

December 2007

The Fashion Group at Schiff Hardin LLP

*The Fashion Group
at
Schiff Hardin LLP*

David Jacoby

212.745.0876

djacoby@schiffhardin.com

Judith S. Roth

212.745.0878

jroth@schiffhardin.com

Maxim H. Waldbaum

212.745.0815

mwaldbaum@schiffhardin.com

Stacie R. Hartman

312.258.5607

shartman@schiffhardin.com

Chris L. Bollinger

312.258.5724

cbollinger@schiffhardin.com

Lori D. Greendorfer

212.745.0814

lgreendorfer@schiffhardin.com

Amy M. Rubenstein

312.258.5625

arubenstein@schiffhardin.com

Preston C. Delashmit

404.437.7050

pdelashmit@schiffhardin.com

Robert E. Lesser

404.437.7051

rlesser@schiffhardin.com

Marc Silverman

212.745.0872

msilverman@schiffhardin.com

Harold S. Nathan

212.745.0838

hnathan@schiffhardin.com

On-Line Access and Accommodation for the Disabled

As many as one in five Americans have a physical, mental or emotional disability, a figure likely to grow as the Baby Boomer generation ages. The disabled are a significant market force as well as a potent political one. In recent decades, various laws not only have prohibited blatant discrimination against disabled individuals, they also have required the rethinking of sometimes unintended barriers to the disabled and required accommodations to be made. Most business-people today would recognize that their physical stores must offer accommodations to visually impaired shoppers. Readers may remember litigation against department stores over aisles that were too narrow for wheelchair users to navigate. As individuals



turn more and more to the Internet for shopping information, the question emerges whether businesses also must make their websites accessible to visually disabled users. A recent federal court decision may be pointing to an affirmative answer. The case serves not only as an important reminder of the legal requirements for serving the disabled in brick-and-mortar facilities but also in the context of dealings on-line.

In National Federation for the Blind v. Target Corporation, No. C 06-01802 MHP (N.D. Cal. Sept. 28, 2007), U.S. District Judge Marilyn Hall Patel certified a national class of legally blind individuals who allege that they have attempted unsuccessfully to access Target.com, and that as a result they, as well as a subclass of similar Californians, have been denied equal access to the enjoyment of goods and services offered in Target stores. The plaintiffs and Target already had gone through a structured negotiation process, as a result of which various improvements to the Target website had been made.

Federal law and laws in many states prohibit discrimination against the physically disabled. The NFB case involved the federal Americans with Disabilities Act (“ADA”) and two California statutes, the Unruh Civil Rights Act “Unruh Act” and the Disabled Persons Act (“DPA”), which have been applied more broadly. A purported class of blind users of the Target.com website claimed all three statutes were violated because the website had impediments to its use by the visually impaired.

The visually impaired — who number about 140,000 in California alone — can access websites by using screen-reading software, which reads out loud what someone else would see. Examples include JAWS (Job Access With Speech) and Window-Eyes. Where an image rather than text is displayed, websites can be set up to include invisible codes called “alt-text.” If, for example, the website displays a photo of a red sweater, the alt-text a blind user would hear might say, “red sweater.” Other characteristics that enable a visually impaired site visitor to navigate a website effectively include image (site) maps with alt-text, prompts for completing forms online and the ability to perform transactions using the keyboard rather than only the mouse.

Of the three statutes, ADA covers only access to physical spaces. However, it was alleged that the limitations of the website impacted the ability of blind customers to use Target stores, because they could not “pre-shop” for items. (To the extent website features were unrelated to the use of physical stores, the court previously had dismissed those ADA claims.) Although Target sought summary judgment, the court declined to decide on the merits which website limitations amounted to a denial of access to the physical stores under ADA. Equally, it did not decide whether accommodative steps taken by Target, such as in-store assistance or having a 1-800 customer service number, satisfied the requirements of ADA. The Court did grant summary judgment against the named representative plaintiff on the ADA claim, but it granted leave for another named plaintiff to be substituted.

Any violation of ADA is automatically a violation of the two California statutes. Beyond that, however, the court held that neither state law requires the link to a physical location that ADA does, so the California laws can apply to the website whether or not it impacts use of the physical Target stores. For the DPA, this is a ruling of first impression.

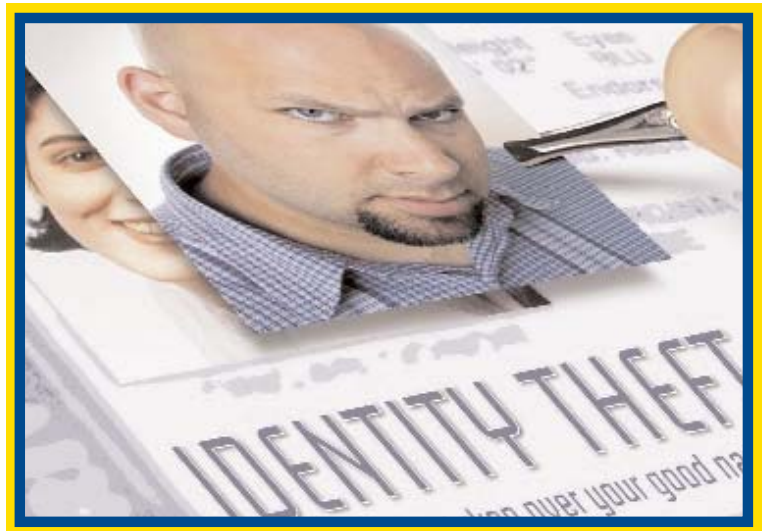
It bears underscoring that the class certification is not a finding on the substantive merits under any of the three statutes. Just the same, the

decision should be a wake-up call for businesses about the need to make sure they are accommodating disabled consumers. While no other case brought by visually handicapped advocacy groups has proceeded to class certification, earlier claims against Southwest Airlines and America Online, among others, led to website changes. If you transact business through a website accessible in California, you must consider the potential application of the Unruh Act and the DPA, which contain provisions for statutory damages. Nationwide, if you have physical locations as well as a website, you must consider whether any limitations blind people face on the website impact their ability to enjoy the use of the physical stores.

Retailer Liability for Identity Theft — Developments

In another development with a California focus, Governor Arnold Schwarzenegger vetoed a bill passed by the Legislature that would have imposed liability for financial institutions' identity theft costs on retailers that retained customer transaction information improperly. Minnesota adopted such a law earlier this year (see September 2007 issue) and other states are considering similar bills.

Retailers on the other coast fared less well in court in dealing with the same issue. At least some claims by credit card-issuing banks for the cost of what has been described as the largest retail security breach in history — the compromise of data from over 45 million customer credit and debit transactions at TJX Companies — survived dismissal motions. In re TJX Companies Retail Security Breach Litigation, 2007 WL 2982994 (D. Mass., October 12, 2007). The Massachusetts federal district court permitted some claims by a putative class of card-issuing banks against TJX and Fifth Third Bancorp., its verifying bank, to proceed, while dismissing others. The banks claim that both TJX and Fifth Third did not disclose that the requirements imposed by operating regulations for MasterCard and Visa cards were not being followed, and seek to recover their costs in making good on fraudulent charges and in replacing affected cards. Third-party beneficiary and negligence claims were dismissed. However, a claim of negligent misrepresentation, as well as a claim of violation of Massachusetts Chapter 93A (the state's unfair and deceptive claims and practices statute) on grounds of negligent misrepresentation



alone, were allowed to proceed. As we went to press with this issue, TJX announced it had settled with another group of card-issuing banks for up to \$40.9 million.

The Skinny on Thin — Update

Montreal Fashion Week adopted health-oriented restrictions for models at its October shows based on body mass index. The new rules also ban models under 16 years of age.

A Little Fashion Advice

Preston Delashmit and **Rob Lesser**, assisted by **Randy Smith** and **Danielle Cook**, in our Atlanta office were the lawyers for the group that represented the trustee of an employee stock ownership plan in connection with its purchase, on behalf of the employees, of thirty percent of the stock of **Nicole Miller**. * * * **Stacie Hartman**, a partner in our Chicago office, gave a talk entitled "**Whose Design Is It Anyway?**" during **Chicago Fashion Focus** in October. * * * Television program "Business First News" conducted an interview on efforts to combat counterfeiting with Schiff Hardin's Intellectual Property Practice Group leader, **Paula J. Morency** * * * New York partner **David Jacoby** was quoted in an article on the prospects for **eco-friendly fashion** in the July 1, 2007 issue of *American Way*, the in-flight magazine of American Airlines.

© 2007 Schiff Hardin LLP

This publication is for the general information of clients and friends of our firm. It does not provide legal advice for any specific matter. Readers should consult a lawyer directly for such advice. This publication, or parts of it, may be considered attorney advertising material under professional conduct rules applicable to lawyers.

Schiff Hardin LLP is a general practice law firm with 400 attorneys, founded in 1864.

The Accessories Council is a not-for-profit, national trade association that was established in 1995 with the mission of increasing consumer use and awareness of accessories.



www.schiffhardin.com

Atlanta

Boston

Chicago

Lake Forest

New York

San Francisco

Washington