Still No Clarity: The ADA Revisited in Light of the Ninth Circuit's Decision in *Robles v. Domino's Pizza, LLC*

By John Dolgetta, Esq.

On January 15, 2019, the Ninth Circuit Court of Appeals issued its decision in *Robles v. Domino's Pizza, LLC* (*see* https://bit.ly/2SDzfF7), which sheds some additional light on the requirements "places of public accommodation" (which include real estate brokerage firms, Realtor associations, and other businesses) are subject to under the Americans with Disabilities Act ("ADA") (*see* https://bit.ly/2dXuamI) with respect to the websites they operate, but still does not provide the much needed and long awaited guidance.

In March, 2017, the District Court in *Robles* (*see* https://bit.ly/2qFTjdb) dismissed the plaintiff's case holding that since the Department of Justice ("DOJ") had not promulgated formal rules establishing the standards that businesses must adhere to when operating websites that are considered "places of public accommodation," the defendant could not be held liable for violating the ADA because that would be deemed to be violative of Domino's due process right under the 14th Amendment of the U.S. Constitution. The plaintiff appealed the District Court's dismissal to the Ninth Circuit which now reversed and remanded the case back to the District Court for reconsideration in accordance with its decision.

The Americans With Disabilities Act

In 1990, the ADA was enacted to protect the rights of persons with disabilities. The ADA was amended in 2008, but still did not specifically address requirements relating to companies that operate websites or that operate exclusively on the web. The ADA 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." As indicated in a previous article (*see* http://bit.ly/2r3Edcq), the National Association of Realtors ("NAR") explains 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." If a website is established to a be a "place of public accommodation" under the ADA then similar to "architectural barriers," any "communication barriers" must also be removed so that disabled persons are able to access the website, and its services and products.

The "Nexus" Approach Applied By Courts

It is important to note that simply because a business or organization operates a website, it does not mean that such a website will be automatically deemed to be a "place of public accommodation" which would require compliance with the ADA. While many courts, and the Department of Justice ("DOJ"), have held that the ADA does apply to websites, many other courts have held that there must exist a "nexus" between the website and the website operator's physical location, which affects the consumer's ability to access the business' services and products at physical locations, for the ADA to apply, and others, have simply held that if the company only

operates a website and does not have any physical locations, then the ADA would not apply. This makes it very difficult for those entities that operate websites to know what is required of them.

In an article by Glenn G. Lammi, Esq., Chief Counsel of the Legal Studies Division, Washington Law Foundation, that appeared in *Forbes.com* (*see* https://bit.ly/2WVGTtz), Mr. Lammi points out that some "…federal courts have refused to expand the law's application beyond physical places, others have engaged in creative statutory interpretation. Several district courts, including the District of Massachusetts in *National Association for the Deaf v. Netflix, Inc.* (*see* https://bit.ly/2E80TSC) have conjured the 'spirit of the law' to justify rulings that websites are places of public accommodation." Mr. Lammi points out that the above decision is in direct conflict with *Cullen v. Netflix, Inc.* (*see* https://bit.ly/2DwzS9F). In *Cullen*, a California District Court held that Netflix did not have to comply with the ADA because "…Netflix's streaming video library is a website where consumers can access videos with an internet connection. The Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation." Common sense would dictate that even if a company or other organization does not have a physical location, it would still be required to adhere to the ADA, but as indicated previously, the ADA does not directly address websites or businesses that operate solely on the web.

Mr. Lammi further explains how the Court in *Cullen* applied the 'nexus' standard. He points out that, "[i]f the defendant, for instance, was Blockbuster Video instead of Netflix, and a plaintiff used the company's website to rent videos from the physical store, the court likely would have held the defendant's website had to comply with the ADA. But Netflix has no affiliated physical location, so the *Cullen* court declined to impose ADA standards." Based on the "nexus" theory, since Netflix's website did not impede the plaintiff's "full and equal enjoyment" of a physical location, the court refused to find that the defendant in that case violated the ADA. Mr. Lammi further pointed out that in another case involving Target, which does have physical locations, a court found that Target did violate the ADA. It is clear that the differing interpretations and conclusions reached by the courts is, in part, due the DOJ's failure to promulgate rules and issue specific standards for companies to ensure that their websites comply with the ADA. The public has been waiting on the DOJ to issue rules and guidance since 2010. There also seems to be a clear need for Congress to update the ADA to address websites specifically.

The Ninth Circuit's Reasoning in Reversing *Robles v. Domino's Pizza*

In *Robles*, the Ninth Circuit agreed with the District Court's holding that Domino's website was covered under the ADA as a "place of public accommodation," however, the Court of Appeals disagreed with the District Court, in that it held Domino's right to due process under the 14th Amendment of the Constitution was not violated as a result of the DOJ not issuing the specific rules and standards relating to website accessibility. The Court held "…that Domino's has received fair notice that its website and app must comply with the ADA." The Court went on to explain that although the DOJ did issue specific guidance, Domino's was on notice that its website should be made accessible to disabled persons under the ADA regardless of whether or not the DOJ issued specific rules.

The Ninth Circuit Panel explained that "[t]he ADA articulates comprehensible standards to which Domino's conduct must conform. Since its enactment in 1990, the ADA has clearly stated that covered entities must provide 'full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations' to people with disabilities, 42 U.S.C. § 12182(a), and must '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,' id. § 12182(b)(2)(A)(iii)." The Panel further stated that the "DOJ has clarified that these provisions require 'effective communication.'" The Court pointed out that the DOJ has repeatedly, in various settlements, amicus curiae briefs, consent decrees, and in its 2010 Advanced Notice of Proposed Rulemaking ("ANPR") [*see* https://bit.ly/2MR60Yw), indicated that the ADA applies to websites that are "places of public accommodation." In addition, in some of the consent decrees and settlements entered into with companies, the DOJ also required that the Website Content Accessibility Guidelines (WCAG) 2.0 (*see* https://bit.ly/2blKahy) should be followed by them when making their websites ADA compliant.

Mr. Lammi states that the "…court's preliminary conclusion that Domino's was generally on notice that the ADA applied to its website, however, is rather flawed." He points out that "[t]he opinion quotes the 2010 ANPR's self-serving conclusion that 'DOJ has 'repeatedly affirmed the application of [T]itle III to websites.' The ANPR cited informal letters, DOJ *amicus* briefs in private lawsuits, and other sub-regulatory actions in support of that assertion. None of those documents or statements carries the force of law." In any event, it is clear that the failure of the DOJ to issue specific rules and the failure of Congress to address these issues in 2008, has led to more ambiguity, varying decisions and increased litigation.

NAR points out that the "…the court expressly stated that it had made no determination on whether [Domino's] Website and App complied with the ADA" nor did it "…consider whether offering a 24/7 toll-free telephone number was a reasonable alternative to offer those who could not access the Website or App." (*See* https://bit.ly/2SNZkkL). The District Court will, therefore, need to address these issues directly and hopefully provide additional and clearer guidance to those businesses which operate websites.

Increasing Threats of ADA Lawsuits

There has been a tremendous increase in the number of lawsuits filed against companies, municipalities, and organizations which operate websites. In a New York Law Journal article by Jason Grant (*see* https://bit.ly/2I9Bc8c), the author points out that "New York's federal courts saw 1,471 lawsuits filed in 2018 aimed at websites that plaintiffs claim are not [ADA] accessible, accounting for 64 percent of the 2,285 ADA website accessibility lawsuits launched in seven major states tracked by the company UsableNet Inc." Further, in an article prepared by Seyfarth Shaw, LLP (*see* https://bit.ly/2DAmRvR) in its ADA Title III News & Insights publication, "Plaintiffs filed [website accessibility] ADA Title III lawsuits in fourteen states - New York and Florida being the most busy jurisdictions with 1564 and 576 lawsuits, respectively." Seyfarth Shaw in yet another report (*see* https://bit.ly/2B1JclI) points out that over 10,000 ADA Title III lawsuits were filed in 2018. Lawsuits are being filed against municipalities as well (*see* https://bit.ly/2S0gZkW; and https://bit.ly/2N4vSSm).

It is clear that companies, organizations, municipalities, and the like which operate websites must take some proactive steps to ensure that their websites are ADA compliant and not wait for the DOJ or Congress to act. With the alarming rise of litigation, these entities should begin to evaluate their websites and take "reasonable" steps to make them ADA compliant.

One important aspect of Ninth Circuit's decision in ***Robles*** is that it does not specifically require that companies implement the WCAG 2.0 standards in order to be compliant. In fact, in its reasoning, the Court of Appeals explains that the defendant was not correct when it argued that the plaintiff was alleging that the defendant violated the ADA because it did not comply with the WCAG 2.0 Guidelines and stated that the lower court erred in dismissing the suit based on the fact that the DOJ did not issue specific rules. In remanding the case, the Ninth Circuit Panel leaves it up to the District Court to determine whether a 24/7 call number made available to users was a "reasonable accommodation" and, ultimately, whether there was a violation of the ADA, irrespective of the failure of the DOJ to issue specific rules or formally require that the WCAG 2.0 Guidelines apply to website operators. Lawyers are increasingly filing these lawsuits on behalf of disabled clients and are specifically targeting companies which operate websites that have accessibility issues. Making a good faith attempt at updating websites makes good sense and will hopefully avert a lawsuit and needless expense.

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