

Internet Business Activities—Are They Now the Bull’s-Eye for ADA Public Accommodation Lawsuits?

August 13, 2012

By Frank C. Morris, Jr.

Two recent decisions involving Netflix again raise the question of whether all online business activities are covered by the public accommodation requirements of Title III of the Americans with Disabilities Act (“ADA”) or whether a “bricks and mortar” presence is required to invoke ADA protections. In late June, in *National Association of the Deaf v. Netflix*, Judge Ponson of the U.S. District Court in Massachusetts denied Netflix’s motion for judgment on the pleadings that challenged the application of the ADA to its video streaming website. The court found that, despite the absence of a bricks-and-mortar business, the ADA’s requirement to provide goods and services accessible to the disabled still applied. Netflix has asked Judge Ponson to permit an immediate appeal of his ruling that the ADA applies to closed-captioning on Internet-supplied videos.

Showing the unsettled state of the law on the application of the ADA to Internet business activities, shortly after Judge Ponson’s decision, a U.S. District Court in California reached a contrary conclusion in *Cullen v. Netflix*. While Cullen pursued claims only under California law, the court first looked at whether the ADA applied to the website, as both California’s Disabled Persons Act (“DPA”) and Unruh Act (which together bar discrimination by California businesses in, among other things, public accommodations) specify that a violation of the ADA is also a violation of the DPA and Unruh Act. In *Cullen*, the court held that the ADA required that, to be a place of public accommodation, an entity must have an “actual physical place.” Based on that analysis, the court determined that a video streaming website is not an actual physical place and, therefore, not subject to the requirements of the ADA.

These two conflicting decisions illustrate a continuing split among the courts as to whether various online business activities are subject to the ADA. Several cases have rejected coverage of online activities, e.g., *McNeil v. Time Ins. Company*, 205 F.3rd 179 (5th Cir. 2000), and *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3rd 1104 (9th Cir. 2000). However, at least four other courts of appeals have found that the ADA may cover online activities, even those lacking a physical presence, e.g., *Car Parts Distribution Ctr., Inc. v. Automotive Wholesalers’ Association of New England, Inc.*, 37 F.3rd 12 (1st Cir. 1994) (on which Judge Ponson relied); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3rd 557 (7th Cir. 1999); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 2000); and *Rendon v. Valleycrest Productions Ltd.*, 394 F.3rd 1279 (11th Cir. 2002).

The issue presented in the two recent Netflix decisions is important to any business or entity that has an online presence as part of its business activities. In fact, in recognition of the ever-increasing importance of online business activity, the U.S. Department of Justice (“DOJ”) previously proposed to issue regulations concerning ADA requirements on such activities. 75 FR 43460 (July 26, 2010). The DOJ now plans to issue a notice of Proposed Rulemaking in December 2012. See the DOJ’s Semiannual Regulatory Agenda, Spring 2011, Docket ID DOJ-OAG-2011-0019. As the above cases suggest, both individuals with disabilities and advocacy groups are not waiting for the DOJ’s proposed regulations.

As businesses consider how the risks of litigation under the ADA may affect their online offerings, they should keep in mind that various state and local laws may also provide public accommodation rights to individuals with disabilities that present financial risks well beyond those of the ADA. While Title III of the ADA permits injunctive relief and civil penalties when the matter is pursued by the DOJ, state and local laws providing rights for individuals with disabilities may also make compensatory or punitive damages available to such individuals or possibly even to advocacy groups that successfully pursue such claims. Thus, while there are still unsettled legal questions regarding the application of the ADA to business websites and related online commerce or activities, additional litigation, often pursued by aggressive advocacy groups like the National Association of the Deaf, on this issue is assured and new regulatory activities by the DOJ in this area should occur in December.

What Businesses Should Do Now

- 1) If a business or state or local entity is considering any significant alterations to its website or online business activities involving, for example, such actions as patient or customer scheduling, sales transactions, restaurant reservations, providing important technical guidance or customer support on use of the business’s products, etc., it would be prudent to consider accessibility issues in any such alterations, redesign, or reconfiguration of a website or related online capabilities, because such changes may trigger potential scrutiny and a readily achievable opportunity to provide greater accessibility.
- 2) Many businesses now advertise that their best “deals” are only available online. Such businesses should consider whether their best deals are equally available to individuals with disabilities, particularly individuals with sight or hearing impairments. Does the website or online transaction system design interfere with the ability of individuals with disabilities to take advantage of those best deals offered only online? Increasingly, technological accessibility solutions may be available at a reasonable cost (that is, potentially meeting the ADA standard of being “readily achievable” without undue cost or difficulty), which would permit individuals with disabilities to have better access to goods and services offered online. An example of technology that may enhance the ability of disabled individuals to engage successfully in Internet activities is a screen reader that facilitates interaction with website text fields for those with sight impairments.
- 3) For websites where audio content is a significant part of the online services offered, businesses should consider whether alternative text formats accessible to the hearing impaired can be integrated into their online services. A further

consideration may be whether individuals who may have difficulty using a mouse or keyboard can be given alternative means of accessing any interactive content.

- 4) Health care and life sciences companies should pay particular attention to this issue in light of the DOJ's recent announcement of its [Barrier-Free Health Care Initiative](#) in conjunction with local U.S. attorneys' offices around the country. The DOJ emphasized that its multiphase initiative is concerned with both physical access to health care activities as well as communicating medical information effectively to deaf and hearing or sight-impaired individuals.
- 5) An audit of the accessibility of a business's online activities open to the public or of its potential customers or clients may be a prudent way to assess litigation risks in this developing area of ADA law. A business may wish to consider whether such an audit should be conducted, and, if so, whether it should be conducted under the auspices of knowledgeable ADA counsel. Engaging an attorney to assist with such a review will provide a stronger argument that the audit results were obtained to enable counsel to provide legal advice on ADA compliance to the business and may therefore be protected by the attorney-client privilege.

If you have any questions about this Advisory or other questions as to the ADA obligations of a public accommodation or other requirements of the ADA and similar state laws, please contact:

Frank C. Morris, Jr.
Washington, DC
(202) 861-1880
fmorris@ebglaw.com

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