

# Your Order is Ready - How ‘Bout Your Website?

## **Ninth Circuit Applies ADA to Domino’s Online Ordering Website**

Many brick-and-mortar retailers have been adding “Buy Online Pick Up in Store” (a/k/a BOPUS) programs, where you can shop online and then pick up for free in the store a short time later - sort of like - pizza. But while these programs are compelling to customers seeking convenience, a recent Ninth Circuit decision says they may also compel retailers to upgrade their websites for ADA compliance.

### **The Problem: A visually-impaired customer can’t buy his pizza online through a website.**

In *Robles v. Domino’s Pizza LLC*, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court’s dismissal of an ADA claim against Domino’s Pizza by a visually impaired individual unable to order a custom-made pizza through their website for pickup or delivery from a local Domino’s restaurant.

### **The Court-Considered Issue: Does the ADA apply to this website?**

Since the lower court dismissed on a summary judgment basis, the issue on appeal was not whether the ADA had been violated (that will be decided on remand), but whether the ADA applied to the Domino’s website and app even where regulations for ADA compliance on websites and apps are yet to be established.

Domino’s essentially relied upon a due process defense found in earlier decisions, such as *United States v. AMC Entertainment, Inc.*, 549 F.3d 760 (9th Cir. 2008) to skirt application of the ADA statute (42 U.S.C. § 12182), and invoked the primary jurisdiction doctrine due to the absence of compliance guidance through regulations from the responsible agency, the Department of Justice.

### **Decision: The ADA applies, remanded to determine liability and damages.**

The Ninth Circuit court, however, reviewed de novo the applicable statute and DOJ’s position, announced back in 1996, that the ADA applies to websites of covered places of public accommodation. The court found Domino’s reliance on AMC misplaced, and the lack of DOJ regulatory guidance insufficient to refute the application of the ADA to websites where the website relates to delivery or pickup of the site owner’s goods or services at a physical location. .

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U.S. Court of Appeals for the Ninth Circuit

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**Impact: The ADA applies to websites tied to BOPUS programs; online-sales only sites distinguished.**

This case opens the door now (not someday when regulations are issued, if ever) and confirms a beachhead on the application of the ADA to a specific category of website: one used for goods ordered online for pick up at a physical location. The court expressly stated: “This nexus between Domino's website and app and physical restaurants—which Domino's does not contest—is critical to our analysis.”

Thus, the case appears relevant to the increasing trend in retailers using online ordering for customer pickup at the local store to avoid waiting. Some of those retailers may be unaware of the impact this marketing change has on their website requirements.

Equally important, the court also distinguished and sustained as valid its decision in *Weyer v. Twentieth Century Fox Film Corp.* 198 F.3d 1104 (9th Cir. 2000) that the ADA does not apply to sites that do not have a connection between the goods and services offered online and a physical location to access them. The *Weyer* court held the ADA inapplicable to an alleged discriminatory employer-provided insurance policy because the policy did not concern accessibility to the insurance company's physical location, nor was it a good offered and accessed at its physical address.

*Weyer* has been in effect since 2000, so many retailers may have relied on it to forego ADA website compliance. They may not be aware, however, that a shift in marketing to BOPUS programs compels ADA website compliance because, like Domino's, they have created a nexus between online ordering and pickup at a covered place of public accommodation.

**The Takeaway: If Your Customers BOPUS, Upgrade Your Site for ADA Compliance**

Retailers who have recently added Buy Online Pickup in Store services should consider these unintended consequences emerging out of a desirable customer-convenience feature. Speak with your IT team and contact counsel experienced with ADA website requirements to be sure your customers' online access to your business is ADA compliant.