

## **CALIFORNIA SUPREME COURT DECISION COULD LEAD TO INCREASED ADA LITIGATION**

by Martin H. Orlick

*June 2009*

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On June 12, 2009, the California Supreme Court unanimously ruled in *Munson v. Del Taco, Inc.* (S162818) that plaintiffs need not prove intentional discrimination to recover \$4,000 minimum statutory damages per occurrence under California's Unruh Civil Rights Act (the "Unruh Act"). This outcome is likely to lead to more lawsuits filed under the Americans with Disabilities Act (ADA) and California's disabled access laws.

The case stemmed from two seemingly inconsistent rulings in California on whether an ADA plaintiff must plead and prove "intentional discrimination" to recover \$4,000 minimum statutory damages under the Unruh Act, or without such pleading and proof, whether the plaintiff was limited to recover only \$1,000 under California's Disabled Person Act ("DPA"). First, the federal ADA prohibits businesses from denying disabled individuals equal access to any public facilities. Similarly, California's Unruh Act and DPA bar public businesses from discrimination based on disability, among other classifications. Here's the difference: while the Unruh Act allows plaintiffs to collect actual damages, trebled, or a minimum of \$4,000 in statutory damages without sustaining any physical injury and the DPA allows \$1,000 minimum statutory damages per occurrence, the ADA does not afford any monetary amount to private plaintiffs.

The Ninth Circuit Court of Appeals in *Lentini v California Center for the Arts* (370 F.3d 837, 847 (9th Cir. 2004)) ruled that ADA violations, whether or not they involved intentional discrimination, would also qualify for damages under the Unruh Act. Further complicating the situation, however, was the California state appellate decision, *Gunther v. Lin* (144 Cal.App.4th 223 (4th Dist. 2006)). *Gunther v. Lin*, asserted that ADA plaintiffs must plead and prove intentional discrimination in order to recover the \$4,000 minimum statutory damages for each and every offense under the Unruh Act stating that the *Lentini* decision was incorrectly decided.

In light of the conflict between the state and federal courts, the Ninth Circuit Court of Appeals petitioned the California Supreme Court to interpret the standard for imposing Unruh Act minimum statutory damages. *Munson v. Del Taco, Inc.* (S162818) resolves the inconsistent rulings of *Lentini* and *Gunther* by concluding that *Lentini's* interpretation was right—that a plaintiff "need not prove intentional discrimination in order to obtain damages."

While this will likely prove troublesome for business owners, if there is a silver lining in the Supreme Court's decision, it is the recognition that recent legislative changes under California SB1608 were designed to curb ADA abuse. Under SB1608, pure "testers" cannot recover damages simply because they identified technical access barriers that had no genuine impact of their full use and enjoyment of a

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business. The new law creates a procedure for business owners to “certify” that their facilities meet state and federal accessibility standards and offers certain litigation safeguards. The Law created a process to certify experts in the field of ADA compliance called the Certified Access Specialists program (CASp).

SB1608 is also designed to resolve accessibility lawsuits early and cost-effectively by providing business owners who have initiated CASp certification the option to stay or stop all litigation and proceed to mediation. The primary benefit of staying litigation is to avoid expensive discovery and other proceedings which drive up legal fees. This process has been in effect for ADA cases in the Northern and Southern District federal courts for years, and it is now available in other courts. To avail oneself of this stay, the business owner must, within 30 days of being served with the summons and complaint, file a motion to stay. An Early Evaluation Conference is to be set within 50 days from filing the request. Under SB1608, a plaintiff can only recover damages for violations actually encountered or violations which deterred the plaintiff from visiting the business on a particular occasion. Reasonable settlement offers by business owners, if rejected, are to be considered in determining any attorneys fees to be awarded the plaintiff. SB 1608 may offer litigation safeguards in ADA lawsuits. For more information on the SB 1608 and the CASp certification process, call us.



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