Winget | Spadafora | Schwartzberg | LLP

NY | NJ | CT | FL | CA | TX | IL | CO

www.WSSLLP.com

CLIENT ALERT

Make it accessible or SHUT IT DOWN!!!

April 14, 2016

Author: Dianna D. McCarthy

So said the State of California in Davis v. BMI/BND Travelware. Making commercial websites accessible for all users has been propelled to the limelight following a letter written by 9 United States Senators to the Obama Administration in December, 2015 (the "Senators' Letter").[1] Many people who are hearing, sight or mobility impaired are often faced with a slow internet experience or prevented from accessing most or all information on many commercial websites. The ultimate goal of the Senators' Letter is to make all commercial websites compliant with the Web Content Accessibility Guidelines ("WCAG") 2.0.

By way of background, Title II of the ADA requires that state and local government websites be accessible to all persons with disabilities. The Equal Employment Opportunity Commission is a great example. Auxiliary aides are often used by such persons to enhance their internet experience. The Department of Justice ("DOJ") enforces requirements for website accessibility on entities subject to Title II and Title III of the ADA. There is no question that Title II requires state and local governments, and schools funded by state and federal dollars, to make their websites ADA accessible. The DOJ has endorsed WCAG 2.0. The question is whether Title III's "place of public accommodation" applies to commercial websites.

To date, there is no federal legislative requirement that commercial websites be ADA accessible or WCAG 2.0 compliant. The DOJ promised in 2011, 2014, 2015 and January 2016 that it would take action by issuing a Notice of Proposed Rulemaking following its **September**

[1] **Edward Markey – D. Mass; Elizabeth Warren, D –Mass; Sherrod Brown D-Ohio; Cory Booker D-JN; Barbara Mikulski D-MD; Richard Blumenthal D-Conn; Benjamin Cardin D-MD; Al Franken D-Minn; Richard**

15, 2010 Advanced Notice of Proposed Rulemaking. Unfortunately, it recently indicated that we cannot expect any guidance until **2018.**

As is typical, the matter is being litigated in State and Federal Courts. Not surprisingly, the result is a split among circuits. Some circuits have refused to extend the ADA to cover non-physical locations – such as a website. Access Now, Inc. v. Southwest Airlines, 277 F. Supp. 2d 1312 (S.D. Fla 2002). Others have held that Title III of the ADA covers commercial websites that do not have ties to a physical location. National Ass'n of the Deaf v. Netflix, 869 F. Supp. 2d 196 (D. Mass 2012). Finally, another way the Courts have looked at the issue is using the *nexus* analysis. The Court looks for a *nexus* between the website at issue and a physical location that satisfies Title III's definition of "place of public accommodation." National Federation of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal 2006).

Using the *nexus* analysis recognized in the 9th Circuit, the Court in Davis v. BMI/BND Travelware, DIVDS 1504682 (California) granted summary judgment in favor of plaintiff. The Court used the *nexus* analysis and found that Travelware (which had information about luggage on its website) violated both Title III of the ADA and California's Unruh Act. It issued a $4,000 fine under the Unruh Act and injunctive relief against Travelware ordering that Travelware makes its website accessible OR TAKE IT DOWN!

There are a number of law firms sending out nearly identical demand letters to many businesses that maintain commercial websites. These letters have made their way to carriers who are analyzing them for coverage under GL, D&O, EPL, E&O and some cyber policies. If you have received one of these letters, please feel free to contact Dianna D. McCarthy at McCarthy.D@WSSLLP.com.