

ADA Braille Gift Card Claims Shouldn't Gain Traction In NY

By **Kathryn Deal, Esther Lander, Michael McTigue, Meredith Slawe, Michael Stortz and James Tysse**

Over the past few weeks, a handful of plaintiffs and their counsel, Gottlieb & Associates, filed more than 130 putative class actions in the Eastern and Southern Districts of New York. All of the nearly identical complaints name retailers and restaurant chains as the defendants and articulate the same novel theory: that the businesses' failure to offer gift cards in Braille — focusing specifically on the names of the businesses and the denominations of the gift cards — violates Title III of the Americans with Disabilities Act, the New York State Human Rights Law and the New York City Human Rights Law.



Kathryn Deal

The New York state law claims are tethered to the ADA claims, and successful defenses to the ADA claims should therefore dispose of the actions in their entirety. These cases should not gain traction in the courts based, for example, on pleading deficiencies, including lack of standing, and existing authority in the ADA regulations.



Esther Lander

Nevertheless, they appear to be an attempt to ride the recent wave of ADA website accessibility claims that prompted many retailers and restaurant chains to settle early to avoid the cost of litigation.



Michael McTigue

How did we get here?

Retailers and restaurants are keenly focused on satisfying the demands of modern consumers. They undertake significant efforts to ensure that goods, products, services and experiences made available by way of their physical stores, restaurants, catalogs, websites and mobile apps can be enjoyed by the public, through transactions designed to be frictionless for consumers across multiple channels. Doing so fosters customer satisfaction, builds loyalty and makes smart business sense in an increasingly competitive environment.



Meredith Slawe

It also serves their common interest in being good and engaged corporate citizens. Consistent with this philosophy, prominent retailers and restauranteurs have demonstrated an unwavering commitment to serving the needs of disabled consumers. They have invested considerable resources into making stores, restaurants and digital experiences as accessible and welcoming to persons with disabilities as possible, including blind and visually impaired individuals.



Michael Stortz

Given their extensive efforts, businesses have been exceedingly frustrated by the explosion of litigation and presuit demand letters sent en masse by serial claimants and their counsel under the ADA, a law that Congress passed in 1990, well before the advent of the modern retail environment. In 2018, in excess of 2,200 Title III website accessibility actions were filed — more than triple from the year before — with the number of presuit demand letters dwarfing the filed cases.[1]



James Tysse

In the absence of uniform regulation and clear guidance from the U.S. Department of Justice, enterprising plaintiffs counsel have brought and threatened litigation based on the assumption — endorsed by some courts — that retail websites and mobile apps must comply with the privately issued Web Content Accessibility Guidelines. These expansive

guidelines, which were intended to be voluntary, extend beyond the ADA's statutory and regulatory text and create a virtually impossible compliance regime for businesses operating in a rapidly changing digital environment. Moreover, attorney fees are fully recoverable under Title III of the ADA, whereas the remedy available to plaintiffs is essentially limited to injunctive relief.

As such, enterprising lawyers threaten protracted and costly litigation absent early settlements that are often conditioned, perhaps not surprisingly, on recovery of hefty attorney fees. These lawsuits and threatened claims ignore the good faith efforts of retailers and exploit a well-intentioned statute that serves an important public purpose. That purpose, in turn, aligns with the objectives of the very businesses that have been disproportionately targeted with abusive, and often lawyer-driven, claims.

Unfortunately, businesses that have elected to settle website- and mobile app-based ADA claims have often seen repeat claims by the same plaintiffs attorneys and others. Some claimants, when engaging with defendants, will even note the successful integration of the challenged websites and/or apps with screen reader technology — making them accessible to visually impaired individuals — but will point out a handful of discrete issues and contend that they should force settlement given the costs of defense and the uncertain legal landscape.

While there are ways to craft settlement agreements in that context to give companies increased protection in the event of subsequent claims, many companies have not had the benefit of those protections and have elected to settle multiple claims simply to avoid costly litigation.

As the U.S. Chamber of Commerce and the National Federation of Independent Businesses aptly wrote in their amicus brief to the U.S. Supreme Court addressing the "profoundly flawed" U.S. Court of Appeals for the Ninth Circuit ruling in *Robles v. Domino's Pizza LLC*,^[2] "[the] unknowable legal standards for applying the ADA to the internet impose heavy litigation costs with little countervailing benefit. That in itself is a major problem, as settlements of such suits unfairly tax innovation while doing little to improve accessibility."^[3]

Last month, despite a compelling petition for certiorari with significant amicus support,^[4] the U.S. Supreme Court declined to hear the *Domino's* case, thereby sending the action back to the U.S. District Court for the Central District of California for further proceedings.

There were predictions that the floodgates of ADA claims might widen with the denial of certiorari in the *Domino's* action. Just a few weeks later, these predictions were borne out by the latest wave of ADA cases that flooded the dockets of the New York district courts.

The Latest Cases

The gift card lawsuits follow the surge of lawsuits and presuit demand letters challenging the accessibility of websites and mobile apps under Title III. Emboldened by numerous settlements reached with little or minimal effort by plaintiffs counsel, and the relatively few cases that challenged the merits of their arguments, serial plaintiffs and their counsel filed well over 100 ADA class action complaints against retailers and casual restaurant chains challenging the accessibility of gift cards.

As noted, a small group of plaintiffs allege that businesses that fail to offer consumers a Braille version of their store or restaurant gift cards deny blind and visually impaired

individuals full and equal access to places of physical accommodation. The complaints assert claims under Title III of the statute, as well as under the New York State and New York City Human Rights Laws.

These complaints — which are nearly identical and focus entirely on the absence of Braille on gift cards — are facially deficient and should be susceptible to early dismissals with respect to the ADA, NYSHRL and the NYCHRL claims. But when faced with having to defend against yet another set of manufactured claims while they are working to serve all consumers, including the blind and visually impaired population, these businesses continue to wonder whether no good deed will go unpunished.

These new lawsuits, all filed within days of one another, reflect a common theme of the plaintiffs consumer class action bar, namely, why file one putative class action when you can file two, or even 100? The plaintiffs attorneys that have brought these actions are seeking to circumvent applicable gift card terms and conditions by failing to allege any purchases of gift cards or difficulty using them, and to extract as many quick settlements as possible before any cases are meaningfully challenged in court. In many of the complaints they have ignored, and even contradicted, the reality of the defendants' gift cards, business models and relevant practices.

Unfortunately for plaintiffs here, the ADA and its regulations actually address whether Braille is required on consumer-facing materials, and provide helpful guidance for retailers and restaurants on this very topic. Although these actions still call for a thoughtful defense that is grounded in deep knowledge of the ADA and class action practice, the claims should not gain traction if handled well.

Hopefully, the courts will put a halt to this legally flawed litigation before plaintiffs counsel are unduly rewarded with quick settlements that will further embolden and incentivize them to file additional lawsuits. Such settlements often serve to fund additional baseless claims testing new theories against retailers and restaurants. These businesses deserve recognition for their ongoing efforts to address accessibility, rather than new waves of contrived litigation.

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Disclosure: Akin Gump filed an amicus brief in support of the petition for certiorari in Domino's Pizza v. Robles on behalf of the Retail Litigation Center and the National Retail Federation.

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[1] UsableNet, 2018 ADA Web Accessibility Recap, https://cdn2.hubspot.net/hubfs/3280432/2019_UsableNet_WebAccessibilityLawsuit_Infographic_FINAL.pdf (Dec. 2018).

[2] 913 F.3d 898 (9th Cir. 2019).

[3] Brief for the Chamber of Commerce of the United States of American and the National Federation of Independent Business as Amici Curiae in Support of Petitioner at 3–4, *Domino’s Pizza LLC v. Guillermo Robles*, No. 18-1539 (July 15, 2019).

[4] A copy of this amicus brief is available [here](#).