BLANKROME

Business Litigation

JANUARY 2019 • NO. 1

New Ruling Reiterates That Websites and Mobile Apps Need to Be ADA Compliant

The Ninth Circuit has issued one of the first appellate decisions on the subject of websites and mobile applications' accessibility to visually impaired and other disabled individuals under the Americans with Disabilities Act ("ADA") and similar state statutes. Companies should review their websites and mobile applications for compliance in order to reduce the risk of litigation and should consider taking steps to remediate their platforms to ensure people with disabilities have equal access to consumer-facing content.

In *Robles v. Domino's Pizza, LLC*, No. 17-55504, __ F. 3d __ (9th Cir. Jan. 15, 2019), the plaintiff alleged that, on at least two occasions, he attempted to order online a customized pizza from a nearby Domino's Pizza location, but was unable to do so, because neither Domino's website nor its mobile app were designed to work with the screen reader software that he and other blind or visually impaired individuals utilize to access information on the Internet and apps. Robles asserted that Domino's violated the ADA and California's Unruh Civil Rights Act (a violation of the ADA can also constitute a violation of that statute), and sought a permanent injunction requiring Domino's to comply with standards developed by an industry group, the Web Content Accessibility Guidelines ("WCAG") version 2.0.

The United States District Court for the Central District of California held that Title III of the ADA, which prohibits discrimination against disabled individuals in places of public accommodation, applies to Domino's website and app. But it held that requiring Domino's to comply with the ADA violated its due process rights because the U.S. Department of Justice ("DOJ"), which the ADA tasks with developing regulations to enforce the statute, had not yet issued any governing regulations or standards regarding website or mobile app accessibility. The District Court therefore invoked the primary jurisdiction doctrine, dismissing Robles' complaint pending the resolution of the issue by the DOJ.

On appeal, the Ninth Circuit began by affirming the District Court's ruling that the ADA applies to Domino's website and app, finding that the ADA requires public accommodations to furnish appropriate "auxiliary aids and services" to ensure effective communications with disabled individuals. The court further held that the alleged inaccessibility of the website and app impeded access to the goods and services of Domino's physical pizza franchises. This "nexus" requirement between the website or app and a physical public accommodation is required by some, but not all circuits, in order to state a claim under the ADA.

Regarding due process, the court held that the language of the statute alone (including the "auxiliary aids" requirement) provided Domino's with fair notice that its website and app must comply with the ADA. The court rejected the argument that requiring Domino's to comply with the WCAG 2.0 violated its due process rights because the DOJ had not given notice that Domino's was obligated to comply with such guidelines. The court noted that Robles was not seeking to impose liability on Domino's for failure to comply with WCAG 2.0; rather, Robles was merely arguing that the court could order Domino's to comply with WCAG 2.0 as an equitable remedy if the court were to find that the website and app violated the ADA.

The court also rejected Domino's argument that its due process rights would be violated by requiring it to comply with the ADA when there were no clear regulations or guidelines for how to do so. The court held that the ADA merely requires that Domino's receive fair notice of its legal duties and does not have to provide a blueprint for how to comply. Citing the DOJ's December 2017 withdrawal of the ADA website accessibility rulemaking process, the court speculated that the lack of specific guidance may be intentional, as the DOJ may prefer that entities such as Domino's have "maximum flexibility" in deciding how to go about meeting the statute's requirements. It is also likely that this part of the court's opinion was a nod to the most recent DOJ guidance on the issue. In its September 2018 response to a congressional inquiry regarding website accessibility, the DOJ explained that the absence of a specific regulation does not serve as a basis for noncompliance with the ADA, and that the absence of a specific technical requirement meant that businesses had flexibility in how to comply. Finally, the court held that it was not necessary or appropriate to invoke the primary jurisdiction doctrine, because the DOJ under the Trump administration has decided not to proceed with any rule-making in this area (therefore waiting for the DOJ to act would only result in a significant delay in resolving Robles' claims) and such rules were not necessary to determine how a website or application can comply with the ADA. The court remanded the case to the District Court to determine whether Domino's website and app provide blind and other disabled individuals with adequate auxiliary aids and services to enable effective communication and the full and equal enjoyment of its goods and services.

The *Robles* decision is a mixed bag. On the one hand, it rejects the notion that every business, no matter its size, must adopt a particular (and costly) technical standard so as to comply with the ADA. On the other hand, no authoritative guidance exists as to how a court (including the District Court to which the case remanded) should apply the "maximum flexibility" standard in determining whether a website is compliant. The best advice is to play it safe. While the *Robles* decision does not specifically require every website and app to comply with WCAG 2.0, from a practical standpoint, any business with a website and/or an app should perform audits to ensure its websites and apps are accessible to screen reader software and devices used by blind and visually impaired individuals and are as compliant as possible with the WCAG 2.0 (and perhaps even with the recently issued version 2.1).

One other possible fix the court in *Robles* considered is establishing and advertising on the website and/or app a telephone "hotline" that visitors to the website or app can call if they encounter accessibility issues. The court stated that it could not determine, without discovery on its effectiveness, whether such a hotline would be sufficient to comply with the ADA, and other courts have noted that, unless the hotline is staffed seven days a week, 24 hours a day, it may not truly provide equal access to disabled individuals under the ADA.

Blank Rome has assisted many of its clients with this process and has not only provided legal guidance but has worked with clients' IT departments and/or a number of third-party accessibility vendors on such efforts. Blank Rome also regularly counsels clients on whether and how to implement such a hotline, developing and posting an accessibility policy on their websites and apps, and other steps they can take to minimize their exposure under the ADA and state statutes in this area.

To learn more about Blank Rome's litigation defense capabilities regarding website accessibility claims, please visit our ADA Website Capabilities brochure.

For additional information, please contact:

Charles S. Marion
cmarion@blankrome.com | 215.569.5384

Martin S. Krezalek
mkrezalek@blankrome.com | 212.885.5130

Harrison M. Brown
hbrown@blankrome.com | 424.239.3433