

# Federal Court Holds Company Liable Under Title III of the ADA for Inaccessible Website in Full Trial, Requiring Compliance with WCAG 2.0 Standards

July 12, 2017

In an unprecedented trial verdict issued on June 13, 2017, the District Court for the Southern District of Florida in *Juan Carlos Gil v. Winn-Dixie Stores, Inc.*<sup>1</sup> held Winn-Dixie liable under Title III of the Americans with Disabilities Act (“ADA,” 42 U.S.C. § 12101 *et seq.*) for a website that was not fully accessible to a disabled individual. To remedy the inaccessibility, the court required the grocery store chain and its third-party service providers to bring Winn-Dixie’s website into compliance with the Web Content Accessibility Guidelines version 2.0 (“WCAG 2.0”) standards published by the World Wide Web Consortium.<sup>2</sup>

The lawsuit alleged that Gil, a blind individual, could not fully access Winn-Dixie’s website through use of a standard screen reader that reads text aloud. Specifically, Gil alleged that he could not access the portions of the retailer’s website that allowed him to find store locations, download coupons, or fill prescriptions at an in-store pharmacy. Citing violations of Title III of the ADA, the court granted injunctive relief for a period of three years, requiring that the website must be made accessible to the disabled through computers, laptops, tablets and smart phones, and awarded attorneys’ fees to the disabled plaintiff. Additional elements of the injunction required Winn-Dixie to adopt a Website Accessibility Policy, conduct periodic website accessibility testing, and provide annual accessibility training to its web content staff.

This case sets new precedent in several ways. As a threshold matter, this is the first known ADA website accessibility case to go to trial in federal court. More importantly, it is the first time that a federal court has required a company to adhere to the WCAG 2.0 standard in bringing its website into compliance with the ADA. The court’s decision did not specify whether Winn-Dixie must comply with the A, AA or AAA success criteria of WCAG 2.0, although prior enforcement actions brought by the U.S. Department of Justice (“DOJ”) in recent years have specified the AA (intermediate) criteria, discussed in more detail

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<sup>1</sup> *Gil v. Winn-Dixie Stores, Inc.*, No. 16-23020-Civ-Scola, 2017 WL 2547242 (S.D. Fla., June 12, 2017).

<sup>2</sup> It is important to note that the court’s decision applies only to website accessibility. To date, there have been no judicial decisions concerning accessibility standards for mobile applications.

below. In implementing the WCAG 2.0 standard, it is critical for businesses to know which success criteria are applicable because there are significant differences between the success criteria.

The case is also notable because the court held Winn-Dixie wholly responsible for the website's inadequate accessibility to the disabled even though portions of the website are operated and controlled by third-party service providers. Third-party components included, among other things, the store locator tool and loyalty points program. In so holding, the court found "...the fact that third party vendors operate certain parts of the Winn-Dixie website is not a legal impediment to Winn-Dixie's obligation to make its website accessible to the disabled. ...[M]any, if not most, of the third party vendors may already be accessible to the disabled and, if not, Winn-Dixie has a legal obligation to require them to be accessible if they choose to operate within the Winn-Dixie website."

Winn-Dixie has publicly indicated that it plans to appeal the decision.

### **Current ADA Website Accessibility Regulatory and Enforcement Landscape**

Over the past few years, the DOJ — which is charged with administering the ADA and its implementing regulations — has stepped up its enforcement of ADA against companies to increase access to digital platforms, such as websites and mobile applications, for disabled individuals. Through its enforcement actions, the DOJ has clearly taken the position that Title III of the ADA covers access to websites, online tools and mobile applications of "public accommodations" (which includes various types of companies, and banks explicitly).<sup>3</sup>

DOJ's enforcement approach relies heavily on its advance notice of proposed rulemaking ("ANPR"), issued seven years ago, that requested comment on website accessibility standards, but it never proposed or finalized a specific rule. In 2010, the DOJ issued an ANPR declaring that websites for public accommodations must be accessible to persons with disabilities and that it would issue proposed regulations on the subject.<sup>4</sup> In its ANPR, the DOJ also solicited public comment on appropriate website accessibility standards to determine compliance with the ADA.<sup>5</sup>

One of the options for website standards suggested in the DOJ's ANPR was WCAG 2.0. As noted above, the WCAG 2.0 is a privately developed set of guidelines for website accessibility that is designed to make

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<sup>3</sup> Under Title III of the ADA, public accommodations are prohibited from discriminating against individuals with disabilities. 42 U.S.C. § 12182(a). Title III of the ADA and DOJ regulations define a "place of public accommodation" as a facility operated by a private entity whose operations affect commerce and fall within one of the enumerated statutory categories; banks are one of those categories. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. In general, public accommodations must provide accessible facilities, make reasonable modifications to policies, procedures and practices to accommodate individuals with disabilities when required, and effectively communicate with individuals with disabilities.

<sup>4</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 **Fed. Reg.** 43460-01; July 26, 2010.

<sup>5</sup> *Id.* at 43465.

website content more accessible to individuals with disabilities. In recent years, WCAG 2.0 has become a generally accepted international standard. In its ANPR, the DOJ suggested the AA (intermediate) success criteria as a potentially appropriate standard.

The public comment period for the DOJ's ANPR closed on January 24, 2011, but to date the DOJ has not yet issued a notice of proposed rulemaking – nor a final rule – based on those comments. In fact, the DOJ's most recent Statement of Regulatory Priorities (Fall 2016) indicates no timeframe for issuing a notice of proposed rulemaking, stating that it would be included “among its long-term rulemaking priorities.” President Trump's executive order placing significant restrictions on any new or pending rulemakings injects further uncertainty into the process.<sup>6</sup> As a result, DOJ's Title III rulemaking currently remains on hold and is unlikely to proceed in the near-term.

Despite the lack of a rule, the DOJ has undertaken a number of enforcement actions. For example, in March 2014, DOJ and H&R Block entered into a consent decree in which H&R Block agreed to make its website, mobile applications, and tax preparation tool comply with WCAG 2.0 AA. The DOJ consent decree appears to clearly adopt WCAG 2.0 AA as the standard for making websites and mobile applications accessible to persons with disabilities and ADA-compliant.

Following the H&R Block settlement, the DOJ proceeded to bring additional enforcement actions based on WCAG 2.0 AA as the technical standard for accessibility of websites and mobile applications. DOJ has applied that standard to both brick-and-mortar businesses with websites, as well as internet-only businesses. In its settlements, the DOJ primarily sought corrective action and injunctive relief.

As a result of the DOJ's enforcement activity and no final rule, uncertainty and confusion currently exists over which standard companies should comply with to ensure that their websites are ADA-compliant and accessible to the disabled. In the absence of a DOJ rule or guidance, many companies have chosen to conform their digital platforms to the WCAG 2.0 AA standard to be consistent with DOJ enforcement actions.

### **Plaintiff Demand Letters and Litigation Outlook**

Concurrent with the increase in the DOJ's ADA enforcement actions, the plaintiffs' bar representing disabled individuals and disability rights groups has been aggressively issuing demand letters to companies. The demand letters claim deficiencies in website and mobile application accessibility (based on information derived from consultants using automated scanning tools) and seek settlements for alleged violations of accessibility standards related to Title III of the ADA. Industries that have received demand letters include retail establishments, restaurants, hotels, and other businesses. During the second half of 2016, plaintiffs' firms began targeting the financial institution industry by sending demand letters to numerous institutions of all sizes.

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<sup>6</sup> Executive Order No. 13771 issued on January 30, 2017 (*Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339, Feb. 3, 2017).

The demand letter tactic likely has been emboldened by the DOJ's successful ADA enforcement actions, and many of the demand letters have proceeded to litigation. Since 2015, over 350 website accessibility lawsuits have been filed in federal court, and more are being filed each month. Although monetary damages are fairly limited under the ADA,<sup>7</sup> such cases are not easily dismissed and the cost of defense may be substantial. As a result, many companies choose to negotiate a settlement rather than litigate.

In a recent trend, the most active plaintiffs' law firms have begun proceeding directly to court without first sending demand letters that place companies and financial institutions on notice about the potential for litigation. The *Winn-Dixie* decision, which was a victory for the plaintiffs' bar, will likely further empower this aggressive litigation strategy.

Nonetheless, other recent federal court decisions have favored defendants. For example, in *Robles v. Dominos Pizza LLC*,<sup>8</sup> the court rejected a website accessibility claim, finding that, in the absence of DOJ regulations, the ADA as applied to technology was too ambiguous to be enforced and resulted in depriving Domino's of its right to due process. In addition, in *Kidwell v. Florida Commission on Human Relations and Seaworld Entertainment, Inc.*,<sup>9</sup> the court held that Seaworld's and Busch Gardens' websites were not public accommodations and therefore the ADA did not apply. Therefore, it is unclear whether the *Winn-Dixie* decision will be a clear turning point that will result in subsequent judicial decisions against companies.

### **Advocacy Efforts and Legislative Initiatives**

During 2017, various trade associations began petitioning Congress to restrict litigation in the absence of a clear technical standard to comply with the ADA. For example, the American Association of Bank Directors, whose President is David Baris, a Buckley Sandler partner, has asked Congress to amend the ADA to freeze any private lawsuits and DOJ enforcement actions against companies (including financial institutions) for not having proper accessibility to websites and mobile devices until DOJ adopts a final rule defining the requirements, and allowing companies a reasonable period of time in which to comply with the rule. Other trade groups, such as the American Bankers Association and state banking associations, have also advocated that members of Congress clarify the applicability of ADA to websites and mobile applications and limit the ability of plaintiffs' to bring private lawsuits.

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<sup>7</sup> Title III of the ADA provides several avenues for relief. Remedies sought by DOJ may include monetary damages, injunctive relief, attorneys' fees and costs, and civil money penalties. 42 U.S.C. § 12188(b)(2)(A), (B); 28 C.F.R. § 36.504(a)(1), (2). Civil money penalties may not exceed \$50,000 for the first violation or \$100,000 for any subsequent violation. 42 U.S.C. § 12188(b)(2)(C); 28 C.F.R. § 36.504(a)(3). Title III may also be enforced by a private plaintiff's lawsuit seeking injunctive relief and attorneys' fees and costs. 42 U.S.C. § 12188(a)(2); 28 C.F.R. § 36.501 (private suits), § 36.505 (attorneys' fees).

<sup>8</sup> *Robles v. Dominos Pizza LLC*, No. CV 16-06599 SJO (SPx), 2017 WL 1330216 (C.D. Ca., March 20, 2017).

<sup>9</sup> *Kidwell v. Florida Comm'n on Human Relations and Seaworld Entm't, Inc.*, No. 2:16-cv-00403-UA-CM, 2017 WL 176897 (M.D. Fla., Jan. 2017).

Bills are also pending in Congress to address the uptick in demand letters and litigation. For example, H.R. 620, introduced in January 2017, seeks to set minimum requirements for demand letters and provide for a notice and cure period before a private civil action can be commenced. Similarly, H.R. 1493, introduced in March 2017, would impose a prior notice requirement and an opportunity to comply before commencement of a lawsuit.

### **Conclusion**

The *Winn-Dixie* case signals that companies and financial institutions should accelerate their efforts to ensure that websites and mobile applications are fully accessible to disabled individuals and thereby mitigate the risk of ADA non-compliance. In light of the increasingly litigious plaintiffs' bar and the *Winn-Dixie* judicial decision, which sets a precedent for an adverse verdict, businesses should carefully weigh whether to settle or litigate ADA accessibility cases in consultation with legal counsel.

If you have any questions concerning the case, visit our [FinTech](#), [Bank Counseling & Compliance](#) or [Complex Civil Litigation](#) practice pages for more information, or contact a Buckley Sandler attorney with whom you have worked with in the past.