

Website Accessibility and the ADA: An Update
Dismissal of a Recent Case - *Robles v. Domino's Pizza, LLC*

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On April 26, 2017, a Federal District Court in California dismissed a lawsuit filed by a plaintiff against Domino's Pizza, LLC ("Domino's") (*Robles v. Domino's Pizza, LLC*, [see http://bit.ly/2s1hUJ7](http://bit.ly/2s1hUJ7)) on the basis that the U.S Department of Justice ("DOJ") failed to issue specific website accessibility guidelines and therefore, the court held that the defendant, Domino's, could not be held liable for a violation of the Americans with Disabilities Act, as amended in 2008 by the enactment of the [Americans with Disabilities Act Amendments Act](#), (collectively, the "[ADA](#)"), when no such guidelines or specific rules exist.

The Americans With Disability Act

The ADA was enacted to protect the rights of persons with disabilities. The ADA's general rule provides that "[n]o 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." The National Association of Realtors® ("NAR") explains that the "...ADA specifically aims to end discrimination by private entities that operate a 'place of public accommodation,' and requires that any existing architectural and communication barriers be removed (where such removal is readily achievable and would not cause undue hardship to the entity) so that disabled persons are provided equal participation and benefits." (*See* <http://bit.ly/2r3Edcq>). The "communication barriers" (like the "architectural barriers") must be removed by all entities that operate a website which is considered to be a "place of public accommodation" under the ADA.

The Court in *Domino's Pizza* pointed out that the ADA, in a section entitled "specific prohibitions," defines discrimination to include:

"a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."

The basic premise of the ADA is that any failure to take the necessary steps to accommodate the disabled could be considered discrimination. However, if the entity or business can establish that taking the steps to comply with the ADA would alter the "fundamental nature" of the goods, services, etc. or compliance results in an "undue burden" then that entity would be exempt from complying with the ADA. Again, it is important to note that the burden to prove this is on the entity, business or organization offering the goods, services, facilities, etc.

The DOJ and Accessibility Guidelines, or Lack Thereof.

In a recent article (“The American With Disabilities Act: Does it Apply to Broker Websites,” HGAR Real Estate In-Depth, October, 2016, *see* <http://bit.ly/2r2ejFN>), the state of the existing law as it related to the requirements of “places of public accommodation” and “service establishments,” which also include real estate brokerage firms, and website accessibility guidelines were addressed in detail. While it was noted that there is a split in the courts as to whether websites are “places of public accommodation” subject to the ADA, the DOJ’s formal stance is that the ADA does indeed apply to websites. In May, 2015, the DOJ reiterated that it was in the process of establishing formal website accessibility guidelines and that new rules would be forthcoming. As of yet, no formal guidelines or rules have been issued.

The DOJ, in various settlements with defendants who were alleged to have violated the ADA because their websites were not accessible to persons with disabilities, made specific reference to the accessibility guidelines known as WGAC 2.0 AA (the “WGAC 2.0 Guidelines”). In a settlement with EdX, Inc. (*see* <http://bit.ly/2e5NUGg>), the DOJ recommended that the WGAC 2.0 Guidelines be utilized in “...making websites accessible across a variety of ADA-covered disabilities, including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities and photosensitivity.” A similar settlement was entered into between the DOJ and Peapod, LLC (“Peapod”) where the DOJ required Peapod to “...ensure that www.peapod.com and its mobile applications conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria (WCAG 2.0 AA), except for certain third party content...” (*See* <http://bit.ly/2s1Y1lj>).

Robles v. Domino’s Pizza, LLC: Lack of Due Process

Domino’s operated the website known as “dominos.com” which is utilized by its customers and visitors for placing online orders and as an ecommerce platform, although Domino’s is primarily a “brick and mortar” business. The plaintiff filed a lawsuit against Domino’s alleging that its website did not comply with the WGAC 2.0 Guidelines. The plaintiff claimed that the website was incompatible with screen reading devices and prevented disabled individuals who used these devices from making purchases. The plaintiff relied on the settlement agreements entered into by the DOJ with various defendants and argued that the standards included therein were the applicable ADA standards established by the DOJ.

In analyzing the case, the Court noted that “[o]n July 26, 2010, the DOJ issued a Notice of Proposed Rulemaking (“NOPR”), stating it was ‘considering revising the regulations implementing title III of the [ADA] in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the [web], accessible to individuals with disabilities.’” The Court points out that the DOJ itself noted in the NOPR “...that a clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA does not exist.” Domino’s argued that in light of the fact that clear guidance has yet to be issued by the DOJ, the plaintiff’s request to impose liability under the ADA for the defendant’s alleged failure to abide by “accessibility

standards” that have not been formally adopted or issued by the DOJ would constitute a violation of Domino’s constitutional right to due process.

Domino’s relied on a case decided by the Ninth Circuit Court of Appeals (*see United States v. AMC Entertainment, Inc.*, 549 F.3d 760 (9th Cir. 2008)), where the Court of Appeals considered whether the ADA required that theater owners “retroactively” incorporate a rule dealing with making specific viewing angles available for theatregoers. The district court in *AMC Entertainment* held that AMC’s theatres violated a particular “viewing” standard (which was promulgated after the theatres were constructed). The Ninth Circuit reversed the District Court decision and held that “[b]ecause the injunction requires modifications to multiplexes that were designed or built before the government gave fair notice of its interpretation of the standard, the injunction violates due process....” Accordingly, relying on *AMC Entertainment*, Domino’s argued that it could not be held liable for a standard that has yet to be promulgated. The Court of Appeals agreed.

The Court of Appeals explained that the “...Plaintiff seeks to impose on all regulated persons and entities a requirement that they ‘comply with the WCAG 2.0 Guidelines’ without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic (citations omitted). This request flies in the face of due process.” While the Court is not stating in its decision that the ADA does not apply to websites, it is firmly establishing that until the DOJ promulgates specific rules and guidance, a company, entity or organization, including brokerage firms which and agents who have websites, cannot be held liable for a violation of something that does not yet exist.

Is Providing a Phone Number a “Reasonable Accommodation” Under the ADA?

The Court of Appeals also commented on the fact that Domino’s, after the lawsuit was commenced, provided a 24-hour telephone number on its website for those individuals that were having difficulty accessing the website. The Court pointed out that the Plaintiff did not provide any evidence or make any argument demonstrating why the 24-hour telephone number did not constitute a “reasonable accommodation” under the ADA. Therefore, while the Court did not specifically hold that providing the phone number was a “reasonable accommodation”, it did open the door to the possibility that reasonable alternatives may be available, once the DOJ promulgates formal rules that would not constitute an undue burden on businesses that may fall under the scope of the ADA.

What Does the *Domino’s* Case Mean for Brokers and Agents?

The *Domino’s* case does not change the legal landscape drastically, but it does provide useful guidance to website operators. One thing that is clear is that once the DOJ promulgates formal rules relating to website accessibility, most businesses, including real estate brokerage firms and agents, will be required to make their websites ADA compliant. As indicated in the October article, it is clearly not going to be an easy or inexpensive undertaking for brokerage firms and agents, which own or who operate websites, to make the appropriate changes that the DOJ and the ADA will require.

In light of this recent case, however, the pressure may be alleviated somewhat, in so far as it may make sense for businesses to wait and see what the eventual rules and website accessibility guidelines are before expending substantial money and prior to making extensive changes to existing websites. Unfortunately, there is no guaranty that someone or some firm will not be sued by a plaintiff and that another court will not find that a particular defendant is liable under the ADA. The decision in *Domino's* also provides additional important guidance, in so far as it suggests that website operators consider making “reasonable accommodations” (although not specifically defined) available to disabled users which may not result in an undue burden. ADA website accessibility guidelines will eventually come and as always the industry should be aware of and be proactive in dealing with these potential issues associated with these developments.

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