Insight

IN-DEPTH DISCUSSION

JUNE 21, 2017

The Continuing Stream of Website Accessibility Claims: A Trial Victory for a Plaintiff and a Dismissal for a Company

BY GAVIN APPLEBY, PETER PETESCH, AND MARK PHILLIS

Over the past 18 months, the number of claims being filed over website accessibility has increased dramatically.[1] Although courts continue to differ as to whether websites are places of public accommodation covered by Title III of the Americans with Disabilities Act ("ADA"), and if so, whether all websites are covered or whether there must be a nexus between a physical location and a website for the website to be a place of public accommodation, litigation over website accessibility continues to proliferate. In recent months, there have been two notable district court opinions in this area.

On June 15, 2017, following the first trial conducted over website accessibility under the ADA, Judge Robert Scola from the U.S. District Court for the Southern District of Florida held in *Gomez v. Winn-Dixie* that the company violated Title III of the ADA because its website is not accessible.

The court first noted that Winn-Dixie's website and physical locations are "heavily integrated." The court observed that services offered on Winn-Dixie's website include the ability to refill prescriptions online, the ability to access digital coupons and link them to a rewards card, and the ability to find store locations. The court reasoned that it did not need to determine whether the company's website is itself a place of public accommodation because the ADA requires not only access to a place of public accommodation, but also "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." The court then found that Winn-Dixie violated the ADA because the lack of website accessibility had denied the plaintiff full and equal enjoyment of the ability to utilize the services available on the website.

---

1 *See* Gavin Appleby, Peter Petesch, and Mark Phillis, *The Wave of Website and Other ADA Accessibility Claims – What You Should Know*, Littler Insight (Feb. 22, 2016).

To remedy the found violation, the court ordered the parties to agree upon timing for the implementation of an injunction to make the company's website accessible. The court required Winn-Dixie to modify its website to comply with the WCAG 2.0 Level AA standards,[2] even though those standards have not been adopted as regulations and, although widely recognized, do not have the force of law. In addition to requiring that all Winn-Dixie created content on the website be accessible, the court also required that any content from third-party vendors on the website be made accessible. In other words, the court made Winn-Dixie responsible for ensuring that the content third-party vendors place on its website is accessible. The court also imposed training and testing requirements.

Plaintiff's counsel, who has filed well over 100 lawsuits over website accessibility in the Southern District of Florida already, likely will continue to do so and will use this decision in other cases he has filed. Other firms bringing these suits will also seek to rely on this opinion, although it has now been appealed to the U.S. Court of Appeals for the Eleventh Circuit.

This ruling stands in stark contrast to a ruling out of the U.S. District Court for the Central District of California a few months ago that is now on appeal to the U.S. Court of Appeals for the Ninth Circuit. In *Robles v. Domino's Pizza LLC*, District Judge Victor Paul Cruz granted Domino's motion to dismiss a claim by a visually impaired individual that the company was violating the ADA because he could not use his screen reader to place orders on its website or to view the menus and applications on its mobile application. Domino's website included accessibility banners that directed users who are using a screen reader and are having a problem using the website to call a number for assistance.

The court noted that while the U.S. Department of Justice ("DOJ") has consistently stated its view that the ADA's accessibility requirements apply to websites of private companies, it has not issued regulations that impose such a requirement. The court traced the history of the DOJ's attempted rulemaking in this area to 2010 and noted that it has yet to issue a final rule regarding website accessibility. Domino's argued that it was improper for the court to impose liability under the ADA for its alleged failure to abide by standards that have not been adopted through proper rulemaking. Domino's asserted that such an action would violate its right to due process under the U.S. Constitution. Relying upon prior Ninth Circuit precedent, the court agreed with Domino's position that seeking to require a company to comply with the WCAG 2.0 Level AA standards would violate Domino's right to due process.

The district court granted Domino's motion to dismiss, but it did so without prejudice, meaning that the case can be refiled after regulations are issued. As noted above, this decision has been appealed to the U.S. Court of Appeals for the Ninth Circuit.

While this decision may be encouraging to some companies, businesses should be aware that several other trial court judges have rejected similar arguments, including a judge in the Central District of California on June 15, 2017. In addition, the DOJ has filed a Statement of Interest in one case urging the court to reject such an argument.

What Should Companies Do About Their Websites in Light of These Opinions?

It is important to remember that since these decisions are trial court opinions, they do not create binding precedent. Nonetheless, the *Winn-Dixie* ruling is likely to increase the number of claims that companies will face over website accessibility. In light of that fact, there are steps companies may want to consider.

Companies should become familiar with the WCAG 2.0 Level AA standards to understand the issues the guidelines address and determine if there might be website modifications that would improve the

2 The Web Content Accessibility Guidelines (WCAG) are a set of technical standards developed through an open, collaborative process involving both individuals and organizations around the world. Its goal is to provide a single, shared standard for web content accessibility that meets the needs of individuals, organizations and governments internationally. The WCAG 2.0 AA standards also have been incorporated into an ISO standard by the International Organization for Standardization, but the ISO standard is not law.

accessibility of their website and mobile apps for disabled individuals. For example, can the company refer disabled customers to a telephone line through which they could obtain information that is otherwise available on the website or obtain assistance in accessing the information or services available on the website? If a company has video on the website or app, can it add close captioning for hearing-impaired individuals?[3] Can the company increase the font size used on the website or include a feature that would enable users to increase the font size? If the website or app contains PDF files, PowerPoints, Word documents, or similar files, can they be formatted so that they can be read by screen readers? Could the company adopt a uniform style sheet for its website and app pages to make navigation easier, particularly for users who rely upon electronic braille?

If a company is contemplating rolling out a new website or app, it may want to work with its designers and vendors on designing the website or app so that it complies with the WCAG 2.0 Level AA standards, to the extent practicable and readily achievable. As part of that process, companies may want to ensure that the scope of work includes compliance with each of the applicable success criteria of the WCAG 2.0 Level AA standards. Companies would be well advised to seek representations from their designers and vendors that the website will comply with the standards and indemnification from them if the website does not. Companies that are not developing a new website or app may still opt to assess their level of accessibility, and may want to collaborate with their designers and vendors with experience in website and app accessibility and with counsel experienced in Title III litigation to review other available options to promote accessibility and evaluate the costs, risks and benefits inherent in such alternatives.

Companies should also continue to monitor how the courts are dealing with these issues, and consider ways to respond if they receive a complaint from a customer about the accessibility of their website or app. Until the DOJ issues guidance on this area, companies will continue to face demand letters and lawsuits over the accessibility of their websites and apps. Settlements continue to be reached, but those settlements require compliance with the WCAG 2.0 Level AA standards, so companies should be aware of the obligations such settlements create.

The authors are among a group of attorneys in Littler's Leave of Absence and Disability Accommodations Practice Group who deal with Title III matters.

3 While most of the lawsuits being filed involve vision-impaired individuals, hearing-impaired individuals also have filed claims.