

## **NINTH CIRCUIT ISSUES IMPORTANT DECISION IN DOMINO'S WEBSITE ACCESSIBILITY ACTION**

Jan 16, 2019

As businesses continue to face lawsuits and demand letters alleging that their websites are inaccessible to blind and deaf patrons in violation of the Americans with Disabilities Act (“ADA”), courts across the country continue to weigh in on the issue. On Tuesday, January 15, 2019, the United States Court of Appeals for the Ninth Circuit issued its much-awaited [decision](#) in the *Robles v. Domino's Pizza* case – holding that the ADA applies to the Domino's Pizza (“Domino's”) website and mobile application (“app”), and rejecting due process and primary jurisdiction challenges raised by Domino's successfully in the court below.

As we previously [reported](#), in March 2017, the United States District Court for the Central District of California granted Domino's motion to dismiss under the primary jurisdiction doctrine, which allows courts to stay or dismiss lawsuits pending the resolution of an issue by a government agency. The District Court held that because the Department of Justice (“DOJ”) has not promulgated regulations defining website accessibility or providing guidance on how to make websites accessible, Domino's due process rights would be violated if the Court were to hold that its website was not compliant with the ADA. (For more information regarding the DOJ's position, visit this [blog post](#).)

The appeal presented three questions: 1) whether the ADA applies to Domino's website and app; 2) whether a holding that the ADA applies raises due process concerns; and 3) whether the primary jurisdiction doctrine should be invoked because the DOJ has failed to provide meaningful guidance on how a company can make its website compliant with the ADA.

In addressing the first question, the Ninth Circuit agreed with the District Court that the ADA applies to Domino's website and app – “even though customers predominantly access them away from the physical restaurant.” Opinion at 11 (discussing that the statute applies to “services *of* a place of public accommodation, not services *in* a place of public accommodation.”). In so finding, the Court focused on the “nexus between Domino's website and app and physical restaurants,” going so far as to call the nexus “critical” to the analysis: “The alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation.” Opinion at 12. While some courts in other jurisdictions have not required a

nexus between a website and a physical location, the Ninth Circuit continues to require such a connection.

With regard to due process concerns, the Court of Appeals dismissed this defense because “at least since 1996, Domino’s has been on notice that its online offerings must effectively communicate with its disabled customers and facilitate ‘full and equal enjoyment’ of Domino’s goods and services.” Opinion at 15. The Court held that the lack of specific regulations from the DOJ does not eliminate the duty to comply with the ADA: “While we understand why Domino’s *wants* DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that Domino’s receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations.” Opinion at 19.

For the third question, the Ninth Circuit held that the District Court erred by invoking the primary jurisdiction doctrine. The Court explained that the DOJ is aware of the issue of website accessibility, and that the withdrawal of the proposed rulemaking “means that the potential for undue delay is not just likely, but inevitable.” Opinion at 23. The Court further stated that such a delay was also needless because “the application of the ADA to the facts of this case are well within the court’s competence” and that “[w]hether Domino’s website and app are effective means of communication is a fact-based inquiry within a court’s competency.” Opinion at 24.

In closing, the Ninth Circuit “express[ed] no opinion about whether Domino’s website or app comply with the ADA.” Rather, the Court of Appeals has left it to the District Court to decide, after discovery, “whether Domino’s website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates.” Opinion at 25. On this point, the Ninth Circuit agreed with the plaintiff that if, after discovery, the District Court finds that Domino’s website and app fail to satisfy the ADA, the District Court can order compliance with the Web Content Accessibility Guidelines (“WCAG”) as an equitable remedy. Opinion at 17. (Additional information on the WCAG standard can be found [here](#).)

It bears noting that the Court also stated that it “need not decide whether the ADA covers the websites or apps of a physical place of public accommodation where their inaccessibility does not impede access to the goods and services of a physical location.” Opinion at 12 n.6. In addition, the Court referenced the fact that the ADA includes an exemption “where compliance would ‘fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.’” Opinion at 11 n.5 (quoting 42 U.S.C. § 12182(b)(2)(A)(iii)). The inclusion of these footnotes by the Court is relevant to retailers and other businesses with an online presence because it highlights that the issue of website accessibility is still one that should be analyzed on a case by case basis.

Bryan Cave Leighton Paisner has extensive experience defending companies against website accessibility claims and regularly offers webinars on the topic to assist our clients in assessing compliance with the ADA.

If you would like to schedule a similar webinar or presentation, or for more information on website accessibility or defending against such claims, please contact any of the attorneys listed.

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