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Removing Barriers — One Class Action at a Time

Paula Pearlman is the executive director of the Disability Rights Legal Center and a visiting associate professor of law at Loyola Law School Los Angeles.



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Brown v. Board of Education marked a watershed moment in this country's legal history - separate is not equal. That moment was equally noteworthy for people with disabilities who have spent the last six decades fighting for full inclusion and equal participation in society and its institutions. Despite longstanding California law, the Rehabilitation Act of 1973, and the passage of the Americans with Disabilities Act in 1990, physical barriers continue to pervade both private businesses and government programs and services. The pervasiveness of these barriers often calls for a comprehensive and thorough response, which is often achieved through a class action.

In both the courts and media these disability issues are often derided as less important, not worthy of judicial attention, or simply the realm of vexatious litigants. However, in our work we see physical access barriers directly impact the lives of our clients in very real ways - preventing a person with a disability from accessing a domestic violence clinic, a classroom, a neighborhood grocery store, or a doctor's office. Even in the U.S. Supreme Court's recent cases involving these issues, it is apparent that real and dramatic barriers persist even in the most critical of government services. Indeed, in *Tennessee v. Lane*, heard in 2004, the plaintiff who used a wheelchair was forced to crawl up a flight of stairs to appear in court, only to have the court recess. The judge then arrested him when he refused to crawl up a second time.

Fortunately, it is well settled that class certification is appropriate in cases involving systemic challenges to physical access barriers under the ADA and similar disability nondiscrimination laws. Both the ADA and other state and federal disability nondiscrimination statutes require people with disabilities be provided with equal access to the benefits afforded to the public by government entities and public accommodations. Many courts, including the 9th U.S. Circuit Court of Appeals, have repeatedly held that actions that challenge failure to remove architectural barriers are suitable for class certification.

Moreover, in so holding, the courts have recognized that the presence of architectural barriers to persons with disabilities results in a class-wide impact such that there is little variation in the experiences of class members who have attempted to use these inaccessible facilities. As the U.S. District Court in the Northern District has noted: "[I]nadequate wheelchair accommodations...are very likely to affect wheelchair-users in the same way." *Arnold v. United Artists Theatre Circuit Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994). In most cases alleging disability discrimination, including those that allege the existence of pervasive barriers and the failure to provide disability access, the issues that determine liability and the appropriateness of a class action focus on the defendant's acts and omissions, making class treatment an efficient means of addressing discrimination.

SPECIAL REPORT

Intellectual Property

Our annual list of the leading intellectual property litigators and portfolio managers. Plus, a profile of Chief Judge Randall Rader.



Monday, April 11, 2011

Criminal

Attorney's M&A Deal Leaks Preventable

Accusations that a lawyer accessed databases at some of the nation's preeminent law firms to obtain confidential deal information to use in stock trades has left industry insiders wondering how this happened and what might be done to prevent it.

Government

Prosecutor Furloughs Set to Begin Monday

A federal government shutdown is expected to send ripples throughout U.S. Courthouses in California, where U.S. attorney's offices have begun furloughing attorneys and certain support staff.

Judicial Profile

Mary M. Schroeder

Judge

9th U.S. Circuit Court of Appeals

Labor/Employment

Removing Barriers — One Class Action at a Time

Systemic, class-wide treatment of disability issues is the most effective approach for plaintiffs and defendants. By **Paula Pearlman** and **Shawna Parks** of the Disability Rights Legal Center.

Law Practice

On The Move

Four Orrick, Herrington & Sutcliffe LLP litigation partners left the firm to open the Los Angeles office of Philadelphia-based Dechert LLP.

Lawyer Finds Freedom After Large Firm Life

When Howrey shuttered in early March, Richard J. Burdge said he took a step back and asked himself - and his wife - what he should do.

Constitutional Law

Focus on the Facts: LGBT Rights Progress Towards Equality

The 9th Circuit has handled numerous disability rights class actions, including some addressing physical access barriers. In *Pierce v. County of Orange*, the 9th Circuit addressed the claims of a class of inmates who alleged "non-compliant jail facilities and denial of access to programs and services available to non-disabled detainees." 526 F.3d 1190, 1195 (9th Cir. 2008). Indeed, the court in *Pierce* largely found that the Orange County Jail had failed to remove physical barriers and failed to provide access to programs and services, and did so on a class-wide basis. This finding was later supported and amplified on remand at the district court. *Pierce* followed *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), which also addressed the claims of people with various disabilities, including those with mobility impairments, in the state prison system.

District courts have repeatedly certified classes alleging systemic disability access cases pursuant to Titles II and III of the ADA and Section 504. In fact, in *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 345 (N.D. Cal. 2008) the U.S. District Court for the Northern District of California noted that "[c]ases challenging an entity's policies and practices regarding access for the disabled represent the mine run of disability rights class actions certified under Rule 23(b)(2)."

In both the courts and media these disability issues are often derided as less important, not worthy of judicial attention, or simply the realm of vexatious litigants.

Not only does the law provide for class treatment of these issues, but systemic treatment of physical access barriers is good public policy as well. In our experience, systemic, class-wide treatment of these issues can be the most effective approach for both plaintiffs and defendants. System wide treatment of access barriers allows Defendants to approach these barriers efficiently, with an organized plan and timetable, rather than through piecemeal fixes. The result is frequently a more cost-effective and less disruptive solution.

Particularly when dealing with public entities, when barrier removal is often required in order to provide access to critical government programs, the class approach to these cases frequently leads to more efficient use of public money and legal resources. Similarly, for individuals who need to access various areas of the public entity's or public accommodation's facilities, it avoids the necessity of each person individually having to challenge each barrier as they encounter it, particularly when a legal challenge may come too late to actually facilitate access to the program or service at issue. In order for people with disabilities to be fully included in society and have access to the same goods and services, such cases are often needed. The class action is an effective, efficient and recognized tool for addressing widespread and systemic barriers.

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Academic research has been key to the advances made by the lesbian, gay, bisexual and transgender community in recent years. By **Brad Sears** of the Williams Institute.

Criminal

A Cultural Reflection: The Crimes They Are a Changin'

Outlaws used to rob banks and railroad cars, now its all about stealing prescription drugs and Medicare fraud. By **Mary Masi** of Mary Masi Law.

Corporate

Abbott Customers Get \$52 Million

A class of drug retailers and wholesalers who sued Abbott Laboratories over a price increase for an HIV drug will receive \$52 million under the terms of a settlement filed with the court Friday.

Technology & Science

Is Amazon's Head in the Clouds?

Amazon's failure to obtain music licenses before releasing its new technology is risky. By **Nick Solish**.

Labor/Employment

Milbank Realty Faces Harassment Suit

Real-estate services firm Milbank Realty Group is facing an unusually public lawsuit by a former in-house attorney who alleges she and workers were sexually harassed by the brother-in-law of the company's CEO.

Environmental

Coverage for Climate Change Claims, an Uphill Fight

Will so-called "pollution exclusions" forestall lawsuits against entities that release anthropogenic greenhouse gases? By **J. Robert Renner** of Duane Morris.

Intellectual Property

Closing Arguments Held in Bratz Trial

In closing arguments Friday in the epic Bratz intellectual property war, a lawyer for MGA Entertainment said Mattel Inc.'s overriding mission in launching the suit seeking control of the famous doll line was to snuff out its chief competition.

Civil Rights

Attorney Accused of Human Trafficking

In a tentative decision this month, U.S. District Judge Andrew J. Guilford said a potential class of 350 teachers brought to Louisiana from the Philippines could pursue trafficking and legal malpractice claims against attorney Robert B. Silverman.

Government

Deloitte Fine Over Lobbying Studied

The state Fair Political Practices Commission will decide Monday whether to accept an \$8,000 fine from New York-based Deloitte Consulting LLP over its failure to timely report two years of lobbying activities by one of its lobbyists.

Criminal

Building Inspectors Arrested for Bribery

Two Los Angeles Department of Building and Safety inspectors were arrested Friday on federal bribery charges for allegedly taking thousands of dollars to approve construction work without properly inspecting it.

Discipline

Discipline

Here are summaries of lawyer disciplinary actions taken recently by the state Supreme Court or the Bar Court, listing attorney by name, age, city of residence and date of the court's action.

Corporate

Google Purchase Comes With Condition

The U.S. Department of Justice announced Friday it will approve Google Inc.'s \$700 million purchase of ITA Software Inc., but only if it fulfills conditions meant to preserve competition in the market for online airfare sales.

Law Practice

Howrey Faces Another Lawsuit

Now-defunct Howrey LLP faces a lawsuit in San Francisco federal court brought by former employees seeking unpaid wages and benefits.

Corporate Counsel

Mary J. Dent

General Counsel and Secretary for SVB Financial Group
Santa Clara

Law Practice

Cool Hand Steers Manatt Out of Stormy Year

In the West Los Angeles offices of Manatt, Phelps & Phillips LLP, CEO and managing partner William T. Quicksilver leaned back in his chair and shrugged as he contemplated the firm's recent history.