Survival under the ADA: The Federal Common Law Standard for Determining Survival Claims

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INTRODUCTION

Recent federal decisions split concerning the appropriate standard for determining whether a claim under the Americans with Disabilities Act (ADA) survives a plaintiff's death. One approach applies the general federal common law standard, which merely evaluates whether the statute at issue seeks to redress an individual or public wrong.¹ Under this standard, claims brought under remedial measures survive plaintiff's death, whereas claims that are penal in nature do not.² The second approach invokes the Civil Rights Act exception to the general common law rule, which incorporates the closest applicable survival statute from the forum state.³

Although the Civil Rights Act exception does apply to ADA survival questions, federal courts are not required to wholly incorporate the forum state's survival law.⁴ When federal statutes are silent regarding claim survival, courts possess the discretion to utilize either state law or federal common law, whichever better serves the federal statute's intent.⁵ The federal common law standard better serves the stated purposes of the ADA, that of providing a clear and comprehensive mandate for the

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¹See infra notes 10-21.
²Id.
³See infra notes 64-74.
⁴Id.
⁵Id.
elimination of discrimination against individuals with disabilities, by providing clear, consistent and enforceable standards addressing such discrimination. In contrast, the almost infinite variations in state survival statutes create the possibility that similarly situated plaintiffs, presenting identical ADA claims in different states, could have entirely different remedies available to them under the same federal act.

The importance of a consistent ADA survival policy lies in the large number of terminally ill patients, specifically those with the human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS), who seek relief under the act. Following the federal common law would allow all terminally ill claimants to pursue their ADA actions, confident that should they not live to see the culmination of their suit; their claims would, nonetheless, survive. Application of state survival law, however, would only serve to discourage those terminal plaintiffs residing in states with unfavorable survival statutes from pursuing legitimate ADA claims.

BACKGROUND

Federal Rule 25(a) allows a court to order party substitution "[i]f a party dies and the claim is not thereby extinguished."5 Because this rule is procedural, however, it does not substantively define whether an action survives the death of a party, which is a question of substantive law unaffected by Rule 25(a).6 No general federal survival statute exists, nor does the ADA contain any provision regarding whether claims raised under the act survive the death of a party.7 Generally, absent specific direction by Congress, survival of a federal action is exclusively a federal question, and must be decided using federal common law.8

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8Heikkila v. Barber, 308 F.2d 558, 561 (9th Cir. 1962) (citing Schreiber v. Sharpless, 110 U.S. 76, 80 (1884)).
Under Federal Common Law, Remedial Actions Survive, While Actions That Are Penal in Nature Must Abate

Under federal common law, survival of an action depends on whether the recovery sought is remedial or penal in nature.\(^9\) Remedial actions that compensate an individual for specific harm suffered, survive plaintiff's death; while penal actions, which impose damages for a general wrong to the public, must abate.\(^10\) There is a danger, however, of "being misled by the different shades of meaning" given to the word "penal."\(^11\) In Huntington v. Attrill,\(^12\) the Supreme Court held that the basis for the common law tradition of proscribing survival of penal actions lies in the "general rules of international comity," which held that criminal laws of a particular jurisdiction are unenforceable outside that jurisdiction.\(^13\) Such strict interpretation of the word "penal" denotes a corporal or pecuniary measure, "imposed and enforced by the state for a crime or offense against its laws."\(^14\) However, "penal" commonly describes "extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered."\(^15\) Therefore, the "tenor of the [Huntington] Court’s opinion," is that, although statutes providing a right of recovery for an individual may have a penal element, under a common law definition, the word "penal" denotes purely criminal laws.\(^16\)

To determine whether lawmakers intended a cause of action under a given statute to be remedial or penal in nature, courts are typically required to make an inference from the language and history of that statute.\(^17\) To do this, most courts rely on the test developed by the sixth circuit in Murphy v. Household Finance Corporation, which held that a double damages cause of action under the Truth in Lending Act (TILA) was not penal, and, thus, passed to the trustee in bankruptcy upon

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\(^9\) Schreiber, 110 U.S. at 80.
\(^10\) Id.; Kilgo v. Bowman Transp., 789 F.2d 859, 876 (11th Cir. 1986); United States v. NEC, 11 F.3d 136, 137 (11th Cir. 1993).
\(^12\) Id.
\(^13\) Id. at 669.
\(^14\) Id. (citing United States v. Reisinger, 128 U.S. 398, 402 (1888)); United States v. Chouteau, 102 U.S. 603, 611 (1881).
\(^15\) Huntington, 146 U.S. at 666.
\(^16\) Smith v. Dep’t of Human Serv., 876 F.2d 832, 836 (10th Cir. 1989) (quoting Huntington, 146 U.S. at 666-78).
adjudication.\textsuperscript{18} The \textit{Murphy} opinion distilled the \textit{Huntington} discussion of penal laws into three factors, which consider:

(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public;

(2) whether recovery under the statute runs to the harmed individual or to the public; and

(3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.\textsuperscript{19}

\textbf{Claims Brought Under the Truth in Lending Act, Which is Remedial in Nature, Survive Plaintiff's Death}

Applying the above three factor test to TILA, the court in \textit{Murphy} first found that the purpose of the Act was to require creditors to disclose accurate credit information to consumers, in an effort to prevent fraudulent practices some lenders used to keep consumers uninformed of the terms extended to them.\textsuperscript{20} The \textit{Murphy} court further held that the "twice the damages" provision of the Act was intended by Congress to encourage private causes of action\textsuperscript{21} and, thus, did not constitute the "kind of penalty courts must narrowly construe within the narrow limits reserved for strictly penal enactments."\textsuperscript{22} Ultimately, \textit{Murphy} held that double damages under TILA, as well as accumulated recovery under other laws, does not "convert an otherwise remedial statutory scheme into a penal one."\textsuperscript{23}

\textit{Murphy}'s three factor test for legislative intent, as well as the holding that TILA was remedial in nature, was subsequently adopted by other circuits. In \textit{Smith v. No. 2 Galesburg Crown Finance Corporation},\textsuperscript{24} the Seventh Circuit held that even though TILA had the effect of "redressing

\begin{itemize}
  \item \textsuperscript{18}560 F.2d 206 (6th Cir. 1977).
  \item \textsuperscript{19}Id. at 209.
  \item \textsuperscript{20}Id.
  \item \textsuperscript{21}Id. at 210.
  \item \textsuperscript{22}Id.
  \item \textsuperscript{23}560 F.2d at 210.
  \item \textsuperscript{24}615 F.2d 407 (7th Cir. 1980).
\end{itemize}
a perceived social ill,” because the “entire focus of the legislation is on the options open to the individual consumer ... the primary purpose of the action is to redress individual wrongs.” Quoting both Murphy and Smith, the Fifth Circuit in James v. Home Construction Company of Mobile, held that although the TILA in some sense addressed both individual wrongs and wrongs to the public, the overall purpose of the act was to “enable the individual consumer ... to credit shop,” thus avoiding the “uninformed use of credit.” Therefore, although TILA does serve the interests of the public, it qualifies as a remedial measure; because the primary purpose of a TILA action is to redress an individual wrong. Soon after Smith, the Fifth Circuit in In re Wood found that although TILA “ultimately serves the dual purpose of providing a remedy for harm to the monetary interests of individuals while serving to deter socially undesirable lending practices;” because the congressional intent was to encourage the individual consumer to prosecute directly by being allowed to recover directly, such a statutory scheme cannot be “properly characterized as penal.” Thus, due to the overall remedial nature of the TILA, all claims raised under the Act, including punitive damages, would survive the death of the plaintiff.

**ADEA Compensatory Claims Survive Plaintiff’s Death, However, the Liquidated Damages Provision is Penal in Nature and Must Abate**

Like TILA, compensatory damages under the Age Discrimination in Employment Act (ADEA) survive the death of a plaintiff as well. Relying on Ricca v. United Press International (at the time the only other case to consider ADEA claim survival), Asklar v. Honeywell used the Murphy test to find that the primary purpose of the ADEA, to “compensate, and where appropriate reinstate, individuals who suffered...

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25 Id. at 414.
26 621 F.2d 727 (5th Cir. 1980).
27 Id. at 730.
28 Id.
29 In re Wood, 643 F.2d 188 (5th Cir. 1980).
30 Id. at 191.
32 See Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985) (the Supreme Court held that the liquidated damages provision of the ADEA was punitive in nature).
33 95 F.R.D. 419 (D. Conn. 1982).
employment discrimination because of their advanced age," qualified as remedial in nature.\textsuperscript{34} \textit{Asklar} further held, notwithstanding the liquidated damages provision, recovery under the Act remained remedial; because it was based on demonstrated loss, which was not disproportionate to the harm suffered.\textsuperscript{35} 

While compensatory damages under ADEA continued to survive plaintiff’s death, the Supreme Court determined, in \textit{Trans World Airlines v. Thurston},\textsuperscript{36} that the legislative history of the ADEA showed “Congress intended for liquidated damages to be punitive in nature.”\textsuperscript{37} The original bill contained a provision that called for criminal liability for a willful violation.\textsuperscript{38} Due to “difficult problems of proof” in a criminal investigation for employment discrimination, including an employer’s invocation of the Fifth Amendment, a provision was proposed to eliminate the criminal penalty in favor of the double or liquidated damages provision.\textsuperscript{39} Such a provision would “furnish an effective deterrent to willful violations [of ADEA].”\textsuperscript{40} For this reason, while ADEA survival questions decided after \textit{Thurston} allowed actions for compensatory damages to survive plaintiff’s death, recovery sought under the liquidated damages provisions would not.\textsuperscript{41} Thus, under common law analysis, as long as the federal statute underlying a plaintiff’s action qualifies under the \textit{Murphy} test as remedial in nature, and neither the specific language of the statute, nor its legislative history can be interpreted as evidence of congressional intent that a particular form of recovery under the act is penal, the claim in its entirety will survive plaintiff’s death.

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 424.
\item \textsuperscript{35} \textit{Id.} at 423.
\item \textsuperscript{36} 469 U.S. 111 (1985).
\item \textsuperscript{37} \textit{Id.} at 125.
\item \textsuperscript{38} 13 CONG. REC. 2199 (1967).
\item \textsuperscript{39} 469 U.S. at 125 (citing S. Res. 788, 90th Cong. (1967)).
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{See} Smith v. Dep’t of Human Serv., 876 F.2d 832, 835-37 (10th Cir. 1989) (because the action was solely for liquidated damages, which the Supreme Court determined in \textit{Thurston} to be penal, the action does not survive plaintiff’s death); and Hawes v. Johnson & Johnson, 940 F. Supp. 697, 703 (1996) holding that compensatory damages survived plaintiff’s death, but the liquidated damages must abate in light of \textit{Thurston}).
\end{itemize}
Both the Overall Purpose, and the Remedies Available Under the ADA Satisfy the *Murphy* Test for Remedial Legislation

The opening section of the ADA easily satisfies the initial *Murphy* criterion by providing an overall legislative purpose addressing individual wrongs, rather than focusing on conduct that constitutes a more general, or public wrong.\(^{42}\) Under the findings and purpose section of the ADA, Congress declared an intent to provide legal recourse for *individuals* who suffer discrimination based on physical or mental disabilities.\(^{43}\) While this section establishes the goal of providing a “national mandate for the elimination of discrimination against *individuals* with disabilities,”\(^{44}\) it seeks to provide “enforceable standards addressing discrimination against *individuals* with disabilities,”\(^{45}\) and to “ensure that the Federal Government plays a central role in enforcing [these] standards ... on behalf of *individuals* with disabilities.”\(^{46}\) While the ADA may have the secondary effect of “redressing [the] perceived social ill,”\(^{47}\) of discrimination against the disabled, the plain language of this section demonstrates that the entire focus of this legislation is to provide more effective legal means for individual disabled persons to combat the discrimination they themselves have suffered. Analysis under the second and third *Murphy* criteria proves more difficult, however, as different remedies apply depending on whether the action seeks recovery for employment discrimination, or discrimination by a public entity.\(^{48}\)

Chapter I of the ADA prohibits discrimination “against a qualified individual with a disability ... in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\(^{49}\) For violations of Chapter I, Section 12117 of the ADA incorporates the remedies and procedures set forth in Section 2000e-5 of the Civil Rights Act, which provides that if a court finds [defendant] “intentionally engaged ... in an unlawful employment practice ... the court may enjoin

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\(^{47}\)Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407, 414 (7th Cir. 1980).


the [defendant] from ... such ... practice, and order such affirmative action ... as ... reinstatement or hiring of employees,” reimbursement for back pay, and any other appropriate forms of equitable relief.\textsuperscript{50} In addition to the section 2000e-5(g) remedies, section 1981a(a)(2) of the Civil Rights Act also allows compensatory and punitive damages for violations of section 12112(b)(5) of the ADA.\textsuperscript{51} Section 12112(b)(5) addresses discrimination caused by the failure to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual,” or “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability” when denial is based on the need to make reasonable accommodations for such disabilities.\textsuperscript{52} As with punitive damages sought under TILA,\textsuperscript{53} the mere fact punitive damages may be available, does not “convert an otherwise remedial statutory scheme into a penal one.”\textsuperscript{54}

Chapter II of the ADA prohibits discrimination that denies an individual the “benefits of the services, programs or activities of a public entity.”\textsuperscript{55} “Public entity” is defined as:

A) any State or local government;
B) any department, agency, special purpose district, or other instrumentality of a State or local government; and
C) the National Railroad Passenger Corporation, and any commuter authority.\textsuperscript{56}

For violations of Chapter II of the Act, section 12133 incorporates the remedies provided in Section 794a of the Rehabilitation Act.\textsuperscript{57} Section 794a of the Rehabilitation Act, in turn, refers to Sections 2000e-16 and 2000e-5(f) through (k) for available remedies.\textsuperscript{58} Thus, as with actions

\textsuperscript{50} 42 U.S.C. § 2000e-5(g)(1) (West 1998). In addition, subsection (k) allows recovery of reasonable attorneys' fees for the prevailing party, subject to the discretion of the court. 42 U.S.C. § 2000e-5(k).
\textsuperscript{52} 42 U.S.C. § 12112(b)(5) (West 1998).
\textsuperscript{53} See discussion supra Part I.A.1.
\textsuperscript{54} Murphy v. Household Fin. Corp., 560 F.2d 206, 210 (6th Cir. 1977).
\textsuperscript{55} 42 U.S.C. § 12132 (West 1995).
\textsuperscript{57} 42 U.S.C. § 12133 (West 1998).
\textsuperscript{58} 29 U.S.C. § 794a (West 1998).
brought under Chapter I, injunctive and other equitable remedies provided by Section 2000e-5(g)(1) are available for claims brought under Chapter II of the Act as well. The remedies available under 2000e-5(g)(1), common to actions under both chapters of the ADA, run to the wronged individual, rather than the general public. While reinstating a wrongfully discharged employee, reimbursing an employee for lost back pay, or enjoining the employer from continuing discriminatory practices, may tangentially advance a general societal goal to end discrimination against the disabled, such remedies, first and foremost run to compensate the wronged individual.

The compensatory and punitive damages allowed for violations of Section 12112 also fall within the criteria of the Murphy test. The very language of the applicable subsection, which provides recovery for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," denotes recovery that runs to the individual harmed, not to the general public. In addition, Section 1981a(b)(3) places limits on the sum of compensatory and punitive damages awarded based on the number of employees retained by the defendant during the current or preceding calendar year. These congressionally imposed limits on recovery, plus the fact that all remedies available under the ADA are based on demonstrated loss, establishes that recovery under the Act is not disproportionate to the harm suffered. The legislation addresses individual wrongs by providing legal recourse for individuals who suffer discrimination due to their disability. Remedies for such discrimination run to the wronged individual and are proportional to the demonstrated loss, thus meeting the Murphy criteria for a remedial enactment.

59 See discussion of the Murphy test supra Part I.A.1.
61 42 U.S.C. § 1981a(b)(3) (West 1998). Sections (A)-(D) limit compensatory damages to: $50,000 for defendant with fourteen to 100 employees for twenty or more weeks in the current or preceding calendar year; $100,000 for employers with 101 to 200 employees for twenty or more weeks in the current or preceding calendar year; $200,000 for employers with 201 to 500 employees for twenty or more weeks in the current or preceding calendar year; and to $300,000 for employers with more than 500 employees for twenty or more weeks in the current or preceding calendar year. 42 U.S.C. § 1981a(b)(3)(A)-(D).
Section 1988 Allows Courts the Discretion to Apply Either Forum State Law or Federal Common Law

Presenting a "unique departure from the general [federal common law] rule," section 1988 of the Civil Rights Act appears to defer to state law all matters not directly addressed by federal civil rights statutes. Section 1988 provides "in the context of civil rights actions," for federal laws that fail to provide "suitable remedies," courts are instructed to turn to the "common law, as modified and changed by the constitution and the statutes of the [forum] state." Following the Supreme Court's holding in Robertson v. Wegman, the majority of federal courts interpret section 1988 as requiring application of state survival law "so long as the result is consistent with the United States Constitution and its laws." In Wegman, the majority's reasoning focused mainly on whether incorporation of state survival statutes is "inconsistent with the Constitution and the laws of the United States." The Supreme Court held that a Louisiana survivorship law only allowing an action to "survive in favor of a spouse, children, parents, or siblings" was not inconsistent with federal statutes and constitutional provisions, nor the "policies expressed in them." Absent in the Court's reasoning was any comparison of the Louisiana statute with the federal common law rule for survivorship. Instead, in a self-described "narrow" decision the majority

63 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 25.10[5][b] (3d ed. 1997).
66 Id. at 589-90 (Applying Louisiana tort survival law). See also Small v. American Tele. & Tele. Co., 759 F. Supp. 1427, 1428 (W.D. Mo. 1991) (applying Missouri tort survival law, which allows survival of compensatory and punitive damages); Slade v. United States Postal Serv., 952 F.2d 357, 360 (10th Cir. 1991) (applying the Oklahoma survival statute for personal injury actions); Glanz v. Vernick, 750 F. Supp. 39, 42-43 (D. Mass 1990) (applying Massachusetts tort survival law, which only allows survival of compensatory damages); Oliver v. United States Army, 758 F. Supp. 484, 485 (E.D. Ark. 1990) (applying Arkansas tort survival law, which allows survival of bodily or personal injury, not injury to feelings, reputation, or for malicious prosecution).
68 Id. at 591.
70 Id. at 594.
simply held that under Section 1988, the federal district court “was required to adopt” the Louisiana survival statute and could only look to the federal common law “as a secondary matter.” Appearing to rely more on the weakness of respondent’s argument than on the strength of prior decisions, the Court summarized its decision as reversing the judgment of the court of appeal; because “[r]espondent’s only complaint about [the Louisiana survival law] is that it would cause [his] action to abate.”

Justice Blackmun’s Dissent in *Robertson v. Wegman*

Highlights the Flaws in the Majority Opinion, While Presenting a Strong Case for a More Liberal Interpretation of Section 1988

Justice Blackmun’s dissent in *Wegman* highlights the majority’s failure to effectively overcome two prior decisions that support a more liberal interpretation of section 1988. The majority failed to acknowledge the language in *Sullivan v. Little Hunting Park* which held that section 1983 is to be read as providing the utilization of both state and federal rules, whichever better serves the policies expressed in the federal statutes. Under this interpretation, automatic deference to state survival law ignores a determination of whether application of state statute, or federal common law, better serves the underlying policies of the statute. As Blackmun discussed, the majority’s narrow interpretation of section 1988 strips the statute of its primary intention, that of giving courts “flexibility to shape their procedures and remedies in accord with the underlying policies of the Civil Rights Acts, allowing them to choose ‘whichever ‘better serves’ those policies.’”

Justice Blackmun further pointed to *Carey v. Piphus*, a civil rights action decided in the same term as *Wegman*, where the Court fashioned a federal damages rule from common law sources without consideration of

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71 *Id.* at 593, n.11.
73 *Id.* at 594.
74 Justices Brennan and White joined Justice Blackmun’s dissent.
77 *Id.* at 596.
78 *Id.* (*quoting Sullivan*, 396 U.S. at 240).
any corresponding forum-state statute. Unlike in *Wegman*, the Court in *Carey v. Piphus* did not first look to the forum state law to test it for possible inconsistencies with the "federal scheme, before embracing a federal common-law rule." Instead the Court fashioned a rule "in light of the historic common-law concerns and the policies of the Civil Rights Acts." Although the majority of courts follow *Wegman's* strict interpretation of section 1988, in light of the points raised by Justice Blackmun's dissent, reliance on the federal common law appears to be more in line both with traditional doctrine and the very specific purposes of the Civil Rights Act. According to Blackmun, the primary concerns of section 1988 are the "compensation of the victims of unconstitutional action, and deterrence of like conduct in the future." Justice Blackmun stated that a "federal rule of survivorship allows uniformity," which would insure that "[l]itigants identically aggrieved in their federal civil rights, residing in ... adjacent [s]tates, will not have different results due to the vagarities of state law."

**Absent Express Language to the Contrary, Statutes are to be Interpreted as Upholding Long-Established Common Law Principles**

Automatic application of state survival law over federal common law ignores another long-standing principle that "statute[s] which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." For a federal statute such as section 1988 to be interpreted as allowing incorporation of a state statute contrary to the federal common law, the federal legislation must "speak directly" to the question addressed by the common law. Courts are to assume

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51Id.
52Id.
53Id. at 598.
54Id. at 602.
55*Wegman*, 436 U.S. at 602.
that "Congress has legislated with an expectation that [the common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" A plain statement by Congress, of an intent to abrogate the common law, is required for the protection of "weighty and constant values." When faced with a question of statutory interpretation, the issue is not whether a particular interpretation is wise, but whether such a reading is consistent with what was intended by the legislature. Because "Congress is understood to legislate against a background of common-law ... principles," a judicial finding contrary to an established common law principle "[i]n traditionally sensitive areas" requires a "clearly expressed congressional intention." No such language, expressing any congressional intent to abrogate the federal common law rule for survivability, exists within either the text or legislative history of section 1988.

Although the vast majority of federal courts follow the Supreme Court's holding in Wegman, which calls for the automatic application of state survivability statutes to federal civil rights claims, such practice seems contrary both to the correct interpretation of section 1988, and to the well-established common law doctrine. As the Court held in Sullivan v. Little Hunting Park, incorporation of state survival statues is not automatic; instead, courts must look to either the federal common law or state statutes, applying whichever better suits the purpose of the federal act in question. In addition, long-held common law principles, such as the federal survivability rule, must be followed unless a statutory purpose to the contrary is evident.

**ANALYSIS OF RELEVANT CASE LAW**

Since the enactment of the ADA in July of 1990, federal decisions concerning survival of ADA claims have split over the proper rule of law. Two district courts have applied the federal common law, while two other

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89 Id. at 109.
90 Id. at 108.
91 Id.
92 Id at 109 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).
district courts have incorporated survival statutes from the forum state.\textsuperscript{95} Unfortunately, neither the Supreme Court nor the federal circuit courts have directly ruled on the issue of claim survivability under the ADA.\textsuperscript{96} However, even those districts that follow the common law do not allow punitive damages to survive, even though the ADA was deemed to have an overall remedial purpose.

**Recent Decisions Applying the Federal Common Law to Actions Brought Under the ADA Allowing Compensatory Damages But Stingy Punitive Damages**

In *Caraballo v. South Stevedoring*,\textsuperscript{97} plaintiff suffered from interstitial lung disease and pulmonary fibrosis.\textsuperscript{98} Seeking compensatory and punitive damages under the Florida Civil Rights Act (FCRA), the ADEA and the ADA, plaintiff alleged that his former employer refused to honor his reasonable requests for accommodation to his condition, and continued to require him to work in the presence of hazardous materials and airborne particles.\textsuperscript{99} After defendants filed a motion to dismiss on all but three claims, plaintiff died.\textsuperscript{100} Defendants then sought to strike all claims for punitive damages on the grounds that they did not survive plaintiff's death.\textsuperscript{101} The *Caraballo* opinion cited on the common law standard, holding that survival of a federal cause of action is a question of federal law, which "turns on whether the relief sought is 'remedial' or 'penal' in nature."\textsuperscript{102} The opinion stated that because punitive damages are "generally

\textsuperscript{95}See discussion infra Parts A and B.

\textsuperscript{96}The seventh circuit has twice considered ADA claims where the plaintiff died before trial concluded. Although the court did not directly rule on survivability in *Hutchinson v. Spink*, the court's opinion did state *in dicta* that state law governs the survival of ADA claims. 126 F.3d 895, 898 (7th Cir. 1997). An earlier seventh circuit decision, U.S. E.E.O.C. v. AIC Security Investigations, upheld compensatory and punitive damages for a plaintiff who died of cancer during trial. 55 F.3d 1276, 1285 (7th Cir. 1995). Strangely, the court's opinion did not discuss survivability at all. *Id.* In the remaining ADA survival case, *Plumley v. Landmark Chevrolet*, the fifth circuit dismissed plaintiff's claim for lack of actual case or controversy under the ADA, and therefore did not rule on claim survivability. 122 F.3d 308, 312 (5th Cir. 1997).


\textsuperscript{98}Id. at 1464.

\textsuperscript{99}Id.

\textsuperscript{100}Id.

\textsuperscript{101}Id.

\textsuperscript{102}Caraballo, 932 F.Supp. at 1466 (*citing* United States v. NEC Corp., 11 F.3d 136, 137 (11th Cir. 1993)).
imposed upon a defendant for a wrong against the public," they are penal in nature. Noting the Supreme Court has held liquidated damages under the ADEA to be penal in nature, the district court appropriately struck the liquidated damages plaintiff sought under the Act. However, the court used this same reasoning to incorrectly strike punitive damages sought under the ADA as well.

The court relied on Earvin v. Warner-Jenkinson Co., where a Missouri federal magistrate dismissed all punitive damages sought by the deceased plaintiff's counsel under Title VII of the Civil Right Act. Grossly misconstruing Murphy v. Household Finance, the magistrate rationalized dismissal of the punitive damages by stating "the survival of the punitive damages cause of action would not remedy any wrong to the public and the punitive damages recovery would have run to the individual, not to the public," which is precisely two of the three Murphy criteria that serve as evidence that an enactment is remedial in nature. Under correct Murphy analysis, penal laws redress public wrongs and provide recovery under which remedies run to the public, whereas remedial enactments redress private wrongs and recovery runs to the wronged individual. The Caraballo opinion nevertheless uses this incorrect application of the Murphy standard as its sole support for abatement of punitive claims raised under a primarily remedial provision.

The second federal decision to apply the common law rule, Estwick v. U.S. Air Shuttle, involved a plaintiff who suffered from prostate
cancer when he was laid off two months prior to his sixty-third birthday.114 Plaintiff's wife, as administratrix of his estate, brought an action for discrimination against her late husband's former employer pursuant to the Civil Rights Act, the ADEA, the ADA and a New York Human Rights provision.115 Defendants moved for summary judgment on several grounds, including a claim that plaintiff's action did not survive her husband's death.116 The district court held that absent specific direction by Congress; whether "an action created by federal statute survives the death of the plaintiff is a matter of federal common law."117 Here, as in Caraballo, the court ruled that because the ADA is silent as to whether a cause of action survives plaintiff's death, the threshold question thus becomes whether the statute is penal or remedial in nature.118 Finding the ADA to be remedial in nature, the court upheld the compensatory damage claim, but dismissed the punitive damages as "plainly penal."119 Once again, like Caraballo, the district court allowed itself to be misled by the "different shades of meaning" the common law has for the word "penal,"120 thus incorrectly dismissing punitive damages that should have survived due to the remedial nature of the act under which they were brought.

Recent Decisions Applying State Survival Statutes to ADA Claims Illustrate the Unpredictable Results Inherent to Such an Approach

In contrast to Caraballo and Estwick, Rosenblum v. Colorado Dep't of Health121 employed a strict interpretation of section 1988 and applied Colorado survival law to plaintiff's action against her former employer.122 Plaintiff's ADA alleged she suffered discrimination based on her diabetic condition, but she died soon after the action commenced.123

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114 Id. at 496.
115 Id. See N.Y. EXEC. L. § 296 3-a(a) (West 1993) (state civil rights law prohibiting discrimination against persons over the age of eighteen because of such individual's age).
116 Estwick, 950 F. Supp. at 496.
117 Id. at 498 (citing Asklar v. Honeywell, 95 F.R.D. 419 (D. Conn. 1982)).
118 Id.
119 Id.
122 Id. at 1408-09.
123 Id. at 1405.
plaintiff’s daughter was substituted as the representative of her estate, defendant filed a motion for summary judgment claiming that because plaintiff died, her daughter could not recover either pain and suffering, or prospective earnings or benefits for periods of time after the date of her death.\(^\text{124}\)

The court held because the ADA did not address the issue of survival of causes of action, courts must "look to state law, provided that it is not 'inconsistent with the Constitution and laws of the United States.'"\(^\text{125}\) Colorado law provides that "damages recoverable after the death of [plaintiff] shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death."\(^\text{126}\) Finding the Colorado provision consistent with the ADA and its underlying policies of deterrence and victim compensation, the court held that plaintiff may not recover damages for pain and suffering.\(^\text{127}\) Applying Colorado law produced a result inconsistent with the federal common law, which would allow damages for pain and suffering, as a recovery which is remedial in nature. More importantly, the Colorado provision that dismissed plaintiff’s damages for pain and suffering expressly contradicts section 1981 (b)(3) which provides recovery for pain and suffering caused by action violative of Title I of the ADA.\(^\text{128}\)

Also following the strict interpretation of section 1988, \textit{Allred v. Solaray},\(^\text{124}\) involved a plaintiff with HIV who filed claims against his former employer under both the ADA and Utah's Anti-Discriminatory Act for intentional infliction of emotional distress.\(^\text{125}\) Although the district court cited \textit{Estwick} and \textit{Caraballo} as authority for denying punitive damages, the court nonetheless applied the Utah tort survival statute to determine whether the compensatory claims survived.\(^\text{126}\) Utah’s survival statute provides that "causes of action arising out of personal injury to the

\(^{124}\text{Id. at 1408.}\)
\(^{125}\text{Id. (quoting Robertson v. Wegman, 436 U.S. 584, 588-89 (1978)).}\)
\(^{126}\text{COLO. REV. STAT. § 13-20-101(1).}\)
\(^{128}\text{See 42 U.S.C. § 12112(b)(5) (West 1998) (Prohibiting discrimination based on the failure to provide reasonable employment accommodations for otherwise qualified disabled individuals).}\)
\(^{129}\text{Allred v. Solaray, 971 F. Supp. 1394 (D. Utah 1997).}\)
\(^{126}\text{Id. at 1395.}\)
\(^{127}\text{Id.}\)
person... do not abate upon the death of the... injured person.\textsuperscript{127} Based on language used in the Utah survival statute, the district court narrowly defined "personal injury" to mean a physical injury, not encompassing an invasion of personal rights.\textsuperscript{128} Because discrimination claims under the ADA are claims for injuries to rights or reputation, and not an actual bodily injuries, the district court held that plaintiff's ADA claims could not survive his death under Utah survival law.\textsuperscript{129}

Although the district court held the ADA to be a remedial act, and the damages sought here by plaintiff were remedial in nature, the particularities of Utah survival statutes did not allow the claim to survive. Although short on the particular facts as alleged by the plaintiff, the Allred opinion does state that plaintiff's claim was based on his former employer's intentional infliction of emotional distress, and that plaintiff sought damages for emotional pain and suffering.\textsuperscript{130} As with Rosenblum, the Utah statute contradicts section 1981a(b)(3), which specifically allows compensatory and punitive damages for mental anguish, emotional pain and suffering caused by an employer's violation of Title I of the ADA.\textsuperscript{131}

The unfortunate result reached in Rosenblum highlights one of the most important arguments for universal application of the common law to survival questions under the ADA, namely the protection of the rights of terminally ill patients, specifically those with HIV or AIDS. Many federal decisions have held that individuals with HIV or AIDS are "disabled" within the meaning of the ADA.\textsuperscript{132} Unfortunately, due to the high

\textsuperscript{127}Id. at 1396, quoting UTAH CODE ANN. § 78-11-12(1)(a)(1996)).
\textsuperscript{128}Id. at 1397.
\textsuperscript{130}Id. at 1395.
\textsuperscript{131}See supra notes 130-131.
\textsuperscript{132}Hoepfl v. Barlow, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995). See also 28 C.F.R. 36.104(1)(iii) ("The phrase physical or mental impairment includes ... HIV disease (whether symptomatic or asymptomatic"); D.B. v. Bloom, 896 F. Supp 166, 170 (D.N.J. 1995) ("[Plaintiff] is, by virtue of his HIV status, a person with a disability"); Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994) ("Aids and HIV are both disabilities within the meaning of the ADA"); Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997) ("HIV-positive status, simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment under the ADA"); Gates v. Rowland, 39 F.3d 1440, 1446 (9th Cir. 1994) ("[A] person infected with the HIV virus is an individual with a disability within the meaning of the [ADA]"); Harris v. Thigpen, 941 F.2d 1495, 1523 (11th Cir. 1991) (Finding HIV-infected class members handicapped within the meaning of the Rehabilitation Act); Hernandez v. Prudential Ins. Co. of Am., No. 96-1316-CIV-T-17C, 1997 LEXIS 15560 (M.D. Fla. Sept. 22, 1997) ("An individual infected with the HIV virus can easily satisfy the 'substantial impairment of major life activities' prong of the ADA"); Doe v. Kohn
mortality rate for such plaintiffs, combined with delays in the federal docket, many may not live to see their ADA claims fully adjudicated. Application of forum-state law could serve to discourage potential plaintiffs affected by HIV and AIDS from filing ADA claims in states whose applicable survival laws would not allow their claims to survive. Likewise, application of forum-state law could produce the effect of promoting discrimination against individuals with terminal disabilities in those states where any claim under the ADA would not survive plaintiff's death. Such an outcome does meet the desired goal of an efficient, consistent national standard to combat discrimination against the disabled.

Yet another complication to raising an ADA claim is the possibility that applying for or collecting either Social Security Insurance (SSI) or private disability benefits may preclude eligibility for protection under the ADA. Although the majority of the federal circuits routinely hold that receipt of SSI or private benefits does not preclude ADA relief, some have ruled otherwise. Usually such decisions rest on the theory of judicial estoppel, the equitable doctrine that precludes parties from taking inconsistent positions in judicial proceedings in an effort to protect the

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133 For example, recovery for injury to feelings, reputation or malicious prosecution would not survive plaintiff's death in Arkansas. See Oliver v. United States Army, 756 F. Supp. 424, 425 (E.D. Ark. 1990).

134 See generally Swanks v. Washington Metro. Area Transit Auth., 166 F.3d 582, 585 (D.C. Cir. 1997) ("Both the Social Security Administration and the EEOC agree that the receipt of Social Security disability benefits does not automatically bar ADA claims."); Whitbeck v. Vital Signs, 116 F.3d 588, 591 (D.C. Cir. 1997) (Award of private disability benefits "does not preclude a later [ADA] claim that the insured can work with accommodation."); Griffith v. Wal-Mart Stores, 135 F.3d 376, 381 (6th Cir. 1998) (Denying judicial estoppel on the grounds that "application from and receipt of Social Security benefits ... gives no consideration to that person's ability to work with reasonable accommodation, which is required to be under the ADA."); Weiler v. Household Fin. Corp., 101 F.3d 519, 523-24 (7th Cir. 1996) ("ADA's determination of disability and a determination under the Social Security disability diverge significantly in their respective legal standards and statutory intent."); Weigel v. Target Stores, 122 F.3d 401, 406 (7th Cir. 1997) (SSA's decision to grant benefits to plaintiff not "determinative as to whether or not she may be considered a 'qualified individual' under the ADA."); Talavera v. School Bd Of Palm Beach County, 129 F.3d 1214, 1220 (11th Cir. 1997) (SSA benefits application is not 'inherently inconsistent with being a 'qualified individual with a disability' under the ADA.'), and Taylor v. Food World, 133 F.3d 1419, 1423 (11th Cir. 1998) (Following Talavera).

135 See McNemar v. The Disney Store, 91 F.3d 610 (3rd Cir. 1996), Cleveland v. Policy Management Sys. Corp., 120 F.3d 513 (5th Cir. 1997); McConathy v. Dr. Pepper Seven Up Corp., 131 F.3d 558 (5th Cir. 1998); and Kennedy v. Applause, 90 F.3d 1477 (9th Cir. 1996).
"integrity of the judicial process." Judicial estoppel applies when a litigant successfully asserts that his opponent:

1. asserted an inconsistent position under oath in a prior judicial proceeding;
2. the prior statement was accepted by a judicial tribunal;
3. he was a litigant to the first judicial proceeding; and
4. he would be prejudiced unless the opponent is estopped.

Under this theory, previously certified assertions to the Social Security Administration (SSA) that a claimant is totally disabled are held to be wholly inconsistent with later assertions under the ADA that claimant is a "qualified person with a disability who, with or without reasonable accommodation can perform the essential functions of the job." Thus, a claimant who received disability insurance from an employer under a claim of total disability would be precluded from filing a subsequent ADA action alleging that this same employer discriminated against the claimant based on the same disability.

Although judicial estoppel has caused controversy in the very circuits where it was used to preclude ADA claims, disability benefits remain a barrier to ADA actions in the Third, Fifth and Ninth Circuits, while the issue remains undecided in the Second and Eighth Circuits. This presents the possibility that an extremely unlucky claimant, suffering the compounded misfortune of living in a jurisdiction that follows both the judicial estoppel doctrine of preclusion and the application of unfavorable forum state survival law, could lose both SSI/private benefits and ADA relief available to a similarly-situated claimant in another jurisdiction. Such an unfair result could occur if a terminally ill plaintiff does not apply

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136 McNemar v. The Disney Store, 91 F.3d 610, 617 (3rd Cir. 1996).
137 McNemar, 91 F.3d at 617.
138 Id. at 618 (quoting 42 U.S.C. §§ 12111(8), 12112(a)).
139 See Krouse v. American Sterlizer Co., 126 F.3d 494, 502-03 (3rd Cir. 1997) ("McNemar has been the object of considerable criticism," some of which "might be well-founded").
140 See Simon v. Safelite Glass Corp., 128 F.3d 68, 74 (2d Cir. 1997); Dusch v. Appleton Electric Co., 124 F.3d 957, 962 at n.8 (8th Cir. 1997).
for disability benefits out of fear that any assertions of total disability to the SSA would preclude his ADA recovery. Assuming, arguendo, that this same plaintiff resides in a forum-state jurisdiction with a survival statute that does not allow his claim to survive his death, plaintiff would lose both legitimate SSI benefits and his entitled ADA relief, simply due to geography.

Rather than wait for judicial resolution of this issue, the preferable and most logical solution would be codification of the federal common law survival standard. Similar to the default federal statute of limitations, providing a general limitation for actions under federal laws that do not have a specific limitations period, a general survival statute could apply to any federal enactment, such as the ADA, which does not contain a specific survival provision. Such a statute could provide that for any civil action arising under an Act of Congress that does not contain a specific survival provision, if plaintiff dies prior to resolution of the matter, only damages which are compensatory in nature will survive plaintiff's death. A default survival statute would resolve the current split concerning ADA claim survival, while merely serving to codify what is currently held as a long established common law principle.

CONCLUSION

When federal laws subject to section 1988 of the Civil Rights Act fall silent as to claim survival, courts are directed to look to the federal common law, as modified by state laws and constitutions. Within this discretion, courts are required to fashion a rule that is consistent with the Constitution and federal law. While no general federal statute governing claim survival exists, the federal common law for survival is well-established. Under the common law, so long as a statute is deemed remedial in nature, all recovery sought under such a act survives the death of a plaintiff, passing to the party substituted in his behalf. Because the ADA squarely meets the requisite criteria for remedial legislation, application of the common law standard to ADA survival questions would

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14 See 28 U.S.C. § 1658 (West 1998) (“Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than [four] years after the cause of action accrues”).


require that all claims, even those for punitive damages, may survive plaintiff's death.

Contrary to the majority of federal courts, section 1988 does not require automatic application of state survival law. Section 1988 allows courts the discretion to apply state law or the common law, whichever better serves the purpose of the legislation at issue. For survival questions arising from actions brought under the ADA, the federal common law rule for survival best meets the stated purposes of the act. The common law rule provides a clear and consistent standard to determine when a deceased plaintiff's ADA suit may continue. Such clarity and consistency is of vital importance due to the large number of terminally ill plaintiffs, most notably those with AIDS or HIV, who seek to recovery under the ADA for discrimination suffered as a result of their diseased status. To subject such plaintiffs to the varied and inconsistent laws of the fifty states, when a simple, and long-established federal remedy is available, is not appropriate.