THE ELEVENTH CIRCUIT REVIVES AN ADA WEBSITE ACCESSIBILITY COMPLAINT ALLEGING NEARLY IDENTICAL ISSUES COVERED IN A PRIOR SETTLEMENT AGREEMENT

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The Eleventh Circuit's recent opinion in *Haynes v. Hooters of America, LLC* [1] has provided momentum to plaintiff's attorneys filing website accessibility lawsuits under the Americans with Disabilities Act ("ADA"). The three-judge panel, in an opinion authored by the Honorable U.S. District Court Judge Eleanor L. Ross, who was sitting by designation, reversed the district court's dismissal of an ADA complaint against the restaurant chain Hooters of America, LLC ("Hooters"). It disagreed with the district court's finding that the claims were mooted by Hooters' prior settlement agreement with another litigant. This opinion calls into question the overall efficacy of private settlement agreements in ADA website accessibility litigation.

On April 4, 2017, Dennis Haynes ("Haynes"), who is blind, filed a Title III ADA complaint against Hooters in the U.S. District Court for the Southern District of Florida. He alleged that Hooters' website was not compatible with screen reader software, which is used by the visually-impaired to navigate internet websites, and sought an injunction, declaratory relief, attorneys' fees, and costs. This type of lawsuit is on the rise given the lack of government-enacted website standards applicable to Title III entities. What does differentiate it, however, is that Hooters had already faced a "nearly identical website-inaccessibility lawsuit" filed on August 22, 2016, and entered into a settlement agreement that was still in effect at the time of the filing of this lawsuit. [2]

The Honorable District Court Judge Robert N. Scola, Jr., dismissed the complaint on the grounds that it was mooted by a settlement agreement addressing the same issues raised in the prior lawsuit and that both lawsuits requested the same relief. The plaintiff appealed the dismissal to the Eleventh Circuit, which limited its analysis to whether: (1) the district court erred in holding plaintiff's claims were moot given that Hooters had agreed to a remediation plan as part of an earlier settlement; (2) actively implementing a remediation plan moots a subsequent claim; (3) asking for any relief that differs from the underlying lawsuit defeats mootness; and (4) a subsequent plaintiff can be bound by a settlement that resolved similar claims.

Interestingly, the Eleventh Circuit was not swayed by Hooters' argument that it had already taken steps to remediate its website. It noted that "while Hooters may be in the process of updating the accessibility of its website, there is nothing in the record demonstrating that Hooters has successfully done so." [3] The Eleventh Circuit went on to conclude that "it cannot be said that the issues are no longer 'live'." [4] It also found that, while both complaints sought to enjoin Hooters to remediate its website, this complaint sought to enjoin Hooters to "*continually update and maintain* its website." [5] This distinction, according to the Eleventh Circuit, undermined the claim that the issues had been previously addressed. Moreover, it was concerned that only the plaintiff to the

prior settlement agreement could enforce the remediation plan, as the district court did not retain jurisdiction over the settlement agreement and Haynes was not a party to it.

The *Hooters* opinion underscores that ADA website litigation remains a front-and-center legal issue that is not going away until there is an actual regulation that sets forth finite requirements. Businesses that have already been targeted may find themselves embroiled in future litigation, and a settlement agreement may not protect them. As such, businesses have to rely on the guidance and prioritize remediation. For some businesses, it may make sense to consider a judicially-approved settlement agreement.

In the coming months, the Eleventh Circuit will hear arguments as to the broader issues concerning website accessibility in the much anticipated appeal, *Winn Dixie Stores, Inc. v. Gil*, 17-13467. A defense-oriented opinion in that case may make the *Hooters* decision short-lived. In the interim, businesses need to be aware that the floodgates are open and prioritizing website enhancements remains a priority.

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[1] 17-13170 (11th Cir. June 19, 2018).

[2] *Id*. at 3.

[3] *Id.* at 6.

[4] *Id.*

[5] *Id.* (emphasis in the original).

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