

Federal Appellate Courts Ring In the New Year by Taking Up Website and Mobile Application Accessibility

EPSTEIN
BECKER
GREEN

Article By
[Shira M. Blank](#)
[Joshua A. Stein](#)
[Epstein Becker & Green, P.C.](#)
[Retail Labor and Employment Law](#)

- [Communications, Media & Internet](#)
- [Labor & Employment](#)
- [Litigation / Trial Practice](#)

- [9th Circuit \(incl. bankruptcy\)](#)
- [11th Circuit \(incl. bankruptcy\)](#)
- [4th Circuit \(incl. bankruptcy\)](#)

Wednesday, January 16, 2019

As expected given the extreme volume of website accessibility lawsuits filed over the last few years, in the first few weeks of the new year, United States' Circuit courts have finally begun to weigh in on the law as it pertains to the accessibility of websites and mobile applications, and the results are generally disappointing for businesses.

Background

The U.S. Department of Justice ("DOJ") has long taken the position that Title III of the Americans with Disabilities Act ("Title III", "ADA") applies to both websites and mobile apps, however, its withdrawal of Advanced Notice of Proposed Rulemaking

("ANPRM") on December 26, 2017 and its September 25, 2018 letter (which effectively passed the onus to Congress to issue legislation on website accessibility standards), have prompted an onslaught of private demand letters and lawsuits filed in both state and federal court against businesses based on the theory that their websites are inaccessible to individuals with disabilities. As those who have confronted these lawsuits may know, the current state of the law has led to businesses being subject to duplicative actions in different jurisdictions, primarily, New York, California, and Florida. Last fall, both the Ninth and Eleventh Circuit courts held oral argument on website accessibility cases, with both panels expressing similar concerns about the current uncertainty in the law and how one can achieve and confirm a sufficient level of accessibility.

The Ninth Circuit Reverses Domino's

Yesterday, in [*Robles v. Domino's Pizza*](#), the Ninth Circuit held that Title III applies to *both websites and mobile applications*. This decision reversed the district court's dismissal of a class action lawsuit which asserted that Domino's Pizza violated the ADA and California's Unruh Civil Rights Act (UCRA) by failing to make its website and mobile app accessible to individuals who are blind or visually impaired. While the district court's decision in *Robles* was always considered an outlier, the Circuit Court's decision is significant because the Ninth Circuit considered, and rejected, defenses which have traditionally been advanced by businesses that have litigated website accessibility matters. For example, the Court refused to accept as a matter of law/summary judgment that providing a telephone hotline is sufficient alternative method for a company to satisfy its obligations under Title III to customers who are blind or have low vision (noting it was an issue of fact that required specific and contextual supporting factual evidence). The Court also rejected the concept that imposing liability in this context violates companies' due process rights because DOJ has failed to issue clear technical standards for compliance.

At the outset, the Ninth Circuit agreed with the district court that Domino's is a "place of public accommodation" and accordingly, the ADA applies to its website and mobile app, thereby requiring it to provide auxiliary aids and services to make its visual materials available to individuals who are blind. Drawing upon prior district court decisions from within the Ninth Circuit, the Court focused on the "nexus" between Domino's website and mobile app and its physical restaurants, and found that the alleged inaccessibility of the website and app unlawfully prevents customers from accessing the goods and services at Domino's physical locations. Notably, the Ninth Circuit declined to determine whether the ADA covers websites or mobile apps whose inaccessibility does not impede access to the goods and services at a physical location, reinforcing courts in the circuit's position more narrowly construing the ADA to apply only to websites with a nexus to a brick-and-mortar location (as opposed to the more expansive positions taken by district courts in Massachusetts, New York, and Vermont).

The Circuit Court also noted that after the plaintiff filed the lawsuit, Domino's website and mobile app began displaying a telephone number to assist customers who are visually impaired and who use a screen reading software. The Ninth Circuit held that a company's use of a telephone hotline presents a factual issue, and, simply having a hotline, without any discovery regarding its effectiveness, is

insufficient to award summary judgment to a company and determine that it has complied with the ADA. (This underscores that proving the sufficiency of an alternative means of access to a website – short of making the website itself accessible – could prove to be a costly endeavor.)

Citing DOJ's failure to issue technical standards and withdrawal of ANPRM, Domino's had argued that: (i) imposing liability would violate due process because it lacks fair notice of the technical standards that it is required to abide by; and (ii) the complaint was subject to dismissal under the doctrine of primary jurisdiction pending DOJ's resolution of the issue. The Ninth Circuit rejected both arguments. First, the court held that DOJ's failure to issue guidance on the specific standards or regulations does not eliminate a company's obligation to comply with the ADA and its obligation to provide "full and equal enjoyment" to individuals with disabilities. Second, the Ninth Circuit held that the district court erred by invoking the doctrine of primary jurisdiction in order to justify its dismissal of the complaint without prejudice pending DOJ's resolution of the issue. The court found that DOJ's withdrawal of ANPRM meant that undue delay in resolving this issue "is not just likely, but inevitable," which required the court to weigh in.

The *Robles* court did not rule on whether Domino's website and mobile app comply with the ADA, and did not provide any guidance on how a company's website or mobile app would comply with the ADA.

The Fourth Circuit Places Minor Restrictions On Standing

Two weeks ago, in *Griffin v. Department of Labor Federal Credit Union*, the Fourth Circuit considered another defense that has been increasingly asserted by businesses: whether plaintiff has standing to sue. In *Griffin*, the court rejected the plaintiff's standing to bring a lawsuit against a Credit Union where he was not eligible for membership, he had no plans to become eligible to be a member, and his complaint contained no allegation that he was legally permitted to use the site's benefits. The court also held that plaintiff's status as a tester was insufficient to create standing where he was unable to plausibly assert that returning to the website would allow him to avail himself of its services. Unfortunately, this is an exceedingly narrow holding which should do little to undercut the rampant stream of filings by serial ADA website plaintiffs, as the heightened standard for joining a credit union would not apply to most other industries/websites. Therefore, while technically a victory for businesses, this decision did not issue the significant blow to serial plaintiffs that defendants had hoped would provide a clear defense moving forward.

Looking Ahead

We next await the holding of the 11th Circuit in *Winn-Dixie*. Unfortunately, it does not appear that, under this administration, we should expect DOJ to promulgate website accessibility guidelines. Similarly, with the government currently shut down (and other issues likely considered more pressing to the general public upon its reopening), it is extremely unlikely that Congress will amend the ADA or promulgate new legislation clarifying these issues in the near future.

Therefore, for the time being, businesses should expect to continue to face the seemingly endless stream of serial plaintiff website accessibility demand letters and lawsuits. As we have repeatedly noted, the best way to avoid falling prey to such a suit is to achieve substantial conformance with WCAG 2.1 Levels A and AA (confirming such status by human-based code and user/assistive-technology testing). Moreover, based upon the scope of the Ninth Circuit's decision in *Domino's*, these matters may soon expand to include mobile apps as well. Therefore, to the extent businesses had, to date, treated mobile application accessibility as a best practice, they should now consider the issue with increased urgency.

©2019 Epstein Becker & Green, P.C. All rights reserved.

Source URL: <https://www.natlawreview.com/article/federal-appellate-courts-ring-new-year-taking-website-and-mobile-application>