



Business groups urge Supreme Court to wade into ADA website litigation fray

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Pro-business and right-leaning public interest groups don't exactly agree on who should set standards for how accessible websites and mobile apps must be to comply with the Americans with Disabilities Act. The Cato Institute pins blame on the Justice Department for failing to write regulations to guide businesses on website accessibility. The U.S. Chamber of Commerce and the National Federation of Independent Business have also criticized DOJ for taking "inconsistent, nonbinding and unaccountable" positions across 20 years of litigation over website accessibility. But the Washington Legal Foundation, which advocates for free enterprise, contends that only Congress can decide how much accommodation internet businesses must provide to disabled customers, since the 30-year-old ADA simply doesn't address websites and mobile apps.

All of the groups agree on one thing, though: With plaintiffs' lawyers filing thousands of lawsuits a year against businesses with allegedly inaccessible internet operations, it's time for the U.S. Supreme Court to clarify whether and to what extent the ADA applies to online commerce. The groups all filed amicus briefs Monday, asking the justices to grant a petition for review of a ruling from the 9th U.S. Circuit Court of Appeals that allowed a blind Domino's Pizza customer to sue over the company's website.

"In the absence of action from DOJ, plaintiffs' lawyers have filled in the void, becoming through litigation and settlement the de facto regulators of website compliance with the ADA," the Chamber argued in its brief with NFIB. "Their central interest, though, is not in developing a coherent body of rules to encourage greater accessibility; it is in extracting quick settlements and related attorney's fees This issue is too important, and too pervasive, to allow this uncertainty and litigation tax to persist any longer."

In the Domino's petition, Supreme Court counsel **Lisa Blatt** of **Williams & Connolly** neatly explained the problem for businesses targeted in ADA website accessibility lawsuits by disabled customers. The 1990 law is full of details about how "places of public accommodation," including private stores, restaurants, banks, gyms and other businesses must make themselves

accessible to disabled patrons. But there's nothing in the statute about websites or mobile apps, and Congress hasn't updated the law to reflect internet commerce. The Justice Department said in 2010 that it intended to propose rules addressing businesses' obligations to online customers – but in 2017, with no proposed regulation in sight, DOJ abandoned that effort.

The federal circuits, operating in a statutory and regulatory vacuum, have been divided on the ADA's applicability to websites and mobile apps. As the Domino's petition details, the 1st, 2nd, and 7th Circuits have essentially concluded that, in the language of the ADA, the internet is a place of public accommodation. So under the precedent from those circuits, any business – whether it's online-only or also operates physical stores – can be liable for violating the ADA if its website or app is not fully accessible to disabled customers.

But the rules are different in the 3rd, 6th and 11th Circuits, where courts have held that because the ADA applies to physical places, only businesses with a bricks-and-mortar presence can be sued for websites that aren't fully accessible. Those circuits, according to the Domino's petition, also take a more holistic approach to accessibility, reasoning that if a disabled customer can obtain service through one of a business's operations, the business is not liable for other alleged shortcomings.

The 9th Circuit's Domino's decision, issued in January 2019, fell between those extremes. The 9th Circuit ruled that only businesses with a physical presences are subject to ADA suits. But it also said that all of their operations must be fully accessible. The plaintiff who sued Domino's, a blind customer named Gilberto Robles, alleged that he was not able to use a web reader to describe all of the pizza options on the Domino's site and was not able to place an order online. Domino's pointed out that the website includes a phone number disabled customers can call if they are unable to order online, but the 9th Circuit said the site didn't meet ADA accessibility requirements. The appeals court also rejected the pizza chain's defense that due process precludes liability for failing to meet vague and unspecified standards.

“This is a no-win scenario for the wide array of defendants facing these suits,” the Domino's petition said. “And it is also a no-win scenario for individuals with disabilities, because defendants faced with these suits overwhelmingly enter into piecemeal monetary settlements with individual plaintiffs or eliminate their online offerings instead of trying to keep up with moving-target compliance standards.”

DOJ comes in for considerable flak in Cato's amicus brief, which described the executive branch's contortions over ADA website accessibility. As the Cato brief pointed out, DOJ “nearly parodied its confused positions” when it argued in two different amicus briefs that Netflix's video-streaming service was a public accommodation that should be fully accessible to deaf customers – but that MIT's online video streaming service was not. “This split-hair legal distinction can have substantial real-life costs on the ground and in the courthouse,” Cato said. (The DOJ video-streaming paradox also featured in an amicus brief from the Restaurant Law Center and in Domino's petition.)

The Chamber's brief outlines what it considers to be the magnitude of the litigation over allegedly inaccessible websites and apps. Thousands of suits have been filed in the last three

years by a highly concentrated plaintiffs' bar: Just 10 firms, according to the Chamber, accounted for more than 82% of all website accessibility suits filed in federal court in 2018.

Firms file in favorable jurisdictions and respond quickly to legal developments – after the 9th Circuit's Domino's ruling, according to the Chamber, filings spiked drastically in California – but there's little opportunity for courts actually to develop coherent law because the vast majority of the suits settle quickly. According to the Chamber, more than 93 percent of website accessibility cases filed in 2018 have already settled. More than half of the suits filed in 2019 settled within 60 days.

The message from Domino's and its amici is clear: Businesses are counting on the Supreme Court to provide answers they haven't gotten from anyone else. Plaintiffs' lawyer Joseph Manning of Manning Law has until Aug. 14 to respond.