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California Court of Appeal Aligns with Ninth Circuit on ADA Website Accessibility Standards

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When plaintiffs sue companies alleging that their websites do not comply with the Americans with Disabilities Act (ADA), courts start by answering two threshold legal questions. Does the ADA apply to websites? And if it does, which websites does it apply to? At least seven federal circuit courts have answered these questions and have reached three different conclusions. Until recently, California courts had provided little guidance. But on September 3, 2019, the Second Appellate District of the California Court of Appeal decided *Thurston v. Midvale Corporation* (Case No. B291631). *Thurston* clarifies that commercial websites with a "nexus" to a physical location are subject to the ADA.

In *Thurston*, the plaintiff sued under California's Unruh Civil Rights Act with her claim being predicated on an alleged ADA violation: that defendant-restaurant's website was not accessible to her because it was incompatible with the screen reader technology that she and other visually impaired people use to navigate the internet. Specifically, she alleged that she could not view the menu or make an online reservation. While the defendant provided a telephone number and email address for inquiries on its website, it only responded to inquiries during business hours. The trial court granted summary judgment for the plaintiff, holding that defendant's website failed to comply with the ADA, and ordering that defendant modify its website to comply with the Web Content Accessibility Guidelines (WCAG) 2.0 – a set of commonly used, privately developed standards.

On appeal, the court began by addressing the threshold question of whether and to what extent the ADA applies to websites. It noted that federal circuit courts have answered this question in three different ways: (1) the Third Circuit has held that the ADA does not apply to websites because it applies only to physical spaces; (2) the Ninth, Sixth, and Eleventh Circuits have held that the ADA applies to websites that have a connection or "nexus" to a physical place of public accommodation; and (3) the First, Second, and Seventh Circuits have held that websites are places of public accommodation under the ADA. Notably, under the "nexus" approach, some courts have based their conclusion on the fact that plaintiffs' access to the underlying physical location is curtailed because the website is not accessible. For this reason, many ADA plaintiffs have alleged that they could not access a "store finder" website feature because it was incompatible with their screen reader.

The court expressly rejected the Third Circuit's conclusion that the ADA does not apply to websites. Instead, and following the Ninth Circuit's opinion in *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905–906 (9th Cir. 2019), the Court held that "including websites connected to a physical place of

public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute."

The plaintiff won in *Thurston* because the court held that the website had a "nexus" to a physical restaurant. Yet the plaintiff asked the court to also declare that commercial websites must comply with the ADA even if there is no nexus to a physical location. The court ultimately left this "wholly hypothetical" question unanswered. But it noted repeatedly that the ADA must be "construed liberally to carry out its purpose" and observed that the internet is now essential to everyday life and is a key part of the consumer experience – comments that are not encouraging for businesses.

The court also broadly interpreted the "nexus" requirement. The defendant argued that there was not a sufficient "nexus" between its website and its restaurant, because it provided only one service (food) and provided this service only in its physical location. In rejecting this argument, the court found that consumers could "speed up" their physical experience at the restaurant by viewing the menu beforehand. It further stated that it might also find a sufficient "nexus" where "the website connects customers to the services of the [business]."

The court also addressed a novel due process challenge raised by the defendant. Specifically, the defendant argued that that the trial court erred by holding that complying with the ADA was the same as complying with the private WCAG 2.0 guidelines. The court ultimately disagreed with this argument, finding instead that the trial court's order – that the defendant's website must be modified to comply with WCAG 2.0 – was remedial, and that the defendant had violated the ADA and not WCAG 2.0. As a result, we expect that WCAG 2.0 will continue to function as the generally accepted standard for ADA website accessibility, in the context of both settlement and injunctive relief in California state courts.

The court's decision in *Thurston* is not the grand slam that the ADA plaintiffs' bar had hoped for. Where a website is tied to a physical location (*e.g.*, a California restaurant or store), California ADA plaintiffs will have an easier time litigating in California state court. But these plaintiffs could already pursue those claims in California federal courts – using a direct ADA claim as the hook for jurisdiction while seeking statutory damages on an Unruh Act claim. Still, the decision is unfortunate news for businesses with physical locations in California, which may want to investigate the feasibility of complying with WCAG 2.0. And looking ahead, the Fourth Appellate District of the California Court of Appeal will likely decide a similar case this year in *Martinez v. San Diego County Credit Union* (Case No. D075360).

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