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The disability-rights personal-injury "crossover" case in public accommodations

ADA TITLE III CLAIMS, UNRUH CIVIL RIGHTS ACT AND CDPA CAN BE POWERFUL TOOLS WHEN A PERSON WITH A DISABILITY IS INJURED BECAUSE OF INACCESSIBLE CONDITIONS

Introduction

A case where a person with disabilities is injured in a building or facility that does not meet the requirements of the Americans with Disabilities Act (or our state's building code) presents several potential theories of recovery that can greatly increase the value of the case. In short, in a case where pleading disability rights-related causes of action is appropriate, the plaintiff may obtain up to three times their actual damages as well as their attorney's fees and costs. Accordingly, a lawyer representing a person with a disability who suffered an injury either because the condition of inaccessible premises or noncompliant policies and procedures at a place of public accommodation has to carefully explore the possibility that he or she may have a case that is far more valuable than a simple negligence matter.

This article will point out some of the basic considerations, opportunities and pitfalls in a potential "ADA/PI crossover." Obviously, disability-rights law is an extremely complicated "niche" area of law and it will be impossible to consider every issue that arises in this type of litigation.

Title III of the Americans with Disabilities Act of 1990 (ADA) prohibits "public accommodations" from discriminating against people with disabilities. California has enacted several statutes which also bar discrimination against people with disabilities, which include, but are not limited to, the Unruh Civil Rights Act and California Disabled Persons Act ("CDPA"), both of which state that a violation of the ADA is a violation of each of those respective acts. Additionally, a violation of our state's building code may constitute an independent disability rights violation.

Though California's disability rights laws and the ADA have similarities, there are differences; with California's laws in areas providing more protection and providing for damages unavailable under the ADA. This article provides a general overview of the issues related to Title III claims under the ADA and disability discrimination claims under the Unruh Civil Rights Act and CDPA and how these laws can be powerful tools in cases where a person with a disability is injured because of inaccessible conditions.

Understanding the Americans with Disability Act (ADA)

The ADA is landmark federal legislation which advances the civil rights of people with disabilities, with a "clear and comprehensive national mandate for the elimination of discrimination against people with disabilities," provides protections in employment, public services, public accommodations and services operated by private entities, transportation and telecommunications.

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Title I prohibits all covered entities (employers with 15 or more employees) from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Title II prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by state and local governments. Title III guarantees that individuals with disabilities are offered full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations" offered by a place of public accommodation. Title IV addresses telecommunications.

The elements of an ADA claim

Title III of the ADA provides in pertinent part, "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 . . . operates a place of public accommodation." (42 U.S.C. § 12182(a).) "The ADA prohibits discrimination on the basis of disability in the enjoyment of public accommodations, including with respect to access." (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044.). A plaintiff in a Title III ADA claim must prove three elements to prevail:
1. that plaintiff is disabled within the meaning of the ADA;
2. that the defendant owns, leases, or operates a place of public accommodation; and
3. that plaintiff was denied public accommodation by the defendant due to his or her disability.
(*Arizona ex re. Goddard v. Harkins Amusement Enters, Inc.*, 603 F.3d 666, 670 (9th Cir. 2012); see also *Molski v. M.J. Cable, Inc.* (9th Cir. 2007) 481 F.3d 724, 730.)

As to the first element, the ADA defines a disability as a "physical or mental impairment that substantially limits one or more of the major life activities of such an individual." (42 U.S.C. § 12101(2)).

As to the second element, the ADA identifies 12 categories of facilities that are considered places of public accommodation for purposes of a Title III action. (42 U.S.C. § 12181). The categories include private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs. (42 U.S.C. § 12181(7)(E).) Two categories of entities are exempt: "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e))"; and "religious organizations or entities controlled by religious organizations, including places of worship." (42 U.S.C. § 12187.) In *PGA Tour, Inc. v. Martin* 532 U.S. 661 (2001), the U. S. Supreme Court emphasized the scope of Title III's coverage: "[T]he legislative history indicates [that the categories of public accommodations] 'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled [sic]." (*Id*., at 676-77.) Note that though the definition of a public accommodation is quite broad, it is also exclusive and businesses and business operations that do not fall into one of the above 12 categories are not covered by Title III of the ADA.

Note that, like a building code, the ADA governs the construction of buildings and facilities built after January 26, 1993. However, unlike a building code, the ADA also regulates buildings and facilities that are existing facilities (those built before January 26, 1993.)

As to the third element, places of public accommodation that are "existing facilities" are required to remove architectural barriers that deny access to persons with disabilities, "where such removal is readily achievable." (42 U.S.C. § 12182(b)(2)(A)(iv).) For buildings and facilities that were constructed, or altered, after January 26, 1993, "discrimination" includes the failure to design and construct or to make alterations to the facility that render it "readily accessible to and usable by individuals with disabilities." (42 U.S.C. § 12183(a)(1).) Whether an architectural element at a facility denies full and equal access to persons with disabilities is determined based on the ADA Accessibility Guidelines. (*Chapman v. Pier I Imports* (*U.S.*), *Inc.*, 631 F.3d 939, 945 (9th Cir.2011).)

The third element – whether plaintiff was denied access on the basis of disability – is met if there was a violation of applicable accessibility standards. (*Chapman v. Pier I Imports* (*U.S.*), *Inc.*, 631 F.3d 939, 945 (9th Cir. 2011); *Donald v. Cafe Royale* (1990) 218 Cal.App.3d 168, 183).) A disabled person who encounters a "barrier," i.e., an architectural feature that fails to comply with applicable standards that are related to his or her disability, suffers unlawful discrimination as defined by the ADA. (42 U.S.C. § 12182(b)(1)(A)(i); *Chapman, supra*, 631 F.3d at p. 947, fn. 5.) There is no intent requirement. Unlike other civil rights violations, liability does not depend on proof of intentional discrimination. (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044, citing *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 669-670; 42 U.S.C. § 12188(a).)

Policies, practices and procedures

Title III of the ADA extends past the built environment and also covers policies, practices and procedures. The ADA defines discrimination as "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." (42 U.S.C. § 12182(b)(2)(A)(ii).) In addition to the requirements that a public accommodation be constructed and modified in compliance with access guidelines, the ADA sets forth four kinds of discrimination:

Adopting eligibility criteria that screen out people with disabilities. (42 U.S.C. § 12182(b)(2)(A)(i).)

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A failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. (42 U.S.C. § 12182(b)(2)(A)(ii)).)

A failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services. (42 U.S.C. § 12182(b)(2)(A)(iii)).

A failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars, where such removal is readily achievable." (42 U.S.C. § 12182(b)(2)(A)(iv)).) This provision applies to businesses and facilities built before January 26, 1993.

The federal regulations, at 28 C.F.R section 36.304 defines readily achievable as "easily accomplishable and able to be carried out without much difficulty or expense" and also depends on other factors including the size and abilities of the entity in question.

Where such barrier removal is not "readily achievable" the business must provide goods and services through "alternative methods," if such methods themselves are "readily achievable." (42 U.S.C. § 12182(b)(2)(A)(v); 28 C.F.R. §36.305.) What is readily achievable will be determined on a case-by-case basis in light of the resources available.

New construction and alterations

Under the ADA, facilities newly built or altered after January 23, 1993, must be "readily accessible …. and usable," and must comply with the detailed regulations and the ADA Accessibility Guidelines. (42 U.S.C. § 12183(a); 28 C.F.R. Part 36.) The standards for new construction and alterations differ, depending on the circumstances. In addition, the alteration of a building or facility requires that an amount up to 20 percent of the value of the alteration be expended on improving the path of travel to and from the area that was altered.

Filing a complaint for a violation of Title III of the ADA

Individuals can file a civil action for injunctive relief under Title III of the ADA. The remedies in a private suit include permanent or temporary injunctions, restraining orders, or other types of orders including removal of barriers or an order to provide a service or auxiliary aid. (42 U.S.C.S. §§ 12188(a)(1).) Compensatory and punitive damages are not available in a private action civil lawsuit. A private litigant cannot obtain damages for the denial of access, only injunctive relief. (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044.)

The Department of Justice has the authority to file suits, which usually focuses on complaints that show a pattern or practice of discrimination. Remedies in such an action include those available in a private action, but also include monetary damages such as out-of-pocket expenses and damages for pain and suffering. The court may also assess civil penalties against the violator in an amount up to $50,000 for the first violation, and up to $100,000 for any subsequent violation.

Attorney's fees

The prevailing party is entitled to recover reasonable attorney's fees. (42 U.S.C. § 12205.) In some cases, the courts have held that a prevailing defendant will only be allowed attorney's fees if the defendant proves that the plaintiff's suit was "frivolous, unreasonable, or without foundation." (*Summers v. A. Teichert & Son* (1997) 127 F.3d 1150; *Adkins v. Briggs & Stratton Corp*. (1998) 159 F.3d 306; *Bruce v. City of Gainesville* (1999) 177 F.3d 949; *Brown v Lucky Stores, Inc.* (2001) 246 F.3d 1182.)

California Unruh Civil Rights Act and California Disabled Persons Act

Two overlapping laws, the Unruh Civil Rights Act (Civ. Code, § 51, et seq.) and Disabled Persons Act (Civ. Code, §§ 54-55.3) are the principal sources of state disability access protection. (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044.)

The Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations and includes disability as one among many prohibited bases. Civil Code section 51(b) provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

The Unruh Civil Rights Act applies to all business establishments which provide services, goods, or accommodations to the public. The California Supreme Court has emphasized that "business establishments" must be interpreted "in the broadest sense reasonably possible." (*Curran v. Mount Diablo Council of the Boys Scouts of Am.*, (1998) 17 Cal.4th 670, 696.) With the exception of claims that are also violations of the ADA (discussed below), intentional discrimination is required for violations of the Unruh Civil Rights Act, and the plaintiff must prove:

- plaintiff was denied full and equal privileges to, or otherwise discriminated against by, a business;
- a motivating reason for the denial or discrimination was the business' perception of plaintiff's protected status; plaintiff was harmed; and
- the business' conduct was a substantial factor in causing the harm. (Civ. Code, § 51(f).)

This article addresses the Unruh Civil Rights Act as it applies to disability discrimination and access issues.

A plaintiff whose rights are violated under the ADA may now seek damages under both the Unruh Civil Rights Act and Disabled Persons Act and is not limited to injunctive relief as plaintiffs are under federal law. The ADA requires existing facilities to remove barriers to

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access so long as removal is readily achievable, regardless of whether the facility has been altered. By amending the Civil Code to provide that a violation of the ADA is also a violation of the Unruh Civil Rights Act and the DPA, the Legislature has authorized the filing of civil actions under state law to enforce the federal requirement that architectural barriers be removed where it is readily achievable to do so, and that alternative means of access be provided where physical access is not readily achievable. (*Californians for Disability Rights v. Mervyn's LLC* (2008) 165 Cal.App.4th 571.)

In 1992, shortly after passage of the ADA, the California Legislature amended the state's disability protections "'to strengthen California law in areas where it is weaker than the [ADA] and to retain California law when it provides more protection for individuals with disabilities than the [ADA].'" (*Munson v. Del Taco, Inc., supra,* 46 Cal.4th at 669, quoting Stats. 1992, ch. 913, § 1, p. 4282.)

As part of the 1992 reformation of state disability law, the California Legislature amended the Unruh Civil Rights Act to incorporate by reference the ADA, making violations of the ADA per se violations of the Unruh Civil Rights Act. (Civ. Code, § 51(f). See also, *Munson v. Del Taco, Inc., supra,* at 668-669.)

The 1992 law was intended not only to prohibit ADA violations under Civil Code section 51, but when such violations occur to provide a damages remedy under Civil Code section52. (*Munson, supra,* at 673.) Damages under Civil Code section 52 include injunctive relief, actual damages, which may include three times the actual damages but no less than $4,000, and attorney's fees. (Civ. Code, § 52(a), (c)(3); *Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1058.)

A defendant's liability for minimum statutory damages may be reduced to $1,000 per offense (instead of $4,000) if (1) a business is in a location that was completed after January 1, 2008, or (2) the business received a Certified Access Specialist (CASp) inspection and within 60 days of service of the complaint, corrected all construction-related violations (along with other requirements) (Civ. Code, § 55.56(f)(1).) A defendant's liability may be reduced to $2,000 per offense (instead of $4,000) if the defendant corrects violations within 30 days of being served with complaint, and the defendant is a small business with 25 or fewer employees within the last three years and with gross receipts of less than $3.5 million. (Civ. Code, § 55.56(f)(2).)

The Disabled Persons Act substantially overlaps with and complements the Unruh Civil Rights Act. (*Munson, supra,* at 675) but has a more narrow focus and guarantees people with disabilities equal rights of access "to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation." (*Munson, supra,* at 674, fn. 8; see, Civ. Code, §§ 54(a), 54.1(a)(1).)

As with the Unruh Civil Rights Act, the California Legislature amended the Disabled Persons Act to incorporate ADA violations and make them a basis for relief under the act. (Civ. Code, §§ 54(c), § 54.1(d); *Munson, supra,* at 674; *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1131.) Civil Code section 54(a) provides, **"**Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places."

The available remedies under the Disabled Persons Act include actual damages, which may include three times the actual damages but no less than $1,000, and attorney's fees. (Civ. Code, § 54.3(a); *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 792.)

With respect to awarding reasonable attorney's fees in construction-related accessibility lawsuits filed on or after January 1, 2009: (1) Civil Code section 55.55 provides that the court may consider written settlement offers made and rejected, and (2) Civil Code section 55.56 provides that statutory damages under Section 52(a) or 54.3(a) may be recovered only if plaintiff personally encountered or had actual knowledge of a violation on a particular occasion, and may be assessed per occasion rather than per each violation of construction-related accessibility standards at the site.

Recognizing the overlap between the Unruh Civil Rights Act and the Disabled Persons Act, the Legislature expressly foreclosed double recovery. (Civ. Code, § 54.3(c); *Munson, supra,* at 675. See also, *Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044-1045.)

Element of intent

As mentioned above, the California Supreme Court has held that "a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination…" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149. *Munson supra,* at 671; *Cohn v. Corinthian Colleges, Inc*. (2008) 169 Cal.App.4th 523.) The California Supreme Court in *Munson, supra,* however, concluded that a plaintiff who sought damages under Civil Code section 52, claiming the denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act, does not require intentional discrimination where the ADA has also been violated. (*Munson, supra,* at 678. [plaintiff, who had a disability requiring use of a wheelchair, filed federal action alleging violations of the barrier/access violations under the ADA and Unruh Civil Rights Act because the doors to the bathroom at a San Bernardino Del Taco were too narrow to allow a wheelchair, in addition to other barriers. The Ninth Circuit certified a question to the California Supreme Court whether the element of intent in such an action was required.])

Alternatively, the plaintiff may file an action for monetary relief under the Disabled Persons Act Civil Code section 54, in which case the plaintiff does not need to prove intentional conduct (*Donald v. Cafe Royale* (1990) 218 Cal.App.3d 168, 176), but the automatic minimum penalties will be only $1,000 per occurrence. (Civ. Code, § 54.3(a).)

Many lawsuits brought under the Unruh Act involve allegations that a business establishment's premises

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discriminate against disabled customers and/or the facility is not in compliance with the ADA. (See, e.g., *Hankins v. El Torito Restaurants, Inc.*, (1998) 63 Cal.App.4th 510; *Moeller v. Taco Bell Corp.*, (2011) 816 F.Supp.2d 831.)

To maintain an action for the statutory $4,000 minimum damages, the plaintiff must establish that she or he was "denied full and equal access on a particular occasion." (*Donald v. Cafe Royale Inc.* (1990) 218 Cal.App.3d 168, 183.) The court in *Feezor v. Del Taco, Inc.* (2005) 431 F.Supp.2d 1088, 1091, concluded that a plaintiff is entitled to $4,000 for each time he or she visits an establishment that contains architectural barriers that deny the plaintiff of full and equal enjoyment of the premises. "Such an interpretation is supported by case law and is consistent with the plain language of UCRA [Unruh Act]." (*Ibid.*) The court in *Hubbard v. Twin Oaks Health and Rehabilitation Center* (2004) 408 F.Supp.2d 923, 932, held that a plaintiff does not need to prove that she or he was wholly excluded from enjoying the business' services, only that he or she was "denied full and equal access."

Integrating the ADA, Unruh and California Disabled Persons Act into a PI case

Standing

In 2008, the California Court of Appeal held that to have standing to sue for discriminatory practices under the Unruh Act, a plaintiff must tender the purchase price for a business' services or products. *(Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 416.) A plaintiff must have a special interest that is concrete and actual rather than conjectural or hypothetical to have standing. (*Id*. at 417.)

However, recall that a person who suffered a violation of the ADA can likely bring an action under the Unruh Act (and unquestionably under the CDPA) without a showing that they tendered a purchase price for services or products.

Additionally, standing for an ADA violation, (which is discussed above), involves the plaintiff meeting standing requirements under federal law for injunctive relief. This means that the person has to be able to demonstrate a particularized intent to return to the public accommodation in question. Remember, that under the ADA, damages are *not* available for violations of Title III. However, both Unruh and the CDPA only require a "violation" of the ADA in order to trigger those statutes' damages provisions.

Another issue to examine in an analysis of standing is whether a potential client is actually a person with a disability. Note that the definition of a person with a disability or medical condition under California law (as set forth in the Government Code) is more inclusive than the federal definition of a person with a disability. Additionally, it's important to determine whether a potential client has the type of disability that would be impacted by the access violation that you believe might exist. For instance, the dimensions of an accessible stall in a bathroom (and the associated features such as grab bars) are designed for people who use wheelchairs or otherwise have mobility disabilities. If a potential client only has visual disabilities, you are not going to be able to make an injury lawsuit out of a toilet stall with inaccessible dimensions.

Though this may seem obvious, it is only because the example itself is obvious.

Careful analysis and the opinion of an expert should be sought if you have any question as to whether someone with a disability was injured by a barrier that was related to or connected with their specific disability or medical issues.

Statute of Limitations

The court in *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 754-760 concluded that claims for denial of full and equal accommodations under the Unruh Civil Rights Act must be brought within two years of the alleged discrimination.

There is no requirement that a plaintiff exhaust administrative remedies. The same statute of limitation applies to the CDPA. In general, the statutes of limitation actions under the ADA follow their respective states' personal injury statutes.

Building Code violations, the ADA and pleading

The Unruh Act and CDPA do not require that a business construct, alter, or repair the premises beyond that construction that is otherwise required by other provisions of law. (*Walker v. Superior Court*, (1991) 53 Cal.3d 257, 269; Civ. Code, § 51(d).) However, the CDPA and likely the Unruh Act do require that covered entities comply with the accessibility requirements of the California Building Code in effect when construction is undertaken or alterations or modifications are made. So, even in cases where the ADA has not been violated, it may still be possible to pursue a disability rights action if you can prove that the California Building Code was violated and that the violation of a portion of the Building Code designed to provide access to people with disabilities (found in Chapters 11 A and 11B) caused the plaintiff's injuries. Though this sort of action under the Unruh Act might require a showing of intent, an action under the CDPA does not require a showing of intent. The basis for a CDPA cause of action for violation of the Building Code is based in the enactment of disability access standards in the Building Code to provide access for people with disabilities. Health & Safety Code sections 19955 and 19955.5 were enacted "[t]o ensure that public accommodations or facilities constructed in this state with private funds adhere to the provisions of Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code." Accordingly, you can argue that the violation of specific access regulations in the code create a violation of the general anti-discrimination provisions of Sections 54 and 54.1.

Parties

Choosing your potential defendants in a disability rights/PI cross case is even more important than it is in a typical personal-injury action. At least two federal

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district courts in California have determined that only the person or entity that actually "designed and constructed" the facility can be liable for new construction violations under the ADA. It can be assumed that some courts will also hold that the same limitation would apply to alteration cases under the ADA. Accordingly, if the current owner of the building or facility is not the party who conducted construction or alteration, you may be forced to prove that the removal of the barriers in question was "readily achievable" at the time of your client's injury. As noted above, the readily-achievable barrier removal standard doesn't always require strict compliance with the ADA's building standards and does not require burdensome expenses or substantial structural work.

Taking note of the above possible restriction on the viability of a case, note that California Building Code violations giving rise to an action under the CDPA might create a better chance for imputing the liability of past actors to current owners; this theory is still awaiting precedent. However, the takeaway is that you should carefully consider current and past owners and their relative potential liabilities for barrier removal (or creation and/or removal of barriers in initial construction or alterations) when analyzing a potential case. If previous owners of a building or facility are still in business at the time you file suit, it will be important to name them and bring them in for their past misfeasance.

Venue

Whether to file in state or federal court is a decision you will have to make based on the facts of the case as well as your comfort litigating in federal court. To file a disability-rights personal-injury crossover case in federal court (and have a hope to remaining there) you're going to have to have a strong argument for injunctive relief under the ADA. The ADA defense bar is particularly skilled at mooting out cases from federal court by simply removing the barriers in question and then moving to dismiss. In this instance, you will have to re-file in state court to pursue your state law causes of action (including your damages claims under Unruh and the CDPA).

However, federal court allows several advantages in a disability rights action, including the ability to aggressively move for partial summary judgment on issues of liability for the failure to remove or the creation of a barrier. Though this won't close the case on damages, a judgment on the underlying violation of the federal civil rights law (which might also prove a violation of underlying state civil rights laws via violation of the Building Code) is a powerful tool. Additionally, federal district court judges are more familiar with disability rights issues and can be more effective in helping a plaintiff move a righteous case forward.

If you choose state court, there are several provisions of the Code of Civil Procedure and Civil Code that will make your life very complex. Whenever you serve a case in state court that alleges "construction related accessibility" claims you need to meet specific pleading requirements set forth in the Code of Civil Procedure, section 425.50, which states: (a) An allegation of a construction-related accessibility claim in a complaint, as defined in subdivision (a) of Section 55.52 of the Civil Code, shall state facts sufficient to allow a reasonable person to identify the basis of the violation or violations supporting the claim, including all of the following:

1. A plain language explanation of the specific access barrier or barriers the individual encountered, or by which the individual alleges he or she was deterred, with sufficient information about the location of the alleged barrier to enable a reasonable person to identify the access barrier.
2. The way in which the barrier denied the individual full and equal use or access, or in which it deterred the individual, on each particular occasion.
3. The date or dates of each particular occasion on which the claimant encountered the specific access barrier, or on which he or she was deterred.

Additional pleading requirements (and an additional $1,000 filing fee) are mandated if you're representing a person who has filed 10 or more construction-related accessibility cases in a 12-month period prior to the initiation of your suit. In addition, note that any complaint alleging a construction-related accessibility claim, as those terms are defined in subdivision (a) of Section 55.3 of the Civil Code, shall be verified by the plaintiff. A complaint filed without verification shall be subject to a motion to strike. This rule is procedural and does not apply in federal court.

These pleading requirements are not extraordinarily difficult to meet, but they do involve you assuring that you state the date of the incident, describe the barriers in question and how they impact the plaintiff in a way that allows a defendant to reasonably locate the alleged barriers in question.

The same requirements are going to need to be set forth in any demand letter right as well. We will take a look at demand letters in the next section. In addition to the above pleading requirements, you are also going to need to serve a draft of documents along with your complaint. These documents generally serve to give defendants notice of their rights in connection to being sued for a disability rights action. Though these documents (and the complex stay and early evaluation procedures they delineate) were designed to help small businesses slow down the rate of fire from lawyers representing "high frequency litigants," they will also capture your complaint in a disability-rights personal-injury crossover suit. The documents include statements about the rights of defendants to reduce minimum statutory damages (which won't really be an issue in a personal injury crossover case) based on early remediation of barriers, the date of construction of a facility, the size of the business or the hiring of a certified access specialist. Recent changes made to the lengthy list of documents that need to be filed include a form answer (which could be catastrophic for a defendant in an access case involving personal injuries) and additional information about early evaluation conferences. Fortunately, all the required forms are now available as

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"DAL" forms on the judicial council website.

Further, when you're in state court it is entirely possible that the defendants or the court itself will seek to use the various early evaluation mechanisms (either properly or improperly) to obtain a stay. The rights of certain defendants to get a stay and early evaluation or mandatory settlement conference are set forth in the Civil Code (starting at § 55.54, et seq.) and bear reading. From a practical perspective, if your complaint in the hands of a relatively competent defense attorney, they are going to understand that the various mechanisms to demand an early evaluation conference or slow down the litigation process were not designed for cases with any significant personal injuries involved and it is unlikely that they will try to exercise any of those procedures. Nonetheless, being forewarned is being well armed and you are urged to review the above sections of the Civil Code before filing a disability rights/PI crossover case.

Please note that there is a debate as to whether a lawyer should serve the above-noted state forms in federal court actions, as all of the procedural rights (though perhaps not the cautionary advice) are inapplicable in the federal forum. The best practice is to serve the forms in any event, as failure to do so can result in discipline.

Speaking of letters...

Regardless of whether you file your case in federal or state court, California has severely limited what you can say in a demand letter that alleges a violation of a construction-related accessibility standard. In addition, demand letters that allege the above violations may not include a demand for money and must be sent to the State Bar trial counsel and the California Commission on Disability Access. This may seem ludicrous to anyone who practices in the area of personal-injury law, but making an error here can result in an investigation by and discipline from the State Bar. Because of the risks involved and the lack of desire on the part of most practitioners to send their demand letters to the State Bar trial counsel, many disability rights attorneys choose not to send demand letters at all – even if the case is a personal-injury matter. In most instances, the first "contact documents" presented to defendants after a preservation of evidence letter are a summons and complaint. That being said, if you wish to send a demand letter, be advised to carefully examine the requirements set forth in Section 55.31, et seq. of the Civil Code. Believe it or not, you are even prohibited from *speaking* about a demand for money damages. Further, you can still be disciplined if your client writes a letter and it turns out that it was written at your direction. If you're starting to wonder whether these restrictions are Constitutional, you're on the right track. They probably are unconstitutional and it is very likely that they will be challenged in the coming year. Note, that if you choose to pick your way through the mine field of writing a demand letter, you are able to discuss damages once the defendants ask. Prudent practice would involve requesting the defendants or an insurance adjuster to send you a document indicating that they initiated the conversation about damages.

Lodging lawsuits and resolution documents with the California Commission on Disability Access (CCDA)

Regardless of whether you file in state or federal court, you are required to send a copy of every lawsuit you file that alleges s violation of a construction-related accessibility standard to the California Commission on Disability Access. This is a simple process that can be accomplished by email; but failing to adhere to the requirement can, of course, subject you to discipline. Additionally, when you settle a case you are required to file an additional document with the California Commission on Disability Access. This latter document is a simple form and the only caveat in this regard is to make sure that any confidentiality provisions in a settlement agreement still allow you to file the required CCDA document. Before filing and resolving an action with a construction-related accessibility claim, be sure to check the website of the CCDA to assure yourself that no new forms or filing requirements have been adopted and to understand the manner in which to electronically transmit documents to the agency.

Advantages and issues

Let's now consider some of the obvious advantages and tactics in litigation…

Attorney's fees

One of the most obvious advantages in bringing a disability rights case is the availability to obtain attorney's fees. Under the ADA, the Unruh Act and the CDPA the court may award the prevailing party attorney's fees. With respect to the ADA, the Unruh Act and the damages provisions of the CDPA, only a prevailing plaintiff is entitled to an award of attorney's fees unless it was determined that the case or cause of action was frivolous or otherwise without merit. Care should be taken in pleading to make sure that you don't request injunctive relief for a violation of the CDPA, as the California Supreme Court has determined that a court is required to award attorney's fees to a prevailing defendant when a party seeks injunctive relief under Section 55 of the California Civil Code (the injunctive relief enforcement section for violations of the CDPA). (See, *Jankey v. Lee* (2012) 55 Cal.4th 1038).) Both Section 52 of the California Civil Code (which sets remedies for violation of the Unruh Act) and Section 54.3 (which sets remedies for violation of the CDPA) provide for an award of attorneys' fees. Please note that, in pursuing attorney's fees for violations of the above civil rights laws in a case alleging construction-related accessibility violations, the court will be able to look at the conduct of the attorneys on both sides of the case in determining an award of fees. (See, Section 55.55 of the California Civil Code).

Damages

Both Sections 52 and 54.3 of the Civil Code provide for awards of up to three times actual damages for violations of the Unruh Act and CDPA (respectively).

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Both sections also provide for minimum statutory damages of $1,000 for a violation of the CDPA and $4,000 for a violation of the Unruh Act. As noted above, these minimum statutory damages can be reduced by behavior of the defendants either prior to a lawsuit (or after one is been initiated) with respect to inspecting properties, remediating barriers, etc. Again, however, the numerous provisions of the California Civil Code related to a defendant's ability to minimize their exposure to minimum statutory damages is really more of an issue for disability rights cases without any serious personal injuries involved.

The term actual damages is generally assumed to include all special and general damages typically available. The ability to obtain treble damages should be of particular interest as the trebling is technically not a form of punitive damages (which are based on the amount necessary to deter conduct). The threat of being able to obtain treble damages from a jury without having to prove fraud, oppression or malice (or dig deeply into the financial solvency of the defendants) can be an effective settlement tool. The best argument to make on statutory damages is that all damages available under Sections 52 or 54.3 of the California Civil Code are in fact "statutory" with the floor being the stated minimums and the ceiling being three times actual damages.

Contribution

An excellent argument exists that the statutory nature of the damages available under Sections 52 and 54.3 of the California Civil Code means that the plaintiff's negligent contributory actions or omissions might not come into the calculation of an award of damages. Again, this argument can be a powerful tool in settlement. Though arguing against contribution may be on the table, a plaintiff is still required to mitigate their damages. (See, § 55.56 of the California Civil Code).

Pleading negligence

Though it has not been firmly established that a violation of an accessibility standard under the ADA or the California Building Code constitutes negligence per se (and one appellate court case seems to hold that it does not), I believe that a violation of a number of state and federal standards could likely and should be argued to constitute negligence per se based on their nexus to safety rather than just access. Arguing negligence along with disability rights causes of action creates both opportunities and risks to the value of the case. The first opportunity is that many general liability carriers will turn down coverage in a disability rights case, even if it involves a physical injury.

The addition of a negligence cause of action will often trigger insurance coverage. Additionally, to the extent you believe that the condition of a building or facility or the actions of defendants were negligent it would be unwise to fail to plead that cause of action in the event that your disability rights causes of action go awry.

However, at some point before trial you might be tempted to consider dropping a negligence cause of action to minimize the chance that a court will decide to not award attorney's fees or award them on reduced sum. Unless you are absolutely certain about your chances of prevailing on your disability rights case or in the event that your disability rights causes of action are substantially more likely to prevail than your negligence cause of action, you likely should not drop the negligence cause of action.

Discovery

In a disability rights crossover case, you shouldn't rely on your trusted premises liability or negligence discovery packages. Even if the defendants remediate the barrier or barriers at issue in your case long before trial, you are still going to need to prove the elements of disability discrimination to prevail under state anti-discrimination laws (remember that your federal remedies are limited to injunctive relief and attorney's fees and that attorney's fees are not available once the defendant remediates barriers without a judicial change in the relationship between the parties through some form of judgment.)

Mayra Fornos is the founder and principal of Fornos Law Firm *in Los Angeles. For more than 20 years, she has been representing and advocating for those who have sustained catastrophic and serious life-altering injuries, as well as those who have been discriminated against because of their disabilities. Her firm was selected for inclusion in the 2014 and 2015 edition of US* News & World Report *as "Best Law Firms — Tier 1" in the areas of Personal Injury and Medical Malpractice. Ms. Fornos has been consistently included in the Los Angeles Times listing of "Los Angeles' Women Leaders In The Law." In addition to her legal work, Ms. Fornos founded Ralph's Riders Foundation, a California non-profit organization which is dedicated to helping rebuild lives after spinal cord injury, in honor of her late husband.*