



## And The Defense Wins

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The California Court of Appeal took a big step recently toward leveling the playing field for defendants embroiled in ADA access litigation and facing claims under state anti-discrimination laws. On February 5, 2010, the First District Court of Appeal upheld a trial court's award of attorney fees in the amount of \$118,458 in favor of Livingston Law Firm clients, defendants Song Koo Lee and K&D Market, against ADA litigants, Les Jankey and Disability Rights Enforcement Education Services (DREES), a nonprofit organization. In so doing, the court expressly rejected a Ninth Circuit holding that prevented prevailing ADA defendants from recovering attorney fees absent a showing the claims were frivolous, unreasonable, or groundless. DRI member [Renée Welze Livingston](#), founding member of the **Livingston Law Firm** in Walnut Creek, California, successfully represented the defendants.

The opinion in *Jankey, et al. v. Lee*, 2010 Cal. App. LEXIS 140, marks the second victory for Lee and his small San Francisco Mission District market. In June 2008, Livingston Law Firm attorney Renée Welze Livingston and a colleague obtained summary judgment against Jankey and DREES on claims brought under (1) the ADA (42 U.S.C. § 12101 *et seq.*); (2) the CDPA (§ 54 *et seq.*); (3) the Unruh Civil Rights Act (§ 51 *et seq.*); and (4) Health and Safety Code § 19955. In addition, defendants prevailed against plaintiffs on their claims for injunctive relief pursuant to the ADA (42 U.S.C. § 12188(a)(2)) and under Civil Code § 55 (Section 55), "to make [the subject place of public accommodation] readily accessible to and usable by persons with disabilities..." The plaintiffs did not appeal the summary judgment itself; rather, the *Jankey* appeal only addresses the subsequent order issued by the trial court in favor of the defendants for attorney fees under Section 55.

The case presented an issue of first impression in the First District and required the court to resolve a conflict between two appellate decisions—one state and one federal—reaching opposite conclusions on whether a prevailing defendant under Section 55 must establish that the claims are frivolous, unreasonable, or groundless before recovering attorney fees. In *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, the Second District Court of Appeal concluded that such a showing is not required. However, about one week before *Molski* was decided, the Ninth Circuit Court of Appeals decided *Hubbard v. SoBreck*, 531 F.3d 983 (9th Cir. 2008), *opinion amended and superseded on denial of rehearing by Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009), and concluded that Section 55 was preempted by federal law because it conflicted with the ADA, and under federal law, a prevailing defendant must establish that the plaintiff's claims are frivolous, unreasonable, or groundless before recovering attorney fees under Section 55.

In a well-reasoned and thorough unanimous decision, the First District Court of Appeal found several grounds for rejecting the Ninth Circuit's holding in *Hubbard* and concluding that it incorrectly determined a conflict exists between Section 55 and the ADA. First, the court noted the ADA does not expressly preempt state law in the entire field of disability discrimination. Second, disabled individuals can enforce their rights concurrently under the ADA and state disability laws to gain the benefit of additional remedies (statutory damages) not available under the ADA. Third, *Hubbard* unfairly allows serial ADA plaintiffs, such as Les Jankey and DREES, to reap the benefits of "scorched earth" litigation against defendants without incurring any adverse risk of harm if defendants prevail. Specifically, under *Hubbard*, defendants would be subject to Section 55's mandatory fee provision if they lose, but would have to establish that the plaintiff's action was frivolous, groundless, or unreasonable before recovering attorney fees if they win. In *Jankey*, because plaintiffs elected to pursue their remedies under Section 55, the court concluded they knowingly accepted the risks of an adverse fee award under the statute. Indeed, the court also awarded defendants their attorney fees on appeal.

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