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Entertainment Law Circular

April 2019

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Events & Speaking Engagements

On **Tuesday, April 9th** the Beverly Hills Bar Association Law Practice Management & Technology section will present the lecture series **Protect Your Business: Educate Yourself About Cybercrime, So You Don't Become a Victim.** Speakers include **Heather Antoine**, founder of Anotine Law Group, **Jason Meshekow**, found of Intouch Insurance Services, and **Michael Paul**, COO of Swift Chip.

For more information on how to attend this and other BHBA events, click here.

Wednesday, April 17th the Beverly Hills Bar Association

Hurry Up and Sign

How Sending Arbitration Agreements Directly to Represented Parties May be Unconscionable in the Near Future

By Michael Peters

The recent decision, *Salgado v. Carrows Restaurants*, by the California Court of Appeals held that an arbitration clause may be procedurally unconscionable if the signing party's attorney did not have an opportunity to advise, and the party offering the contract knew that the signing party was represented by counsel. In this case, a long-time employee of Carrows Restaurants, Maureen Salgado, sued Carrows for employment discrimination and violation of her civil rights. There were two main issues on appeal: 1) whether the arbitration agreement between Carrows and Salgado was retroactively applicable to a lawsuit that had previously been filed at the time the contract was signed; and 2) whether the circumstance in which Salgado signed the arbitration agreement was unconscionable.

The first issue was resolved on appeal. As it has before, the California Court of Appeals held that an arbitration agreement may apply to claims already in existence. The decision was fact-specific, looking to the exact language of the agreement which applied to "all disputes which

Bankruptcy Law Section and Entertainment Law Section will present **The Intersection of IP & Bankruptcy Law and Thorny Issues Arising in Entertainment Bankruptcies.** Panelists will include **Michael Gottfried, Jonathan M. Weiss, David Shermano, and Ted A. Dillman.**

David Albert Pierce is Chairman of the BHBA Entertainment Law Section and will be introducing the panel. *For more information on how to attend this and other BHBA events, click here*

Tuesday, April 30th the Leukemia & Lymphoma Society will be holding their **2019 LLS CA Southland Volunteer Leadership Reception.** **Dr. Louis DeGennaro,** President & CEO of The Leukemia & Lymphoma Society, will be attending and sharing his vision of the future for the organization.

David Albert Pierce is a long-time member of the LLS Board of Trustees. For more information on what the LLS Southland is doing to help bring awareness to Leukemia and Lymphoma, click here.

On Thursday, May 2nd the BHBA Entertainment Law Section will be presenting **Marissa Roman Griffith** of Akin Gump Strauss Hauer & Feld LLP with the honor of

[1] may arise out of or [2] be related in any way to [Salgado's] application for employment and/or employment." The court interpreted this language to imply that it applied to existing claims as those claims would still be "related in any way" to Salgado's application or employment. However, Carrows was not named as a defendant in this case until after the arbitration agreement was signed. Therefore, the court did not need to rule on whether a defendant that is already party to a lawsuit at the time an arbitration agreement is signed may enforce the agreement and compel arbitration.

Practice Tip: The second issue was remanded, and this is the issue that may lead to very interesting results regarding the daily practices of the entertainment industry. The primary factual issue upon which the determination of unconscionably will turn on remand is whether Carrows knew or should have known that Salgado was represented by counsel when they asked her to sign the arbitration agreement. The result of this case may be significant in entertainment law because employers (e.g. studios, producers, etc.) on occasion, present talent and crew directly with contracts when on the set even if they know the talent or crew has representation, and these agreements almost invariably contain arbitration provisions.

While there are many distinguishing facts here from the average entertainment transaction (namely that there was an active litigation in motion at the time Salgado signed the arbitration agreement and that she claims she was "confronted" at work and "forced to sign" the agreement), the outcome of this case could have a reaching effect on the enforceability of arbitration provisions in entertainment industry agreements under the occasional situation where producers circumvent representation and have talent sign agreements on set. Likewise, lesser talent and crew are often presented with contracts for the first time on the set and are pressured to sign. Even when they ask if there is time to send the agreement to their lawyer, producers will often say things such as "we are filming now, you don't have time." Such aspiring artists often do not want to "make waves." These factors of time and fiscal pressure, particularly for aspiring talent, could be analogous to the facts in *Salgado*, and therefore it is not far-fetched that a finding of unconscionability for Salgado could

Entertainment Lawyer of the Year!

David Pierce, as the BHBA Entertainment Law Section Co-Chair, will be speaking at this event. Cocktail hour begins at 5:30 pm and dinner will commence at 7:00 pm.

For more information on how to get tickets and reserve tables, click here.

Pierce Law Group Gives Back

In her limited free time Dhara Patel volunteers for Education First. Founded in 1995, the organization's philosophy is that education can help break down generational poverty as it is an "equalizer." Education First has awarded over **$800,000** in scholarships since 1996, and for the current school year, the organization is offering:
(1) two $5,000 college scholarships in each chapter city and (2) access to a professional college coach to each recipient.

Regarding her volunteer choice, Dhara says, **"My experience volunteering for Education First has been nothing short of rewarding and wonderful.** Like many others, I am a first generation college student and was raised in a household with several extended family members. I also had parents who worked around the clock and made countless sacrifices to make sure my younger brother and I received a college education. Turns out, we were lucky enough to end up with

open the door for further findings of unconscionability in Hollywood.

*For more information about this decision and how it affects you, contact **Michael Peters, Esq.** or **David Albert Pierce, Esq.***

Robles v. Domino's Pizza

2019 DJDAR 416 (9th Circuit, January 16, 2019)

By Michael Peters

In a recent decision, Robles v. Domino's Pizza, 2019 DJDAR 416 (9th Circuit, January 16, 2019), the 9th Circuit Court of Appeals states that if your website or app provides a visual aid to help customers access your goods or services then it must be ADA compliant so that blind people can use the website via "commonly used screen-reading software for the blind."

The standard of compliance with the ADA is simply the requirement of taking "reasonable steps to provide disabled guests with a like experience" to that of non-disabled guests. For example, providing deaf theater patrons with auxiliary hearing devices, or wheelchair seating and an adjacent seat for the disabled patron's husband or wife.

General facts and holding

In *Robles*, a blind man sued Domino's because he couldn't order a pizza online through Domino's website or app which lacked compatibility with screen-reading software that the blind regularly use. The 9th Circuit found that, despite a dedicated phone service for the blind, the website and app themselves must comply with the ADA because of the incredibly close "nexus" between the Domino's website or app and the goods provided by the physical restaurants. This connection was so close that the Court found that "inaccessibility [to] Domino's website and app impedes access to the goods and services of its physical franchise."

While the decision lacks details as to why the Court saw such a close nexus, it is easy to recognize the convenience and superiority the Court is referring to. On-line or app-based pizza ordering allows for fast and accurate selection of and payment for customized pizzas that is far

graduate degrees! Now, it's my turn to help others. And for me, there is no better way than to volunteer for an organization *dedicated* to providing coaching to high school seniors (at high schools with low percentages of college applicants) *and* dedicated to providing need-based college scholarships."

To learn more about Education First and its scholarships, click here. For information on how to donate, click here.

Pierce Law Group Around Town

Josh Edwards attended **Take Creative Control's Los Angeles Legal Event on March 29th** where he offered pro bono legal advice to attendees. Take Creative Control is a nonprofit organization that aims to bring together lawyers, policy experts, and creators to advocate for the creative rights of people of color.

For more information on the group's advocacy and when they're holding their next event, click here!

Josh also attended an NAACP brunch on March 30th, where he met incredible industry leaders like **Nneka Luke**, the film commissioner for Trinidad & Tobago, and **Asantewa Olatunji, Esq.**, the Director of Programming for The Pan African Film Festival. Awesome!

Pierce Law Group Comedy

Each Monday our client Tony

superior to the traditional phone call. Especially in a market that is increasingly dominated by credit card transactions, using a website or app to purchase pizza is exponentially easier and more fool-proof than reading your card and address information over the phone to a busy Domino's employee.

While this decision may appear alarming and of sweeping impact to small businesses across the country, there are many reasons why this decision is far less consequential than it first appears to be.

The 9th Circuit did not hold that Domino's accommodations on their website or app were in violation of the ADA

The 9th Circuit merely held that the ADA applied to the Domino's website and app. This is nothing new. As early as 2010, the Federal Registrar contemplated this same issue and found that "Title III (the ADA) applies to any activity or service offered by a public accommodation." The Court's reasoning in this *Robles* decision focuses exclusively on three points: 1) does the ADA apply to Domino's website and app, 2) does applying the ADA to the website raise due process concerns under the 14th amendment, and 3) whether the primary jurisdiction doctrine should defer this decision to a regulatory authority instead of the judicial branch? Note that a determination of adequacy of Domino's efforts to make their website and app accessible to the blind is not among these topics, which is a heavily fact-specific analysis involving a cost-benefit evaluation. The 9th Circuit "express[ed] no opinion about whether Domino's website or app compl[ies] with the ADA." The case was remanded back to the district court to make the factual determination of whether Domino's provided adequate accommodation to the blind.

The 9th Circuit held that non-compliance with the WCAG 2.0 *does not* give rise to liability under the ADA

The WCAG 2.0 is a list of guidelines for making websites accessible for blind or visually-impaired people published by the World Wide Web Consortium, the predominant international standards organization for the internet. While the Court found that there was no liability for Domino's failure to comply with these guidelines, it agreed that an order to comply with these

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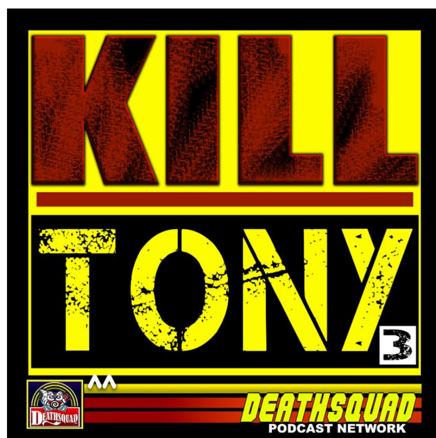

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guidelines would be a legitimate remedy for a violation of the ADA. The full list of WCAG 2.0 guidelines can be found here.

The WCAG 2.0 is a well-established benchmark for internet accessibility for the blind, and we recommend referring to as you evaluate your own websites. While it is currently not mandatory under the 9th Circuit to comply with all of these guidelines, they provide a helpful goal in an effort to maximize your online accessibility.

This decision *does* mean that websites that connect the public to goods offered at a physical place of public accommodation must be ADA compliant

If your business is a physical place of public accommodation, any website associate with your business must comply with the ADA to the extent that the website allows access to the goods or services provided by your physical place of business. Note that the very close "nexus" between the goods and services of the Domino's physical locations was crucial to the 9th Circuit's reasoning in this decision. Therefore, the closer the connection between your goods or services provided at your physical location and your website or app, the more analogous your business will be to Domino's in this case and therefore the more cautious you should be about making your website or app accessible to the blind.

This decision *only* effects physical business so purely online services are unaffected, for now

This decision only applies to "places of public accommodation" which includes establishments selling or renting nearly any form of good or service. While this list is expansive, it is limited to physical places that provide goods or services to the public, and their websites and apps that are connected to the goods or services provided at or from these physical places. Further, the Court's reasoning in the *Robles* decision hinged significantly on the distinction between "services *of* a place of public accommodation, not services *in* a place of public accommodation" and the Court specifically states that the "nexus between Domino's website and app and *physical* restaurants...is critical to [the Court's] analysis" (emphasis added). Moreover, this decision directly distinguished this *Domino's* dispute from *Weyer v. Twentieth*

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Pierce "Dog" Group

Scrappy Pierce, Esq.

Century Fox Film Corp., in which an insurance company's policy was found *not* to be a "covered place of public accommodation" because "the ADA only covers actual physical places where goods or services are open to the public, and places where the public gets those goods or services, there had to be some connection between the good or service complained of and an actual physical place."

Therefore, this decision does not apply to a website that purely displays entertainment products on the internet. Regardless, we strongly recommend ensuring that your website is compatible with commonly used screen-reading software for the blind and investigating what steps can be taken towards making your websites more blind-accessible. The WCAG 2.0 will likely be helpful reference in this endeavor.

The recently-filed Playboy.com lawsuit may have significant effects on purely online service's ADA liability

On November 28, 2018, a blind man named Donald Nixon filed a class action in Federal Court in the Eastern District of New York on behalf of himself and other blind persons against Playboy.com. Nixon alleged that Playboy.com is a place of public accommodation, that it has violated of the ADA, and that it is not in compliance with the WCAG 2.0. Playboy.com, in its answer, denies that it is a place of public accommodation, denies that its policy and practice denied Nixon access to their website and the goods and services therein, and denies that Nixon encountered multiple access barriers on its website and was thereby denied equal access. If you are in the business of providing online entertainment, we recommend keeping a close eye on this case to see how the 2nd Circuit rules on whether Playboy.com is a place of public accommodation as well as the issue of whether any liability arises from non-compliance with the WCAG 2.0. Further, if *Robles* is granted certiorari by the Supreme Court while this Playboy.com case in progress, that hearing will in turn have a significant impact on how this Playboy.com case develops. For now, it is important to be aware of it, but too early for alarm.

RECOMMENDATIONS:

1) Make sure your website is compatible with commonly used screen-reading software for the

blind; and 2) refer to the WCAG 2.0 guidelines to maximize accessibility to your website, thereby minimizing any chance of a discrimination lawsuit filed against your business. Please note that while this decision may seem alarming, it merely affirms ADA liability of websites connected to physical locations. It is important to remember that the key words of the ADA are "reasonable steps to provide disabled persons with a like experience." Thus, the ADA does not require that best or most effective steps, only "reasonable steps" and a cost-benefit analysis has always been a significant factor. For example, you don't need to replace a drinking fountain in an odd location that makes bending over in a wheelchair impossible if merely installing a Dixie cup dispenser within easy reach of a patron in a wheelchair can serve the same purpose.

For more information about this decision and how it affects your company, contact ***Michael Peters, Esq.*** *or* ***David Albert Pierce, Esq.***

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About Pierce Law Group LLP

Pierce Law Group LLP is a full service, boutique entertainment law firm that provides both transactional and litigation legal services. Our practice areas include entertainment law, intellectual property (copyright, trademarks, right of publicity), film finance, securities law, production counsel, and labor & employment issues affecting the entertainment industry, with an emphasis on film, television, and new media. We represent production companies and other creative businesses as well as artists including producers, actors, writers, directors, comedians, and other entrepreneurs.Our client list includes both Academy Award and Emmy Award winners. We utilize an academic and analytic legal approach to

accomplish creative solutions to our clients' goals.

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