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# Supreme Court Declines to Clarify ADA Applicability to Websites and Mobile Apps, Resulting in a Ninth Circuit Decision That Is Bad for Businesses

*On October 7, 2019, the Supreme Court denied Domino's petition for writ of certiorari in Robles v. Domino's Pizza LLC, 913 F.3d 898 (2019), leaving in place the Ninth Circuit's pronouncement that Title III of the Americans with Disabilities Act ("ADA") applies to Domino's website and mobile application because each constitutes a "service of a place of public accommodation." In light of this decision, businesses should consider developing a coordinated strategy involving internal decisionmakers, legal counsel, and qualified website design professionals to manage risk before, during, and after a lawsuit.*

Blank Rome previously reported on the Ninth Circuit's January 2019 decision, finding that the language of the ADA alone provided Domino's with fair notice that its website and app must comply with the ADA (and, by extension, California's Unruh Civil Rights Act, which incorporates the ADA), and thus Domino's would be obligated to remove any barriers preventing the visually impaired from accessing services offered through the website and mobile app. See New Ruling Reiterates That Websites and Mobile Apps Need to Be ADA Compliant. The Ninth Circuit rejected Domino's argument that requiring it to comply with the standards developed by an industry group, the Web Content Accessibility Guidelines ("WCAG") version 2.0, violated its due process rights because the Department of Justice ("DOJ") had not given notice that businesses were obligated to comply with these guidelines.

The court noted that the visually impaired plaintiff was not seeking to impose liability on Domino's for failure to comply with WCAG 2.0; rather, he argued 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 held that the ADA only requires that Domino's receive fair notice of its legal duties and does not have to provide a blueprint for how to comply. The court also held that it was not necessary or appropriate to invoke the primary jurisdiction doctrine, a prudential doctrine pursuant to which a court may determine that the claim implicates technical and policy questions that should be addressed in the first instance by the DOJ, the agency with regulatory authority to implement the ADA. Since the DOJ under the Trump administration has decided not to proceed with any rulemaking in this area, the court held that waiting for the DOJ to act would result in a significant delay in resolving the plaintiff's claims. Moreover, DOJ regulations were not necessary to determine how a website or application can comply with the ADA.

Domino's petitioned the Supreme Court to reverse the Ninth Circuit. Citing statistics showing that website accessibility lawsuits have tripled over last two years, Domino's argued that, left undisturbed, the Ninth Circuit's decision would

turn this "*flood of litigation into a tsunami*." Business interest groups encompassing 500,000 restaurants, 300,000 businesses, and 18,000 retailers supported Domino's petition and urged the Supreme Court to intervene to clarify the law on Title III's applicability to websites and mobile apps by resolving the conflict of inconsistent standards existing among several federal circuits. Collectively, these amici curiae (or "friends of the court") argued that the prevailing legal landscape of non-existent legal standards imposed heavy litigation costs with little countervailing benefit. These industry participants correctly recognized that the surge of website accessibility lawsuits (which almost always end in cost-benefit-driven quick settlements) unfairly tax innovation while doing little to improve accessibility.

The Supreme Court preserved the status quo by refusing to review the only federal appellate decision regarding the ADA's applicability to websites and mobile applications. Consequentially, the hodgepodge of inconsistent standards among the federal circuits continues. For example, there is no uniformity in how website accessibility claims comport with the ADA's limitation to "places of public accommodation." Courts in the First, Second, and Seventh Circuits have suggested that the ADA may apply to a website independent of any connection between the website and a physical place. But, in holding that the ADA applies to Domino's website and app only because it "*connect[s] customers to the goods and services of Domino's physical restaurants*," the Ninth Circuit affirmed the "nexus" requirement, rooted in the premise that the ADA does not apply to websites wholly unconnected to a physical location. Courts in nexus requirement jurisdictions, which include the Third, Sixth, Ninth, and Eleventh Circuits, require a plaintiff to demonstrate that at a minimum the website facilitates the use of (or connects users to the services of) a brick and mortar location. In addition to passing on the opportunity to clarify whether a nexus is required, the Supreme Court declined to advise lower courts on whether the prudential doctrine of primary jurisdiction was a viable defense to ADA website lawsuits. After *Domino's*, it most certainly is not in the Ninth Circuit.

For the foreseeable future, there is no safe harbor and all industries remain vulnerable to shake down lawsuits by enterprising plaintiffs' lawyers. A coordinated strategy is the best approach to manage risk before, during, and even after a lawsuit. Successful strategies involve internal decisionmakers, solid legal advice, and qualified website design professionals. Businesses should conduct audits of their websites and mobile apps to ensure accessibility to screen reader software and devices used by blind and visually impaired individuals, as the vast majority of claims in this area are brought by visually impaired individuals who utilize such software and devices. While the *Domino's* decision adopted the DOJ's recent "flexibility" directive—*not specifically requiring every website and app to comply with WCAG 2.0*—from a practical standpoint, businesses should strive to be as compliant as possible with the WCAG 2.0 (and, if practicable, the recently issued and updated version 2.1). If sued, several valid defenses still exist, including lack of nexus (in nexus jurisdictions). Traditional defenses like mootness, failure to plead a particularized injury, and lack of personal jurisdiction may also exist.

Blank Rome has assisted many 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 other steps they can take to reduce their risk and exposure to such claims, such as establishing a "hotline" visitors to their websites can call when they encounter accessibility issues, developing and posting an accessibility policy on their websites and apps, and developing internal policies for those employees responsible for posting content to the websites and apps.

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

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