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Websites and the Americans with Disabilities Act: What Franchisors and Franchisees Need to Know and Do

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During the past few years, there has been a virtual explosion in the number of lawsuits being filed asserting that a business' website violates the Americans with Disabilities Act (ADA). In the first nine months of 2018 alone, more than 1,000 such cases were filed. Absent intervention by the Department of Justice (DOJ) or Congress, the number of these cases will continue to increase. While nearly all of them are being filed in just three states—California, Florida and New York—companies doing business throughout the United States, and in a wide variety of industries (including hotels, banks, clothing and other retailers, supermarkets and restaurants), are being targeted. These lawsuits are typically brought by a visually impaired plaintiff who uses screen reader software to access and "read" the content of websites. The complaints allege that the plaintiff visited the defendant's website but was prevented from accessing all of the pages, features and content on the site that non-disabled individuals can access and enjoy, because the website was not coded or otherwise set up to work with such software.

Franchises are not immune from such lawsuits. Among the growing list of franchises sued in these cases are GNC, 1-800-Flowers.com, Famous Dave's, O'Charley's and Domino's Pizza. In fact, some of the most important decisions in this area over the last few years have involved franchises. There are, however, some unique issues that franchisors and franchisees need to consider and address when it comes to website accessibility issues and claims.

But how did we get here? That is a reasonable question given that the ADA, which was enacted in 1990, says nothing whatsoever about the Internet or websites. Title III of the ADA prohibits discrimination on the basis of disability in the activities of "places of public accommodation." 42 U.S.C. § 12182(a). But the twelve categories or types of public accommodations identified in the statute are all physical spaces, such as restaurants, schools, and movie theaters. 42 U.S.C. § 12181(7).

During the 2000s, however, with the tremendous growth of e-commerce and use of the Internet, more attention was paid to individuals' ability to access and navigate websites. In 2006, the National Federation for the Blind filed a class action lawsuit against Target Corporation, alleging that Target's website violated Title III of the ADA, because visually impaired visitors were unable to access all of the information on or purchase goods through the website. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006). The case survived motions to dismiss, and for summary judgment, and was eventually settled by Target, which agreed to pay a significant amount in damages to the class members and update its website so that it was accessible to visually impaired users.

Around that same time, the DOJ began showing interest in this issue. It investigated certain ADA claims involving websites, sided with the plaintiffs in some lawsuits, and, in 2010, announced it was beginning the process of developing rules and regulations for how businesses could make their websites accessible to disabled individuals. However, the DOJ repeatedly postponed its deadline for issuing these guidelines, and in 2017, the Trump administration moved the project to the DOJ's "inactive" list.

As a result, there are no governmental rules or regulations that detail what a business must do in order to make its website accessible to visually impaired and other disabled individuals. At least one district court found that requiring a franchisor to update its website to make it more accessible to disabled individuals without any governmental rules or other authority telling it how to do so would violate the franchisor's due process rights. *Robles v. Domino's Pizza, LLC*, No. 2:16-cv-06599, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017). However, the Domino's decision has been appealed and several courts in other jurisdictions have rejected this type of due process argument.

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An industry group active in this area, the World Wide Web Consortium, publishes Web Content Accessibility Guidelines ("WCAG") which are updated from time to time (the currently version is 2.0, but version 2.1 is in the process of being finalized). The WCAG have become the de facto standards for what criteria a website must meet to be accessible to visually impaired persons and others with disabilities.

Title III generally does not provide for monetary damages. Rather, only injunctive relief is available. 42 U.S.C. § 12188. However, a prevailing party can recover its attorney's fees. 42 U.S.C. § 12205. In addition, a growing number of plaintiffs are also pleading violations of certain state or local statutes which prohibit discrimination against those with disabilities, such as California's Unruh Civil Rights Act and the New York State Human Rights Law, that provide for statutory or other types of damages.

Most accessibility lawsuits are settled by the parties at a very early stage in the proceeding. Others, however, have been decided on a motion to dismiss or a motion for summary judgment, and at least one has proceeded to a bench trial. *See Gil v.Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1315 (S.D. Fla. 2017) (finding Winn-Dixie's website is heavily integrated with its physical store locations and its inaccessibility violated Gil's rights under the ADA). Court decisions in these cases have not been consistent. To the contrary, a split has developed among the various circuits regarding whether and when one who has encountered an accessibility problem on a website can state a claim under Title III of the ADA.

For example, ever since Target was decided, California courts have consistently held that a "nexus" must exist between the defendant's website and its physical, or "bricks and mortar," location in order for a plaintiff who experienced accessibility issues on the website to state a claim for violation of Title III. In Target, a sufficient nexus was found to exist, as the plaintiffs argued, among other things, that the website allowed customers to purchase items that could then be picked up in Target's stores and print coupons that could be used in the stores. *Target Corp.*, 452 F. Supp. 2d at 956 (denying Target's motion to dismiss). Courts in the Third, Sixth, and Eleventh Circuits similarly require this nexus in order to state a claim under the ADA. In Florida, for example, the courts have generally held that encountering an accessibility issue on a website is not, by itself, sufficient to state a claim under the ADA. It is only where the accessibility problem impedes the plaintiff's ability to access the defendant's physical store or location that a claim can be stated. *See, e.g., Gomez v. Bang & Olufsen America, Inc.*, No. 16-cv-23801, 2017 WL 1957182 (S.D. Fla. Feb. 2, 2017).

In other circuits, however, district courts have held that encountering accessibility problems on a defendant's website is, in and of itself, sufficient to give rise to a claim under the ADA. In fact, in two cases decided ten days apart in the summer of 2017, judges in the Southern and Eastern Districts of New York denied defendants' motions to dismiss, and declined to require any nexus between the defendants' website and its physical location in order to state a claim under Title III. *See Markett v. Five Guys Enterprises LLC*, No. 17-cv-788 (KBF), 2017 WL 5054568 (S.D. N.Y. July 21, 2017) (involving franchisor's website www.Fiveguys.com); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y.2017).

Not surprisingly, since *Five Guys* and *Blick* were decided, New York has become the most popular venue for plaintiffs filing website accessibility cases. While most of these cases are brought as class actions, nearly all of them are settled or otherwise resolved prior to the class certification stage. It would be interesting to see if a class could, in fact, be certified in these types of cases given that the plaintiffs have many different levels of visual impairment, use various types of computers that have different operating systems, use different types and versions of screen reader software, and are trying to access a wide variety of features on a wide variety of websites.

This is an area which really cries out for clarification and guidance, whether from Congress, the DOJ, or —in light of the split among the Circuits — the Supreme Court. The U.S. House of Representatives last year passed a bill targeting "drive-by" ADA lawsuits and requiring that plaintiffs give businesses notice and an opportunity to cure before filing a lawsuit. However, the law only deals with physical spaces, and does not address the many website-related claims and lawsuits being asserted. Certain states are considering similar legislation. In September 2018, several U.S. senators sent Attorney General Sessions a letter seeking clarification regarding the ADA and websites, noting, among other concerns, that business and property owners are unsure as to what standards, if any, govern their online services.

In the meantime, plaintiff's lawyers will continue to file ADA lawsuits against businesses that operate websites that cannot be accessed using screen reader software, or otherwise do not comply with the WCAG. Given that trend, as well as the increasing number of court decisions holding that accessibility problems with websites can give rise to a claim under Title III of the ADA, franchises would be wise to assess the accessibility of their websites and what steps can be taken to reduce their exposure for such claims.

Franchisors normally own and operate the website for a system or brand, with franchisees contributing to an ad fund that helps cover the cost of maintaining the site and other marketing efforts engaged in by the franchisor. In terms of best practices, first and foremost, the franchisor should conduct an audit of its website to determine how compliant or non-compliant it is with the WCAG. If the website is not compliant, the franchisor should investigate options for remediating or updating the website to bring it into compliance. There are numerous vendors that conduct such audits and then either recommend corrective measures to the franchisor's IT staff or implement them themselves. This same effort should be undertaken with respect to any mobile apps the franchisors offer to their customers. It is also important to check any on-line job application pages, forms, and sites the franchisor utilizes, as some recent claims allege ADA violations due to disabled individuals not being able to access and complete on-line job application forms. (Another recent trend beyond the scope of this article is for quick serve restaurants and other franchise systems to install kiosks where customers can place their orders using a touch screen; while the kiosks themselves may be ADA-compliant in terms of their height and other dimensions, there could be accessibility issues with the touch screen ordering system.)

If franchisees are permitted to operate their own websites, especially if they are using the franchisor's name and marks on such sites, the franchise agreement should be updated or amended to require that the franchisee's website(s) comply with the then current version of the WCAG (or, if the federal or a state government enacts rules and regulations governing website accessibility, such rules). Similarly, if there are third parties that contribute content to a franchisor's website, the franchisor should include a provision in its contract with the third party that such content must comply with the WCAG. In addition, many websites contain links that take the visitor to a third party's website (for example, to purchase a gift card). If that is the case, when the visitor clicks on the link, a prominent message should appear advising the visitor that he is leaving the franchisor's website and being taken to a third party's website over which the franchisor has no control. And if possible, the franchisor's contract with the third party should include a requirement that the third party's website comply with the WCAG.

Another best practice is to post an accessibility policy on the website's home page (or at least include a link to such policy next to links for the site's terms and conditions and privacy policy) as well as a telephone number visitors can call if they encounter accessibility problems on the site. Whether the telephone number will help insulate the website operator from liability may depend on whether the number will be staffed and answered 24 hours a day, seven days a week, because, if it is not, those who encounter issues and call the hotline but then have to wait for someone to get back to them at a later time are not truly being given equal treatment and access.

An interesting issue that has not yet been litigated but could arise in a jurisdiction that requires a nexus between the defendant's website and its physical location in order to state a claim for violation of Title III is that, in many franchise systems, the franchisor owns and operates the system's website but does not own, lease or operate its franchisee's physical location. The franchisor could therefore argue that the website is not a service, privilege, advantage or accommodation of its physical place of public accommodation. Dunkin' Donuts raised this issue in its motion to dismiss in *Haynes v. Dunkin' Donuts LLC*, No. 18-10373, 2018 WL 3634720 at *1 n.2 (11th Cir. July 31, 2018), but because plaintiff's complaint did not allege anything about Dunkin' being a franchisor, the court held that it was not appropriate to consider this issue on a motion to dismiss, rather it was more appropriate for a motion for summary judgment.

ADA lawsuits targeting businesses' websites are not going away, nor is the law in this area going to become any clearer or more settled, any time soon. It is therefore important for franchisors and franchisees to not only be aware of this issue, but to assess their potential liability and exposure for ADA claims relating to their websites and take whatever steps they can to eliminate or minimize such risk.

[1] The author is attorney of record for Dunkin' Donuts in the *Haynes* case cited above