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WEBSITE ACCESSIBILITY ALERT: ELEVENTH CIRCUIT COURT OF APPEALS ISSUES IMPORTANT SPLIT DECISION IN WINN-DIXIE WEBSITE ACTION

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Businesses with an online presence should take note that the United States Court of Appeals for the Eleventh Circuit has held—in a split decision—that websites are not places of public accommodation under Title III of the Americans with Disabilities Act ("ADA").

On Wednesday, April 7, 2021, the Eleventh Circuit issued its much-awaited decision in Gil v. Winn-Dixie Stores, Inc. —holding that "websites are not a place of public accommodation under Title III" of the Americans with Disabilities Act ("ADA") and that the plaintiff's inability to access Winn-Dixie's website was not a violation of Title III, vacating the decision of the district court, and remanding the case for further proceedings.

As we previously reported, *Gil* was the first website accessibility case to go to trial. After a bench trial, the U.S. District Court for the Southern District of Florida held that Winn-Dixie had violated Title III of the ADA because its website was inaccessible to the visually impaired plaintiff. Despite the fact that Winn-Dixie does not conduct sales through its website, the district court found that the website was "heavily integrated" with the physical store locations since customers could use the website to access digital coupons, find store locations, and refill prescriptions through the website.

The appeal presented three questions: (1) whether the plaintiff had standing to bring the case; (2) whether websites are places of public accommodation under Title III of the ADA; and (3) whether the district court erred in its verdict and judgment. Opinion at 9. In addressing the second question, the majority (Judges Branch and Reeves) focused on "two primary issues: (1) whether Winn-Dixie's website is a place of public accommodation in and of itself, such that its inaccessibility violates Title III; and (2) if it is not a place of public accommodation, whether the website otherwise violates Title III." Opinion at 11.

In answering both of these questions in the negative, the majority noted that Title III's definition lists various "public accommodations" but that list does not include websites. Opinion at 15. According to the majority, "pursuant to the plain language of Title III of the ADA, public

accommodations are limited to actual, physical places." Opinion at 16-17. The majority also found that "Winn Dixie's website does not constitute an 'intangible barrier' to [the plaintiff's] ability to access and enjoy fully and equally 'the goods, services, facilities, privileges, advantages, or accommodations of' a place of public accommodation," because it has only limited functionality and is not a point of sale. Opinion at 22-23.

The majority declined to follow the Ninth Circuit's 2019 decision in *Robles v. Domino's Pizza, LLC* , stating that the *Robles* decision was 'both factually and legally distinguishable." Opinion at 29-31. Finally, the majority noted that there are difficulties in resolving the differences between the "significant inconvenience" that website inaccessibility may cause and Title III's definition of "places of public accommodation," stating 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." Opinion at 32.

In her dissent, Judge Pryor stated that "Winn-Dixie's visually-impaired customers … were treated differently than its sighted customers and denied the full and equal enjoyment of services, privileges, and advantages offered by Winn-Dixie stores" and that, in her view, "this inferior treatment amounted to disability discrimination by the operator of a place of public accommodation under Title III of the ADA." Opinion at 33. Judge Pryor also noted that she "fear[s] the majority opinion's errors will have widespread consequences" because it "gives stores and restaurants license to provide websites and apps that are inaccessible to visually-impaired customers so long as those customers can access an inferior version of these public accommodations' offerings"—a result she says "cannot be squared with the ADA." Opinion at 66-67.

It bears noting that all three judges declined to adopt a "nexus" standard, finding no basis for such a standard in the statute or precedent. Some circuit courts—namely the Third, Fifth, Sixth, and Ninth—have held that, in order to be considered a "public accommodation," an online business must have a nexus to an actual, physical space; whereas other circuit courts—namely the First, Second, and Seventh—have held that no such nexus is necessary.

This decision is relevant to retailers and other businesses with an online presence because it highlights that the issue of website accessibility is still one that should be analyzed on a case-by-case basis. However, retailers should take note that the court's decision is not binding on courts in other circuits and that the plaintiff might seek further review by filing a petition for rehearing before the full Eleventh Circuit or a petition for a writ of certiorari with the United States Supreme Court.

Bryan Cave Leighton Paisner has extensive experience defending companies against website accessibility claims and regularly offers webinars on the topic to assist our clients in assessing compliance with the ADA. If you would like to schedule a similar webinar or presentation, or for more information on website accessibility or defending against such claims, please contact any of the attorneys listed.

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