Federal District Court Dismisses Website Accessibility Claims Because of Lack of Due Process

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On March 20, 2017, a federal district judge in the Central District of California issued a big win for businesses dealing with the recent onslaught of website accessibility litigation – claims that a business's website is not in compliance with Title III of the Americans with Disabilities Act (ADA). In *Robles v. Domino's Pizza LLC*, Case No. CV 16-06599 SJO (SPx), the Court dismissed a website accessibility suit on the grounds that the U.S. Department of Justice's (DOJ) years' long failure to issue clear guidelines for website accessibility compliance violated Dominos' due process rights.

Background On Website Accessibility Litigation

Title III of the ADA sets forth the obligations of places of public accommodation to disabled persons. In California (and other states in the Ninth Circuit's jurisdiction), a website is considered a place of public accommodation – and thus subject to Title III – if there is a sufficient nexus between the website and a brick and mortar physical location.[1]

Title III of the ADA provides in part: No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation. 42 U.S.C. § 12182(a). Discrimination under the ADA encompasses the denial of the opportunity, by the disabled, to participate in programs or services, and providing the disabled with separate, but unequal, goods or services.

Although Title III's requirement of full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation is explained in minute detail for

physical locations under the ADA Accessibility Guidelines (ADAAG), no such technical guidance exists for websites. In other words, outside the nebulous mandate of full and equal enjoyment, there is no legally binding technical standard that defines an accessible website under Title III.

The DOJ's duties include promulgating guidelines for compliance with Title III – including developing and promulgating the ADAAG – but the DOJ has not yet issued any such guidelines for websites. In 2010, the DOJ issued a Notice of Proposed Rulemaking (NOPR), 75 Fed. Reg. 43460 (July 26, 2010), in which it announced its plan to solicit suggestions for issuing comprehensive website accessibility guidelines – in other words, an ADAAG for websites. To date – nearly seven years later – the DOJ has yet to issue any such guidelines. However, this has not stopped the DOJ from maintaining in the intervening years that the ADA accessibility requirements apply to websites belonging to private companies.

Notwithstanding, the DOJ has independently investigated numerous public accommodations, pressuring them to make their websites accessible. The DOJ has also intervened in recent lawsuits, taking the position that public accommodations must maintain an accessible website even in the absence of any new regulations or technical standards.

In various settlements and consent decrees, the DOJ has used version 2.0 of the Web Content Accessibility Guidelines (WCAG) as a benchmark for compliance. The WCAG is published by the World Wide Web Consortium (W3C), a non-profit website standards organization, and sets forth detailed benchmarks for accessibility. The standards of the WCAG are primarily focused on accessibility for blind users who utilize screen readers to browse the internet.

Given the DOJ's embrace of the WCAG, in the last two to three years, there has been a marked increase in litigation against businesses claiming that their websites are not in compliance with the WCAG, and thus not accessible to the disabled in violation of the ADA. However, to date, no court has ruled on whether the WCAG are the accepted compliance standards for Title III. Consequently, businesses face a difficult situation where they must ensure their websites are accessible, but have no guidance as to what technical specifications are required for accessibility

The Court's Decision

In the Domino's case, Domino's was faced with claims that its website did not comply with the ADA. Specifically, the plaintiff alleged that Dominos.com did not comply with the WCAG. Domino's primary defense was that the DOJ's failure to promulgate specific standards of website accessibility compliance denied Domino's its due process rights. In an opinion that no doubt aired many of the grievances businesses have long voiced to their attorneys, the Court agreed.

Citing to Ninth Circuit precedent in the area of ADA compliance for sightlines in movie theaters – an area in which the DOJ remained inactive for years – the Court noted a similarly lengthy timeline of DOJ inaction leaving businesses unfairly in the dark as to what specifically is required to ensure website accessibility under the ADA.

The Court then turned to the WCAG. The plaintiff cited to the DOJ's numerous Statements of Interest and consent decrees obligating businesses to abide by WCAG criteria as sufficient grounds to use the WCAG standard for Dominos.com. The Court brushed this argument aside.

As a preliminary matter, the Court refused to give deference to statements made by the DOJ through documents filed in the course of litigation with regulated entities. The Court also used the DOJ's language – from a Statement of Interest the plaintiff cited -- against the plaintiff. In the Statement of Interest, the DOJ noted that, until the process of establishing specific technical guidelines were complete, public accommodations have a degree of flexibility in complying with the ADA's general concept of accessibility and non-discrimination. Here, Domino's had set up a telephone hotline on its website for the visually impaired to contact in the event they were unable to use Dominos.com with their screen-reading device. The Court noted that the plaintiff could not articulate why such an option did not fall into the flexibility standard, until further DOJ guidelines were established.

The Court also noted the DOJ's own inconsistency in its consent decrees and settlements with regard to which level of WCAG compliance – either A, AA, or AAA – was required to meet ADA compliance. In one case, the DOJ mandated that a company comply with either level A or AA; in another, the DOJ required compliance with any WCAG level. The Court also pointed to the DOJ's NOPR, which itself questioned whether standards other than the WCAG should be adopted. Accordingly, it was clear to the Court that even the DOJ was uncertain about which level of the WCAG to apply – or whether the WCAG standard was even the correct standard to begin with.

In concluding its opinion, the Court recognized the inherent unfairness to businesses in facing an flood of lawsuits with no guidance from the agency tasked with doing so: Such regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III [of the ADA]. ... The Court concludes by calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III [of the ADA], and the judiciary.

Takeaways

While this is a helpful opinion for businesses facing the uncertainty of website accessibility compliance, it must be noted that it is only a district court opinion, and thus does not carry the precedential value of a Ninth Circuit decision. Indeed, sister courts in California, and the Ninth Circuit itself, are not bound by the decision. However, it does have useful persuasive value. It gives businesses a valuable shield against any ongoing or threatened litigation – an articulate, well-reasoned opinion that due process rights are violated where business are held to an nebulous standard, without the specific, technical guidance the DOJ promised in 2010.

Additionally, the opinion provides encouragement for businesses to take proactive steps to make their websites more accessible. In this case, an important element to Domino's defense was that it had taken steps to make its website accessible, vis-à-vis its telephone hotline to provide assistance for disabled users unable to use the Dominos.com website. Moreover, although the Court downplayed the plaintiff's reliance on them, the WCAG guidelines do provide a helpful tool in helping businesses make their websites more accessible to their disabled users. Accordingly, businesses should take steps to increase the accessibility of their websites, including consideration of providing live support for disabled users.

How Can Nossaman Help?

Nossaman attorneys have extensive experience with ADA website accessibility compliance and litigation. If you are served with a complaint or receive a letter threatening website accessibility litigation, or if you would

like a consult about how to take preventative steps now to protect against website accessibility litigation, contact us to help guide you through the process.

[1] In other jurisdictions, such as the First and Seventh Circuits, a website may be considered a place of public accommodation even if it does not have a nexus to a physical location. See, e.g., *Nat'l Federation of the Blind v. Scribd*, *Inc*., No. 2:14-cv-162, 2015 WL 1263336 at *5 (D.Vt. March 19, 2015) (holding that a website-only business may be subject to Title III in part because the Internet is central to every aspect of the 'economic and social mainstream of American life.') (internal citations omitted); *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 201 (D.Mass. 2012) (holding that Netflix.com is a place of public accommodation even though Netflix does not maintain any physical locations).