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The Eleventh Circuit Issues Important Opinion on the Inapplicability of Title III of the Americans with Disabilities Act to Consumer-Facing Websites

On April 7, 2021, in *Gil v. Winn-Dixie,* Case No. 17-13467, the U.S. Court of Appeals for the Eleventh Circuit issued an important decision on whether Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., is violated when a place of public accommodation (there, a grocery store) offers valuable in-store benefits to customers through a website that is inaccessible to individuals with visual disabilities.

The 2-1 panel decision is significant, and is a likely precursor to U.S. Supreme Court review because, among other reasons, it expressly disagrees with and rejects a prior decision by the Ninth Circuit, the only other circuit court to squarely address the issue of whether the ADA applies to websites. The *Winn-Dixie* decision resolves several legal issues that will clarify future website accessibility litigation in the Eleventh Circuit. The decision will serve as binding precedent throughout the circuit, which includes the Florida hot spot for such litigation. However, until the Supreme Court decides the issue, the national legal landscape remains in flux and businesses with stores in the Ninth Circuit must continue to follow prior case law. Businesses with consumer-facing websites should remain vigilant and continue to apply a coordinated strategy involving internal decisionmakers, legal counsel, and qualified website design and accessibility professionals to manage risk before, during, and after a claim or lawsuit is brought.

THE DECISION

The court's well-reasoned analysis is rooted in the fundamental principle of the primacy of the statutory text itself when it comes to construing the provisions of the ADA. Particularly, applying the ADA's plain language, the court made several key legal rulings that should help guide lower courts in the Eleventh Circuit (and perhaps others) dealing with the recent onslaught of ADA website litigation.

WEBSITES ARE NOT "PLACES OF PUBLIC ACCOMMODATION"

First, the court held that, "pursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places," and *"websites are not a place of public accommodation under Title III of the ADA."* Accordingly, Gil's inability to access and communicate with the website was not itself a violation of the ADA.

The court noted that Congress (when the ADA was enacted in 1990 and later amended in 2008) provided a very comprehensive definition of "public accommodations," which did not include websites. Since Congress' intent not to include websites is sufficiently clear, it is not necessary to consider legislative history or previous positions taken by the U.S. Department of Justice, the agency charged with enforcing the ADA.

This part of the opinion is not overly remarkable, since the Eleventh Circuit has never held that websites alone were covered by the ADA, and previously sustained website accessibility challenges at the motion to dismiss stage on the theory that the website was a *service that facilitated* the plaintiff's use of public accommodations (*i.e.,* physical locations). *Haynes v. Dunkin' Donuts LLC,* 741 F. App'x 752, 754 (11th Cir. 2018) (plaintiff stated claim by pleading that the inaccessibility of Dunkin' website denied blind people the ability to enjoy the goods, services, privileges, and advantages of Dunkin' shops because, among other things, the website allows customers to locate physical Dunkin' store locations and purchase gift cards online, and provides access to and "information about…the goods, services, facilities, privileges, advantages, or accommodations of" Dunkin' shops).

Indeed, many district courts have acknowledged a circuit split on the issue of whether only physical structures may be a "place of public accommodation"—with, until this Winn-Dixie decision, the Eleventh Circuit aligning with the Sixth and Ninth Circuits in holding that the ADA dictates that "places of public accommodation" are physical structures and the only goods and services that disabled persons have the "full and equal" right to enjoy are those offered at a physical location. In these circuits, discrimination only exists if the discriminatory conduct has a "nexus" to the goods and services of a physical location. On the other hand, the First and Seventh Circuits (as well as several district courts in the Second Circuit, and the District Court for the Western District of Pennsylvania—another hot spot for website accessibility litigation) have concluded that "places of public accommodation" need not be physical structures, and that websites themselves (without any nexus or other connection to a physical location) fall within the reach of Title III.

While the Eleventh Circuit remained on the same side of the split with respect to whether a website alone is actionable, in Winn-Dixie the court took a much deeper dive than it previously had, and its plain and unequivocal statement of the law is refreshing—especially in an area where businesses have been provided such little guidance to this point.

THE INACCESSIBILITY OF THE WINN-DIXIE WEBSITE WAS NOT AN INTANGIBLE BARRIER TO EQUAL ACCESS OF A PUBLIC ACCOMMODATION

Looking to its previous cases defining the reach of Title III of the ADA, the Eleventh Circuit recognized that the ADA prohibits discrimination via both tangible barriers (physical and architectural barriers that prevent a disabled person from entering an accommodation's facilities and accessing its goods, services, and privileges) and "intangible barriers" (eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services, and privileges). Thus, the court framed the salient issue as—*whether Winn-Dixie violated Title III because the inaccessibility of its website presented an "intangible barrier" to Gil's equal access to the services, privileges, and advantages of Winn-Dixie's physical stores (which are places of public accommodation)?* The court answered this question in the negative.

The court distinguished the "intangible barrier" alleged in *Winn-Dixie* from the intangible barrier involved in its previously most-significant ADA decision, *Rendon v. v. Valleycrest Productions, Ltd.,* 294 F.3d 1279 (11th Cir. 2002). *Rendon* involved a challenge to the television game show *Who Wants to Be A Millionaire's* use of an automated telephone hotline to conduct contestant selection. The hotline, which was the only method of contestant selection, provided a series of questions that callers could answer only by using their telephone keypads. Those who answered correctly could proceed through the process and ultimately have a chance of appearing on the show. The *Rendon* plaintiffs, who were deaf and mobility impaired, claimed they could not hear the questions because the hotline did not provide Telecommunications Devices for the Deaf ("TDD"), which allows deaf people to communicate with each other via text. Additionally, the plaintiffs claimed they could not move their fingers quickly enough to record their answers. The *Rendon* plaintiffs successfully argued that the automated contestant hotline was a discriminatory procedure that screened out disabled hearing-impaired and mobility-impaired individuals who sought to be contestants on the show. The *Rendon* court held that the ADA's discrimination provisions applied not just to physical barriers but also to "intangible barriers." Therefore, the *Rendon* court concluded that the plaintiffs stated a valid claim by alleging that the telephone selection process was a discriminatory screening mechanism, policy, or procedure, which deprived them of the opportunity to compete for the privilege of being a contestant on the gameshow.

The *Winn-Dixie* court found critical the fact that "the phone system in Rendon provided the sole access point for individuals to compete for the privilege of being a contestant on the game show and that same phone system was inaccessible by individuals with certain disabilities." For that reason, it "necessarily acted as an intangible barrier that prevented the plaintiffs from accessing a privilege of a physical place of public accommodation (the game show)."

However, the *Winn-Dixie* court explained that, unlike the Rendon hotline, Winn-Dixie's "limited use website," notwithstanding its inaccessibility, *"did not function as an intangible barrier to an individual with a visual disability accessing the goods, services, privileges, or advantages of Winn-Dixie's physical stores (the operative place of public accommodation)."* The court specifically noted that the website had limited functionality—most importantly, that it was not a point of sale because all product purchases must occur at the store. Further, the Eleventh Circuit noted that all website interactions with Winn-Dixie (e.g., prescription pick-ups and redemption of coupons) must be completed in-store, and nothing prevented Gil from shopping or obtaining his prescriptions at the physical store.

NO LIABILITY FOR ABSENCE OF AN AUXILIARY AID ON THE WEBSITE

The court next analyzed whether Winn-Dixie violated the ADA because the website was incompatible with screen reader software (*i.e.,* an "auxiliary aid," or a tool or service to ensure "effective communication" with a person with a hearing, vision, or speech disability).

Disagreeing with the Ninth Circuit's 2019 decision in *Robles v. Domino's Pizza* (which we previously discussed here and here), the Eleventh Circuit once again stated that the dispositive issue was whether any "intangible barriers" existed. That is, regardless of whether Winn-Dixie failed to provide an auxiliary aid, to be actionable, the inaccessibility of the website must serve as an "intangible barrier" to Gil's ability to access the services, privileges, and advantages of Winn-Dixie's physical stores, which results in Gil being excluded, denied services, segregated, or otherwise treated differently from other individuals in the physical stores. Because Gil never asserted that he was not able to communicate effectively with, or access the services offered in, the physical stores, the court found that there was no ADA violation.

ELEVENTH CIRCUIT REJECTS THE "NEXUS" STANDARD

One of the most significant rulings in the *Winn-Dixie* decision is the court's flat rejection of what Gil (any many ADA litigators) have long assumed—that the Eleventh Circuit had previously established a "nexus" standard whereby a plaintiff can state a claim by demonstrating that there is a "nexus" between the service offered through the website and a physical public accommodation.

The court denied having created a nexus standard in its Rendon decision, where it acknowledged precedent from other circuits (including the Ninth) requiring a nexus between the challenged service and the premises of the public accommodation. Instead, the *Winn-Dixie* court expressly declined to adopt a "nexus" standard because it found *"no basis for it in the statute or in our precedent."*

In particular, the court distinguished *Robles* because, unlike there, where plaintiff complained he was denied access to the goods and services of Domino's physical stores through the website (and through its app), *"Winn-Dixie's website does not provide any direct sales of goods or services or impede access to the goods and services offered in the physical stores."* Further, the court noted that Robles was decided on the basis of the "nexus" standard, which the Eleventh Circuit officially declined to adopt. The court specifically declined to follow *Robles,* finding it factually distinguishable and legally unpersuasive, and instead chose to apply the text of the ADA and its own precedent.

WHAT NOW?

The *Winn-Dixie* court made a point to mention that *"constitutional separation of powers principles demand that the details concerning whether and how these difficulties should be resolved is a project best left to Congress,"* and concluded by stating that *"[a]bsent congressional action that broadens the definition of 'places of public accommodation' to include websites, we cannot extend ADA liability to the facts presented to us here, where there is no barrier to the access demanded by the statute."*

As we have previously reported here, a bipartisan bill called the "Online Accessibility Act" was originally introduced in the 116th Congress (which concluded on January 3, 2021) and was recently reintroduced in the 117th Congress. The proposed act would amend the ADA to add a Title VI, which would specifically apply to consumer facing websites and mobile applications owned or operated by private entities. The bill would abrogate *Winn-Dixie* and other precedent discussed above by, among other things, conclusively answering the question of whether the ADA applies to private websites. Further, the proposed act would establish what standards must be met to make a website accessible and require the exhaustion of administrative remedies before a plaintiff could file suit. But even assuming the bill gets traction, the bill's journey to the president's desk is long and fraught with obstacles. Among other things, there is sure to be opposition by special interest advocates.

Further, the Eleventh Circuit's *Winn-Dixie* opinion will likely be the subject of a petition for panel and en banc rehearing, followed by a petition for certiorari to the Supreme Court. Even if the decision survives a full panel review, and even if the Supreme Court were to grant certiorari (unlike

its decision to pass on reviewing the Robles decision), the *Winn-Dixie* case would not reach the Supreme Court until the next term.

To be sure, *Winn-Dixie* provides a glimmer of hope on the horizon for potential Supreme Court clarification of the reach of Title III the ADA. However, until then (or unless Congress succeeds in amending the ADA to add a Title VI or otherwise addressing the issue), *Winn-Dixie* is a very significant decision to be added to the inconsistent patchwork of cases interpreting businesses' obligations and exposure with respect to website accessibility. For example, several district courts in the Second Circuit have declined to find that a nexus to a physical place of business is required to subject a website to the ADA. Enterprising plaintiffs in other states, like California, claim that a business need not have a nexus to a physical place of accommodation *and* need not even be located in the state to be subject to their states' laws. Thus, the existing framework of legislation and regulation through litigation will likely continue unabated. The *Winn-Dixie* decision should, however, have immediate impact on ADA website accessibility lawsuits filed in Florida (one of the three states where most of these lawsuits are currently being filed), as we anticipate businesses will move to dismiss such cases based on the court's ruling.

Winn Dixie makes clear that, at least in the Eleventh Circuit, purely e-commerce websites are not places of public accommodation, and non-point-of-sale websites tied to establishments where the purchases must occur require showing an intangible barrier, not merely website inaccessibility. Thus (for the time being), such websites should be relatively safe from liability in the Eleventh Circuit. But nationally, there remains no safe harbor for the foreseeable future. All businesses with an Internet presence remain vulnerable to accessibility lawsuits. A coordinated strategy is the best approach to manage risk before, during, and even after a lawsuit. Successful strategies involve internal decisionmakers, solid legal advice, and qualified website design professionals. Businesses should continue to conduct audits of their websites and mobile apps to ensure accessibility to screen reader software and devices used by blind and visually impaired individuals. From a practical standpoint, businesses should strive to be as compliant as possible with the WCAG 2.0 (and, if practicable, the more recently issued and updated version 2.1). If sued, several valid defenses still exist, including lack of nexus (in nexus jurisdictions), or no "intangible barriers" in the Eleventh Circuit. Traditional defenses like mootness, failure to plead a particularized injury, and lack of personal jurisdiction, may also exist.

Blank Rome's ADA Title III Litigation & Compliance Team has assisted hundreds of clients with this process and has not only provided legal guidance, but has worked with clients' IT departments and/or a number of third-party accessibility vendors on such efforts. Blank Rome also regularly counsels clients on other steps they can take to reduce their risk and exposure to such claims, such as establishing a "hotline" visitors to their websites can call when they encounter accessibility issues, developing and posting an accessibility policy on their websites and apps, and developing internal training and policies for those employees responsible for posting content to the websites and apps and answering the hotline.

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