



ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

January 23, 2020
Universal Hilton

sponsored by: **Mintz**

Marketing – Tips and Tricks for Staying Out of Court



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SPEAKERS

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Joshua is Managing Member of the Mintz’s LA office. He is a highly experienced trial lawyer with a national practice. He has served as lead defense counsel on over 400 alleged class actions in state and federal courts across the country and he has received awards and national recognition for his innovative approach to the defense of bet-the-company litigation. He has represented clients in such industries as financial services, building products, retail, pharmaceuticals, automotive, professional sports, food and beverage, petroleum, chemical manufacturing, health care, high technology, and higher education. He frequently publishes and lectures before national and local bar and industry organizations.



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SPEAKERS – con't

Nicole V. Ozeran
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Nicole's practice focuses on complex corporate litigation, with an emphasis on consumer class actions, online and telephone marketing, false advertising, and regulatory and statutory compliance issues. Nicole regularly advises clients in all stages of litigation, from pre-litigation counseling and investigation through discovery, dispositive motion practice, trial, and appeals. Nicole has extensive knowledge of class certification at both the state and federal level, having briefed and argued multiple oppositions to motions for class certification.



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AGENDA

■ ADA Website Accessibility Claims

- Can these lawsuits be avoided?

■ Updates in the “Food Court”

- Should companies expect to be sued in New York now?



ADA: WEBSITE ACCESSIBILITY

■ WHAT IS ADA WEBSITE COMPLIANCE?

- The American Disabilities Act requires businesses and other public spaces to make accommodations for those with disabilities.
- Websites are now considered “public spaces.”
- Web Content Accessibility Guidelines (WCAG 2.0 and 2.1)



ADA: WEBSITE ACCESSIBILITY

This week's headline:



VIDEO

LIVE

SHOWS

2020 ELECTIONS



Deaf man sues Pornhub over lack of closed captions

The lawsuit claims that Pornhub is in violation of the ADA.

By [Aaron Katersky](#) and [Ella Torres](#)

January 17, 2020, 9:15 AM • 2 min read



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ADA: WEBSITE ACCESSIBILITY: NOTABLE CASES

June 2017

Winn-Dixie

Southern District of Florida

- The lawsuit against Winn-Dixie was the first of its kind. In this case, a suit was filed against Winn-Dixie's website alleging the website's inaccessibility hindered the plaintiff's ability to enjoy the physical store. The website was heavily integrated with their physical locations, offering maps and coupons online.
- This case was the first to find that websites *are* public spaces.

21,922 views | Jun 13, 2017, 02:22pm

First-Of-Its-Kind Trial Goes Plaintiff's Way; Winn-Dixie Must Update Website For The Blind



Legal Newline Former Contributor

Policy

We cover issues that affect businesses in state and federal courts

POST WRITTEN BY

John O'Brien

I am the editor of Legal Newline and the Pennsylvania Record.



This article is more than 2 years old.



Winn-Dixie has been ordered to make its website more accessible to the visually impaired by a federal judge.



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ADA: WEBSITE ACCESSIBILITY: NOTABLE CASES (con't)

September 2016

Domino's Pizza

Central District of California

- **A blind man filed a lawsuit against Domino's in September 2016**
 - Claimed that he was unable to order a pizza or take advantage of online-only discounts because Domino's website and app would not work with his screen reading software.
- **Judge S. James Otero dismissed plaintiff's claims**
 - Found that, while the ADA does apply to Domino's website and mobile app, applying it in the lawsuit would violate the company's due process rights because the Department of Justice had not handed down standards for online accessibility or offered technical assistance to enact such standards.
- **The Ninth Circuit reversed**
 - Found "the alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises – which are places of public accommodation."



SHAMELESS PLUG

<https://news.bloomberglaw.com/us-law-week/insight-ninth-circuit-delivers-bad-news-to-dominos-and-ada-website-accessibility-defendants>



A employee moves pizza boxes before a delivery at a Domino's Pizza Inc. restaurant in Chantilly, Virginia, on Feb. 20, 2018. A new Labor Department rule expected to make 1 million workers eligible for overtime is likely to impact the fast food industry.

Andrew Harrer/Bloomberg via Getty Images

INSIGHT: Ninth Circuit Delivers Bad News to Domino's and ADA Website Accessibility Defendants

Jan. 24, 2019, 1:01 AM



The Ninth Circuit's recent ruling finding Domino's Pizza violated the ADA because its website and app were inaccessible to blind customers left defendants in these types of cases highly exposed to liability. Attorneys with Mintz say defendants need to think ahead, and remediate websites before a lawsuit is filed, as a valid defense to an ADA claim.



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ADA: WEBSITE ACCESSIBILITY: WHAT SHOULD COMPANIES DO?

The Bad News:

- There's no way to stop a plaintiff from suing your company.

The Good News:

- There are ways to protect yourself if a suit is filed
 - Internal Compliance Programs (WCAG 2.0, 2.1)
 - Working with External Vendors
 - Eliminating Barriers (or having proof that “hits” on WAVE are false-positives)
- Settlement demands can be reasonable (if you have the right defense counsel)



CONSUMER CLASS ACTIONS

Is California still the “Food Court”?



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CONSUMER CLASS ACTIONS

- **New York may soon rival California for the "food court" title.**
- **New York now hosts 22% of food class actions and has experienced a 33% increase in such filings from 2017 to 2018 alone.**



CONSUMER CLASS ACTIONS

BUT WHY THE SHIFT?

Plaintiffs are being the pressure from California judges -- California judges are frustrated with the continued flood of food cases clogging their dockets.

California judges have expressed this frustration by holding, for example, that:

- (1)** it is not plausible that a significant portion of the public could possibly be misled into thinking cookie snack packs would be packed to the brim (*Bush v. Mondelez Int'l, Inc.*, 2016 WL 5886886 (N.D. Cal. Oct. 7, 2016)); and
- (2)** foam would not count toward at least some portion of the volume of a Starbucks latte (*Strumlauf v. Starbucks Corp.*, 2018 WL 306715 (N.D. Cal. Jan. 5, 2018)); and,
- (3)** any reasonable consumer would know that drinking diet coke alone, without exercise or proper nutrition, would not lead to weight loss. *Becerra v. Coca-Cola*, 2018 U.S. Dist. LEXIS 31870 (Feb. 27, 2018 N.D. Cal.)



CONSUMER CLASS ACTIONS

QUESTION:

Should companies be concerned about defending suits in multiple jurisdictions?



CONSUMER CLASS ACTIONS

ANSWER: It depends.



CONSUMER CLASS ACTIONS: Slack-Fill Cases

- Slack fill is prohibited under California's Fair Packaging and Labeling Act unless it serves one of several functions listed in the FPLA.
- In September 2018 the California Legislature passed a law — A.B. 2632 — that creates new safe harbors from slack-fill claims.
- New York does not have a law similar to the FPLA.

Advantage for plaintiffs: New York.



CONSUMER CLASS ACTIONS:

Standing to Challenge Non-Purchased Products

- CA federal courts generally dismiss all claims involving non-purchased products *unless* the plaintiff can show the unpurchased products are substantially similar.
- The Second Circuit has approached such class standing with more skepticism
 - *DiMuro v. Clinique Laboratories LLC*
 - *Buonasera v. The Honest Company Inc.*
- Advantage for plaintiffs: California (for now).



CONSUMER CLASS ACTIONS:

Take-Away

- New York is a growing hub for consumer class actions – it's important to understand the consumer protection laws at play in NY & CA.
- Think ahead and work with counsel that has experience practicing in both jurisdictions to avoid difficulties or inconsistencies in defense strategy later.
- The Courts are getting tired of ridiculous claims – keep your claims REASONABLE!



CONCLUSION

- **Thank you for attending!**
- **Q & A**





17th ANNUAL IN HOUSE COUNSEL CONFERENCE

January 23, 2020

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