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Must Websites Comply With the ADA?

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Website ADA compliance litigation is all the rage, manifesting itself as an epidemic of "website drive-by lawsuits."[1] Beyond the litigation controversy, the issue is whether websites must be accessible to the visually-impaired via screen reader software to comply with the ADA. Circuit Courts are split.

> Title III of the ADA requires that
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> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[2]

The statute defines "public accommodation" through a laundry list of 12 characterizations whose common denominator is that they are all physical places that must affect commerce, *i.e.*, hotels, restaurants, retail stores, schools, stadiums, theaters, just to name a few.[3] When the ADA became law in 1990, the public conscience largely associated disabled Americans with individuals with mobility issues, hence the installation of reserved parking spaces and wheelchair-friendly access ramps. Fast-forward a few years and one of the hot-topic issue has become the visually-impaired's ability to access Internet. The substantive legal question whittles down to whether a website is a "place of public accommodation" under 42 U.S.C. § 12181(7), an expression that the statute leaves undefined.

Some courts require a nexus between a website and a physical place to impose ADA compliance requirements.

One line of cases has construed § 12181(7)'s laundry list narrowly and held that websites are generally not places of public accommodation because they are not physical places where the public acquires good or services.[4] This line of cases holds that a website need not comply with the ADA unless a sufficient nexus can be established between the website and a corresponding physical space. For example, in *Earll v. eBay, Inc.*, the Ninth Circuit Court of Appeals held that eBay was not subject to the ADA because its services were "not connected to any 'actual physical place[ ].'"[5] Under this logic, streaming and social media sites are exempt from ADA compliance.[6] But websites that are tied to a physical store may have to comply. In *Nat'l Fed'n of the Blind v. Target Corp.*, the plaintiffs complained that Target's website was inaccessible to the blind and that they were denied "full and equal" access to the company's stores and the goods and services therein.[7] The court agreed and refused to dismiss the plaintiff's complaint to the extent that the website's inaccessibility impeded the visually-impaired's access to the physical stores.[8] It reasoned that § 12182(a) "applie[d] to the services *of* a place of public accommodation, not services *in* a place of public accommodation," and it concluded that, in this case, the website offered an access to the services of Target's physical stores.[9] The court dismissed the plaintiffs' claim to the extent that Target's website offered information and services unconnected to its stores.

The above line of California cases cited to *Weyer v. Twentieth Century Fox Film Corp. Weyer*, in turn, cited approvingly to two Third and Sixth Circuit cases that have also construed website ADA compliance narrowly—unless a nexus to a physical store exists.[10] Two recent district court cases show that this nexus is not difficult to establish. In *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, one of the defendants, a bank, moved to dismiss plaintiffs' complaint that its website was not ADA compliant because it was not a "place of public accommodation."[11] The court disagreed because the bank "own[ed], operate[d], and control[led]" the property through which individuals accessed its services, namely its website, and it denied the bank's motion to dismiss.[12] Likewise, in *Castillo v. Jo-Ann Stores, LLC*, the plaintiff alleged that

Jo-Ann Stores' web site was not accessible through screen-reading software, in violation of the ADA.[13] Castillo alleged that the website could be used to locate brick-and-mortar stores, to browse for products, to find specials and discounts, and to purchases items. The court held that these claims sufficiently alleged a nexus between Jo-Ann's website and its physical stores, and it denied Jo-Ann's motion to dismiss. The court saw no need to decide whether the website qualified as a place of public accommodation.[14]

Some courts hold that the ADA applies to all websites.

Another line of cases has held that websites must comply with Title III of the ADA regardless of whether the website is tied into a physical store. In *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, the First Court of Appeals rejected the defendants' attempt to narrow ADA Title III's scope to physical locations.[15] It held that Congress necessarily contemplated that Title III applied to more than services in physical places when it included "travel services" in § 12181(7)'s laundry list. Travel services are often conducted over the phone and do not require the client's in-store presence. Per the court, it would defy logic to conclude that the ADA protected in-store clients but not those who transacted over the phone. "Congress could not have intended such an absurd result."[16] Citing *Carparts*, the New Hampshire District Court refused to dismiss a defendant's claim that it did not have to make its website ADA compliant.[17]

The Second and Seventh Circuit Courts have followed *Carparts*.[18] In a detailed opinion, the district court in *Andrews v. Blick Art Materials, LLC* denied a motion to dismiss an ADA Title III claim against a company whose website the blind plaintiff could not use.[19] The court noted that Title III's title (see footnote 2) and the laundry list's heading both excluded the word "places," which indicated Congress's intent not to limit the statute's reach by this term.[20] A broad interpretation of Title III's scope was consistent with "the ADA's broad remedial purpose" of fighting discrimination against disabled persons. The court specifically rejected as plainly unworkable the *Target* court's holding that ADA compliance could be compartmentalized between information about a website and information related to the goods and services available through the website. It implied that some parts of a website would have to comply with the ADA and others not.[21]

Others courts have not fully addressed the issue, or not at all.

The Eleventh Circuit recently issued its first decision on the issue of website ADA compliance, holding that a plaintiff alleged a viable ADA Title III claim where the website offered services that facilitated access to physical shops, like a store locator and the ability to purchase gift cards online.[22] The appellate court did not address the question of whether compliance was required even in the absence of a physical store nexus. Echoing the holding in *Target*, Florida district courts have distinguished between websites that provide information about a physical location, and websites that provide access to enjoy a physical location.[23] These courts have held that only the latter are subject to the ADA. In *Price v. Everglades Coll., Inc.*, the plaintiff was allegedly unable to obtain admissions information from the college's website, which was not compatible with screen-reader software. The court held that his complaint failed to state a claim.[24]

The Fifth Circuit has not addressed the issue of website compliance with the ADA. But it held in *Magee v. Coca-Cola Refreshments USA, Inc.*, that Title III did not apply to the owner of glass-front beverage vending machines.[25] The court reasoned that based on the plain meaning of the term, a vending machine did not qualify as a "sales establishment" under § 12181(7)(E). The court joined the Third, Sixth, and Ninth Circuit Courts in noting that § 12181(7) lists physical places open to the public, and acknowledged the contrarian view espoused by the First, Second, and Seventh Circuits.[26] At the very least, *Magee* suggests that the Fifth Circuit will look closely at the nexus between a website and a physical store in deciding whether to require ADA Title III compliance.

[1] Drive-by lawsuit: a suit filed by someone who drove-by a business and spotted something (anything) not in compliance with the Americans with Disability Act (ADA, 42 U.S.C. § 12101 *et seq*.). A quick Internet search will reveal the scope of the problem and the engine that allegedly drives the litigation: enterprising attorneys and their clients who file ADA-based lawsuits against businesses that are quickly settled for a payment that is less than the cost of defending the suit. *See*, *e.g*., Mark Pulliam, *In Austin, the ADA Lawsuit Mill Grinds On*, SE TexasRecord, Mar. 5, 2018. A prevailing ADA plaintiff can expect equitable remedy and attorney fees; not so the defendant. 42 U.S.C. §§ 12188(a)(1), 12205. This article side-steps the lawsuit abuse controversy to focus on the substantive ADA compliance issue.
[2] 42 U.S.C. § 12181 *et seq*. (Subchapter III, Public Accommodations and Services Operated by Private Entities); *id*. § 12182(a).
[3] *Id*. § 12181(7).
[4] *See*, *e.g.*, *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir. 2000)).
[5] 599 Fed. Appx. 695, 696 (9th Cir. 2015) (mem. op.) (not appropriate for publication and not precedent) (citing *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir. 2000)).
[6] *See Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at *4–5 (D. Mont. Mar. 31, 2011); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114–16 (N.D. Cal. 2011).
[7] 425 F. Supp. 2d 946, 949–50, 952 (N.D. Cal. 2006).
[8] *Id*. at 956.
[9] *Id*. at 953–55 (emphases in original); *see also Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012) (noting that Title III "covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation" in a case that holds that the ADA applies to website regardless of a nexus to a physical place).
[10] *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co*., 121 F.3d 1006 (6th Cir. 1997). *Weyer*, *Ford*, and *Parker* are insurance cases but are cited to support the proposition that websites need a nexus to a physical place to require compliance with the ADA.
[11] 251 F. Supp. 3d 908, 911–12 (W.D. Penn. 2017).
[12] *Id*. at 918.
[13] 286 F. Supp. 3d 870, 872 (N.D. Ohio 2018).
[14] *Id*. at 880–81.
[15] 37 F.3d 12, 19 (1st Cir. 1994) (insurance case).
[16] *Id*.
[17] *Access now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at * (D.N.H. Nov. 8 2017).
[18] *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am. Fed'n of Grain Millers*, AFL–CIO–CLC, 268 F.3d 456, 459 (7th Cir. 2001); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999).
[19] 268 F. Supp. 3d 381, 385 (E.D.N.Y 2017).
[20] *Id*. at 393–94.
[21] *Id*. at 396.
[22] *Haynes v. Dunkin' Donuts, LLC*, No. 18-10373, 2018 WL 3634720, --- Fed. Appx. ---, at *2 (11th Cir. July 31, 2018) (per curiam) (citing *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2001) (insurance case)).
[23] *Price v. Everglades Coll., Inc.*, No. 6:18-cv-492, 2018 Wl 3428156, at *2 (M.D. Fla. July 16, 2018) (slip op.).
[24] *Id*.; *compare with Fuller v. Smoking Anytime Two, LLC*, No. 18-cv-60996, 2018 WL 3387692 (S.D. Fla. July 7, 2018) (blind plaintiff sufficiently alleged a claim where website incompatible with screen-reader software offered information about physical store locations, products, gift cards, discounts, and orders for in-store pick-ups).
[25] 833 F.3d 530, 535 (5th Cir. 2016).
[26] *Id*. at 534 and n.23.