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Favorable Decision For Targets of ADA Shakedown Law Suits

Targets of “form” or “shakedown” law suits for alleged Americans With Disability Act (“ADA”) violations related to the accessibility of retail websites to the visually impaired received some rare good news. The federal District Court in Central California dismissed a law suit against Domino’s Pizza, LLC over its retail website on the grounds that the company cannot be held responsible for failing to comply with the ADA if the agency that is responsible for enforcing the ADA—the U.S. Department of Justice—has failed to establish clear standards.

The suit was filed in September, 2016 for the Defendant’s alleged failure to make its website and mobile application accessible to and independently usable by Plaintiff, who is visually impaired, in violation of the ADA and the state’s Unruh Civil Rights Act.¹ Specifically, Plaintiff alleged that Defendant failed to use screen-reading software on its website called Job Access With Speech or “JAWS,” or “VoiceOver” software on its mobile application for the Apple iPhone, and neither domain is in compliance with the Web Content Accessibility Guidelines 2.0 (“WCAG 2.0”) promulgated by the World Wide Web Consortium an international standards organization with no

governmental rule making authority. Subsequent to the law suit being filed, Defendant created a workaround for its website and its mobile application allowing visually impaired persons to call a toll-free number for assistance.

Defendant moved to dismiss the suit in part on the argument that the ADA does not apply to the company’s website and mobile application because they are not “places of public accommodation” within the meaning of the ADA. Citing *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), the Court found that application of the ADA is not limited to physical locations. In that decision, the retailer had also argued that Target.com is not a place of public accommodation. ADA liability, it said, could be found only if individuals with vision impairments are denied access to one of Target’s brick and mortar stores. The Court disagreed, finding that inaccessibility of Target.com impedes “the full and equal enjoyment of goods and services offered in Target stores.” 452 F.Supp. 2d at 956.²

² The Court also distinguished other decisions supporting the proposition that the ADA does not apply to internet-only retailers since Defendant also operates physical pizza stores. See *Young v. Facebook, Inc.*,

¹ Civil Code Section 51 *et seq.*

The same analysis applies here. Moreover, the ADA requires entities to take steps to ensure accessibility through the use of auxiliary aids and services unless such steps would fundamentally alter the thing being offered or would result in an undue burden.

Nevertheless, the Court dismissed the suit against Domino's Pizza because it said the DOJ has not issued clear guidance on accessibility standards for websites or mobile applications. While the DOJ has consistently affirmed that private company websites are covered by the ADA, and while in 2010 it issued a notice of proposed rulemaking stating its intention to establish website accessibility standards, the DOJ in fact has not followed through with a formal rulemaking. Therefore, to hold Defendant and other businesses liable when the responsible administrative agency has failed to specify what it has to comply with violates Defendant's due process rights.

On this point the Court relied on *United States v. AMC Entertainment, Inc.*, a Ninth Circuit Court of Appeals decision. In *AMC*, the court held that it was a violation of theater owners' due process rights to require them to modify multiplexes that had been designed or built before the government gave fair notice of its interpretation of Section 4.33.3 of the ADA Accessibility Guidelines ("ADAAG") related to viewing angle. The text of Section 4.33.3 does not specify what is

790 F.Supp. 2d 1110, 1114-16 (N.D. Cal. 2011) (plaintiff failed to allege a sufficient nexus between the website and a physical place of public accommodation).

prohibited, and the government could have, but did not, remedy the vagueness by officially amending Section 4.33.3. The AMC decision controls here.

The Court said, "Here, too, 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. [Ref. omitted] This request flies in the face of due process." The Court also declined to give weight to the DOJ's prior issuances of "Statements of Interest," consent decrees, and settlements where it had required entities to comply with particular WCAG 2.0 criteria. In doing so, the Court followed the lead of the Ninth Circuit which has declined to give deference to ADAAG guidelines that have not been adopted by the DOJ or to the DOJ with regard to its own proposed (as opposed to final) regulations.³

The Court further noted that in prior Statements of Interest, the DOJ itself and magistrates have affirmed that, in the absence of specific technical standards, entities have flexibility in complying with the ADA and choosing appropriate auxiliary aids. In settlement agreements and consent orders the DOJ has obligated defendants to comply in each instance with different levels of WCAG 2.0 success criteria (level A or AA). And in its 2010 notice of proposed rulemaking the DOJ invited the public to respond to questions about what the appropriate standard

³ *Assistance v. Legal Servs. Corp.*, 917 F.2d 1171, 1173 (9th Cir. 1990).

should be, citing the WCAG 2.0 model as just one option. It is evident, the Court concluded, that the DOJ is far from settled in the standards that it expects entities to follow.

The Court granted Defendant's motion to dismiss each of Plaintiff's causes of action pursuant to the primary jurisdiction doctrine. Under this doctrine a court may dismiss a law suit without prejudice pending resolution of an issue that is within the special competence of an administrative agency, in this case the DOJ or possibly ADAAG. The Court concluded by "calling on Congress, the Attorney General, and the DOJ to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary."

ADA legal expert Martin Orlick who represents defendants in ADA suits ascertained from Plaintiff's counsel in the *Domino's Pizza* case that Plaintiff is preparing the appeal. Undaunted by the adverse ruling, counsel vows to continue filing website accessibility cases. According to Orlick, another active plaintiffs' ADA lawyer who has sued several California banks also vowed to continue filing website cases irrespective of the *Domino's* decision.

As discussed above, the Court determined that the DOJ has articulated or applied inconsistent standards in its enforcement and rulemaking activities. Orlick believes the DOJ may have an interest in submitting an amicus brief on appeal to argue otherwise since this decision goes to

the heart the question of compliance and which has been under consideration for more than a decade. On appeal the key issue of due process may get a more robust hearing since, as the District Court pointed out, Plaintiff failed to brief this issue adequately at the trial level.

All this suggests that, while the decision is favorable to defendants who are targets of shakedown law suits, it is still only one decision among several inconsistent decisions rendered in different jurisdictions, both federal and state. It is unclear how the notoriously liberal Ninth Circuit Court will rule. Merrit Jones, who also represents businesses in ADA claims, thinks the District Court judge marshalled compelling evidence in support of its ruling under the primary jurisdiction doctrine. The Ninth Circuit may find this argument persuasive, especially since the DOJ has already indicated it will take up the stalled rulemaking next year. Clear standards benefit the visually impaired and businesses alike, said Jones.

In the meantime the economics that many smaller banks and other businesses are confronted with remains largely unchanged. While this decision will undoubtedly help large businesses who opt to defend themselves in court in the face of bigger potential damage awards, it remains very costly for smaller businesses to mount a defense even to try to bring a case to a dismissal or summary judgment in comparison to settling privately. However, Orlick believes that if the Ninth Circuit affirms and perhaps other favorable decisions are rendered, then that may persuade plaintiffs'

attorneys to refocus their efforts elsewhere. In any event, both Jones and Orlick advise entities to take steps immediately to make their websites accessible. Striving to achieve the WCAG 2.0 AA Success Criteria, a widely-recognized compliance level, would be prudent even as this decision suggests that public accommodations may have a degree of flexibility in complying with the ADA.

Leland Chan

**Martin Orlick is a partner with the law firm Jeffer Mangels Butler & Mitchell and Chairs the Firm's ADA Compliance and Defense Practice Group.*

Merrit Jones is an attorney with the law firm Bryan Cave and represents banks and retailers in ADA and other matters. Both are based in San Francisco.

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