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Supreme Court Denies Review of ADA Website Accessibility Lawsuit, Highlighting Litigation Risks to Website and App Operators

By: Sean Kilian, Hanna Norvell and David Standa

On October 7, 2019, the Supreme Court denied a petition to review the Ninth Circuit's decision in *Robles v. Domino's Pizza*, to the disappointment of many in the business community. As a result, businesses subject to the Americans with Disabilities Act (ADA) remain vulnerable to lawsuits asserting their websites or apps are inaccessible to individuals with disabilities by not meeting the standards of WCAG 2.0 or 2.1[1], yet such businesses do not have a definitive answer as to what level of accessibility is required, WCAG standards or otherwise.

In the *Robles* case, the plaintiff, a man with a visual impairment, alleged that Domino's violated Title III of the ADA and California law because its website and mobile app were not accessible to him. Specifically, the plaintiff alleged that because the Domino's website and app did not work with his screen reading software, he could not order pizza, and he asked for an injunction forcing Domino's to comply with the voluntary "WCAG 2.0" standards for website accessibility. The ADA does not include regulations or standards specifying the details of website accessibility, and Domino's argued, among other things, that forcing it to comply with voluntary standards not included in the ADA would violate its right to due process. The district court agreed and dismissed the plaintiff's claims. The Ninth Circuit reversed, which triggered Domino's petition to the Supreme Court.

To date, ADA jurisprudence has recognized distinctions between businesses that operate only online, and those that operate at physical locations and online, like Domino's. Some circuit courts hold that the ADA applies to online-only businesses, while others do not. Circuit courts have also disagreed about the extent to which the ADA applies to an online *means of accessing* the goods or services of a business's physical location: some circuit courts have held that *each means of access* must satisfy the ADA, while others have held that a business as a whole may satisfy the ADA so long as *any means of access* is accessible to individuals with disabilities.

In reversing the district court, the Ninth Circuit brought those distinctions to the forefront. Critically, and as an initial issue, the Ninth Circuit held that the ADA applies to both Domino's website and app, as means of accessing its physical locations. The Ninth Circuit also found that the absence of website accessibility regulations does not eliminate the statutory obligation for Domino's website and app to facilitate full and equal enjoyment of its goods and services for individuals with disabilities. In doing so, the Ninth Circuit found that after discovery, the district court could, in fact, order compliance with WCAG 2.0, but that such standards were not the only remedy.

In its petition to the Supreme Court, Domino's argued, in part, that by requiring it to make its website and app accessible (as opposed to allowing it to offer alternative accessible means for individuals with visual impairments to order pizza), the Ninth Circuit exacerbated the above-referenced circuit split. Practically speaking, Domino's argued, the effect of the Ninth Circuit's decision would be to force almost every business covered by the ADA to make its website and app accessible, without the benefit of

1 WCAG, which stands for Web Content Accessibility Guidelines, is a set of standards published by the World Wide Web Consortium to assist with making the internet more accessible to people with disabilities. Within WCAG, different levels of accessibility are specified including A, AA and AAA.

regulatory guidance for how to do so. Thus, many hoped that the Supreme Court would clarify how the ADA applies to the websites and apps of covered businesses with physical locations, or how it applies to businesses that operate only online.

In the wake of the Supreme Court's denial, website and app operators that are covered by the ADA continue to face the threat of litigation over accessibility, including class action lawsuits under the ADA, or similar state law, if their websites or apps might not meet the WCAG 2.0 or 2.1 standards, or otherwise do not adequately facilitate access to their goods and services by individuals with disabilities.

The Department of Justice has stated that businesses have flexibility in determining how to make their websites comply with the ADA while emphasizing that statutory obligations remain. Likewise, the Ninth Circuit in *Robles* stated as follows:

> The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.[2]

Although the DOJ and courts emphasize flexibility and the WCAG standards have not been adopted into law, many lawsuits allege only compliance with the WCAG standards will satisfy any applicable ADA obligations. Indeed, the district court in *Robles* will now have to determine whether compliance with WCAG 2.0 is an appropriate equitable remedy in that case. Going forward, unless and until legislative or regulatory changes are made, businesses covered by Title III of the ADA will continue to struggle with determining the appropriate level of accessibility for their websites and apps. The uncertainty will continue to fuel litigation, even where businesses have made significant attempts to improve their online accessibility.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

Sean Kilian | 214-740-8560 | skilian@lockelord.com
Hanna Norvell | 713-226-1423 | hnorvell@lockelord.com
David Standa | 312-443-1748 | dstanda@lockelord.com

2 *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 908 (9th Cir. 2019), cert. denied, No. 18-1539, 2019 WL 4921438 (U.S. Oct. 7, 2019) (*quoting Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508 at *5 (C.D. Cal. Oct. 3, 2017).