

ADA Title III Litigation & Compliance Team



AUGUST 27, 2021 • NO. 2

U.S. District Court for the Eastern District of New York Issues Important Opinion on the Inapplicability of Title III of the Americans with Disabilities Act to Consumer-Facing Websites

In *Winegard v. Newsday LLC*, No. 19-CV-04420(EK)(RER) (E.D.N.Y. August 16, 2021), the Honorable Eric R. Komitee held that a website does not constitute a “place of public accommodation” under Title III of the Americans with Disabilities Act (“ADA”) and granted Newsday’s motion to dismiss. The decision is a first of its kind by a New York federal court, and it goes against several district court decisions to the contrary. Nevertheless, the court’s well-reasoned and meticulous analysis could be adopted by other judges in the Southern and Eastern districts, which have been hotbeds for abusive website accessibility shakedown lawsuits.

BACKGROUND

Congress passed the ADA in 1990 and amended it in 2008. “[T]he ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III).” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001). Under Title III, “[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.” 42 U.S.C. § 12182(a) (emphasis added).

In the 12 subparagraphs in Section 12181(7), Congress provided an expansive list of physical locations, which are “public accommodations.” The list covers most types of physical locations where individuals may find themselves. Notably, the list does not include websites. Only two circuit courts have been presented with the issue of whether a website is a place of public accommodation under Title III of the ADA.

In *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir.), *cert. denied*, — U.S. —, 140 S. Ct. 122, 205 L.Ed.2d 41 (2019), the Ninth Circuit expressly avoided the issue of whether a website was itself a public accommodation (*Id.* at 905 n.6), and instead embraced a “nexus” standard; holding that the ADA applied to Dominos website and app only because they “connected customers to *the goods and services of Domino’s physical restaurants.*” *Id.* at 905. In contrast, this past April, in *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021), the Eleventh Circuit directly addressed the issue and held that the statutory language

defining “public accommodations” was unambiguous and clear—it describes 12 types of locations, all of which were tangible, physical places. No intangible places or spaces, such as websites, are listed. The *Winn-Dixie* court thus concluded that “pursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places,” and websites did not qualify. *Id.* at 1277.

The Second Circuit has never squarely resolved the question of whether a website constitutes a “place of public accommodation.” But several district court judges within the circuit have opined that websites themselves were places of public accommodation under the ADA. *See, e.g., Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F.Supp.3d 565, (D. Vt. 2015) (Title III of the ADA covers the website of a company without any physical locations); *Markett v. Five Guys Enterprises LLC*, No. 17-CV-788 (KBF), 2017 WL 5054568, at *2 (S.D.N.Y. July 21, 2017) (“[T]he text and purposes of the ADA, as well as the breadth of federal appellate decisions, suggest that defendant’s website is covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant’s restaurants, which indisputably are public accommodation under the statute.”); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (“It is unambiguous that under Title III of the ADA, dickblick.com is a place of public accommodation.”). While several New York federal judges have dismissed ADA website lawsuits on various grounds, prior to *Winegard*, no New York federal courts have directly held that the ADA does not apply to websites.

THE WINEGARD V. NEWSDAY DECISION

Winegard involved a deaf plaintiff alleging that he visited Newsday’s website to watch various videos but was unable to view them because the videos lacked closed captioning. The complaint alleged that Newsday’s failure to provide closed captions for the benefit of deaf people violated the ADA.

Recognizing that he was not bound by the district court cases extending the application of the ADA to websites, Judge Komitee carefully analyzed the ADA’s text and context as well as the history of the term “place of public accommodation.” Applying strict constructionism, the court concluded that by its plain language, the ADA excludes websites of businesses with no public-facing, physical retail operations from the definition of public accommodations.

Noting that Congress could easily have said the ADA applies to “all businesses operating in interstate commerce,” or all “retail” or “service” operations, the court reasoned that Congress’s express limitation of the enumerated categories to physical places “was obviously deliberate.” The plain language used by Congress demonstrated its decision to apply the ADA’s anti-discrimination provision to physical places rather than business operations generally. The court also noted that, even accepting the premise that Congress could not have anticipated the Internet when the ADA was passed (a dubious fact since the Internet was already in development) there were countless other types of businesses operating outside of brick-and-mortar premises in 1990 (*e.g.*, catalogs, mail-order, etc.). Nonetheless Congress still chose to list *only physical places*. Moreover, the ADA was amended in 2008. If websites had indeed been overlooked in the 1990 bill simply because the Internet was in its infancy, Congress could have amended the definition to clarify their inclusion with the 2008 amendment. The fact that it did not demonstrates Congress’s intent for the ADA not to apply to websites.

Most notably, Judge Komitee dismantled the basis for several New York district court judges’ determinations that the Second Circuit precedent in *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999) compelled extending the ADA to stand-alone websites. In *Pallozzi*, the Second Circuit applied the ADA to an insurance policy. But, as Judge Komitee correctly recognized, in that case there was no dispute that a physical “insurance office” qualified as a public accommodation. The sole issue is whether an insurance policy was a “good” or “service” of an insurance office so as to preclude an insurance office from denying that good or service to a customer because of his disability. Judge Komitee thus rejected the notion that *Pallozzi* compelled an outcome at odds with the plain-reading of the ADA because, unlike in *Pallozzi*, *Winegard* had never alleged that Newsday operated a “public-facing, physical place in which newspapers or any other goods or services are sold.”

WINEGARD’S IMPACT

To be sure, the *Winegard v. Newsday LLC* decision is not binding on other Southern and Eastern district judges. Nevertheless, ADA website accessibility defense lawyers will surely try (as they should) to get as much mileage as possible out of this landmark ruling. At a minimum, purely e-commerce businesses sued in New York federal

courts now have another valid defense to add to the oft-employed traditional defenses like mootness, failure to plead a particularized injury, and lack of personal jurisdiction. Additionally, because *Winegard* split from several previous New York federal courts on the issue of whether a website is a place of public accommodation, the odds that this critical issue may finally be addressed by the Second Circuit have significantly increased.

Finally, businesses with corresponding physical locations may not benefit much from the *Winegard* decision. The court's statement that a business' goods and services are not covered by the ADA unless and until the "place of public accommodation" test is satisfied would appear to limit any *Winegard*-based defense to purely e-commerce businesses. Indeed, the court recognized that the Second Circuit's *Palozzi* ruling may support the conclusion that websites may be subject to the ADA "when they offer the same 'goods and services' as the business' brick-and-mortar operation." Therefore, all businesses with both an Internet and a physical presence remain just as vulnerable to accessibility lawsuits in New York.

A coordinated strategy is the best approach to manage risk before, during, and even after a lawsuit. Successful strategies involve internal decisionmakers, solid legal advice, and qualified website design professionals. Businesses should continue to conduct audits of their websites and mobile

apps to ensure accessibility to screen reader software and devices used by blind and visually impaired individuals. From a practical standpoint, businesses should strive to be as compliant as possible with the WCAG 2.0 (and, if practicable, the more recently issued and updated version 2.1).

Blank Rome's [ADA Title III Litigation & Compliance](#) team has assisted hundreds of clients with this process and has not only provided legal guidance, but has worked with clients' IT departments and/or a number of third-party accessibility vendors on such efforts. Blank Rome also regularly counsels clients on other steps they can take to reduce their risk and exposure to such claims, such as establishing a "hotline" visitors to their websites can call when they encounter accessibility issues, developing and posting an accessibility policy on their websites and apps, and developing internal training and policies for those employees responsible for posting content to the websites and apps and answering the hotline.

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