DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

October 16, 2019

U.S. SUPREME COURT WILL NOT HEAR WEBSITE ACCESSIBILITY CASE

The U.S. Supreme Court has decided not to address whether Title III of the American with Disabilities Act ("ADA") requires a website or mobile phone application that offers goods or services to the public to satisfy discrete accessibility requirements with respect to individuals with disabilities.

This question was presented to the Supreme Court upon an appeal of the Ninth Circuit's decision in *Robles v. Domino Pizza LLC*. *See* 913 F.3d 898 (9th Cir. 2019). In that case, Robles, who is blind, alleged that Domino's intentionally discrimination against him in violation of the ADA because he could not complete his custom pizza order using the Domino's website or mobile app with his screen-reading software. Robles alleged that Domino's website and mobile app did not include adequate written descriptions for every image and required screen reader users to go through additional steps to place an order. Robles asserted that the ADA requires Domino's to comply with the Web Content Accessibility Guidelines.

While the Ninth Circuit acknowledged that under its precedent, Title III covers only physical places, the court held that Domino's website and mobile app were subject to Title III because these technologies connect consumers to or facilitate access to goods and services of Domino's physical restaurants, which are places of accommodation. The court found a sufficient "nexus" between the website and mobile app and the physical restaurants. The Ninth Circuit recognized a Title III claim even though Robles did not allege overall inaccessibility to the goods or services at Domino's restaurants because Robles could call to order a pizza. According to Domino's, the Ninth Circuit held that websites or mobile app, taken in insolation, must be fully accessible to individuals with disabilities.

Domino's argued that the Supreme Court should hear its appeal because a circuit split exists on whether Title III applies to online-only businesses and on whether Title III mandates discrete accessibility requirements for websites maintained by brick-and-mortar enterprises. In addition, unless the Supreme Court intervenes, the Ninth Circuit's decisions will create "a burdensome litigation epidemic" and "impose immense costs" on businesses and non-profits. Domino's argued that the decision from the Ninth Circuit (which includes California) effectively creates a nationwide standard because no business designs a website for different U.S. regions. Domino's petition indicated that in 2018 alone, litigants filed over 2,250 federal lawsuits asserting ADA violations based on website inaccessibility. The petition also described (i) the costs of complying with a website accessibility standard, (ii) the uncertainty of which standard to follow and (iii) the continual litigation risk a business faces after selecting and complying with an accessibility standard because no authoritative website accessibility guidance exists.

Finally, Domino's argued that the Supreme Court should hear its appeal because the Ninth Circuit's decision is wrong based on the plain language of the ADA. Title III applies to places of accommodations, which are tangible physical locations. According to Domino's, websites and mobile apps should not become public accommodations simply by virtue of providing access to goods and services of a brick-and-mortar business. Further, Title III does not require full accessibility for each and every means of accessing goods or services that a public accommodation provides to the public. Title III requires "full and equal enjoyment" of the goods and services of physical places of accommodation, which should look at an individual's overall access to the goods and services. Domino's asserted that Congress, not the judiciary, should rewrite Title III, if Congress believes Title III should extend to websites and mobile apps and should require such technologies to satisfy discrete accessibility standards.

As warned by Domino's, the Supreme Court's refusal to hear the Ninth Circuit's decision will continue the tide of website accessibility litigation. Legislative or regulatory guidance is unlikely. The Department of Justice announced its intent to propose a rule governing website accessibility in 2010 and abandoned the effort in 2017 without proposing a rule. As shown by the "*Madden* fix" bill, it is an uphill battle to get anything passed in the U.S. Congress.

Website accessibility affects any online business, including financial service providers. We can help. We keep updated on non-industry specific topics that could affect financial service providers, such as electronic communication. ❑

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