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Are Your Private Web Sites Covered By ADA Title III?

Portfolio Media, New York (March 21, 2008)

Recent litigation involving the discount retailer **Target** Corporation has once again raised the question: Do certain private Web sites come within the scope of Title III of the Americans with Disabilities Act of 1990 (ADA), which requires that “public accommodations” be accessible to the disabled. In the case of Target, does its Web site need to be accessible to the blind?

Though some members of Congress and the U.S. Justice Department (at least during the Clinton Administration), have taken the view that Title III applies to private Web sites, the few courts to address this question have not uniformly agreed with that position.

The lack of consensus has left businesses – most of whom today have supporting Web sites – with conflicting guidance as to whether they are, in fact, running afoul of Title III if their Web site is not entirely accessible to the disabled.

This article will review the current state of the law on this question and advise businesses as to what measures they may wish to take to avoid being the target of a Title III discrimination lawsuit.

What Is Title III And Who Does It Cover?

Title III of the ADA prohibits private entities that affect commerce and fall within the definition of a “public accommodation,” from discriminating against individuals on the basis of a disability with respect to the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”

Title III’s anti-discrimination provisions require that covered entities take affirmative steps to ensure that disabled individuals are not discriminated against.

In other words, companies must put proper accommodations into place so that all individuals may partake of their goods and services.

This differs from Title I, the ADA section that applies to the employment setting. Under Title I, an employer’s obligation to provide a reasonable accommodation is not triggered

until after the individual (employee or job applicant) notifies the employer that he or she needs an accommodation to perform the essential functions of the job or to apply for a job.

What The Courts Have To Say About Title III's Reach

Non-Web Site Cases – Insurance Cases

Even before a court was faced with answering the question of whether a Web site satisfied the definition of a public accommodation, in the years following the passage of the ADA, courts began to explore the outer limits of what could be treated as a public accommodation.

Not surprisingly, courts addressing the question reached different conclusions, depending on how they defined a public accommodation.

In the first case to conclude that a public accommodation is not limited to a physical structure, the First Circuit Court of Appeals held that “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.” *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Association of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

Two other circuit courts have endorsed the First Circuit’s analysis. See *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999); *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999) (2-1 ruling).

The court’s majority in *Doe*, citing *Carparts* for support, explained that the “core meaning” of Article III’s anti-discrimination provision is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space [*Carparts* citation omitted]) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do. *Id.* at 559 (emphasis added).

On the other hand, those courts who gave a narrow construction to the meaning of public accommodation held that policy holders could not assert a claim against the insurance company under Article III, because the definition only contemplated physical, concrete structures. See, e.g., *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998); *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006, 1010-14 (6th Cir. 1997).

Non-Web Site Cases – “Nexus Approach” Cases

A judicially-crafted analysis called the nexus approach has gained prominence in the debate over whether Title III applies to Web sites.

While narrowly defining a public accommodation as requiring a physical space, the nexus approach holds that the discriminatory act (vis-à-vis one’s access to the goods or services provided by the public accommodation) does not have to take place at a physical location provided that there is some connection (nexus) between the discriminatory act and the public accommodation.

For example, in *Rendon v. Valleycrest Products, Ltd.*, 294 F.3d 1279 (11th Cir. 2002), hearing and mobility impaired individuals filed a class action lawsuit against the

producers of the television quiz show "Who Wants to be a Millionaire."

The individuals alleged that the show's applicant screening process discriminated against those with hearing and upper-body mobility impairments, because it relied upon the speed with which a potential contestant could answer questions over the phone using the keys on the telephone keypad to indicate his or her answers.

On appeal, the Eleventh Circuit found that the screening process had the effect of denying access to an individual's participation on the show, which took place at a public accommodation (the television studio).

The court observed that there is nothing in the text of Title III "to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA." *Id.* at 1283-84 (emphasis added).

Moreover, the Eleventh Circuit observed that there was clearly a nexus between the challenged service (being a participant on the show) and the public accommodation (the studio).

Web Site Cases

A federal district court in Florida was the first court to rule on whether a private Web site must comply with the requirements of Title III. It held that Title III did not apply because a web site was not a public accommodation. *Access Now v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *aff'd* 385 F.3d 1324 (11th Cir. 2004).

In *Access Now*, plaintiffs argued that they could not easily access and navigate the online airline/hotel booking features on defendant's Web site because blind users could not use their screen reader program, which transforms visual images displayed on the web site into synthesized speech.

Plaintiffs did not make a nexus argument in their court pleadings; rather, they argued that Southwest's Internet Web site, *southwest.com*, was itself a public accommodation. The court declined to broadly construe the ADA's definition of public accommodations and dismissed the case.

On appeal, the plaintiffs argued that the Web site had a nexus to Southwest's physical facilities. The Eleventh Circuit refused to reach the merits of this argument because plaintiffs had not raised it before the lower court, but the court did acknowledge the "substantial public importance" of resolving whether Title III applies to the Internet. However, it would be several more years before that would happen.

In 2006, a class action lawsuit was filed against Target Corporation in a California state court, alleging that Target's Web site, *Target.com*, was not fully accessible to the blind because, as was the case with Southwest's Web site, it did not include alternative text to verbally describe the graphics included on the Web site.

As a consequence, plaintiffs contended, blind customers are denied full and equal access to Target stores due to their inability to utilize the panoply of services available on the company's Web site (e.g., refill a prescription, order photo prints for pick up, print coupons redeemable at store, access the store's gift registries).

Due to their inability to "pre-shop" on Target's Web site, individual plaintiffs contend that they were forced to make purchases from other stores ("diverted sales") who had more accessible Web sites than Target or experienced in-store barriers when they came

to the store (necessitated by their having to spend more time and expense in the store). *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), subsequent proceedings, 2007 U.S. Dist. LEXIS 73547 (N.D. Cal. Sept. 28, 2007).

Target removed the case to a California federal court and then filed for dismissal of the case, arguing first (with respect to plaintiffs' ADA claim) that because Target.com was not a physical space it did not meet the definition of a public accommodation.

Target also argued that plaintiffs could not proceed with their ADA claim under the nexus approach because the alleged discrimination had to occur on the premises of the place of public accommodation and involve the denial of physical entry to, or use of, the space.

The federal court rejected both of Target's arguments and refused to dismiss plaintiffs' federal or state claims. The court subsequently certified a class and subclass based on plaintiffs' Title III and state law claims.

At some point after this lawsuit was filed, Target voluntarily undertook certain modifications to its Web site to make it more keyboard accessible to the blind and later tried, albeit unsuccessfully, to argue that some of plaintiffs' accessibility claims were moot. *National Federation of the Blind*, 2007 U.S. Dist. LEXIS at *16.

In refusing to dismiss plaintiffs' Title III claim, the court in Target explained that the nexus theory has never been solely premised on the denial of physical access to a place of public accommodation. On the contrary, the Rendon court recognized that "intangible barriers 'restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.'" *National Federation of the Blind*, 452 F. Supp. 2d at 954.

As long as the "benefits and privileges of the Web site are services of the Target stores," there is a sufficient nexus between the Web site and the physical place. *Id.* The court went on to state that the challenged service (provided by the Web site) is "heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores."

The court concluded: "To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA." *Id.* at 956 (emphasis added).

What Measures, If Any, Should Businesses Undertake Following The Target Ruling?

If there is but one lesson to take away from the Target case it is this: if a company has a Web site that enhances a customer's enjoyment of good and services offered at a company's place of public accommodation and that Web site is not accessible to the blind, courts in some jurisdictions may find that it violates Title III's anti-discrimination provisions.

In the case of Target, it was plaintiffs' inability to utilize the Web site's "pre-shop" features (i.e., refill a prescription, order photo prints, access gift registries) that brought the Web site within Title III's reach.

Additionally, if a retail store provides in-store coupons that are only available to customers on its Web site or notifies customers of impending sales or promotions within the store only through its Web site, that would likely trigger Title III's accessibility requirements.

What is less clear from the court's ruling in Target is whether a business which provides Web site features that enable a customer to bypass having to come into its store or office (e.g., a financial institution that provides on-line banking services), would need to comply with Title III.

At this juncture, only a few courts have broadly defined a public accommodation (First, Second and Seventh Circuits) to include web sites or, alternatively, have endorsed the nexus approach (Eleventh and Ninth Circuits).

For businesses located in any of these five appellate circuits, companies should initiate measures to make their Web sites accessible to the blind, if they are not currently accessible.

Many commentators have urged the Congress to step in and clarify once and for all whether Web sites are covered under Title III. With no legislative fix on the horizon and a yet unknown president set to take office come January 2009, businesses need to weigh their options now and decide whether to take preemptive measures.

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