

ASK THE EXPERT

> 'ADA' boys all around! – Sens. Steinberg and Dutton reform ADA litigation

by Brian Sanders

When the governor approved SB 1186 on Sept. 19, 2012, it heralded a new day in ADA litigation in California. The legislation, shepherded through the legislature by senators Darrell Steinberg (D) and Bob Dutton (R), reins in so-called “serial plaintiffs” by placing obstacles in their paths – both to settlement money and to the courthouse.



Brian Sanders

We have all heard of a particular group of plaintiffs and their attorneys (sometimes the same person) who visit a business and, after merely viewing the premises, file disabled access claims. It has gotten so common that phrases like “drive-by ADA” have become part of our vocabulary. Some plaintiffs have gone so far as to visit the same business multiple times to “stack” their complaints to increase their recovery under the statutes. Such plaintiffs send demand letters to the owners and occupants of the premises, demanding money to avoid lawsuits. The demands are often no more than the minimum statutory damages for each claim, making it less expensive to simply pay the claims rather than defend against them.

SB 1186 – which took effect immediately upon Governor Brown’s signature – enacts numerous controls on the process of filing ADA lawsuits in California, including the following:

- “Stacking” – the practice of visiting the same premises multiple times each day in order to increase the alleged number of violations the plaintiff can claim – should be dramatically curtailed by the statute’s provision treating multiple violations in

a single day as one violation. Plaintiffs could try to evade the operation of this provision by sending more than one person to the premises in order to allege separate claims for each person, but the statute also requires the court to determine whether the plaintiffs’ conduct in visiting the premises is reasonable. Adroit defense counsel should argue that, having once visited the premises for the purpose of assessing ADA compliance in anticipation of litigation, the plaintiffs should not re-visit before the claim is noticed to the putative defendant and there has been an opportunity to resolve it.

- The minimum statutory damages are reduced from \$4,000 per claim to \$2,000, or even as little as \$1,000. The amount depends on (among other things) whether the claimed deficiency is corrected in 30 days or 60 days from the notice of the condition, and whether the recipient of such notice is a small business owner.

- A written notice must be provided with each demand letter and complaint. In a new requirement, legal counsel must state facts about the claim that are sufficient to give a reasonable owner enough information to identify the actual basis for the claim (i.e., the specific condition complained of).

- Complaints filed with respect to construction-related accessibility claims must be verified – meaning the plaintiff must affirm the claims under penalty of perjury.

- The demand letter and notice may not contain a request or demand for money or make a settlement offer to the business owner that involves paying money to the plaintiff. Attorneys issuing such letters may be subject to State Bar disciplinary action.

- The law provides assistance to lessees/tenants as well.

Owners of commercial real estate must disclose, in their lease agreements executed on or after July 1, 2013, whether the leased/rented property has been inspected by a certified specialist. If it has, then the lessee and owner may be able to take advantage of additional statutory advantages if the condition complained of was set forth in the specialist’s report and corrected before the ADA plaintiff’s visit to the premises.

It seems the legislature has taken significant steps to substantially reduce the cottage industry of making money by filing specious Federal ADA-based accessibility claims in California. More is needed, but this legislation is an encouraging development in the eyes of the California ADA defense bar. ■

Brian Sanders is a partner in the Oakland office of Ericksen Arbuthnot. He can be reached at (510) 832-7770 or at bsanders@ericksenarbuthnot.com.