(Without Reference to File)

SENATE THIRD READING
SB 1186 (Steinberg and Dutton)
As Amended August 30, 2012
2/3 vote. Urgency

SENATE VOTE: 36-0

JUDICIARY	JUDICIARY	9-0
(vote not relevant)		
	Ayes:	Wieckowski, Wagner, Alejo, Dickinson, Feuer, Gorell, Huber, Jones, Monning

SUMMARY: Seeks to promote compliance with the state's disability access laws without unwarranted litigation. Specifically, this bill:

1) Requires an attorney to provide a written advisory with each demand letter or complaint, as defined, sent to or served upon a defendant or potential defendant for any construction-related accessibility claim, as specified.

2) Requires an allegation of a construction-related accessibility claim in a demand letter, or any allegation of noncompliance with construction-related accessibility standards in a complaint, to state facts sufficient to allow identification of the basis for the claim.

3) Prohibits a demand letter from including a request or demand for money or an offer or agreement to accept money, as specified.

4) Requires an attorney to include his or her State Bar license number in a demand letter, and to submit copies of the demand letter to the California Commission on Disability Access (CCDA) and, until January 1, 2016, to the State Bar.

5) Requires, until January 1, 2016, an attorney to submit a copy of a complaint to the commission. Provides that a violation of these requirements may subject the attorney to disciplinary action.

6) Requires the commission to review and report on the demand letters and complaints it receives until January 1, 2016.

7) Also requires the State Bar, commencing July 31, 2013, and annually each July 31 thereafter, to report specified information to the Legislature regarding the demand letters that it receives.

8) Permits other defendants to file a request for a court stay and early evaluation conference pursuant to this provision, including a) a defendant, until January 1, 2018, whose site's new construction or improvement on or after January 1, 2008, and before January 1, 2016, was approved pursuant to the local building permit and inspection process, b) a defendant whose site's new construction or improvement was approved by a local public building department

inspector who is a certified access specialist, and, c) a defendant who is a small business, as described.

9) Authorizes a defendant who does not qualify for an early evaluation conference pursuant to these provisions, or who forgoes those provisions, to request a mandatory evaluation conference, as specified. Authorizes a plaintiff to make that request if the defendant does not make that request.

10) Requires the court, in assessing liability in any action alleging multiple claims for the same construction-related accessibility violation on different particular occasions, to consider the reasonableness of the plaintiff's conduct in light of the plaintiff's obligation, if any, to mitigate damages.

11) Reduces a defendant's minimum liability for statutory damages in a construction-related accessibility claim against a place of public accommodation to $1,000 for each unintentional offense if the defendant has corrected all construction-related violations that are the basis of the claim within 60 days of being served with the complaint and other specified conditions apply, and reduces that minimum liability to $2,000 for each unintentional offense if the defendant has corrected all construction-related violations that are the basis of the claim within 30 days of being served with the complaint and the defendant is a small business, as specified.

12) Requires the Department of General Services to make a biannual adjustment to financial criteria defining a small business for these purposes, and to post those adjusted amounts on its Internet Web site.

13) Requires a commercial property owner to state on a lease form or rental agreement executed on or after July 1, 2013, if the property being leased or rented has undergone inspection by a certified access specialist.

14) Requires, in administering the certified access specialist program, the State Architect to periodically review its schedule of fees for certification under the program to ensure that the fees are not excessive. Prohibits the State Architect from charging a California licensed architect, landscape architect, civil engineer, or structural engineer, an application fee for certification that exceeds $250.

15) Adds a state fee of $1 on any applicant for a local business license or similar instrument or permit, or renewal thereof, for purposes of increasing disability access and compliance with construction-related accessibility requirements and developing educational resources for businesses to facilitate compliance with federal and state disability laws, as specified. Divides those moneys for the state between the local entity that collected the moneys and the Division of the State Architect, pursuant to specified percentages. Creates a continuously appropriated fund, the Disability Access and Education Revolving Fund, for the deposit of funds to be transferred to the Division of the State Architect, thereby making an appropriation. Makes an appropriation by authorizing local government entities to retain 70% of the fees imposed.

16) Revises and recasts the duties and powers of the California Commission on Disability Access, as specified, and eliminates the biennial reporting requirement. The bill instead

provides that a priority of the commission shall be the development and dissemination of educational materials and information to promote and facilitate disability access compliance, including a requirement that the commission work with the Division of the State Architect and the Department of Rehabilitation to develop educational materials for use by businesses. Requires the commission to post specified information on its Internet Web site, including, but not limited to, educational materials and information that will assist business owners. Requires the commission to report to the Legislature on its implementation by a specified date. Requires the commission to compile data with respect to any demand letter or complaint sent to the commission, and post that information on its Internet Web site.

FISCAL EFFECT: Unknown

COMMENTS: In support of the bill the author's state: "SB 1186 is a compromise that applies a common sense approach to resolve difficult issues. It maintains the hard-fought civil rights of the disabled community while helping to protect California businesses from predatory demand for money letters and lawsuits. Support for important laws like the Unruh Act and the Americans with Disabilities Act are weakened when those laws are abused for personal gain. This measure bans the unscrupulous practice of 'demand for money' letters, stops the stacking of claims based on alleged repeat violations to force a business into a quick settlement, while encouraging businesses to fix their violations to comply with the law. Thus, SB 1186 provides some relief to businesses who show good faith in trying to follow the law and are willing to correct the violation, which ultimately promotes compliance and brings greater access to the disabled community."

Under current law, a violation of the Disabled Persons Act subjects the violator to liability for actual damages plus a maximum of three times the actual damages (but not less than $1,000), plus attorney's fees and costs. In a private right of action under the Americans with Disabilities Act (ADA), a plaintiff may obtain injunctive relief and attorney's fees, while an action by the U.S. Attorney may bring equitable relief, monetary damages on behalf of the aggrieved party, and a civil penalty of up to $100,000.

Likewise, persons with disabilities have long been among the groups covered by the Unruh Civil Rights Act entitling all persons, regardless of sex, race, color, religion, ancestry, national origin, disability or medical condition, to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civil Code Section 51.) A violation of the ADA also constitutes a violation of Section 51. A violation of this section subjects a person to actual damages incurred by an injured party, plus treble actual damages but not less than $4,000, and any attorney's fees as the court may determine to be proper. (Civil Code Section 52.)

SB 262 (Kuehl), Chapter 872, Statutes of 2003, established in the Division of the State Architect a voluntary "access specialist certification program" in order to assist business and property owners to comply with ADA and state access laws. The bill also authorized an enforcement action with civil penalties for noncompliance with ADA and state access laws, after notification of the business owner or operator by a government agency. The authority to institute a civil action was extended to county counsels (in addition to the Attorney General, district attorney, and city attorney).

This bill bans oral and written pre-litigation "demands for money," and creates rules for demand letters and complaints in claims involving a construction-related accessibility violation. According to the authors, these provisions are needed to respond to evidence showing that a very small number of plaintiff's attorneys have been abusing the right of petition under Section 52 and Civil Code Section 54.3, by issuing a demand letter to a business that the business pay a quick settlement of the attorney's often inflated claim of damages or else incur greater liability and legal costs if a lawsuit is filed. The bill seeks to prevent these so-called "extortion" techniques by a few unscrupulous lawyers in order to protect the integrity of the state's disability access law.

In an effort to do this, the bill bans pre-litigation demands for money, where the plaintiff alleges a construction-related accessibility violation and makes a request or demand for money or an offer or agreement to accept money. The bill also provides that a demand letter alleging a construction-related violation or asserting a claim may offer pre-litigation settlement negotiations but may not include a specific request or demand for money. It also may not state any specific potential monetary liability for any asserted claim or claims, and may only state "The property owner or tenant, or both, may be civilly liable for actual and statutory damages for a violation of a construction-related accessibility requirement." Uncodified legislative intent language further expresses the Legislature's policy that the abusive use of the right to petition under Section 52 and Section 54.3, does not promote compliance with the accessibility requirements and erodes public support for and confidence in our laws.

The bill requires any demand letter or complaint asserting a construction-related accessibility claim to state facts sufficient to allow identification of the basis for the claim. The requirement is that the alleged violations supporting the claim be described with some specificity but without the need to make averments with special language or precision, such as a lawyer might employ, in light of the fact that this standard is designed to be satisfied by non-lawyers. It is expected that these rules will be liberally construed for non-lawyers, and the bill specifically provides that there is no penalty for violation of these instructions by a non-lawyer. The specificity requirement prescribes the content of pleadings; it does not change the permissible circumstances or standards by which pleadings may be amended.

This specificity provision is designed to deter the use of form demand letters and complaints by the so-called "mill" attorneys described above who assert hundreds of the same or nearly identical claims, often for the same client against different businesses. The requirement is also intended to address the inappropriate "stacking" of multiple claims by requiring a description of each alleged violation instead of the use of a generalized form letter or complaint alleging any number of multiple violations without more specificity. In the *Magic Real Estate* case, the attorney simply stated that the plaintiff "would have patronized said facility on at least 30 occasions during [the preceding year]" without any greater specificity.

A further provision adds a requirement that any complaint alleging a construction-related accessibility violation must be verified by the plaintiff. This provision is in response to the practice of at least one attorney asserting and filing claims without the claimant's knowledge or authorization.

The bill will, for a three-year period, require any demand letter alleging a construction-related accessibility violation to be sent to the State Bar. For easier identification, the bill also requires the demand letter to include the attorney's State Bar license number. The measure also provides

that a violation of the ban on making a demand for money in a construction-related accessibility claim, or for sending a demand letter which makes a request or demand for money or an offer or agreement to accept money would be cause for attorney discipline. Attorney discipline, however, would not be mandatory.

The bill also requires a copy of any attorney demand letter or complaint in state or federal court which alleges a construction-related accessibility violation to be sent to the CCDA. These documents would evidently be public records absent some exception. The CCDA would be directed to tabulate the types and frequency of violations alleged and to compile a list of the top ten frequently alleged violations which would be posted on its Web site. The CCDA would also be directed to report to the Legislature the tabulated data. This information will provide empirical data to policymakers about disability access and compliance issues. It would also provide information to property owners about the most common accessibility violations alleged in demand letters and complaints so that they might take steps to protect themselves from those frequent claims.

One of the most significant features of the bill with strong support from business advocates is the new subdivision (f) to be added to Civil Code Section 55.56, which provides the potential for reduced statutory damages and certain procedural benefits to certain defendants for non-intentional violations. In order to avail themselves of these advantages, a defendant must establish that it has corrected the alleged violation within either 30 or 60 days of being served with the complaint, depending on the defendant. This period is deliberately short and is not subject to enlargement because it is designed to be available for relatively less-extensive violations.

A defendant who had hired a certified access specialist (CASp) and had met applicable compliance standards, or a person who had new construction or an improvement approved by the local building department on or after January 1, 2008, would be liable for minimum statutory damages of $1,000 per offense, instead of $4,000 per offense, when the defendant corrects the alleged construction related accessibility violation within 60 days of being sued. Also, a small business defendant (defined as having 25 or fewer employees and no more than $3.5 million in gross receipts) could have its minimum statutory damages liability reduced to $2,000 for each offense, instead of $4,000, when it corrects an alleged physical accessibility violation within 30 days of being served the complaint. These provisions would not allow for reduced statutory damages where the violation was intentional. The bill does not change the general rule that liability for disability access discrimination typically does not require proof of intent. (*Munson v. Del Taco, Inc.*, 46 Cal. 4th 661 (2009); *Donald v. Cafe Royale, Inc*., 218 Cal. App. 3d 168, 180 (1990).) The amendments revising the definition of "intentional" are designed to reflect that the one previously-identified example involving actual knowledge is just one of the many means by which intent may be shown in light of the principles and purposes by which the relevant statutes are construed. (*See Angelucci v. Century Supper Club, 41 Cal.4th 160, 167 (2007). See also Gunther v. Lin,* 144 Cal. App. 4th 223, 228 (2006); *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 850 (9th Cir. 2004). *Cf. Modern Development Co. v. Navigators Insurance Co*, 111 Cal. App. 4th 932, 943 (2003).) Also, new subdivision (f) would not affect the availability or amount of actual damages, treble damages or attorney's fees.

For the defendants who establish that they satisfy the requirements of section 55.56(f), the bill also grants the option to request an early evaluation conference (EEC) and an immediate mandatory stay of the proceedings, similar to the litigation protections now given to a qualified

defendant who had hired a CASp to inspect the property and issue a report on its compliance status. Evidence regarding the defendant's eligibility for the EEC as a small business would be confidential at this stage of the proceedings so as to not deter potentially eligible defendants from applying for an EEC. A mandatory stay freezes the litigation at the point of the court order, which serves to freeze the plaintiff's attorney's fees at that point. An EEC could be useful to end the case at an early stage, particularly when the defendant has corrected the asserted violation. The authors state that the policy goal of new subdivision (f) is to incentivize property owners to correct their violations, as opposed to settling the case and doing nothing to eliminate the violation. The provision for reduced minimum statutory damages in section 55.56(f) flows from the understanding that the condition causing the violation will be fixed by the time the EEC is held, and thus does not represent a departure from the traditional rule that a defendant may not reduce a penalty by post-litigation conduct, as reflected in the fact that the availability of treble damages is not affected.

The bill also expands and strengthens the existing advisory notice that recipients of civil complaints and demand letters to provide information regarding the new rights and restrictions under the bill. As with notification to the State Bar and CCDA, these notices are to be sent once at the outset and do not need to be re-sent in the same dispute unless new claims are asserted.

New subdivision (h) is added to Civil Code Section 55.56 to address the so-called "stacking" problem. This occurs when the plaintiff is allegedly deterred by the same construction-related accessibility violation on different occasions and thereby asserts a claim of $4000 in statutory damages for each of the multiple claims. According to the authors, the most egregious example is the *Mundy v. Magic Real Estate* case, where the person asserted 30 violations over a short period of time (less than 30 days reportedly) and sought $120,000 in statutory damages. While the obligation to mitigate damages under current law would likely result in a much lower award in a court trial, the mere threat of multiple stacked claims and the purported minimum statutory damages based on multiple claims is intimidating to many property owners who are pressured to quickly settle for lesser damages. New subdivision (h) states that in assessing statutory damages in a deterrence claim, the reasonableness of the plaintiff's conduct in light of the plaintiff's obligation (if any) to mitigate damages must be considered by the court in any action alleging multiple claims for the same construction-related accessibility violation on different particular occasions.

This bill allows either party to request a mandatory evaluation conference (MEC) conducted by the court within 90 days to 120 days of the request. Similar to the EEC under existing law, the MEC would evaluate the status of the case and consider the current condition of the property and whether the defendant has made repairs or plans to make repairs, what are the asserted damages and attorney's fees of the plaintiff, and whether the case can be settled in whole or in part. While these defendants would not be eligible for the court stay of the proceedings, the mandatory court evaluation conference could assist in resolving the case at an early stage and promoting compliance, whether because the defendant has corrected the violation or because the plaintiff is able to obtain injunctive relief.

This bill will require property owner and lessor to notify the tenant in the lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a CASp, and if so, whether the property has been or has not been determined to meet all applicable construction-related accessibility standards.

As part of the effort to educate businesses of their obligations under the law with respect to disability access, this bill requires a city, county, or city or county, to inform the licensee that under federal and state law, compliance with disability access laws is a serious and significant responsibility that all applies to all California building owners and tenants with buildings open to the public. The bill further requires the local entity to inform the licensee that information about the compliance requirements and how to comply is available at various state agencies, and to list the Web site addresses of those agencies.

This bill requires cities and counties to collect a $1 fee upon issuance or renewal of a business license or similar instrument to pay for more CASp in local building departments, to reduce costs of CASp testing and certification to encourage more private CASp, to strengthen the CASp program by enabling the Division of State Architect (DSA) develop audit procedures for the CASp program to maintain quality control, develop "best practices" guidelines, and pay for development of more educational and training resources at state and local level to promote compliance. Monies collected will be split 70% to locals and 30% to DSA. Local public entities could use 5% of monies for administrative costs and the rest would go to pay for hiring and training of more CASp for local building departments. The other 30% would go to the newly created Disability Access and Education revolving fund in DSA for the purposes noted above.

Getting more public and private CASp is essential to promoting compliance and helping businesses, particularly those in older buildings, comply and avoid lawsuits. Currently, only about 450 CASp, split evenly between private and public employment, serve the needs of all of California. The high costs of certification and examination, $1,650 for a three year certificate, has been a significant hurdle. This $1 fee proposal is intended to help fund more public and private CASp and make the program stronger. Some funds will also be spent on state and local educational programs to assist building owners understand and meet their compliance obligations.

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FN: 0005841