁴ That number has far increased since then.

The basic premise of these claims is that the business selling a product or service on its Web site allegedly failed to provide accommodations that enable visually disabled visitors to use and/or access the Web sites.⁵ Claims alleging Web site violation of the ADA have been directed at the Web sites of various types of businesses, including restaurants, supermarkets, art supply stores, and manufacturers.⁶ There remains a split among circuits regarding whether a Web site is subject to the ADA, with some courts finding no claim under the ADA where the business does not have a physical location, as discussed below. However, because a Web site visitor can be located anywhere in the country, it is difficult

to predict whether the location of the Web site user or operator will determine the law that is applied to any given circumstance. The upshot is that understanding nationwide distinctions in the law is recommended.

The ADA and Web Sites

By way of background, the ADA prohibits discrimination on the basis of disability at “places of public accommodation.”⁷ Thus, businesses that are generally open to the public—and fall within 12 broad categories—are subject to the ADA.⁸ A nuance that has developed, largely due to the growing prominence of a virtual marketplace (*e.g.*, sales on products and services on the Internet) is that some courts have held that Web sites are places of accommodation subject to the ADA.⁹

There are split decisions throughout the United States on the issue of whether a Web site seller can be subject to the ADA where the company does not also sell to the public from a brick-and-mortar location.¹⁰ Some courts have held that where a business does not have a physical location where it sells products or services to the public, its Web site is not subject to the ADA.¹¹ The more prevalent trend, however, appears to be that Web site sellers (regardless of whether they have non-virtual stores) are subject to the ADA.¹²

Case law has evolved just in the past year. For instance, in 2017 the Southern District of Florida ordered the defendant supermarket, Winn Dixie Stores, Inc., to not only address accessibility issues on its Web site but also address the accessibility of third-party Web sites to

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American Disabilities Act

which it drove its viewers by way of links—and pay plaintiff’s attorneys’ fees.¹³ There, the court came to its decision without deciding whether the defendant store’s Web site is a place of public accommodation.¹⁴ Instead, the court denied the defendant’s motion to dismiss the complaint on the basis that the defendant’s physical locations are places of accommodation, and the plaintiff “has sufficiently alleged a nexus between Winn-Dixie’s website and its physical stores.”¹⁵

That same year, in the Eastern District of New York an extraordinary judgment was entered against an art supply retailer, requiring it to make its Web site accessible within a finite period of time or abandon using a Web site altogether.¹⁶ There, the court approved and placed the settlement agreement on the record (and in turn allowed for withdrawal of the class action allegations).¹⁷

The record there sets forth exactly, and technically, what the defendant has agreed to attempt with respect to its Web site and a two-year timeline for implementing the changes.¹⁸

Late in 2018, the Eleventh Circuit reaffirmed its position that the ADA applies to Web sites in a case filed against Dunkin’ Donuts LLC, and reversed the lower court’s dismissal, noting that “[t]he website is a service that facilitates the use of Dunkin’ Donuts’ shops, which are places of public accommodation. And the ADA is clear that whatever goods and services Dunkin’ Donuts offers as a part of its place of public accommodation, it cannot discriminate against people on the basis of a disability, even if those goods and services are intangible.”¹⁹

Where the Circuits Have Landed

Thus far, the Third Circuit is in line with the Sixth, Ninth, and Eleventh circuits, holding that “places of accommodation” under the ADA must be “physical structures,” and “discrimination only exists if the discriminatory conduct has a nexus to the goods and services of a physical location.”²⁰

In that 2010 Third Circuit decision, the court held that the term “public accommodation” in the ADA refers to a “physical structure.”²¹ A Web site, however, was not involved in that case. There, plaintiff, a blind individual, used a Discover credit card serviced by defendant to purchase sex from a prostitute while in her apartment.²² The plaintiff signed each receipt but could not see the amount that had been charged.²³ The plaintiff disputed the charges he ultimately received, and contacted the defendant claiming there had been fraud in the billing.²⁴ The defendant investigated and denied there had been fraud, noting the plaintiff could have checked his bill at any time using its 24-hour telephone service.²⁵ The court affirmed dismissal of the case,

holding the defendant’s credit card processing terminal is not a “public accommodation” under the ADA, and that defendant did not own, lease, or operate a merchant’s place of business where the credit card could be used.²⁶

In a 2017 District of New Jersey case where the plaintiff alleged the defendant’s Web site violated the New Jersey Law Against Discrimination (LAD) (which, like the ADA, prohibits discrimination in a “place of public accommodation”), defendant moved to dismiss on the basis that in the Third Circuit, a place of accommodation must be a physical location.²⁷ The court, however, denied the motion.²⁸ There, the court found the issue undecided under LAD because of a New Jersey appellate decision that held that with regard to “a Township police department,” each of both the individual police officers and the building, “is a place of public accommodation,” making “the legal question unsettled,” under LAD.²⁹

In another 2017 case within the Third Circuit, the court signaled a move closer to the *Blick* decision in New York, in that it distinguished the Third Circuit’s 2010 decision in *Peoples*, holding that when a Web site is under the ownership, possession or control of the defendant company, it is a place of public accommodation that is subject to the ADA, even though a Web site is not a “physical” location.³⁰

No Regulatory Guidance Expected Soon

Frustrating defendants in these lawsuits (and businesses seeking to comply before ending up in court) is that there are no regulations in place for Web site accessibility. There are requirements for federal Web sites that could be accessed for guidance.³¹ But thus far, the federal government has not passed any regulations regarding Web site accessibility for the private sector. In fact, on December 26, 2017, the Department of Justice (DOJ) withdrew two previously announced notices of proposed rulemaking in this area, stating that it is “evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate.”³²

There is some legislative movement on the issue, but nothing yet has been effectuated. For instance, on February 15, 2018, federal legislators in the House of Representatives passed a bill requiring individuals with Web site accessibility issues to contact the Web site owners, who would then have six months to make “substantial progress” to address the issues before the individual could file a lawsuit.³³ At the time of this publication, it remained to be seen if the Senate would pass the bill—and whether it would be signed into law.

Further, on September 25, 2018, the US Department of Justice, in response to a request from a Senator, confirmed that the DOJ has still done nothing in this area and is still “evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”³⁴ However, in that letter, the DOJ also claimed that it has previously stated, and maintains the position, that “the ADA applies to public accommodations’ websites.”³⁵

There are guidelines that courts have referenced, and they include the Web Content Accessibility Guidelines (WCAG2), which offers three standards of accessibility levels—A, AA, and AAA.³⁶ Indeed, the Eastern District of New York, in *Blick*, noted that the guidelines chosen there—WCAG 2.0 Level AA—“appear to be nearly universally accepted.”³⁷ Nonetheless, because there are no codified regulations, and no case law specifying a legal requirement, it remains unknown what level of WCAG, if any, would be considered reasonable as a matter of law in nationwide courts. Stay tuned.

Notes

1. Shari Lewis, “Judge Weinstein Does Deep Dive Into Web Site Accessibility Lawsuits,” *New York Law Journal* (Feb. 16, 2018).
2. See 42 U.S.C. § 12182(a).
3. See, e.g., *Andrews v. Blick Art Materials, LLC*, No.: 17-cv-767, 2017 WL 3278898, at *4 (E.D.N.Y. Aug. 1, 2017); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp.3d 1340 (S.D. Fla. 2017); *Demetro v. Nat’l Assoc. of Bunco Investigations*, No.: 14-cv-6521, 2017 WL 3923290 (D.N.J. Sept. 9, 2017).
4. *Andrews v. Blick Art Materials, LLC*, 286 F. Supp.3d 365, 368 (E.D.N.Y. 2017).
5. See *id.*
6. See *id.*
7. See 42 U.S.C. § 12181 (Definitions).
8. *Id.* at (7).
9. See, e.g., *Blick*, 2017 WL 3278898; *Winn Dixie Stores, Inc.*, 242 F. Supp.3d 1315.
10. *Andrews v. Blick Art Materials, LLC*, No.: 17-cv-767, 2017 WL 3278898, at *4 (E.D.N.Y. Aug. 1, 2017) (noting (but disagreeing) that some circuits have held that an Internet business must also have a “physical structure” to be subject to the ADA).
11. *Id.*
12. See *Blick*, 2017 WL 3278898.
13. See *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp.3d 1340 (S.D. Fla. 2017). Note that Winn-Dixie filed a notice of appeal on Aug. 1, 2017.
14. See *id.*
15. *Id.* at 1349.
16. *Blick Art Materials, LLC*, 286 F. Supp.3d at 365 (approving and placing settlement terms on the record).
17. *Id.* at 370–402.
18. *Id.* at 383–384.
19. *Haynes v. Dunkin’ Donuts LLC*, No.: 18-10373, at *6 (11th Cir. July 31, 2018).
20. *Andrews v. Blick Art Materials, LLC*, No.: 17-cv-767, 2017 WL 3278898 (E.D.N.Y. Aug. 1, 2017).
21. *Peoples v. Discover Fin. Servs., Inc.*, 387 Fed. Appx. 179 (3d Cir. 2010).
22. *Id.* at 180.
23. *Id.*
24. *Id.* at 182.
25. *Id.*
26. *Id.* at 184.
27. *Demetro*, 2017 WL 3923290, at * 14.
28. *Id.*
29. *Id.* (citing *Ptaszynski v. Uwaneme*, 371 N.J. Super. 333, 347 (App. Div. 2004)).
30. See *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp.3d 908, 918 (W.D. Pa. 2017).
31. See Federal Acquisition Regulation, US Access Board Section 508; <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-section-508-standards> (last viewed on May 16, 2018).
32. See <https://www.federalregister.gov/documents/2017/12/26/2017-27510/Nondiscrimination-On-The-Basis-Of-Disability-Notice-Of-Withdrawal-Of-Four-Previously-announced> (last viewed on May 13, 2018).
33. See H.R. 620 – ADA Education and Reform Act of 2017 (115th Congress 2017–2018); <https://www.congress.gov/bill/115th-congress/house-bill/620/actions> (last viewed on May 10, 2018).
34. See <https://www.retaillaborandemploymentlaw.com/files/2018/10/9.25.pdf>.
35. *Id.*
36. See *Blick Art Materials, LLC*, 286 F. Supp.3d at 386; see also Web Content Accessibility Guidelines (WCAG) Overview, <https://www.w3.org/WAI/intro/wcag> (last viewed on May 13, 2018).
37. *Id.*

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