FAQ 7.02: *Multiplied Financial Damages Claims for Pre-Notice Visits in ADA/accessibility Cases:*

Is the plaintiff in your case "playing" the "multiple visit game"?

Some plaintiffs in ADA/accessibility lawsuits seek multiples of the $4,000 financial damage amount provided by California Civil Code § 52(a) based on the claim that they visited the property which is the subject of the lawsuit on a number of occasions before the defendant would have had any chance to know about their claims. Defendants complain that this is like seeking multiplied damages for tripping over the same pothole repeatedly and question whether such claims have been authorized by California's legislature.

Claimants often cite new California Code § 55.56(e) to support their contention that they should be able to recover financial damages for each time they visit a property which does not meet applicable standards for disabled accessibility, but they overlook the companion provision which follows it in subsection "(f)" which confirms that "[t]his section does not . . . alter any legal obligation of a party to mitigate damages." California's law on the mitigation of damages is well established and predates even the first laws for accessibility by people with disabilities: "[i]t is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part."[1] Because the relevant portions of California's suite of antidiscrimination laws (i.e., the Unruh Act, Disabled Persons Act, etc.) were enacted long after California's policy of mitigation of damages was established in the courts, the legislature is presumed to have been aware of the law when creating new standards; if it did not take steps to override those standards, it can be presumed to have intended that they remain unchanged.

Does this mean that a person with disabilities cannot return to a property which has problems? Of course not— it only means that defendants should not be expected to pay for damages which the claimant could have avoided through reasonable efforts. In the context of an ADA/accessibility claim, it hardly seems reasonable for a claimant to seek financial damages for returning repeatedly to a location before the defendant has any notice of the claim (i.e., at a time when the plaintiff had no reason to believe that anything was likely to have changed). One plaintiff[2] sought $120,000 for thirty (30)

[1] Green v. Smith (1968) 261 Cal App 2d 392, 396

[2] See Mundy v. Magic Real Estate, Los Angeles Superior Court Case No. BC422907

alleged visits to a fire-damaged property over a period of just a few days (i.e., it appeared he would have had to have gone several times per day in light of the filing date, fire date and the evidence produced).

Some of the confusion about whether multiplied damages are recoverable for pre-notice revisitations by claimants arises directly from the language of new California Civil Code § 55.56(e), which indicates in pertinent part that "[s]tatutory damages may be assessed . . . *based on each particular occasion that the plaintiff was denied full and equal access* . . ."; but it is important to consider the very unusual circumstances under which claims for multiplied damages have been awarded in California courts. In one unusual situation, a theater patron who was asked to remove her service animal contended that she was deprived of the benefit of her prepaid series of season tickets, and a court agreed.[3] This makes sense, because if she was directed by management to remove the dog for one performance, it is likely that she would be for others as well.

But the Lentini case involved a number of factors not present in most typical ADA/accessibility lawsuits: (1) an intentional decision was made by an employee of the defendant which would exclude a theatergoer who genuinely required a service animal (in most cases, a condition— like a step at the front door— has simply remained there for decades and was never *intended* to exclude anyone), and (2) the exclusion would make a series of unique, prepaid, time-sensitive events valueless to the claimant.

Since Lentini and CRASCA[4], a number of opportunists have advanced countless creative theories to multiply the claim for damages they are seeking to recover from defendants before those defendants had knowledge of their claims. It is not surprising that courts have been reluctant to allow claimants to act unilaterally to increase damages mandated by statute. But what about once a defendant gains knowledge of a claim? Shouldn't the defendant take quick steps to correct any noncompliant conditions so the plaintiff can return unencumbered? Not without checking with their lawyer first— in California, a defendant who makes changes to their property after becoming aware of a plaintiff's claim could guarantee an award of attorneys' fees to the plaintiff under the "catalyst" doctrine[5] (i.e., the inference that the lawsuit was a catalyst in motivating the defendant to make appropriate changes); also, some attorneys have claimed that defendants who made changes destroyed relevant evidence.[6]

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[3] Lentini v. California Center for the Arts Escondido (2004) 370 F3d 837

[4] i.e., the Construction Related Accessibility Standards Compliance Act (arising from 2008 California Senate Bill 1608), which spawned new California Civil Code § 55.54, *et. seq*.

[5] See, *inter alia*, Graham v. Daimler Chrysler (2004) 34 Cal 4th 553

[6] But since the claimant's attorney will normally have a duty to make a reasonable investigation of the plaintiff's claims before filing an action under both FRCP 11(b) and CCP § 128.7(b) and much can be documented through free digital pictures, such a contention may have limited application in most ADA/accessibility claims.

The foregoing reflects the truism that defendants should consult a qualified attorney before taking any action of potential legal significance in their cases. Some attorneys have suggested both (1) that defendants should not have destroyed evidence by making changes after a lawsuit was filed, and (2)-- in the same case[7] -- that their client was entitled to multiplied damages for revisiting the property after the lawsuit was filed, on claims that changes had not been made. So while courts are experienced in dealing with ambitious claims of this nature, Defendants should get qualified legal advice before paying claims based on multiple visitations at any time after the plaintiff becomes aware of conditions which could limit accessibility.

Some claimants express frustration that California's requirement for mitigation of damages suggests to them that they should not be allowed to go wherever and whenever they please, but it does not do that— it only limits their ability to recover for repeatedly re-encountering conditions they claim entitle them to statutory financial damages.

While the practice of claiming increased damages through voluntary revisitation of property at a time when the claimant has no reason to believe anything will have changed is troubling to many, a growing number of claimants appear to be engaging in a customary practice of seeking multiplied damages for visiting nearly every property they sue more than once, and seeking financial damages for each alleged visit. Some lawyers think this is an abuse of process, as discussed in Booker v. Roundtree (2007) 155 Cal App 4th 1366-- the Booker court concluded that an abuse of process occurred "in the use of the process not proper in the regular conduct of the proceedings"; because the 1968 Green v. Smith case (cited above) confirmed unequivocally that "[i]t has been the policy of the courts to promote the mitigation of damages" it is reasonable to conclude that the practice of mitigating damages is regular in the course of legal proceedings, while a practice of multiplying would not be. Claimants who *customarily* seek multiplied damages for claimed revisitation of locations they have no realistic expectation would have changed (i.e., before defendants are on notice of their claims) should get qualified legal advice about whether such practices needlessly expose them to counterclaims for abuse of process and other significant consequences.

Claimants who regularly seek multiplied legal damages often respond that they customarily reduce their demands when confronted with the impropriety of this practice and do so just to "get the attention" of the business defendants they sue. But just as those who *routinely* overbill insurance companies or government agencies, there are consequences for customarily asserting that they are entitled to recover greater damages than the law would ordinarily provide— the plaintiff is the one with exclusive knowledge of his/her claim and the plaintiff's attorney is in the best position to evaluate that claim before filing it. In the same way that attorney may have a duty to "zealously advocate" the client's claim, s/he also has a duty not to use the court's jurisdiction to seek recovery of sums applicable law would not authorize. For example, while a

[7] Strong v. Horton Plaza, United States District Court, Southern District of California, Case No. 09-cv-2901-JM-NLS, ECF Doc 36 at 3:19 and 14:16

claimant could demand $100,000 for pain and suffering if the facts supported the claim, they could not demand a cent for securities fraud if they didn't acquire a security.

Defendants who are being asked to pay multiples of the $4,000 damage amount authorized by California Civil Code §52(a) should get those demands in writing— this can take the form of asking for a written settlement demand from the plaintiff's attorney or writing a letter confirming an understanding of a settlement demand verbally received (ask the addressee to confirm in writing, by fax and email, if the settlement demand was different from that summarized in the confirming letter). California legislators recently enacted a reform (new California Civil Code § 55.55) which can allow a party in cases of this nature to show the judge written settlement offers made and rejected to support a claim that attorneys fees being sought should not be awarded. To the extent a claimant customarily seeks damages in excess of the amount which would be authorized by statute in ADA/accessibility claims, others remedies may also be available.
