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Client Alert

A report for clients and friends of the firm

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Americans with Disabilities Act Impacts Web Sites: Web Sites Offering Services Related to Physical Stores Must Be Accessible to the Blind

The general merchandise retailer Target operates 1300 stores in 47 states, each of which is subject to Title III of the Americans with Disabilities Act, which addresses accessibility of public accommodations to the disabled. 42 U.S.C. §§ 12101 et seq. In California, Target also is subject to the provisions of the Unruh Civil Rights Act, *Cal. Civ. Code.* § 51(b) (people with disabilities "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever").

In February of 2006, Bruce Sexton Jr., president of the California Association of Blind Students, and a student at the University of California at Berkeley, (joined by the National Federation of the Blind) sued Target in a class action lawsuit, alleging that the retailer's Web site was inaccessible to him and others similarly situated. The Complaint charged that the inaccessible Web site violated Title III of the ADA and violations of the Unruh Civil Rights Act. Sexton charged Target with not making the site fully navigable by the visually impaired.

On September 5, 2006, United States District Judge Marilyn Hall Patel ruled that the lawsuit stated a claim and may proceed. *National Federation of the Blind v. Target Corp., Slip op.* No. 06-01802 MHP (September 5, 2006 N.D. CA). Judge Patel wrote that "the 'ordinary meaning' of the ADA's prohibition against discrimination in the enjoyment of goods, services, facilities or privileges, is that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services." However, the court made clear that "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." (emphasis supplied).

While this is not a final ruling on the lawsuit, but is only a ruling on the motion to dismiss the case, it does set a strong precedent that certain aspects of online stores are covered by the ADA.

In moving to dismiss, Target had argued that only physical stores were covered by the ADA, not Web sites. It relied, in part, on the decision in *Access Now Inc. v. Southwest Airlines Access Now, Inc. v. Southwest Airlines*, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004), a matter in which a visually impaired customer was unable to purchase tickets via Southwest Airlines' Web site. There, the court ruled a "public accommodation" must be physical, not virtual, in nature. The court granted Southwest summary judgment, ruling that an Internet Web site is not such a 'place' unless there is a nexus between it and a physical accommodation.

Mindful of the *Southwest* case, plaintiffs identified Target.com *not* as a place of public accommodation but rather as a "service and benefit" offered by Target stores in California, which *themselves* are public accommodations. Thus the claim establishing the nexus was not that a blind person cannot place an order at Target.com but, rather, that the Web site's store locator (which directs people to a local store's location and opening hours), the online pharmacy (where prescription refills may be ordered before going to a Target store to pick them up), and discount coupons on the Web site (that can be printed and redeemed at a physical store), all lacked the requisite ADA accessibility.

The main point of contention in the lawsuit concerns how Target.com uses so-called "alt" tags on its Web site. Alt tags are used to provide brief text descriptions of Web page elements that are decipherable by screen readers to describe page contents to blind users. The Complaint charges that on the Target.com Web site, the alt tags are not fully useful and that some text omits alt tags altogether.

Notably, while allowing the case to proceed, the court *denied* the motion for a preliminary injunction pending further development of evidence on the issue of whether "the average blind person" is able to access the Target Web site. And, in permitting the Unruh Civil Rights Act claim to proceed, given the wider scope of that law, broader Web site accessibility issues may be resolved in the case. (The practical effect of a broader ruling under the California law would be to force Target to modify its Web site for all customers nationwide unless it chose to have a "California-only" Web site, which is unlikely.)

Although this recent ruling is unlikely to affect "pure-play" dot com companies, like eBay, Amazon, iTunes, etc., it does have significant potential to affect companies operating Web sites that complement the services available at their brick-and-mortar locations.

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Proskauer Rose LLP represents clients with respect to Americans with Disabilities Act (ADA) matters and on legal issues implicated by online commerce and the use of the Internet. By combining our skills in those areas, we are well positioned to advise on the issues involved in the applicability of the ADA to the Internet. For further information:

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