



## Legal Alert: Ninth Circuit reversal delivers blow to defense of website accessibility class actions

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On January 15, 2019, the US Court of Appeals for the Ninth Circuit revived a previously dismissed Americans with Disabilities Act (ADA) website accessibility class action against Domino's Pizza. In *Robles v. Domino's Pizza, LLC*, No 17-55504 (9th Cir. Jan. 15, 2019), the Ninth Circuit reversed the dismissal of a class action suit alleging that Domino's Pizza's website and mobile application were inaccessible to blind and visually impaired individuals in violation of Title III of the ADA. The earlier 2017 decision by the US District Court for the Central District of California was one of the only decisions to resolve an ADA website accessibility suit based on a Rule 12 motion to dismiss.

This ruling reinforces the application of Title III of the ADA to websites and mobile applications that provide access to the goods and services of physical establishments, and eliminates precedent helpful to businesses in defending against the continuing deluge of website accessibility lawsuits. In 2018, more than 10,000 Title III ADA actions were filed in courts across the country, up approximately 35% from 2017. Most of those cases alleged website inaccessibility as the basis for the ADA claim.

As discussed in previous Eversheds Sutherland legal alerts, *Robles v. Domino's*, CV 16-06599, 2017 WL 1330216 (N.D. Cal. Mar. 20, 2017), involved a class action alleging that Domino's Pizza's website and mobile application were inaccessible to blind and visually impaired individuals in violation of Title III of the ADA. Domino's moved to dismiss the action arguing that (1) the ADA did not cover Domino's online offerings; (2) applying Web Content Accessibility Guidelines 2.0 (WCAG 2.0) (private industry standards for website accessibility) to Domino's website or mobile application violated due process; and (3) the court should invoke the primary jurisdiction doctrine (which allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency) and defer to the Department of Justice's (DOJ) ADA rulemaking authority.

Domino's further argued that plaintiff failed to identify an ADA violation. Domino's included a banner on its website, readable by screen reader software, which directed blind or visually impaired users to a 1-800 number where they could receive assistance from an operator to navigate the website and obtain the goods and services available on the website.

The district court found that the website and mobile application were subject to the ADA and agreed that Domino's due process rights were violated because the DOJ had not issued rules or guidance on the applicable standard for website compliance under the ADA. The court dismissed the action, invoking the primary jurisdiction doctrine, deferring to the DOJ for guidance on the appropriate standard for compliance. The district court also noted that plaintiff failed to identify an ongoing ADA violation, specifically referencing Domino's inclusion of

### Related People/Contributors

- Lewis S. Wiener
- Alexander P. Fuchs

an accessibility banner and a 1-800 number on its website that blind and visually impaired users could access for assistance. Plaintiff appealed the decision.

In reversing the district court's ruling, the court of appeals held that:

- Imposing liability on Domino's under the ADA would not violate the company's due process rights because Domino's had received fair notice, since at least 1996, that its website and mobile application must comply with the ADA.
- Plaintiff did not seek to impose liability on Domino's for failure to comply with WCAG 2.0, but rather sought an order requiring compliance with WCAG 2.0 as a possible equitable remedy which did not implicate Domino's due process rights.
- The lack of specific website accessibility regulations, not yet promulgated by the DOJ, did not eliminate Domino's duty to comply with Title III of the ADA.
- The district court erred in invoking the doctrine of primary jurisdiction, because the application of the ADA to the facts of this case was well within the district court's competence.

In a brief footnote, the court also addressed the accessibility banner and 1-800 number on Domino's website and mobile application, finding that whether the hotline guaranteed full and equal enjoyment of Domino's goods and services, and "protect[ed] the privacy and independence of the individual with a disability" under 28 C.F.R. § 36.303(c)(1)(ii) (2017), was a question of fact that could not be resolved on a Rule 12 motion to dismiss.

## **Conclusion**

The Ninth Circuit's decision is a blow to companies defending against Title III ADA website accessibility lawsuits, reversing one of the only decisions that dismissed a website accessibility action at the motion to dismiss stage. The question of whether Domino's website and mobile application are accessible remains an open and unresolved issue. The ruling makes it clear that the court of appeals considers this to be a question of fact that can only be answered following time-consuming and costly discovery. While this decision is not binding precedent on courts outside of the Ninth Circuit, it may encourage plaintiffs to continue filing these suits. Accordingly, it is important to understand the need for ADA compliance and the pitfalls posed by non-compliance in an effort to limit risk before litigation is filed.

*If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under 'Related People/Contributors' or the Eversheds Sutherland attorney with whom you regularly work.*