

RESOLUTION 07-08-2007

DIGEST

Disability Access Litigation: Prior Notice Of Inaccessibility Complaint

Amends Civil Code section 52 to require prior notice and an opportunity to cure conditions which deny property access to disabled individuals.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 03-10-2005, which was approved in principle.

Reasons:

This resolution amends Civil Code section 52 to require prior notice and an opportunity to cure conditions which deny property access to disabled individuals. This resolution should be approved in principle because it would provide property owners or lessees a fair chance to improve accessibility and avoid needless litigation.

The purpose of section 52 is to make public property accessible to the disabled. Unfortunately, the section has become a vehicle for “professional disability plaintiffs” to bring numerous lawsuits against property owners on the basis of some noncompliance, usually minor, with disability access codes. In fact, some of these plaintiffs intentionally seek out and go to properties for the sole purpose of seeing whether or not there are any violations, rather than because they have any interest in actually visiting the property. If there is even the smallest deficiency, a lawsuit is filed without the property owner being given a chance to remedy the defect.

This resolution would return section 52 to its original intent. If someone determines there is a deficiency, then the property owner would be put on notice of the deficiency, and would then have an opportunity to cure the deficiency before a lawsuit for injunctive relief could be filed. If the property owner elects not to cure, then the lawsuit could be filed and the injunction could be sought. Similarly, if the disabled individual truly has suffered any damage, the resolution would permit that person to file suit under all circumstances. That is exactly what Civil Code section 52 was meant to accomplish.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Civil Code Section 52 to read as follows:

- 1 §52
- 2 (a) Whoever denies, aids or incites a denial, or makes any discrimination or
- 3 distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the
- 4 actual damages, and any amount that may be determined by a jury, or a court sitting without
- 5 a jury, up to a maximum of three times the amount of actual damage but in no case less than

6 four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court
7 in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or
8 51.6.

9 (b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites or
10 conspires in that denial, is liable for each and every offense for the actual damages suffered
11 by any person denied that right and, in addition, the following:

12 (1) An amount to be determined by a jury, or a court sitting without a jury, for
13 exemplary damages.

14 (2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person
15 denied the right provided by Section 51.7 in any action brought by the person denied the right,
16 or by the Attorney General, a district attorney, or a city attorney.

17 (3) Attorney's fees as may be determined by the court.

18 (c) Whenever there is reasonable cause to believe that any person or group of persons is
19 engaged in conduct of resistance to the full enjoyment of any of the rights described in this
20 section, and that conduct is of that nature and is intended to deny the full exercise of those
21 rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by
22 the conduct may bring a civil action in the appropriate court by filing with it a complaint. The
23 complaint shall contain the following:

24 (1) The signature of the officer, or, in his or her absence, the individual acting on behalf
25 of the officer, or the signature of the person aggrieved.

26 (2) The facts pertaining to the conduct.

27 (3) A request for preventive relief, including an application for a permanent or
28 temporary injunction, restraining order, or other order against the person or persons responsible
29 for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights
30 described in this section.

31 (d) Whenever an action has been commenced in any court seeking relief from the denial
32 of equal protection of the laws under the Fourteenth Amendment to the Constitution of the
33 United States on account of race, color, religion, sex, national origin, or disability, the Attorney
34 General or any district attorney or city attorney for or in the name of the people of the State of
35 California may intervene in the action upon timely application if the Attorney General or any
36 district attorney or city attorney certifies that the case is of general public importance. In that
37 action, the people of the State of California shall be entitled to the same relief as if it had
38 instituted the action.

39 (e) Actions brought pursuant to this section are independent of any other actions,
40 remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

41 (f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of
42 Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment
43 and Housing pursuant to Section 12948 of the Government Code.

44 (g) The court shall not award injunctive relief as provided in subsection (c)(3), above, or
45 attorney's fees as provided in subsection (a), above, unless at least 60 days prior to filing a
46 complaint in a court hereunder the plaintiff shall have notified the defendant in writing of
47 plaintiff's belief that defendant or defendants have denied plaintiff the rights guaranteed under
48 Section 51 of this code by failing to provide access to disabled persons as required by any law
49 with respect to property owned, leased or otherwise occupied and controlled by defendant. The
50 notice shall inform the defendant in sufficient detail the nature of the denial of access and that a
51 complaint may be filed pursuant to this section unless corrective action is taken within 60 days.

52 (h) If, after receiving such notice and before a complaint is filed by plaintiff, the
53 defendant alters, repairs or otherwise modifies the property (or commences such alterations,
54 repairs or modifications) so that the property is, or will be upon completion of the alterations,
55 repairs or modifications, in compliance with all existing laws regarding disabled access, the
56 plaintiff shall not be entitled to obtain injunctive relief as provided in subsection(c)(3), above;
57 nor shall plaintiff be entitled to an award of attorney’s fees, as provided in subsection (a), above,
58 on account of causing defendant to make the alterations, repairs or modifications. Nothing
59 herein shall be deemed to deny a plaintiff reasonable attorney’s fees if he or she obtains an
60 award of actual damages, as provided in subsection (a), above.

61 (i) For any person who has given the notification provided for in paragraph (g) of
62 this section, the time within which to commence an action pursuant to this section shall be
63 extended an additional sixty (60) days added to the time within which the action would
64 otherwise have been required to be commenced.

65 (gj) This section does not require any construction, alteration, repair, structural or
66 otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair,
67 or modification that is otherwise required by other provisions of law, to any new or existing
68 establishment, facility, building, improvement, or other structure, nor does this section augment,
69 restrict, or alter in any way the authority of the State Architect to require construction,
70 alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other
71 laws.

72 (hk) For the purposes of this section, “actual damages” means special and general
73 damages. This subdivision is declaratory of existing law.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Under existing law a disabled person may file a complaint against a property owner claiming the property is inaccessible without giving the owner any advance notice of the complaint. Even if the owner immediately agrees to alter or repair the property to make it accessible, the plaintiff is entitled to attorney’s fees under Section 52(a) of the Civil Code under the so-called “catalyst theory.”

This Resolution: Would require a plaintiff to give the property owner 60 days’ advance notice of the claim of inaccessibility in order to qualify for injunctive relief or attorney’s fees regarding the claim of inaccessibility. If the property owner alters or repairs the property (or undertakes such alterations and repairs) to bring it into compliance with law before the complaint is filed, the plaintiff shall not be entitled to injunctive relief or attorney’s fees with respect to bringing about the changes to the property.

The Problem: A number of disabled persons have become “professional disability plaintiffs,” bringing dozens of lawsuit against property owners claiming that the property does not comply with existing disability access codes. See, “Visionary law’s litigious legacy,” *Sacramento Bee*, November 12, 2006. Often the code violations are minor and require only modest alterations, such as building a ramp, widening doors or lowering thresholds. Upon being sued, the owner

often will immediately agree to make all the alterations required and settle the lawsuit. Under the “catalyst theory,” *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, the plaintiff will be entitled to an award of attorney’s fees even though no judgment in favor of plaintiff is entered. (Under federal law, such as in actions under the Americans with Disabilities Act, fees are not allowed under the catalyst theory. *Buckhannon Bd. v. West Virginia D.H.H.R* (2001) 532 U.S. 598.) Often, the attorney’s fees are the single biggest element of the plaintiff’s recovery, and provide a large motivation for defendants to settle quickly even if their property is actually accessible, although in technical violation of the very complex accessibility laws. (Note: unlike many other discrimination laws, there is no required administrative complaint process in the disability access context which allows for inexpensive resolution of claims prior to filing a lawsuit.) A number of judges have recently complained in written opinions about the volume of such disability “strike suits.” *E.g.*, *Brother v. Miami Hotel Invs. Ltd.*, 341 F. Supp 2nd 1230, 1233-4 (S.D. Fla. 2004); *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2nd 1368, 1375 (M.D. Fla. 2004); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1281-2 (M.D. Fla. 2004.) Even in *Graham*, the California Supreme Court referred to the risk that the catalyst theory will encourage “extortionate lawsuits.” 34 Cal. 4th at 575. In order to avoid this, the Court imposed certain criteria for obtaining an award of fees under the catalyst theory and one was that the plaintiff “must first reasonably attempt to settle the matter short of litigation.” *Id* at 577. The proposed amendment to the Civil Code in essence codifies this requirement.

If the purpose of the law is to make public property accessible to the disabled, giving property owners fair notice of violations and an opportunity to make corrections as a way of avoiding large attorney’s fee awards would serve the purpose of the law. The argument that attorney’s fee awards are necessary to motivate enforcement of the law is not persuasive. The notices required by the proposed amendment could be prepared by lay persons (including non-profit disability access organizations). If an owner does not agree to comply, then an attorney can become involved and a complaint filed. This would limit lawsuits to cases where the owner is recalcitrant or where the owner believes it has a meritorious defense.

This resolution is identical to Resolution 03-10-05, which was approved in principle. However, no legislative action was taken, in anticipation the remedy would be included in a ballot measure in 2006. The ballot measure did not materialize, and this proposal should be placed back on the legislative agenda of the CDCBA.

IMPACT STATEMENT

This resolution does not impact any other law, statute or rule.

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