

GUNTHER V. LIN, FILED OCTOBER 26, 2006, THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, ISSUED A POTENTIAL LANDMARK ADA DECISION WHICH THOSE IN THE KNOW BELIEVE WILL CHANGE THE LANDSCAPE OF ADA LITIGATION IN CALIFORNIA

by Martin H. Orlick

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In potentially one of the most important ADA decisions in years, the California state Court of Appeal ruled Thursday, October 26, 2006, in *Gunther v. Lin*, 415 F. Supp. 2d 1048, 2006, that ADA plaintiffs must plead and prove intentional discrimination in order to recover the \$4,000 minimum civil penalty for each and every offense, under Civil Code § 52(a). Relying upon the California Supreme Court's ruling in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, which held the Unruh Civil Rights Act was intended to "punish intentional and morally offensive conduct," the *Gunther* court held the plaintiff must plead and prove that business owners deliberately intended to discriminate against the disabled in order to recover the higher \$4,000 minimum statutory damages per offense. In 1993, the Unruh Act was amended to provide "a violation of the right of any individual under the Americans with Disabilities Act of 1990, . . . shall also constitute a violation of this section (Section 51) ". California subsequently enacted the Disabled Persons Act, Civil Code §§ 54, *et seq.* ("DPA"), which similarly makes it a violation of the ADA a violation of state law. The DPA authorizes minimum statutory damages of \$1,000 for every offense.

The *Gunther* court held that technical deviations from compliance with the Federal Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), without proof of an intent to discriminate, will prevent a plaintiff from recovering the \$4,000 minimum statutory damages per offense. Plaintiff must elect whether to proceed to trial under the Unruh Act or the DPA. If a plaintiff elects to proceed under the Unruh Act to recover the higher \$4,000 minimum statutory damages, but fails to plead and prove intentional discrimination, under *Gunther*, no minimum statutory damages will be

awarded. The court noted that some ADAAG standards are so "intuitive and obvious" it would be hard to believe that noncompliance with them could be other than intentional. Yet other deviations are far from obvious and require a finding of intentional discrimination.

Plaintiff visited a Jack-in-the-Box restaurant at a time just before the completion of remodeling. The restroom was accessible, but plaintiff found the hot water pipe was not insulated and the mirror was too high. Gunther sued seeking at least \$8,000 in automatic penalties under Section 52 for the alleged ADAAG violations. The court found no evidence that defendant intended to violate the ADA. Defendant successfully moved for summary judgment based on the *Harris* decision, which construed the language of Section 52 to require an intent to discriminate before its damage provisions would be triggered. The ruling was affirmed on appeal last week after a thorough analysis of the legislative intent under California law governing access of disabled persons to public accommodations.

Importantly, the *Gunther* court analyzed and rejected the Ninth Circuit decision in *Lentini v. California Center for the Arts* (9th Cir. 2004) 370 F.3d 837 which held, in one brief paragraph that it devoted to the issue, because the *Lentini* court refused to follow the California Supreme Court decision in *Harris*. The *Gunther* court ruled:

Gunther could have sued Lin based on Lin's unintentional ADA violations, but recovered the smaller statutory minimum penalty under section 54.3. Rather, he elected to try to obtain the larger statutory minimum penalty under section

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52, but that remedy is reserved for intentional violations. Since California law (quite logically) does not allow plaintiffs to proceed under both statutes, and Gunther failed to present any evidence that the defendant had intentionally discriminated against him as required by section 52:

The judgment is affirmed. Costs rest with the discretion of this court. Justice is well served in this case by an award of costs against Gunther and to the prevailing respondent.

The *Gunther* decision will certainly impact damages recoverable in existing cases brought under the Unruh Act and will likely affect cases which are based on inadvertent, technical deviations of the various and often confusing ADAAG standards. Proving intentional discrimination may be difficult in most cases.

Many think the *Gunther* decision, with its higher standard of proof (intentional discrimination), will stem the tide of ADA litigation and reduce or eliminate suits involving technical violations of accessibility laws. This author is not convinced there will be a significant reduction in ADA cases, which are largely attorney fee-driven. However, the *Gunther* decision is already impacting settlement strategies. In light of *Gunther*, there are clear strategic implications for defending and cost-effectively resolving ADA litigation.

The *Gunther* decision may have additional import for insurance coverage. Since the *Modern Development Company v. Navigators Insurance Company* (2003) 111 Cal.App.4th 932, decision which found that ADA claims involved "intentional acts" and were therefore not covered under most policies, coverage has been systematically denied. In light of *Gunther*, insureds may be well advised to revisit adverse coverage decisions.



Martin H. Orlick is a partner in the Real Estate Department of Jeffer, Mangels, Butler & Marmaro's San Francisco office. Mr. Orlick is a member of the American College of Real Estate Lawyers (ACREL) and has been a member of the International Council of Shopping Centers (ICSC) for nearly 20 years. He has handled more than 175 ADA cases for retailers and other commercial businesses. He can be reached at 415.984.9667 or morlick@jmbm.com.