

Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 31 • NUMBER 5 • MAY 2019

Ninth Circuit Determines That Absence of Federal Guidance Is No Bar to ADA Claims Challenging Websites and Mobile Apps

By Esther G. Lander, Michael J. Stortz, and Mira E. Baylson

In a recent decision, a panel of the U.S. Court of Appeals for the Ninth Circuit reinstated a claim against Domino's Pizza LLC that its website and mobile app were not accessible to visually impaired or blind people in violation of Title III of the Americans with Disabilities Act (ADA) and California's Unruh Civil Rights Act.¹

The panel's decision turned on the alleged nexus between the app and website and Domino's brick-and-mortar restaurants. Specifically, the website and mobile app are auxiliary services of a place of public accommodation (i.e., Domino's restaurants), and as such are held to the same ADA standards as a restaurant. The panel also determined that the lack of federal guidance as to what the ADA requires could not serve as a defense to claims for noncompliance. The panel expressed "no opinion about whether

Domino's website or app comply with the ADA" and remanded the case to the district court for further proceedings on the merits.

Background

Whether and how the ADA might apply to websites and mobile apps has been an open question for some time. Following the December 2017 withdrawal of an Advanced Notice of Proposed Rulemaking, the Department of Justice (DOJ) was expected to issue regulations as to how the ADA applies to both websites and mobile apps. In the following six months, more than 1,000 lawsuits alleging website accessibility violations under the ADA were filed. The lack of DOJ action prompted a congressional inquiry to which the DOJ responded last September to advise that it was still "evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA." The DOJ confirmed that it interprets the ADA to apply to "public accommodations' websites[,] but offered little else in terms of guidance.

Against this backdrop, both the Ninth and the Eleventh Circuits held oral arguments on the issue of website accessibility under the ADA in which the lack of clarity and federal guidance as to the law played a prominent role.

Esther G. Lander (elanders@akingump.com) is a partner at Akin Gump Strauss Hauer & Feld LLP focusing on workplace internal and government investigations and complex employment discrimination claims. **Michael J. Stortz** (mstortz@akingump.com) is a partner at the firm representing businesses against claims of unfair competition, false and deceptive advertising, labeling and marketing, consumer fraud, breach of warranty, and product defect. **Mira E. Baylson** (mbaylson@akingump.com), a counsel at the firm, focuses on white collar defense and investigations.

Robles v. Domino's Pizza

In proceedings below, the district court had concluded that the ADA does apply to Domino's website and app under its "auxiliary aids and services" section.² Specifically, the court held that, because Domino's website and app "facilitate access to the goods and services of a place of public accommodation"—Domino's physical restaurants—the ADA applies to its mobile presence. The Ninth Circuit panel affirmed this ruling.

The panel reversed, however, the lower court's ruling that the absence of DOJ regulations and technical assistance precluded claims under the ADA challenging the accessibility of websites and apps on due process grounds. The panel acknowledged that the DOJ has not issued specific regulations on the issue of ADA applicability to websites/mobile applications despite promising to do so. Nevertheless, the panel concluded that Domino's had received fair notice that its websites and mobile app must comply with the ADA. In denying Domino's due process challenge, the court found that the law "articulates comprehensible standards to which Domino's conduct must conform." The panel held that, "as a general matter the lack of specific regulations cannot eliminate a statutory obligation."

The panel also rejected Domino's contention that the plaintiff was seeking to impose liability based on its failure to comply with privately promulgated Web Content Accessibility Guidelines 2.0.

Although the panel did not reach any conclusion as to whether the Domino's site and app were compliant, its decision suggests at least two potential defenses to such claims. First, Domino's identified

that its mobile offerings displayed a telephone number providing assistance to customers using screen-reading software. The panel held that there was a question of fact whether such a telephone hotline could guarantee "full and equal enjoyment," as well as protect "the privacy and independence of the individual with a disability."³ This language could help provide guidance for companies that are attempting to fashion suitable alternatives for websites and mobile apps in the absence of federal regulatory action.

Second, the panel expressly limited its holding to the scenario where the alleged inaccessibility via website or mobile apps "impedes access to the goods and services of [Domino's] physical pizza franchises," which were included in the federal regulatory definition of public accommodation. To the extent that a website or app did not provide direct access to purchases in brick-and-mortar facilities, the panel's decision does not provide guidance as to whether the ADA applies. This silence suggests that the ADA may not apply to businesses and companies where the primary purpose of the app or website is not to facilitate transactions in brick-and-mortar locations.

Given the evolving legal and regulatory landscape, companies should continue to monitor activity in this area.

Notes

1. See *Robles v. Domino's Pizza, LLC*, No. 17-55504 (9th Cir. Jan. 15, 2019).
2. 42 U.S.C. § 12182(b)(2)(A)(iii).
3. 28 C.F.R. § 36.303(c)(1)(ii) (2017).

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Number 5, pages 30–31, with permission from Wolters Kluwer, New York, NY,
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