THE ELEVENTH CIRCUIT HAS RULED THAT WEBSITES ARE NOT PLACES OF PUBLIC ACCOMMODATION-UNLESS CONGRESS SAYS SO

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Litigation and Dispute Resolution Alert

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In a recent landmark ruling, the Eleventh Circuit Court of Appeals has held that websites are not places of public accommodation within the meaning of Title III of the Americans with Disabilities Act (ADA). In a 2-1 decision, the panel in *Gil v. Winn Dixie Stores, Inc.*,[1] (Winn Dixie) held on 7 April 2021, that websites are not within the 12 types of tangible physical places identified in 42 U.S.C. § 12182(a), and it is the job of Congress, not courts, to require websites be made accessible. The decision conflicts with *Robles v. Domino's Pizza, LLC*,[2] in which the Ninth Circuit held that the "ADA applies to the services ***of*** a public accommodation, not services ***in*** a place of public accommodation" (emphasis original). The ruling appears to establish a circuit split and likely tees the issue up for potential future review in the United States Supreme Court.

WEB ACCESSIBILITY LAWSUITS HAVE AFFECTED THOUSANDS OF BUSINESSES

How did we get here? Since 2014, there has been an exponential increase in website-accessibility litigation. Meanwhile, businesses have struggled to comply given the lack of clear guidance from the Department of Justice on the issue. Over the past three years alone, plaintiffs across the country have filed more than 10,000 lawsuits against businesses based often on threadbare allegations that a website lacks accessibility features. During the pandemic, with more businesses making their services available online, web accessibility lawsuits have risen substantially. Based on recently released 2020 statistics, the hotbeds for these lawsuits remain New York (1,756), California (989), Florida (542), and Pennsylvania (187).

K&L Gates has been at the forefront on this issue, and we have filed *amicus* briefs in both the *Winn Dixie* and *Robles* cases. Both briefs argued that the DOJ's position on this issue in the absence of enforceable regulations ran afoul of proper rulemaking under the Administrative Procedures Act and that it is solely within the purview of Congress (not the courts) to declare websites as public accommodations within the meaning of Title III of the ADA. The Eleventh Circuit tracked this position in a decision that will provide a brief reprieve to the business community.

THE TRIAL COURT

The *Winn Dixie* case was one of the first web-accessibility cases to go to trial and was a case of first impression in the Southern District of Florida (Miami). The case was brought by a legally blind patron who had "frequented Winn-Dixie's physical grocery stores to shop and occasionally fill his prescriptions over a fifteen year period."

Upon learning of the existence of Winn Dixie's website, the plaintiff visited the site and discovered it was incompatible with screen-reader software, which he required to access the site as a visually impaired individual. An important feature of the website was that it was not a point of sale for Winn Dixie's goods and services. Plaintiff's primary argument at trial was that Winn Dixie's website violated the ADA because he was unable to refill his prescription drugs through the website. Thus, “Winn-Dixie had not provided him full and equal enjoyment of the services, facilities, and privileges through its website.” After a two-day nonjury trial, the district judge determined that Winn Dixie's website operated as a “gateway” to its physical store locations and therefore it was required to be accessible to individuals with disabilities. The judge's decision held that (1) having an inaccessible website violates Title III of the ADA, and (2) a business is required to make its website accessible even though the DOJ never promulgated enforceable regulations.

THE ELEVENTH CIRCUIT'S ANALYSIS

On appeal, the Eleventh Circuit rejected plaintiff's argument that websites are places of public accommodation within the meaning of the ADA. In an opinion by Circuit Judge Elizabeth Lee Branch, using a textualist canon of interpretation, the court recognized that:

[t]he statutory language in Title III of the ADA defining 'public accommodation' is unambiguous and clear. It describes twelve types of locations that are public accommodations. All of these listed types of locations are tangible, physical places. No intangible places or spaces, such as websites, are listed. Thus, we conclude that, pursuant to the plain language of Title III of the ADA public accommodations are limited to actual, physical places. Necessarily then, we hold that websites are not a place of public accommodation under Title III of the ADA.

Next, the court turned to the issue of whether Winn Dixie's website otherwise violated Title III of the ADA based on the argument that the statute forbids not just physical barriers but also “intangible barriers” that prevent an individual from fully and equally enjoying the goods, services, privileges, or advantages of a place of public accommodation. The court rejected that argument and found that the plaintiff's “mere inability to communicate with and access the services available on the website does not mean that Winn Dixie is in violation of [Title III].” Rather, the court held that, to be in violation of Title III, “the inaccessibility of the website must serve as an intangible barrier” to a plaintiff's ability to communicate with Winn Dixie's physical stores, which results in plaintiff being excluded, denied services, segregated, or otherwise treated differently from other individuals in physical stores.

This part of the analysis is critical because, in the Eleventh Circuit's view, “all interactions with Winn-Dixie which can be (although need not be) initiated on the website must be completed in store . . . and nothing prevents [plaintiff] from shopping at the physical store . . . in fact he has done so for many years.” In other words, if a point of sale or transaction can be completed at a physical location, there is not an insurmountable “intangible barrier” to access. This guidance could alleviate some of the pressure these types of lawsuits have posed to businesses that have physical locations. The court also rejected the “nexus” standard applied in other jurisdictions, which requires a court to determine whether the website itself “augments” or enhances the experience of the user.

THE CIRCUIT SPLIT AND THE FUTURE OF WEBSITE ACCESSIBILITY LITIGATION

Finally, the Eleventh Circuit majority addressed the Ninth Circuit's contrary decision in *Robles*. The court wrote that “we do not find Robles persuasive, either factually or legally. Instead, we apply the statute, and our precedent, to the facts before us.” The court concluded its lengthy opinion by recognizing the inconvenience web inaccessibility may pose to a given user, but noting the intrinsic importance due process and separation of powers principles play. “[C]onstitutional separation of powers principles demand that the details concerning whether and how these difficulties should be resolved is a project left best for Congress. Our constitutional structure does not permit this Court to rewrite the statute that Congress has enacted.” While the appeals court's decision in *Winn Dixie* does not put an end to the issue, it firmly puts the proverbial ball back in the court of the political branches of government to take action unless the Supreme Court sides with the Ninth Circuit.

FOOTNOTES

[1] On 9 April 2021 the Eleventh Circuit issued an Order witholding the mandate in this appeal. *See, Gil v. Winn Dixies, Stores, Inc.*, No. 17-13467-CC (11th Cir. 2021).

[2] 913 F.3d. 898 (9th Cir. 2019).

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