

## Publication

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### Client Alert: ADA Website Accessibility Ruling Deepens Circuit Split

The Eleventh Circuit recently issued a ruling that websites are *not* places of public accommodation, building upon decisions by other courts and deepening the divide among appellate courts on this issue. As we have written in prior client alerts,[1][2][3] Title III of the Americans with Disabilities Act (ADA), which forbids “places of public accommodation” from discriminating against those with disabilities, may also apply to websites. Blind and visually impaired people often use adaptive technology and software to “read” websites and navigate using voice commands and keystrokes rather than using a mouse. For this assistive technology to work properly, particular coding must be used in creating the website.

In the absence of concrete guidance from the Department of Justice (which promulgates rules under the ADA) or Congress, businesses and their compliance and IT professionals have struggled to determine whether the ADA applies to their websites, and which accessibility fixes may be required. Informal and non-binding DOJ guidance indicates that the “places of public accommodation” language of the ADA applies to websites.

The courts also are split, with federal courts in the First, Second, and Seventh Circuits holding that any website can be a place of public accommodation, and courts in the Third, Sixth, and Ninth Circuits holding that there

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must be a “nexus” between the website and an actual physical location.[4]

The Eleventh Circuit is the latest appellate court to issue a ruling in this area, and it builds upon decisions by the Third, Sixth, or Ninth Circuits in holding that websites are *not* places of public accommodation. In the recent *Gil v. Winn-Dixie Stores* decision,[5] the court vacated a trial court ruling that the grocer’s website violated the ADA because it did not work with assistive reading software for visually impaired customers. The trial court had issued an injunction that required, among other things, that Winn-Dixie’s website adhere to Web Content Accessibility Guidelines 2.0 (“WCAG 2.0”), which is a set of accessibility standards generated by a private consortium. The Eleventh Circuit panel overturned the trial court decision and vacated the injunction. In so ruling, the appeals court held that websites are *not* places of public accommodation as contemplated by the ADA. The court further held that the website did not present an impermissible barrier to access, because visually impaired customers could still access the physical stores without being able to access the website.

While this is a major win for business owners, particularly those whose businesses operate solely online, litigation in this area continues on a widespread basis (particularly in the First, Second, and Seventh Circuits and states with their own accessibility laws). Accordingly, businesses building or updating their websites should continue to consider accessibility from the outset. Although plaintiffs can obtain only injunctive relief and attorney’s fees in litigation under the ADA, some attendant state law claims do allow for some financial recovery, and the plaintiffs’ bar has been very aggressive in pursuing early settlements.

If you have any questions about this ruling or any other issue concerning your business’s web presence, please



contact Lee Eulgen, Kate Dennis Nye, or your Neal Gerber Eisenberg attorney.

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[1] "ADA Claims Reach Into Cyberspace," Neal Gerber Eisenberg Client Alert, January 20, 2016.

[2] "Website ADA Compliance Remains a Pressing Concern," Neal Gerber Eisenberg Client Alert, December 20, 2016.

[3] "Online Hotel Reservation Systems Under Attack for Alleged ADA Violations," Neal Gerber Eisenberg Client Alert, January 16, 2019.

[4] *Compare Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999); and *Haynes v. Dunkin' Donuts LLC*, 2018 WL 3634720, at \*2 (11th Cir. July 31, 2018); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998); *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 183 (3d Cir. 2010); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

[5] *Gil v. Winn-Dixie Stores, Inc.*, No. 17-13467 (11th Cir. Apr. 7, 2021).

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