

## THE IMPACT OF *MUNSON v. DEL TACO* ON CALIFORNIA DESIGN PROFESSIONALS

By: Michael M. Edwards, Esq.

The California Supreme Court recently ruled unanimously in *Munson v. Del Taco, Inc.* (2009) 46 Cal. 4th 661 (“*Munson*”) that the California Unruh Civil Rights Act (the “Unruh Act”) provides a private litigant with a right to sue for damages under the Unruh Act in the case of unintentional Americans with Disabilities Act (“ADA”) violations. This decision disapproved a lower appellate court opinion on the same point, *Gunthur v. Lin* (2006) 144 Cal. App. 4th 223. Thus, under the Unruh Act, if there is an ADA violation (whether or not intentional), the injured party may sue an owner or lessor (among others) for damages specified in the Act. This, for obvious reasons, can have a significant impact on design professionals who may be involved in providing professional services for projects where an ADA violation is claimed.

### The Effect Of Munson:

The current Unruh Act is an offshoot of a public accommodations law, preventing discriminatory behavior by business people. It has been amended many times since its original enactment. The now overruled *Gunthur v. Lin, supra*, 144 Cal. App. 4th 223 decision had interpreted the Act to say that a 1990’s revision of the Unruh Act (*see*, Civil Code, section 51(f)) concerning the right of a private person to sue for damages in the case of an ADA violation would only apply if the ADA violation was intentional.

The California Supreme Court disagreed in *Munson*. This means that a “victim” of any ADA violation may sue for damages under the Unruh Act in state court. This approach is somewhat remarkable given that the Federal ADA itself does not allow lawsuits for damages to be filed by private persons; rather, private parties may only sue for injunctive relief under the ADA. Further, the Federal ADA only allows lawsuits for its violation to be filed in United States District Court. State courts are without jurisdiction over pure ADA actions. *Munson* did not attempt to change this portion of the law.

After *Munson*, every ADA violation (whether negligent or intentional in origin), allows for a party alleging the Federal ADA violation to bring a state court suit for damages under the Unruh Act. This is to be distinguished from an action founded solely upon the ADA, which lawsuit is only susceptible to Federal Court jurisdiction. The damages allowed by the Unruh Act, pursuant to Civil Code section 52, include, among other things, “up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney’s fees that may be determined by the court . . . .” Thus, a recovery by one suing under the Unruh Act may entitle him/her to more than actual damages, and attorney’s fees as well if he/she prevails.

Simply put, *Munson* effectively encourages individuals who want to sue owners or lessors for ADA violations to sue in state court, not using the ADA itself, but by way of the Unruh Act. Most likely, this means personal injury plaintiffs will attempt to state Unruh Act causes of action because, if they succeed, they recover statutory damages and attorney fees.

Also, when the plaintiff does choose to sue under the ADA in Federal Court for the injunctive relief allowed by the ADA, such plaintiff, thanks to *Munson*, can additionally bring a state cause of action, one which is permitted to be included under Federal “supplemental jurisdiction,” for damages under the Unruh Act.

#### The Effect Of Munson On Design Professionals:

In light of the holding in *Lonberg v. Sanborn Theaters, Inc.* (9th Cir. 2001) 259 F.3d 1029, the class of ADA violators can be owners, lessors, lessees or operators of a public accommodation; however, design professionals cannot be sued in the Ninth Circuit (which circuit includes the State of California) for an ADA violation. *Lonberg* determined that, while the ADA applies to owners and lessors (and certain others), its reach does not extend to design professionals. Interestingly, some Federal appellate courts have come to a different conclusion on ADA suits; however, to date, design professionals are protected from Federal ADA lawsuits filed in California. This fortunate result, though, does not prevent owners or lessors, who are sued under the ADA and/or the Unruh Act, from seeking implied (or possibly express) indemnity from a design professional who allegedly committed professional malpractice, which resulted in the ADA violation, or a personal injury suit alleging a *Munson* cause of action.

After *Munson*, it is highly likely, as borne out by a recent trend that California state court actions founded upon the Unruh Act, and based upon ADA violations, will commonly be brought against owners or lessors for damages. It has and will continue to produce indemnity cross-suits by such defendant owners or lessors against design professionals for alleged malpractice in connection with the ADA violation allegedly causing the loss.

Insurance coverage questions arise from these cross-suits; For example, questions arise from: (a) the nature of any “ADA violation” exclusions found in the Design Professional’s errors and omissions policy; (b) the ability of the indemnitee cross-complainant to recover from the design professional sums in excess of the actual damages suffered by the plaintiff (which the Unruh Act appears to allow); and (c) possible questions over an attorneys’ fees recovery by the cross-complainant against the design professional.

#### Conclusion:

The holding in *Munson* provides, in essence, that negligent ADA violations may be resolved in state court suits for damages under the guise of the amended Unruh Act. If recent trends continue, this will result in a sizable number of state court actions that never could have been brought before *Munson*. While design professionals probably cannot be sued directly under the Unruh Act (because they cannot be Federal ADA violators), they may well be joined as indemnity cross-defendants in litigation by owners or lessors of properties who are sued for ADA violations.

More litigation for design professionals is never positive. Additionally, there may be insurability problems for design professionals, depending on the scope of their errors and omissions insurance policies. Design professionals should check with their insurance broker on this issue.

Before *Munson*, the Unruh Act reference to ADA violations was believed to only relate to intentional acts, and those are clearly quite rare. Post-*Munson*, Unruh Act damages lawsuits are available regardless of the nature of the violation, and this changes the litigation “playing field” for everyone, design professionals included.

---

About the Author: Michael M. Edwards . Edwards is a partner with Byron & Edwards , APC, and is an "AV" rated attorney by *Martindale-Hubbell* with over 33 years practice experience. He is an arbitrator for the Superior Court of the County of San Diego (1980-present) and serves on the panel of arbitrators of the American Arbitration Association. Additionally, he has served as Judge *Pro Tem* for the San Diego Superior Court (1986-present) and for the San Diego Municipal Court (1991-present as well as a member of the San Diego County Planning Commission (1992-present).

Mike’s areas of concentration are contract law, contract negotiations, construction litigation, professional liability (specializing in defense of architects and engineers) and real estate and employment law. He is the author of "Liability for Innovative but Unproven Designs," Cushman/Hedemann, Architect and Engineer Liability: Claims Against Design Professionals (Second Ed. 1995).

For more information on this or other topics, Mr. Edwards can be reached at 619-400-5880, medwards@bemapc.com or visit Byron & Edwards, APC’s website at [www.bemapc.com](http://www.bemapc.com).