TUESDAY, JANUARY 5, 2016

CLIENT ALERT

BALCH & BINGHAM LLP

WEBSITE ACCESSIBILITY & THREATS OF ADA LITIGATION

In the last couple of weeks, a number of electric utility industry clients have received virtually identical demand letters claiming that the utility's website violates the Americans with Disabilities Act by not being fully accessible to the disabled community. If you receive a similar letter, you should carefully review and contact appropriate counsel.

A. The Letter, The Claims, and the Settlement

The letter is signed by a well-known attorney who has previously filed class-action lawsuits against companies such as Apple, Inc. alleging that iPhones and iPads "leaked" personal data of their customers. It is also signed by another law firm that regularly represents plaintiffs in employment issues. The law firms allege their unnamed experts have determined that website pages are not in compliance with guidelines published by the World Wide Web Consortium. The guidelines are called version 2.0 of the Web Content Accessibility Guidelines ("WCAG 2.0"). There is no law or regulation specifically requiring compliance with these guidelines, but they have been tentatively endorsed by the Department of Justice ("DOJ"), which is responsible for implementing guidance regarding the ADA, and are generally viewed as the most likely guidelines for accessibility.

The letter advises the utility of these issues, requests a hold on the destruction of potentially relevant documents, and then demands a settlement in lieu of the law firms filing litigation. The settlement demand includes payment of the firms' attorneys' fees and implementation of a burdensome compliance program, which requires the utility to hire an expert consultant (approved by the law firms, but paid by the utility) who will (1) evaluate the website, (2) implement the WCAG 2.0 standards, (3) develop appropriate policies and practices, (4) train employees, and (5) conduct regular reviews and testing of the website as well as policies and practices. All of these steps must be approved by the consultant and the lawyers, who will expect to be paid for monitoring the progress after the settlement agreement is signed.

B. The Law Governing Utilities' Obligations to Have Accessible Websites is Far From Clear

1. Title III of the ADA

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 135 Cong. Rec. 19,803 (1989) (statement of Sen. Harkin); 42 U.S.C. § 12101(b)(1). Title III of the ADA specifically prohibits discrimination in places of public accommodation:

> *No individual shall be discriminated against 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. 42 U.S.C. § 12182 (a).*

The ADA was enacted before the widespread use of the Internet. Since then, more and more companies have established websites for marketing and sales purposes. Advocacy groups for people with disabilities have argued that, under Title III of the ADA, these websites should be accessible to people with disabilities.[1] There are two alternative conceptual frameworks under which these advocacy groups typically allege a website is subject to Title III: (1) as a place of public accommodation, and/or (2) as one of the "'goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.'" *See Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002); *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

Prior to the Target case, the one case addressing website accessibility was *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), a Southern District of Florida case. In that case, a blind individual and an advocacy group sued Southwest Airlines, alleging that the airline's website was inaccessible to blind individuals, in violation of the ADA. The plaintiffs argued that the website was a place of public accommodation. Granting Southwest Airlines' motion to dismiss, the court held that the airline's website was <u>not</u> a "place of public accommodation" as defined by the ADA:

> *In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit had recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation. Where Congress has created specifically enumerated rights and expressed the intent of setting forth "clear, strong, consistent, enforceable standards," courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover "virtual spaces" would be to create new rights without well-defined standards.*

227 F. Supp 2d at 1318 (internal citations omitted).

Other courts have taken an even more absolute approach in finding that Title III does not apply to non-physical spaces. For example, in *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006 (6th Cir. 1996), the Sixth Circuit held that Title III does not govern an insurance policy because places of public accommodation are confined to physical spaces. *See also Ford v. Shering-Plough Corp.*, 145 F.3d 601 (3rd Cir. 1998) (holding that Title III does not apply to a benefits policy because the plain meaning of public accommodation is a physical place).

In contrast, other earlier court decisions indicated that Title III obligations should be applied to non-physical places, which could include websites. For example, *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), in which the defendant argued that Title III does not apply to insurance policies because they are not a place of public accommodation, Judge Posner opined that "The core meaning of this provision [Title III of the ADA's nondiscrimination provision], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, **Web site**, or

[1] In 2000, the United States House of Representatives held a hearing regarding whether the ADA should apply to private Internet sites, but Congress has not amended the ADA to clarify the issue. *See* http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_0f.htm

other facility (whether in physical space **or in electronic space**, . . .) 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." *See also Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) (holding that that places of public accommodation need not be limited to physical spaces.)

The decision that triggered much of the current litigation and threats of litigation over websites is *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006). In the *Target* case, the National Federation of the Blind and a blind individual filed a lawsuit alleging that the design of Target's website prevented blind individuals from navigating it which, in turn, denied them full access to Target's stores. To distinguish Ninth Circuit precedent holding that a place of public accommodation must be a physical establishment, the Target plaintiffs argued that Target's website was a "service, privilege or advantage" of Target's "brick and mortar" stores because the website allows customers to purchase many of the items available in the 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. In other words, the court did not have to decide the issue of whether the website was a place of public accommodation because a "nexus" existed with a physical store. Target filed a motion for summary arguing that the website was not a physical location. In denying Target's motion, the Court noted that although under Ninth Circuit law "a 'place of public accommodation,' within the meaning of Title III, is a physical place," a "*nexus*" may be established between such a place and *a challenged service*. *Id.* at 952-953. The court summarized:

> *[T]o the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied. 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. In a later opinion, the court granted the plaintiffs' motion for class certification. *National Federation of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007). After class certification, Target settled the case for over $ 6 million plus attorneys' fees and agreed to make its website accessible pursuant to certain guidelines.

While the court never held that Target was required to make its website accessible to individuals with disabilities under the ADA, this case was significant in that the court found that the plaintiffs stated a claim under the ADA for which relief could be granted[2] because there was a potential "nexus" between the use of the website and the enjoyment of the goods and services offered at the retailer's physical store.

Other cases similar to Target have also settled. The Attorney General of New York filed a lawsuit against both Priceline.com and Ramada.com, alleging that the websites were inaccessible to blind individuals in violation of the ADA and New York law. As part of the settlements, the defendants agreed to reimburse the state for its costs in investigating and filing the lawsuit and also to make their websites accessible to blind and visually impaired individuals.

[2] In contrast, a number of California courts have held that website-*only* businesses are not places of public accommodation. Courts in Massachusetts and Vermont have reached the opposite conclusion.

2. The Department of Justice's Changing Position

In 2010 DOJ announced in an Advanced Notice of Proposed Rulemaking (ANPRM) that it would issue new regulations under Title III of the ADA to address the accessibility of public accommodations websites, indicating that such regulations were necessary and businesses would have time to comply. In addition, DOJ indicated that public accommodation companies would not have to have accessible websites if they offered an equivalent alternative way to access the goods and services provided on the website, such as by offering a staffed telephone line that provided an equal degree of access in terms of hours of operations, options, and range of information.

DOJ changed its position on June 25, 2015, when it filed statements of interests in two lawsuits brought by the National Association of the Deaf alleging that two universities had failed to caption videos posted to their websites. In court filings, the DOJ stated that although it was planning to issue Title III website accessibility guidelines by early 2016, it considered businesses obligated to make websites accessible and would continue to pressure business by joining in similar lawsuits. In other words, the obligation to make public accommodation websites accessible exists *right now*.

The latest change in position occurred just last month, when DOJ announced that it will not issue any regulations for public accommodations websites until at least 2018. Instead, DOJ stated that it will implement similar regulations in 2016 for state and local governments (Title II), and then learn from the implementation of the Title II regulations before finalizing regulations for Title III businesses.

3. Summary

At this time, no legally binding rules or regulations state whether a business has to have an accessible website, much less defining what "accessible" means or requires. For businesses in the 11th Circuit (Alabama, Georgia, and Florida), strong language from the Court of Appeals states a website is not a place of public accommodation.[3]

On the other hand, the DOJ and many disability rights groups continue to file lawsuits alleging that websites must be made accessible. Some courts have agreed with them, and some defendants have decided to settle their cases instead of fighting the litigation.

C. What Should You Do if You Receive a Similar Letter?

If your utility receives a similar letter, you need to immediately contact counsel. Although it is not clear if the law firms have potential plaintiffs who utilize your company's website, many disability rights organizations have strong ties with such law firms and can assist them in finding local plaintiffs to file lawsuits. Consequently, the threat of litigation should not be ignored.

As set forth above, the law in this area is far from settled, and there are good arguments supporting the position that utilities are not be obligated to make their websites accessible to all individuals with disabilities. On the other hand, many businesses want their websites to be fully accessible to their disabled customers. However, as with most technical issues, the extent to which a utility may be able to make its website accessible (e.g. whether it addresses all disability issues or just some) will depend on a number of factors.

[3] In the Eleventh Circuit, the issue of whether a website is a service linked to a physical place of public accommodation, and, therefore, subject to Title III of the ADA remains open.

All of these issues, including the costs of defending a case or settling claims, should be considered in determining the appropriate action to take in response to these "demand" letters.

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