
PUBLIC ACCOMMODATIONS

I. Introduction¹

Both federal and California law prohibit private businesses from discriminating against clients and customers with disabilities. In many respects the federal and state requirements are similar, particularly as some California laws expressly incorporate the protections of federal law. However, California attorneys should be aware that federal and California law differ in some regards, with state law often providing more expansive protections. Thus, each potential cause of action must be individually examined with attention to its specific protections, limitations and remedies.

The key federal law is Title III of the Americans with Disabilities Act of 1990 (ADA), which prohibits “public accommodations” from discriminating against people with disabilities as defined by that statute.² 42 U.S.C. §§ 12181-12189; 28 C.F.R. Part 36. Some entities covered by Title III (e.g., most private universities and hospitals) will also be covered by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which imposes a disability nondiscrimination mandate on recipients of federal financial assistance. Section 504 will not be discussed in detail in this chapter, but practitioners should be aware that its protections, limitations and remedies are different than those of Title III, and in many respects offer more expansive protections for people with disabilities.

Several California statutes originally enacted prior to the ADA also guarantee people with disabilities nondiscrimination in and access to a wide range of private businesses.³ These include the Unruh Civil Rights Act, CAL. CIV. CODE § 51, *et seq.* (Deering 2003)(“Unruh Act”); Section 54.1 of the Civil Code CAL. CIV. CODE § 54.1, *et seq.* (Deering 2003)(sometimes known as the “California Disabled Persons Act” or the “California Public Accommodations Law”); and Section 19955 of the Health and Safety Code; *see also* CAL. HEALTH & SAFETY CODE § 19955 *et*

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² As discussed in Chapter 7, the ADA definition of “disability” is found at 42 U.S.C. § 12102(2). While the federal definition of disability has been increasingly narrowed by the courts, consistent with ADA legislative history and enforcing agency pronouncements, the U.S. Supreme Court has nevertheless recognized that HIV infection can constitute a federal “disability.” *See Bragdon v. Abbott*, 118 S.Ct. 2196 (June 25, 1998); U.S. Department of Justice ADA Title III Regulations, 28 C.F.R. 36.104 (2003); U.S. Department of Justice, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL, §III-2.2000 (Nov. 1993) (hereinafter *Title III Technical Assistance Manual*). *See also Toyota Motor MFG v. Williams*, 122 S.Ct. 681 (Jan. 8, 2002); *Sutton v. United Airlines, Inc.*, 119 S.Ct. 2139 (June 22, 1999); *Murphy v. United Parcel Service, Inc.*, 119 S.Ct. 2133 (June 22, 1999); *Albertsons, Inc. v. Kirkingburg*, 119 S.Ct. 2162 (June 22, 1999). Title III also prohibits discrimination against any individual on the basis of his or her association with a person with a disability. 28 C.F.R. § 36.205 (2003).

³ As discussed in Chapter 7, it should be noted that California has independent definitions of “physical disability,” “mental disability” and “medical condition” that are more expansive than the federal law definition of “disability” as recently narrowed by the courts. *See* Cal. Gov. Code § 12926, as amended by the Prudence K. Poppink Act, AB 2222 (2000), 2000 Stats., ch. 1049; AB 677 (2001), Stats. 2001, ch. 708; *Colmenares v. Braemar Country Club* (Feb. 20, 2003) 29 Cal.4th 1019; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 257; *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 721-722. *But see Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 442-443. As with federal law, California law prohibits discrimination based on association with an individual with a disability. CAL. CIV. CODE § 51.5(a).

seq. (Deering 2003). Additionally, any private entity receiving financial assistance from the state of California is subject to a disability nondiscrimination mandate, CAL. GOV. CODE § 11135, and there are access requirements that apply to buildings constructed with state funds. CAL. GOV. CODE § 4450.

This chapter will discuss the relevant legal and practical matters a person with a disability and his or her attorney should consider when evaluating a potential case for disability discrimination against a public accommodation. To prevail, a plaintiff must establish the following as to each potential cause of action: (1) he or she meets the applicable definition of disability (discussed in Chapter 7); (2) the potential defendant is the type of entity subject to the statutory nondiscrimination mandate; and (3) the defendant's behavior or policies are prohibited, even when potential defenses available to the entity are taken into consideration. The differing remedies provided by the several statutes, which should also be considered in selecting claims, are also discussed below.

II. What Types of Entities Are Covered?

A. Public Accommodations under the ADA

The definition of “public accommodation” under the ADA is broad. The following basic requirements must be met for an entity to be considered a public accommodation. First, it must be a private entity. 42 U.S.C. § 12181(7) (2003).⁴ Second, it must affect commerce. *Id.*⁵ Third, it must be an entity that “owns, leases (or leases to), or operates” a “place of public accommodation.” 42 U.S.C. § 12182 (a). Pursuant to this definition, commercial landlords and tenants are both subject to Title III requirements. They may allocate compliance responsibility by lease or other contract, but such allocation is only effective as between the landlord and the tenant; an individual with a disability may pursue statutory claims against either or both. 28 C.F.R. § 36.201(b); *Title III Technical Assistance Manual, supra*, at § III-1.2000.

“Places of public accommodation,” in turn, must fit into one of the following twelve general categories:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

⁴ Public entities other than the federal government are covered by Title II of the ADA. 42 U.S.C. §§ 12131-12134. The federal government is covered pursuant to the 1978 amendments to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

⁵ The statutory definition of “commerce” can be found at 42 U.S.C. §§ 18181(1)-(5).

- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. §§ 12181(7)(a)-(I). While this list of categories is exhaustive, the examples contained therein are not. S. Rep. No. 101-116, at 59 (1989), H.R. Rep. No. 101-485, pt. 2, at 100 (1990). Title III coverage also extends to: “Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” 42 U.S.C. § 12189.

Because Title III was modeled on the Civil Rights Act of 1964, 42 U.S.C. § 2000a, it exempts from coverage two categories of entities: [1] “*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 [2] “*religious organizations* or entities controlled by religious organizations, including places of worship.” 42 U.S.C. § 12187 (emphasis added).

Whether an entity is a private club or establishment is not determined by a single test. Rather, a “number of variables must be examined in light of the Act’s clear purpose of protecting only the genuine privacy of private clubs whose membership is genuinely selective.” *Nesmith v. YMCA*, 397 F.2d 96, (4th Cir. 1968) (internal quotations, omissions, and citations omitted). Factors include whether the entity operates for profit, whether it is owned and controlled by members, *Daniel v. Paul*, 395 U.S. 298 (1969), the size of the organization, the extent to which it limits membership, *Nesmith*, 397 F.2d 96, size of the clubs membership fee, whether the club advertises for membership, *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312-13 (4th Cir. 1980), and whether the club has well-defined membership policies. *Nesmith*, 397 F.2d at 107. This list of factors is not exhaustive. Although the Supreme Court has not ruled on the issue, the Ninth Circuit held in *Jankey v. Twentieth Century Fox Film* that the private club exception protects establishments that fit within one or more of the twelve categories but are part of a private establishment. 212 F.3d 1159, 1161 (9th Cir. 2000). In *Jankey*, a commissary on Fox Film’s private movie lot was held to be outside the scope of Title III. *Id.*, at 1160-61.

A religious entity is exempted in “all of the activities of [the] religious entity, whether religious or secular.” *Title III Technical Assistance Manual, supra*, at § III-1.5200. Thus, religious organizations operating facilities that would otherwise be considered public accommodations are exempt from Title III requirements.⁶

In addition, although short-term lodgings such as hotels, inns, and motels are covered by Title III, residential housing such as apartments and condominiums are not covered.⁷ Title III’s failure to cover long-term housing is a function of the fact that Congress had already prohibited disability discrimination in private housing prior to the passage of the ADA by enacting the Fair Housing Amendments Act of 1988. *See* 42 U.S.C. §§ 3601, as amended (P.L. 100-430); 42 U.S.C. 12181(7)(A), H.R. Rep. No. 101-485(II) 101st Cong., 2d Sess. 383 (1990); and *Indep. Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993).⁸ Title III does, however, apply to real estate sales offices (including such offices located within model homes), as they are “sales and rental establishments” under 42 U.S.C. § 12181(7)(E).

There is a growing body of case law discussing the scope of the definition of public accommodation under Title III. The only Supreme Court case to address this issue is the well-known *PGA Tour, Inc. v. Martin*. In *Martin*, the Court held that the PGA, “as a public accommodation during its tours and qualifying rounds . . . may not discriminate against either spectators or competitors on the basis of disability.” 532 U.S. 661, 681 (2001). While this holding provides no direct guidance as to what specifically would be deemed a public accommodation in other contexts, the court emphasized the breadth 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 (quoting S. Rep. No. 101-116, at 59 (1989) and H.R. Rep. No. 101-485, pt. 2, at 100 (1990)) (internal footnotes omitted).

Several circuit courts have also considered the definition of public accommodation under Title III. Many of these cases have focused on the issue of whether there is a Title III cause of action against an outside insurance company issuing an employer-provided insurance benefit. The rulings have been generally adverse to plaintiffs, holding that “[a] benefit plan offered by an employer is not a good offered by a place of public accommodation.” *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc). *See also Chabner v. United of Omaha Life Ins.*, 225 F.3d 1042, 1047 (9th Cir. 2000); *Ford v. Schering Plow Corp.*, 145 F.3d 612-613 (3rd Cir. 1998).

Some of this insurance authority, as well as decisions issued in other contexts, construes the “place of public accommodation” requirement as necessitating a physical place, noting that the regulations define place as a “a facility, operated by a private entity, whose operations affect

⁶ Religious entities are, however, subject to the employment provisions of Title I of the ADA, though they are entitled to give preference in employment to the adherents of that faith, and may require that all applicants and employees conform to the tenets of that faith. 42 U.S.C. § 12113(c).

⁷ It is currently an open question whether residential and single room occupancy hotels are covered by Title III.

⁸ The FHAA also prohibits disability discrimination in public housing. Most public housing is additionally covered by Section 504 (applicable to recipients of federal financial assistance), and by Title II of the ADA, Subtitle A, 42 U.S.C. §§ 12131-12134 (applicable to all activities of state and local governments, including the provision of housing by such entities).

commerce, and fall within at least one of the twelve . . . categories. Facility, in turn, is . . . ‘all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.’” *Stoutenborough v. National Football League*, 59 F.3d 580, 583 (6th Cir. 1995) (quoting 28 C.F.R. § 36.104) (internal citations omitted). *See also Ford, supra*, 145 F.3d at 613 (restricting “public accommodation” to physical places). The Ninth Circuit has ruled that “some connection between the good or service complained of and an actual physical place is required.” *Weyer, supra*, 198 F.3d at 1114. However, there is also authority holding that discrimination need not be in the form of denial of access to the physical place, because the operator of a place of public accommodation is generally prohibited from discriminating against individuals with disabilities. *See, e.g., Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002)(contestant hotline, which was an automated fast finger telephone selection process for a television quiz show, was a place of public accommodation); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 302 (N.D. Cal. 1997) (unjustified denial of health insurance to spouse of an HIV-positive individual violates Title III); *Schultz v. Hemet Youth Pony League*, 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (Title III covers administrative bodies for youth baseball leagues, irrespective of their link to any physical facilities)

As to the requirement that the defendant *operate* the public accommodation, the Fifth Circuit has noted that, in the context of Title III, “operate” should be given its ordinary meaning. Thus, operate means to “conduct the affairs of; manage[.]” *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995) (*quoting* WEBSTER’S II: NEW RIVERSIDE UNIVERSITY DICTIONARY 823 (1988)). As a result, the court held that Title III did not apply to a franchisor. *Id.*, at 1068. Adopting the same rationale, and pointing out that courts have made the same determination for Titles I and II of the ADA, the Third Circuit held that individuals cannot be held liable under Title III. *Emerson v. Thiel College*, 296 F.3d 184, 189 (3d Cir. 2002); *see also Han v. Brobeck*, 2000 U.S. App. Lexis 23329 (9th Cir. April 11, 2000).

B. Scope of Coverage Under California Laws

The protections offered by each California nondiscrimination law are a function of specific statutory language, and thus the scope of coverage afforded by each statute must be analyzed independently.

The Unruh Act 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, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever*.” CAL. CIV. CODE § 51(b) (emphasis added).

The California Supreme Court has repeatedly emphasized that the legislature intended the Unruh Act to be read in “the broadest sense reasonably possible,” covering a broad range of “business establishments.” *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 468 (1962); *O’Connor v. Villiage Green Owners Ass’n*, 33 Cal.3d 790, 795 (1983) *Ibister v. Boys’ Club of Santa Cruz*, 40 Cal.3d 72, 76 (1985); *Warfield v. Peninsula Golf & Country Club*, 10 Cal. 4th 594, 599

(1995); *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal.4th 670, 696 (1998). The state high court has recognized that the Unruh Act comfortably encompasses non-profit as well as for-profit organizations that are sufficiently open to the public, and have “businesslike attributes” and/or are “places of public accommodation or amusement.” See, e.g., *Curran, supra*, 17 Cal.4th at 730; *O’Connor, supra*, 33 Cal. 3d at 796 (1983); *Ibister, supra*, 40 Cal. 3d at 83 (1985); *Rotary Club of Duarte v. Bd. of Dir. of Rotary Int’l*, 178 Cal. App. 3d 1035, 1055 (1986).

The Unruh Act thus clearly covers the types of establishments also subject to Title III of the ADA. The Unruh Act’s scope is also broad enough to extend beyond that of Title III in several regards. One of the most significant departures in coverage is that the California statute prohibits discrimination in the sale or rental of permanent housing. See, e.g., *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721 (1982) (apartment complexes); *Lee v. O’Hara*, 57 Cal. 2d 476 (1962) (real estate rental); *Vargas v. Hampson*, 57 Cal.2d 479 (1962) (real estate sale of home); *Winchell v. English*, 162 Cal.App.3d 125 (1976) (mobile home parks). The Unruh Act also extends to at least some governmental activities. See, e.g. *Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 952 (public schools). Though case law authority is sparse, the breadth of the Unruh Act provides generally strong arguments for extending coverage to public entities engaged in activities that would be covered if undertaken by private entities (e.g., education and recreational services, sales and rental activities, transportation). The coverage argument is more difficult, though still possible, with respect to activities that are the exclusive province of government (e.g., voting, corrections).

Like Title III, the Unruh Act does not cover truly private clubs, with California courts characterizing the defining “private” relationships as those that are “continuous, personal and social.” *Ibister, supra*, 40 Cal. 3d at 84, n.14; *Rotary Club of Duarte, supra*, 178 at 1058. Similarly, the Unruh Act does not extend to the “membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members.” *Curran, supra*, 17 Cal.4th at 697; see also *Randall v. Orange County Council, Boy Scouts of Am.*, 17 Cal. 4th 736, 738 (1998) (holding the Boy Scouts are not a public accommodation under the Unruh Act).

Unlike Title III, the Unruh Act does not include an explicit exemption for religious entities.⁹

Section 54.1 prohibits discrimination in a broad range of enumerated public accommodations:

Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers,

⁹ Again in contrast to the ADA, the California Legislature has entirely exempted religious entities from the employment nondiscrimination mandate of the California Fair Employment and Housing Act. Cal. Gov. Code 12926(d) (“Employer” does not include a religious association or corporation not organized for private profit”); cf. ADA Title I, 42 U.S.C. 1211(c). Because no such exemption appears in any other part of the state civil rights statutory scheme, it can be reasonably inferred that no additional religious exemptions were intended. However, whether religious entities are covered by other California nondiscrimination laws remains an open question.

airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

See CIV. CODE § 54.1(a)(1). Coverage under this California statute also exceeds that of ADA Title III, including, for example, coverage of housing accommodations, and protections from discrimination in *public* transportation in addition to private carriers. *See* CIV. CODE § 54.1(b); *Compare* CAL. CIV. CODE § 54.1 with 42 U.S.C. § 12184.¹⁰ As with the Unruh Act, the breadth of Section 54.1 coverage has been recognized by the courts. *See Arnold v. United Artists Theatre Cir., Inc.*, 866 F. Supp. 433, 438 (N.D. Cal. 1994) (“California courts have applied a canon of broad construction to civil rights statutes generally, and to § 51 and § 54.1 in particular.”); *Donald v. Sacramento Valley Bank*, 209 Cal. App. 3d 1183 (1989).

Section 19955 of the Health & Safety Code imposes requirements on “public accommodations or facilities constructed in this state with private funds,” further defining “public accommodations or facilities” as “a building, structure, facility, complex, or improved area which is used by the general public and shall include auditoriums, hospitals, theaters, restaurants, hotels, motels, stadiums, and convention centers.” CAL. HEALTH & SAFETY CODE § 19955(a). Additional sections of the Health & Safety Code further delineate the facilities to which the requirements apply. CAL. HEALTH & SAFETY CODE §19955.5, §19956 and §19956.5.

Section 11135(a) of the Government Code imposes a nondiscrimination mandate on the state of California and its funding recipients:

No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

See CAL. GOV. CODE § 11135 (Deering 2003).

Section 4450(a) of the Government Code similarly links access requirements to the use of public funds: “... all buildings, structures, sidewalks, curbs, and related facilities, constructed in this state by the use of state, county, or municipal funds, or the funds of any political subdivision of the state shall be accessible to and usable by persons with disabilities. ...” *See* CAL. GOV. CODE § 4450(a) (Deering 2003).

¹⁰ However, discrimination in public transportation is prohibited by Title II of the ADA, Subtitle B, 42 U.S.C. §§ 12141-12165.

III. Prohibited Conduct & Defenses

A. Analysis Under the ADA

1. Establishing Liability Under the ADA

The general nondiscrimination mandate of ADA Title III provides:

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 owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a); 28 C.F.R. § 36.201.¹¹

The statute also offers a more detailed construction of this general nondiscrimination mandate. 42 U.S.C. § 12182(b). Prohibited conduct includes denial of participation, provision of unequal benefit, and provision of separate benefits (unless necessary to ensure equal opportunity). 42 U.S.C. § 12182(b)(1)(A); 28 C.F.R. § 36.202. Public accommodations cannot use any selection criteria that “screen out or tend to screen out” an individual with a disability or any class of individuals with a disability. 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a); *see also Rendon v. Valleycrest Prods. Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

In addition, public accommodations are required to make “reasonable modifications” to their policies, practices and procedures. 42 U.S.C. §§ 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302. The U.S. Supreme Court addressed this requirement in the *Martin v. PGA* case, noting that “the statute contemplates three inquiries: whether the requested modification is ‘reasonable,’ whether it is ‘necessary’ for the disabled individual, and whether it would “fundamentally alter the nature of” the activity at issue *Martin, supra*, 532 U.S. at 683, n.38. Title III further specifies that covered entities must provide necessary “auxiliary aids and services,” unless they would result in “fundamental alteration,” or an “undue burden” (i.e., “significant difficulty or expense”). 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

As to architectural access issues, the ADA imposes specific design requirements on public accommodations that are newly constructed or altered after the January 1992 effective date for Title III. 42 U.S.C. 12183; 28 C.F.R. §§ 36.401-36.406.¹² Structural barriers in “existing facilities” (i.e., facilities constructed prior to January 1992) must be removed if such removal is “readily achievable” (defined in regulation as actions “easily accomplishable and able to be carried out without much difficulty or expense”). 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304. Where such barrier removal is not “readily achievable,” the public accommodation must

¹¹ Title III includes additional provisions specifically addressing discrimination in transportation, with statutory language that provides both a general nondiscrimination mandate and more detailed construction guidance. See 42 U.S.C. § 12184. The transportation provisions are also implemented through an additional set of regulations issued by the U.S. Department of Transportation. See 49 C.F.R. Part 37

¹² The Title III new construction and alterations requirements also apply to “commercial facilities” as well as to public accommodations. See 42 U.S.C. §§ 12183, 12181(2).

provide goods and services through “alternative methods,” if such methods are themselves readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v); 28 C.F.R. § 36.305.

At least one circuit court has held that Title III liability is analyzed pursuant to the *McDonnell-Douglas* burden-shifting analysis. See *Rothman v. Emory Univ.*, 123 F.3d 446, 451 (7th Cir. 1997) (applying the analysis set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)). Under this scheme, the plaintiff must establish a prima facie case for discrimination. The defendant may then proffer a non-discriminatory reason for its actions. Lastly, the plaintiff is given an opportunity to prove that the proffered reason was merely subterfuge, or a pretext for discriminatory action.

2. Key Defenses under the ADA

Published judicial decisions specifically involving plaintiffs with HIV or AIDS have focused on two key statutory defenses that are available under Title III: (1) the direct threat defense, and (2) the safe harbor defense for insurance defendants.

The direct threat provision of Title III provides that a covered entity is not required to provide goods or services to an individual with a disability “where such individual poses a direct threat to the health or safety of others.”¹³ “‘Direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by a modification” 42 U.S.C. 12182(b)(3). The regulations note that the entity must make an “an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence.” 28 C.F.R. § 36.208(c). Pursuant to this standard, four factors must be considered in determining whether the plaintiff constitutes a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. *Id.*

This regulatory provision codifies the “direct threat” standard first applied by the U.S. Supreme Court in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), which involved Section 504 of the Rehabilitation Act. The high court has subsequently recognized and discussed the applicability of the *Arline* analysis in a Title III case. See *Bragdon v. Abbott*, 524 U.S. 624 (1998). In the context of health care, various lower courts have held that a patient merely having HIV does not constitute a direct threat, in light of available technology to protect the health care provider from contraction. See, e.g., *U.S. v. Morvant*, 898 F. Supp. 1157 (E.D. La. 1995); see also *Howe v. Hull*, 873 F. Supp. 72 (N.D. Ohio 1994). But cf. *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999) (karate school did not have to admit an HIV-positive student into its full-contact classes).

¹³ A significant legal question is raised as to whether the “direct threat” analysis applies when evaluating threats to the health or safety of the individual with the disability himself or herself. The U.S. Supreme Court has ruled that “risk to self” is subject to direct threat analysis in the context of employment, but this holding was restricted to Title I of the ADA, and was based in part on the potential danger of employer sanctions under OSHA. *Chevron v. Echazabal*, 536 U.S. 73, 84-85 (2002). But while there is no corresponding high court Title III “direct threat” judicial authority, there is other authority relevant to the issue of “risk to self” under Title III. Specifically, as to the issue of “eligibility criteria,” the Title III DOJ regulations specify: “A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.” 28 C.F.R. § 36.301(b). This language is broad enough to permit consideration of “risk to self” as well as risk to others.

The ADA's safe harbor defense for insurance companies states that the ADA shall not prohibit "an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law."¹⁴ 42 U.S.C § 12201(c)(1). The statute also states, however, that this provision "shall not be used as subterfuge to evade the purposes" of the ADA. 42 U.S.C § 12201(c). In essence, this provision requires that insurance companies comply with state law in determining how policies for an individual with a disability may differ from policies offered to non-disabled individuals. In California, this calculus need not be based strictly on actuarial principals. Insurance companies must base their decision on available economic and medical data. *See Cloutier, supra*, 964 F. Supp. at 304-06 (denial of health insurance must be based on sound medical or economic data); *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997) (holding that an AIDS cap on insurance policies, absent a safe harbor defense, is prohibited), *vacated on other grounds, World Ins. Co. v. Branch*, 156 F.3d 1142 (11th Cir. 1998); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 426 (D.N.H. 1996).

B. Analysis Under California Law

Section 51(f) of the Unruh Act specifies that "A violation of the right of any individual under the [ADA] shall also constitute a violation of this section. CAL. CIV. CODE § 51(f); § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a); *see also Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134 (N.D. Cal. 1998) (given incorporation of federal law, discriminatory intent is not an element of disability discrimination claim under Section 51(f)). This is an important aspect of the Unruh Act because it means that any case that may be brought under the ADA may be brought instead, or in addition, under California law.

In addition to this federal law incorporation, the Unruh Act contains a long-standing, independent provision that generally guarantees "full and equal" access. The Unruh Act has historically identified certain general behaviors that constitute discrimination. *See, e.g.*, CAL. CIV. CODE § 51.5(a) (making it illegal to "discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with" someone based on disability); CAL. CIV. CODE § 51.8 (prohibiting discrimination in granting franchises). However, prohibited practices extend beyond those specifically enumerated, because, as the California Supreme Court has recognized, "The Act is to be given a liberal construction with a view to effectuating its purposes." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 28 (internal citations omitted). Consistent with this broad mandate, California courts have not been welcoming to defenses alleging adverse impact on business. *See, e.g., Rotary Club of Duarte, supra*, 178 Cal. App 3d 1035, 1061.

However, the reach of the Unruh Act's "full and equal access" provision is not unlimited. The California Supreme Court has ruled that this provision requires proof of intentional discrimination, such that a policy that applies neutrally to all people, regardless of their characteristics, does not violate the Unruh Act. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991).¹⁵ The state high court has also recognized that the statute does not prohibit

¹⁴ The safe harbor provision also applies to hospitals, HMOs, or any entity that administers medical benefits or retirement plans. 42 U.S.C. § 12201(c).

¹⁵ Again, practitioners should keep in mind that this analysis involves *only* the independent, Section 51(b) "full and equal access" provision of the Unruh Act, *not* the federal law incorporation contained in Section 51(f). Because Title III of the ADA prohibits covered entities from using eligibility criteria that "screen out or tend to screen out" individuals with disabilities or classes of

discrimination based on inappropriate *conduct*. *Marina Point, Ltd., supra*, 30 Cal. 3d at 725 (“the Unruh Act preserves the traditional broad authority of owners and proprietors of business establishments to adopt reasonable rules regulating the conduct of patrons or tenants”). At the same time, however, “an individual who has committed no such misconduct cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group.” *Id.* at 726.

Like the Unruh Act, Section 54.1 contains a federal incorporation provision, prohibiting any conduct also prohibited by Title III. CAL. CIV. CODE § 54.1(d). Section 54.1 additionally contains an independent “full and equal access” mandate. CAL. CIV. CODE § 54.1(d). Notably, in contrast to the requirements of Section 51(b) of the Unruh Act, the “full and equal access” provision of Section 54.1(d) does *not* require intent for the plaintiff to state a claim. *Hankins v. El Torito Restaurants, Inc.*, 63 Cal.App. 4th 510, 520 n.4 (citing *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 178-180 (1990)).

Very few lawsuits have been brought pursuant to Section 11135 of the Government Code, so there is effectively no judicial authority to illuminate that statute’s “full and equal access” requirement. Section 19955 of the Government Code, and the provisions of Section 4450 of the Government Code that it cross-references, impose the specified building standards relating to access for persons with disabilities in buildings and facilities subject to those mandates.

V. Remedies

Remedies potentially available to redress violations of disability civil rights laws include equitable (or injunctive) relief; monetary damages; and attorneys’ fees. Available remedies differ from statute to statute, so, as with issues of liability and defenses, practitioners should take care to evaluate each cause of action independently. The applicable standards for determining entitlement to remedies also vary, particularly as between federal and state claims.

With respect to the issue of attorneys’ fees, attention should be paid to several key phrases and concepts that provide a general framework for analysis. Under the general “American Rule,” parties are ordinarily required to bear their own attorneys’ fees, irrespective of the outcome of the case - i.e., the winner is not entitled to recover the costs of litigation and representation from the loser. In some instances, however, including in many civil rights laws, legislatures have enacted “fee-shifting” provisions - statutory sections that expressly entitle one party to recover costs and fees from another under enumerated circumstances. Attorneys’ fees are generally awarded to “prevailing parties,” as that standard is defined and construed by the

individuals with disabilities, courts have recognized that federal law---and correspondingly, the federal incorporation into California law -reaches beyond intentional discrimination. *See* 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a); *see also Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134 (N.D. Cal. 1998). In many cases, it will be preferable or necessary to proceed solely under Section 51(f), given the detailed descriptions of prohibited practices contained in the incorporated federal regulations, and the federal coverage of non-intentional discrimination. However, in cases involving intentional discrimination, arguments can be made that the independent “full and equal” access of Section 51(b) provides broader protection than the prohibitions contained in Section 51(f), by reaching intentional conduct not prohibited by Title III of the ADA.

relevant statute and case law.¹⁶ Generally, the starting point for calculating the amount of the payment to be made is the attorneys' fees "lodestar." The "lodestar" is arrived at by multiplying timekeeper(s) reasonable hourly rate(s) by the number of hours billed. Depending on the applicable legal standards, in some cases this "lodestar" may be increased by an "enhancement" or "multiplier," which is awarded in recognition of certain justifying factors.

A. Remedies under the ADA

1. Administrative Complaint Options

The U.S. Department of Justice has authority to accept and investigate administrative complaints alleging violations of Title III of the ADA. More information on this administrative complaint option is available at the Department's website, www.doj.gov. The Department construes this authority to be elective, not mandatory, and generally declines to investigate complaints unless they present issues involving "pattern and practice" violations. There is no administrative exhaustion requirement, and plaintiffs may proceed directly to litigation if they choose.

2. Equitable Relief

Because Title II was modeled on the Civil Rights Act of 1964, it incorporates the remedies and procedures of that Act. *See* 42 U.S.C. CODE § 12188 (incorporating 42 U.S.C. § 2000a-3(a)). There is a private right of action for equitable relief. 42 U.S.C. § 12888(a). As with all federally enforced federal claims, standing to pursue injunctive relief under Title III is subject to federal court standing requirements. As the federal courts are courts of limited jurisdiction, federal standing requirements are generally more restrictive than California law standards. Title III specifically affords standing only to an individual "who is being subject to discrimination" (i.e., the plaintiff himself or herself must have experienced a violation of law). However, suit can be maintained to prevent anticipatory violations of law in limited cases. Specifically, enforcement is available to a plaintiff who has "reasonable grounds" for believing that discrimination is about to occur. 42 U.S.C. § 12188(a)(1). Additionally, the statute provides that "Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provision." 42 U.S.C. § 12188(a)(1).

3. Damages

Under Title III, only the United States Attorney General may seek damages against a covered entity. 42 U.S.C. § 12188(b)(2)(B); *see Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002). The Attorney General may only seek actual damages; he or she does not have authority to seek punitive damages. 42 U.S.C. § 12188(b)(4).

4. Attorneys' Fees

¹⁶ The term "prevailing party" is the most commonly used term in attorneys' fee provisions. However, alternative phrases, such as "successful party," appear in some statutes. Careful attention should be given to the exact language of the relevant provision, and the authority that has construed it.

The ADA incorporates by reference the fee-shifting provision of the Civil Rights Act of 1964. 42 U.S.C. § 12188. The relevant provision of the Civil Rights Act states, “In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee” 42 U.S.C. § 2000a-3(b). In *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health & Human Resources* (*Buckhannon*), the Supreme Court abolished the catalyst theory¹⁷ for fee shifting and announced new restrictions on when a plaintiff would be considered a prevailing party. 532 U.S. at 598, 605 (2001). Under *Buckhannon*, the plaintiff cannot be a “prevailing party” unless there has been a “material alteration of the legal relationship of the parties.” *Id.* at 604. Consistent with this standard, *Buckhannon* explicitly allows for plaintiffs to collect attorneys’ fees where there is either a judgment on the merits or a court ordered consent decree. *Id.* at 604. In light of *Buckhannon*, the Ninth Circuit also allows plaintiffs to collect attorneys’ fees in at least two additional circumstances: (1) As the result of a preliminary injunction, *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), or (2) under a private settlement agreement, *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9th Cir. 2002). The U.S. Supreme Court has rejected attorneys’ fee “multipliers” or “enhancements” for suits under federal law. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

B. Remedies under California Law

1. Administrative Complaint Options

Notwithstanding the apparently more limited jurisdiction reflected in the agency title, the California Department of Fair Employment and Housing (DFEH) has authority to accept and investigate administrative complaints alleging violations of the California Unruh Act. More information on this administrative complaint option is available at the Department’s website, www.dfeh.ca.gov. There is no administrative exhaustion requirement, and plaintiffs may proceed directly to litigation if they choose.

2. Equitable Relief

Injunctive relief is available under each of the California statutes discussed in this chapter. The Unruh Act allows *any attorney* to bring an action to enjoin violation of the Act. CAL. CIV. CODE § 52.1. Thus, unlike under the ADA, the plaintiff need not have had his rights violated to bring an action for injunctive relief. Injunctive relief, either by a private plaintiff or public agency, is also authorized in cases alleging a violation of Section 54.1. CAL. CIV. CODE § 55. In addition, a private plaintiff may bring suit for injunctive relief under Sections 11135, 19955 and 4450 of the Government Code. *See* CAL. GOV CODE § 11139; *Botosan v. Fitzhugh*, 13 F.Supp. 2d 1047, 1052 (S.C. Cal. 1998); and *Donald, supra*, 218 Cal. App. 3d at 183.

Finally, a plaintiff may seek statewide injunctive relief through California Business & Professions Code § 17200. Section 17200 prohibits unfair competition, defined as “any

¹⁷ The catalyst theory previously allowed for recovery even where there was “no judicially sanctioned change in the legal relationship of the parties,” *Buckhannon*, 532 U.S. at 605, i.e., in cases in which the plaintiff “has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.” *Id.*, at 600.

unlawful, unfair or fraudulent business act or practice” CAL. BUS. & PROF. CODE § 17200. “The ‘unlawful’ practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.” *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994). In addition, “[t]he Legislature . . . intended to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur.” *Barquis v. Merch. Collection Ass’n*, 7 Cal. 3d 94, 111 (1972). Thus, Section 17200 provides a private right of action for statewide injunctive relief. CAL. BUS. & PROF. CODE § 17204, *Brown v. Allstate Ins. Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998).

3. Damages

Section 52 of the Civil Code authorizes damages under the Unruh Act. Specifically, anybody who violates the Unruh Act is liable for the actual damages and a penalty of up to three times the actual damages (treble damages). The statute also sets a damage floor of \$4,000. CAL. CIV. CODE § 52(a). However, to win a damage award under the Unruh Act, the plaintiff must prove that the defendant intentionally violated his rights under the Act. *Hankins*, *supra*, 63 Cal.App. 4th 510.

Under Section 54.1, a plaintiff may also bring suit for damages for violation of his or her rights by a public accommodation. Specifically, California law provides for actual damages to be recovered against any person or entity who “denies or interferes with admittance to or enjoyment of” a public accommodation, or “otherwise interferes” with the rights of an individual with a disability under Section 54.1 CAL. CIV. CODE § 54.3(a). To receive damages, the plaintiff must show not just that the defendant violates the statute, but also that “he or she was denied equal access on a particular occasion.” *Donald*, *supra*, 218 Cal. App. 3d 183. As with the Unruh Act, § 54.3 provides for a treble damages penalty and a statutory floor (\$1,000). *Id.* Because both the Unruh Act and § 54.3 cap damages at three times the actual amount of damages, these damages may only be trebled one time. Further, the treble damages provision has been read to cap damages and thus preclude punitive damages under the Unruh Act and § 54.1. *Loskot v. LuLu’s Rest.*, 2000 U.S. Dist. LEXIS 22252, *7-8 (E.D. Cal. Nov. 15, 2000), *Botosan*, *supra*, 13 F. Supp. 2d at 1052-53 (S.D. Cal. 1998).

In addition, under § 3345 of the Civil Code, a plaintiff may receive damages “up to three times greater than authorized by statute” for an illegal act against a disabled person. CAL. CIV. CODE § 3345(b) (Deering 2003). This creates an interesting question, not yet answered by the California courts, as to whether a plaintiff may ask for trebled treble damages under a combination of § 3345(b) and the Unruh Act or § 54.3. A plaintiff might claim that this is distinct from twice trebling damages under the Unruh Act and § 54.3 because § 3345 explicitly permits trebling damages beyond a cap otherwise set by another statute. CAL. CIV. CODE § 3345(b).

Damages are not available to enforce Sections 11135, 19995 or 4450 of the Government Code. See CAL. GOV CODE § 11139; *Botosan v. Fitzhugh*, 13 F.Supp. 2d 1047, 1052 (S.C. Cal. 1998); and *Donald*, *supra*, 218 Cal. App. 3d at 183.

4. Attorneys' Fees

California statutes provide a number of ways to shift attorneys' fees. The Unruh Act authorizes "Attorney's fees as may be determined by the court." CAL. CIV. CODE § 52(b)(3). Similarly, the enforcement provisions of Section 54.1 specify: "The prevailing party in the action shall be entitled to recover reasonable attorney's fees." CAL. CIV. CODE § 55.

Additionally, California has a general "private attorney general statute," which provides:

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

CAL. CIV. PROC. CODE § 1021.5 (Deering 2003). Thus, in a suit where broad injunctive relief is granted, such as a suit under Section 17200, or in any other case that has benefited "a large class of person" (regardless of whether the case was in fact a class action), fees may be awarded under Section 1021.5.

California law has long recognized that the catalyst theory was grounds for attorneys' fees awards under California fee-shifting provisions such as Section 1021.5, the Unruh Act, and Section 54.1. See, e.g., *Maria P. v. Riles*, 743 P.2d 932, 937-38 (Cal. 1987), *Westside Cmty. for Indep. Living, Inc. v. Obledo*, 657 P.2d 365, 367 (Cal. 1983). However, in light of the U.S. Supreme Court's recent *Buckhannon* decision, the Ninth Circuit has now certified to the California Supreme Court the question of whether the catalyst theory still has applications under California law. *Tipton-Whittingham v. City of Los Angeles*, 316 F.3d 1058, 1060 (9th Cir. 2003), Cal. Supreme Court Case No. S112943. *Tipton-Whittingham* raises issues also presented by *Graham v. DaimlerChrysler Corp.*, an unpublished state appellate court decision that the state high court has also agreed to review. 2002 WL 31732556 (Cal. App. 2 Dist. Dec 06, 2002), Cal. Supreme Court Case No. S112862.¹⁸ The upcoming California Supreme Court decisions will specifically analyze the attorneys' fees provisions of Section 1021.5 and the California Fair Employment and Housing Act, but will likely also have implications for the Unruh Act, Section 54.1, and other California fee-shifting statutes as well.

California courts have, however, repeatedly recognized the propriety of fee multipliers. See, e.g., *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001), *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311 (1983), *Serrano v. Priest*, 20 Cal. 3d 25 (1977) ("Serrano III"), *Rader v. Thrasher*, 57 Cal. 2d 244 (1962). The Court in *Serrano III* listed several non-exclusive questions for a court to ask when considering whether to allow a fee multiplier: (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award; (4) the impact of

¹⁸ The California Supreme Court granted review in *Graham* on February 19, 2003 and in *Tipton-Whittingham* on March 19, 2003. As of this writing, both cases are fully briefed, and awaiting oral arguments, which have not yet been scheduled.

granting a fee on the budget of a governmental defendant; (5) the extent to which the attorney received public or charitable funding for the law suit; (6) the extent to which the fees awarded would go not to the individual attorneys, but to the organizations by which they are employed. 20 Cal. 3d at 49. The Court in *Ketchum* explained the justification for a fee multiplier: “The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.” *Ketchum*, 24 Cal. 4th at 1132.

VII. Conclusion

This chapter explores only a small number the issues that individuals with HIV or AIDS and their attorneys must consider when evaluating potential legal claims and determining a legal strategy against a public accommodation. Important issues not discussed here include pros and cons of proceeding to litigation versus pursuing informal advocacy or administrative complaints, potential common law claims, privacy considerations (including such considerations in light of evidentiary requirements), the intricacies of damage awards under the various California statutes, and many important issues regarding the definition of disability (discussed in Chapter 7). However, it is hoped that the above information will provide a starting point for assessing potential public accommodation cases under California law, federal law, or both.