

## U.S. Supreme Court Declines to Issue ADA Web Access Guidance

By Philip R. Voluck, Esq. and Jennifer L. Prior, Esq.

On October 7, 2019, the United States Supreme Court declined to address the absence of website accessibility standards under Title III of the Americans with Disabilities Act, as amended ("ADA"). The ADA, signed into law in 1990, requires that businesses serving as "places of public accommodation" remove barriers to access for people with disabilities. Under Title III of the ADA, places of public accommodation include restaurants, theaters, retail stores and more. In 2018 alone, more than 2,200 lawsuits involving web access were filed, and the number for 2019 could be even higher. The Court's decision affects thousands of businesses and organizations across the country who were hoping the Court would, at a minimum, remand the case to the District Court for further consideration.

The Court's decision arose out of petition for review filed by Domino's Pizza, which was seeking to clarify whether the ADA applied to its website, given the undisputed lack of formal regulations governing remediation and compliance. The business community has frequently verbalized its frustration over the absence of guidance from the Department of Justice (DOJ), which enforces Title III, regarding how the ADA's instructions on accessibility—which were passed in a pre-internet era—should apply to electronic and digital properties. In 2010, the Obama Administration DOJ promised to issue rules on how companies should make websites accessible to the disabled. But the rules never materialized and, in 2017, the Trump Administration formally cancelled the process as part of an Executive Order shutting down further agency rulemaking across the board.

In denying Domino's petition, the Supreme Court also declined a much-needed opportunity to: (1) settle the current split in the Federal Circuit Courts of Appeal concerning the application of the ADA's accessibility requirements to websites and apps, and (2) direct the DOJ, the agency charged with implementing and enforcing Title III of the ADA to issue consistent and effective regulations. Certain Circuits have concluded that websites and apps qualify as places of public accommodation under the ADA, extending potential Title III liability to web-only businesses. Whereas, other Circuits, have concluded that only websites tied to physical locations are places of public accommodations. In effect, the Court merely preserved the status quo of a nebulous area of law with no real compliance guidance. The Court declined to address the issue in any meaningful, "real world" context, leaving in its wake the jumbled amalgamation of "guidelines" indiscriminately followed by non-governmental entities. For instance, the Web Content Accessibility Guidelines ("WCAG") are website accessibility standards developed by the World Wide Web Consortium (W3G), a global community of accessibility experts. WCAG provides guidelines rather than requirements that are unspecific to particular industries or the size of a business or organization, and therefore fail to address the level of burden such guidelines would cause a business or organization. The plaintiff's bar follows WCAG.

Domino's argued that not only is the case law inconsistent regarding the application of the ADA's accessibility requirements to websites and apps, the DOJ has expressed varying positions on the issue, and has failed for many years now to issue a rule imposing accessibility requirements. What this leaves the business community with is DOJ Regulation 28 C.F.R. § 36.303(a), which states a public accommodation must take necessary steps to ensure individuals with disabilities are not denied goods or services, including providing auxiliary aids and services, unless such steps would fundamentally alter the nature of goods or services being offered, or would result in an undue burden.

Until the Supreme Court decides to hear arguments regarding the applicability of the ADA to websites and apps, and the DOJ issues a rule setting forth specific criteria for ADA compliant websites and apps, litigation will remain the only mechanism for enforcing the still undefined mandates of Title III of the ADA. This has added to genuine confusion regarding the state of the law, leading businesses to claim they are doing their best to accommodate disabled customers online, but just do not know what standards they have to meet. "Creating a nation-wide standard will eliminate the tsunami of website accessibility litigation that has been filed by plaintiffs' lawyers exploiting the absence of a standard for their own benefit, and chart a common path in meeting the accessibility needs of the disabled community," said one Domino's spokesperson.

KD has represented dozens of businesses across the country which have been faced with web access claims. Many are generated by a handful of plaintiffs and plaintiff law firms. If you would like more information, please contact Philip R. Voluck or Jennifer Prior by email at [pvoluck@kaufmandolowich.com](mailto:pvoluck@kaufmandolowich.com), [jprior@kaufmandolowich.com](mailto:jprior@kaufmandolowich.com) or by phone at (215) 461-1100.