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Recent New York Federal Court Decision Confirms Applicability of the Americans with Disabilities Act to Various Commercial Consumer-Oriented Websites as Places of "Public Accommodation"

March 26, 2018 – U.S. District Judge Paul Engelmayer of the Southern District of New York issued a recent decision holding that a "commercial website" qualifies as a place of "public accommodation" under the Americans with Disabilities Act ("ADA"), which requires a "right of equal access" to blind or visually impaired consumers, among other persons with disabilities. This December 20, 2017 decision *in Del-Orden v. Bonobos, Inc.*, 17 Civ. 2744, adds to a growing trend of decisions throughout the U.S. – although far from a consistent and uniform body of national law – which suggest that entities with commercial consumer-oriented websites need to consider whether their sites are compliant with the access requirements intended under the ADA. Such compliance may require, among other things, modifications to the website enabling consumers to use screen-reading software used by visually impaired consumers to navigate the internet and "read" website content.

Title III of the ADA, enacted in 1990, and its implementing regulations, prohibit discrimination on the basis of disability in full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations provided at any place of "public accommodation," including by a private entity. Since the World Wide Web and ecommerce as they currently exist today were not present in 1990, the ADA did not explicitly address whether websites are places of "public accommodation" or not. Recently, there have been a plethora of lawsuits asserting ADA violations against various retail and consumer-oriented commercial websites for the alleged failure of those websites to provide equal access to blind and visually impaired consumers. Such lawsuits are typically commenced as class action suits on behalf of similarly situated visually impaired consumers, but are usually resolved long before any class is certified. In his recent decision, Judge Engelmayer noted that the issue of whether or not the ADA applies to commercial websites as places of "public accommodation" has not been squarely addressed by the Second Circuit Court of Appeals, the final authority on federal statutory issues in New York, Connecticut and Vermont (unless the U.S. Supreme Court weighs in, which it has not). Nonetheless, after surveying various rulings of federal judges in New York and around the country, he concluded that even if a commercial website was not, by itself, directly subject to the

ADA as a place of "public accommodation," such website would clearly fall within the scope of ADA protection where a non-compliant website allegedly impairs the user's access to a "traditional public accommodation, such as a merchant's brick-and-mortar stores." Therefore, even under this narrower approach advocated by certain courts, any company with a retail or publicly accessible store or location needs to consider whether to make its website compliant with the ADA.

While no authoritative guidance has been issued by the U.S. Justice Department on how commercial website owners should make their sites accessible to visually impaired persons, most courts addressing the issue have looked to the Worldwide Web Consortium's Web Content Accessibility Guidelines version 2.0 ("WCAG 2.0") for guidance on the appropriate measures to be taken. Even though such claims under the ADA only provide for injunctive and other equitable relief – and ***not money damages*** – plaintiffs bringing such putative class actions typically seek financial compensation under the ADA provisions authorizing recovery of attorney's fees as well as under analogous state anti-discrimination statutes that often provide for monetary recovery (which is available to consumers under New York state law).

While there are different theories to try to defeat these types of claims through litigation, as illustrated by Judge Engelmayer's ruling denying defendant's motion to dismiss, such defenses have not been typically successful based on recent decisions by New York federal judges. Ultimately, the best defense to such claims and simultaneously to enhance the accessibility of a business's website to the greatest number of potential users is to comply with one of the available options set forth in the WCAG 2.0 guidelines. Unless and until such website is so compliant, the website owners are potentially subject to being sued in one or more federal class actions for violation of the ADA.

If you have any questions about whether or not your website may be at risk for such potential ADA and related claims and lawsuits, please contact:

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