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As Summer Approaches, the SDNY Once Again Provides Hope for Businesses Exhausted by Repeated Website Accessibility Lawsuits

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While businesses have long grown weary of the plaintiff bar's seemingly endless stream of website accessibility lawsuits, it appears that judges in the SDNY may be increasingly feeling the same way. For the second time this spring, following on the back of the decision in *Mendez v. Apple*, a judge in the SDNY, in the case of *Diaz v. The Kroger Co.*, 18-cv-7953 (KPF), has granted a business' motion to dismiss a website accessibility lawsuit. While decided on multiple grounds, the Court's decision is primarily based on mootness, providing businesses who have already taken the necessary steps to comply with the Web Content Accessibility Guidelines (WCAG) at Levels A and AA, and to also maintain compliance going forward, with a potential blueprint to defeat "secondary strike" lawsuits brought in the SDNY.

Background

In *Diaz*, the plaintiff, who asserted she is visually impaired, alleged that the defendant – a supermarket chain based in Ohio – failed to make its website accessible to individuals who were blind. As a result, plaintiff claimed that she was unable to learn about certain products on the site, as well as promotions and coupons.

Defendant sought to dismiss the lawsuit on two grounds: (i) lack of subject matter jurisdiction, because its remediation of the barriers identified in the complaint rendered plaintiff's claims moot; and (ii) lack of personal jurisdiction, because the Ohio-based defendant does not transact business in New York State, and accordingly, New York's long-arm statute does not subject it to the court's review.

Defendant's Remediation of the Issues Identified in the Complaint Rendered Plaintiff's Complaint Moot

In support of its motion to dismiss for lack of subject matter jurisdiction, defendant submitted an affidavit from one of its employees, a "Group Product Design Manager." In the affidavit, the

employee affirmed the following, which the Court found to be significant:

- Defendant had undertaken to comply with the WCAG *before* this lawsuit was filed;
- The website now complies with the WCAG 2.0 standards;
- The employee "personally" confirmed that all of the deficiencies identified in the complaint had been remedied;
- The barriers to access which were identified in the complaint no longer exist;
- Defendant was committed to keeping the website in compliance with the WCAG so that it would remain accessible;
- Defendant had no intention of undoing those changes or regressing to non-compliance with the WCAG and ADA (both due to the time/cost involves in achieving compliance and due to a desire to avoid future similar lawsuits); and
- Defendant intended to keep the website up to date with any new website accessibility standards that are issued/promulgated.

The Court acknowledged that "there are few cases in the federal courts, and none with precedential value on these issues," and that, "several sister courts in this District have found, on the facts of those cases, that the defendants had failed to establish mootness." Nevertheless, the Court distinguished this case from those that denied similar motions to dismiss for mootness, finding that the employee's affidavit in this case clearly and fully met the "stringent showing required by the Supreme Court's mootness precedent." Simply put, plaintiff identified several barriers on the website, the defendant remediated them, brought the website into compliance with the WCAG, and stated its intention to remain in compliance going forward. Despite the fact that the defendant did not provide any concrete plans for future compliance, the court was satisfied with the employee's representation that the company was committed to monitoring any technological updates in the future to provide individuals with visual impairments with equal access to the website, and it found these representations sufficient to render the complaint moot.

Of key importance, the court also considered and rejected the argument – which plaintiffs regularly assert in this context – that ADA claims involving websites can *never* be mooted, because websites are constantly being revised, updated, and edited, with new content added, replaced, and deleted. Once again, the Court recognized that other courts outside of this jurisdiction have previously accepted this argument. While agreeing "alleged violations are more likely to reoccur with websites" than in the brick and mortar context, the court refused to adopt, what it characterized as, "[p]laintiff's sweeping, technology-specific exception to the mootness doctrine." Instead, the court stated that, "ADA cases involving websites are subject to the same mootness standard as their 'structural' counterparts."

The New York District Court Lacked Personal Jurisdiction over the Ohio Grocery Store That Did Not Provide Any Delivery Services to New York State Residents

Despite recognizing that it could have dismissed the case for lack of subject matter jurisdiction, and concluded its opinion there, the Court went further and also considered and accepted defendant's

argument that the New York district court lacked personal jurisdiction over the Ohio grocery store. The Court rejected plaintiff's argument that the website's provision of certain services – such as information about calorie counts and cook time – was sufficient to confer jurisdiction over the Ohio defendant. The court personally reviewed the website and confirmed that the defendant's grocery stores did not deliver to *any* New York state zip code (its closest source for deliveries was in Virginia). Based on this, the Court held that the defendant did not transact business with any resident of New York State, and that the plaintiff's mere accessing of the website from New York was insufficient to subject it to the court's jurisdiction.

While not the primary argument advanced by defendant in support of its application for dismissal, the Court's analysis and holding is nonetheless significant in light of the fact that serial plaintiffs, such as the one that filed this case, have filed, and continue to file, website accessibility lawsuits against defendants operating in other jurisdictions, and who do not transact business in the state in which the lawsuit was filed. This holding may be persuasive in these, highly specific, cases.

Takeaways

This decision is clearly another positive development for businesses facing website accessibility lawsuits in the SDNY (particularly of a repeat nature). However, notwithstanding the court's thorough, multi-faceted, analysis, the precedential value of this decision should not be overstated. As the Court acknowledged, its holding diverges from those in other circuits, and, in some ways, other courts in this district. Accordingly, while this decision undoubtedly provides businesses – particularly those frustrated by multiple lawsuits notwithstanding their attempts to modify their websites to comply with the WCAG – with additional grounds through which to fight back, it remains unclear whether other district court judges will engage in the same analysis or reach the same conclusion. Moreover, while this court accepted the representations made by the defendant's employee in his affidavit, we would strongly recommend that any company that seeks to file a similar motion to dismiss for mootness include support from an outside website accessibility expert (containing considerably greater details about how the company achieved compliance and its plans to maintain compliance going forward) as well as that of a qualified employee.

Like the *Mendez v. Apple* decision earlier this spring, this decision does not preclude serial plaintiffs from filing multiple, identical, lawsuits against various defendants. Nevertheless, there has been a marked decline in the number of website accessibility lawsuits filed in the SDNY following the *Mendez* decision. We expect that this decision will further ebb the flow of these lawsuits in the SDNY. That said, given recent decisions in other jurisdictions (*e.g.*, California state court), this will most likely simply result in more lawsuits being filed elsewhere. In the meantime, as we've repeatedly noted for years, the best way to avoid falling prey to such a suit is to achieve substantial conformance with WCAG 2.1 Levels A and AA (as confirmed via human-based auditing from both the code and user perspectives).

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