Is Your Website a Place of Public Accommodation under the ADA? The Plaintiffs' Bar Says "Yes," the Circuits Are Split, and the DOJ Is Unlikely to Provide Guidance Any Time Soon

What do glasses retailer Warby Parker Retail, Inc., delivery service Grubhub, pizza company Domino's and media streaming giant Netflix have in common, besides having significant online services? The answer is that they have all been recent targets of lawsuits based upon the Americans with Disabilities Act ("ADA") for allegedly not having ADA-compliant websites. In recent months, the number of ADA lawsuits against companies based upon their websites has increased exponentially. Targets include everything from large publicly traded companies to boutique retailers and mom-and-pop shops. This issue is not new. However, due to the burgeoning use of the internet and related technologies, the responsibility of companies to accommodate disabled individuals using their websites has become a prevalent issue. Companies using the internet to conduct business are facing an increasing risk of lawsuits regarding website accessibility.

Background

Title III of the ADA requires public accommodations to be accessible to individuals with disabilities, and prohibits disability discrimination in the activities of public accommodations. The statute has an expansive definition of "public accommodations" that includes private entities whose operations affect commerce, whose businesses are generally open to the public and that fall within one of the enumerated categories in the statute, such as retail stores, hotels, restaurants, movie theaters, day care facilities, recreation facilities and doctors' offices. Each of the enumerated categories of public accommodation is a physical location, but in the statute, each ends with the catch-all phrase "***or other place*** …." This catch-all phrase is one of the hooks that the plaintiffs' bar is using to argue that businesses' websites—in addition to their physical locations—must comply with the ADA.

The Uncertain Legal Landscape

Courts are split on whether a commercial website qualifies as a "place of public accommodation" under the ADA. More specifically, the split centers on whether ***all*** commercial websites are places of public accommodation and thus subject to the ADA, or whether only those websites associated with brick-and-mortar businesses (i.e., those with physical locations) must comply. Throughout the country, courts generally take one of three positions: (1) places of public accommodation need not be physical structures; (2) places of public accommodation can *only* be physical structures; or (3) for a non-physical "place" to be a "place of public accommodation," it must have a sufficient *nexus to a physical structure* that constitutes a public accommodation.

Some cases from earlier this year reveal disparities in how courts are tackling this issue:

- In *Juan Carlos Gil v. Winn-Dixie Stores, Inc*. No. 16-cv-23020, Dkt. No. 63 (S.D. Fla. June 13, 2017), the District Court for the Southern District of Florida addressed the issue of website accessibility. There, supermarket chain Winn-Dixie purportedly violated the ADA by not providing an accessible public website to the visually-impaired plaintiff and others, allegedly depriving disabled individuals of "full and equal enjoyment" of the goods and services offered. The court adopted the "nexus theory," holding that the company's website

"is heavily integrated with Winn-Dixie's physical store locations," which are clearly places of public accommodation under the ADA. The court found that, although customers could not purchase 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, develop and adopt website accessibility policies, provide website accessibility training and conduct regular ongoing compliance audits.

- Conversely, in *Robles v. Domino's Pizza*, LLC, CV 16-06599 SJO (Spx) 2017 WL 1330216 (C.D. Cal. March 20, 2017), the U.S. District Court for the Central District of California granted the defendant's motion to dismiss. In this case, the plaintiff, who had filed numerous other virtually identical lawsuits against other business, claimed that Domino's website and mobile app could not be accessed by people who were blind or of low vision and used screen reader software. More specifically, the website and app did not allow him to access the menus and applications. In an unusually pro-business ruling, the court held that it would violate Domino's due process rights to find that its website violates the ADA, because the Department of Justice ("DOJ") has not yet promulgated anticipated regulations defining website accessibility.
- To complicate matters, in *Gorecki v. Hobby Lobby Stores, Inc.*, No. 17-cv-01131-JFW-SK (C.D. Cal. June 15, 2017), another case out of the U.S. District Court for the Central District of California, the judge denied Hobby Lobby's motion to dismiss a website accessibility lawsuit, which motion was based on the same grounds as the *Robles* case above. One reason for the disparate outcomes could be that in the *Robles* case, the plaintiff sought injunctive relief requiring Domino's to comply with specific website accessibility standards that the DOJ has not yet officially adopted. In *Hobby Lobby*, on the other hand, the plaintiff merely sought "full and equal" enjoyment of the website's services, without specifying how that would be accomplished.

Whatever the courts' reasoning, these cases demonstrate that the legal landscape is murky, leaving companies in the difficult position of deciding whether their websites must be ADA compliant and attempting to ascertain what such compliance would entail.

The DOJ's Position

Under the Obama administration, the DOJ signaled its intent to adopt an expansive view of what constitutes a place of public accommodation. For example, in 2014, the DOJ intervened in litigation in the District Court of Massachusetts and entered into a consent decree to remedy alleged violations of the ADA. *See* **Consent Decree**, *Nat'l Fed'n of the Blind & U.S. v. HRB Digital LLC*, DOJ 14-439 (D.O.J.), 2014 WL 875304. In that case, defendant H&R Block agreed to adopt modifications to enhance the accessibility of its website, tax preparation tools and mobile applications. Similarly, in 2015, the DOJ entered into a settlement agreement with various cruise line brands, requiring them to ensure that their websites conform to certain standards to enhance accessibility for disabled individuals. *See* **Settlement Agreement** between U.S. & Carnival Corp., DOJ 202-17M-206 (July 23, 2015).

Employers are hamstrung by the DOJ's settlements requiring companies to make their websites accessible and its collection of civil fines, coupled with little visible progress by the DOJ in providing guidelines and regulations for ADA compliance. In 2010, the DOJ issued a notice announcing its intent to apply the ADA to websites. Administrative rulemaking processes tend to be long, but this process has been especially drawn out, with the DOJ currently intending to issue a Notice of Proposed Rulemaking in 2018, *eight years* after its initial announcement.

This could still be pushed back, if not abandoned altogether, particularly considering the Trump administration's position on rulemaking. An executive order directs federal agencies to identify at least two existing regulations to repeal for each new one implemented; the DOJ is therefore faced with the challenge of choosing which regulations to repeal to make room for a regulation regarding websites as public accommodations, as well as offsetting and minimizing associated costs. This means a low likelihood that the DOJ will release a public accommodation website regulation, which portends more uncertainty.

What Should Companies Do?

Due to the onslaught of lawsuits and demand letters companies face on the issue of website accessibility, it is wise, even in the absence of a clear legal standard and DOJ or court guidance, to take precautionary measures to make websites accessible. For now, any website is potentially subject to ADA liability, even those with no connection to a physical business location. Moreover, while the DOJ invited comments as to appropriate website accessibility standards, it expressed its intention to adopt the **Web Content Accessibility Guidelines** (WCAG-2.0), Level AA standards. The WCAG-2.0 outlines how to make web content more accessible to a wide range of people with disabilities and provides requirements for text alternatives—e.g., increasing font size, using braille, speech, symbols, or simpler language, pre-recorded audio-only or video-only content, and color distinctions by separating the foreground and the background. Companies can test the compliance of their websites by visiting a web accessibility site (of which there are many with varying degrees of reliability) and typing in the company's website address; the compliance report that is generated is supposed to detect errors and identify the website's content failures. At the very least, this gives an initial evaluation of how far out of compliance a company's website may be. A website vendor versed in WCAG-2.0 can then implement the necessary changes. It should be noted that the plaintiffs' bar can—and likely does—use these same websites to identify potential targets for accessibility lawsuits.

Under the terms of various decrees and settlement agreements as noted above, as well as plaintiffs' suggestions in litigation, companies are required or encouraged to conform to WCAG-2.0 Level A standards, the minimum level of conformance, with criteria to provide basic web accessibility, or Level AA Success Criteria, which is the intermediate level of conformance that includes all of the Level A criteria, plus enhanced criteria that provide more comprehensive web accessibility. Because the DOJ and plaintiffs' counsel often deem websites to be ADA-compliant if they conform to WCAG-2.0, Level AA, ensuring that your business websites are compliant with those standards may be the best option to avoid becoming a lawsuit target.

Christine A. Samsel
Shareholder
csamsel@bhfs.com
303.223.1133 (CO)
310.500.4622 (CA)

Jonathan C. Sandler
Shareholder
jsandler@bhfs.com
310.564.8672