

# Jankey v. Lee: California Supreme Court Rules That Prevailing Defendants In State Disability Suits Can Recover Attorney's Fees

## Supreme Court and Appellate Alert

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In *Jankey v. Lee*, on December 17, 2012, the California Supreme Court affirmed an award of attorney's fees to a prevailing defendant under section 55 of California's Disabled Persons Act and held that the California fee provision mandates an award of fees for "any prevailing party"—regardless whether it is the plaintiff or the defendant who prevails—and that the fee provision is not preempted by the Americans with Disabilities Act ("ADA").

The plaintiff had brought suit against the owner of a market alleging discrimination on the basis of a disability. The plaintiff sought relief pursuant to the ADA and state disability law. Among other relief, the plaintiff sought an injunction under state and federal law, compelling the market owner to make the store readily accessible to individuals with disabilities.

Section 55 of California's Disabled Persons Act provides for a prevailing party's recovery of fees in an action to enjoin a violation of disability access requirements. The defendant, who defeated all of the plaintiff's claims on summary judgment, was awarded over \$100,000 in fees.

The California Supreme Court held that section 55 is *not* preempted by the ADA, rejecting the plaintiff's argument that Congress's adoption of a more stringent federal standard (under which prevailing defendants may receive fees only if the claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so") should preempt the award of fees under a lesser standard when the same work is done to defend against state and federal claims.

In analyzing whether the ADA preempts the Section 55 award, the California Supreme Court relied upon its determination that Congress—instead of broadly preempting every arguably lesser state remedy in the ADA—had "embraced a cafeteria approach." The Court reasoned that individuals with disabilities can "pick and choose from among federal and state remedies and procedures" for the avenues they consider the most advantageous. The Supreme Court thus instructed courts considering ADA preemption to analyze whether the state remedial scheme is "in any regard superior to the ADA," and, if so, it is *not* preempted. The plaintiff has the choice to seek relief under federal law, state law, or both.

The California Supreme Court held that section 55 affords in at least some respects greater protection than federal law (specifically noting its broader standing provision)—regardless whether its other aspects might be less advantageous—and, therefore, it is not preempted.

The California Supreme Court recognized that the Ninth Circuit had reached a contrary conclusion in *Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009). There the Ninth Circuit concluded that because it is "impossible to



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distinguish” the fees necessary to defend against the state law claim from those expended in defense against the federal claim, a grant of fees on the state law claim was “necessarily a grant of fees as to the ADA claim” and thus preempted. *Id.* at 745.

The California Supreme Court disagreed with the Ninth Circuit’s premise—that fees for defending a state law claim are necessarily fees for ADA work where the claims overlap—and decided instead that the fee award was the consequence of the plaintiff’s decision to seek additional state remedies, not the existence of an ADA claim.

After *Jankey*, plaintiffs will likely think carefully about whether to invoke their Section 55 rights and risk having to pay the defendant’s fees. It also remains to be seen whether the California legislature may take up the issue of this prevailing party fee provision, should it inspire some reluctance on the part of plaintiffs to assert Section 55 rights. In addition, both plaintiffs and defendants considering claims brought under Section 55 should consider the fact that in federal court, under the law of the Ninth Circuit, fees for a prevailing defendant may be held to be preempted by the ADA, but not in California state court.

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## CONTACT INFORMATION

If you have any questions concerning this alert, please contact —

**Rex Heinke**  
[rheinke@akingump.com](mailto:rheinke@akingump.com)  
310.229.1030  
Los Angeles

**Daniel L. Nash**  
[dnash@akingump.com](mailto:dnash@akingump.com)  
202.887.4067  
Washington, D.C.

**Gregory W. Knopp**  
[gknopp@akingump.com](mailto:gknopp@akingump.com)  
310.552.6436  
Los Angeles

**Katharine J. Galston**  
[kgalston@akingump.com](mailto:kgalston@akingump.com)  
310.728.3014  
Los Angeles