The Gaming Industry is Susceptible to ADA Website Accessibility Lawsuits

While we usually think that that the Americans with Disabilities Act ("ADA") is limited to physical barriers impacting disabled individuals, such as whether doorways are wide enough or ramps too steep, lawyers for disabled individuals are making a concerted effort to expand this doctrine to include websites and mobile apps. In fact, the filing of lawsuits against companies for purportedly inaccessible websites is one of the fastest-growing trends in consumer protection litigation, and the gaming industry is a target.

Traditional Interpretations of "Places of Public Accommodation" Are No Longer Reliable

Title III of the ADA has an expansive definition of "public accommodation" that includes private entities whose operations affect commerce and whose businesses are generally open to the public and fall within one of the enumerated categories in the statute, such as retail stores, hotels, restaurants, movie theaters, recreational facilities and doctors' offices. In the statute, each category ends with the catch-all phrase "or other place …." Traditionally, each of the enumerated categories of public accommodation has been interpreted as a physical location. The cited catch-all phrase is one of the hooks that attorneys for disabled individuals are using to argue that businesses' websites and apps—in addition to their physical locations—must comply with the ADA.

Courts across the country are split on whether a website qualifies as a "place of public accommodation" under the ADA. Courts typically adopt one of three positions: (1) places of public accommodation can ***only*** be physical structures under the ADA, and websites thus are not encompassed by the ADA; (2) places of public accommodation ***need not*** be physical structures, and websites thus are encompassed by the ADA; or (3) for a non-physical "place" such as a website to be a "place of public accommodation," it must have a ***sufficient nexus*** to a physical structure that constitutes a public accommodation to be encompassed by the ADA. The latter two more expansive interpretations are particularly problematic for the gaming industry (even if they do not have a brick and mortar physical structure) because of the growing popularity of online and social games that may be covered under those interpretations.

Recent Cases Demonstrate the Risks

According to recent reports, ***over 800 lawsuits*** claiming lack of website accessibility were filed in federal courts in 2017, a number that does not event take into account lawsuits filed in state courts throughout the country. Many of these lawsuits involve the hospitality industry and, more recently, the gaming industry in particular. For example, in *Lisa Frazier, Access Now, Inc., R. David New v. Churchill Downs Inc.*, a case filed in the U.S. District Court for the Western District of Pennsylvania, a group of visually impaired individuals sued Churchill Downs Inc. for the alleged inaccessibility of its gaming-related websites with respect to disabled individuals. In denying Churchill's Motion to Dismiss, the court found that "because Churchill's websites barred [the visually impaired individuals'] screen reader software from reading the content of its websites, [they] were unable to participate in the gaming and entertainment services provided by Churchill." The court also noted that such website impediments could negatively impact the disabled individuals' ability to frequent Churchill's brick and mortar locations. This and similar cases likely are a portent of things to come for gaming companies.

The case of Gil v. Winn-Dixie, brought in the U.S. District Court for the Southern District of Florida, is the first post-trial verdict case regarding website accessibility. There, the court found that supermarket chain Winn-Dixie violated the ADA with respect to a visually impaired individual by not providing an accessible website. The court adopted the "nexus theory" described above, holding that Winn-Dixie's website "is heavily integrated with Winn-Dixie's physical store locations," which store locations are clearly places of public accommodation under the ADA. Despite the fact that customers could not make purchases directly through the website, they could still obtain coupons and link them to discount cards used in stores, refill prescriptions for in-store-pickup, and find store locations. The court ordered Winn-Dixie to bring its website into conformance with specific website accessibility standards (even though the ADA contains no such website standards), develop and adopt website accessibility policies, provide website accessibility training, and conduct regular ongoing compliance audits. It also awarded the plaintiff more than $100,000 in attorneys' fees. Cases around the country have reached similar results.

While defendants are not subject to monetary damages under the ADA (beyond attorneys' fees and costs), the costs of litigation and compliance can be substantial. Moreover, plaintiffs are increasingly coupling these ADA-based lawsuits with related claims under state law that may allow for imposition of damages. In *Rebecca Castillo v. Jo-Ann Stores, LLC*—a case that should make gaming companies nervous—an Ohio federal court recently allowed a California resident to sue Jo-Ann Stores, a specialty retailer of crafts and fabric, in Ohio for violation of the California Unruh Civil Rights Act in connection with an allegedly inaccessible website. The court in that case found that the individual had standing to sue Jo-Ann Stores under the ADA, a website was a place of public accommodation and Jo-Ann Stores' due process rights were not violated by the lack of governmentally issued website accessibility standards. Notably, the court also found that the California Unruh Civil Rights Act applied to the Title III violation and therefore would survive Jo-Ann Stores' motion to dismiss. This means that the Ohio defendant is potentially subject to statutory penalties and treble damages pursuant to a California statute.

The Department of Justice

Unfortunately, there are currently no definitive guidelines for companies looking to bring their websites into compliance. The Department of Justice ("DOJ") during the Obama administration commenced the rulemaking process to issue ADA regulations concerning websites. At that time, the DOJ signaled its intent to adopt an expansive view of the definition of "place of public accommodation," indicating that it would adopt the privately promulgated **Web Content Accessibility Guidelines (WCAG-2.0), Level AA**, which set forth standards to make web content more accessible to a wide range of people with disabilities. (This is a moving target; notably, a proposed WCAG-2.1 standard has already been promulgated and Yale University recently released its own proposed website accessibility commitment and policy.) In July 2017, however, the DOJ announced that it was putting the rulemaking on the "inactive" list. Then, in December 2017, the DOJ announced that it was officially withdrawing its two Advance Notices of Proposed Rulemaking related to website accessibility, purportedly to evaluate whether promulgating such regulations was necessary and appropriate. The DOJ's decision to withdraw the notices dooms businesses to a lack of definitive and uniform guidance regarding ADA compliance in cyberspace for the foreseeable future, and leaves courts across the country to fill the void with a patchwork of legal holdings. This will be an evolving area until official rulemaking takes place.

Recommendation

In light of the current state of these issues, it is imperative for companies to be proactive:

- Review your public-facing websites and mobile apps. Website auditing software is available to help identify potential accessibility issues. While there are no definitive guidelines, both the DOJ and various courts have approved of the WCAG-2.0, Level AA, standards, thus they provide (at least currently) a good guidepost against which to measure accessibility.
- Ensure that your web designers are sufficiently knowledgeable of commonly applied accessibility standards to understand and implement appropriate modifications to provide maximum accessibility for disabled users.
- Examine your vendor agreements and update them as appropriate to address accessibility issues, cover compliance updates and potentially shift liability for noncompliance. Review contracts in conjunction with legal counsel to minimize potential exposure.
- Stay current on the standards being imposed by the courts.
- Talk to your insurance brokers about website accessibility coverage. Not all policies cover claims related to websites, and this is a good opportunity to ensure that you are properly protected.

Communicate with members of Congress and gaming associations to urge them to work with the DOJ to implement standards and guidance. Without such definitive guidance, lawsuits will continue to proliferate, and your business is at risk.

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