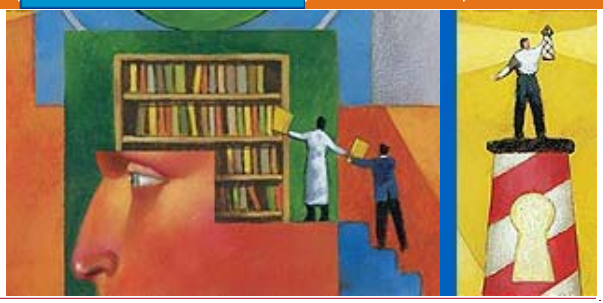

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Association Law & Policy

National Federation for the Blind v. Target Corp.: Its Potential Impact on Web Sites and Services

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A review of how web-based Americans with Disabilities Act claims have been viewed historically, what the Target decision means, and how it may impact organizations with web sites.

National Federation for the Blind v. Target Corp.: Its Potential Impact on Web Sites and Services

By Carla J. Rozycki and Darren M. Mungerson[1]

The National Federation for the Blind ("NFB") has been given the green light to pursue claims against Target Corp. that the retailer's web site is inaccessible to the blind and incompatible with software used by the blind in violation of Title III of the Americans with Disabilities Act ("ADA"). National Federation for the Blind v. Target Corp.[2] The refusal of the U.S. District Court for the Northern District of California to dismiss the claims against Target is the first published decision allowing ADA claims based upon inaccessibility of a web site to proceed against a private entity. The Target decision may lead to an explosion of web-based ADA claims. This article reviews how web-based ADA claims have been viewed historically, what the Target decision means, and how it may impact organizations with web sites. Private entities, including associations and other non-profits, should take careful note of this ruling, as it may have significant implications for the future management of their web-based activities.

Title III of the Americans with Disabilities Act

In 1990, Congress enacted the ADA to establish a clear and comprehensive prohibition of discrimination on the basis of disability. Among the protections provided in the ADA is the right for disabled persons to enjoy places of public accommodation fully and equally as non-disabled persons. Specifically, Title III of the ADA prohibits "discrimination against persons on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

The ADA defines a "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following twelve categories:

(1) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(2) a restaurant, bar, or other establishment serving food or drink;

(3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) an auditorium, convention center, lecture hall, or other place of public gathering;

(5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) a terminal, depot, or other station used for specified public transportation;

(8) a museum, library, gallery, or other place of public display or collection;

(9) a park, zoo, amusement park, or other place of recreation;

(10) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[3]

The federal regulations implementing the ADA define "facility" as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[4]

Historically, the term "place of public accommodation" has been interpreted to mean a physical structure. However, the ADA and the implementing regulations were enacted before the Internet became an everyday tool for conducting business and recreational activities.

Neither the statute nor the implementing regulations expressly include the Internet as a place of public accommodation under Title III of the ADA. Nonetheless, the United States Department of Justice has consistently taken the position that the Internet is a place of public accommodation under Title III of the ADA.[5] Plaintiffs in a number of cases have also challenged the inaccessibility of a company's web site. Until recently, those claims have not had any significant success before the courts. However, the Target decision may be a turning point for challenges to inaccessible web sites under the ADA.

Efforts to Bring the Internet within the Purview of the ADA

One of the earliest cases seeking to establish the reach of Title III of the ADA to the Internet was filed in 1999 by the National Federation of the Blind ("NFB") against America Online ("AOL"). NFB alleged that AOL's proprietary web browser was incompatible with screen-reader software used by visually impaired persons, interfered with those persons' ability to use the software, and was inaccessible to visually impaired persons in a number of other ways. However, NFB and AOL reached a settlement before the court had an opportunity to determine whether a web site constituted a "place of public accommodation" under Title III

of the ADA.

Since then, courts have split on the issue of whether web sites are places of public accommodation under Title III of the ADA. The first case to directly rule on whether the Internet constituted a place of public accommodation was Access Now, Inc. v. Southwest Airlines Co.[6] The United States District Court for the Southern District of Florida held that a place of public accommodation must be a physical concrete structure. As a web site "does not exist in any particular geographic location," it is not a "place of public accommodation." The Sixth and Ninth Circuits have endorsed the ruling in Access Now that a public place of accommodation must be a physical location.[7]

In contrast, the United States Court of Appeals for the First Circuit has stated that Title III of the ADA is not limited to purely physical structures, although not specifically addressing the Internet.[8] Similarly, the Court of Appeals for the Seventh Circuit, in dicta, has stated that the core meaning of Title III of the ADA is that "the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theatre, ***Web site***, or other facility ***(whether in physical space or in electronic space)*** . . . that is open to the public cannot exclude disabled people from entering the facility and, once in, from using the facility in the same way that the nondisabled do."[9] Similarly, the United States Court of Appeals for the Eleventh Circuit held that the automated method of selecting contestants for the television show "Who Wants to be a Millionaire?" was covered by the ADA as an intangible barrier to a physical location in Rendon v. Valleycrest Productions.[10]

In 2002, the United States District Court of the Northern District of Georgia granted a preliminary injunction against the Atlanta public transit agency in favor of several individuals who alleged violations of the ADA including non-accessible information technology. Martin v. Metropolitan Atlanta Rapid Transit Authority.[11] The preliminary injunction required the Atlantic public transit agency to make its internet communications system accessible to the disabled. However, the Martin case involved Title II of the ADA dealing with "public agencies" as opposed to Title III, which deals with "public accommodations." Nevertheless, the Martin case was the first published decision where a defendant was ordered to make its web site accessible to disabled persons.

The *Target* Decision

The United States District Court for the Northern District of California's September 6, 2006 opinion in National Federation of the Blind v. Target Corp. is the first published decision allowing a claim of inaccessibility of a web site to proceed against a private entity under Title III of the ADA.

The NFB alleged that Target (a national retail chain with over 1,400 stores nationwide) operated a web site which was not accessible to the blind, and that Target failed and refused to put well-recognized and readily achievable coding on its web site that would allow blind people to use software to access the site. NFB claimed that this refusal violated Title III of the ADA and California state law prohibiting discrimination against the disabled.

The plaintiffs in Target contended that Target's web site was a "service, privilege or advantage" of Target's "brick and mortar" stores, to distinguish Ninth Circuit precedent that a "place of public accommodation" must be a physical establishment. According to the plaintiffs, Target's web site allows customers to purchase many of the items available in Target's "brick and mortar" stores, and to perform other functions related to those physical stores, such as accessing information on store locations and hours, refilling a prescription, ordering photo prints for pick-up at a store, or printing coupons to redeem at a store. Therefore, due to the nexus between the web site and the physical stores, the plaintiffs argued that the Court need not decide whether the Internet, as a stand alone entity, constituted a "public place of accommodation."

Target sought to dismiss the complaint. Target maintained that the ADA applied only to a physical place of public accommodation, and that there was no allegation that Target's physical stores were inaccessible. Target disagreed that there was a sufficient nexus between the services provided by the web site and Target's brick and mortar stores to bring its web site within the coverage of Title III of the ADA. Target also argued that its 800 phone system, which was available 24 hours a day, 365 days a year, was a sufficient alternative to Target's

web site.

The Court first noted that the Ninth Circuit had held that a "place of public accommodation" must be a physical place. However, the Court agreed with the plaintiffs that this precedent was not controlling because Target's web site was a "service, privilege or advantage" of Target's physical retail stores. The Court concluded that the ADA applied to the services ***of*** a place of public accommodation, not simply services ***in*** a place of public accommodation. The Court also rejected Target's argument that the plaintiffs failed to state a claim because they had not alleged inaccessibility of Target's physical stores. The Court held that Title III of the ADA required accessibility to all benefits of a place of public accommodation not merely physical entry. The Court concluded that the "challenged service here is heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores." Therefore, the Court allowed the plaintiffs to proceed with their challenges with regard to information and services on Target's website that were connected to Target's retail stores.

The Court expressly distinguished information and services of Target's web site "which do not affect the enjoyment of goods and services offered in Target stores," although the Court failed to sufficiently explain what those goods and services were. With regard to those types of information and services, the Court held that there was no claim under Title III of the ADA.

While the Court denied Target's motion to dismiss the complaint, the Court also refused to grant plaintiffs' motion for a preliminary injunction, finding that there were substantial questions of fact regarding the extent that Target's web site was inaccessible to the blind that required discovery and further proceedings.

The Impact of the *Target* Decision

Whether the Ninth Circuit or other courts will agree with the California District Court's decision in Target remains to be seen. However, private entities, including associations and other nonprofits, with physical stores and associated web sites need to take note of the Court's decision in Target. The NFB is likely to use the Target decision to persuade retailers and other entities to make their web sites accessible and compatible with software used by the blind.

Many questions remain. Are entities that engage in Internet retail from centralized warehouses, but without any physical retail stores, covered by Title III of the ADA? Arguably, the warehouses are physical locations and the web site is a "service, privilege or advantage" of that physical site, but is the warehouse itself a "place of public accommodation" if the public is not given physical access? Notwithstanding the decision in Target, and in light of contrary language in other jurisdictions, are entities that provide only services or information, as opposed to products, covered? Are web casts or educational seminars presented over the Internet covered? Does it matter whether the seminar is being presented to a live audience in an auditorium simultaneously with being broadcast over the Internet? What if the seminar is being presented solely over the Internet? Are there any alternatives to web sites, such as Target's 800 number system, that allow sufficient accessibility to physical stores to bring retailers into compliance with Title III of the ADA? How accessible or inaccessible must a web site be to the blind?

Private entities, including associations and other nonprofits, that host web sites need to closely monitor developments in the Target case, and whether other courts will follow the Target court's lead. In the meantime, these entities should consider making their sites more accessible to and compatible with the software used by the blind.

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[2] -- F.Supp.2d --, 2006 WL 2578282 (N.D. Cal. Sept. 6, 2006).

[3] 42 U.S.C. §12181(7).

[4] 28 C.F.R. § 36.104

[5] For example, a September 9, 1996 letter to Senator Tom Harkin from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, United Stated Department of Justice (now Governor-elect of Massachusetts), opined that "entities [covered by the ADA] that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well." The Department of Justice has also filed a number of amicus briefs in cases asserting that Title III of the ADA covers the Internet as a "place of public accommodation."

[6] 227 F.Supp.2d 1312 (S.D. Fla. 2002), *appeal denied*, 385 F.3d 1324 (11th Cir. 2004) (dismissing case alleging that Southwest's "virtual ticket counters" and web site was inaccessible to blind persons in violation of Title III of the ADA).

[7] See, e.g., Parker v. Metro. Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

[8] Carparts v. Automotive Wholesaler's Ass'n., 37 F.3d 12, 22-23 (1st Cir. 1994).

[9] Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (emphasis added).

[10] 294 F.3d 1279 (11th Cir. 2002).

[11] 225 F. Supp. 2d 1362 (N.D. Ga. 2002).

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