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Refining possible solutions to California's ADA access lawsuit crisis *www.ADAreform.com*

402 WEST BROADWAY, FOURTH FLOOR
SAN DIEGO, CALIFORNIA 92101
(619) 275-2000 FAX: (888) 453-1262

Current summary of proposed solutions to California's access lawsuit crisis [revised 1 May 2004]

***PROBLEM ONE*: New buildings/construction are being certified by building inspectors and are still not compliant**. California's access lawsuit crisis will not improve until new buildings are not subject to immediate litigation for non-compliance. Currently, a considerable amount of new construction does not meet applicable accessibility standards; worse, the issue of accessibility is often not raised early enough in the process, so expensive re-planning is often required.

Possible Solutions:

1. No building inspector should be able to certify a structure for occupancy/use if it does not comply with all applicable access laws; it should be anticipated that the use of a particular facility may change over time and that disabled employees should be able to be hired, even if they are not currently employed at the facility.

2. No building permit should be issued for new construction (or major renovations to existing construction) unless such construction complies with all applicable access requirements (though a court procedure could be available for leave in exceptional cases);

3. Any plan or rendering produced by an architect should comply with all applicable access requirements; any added expense to cause plans or renderings to conform to applicable access laws (once finalized) should be the responsibility of the architect and should not be passed on to the client(s); and

4. Any price quoted in a proposal, bid or estimate by a contractor or architect should include all expense to cause such work to fully comply with all applicable access requirements; the obligation to ensure compliance with access laws in new construction and substantial renovations should be joint and several between contractors and architects.

PROBLEM TWO**: Mass-production of unlawful/unethical conduct**. Many attorneys are repeatedly engaging in conduct which is unethical, and in many cases unlawful, because of their entitlement to recover their fees in an access case. Sometimes, these tactics increase their profit, at other times, they increase the burden and expense to defendants and force quick, often inappropriate, settlements. These lawsuits are usually brought well within the applicable period of limitations (so there is no urgency to justify non-compliance with any law or regulation):

> ***Possible Solution***: If an attorney makes an identical or substantially similar violation of a requirement to which s/he is subject in three (3) or more lawsuits, any claim to fees is waived on each case and the matter must be referred to the State Bar; if the attorney knowingly violates any applicable law, rule or regulation to which s/he is subject on ten (10) or more occasions, disbarment proceedings should be mandatory and the burden should be shifted to the attorney to demonstrate why s/he should not be disbarred.

PROBLEM THREE: **Attorneys selling relief from compliance—not enforcing compliance**: Currently, many plaintiffs' attorneys are receiving large legal fees in access cases without ensuring that required renovations are made; this hurts the disabled community and makes defendants more vulnerable to follow-up lawsuits. Further, considerable financial irregularities between plaintiffs and their attorneys are resulting in a loss of tax revenue and inappropriate payment of government benefits.

> ***Possible Solutions***: Amend Civil Code §52 to require:
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> 1. Any settlement of claims of discrimination based on the mere inaccessibility of commercial premises should require court approval.
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> 2. Any settlement of a claim for recovery of legal fees on the basis that they were necessarily incurred to obtain access ***for the plaintiff*** in an action to gain access to commercial premises alleged to be inaccessible to the disabled should require:
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>   a. court approval, and a clear allocation of the characterization for tax purposes of all amounts paid, or proposed to be paid by defendants to settle the matter; and
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>   b. a showing that the defendant was provided an opportunity to stipulate to avoid each and every legal act or action involving an expense of more than $500 to the defendant
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> 3. Any settlement of a claim for recovery of legal fees on the basis that they were necessarily incurred to obtain access ***for others***

(i.e., on behalf of the disabled community, as, for example through CCP §1021.5) in an action to gain access to commercial premises alleged to be inaccessible to the disabled should require:

a. court approval, and a clear allocation of the characterization for tax purposes of all amounts paid, or proposed to be paid by defendants to settle the matter; and

b. a showing that the defendant was provided an opportunity to stipulate to avoid each and every legal act or action involving an expense of more than $500 to the defendant; and

c. any determination that barrier removal is not readily achievable for any reason (or that all readily achievable barrier removal will not be accomplished for any reason) must be approved by the court, and such determination(s) should be made in accordance with the Solution to Problem Two

PROBLEM FOUR**: Compulsion to produce financial information**: Currently, a primary factor in determining whether barrier removal is readily achievable is the financial resources of the defendant(s). Not surprisingly, many defendants will do almost anything to avoid providing their financials, and many substantial settlements have been obtained solely to avoid production of financials, with no benefit to the disabled community.

Possible Solution:

1. Any demand for information about a defendant's financial resources (for purposes of ascertaining whether barrier removal is readily achievable) shall afford defendant an option to provide such financial information in confidence to a court (and to be held strictly in confidence by such court); though a plaintiff shall be entitled to bring a motion to learn summary information about the financial resources of the defendant based on a showing of reasonable necessity therefor;

2. Any determination that the removal of barriers is not readily achievable at a given site shall be made with the financial resources of the property owner and all those who profit directly from business operations on the property (i.e., including without limitation, the property manager, commercial tenants, franchisors, etc.).

PROBLEM FIVE**: Uncertain standard, unequal application**: Some professional plaintiffs seek as little as $1,000 for themselves and $2,500 in attorneys' fees while others make million dollar demands against large chains. The basis for entitlement to fees and damages is currently uncertain and should be clarified. Currently, a number of claimants contend that the $4,000 minimum damage requirement of California Civil Code §52 applies to each and every item of alleged discrimination at a particular facility. Thus, no heat bib under the sink = $4,000, improper striping of the parking lot = $4,000, a paper towel dispenser too high = $4,000, etc. It has been suggested that the legislative intent of this passage should be clarified. Parties and courts often confuse large settlements in these cases as helping the disabled community; more commonly, the money goes to specific professional plaintiffs and the lawyers representing them, and appropriate renovations are not made.

> ***Possible Solution***: Any amount in excess of the $4,000 minimum should require a judge's determination that it is warranted by the facts and circumstances (including a determination that no required access renovations have been excused/overlooked), and, at the judge's discretion, may be paid to a fund which advocates for the disabled, rather than to the plaintiff.

PROBLEM SIX**: A reasonable opportunity to fix problems without a lawsuit**: Many defendants regularly inspect their premises for problems, but temporary situations like vandalism or the need to resurface a parking lot can lead to an infinite number of opportunistic lawsuits. Opponents of laws previously introduced to require notice to a defendant before filing a lawsuit have objected that no notice should be required of a 10 year old law. We agree, but make the following proposal because many business owners may not be aware of certain access impediments on their property, and should be given a reasonable opportunity to solve the problem without a lawsuit (i.e., we don't want notice of the law, we want notice of a particular person's difficulty accessing a property):

> ***Possible Solution***: A plaintiff should not be able to recover legal fees in an access lawsuit unless and until written notice has been provided to the defendant of the specific impediments the plaintiff claimed prevented them from accessing the facility. For example, if a particular employee is rude to disabled individuals, an employer might not know about this situation, and it should not take a lawsuit (nor should an aggrieved customer have to file one) to resolve the problem.
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> > ***Case One***: **Defendant already paid for solution to Plaintiff's access problem**: We think that if a defendant has already paid to address a problem a plaintiff is experiencing at the defendant's property, the plaintiff should not be able to file a lawsuit unless the defendant has acted unreasonably in implementing it; for example, if defendant has failed to comply with an implementation schedule. Thus if a defendant had already removed a handicapped sign which was removed or vandalized, no

lawsuit should be filed if the defendant agrees to replace the item within 30 days.

Case Two: **Defendant quickly agrees to pay for solution to Plaintiff's access problem**: If the defendant takes immediate steps to resolve all problems identified by plaintiff, the defendant's exposure should be capped at the statutory minimum ($1,000/$4,000 as applicable), provided no other access impediments exist which are readily achievable to remove and which are not subject to an existing implementation schedule.

The goal should be a maximum of one lawsuit per business location. Accordingly, if there is to be a settlement of access claims, it should be handled in accordance with the solution to Problem Three, above.

Case Three: **Defendant declines to quickly pay for solution to Plaintiff's access problem**: While the defendant should be entitled to seek a judicial determination on an expedited basis as to whether the barrier removal in question is readily achievable, a court should determine whether the defendant's refusal to remove the barrier was made in good faith or not, based on existing law. If the defendant's determination is made in good faith, no penalty should apply; if not, and the defendant fails to agree to resolve the problem within thirty (30) days, the discrimination should be deemed intentional.

***PROBLEM SEVEN*: Courts are a costly and inefficient means of achieving access, and the current statutory scheme virtually assures that full compliance will not occur**:

Possible Solutions:

1. **Access Certification to Renew Business License**: Consider a provision whereby a compliance certification (by an inspector certified per 2003 California Senate Bill 262) is required to renew a business license [but what about unincorporated areas?]. This would allow a business a "safe and sane" period of one year to ascertain the compliance of their business to access requirements and an opportunity to seek judicial or other relief if they need more time to comply.

2. **Access Renovation Credit Facility**: Given the dramatic increase in equity in commercial property across the state, the fact is that there is most likely sufficient equity in most property to fund needed renovations—the oldest properties, which often need the most renovation, will often have large amounts of equity, but are often leased to tenants with limited resources. We'd propose a special standardized loan facility (perhaps

similar to SBA loans) whereby an accelerated approval, implementation and fund-control process could allow business defendants to quickly obtain secured financing for access renovations. If all necessary parties are involved in the lawsuit, this could facilitate a global resolution of issues whereby costs are amortized over time, rents are slightly increased, and the overall cost is passed onto consumers on a small per-transaction basis.

***PROBLEM EIGHT*: No "safe harbor" for business**: Many fully-compliant firms report being sued repeatedly on substantially meritless claims. While this is often because they are associated with a nationally-recognized name or trademark, the point is that business needs "safe harbor" provisions, whereby if they fully comply, they will be insulated from lawsuits.

Current statutory protections designed to prevent frivolous lawsuits are virtually useless in access cases because: (1) a large number of "professional plaintiffs" have few personal resources to make them accountable for misuse of litigation, and (2) even if they did, few business defendants would proceed to sue a disabled plaintiff. Because of the potential exposure to attorneys' fees in access cases, even many fully-compliant firms would rather pay thousands of dollars in "nuisance" settlements than to incur the much greater expense of proving their innocence in court. Few corporations could risk the level of sympathy many disabled plaintiffs receive in court to prove they had done nothing wrong.

> ***Possible Solution***: A business which has been certified compliant by an inspector certified pursuant to 2003 California Senate Bill 262 should be immune from access lawsuits on those issues certified, and additionally as to any issues a court with competent jurisdiction determines are not readily achievable to remove; the exception to this arrangement would be any significant renovations made since the certification and any access impediments knowingly permitted by the defendant.

***PROBLEM NINE*: Historical properties hard hit**: Many historical properties are subject to significant regulations which make can full compliance with access laws impossible; additionally, the owners are often required to undertake significant additional expenses which are not required for most other businesses simply because their properties have been designated historical. Owners of historical properties have been sued over noncompliance, even though they have been told by city officials that the exact renovations which were the subject of the lawsuit would never be approved. The purpose of the historical designation is to preserve historic houses for the people; however, the exposure of historic property to repeated access lawsuits has made many business owners consider reducing public access, or closing them altogether— which defeats the intent of the access laws.

> ***Possible Solution***: Allow historic properties which post information about access limitations some protection from access litigation.

PROBLEM TEN**: Deliberate vandalism for "nuisance" claims**: Many access renovations have been vandalized, and many have suspected that the vandalism occurs for the purpose of bringing access claims. Many business owners inspect their properties at regular intervals for access compliance, but are powerless to protect themselves from some who, for example, uses the restroom, damages an access renovation inside, takes a picture, and then sues.

> ***Possible Solution***: If a business can show that in the regular course of business a problem which had already been the subject of an access renovation was replaced as part of a regular maintenance program, it should not be required to defend a lawsuit based on that claim.

PROBLEM ELEVEN**: No duty to mitigate damages**: Some lawyers are now claiming that their clients who regularly visit companies are entitled to $4,000 under Cal. Civil Code §52 for each and every time they visit a facility and encounter problems, even though they do not inform the owner or occupant of the access problems. By this rationale, someone who went to the same fast-food restaurant every day for a year could claim over $1,460,000 in damages without ever telling the management. Other plaintiffs fail to ask for assistance or even look for signs, one parked right in front of the disabled parking area and then filed a lawsuit claiming there wasn't one!

> ***Possible Solution***: Require disabled plaintiffs to show that they have made a reasonable effort to reduce any harm they claim in a lawsuit. If they revisit the same facility repeatedly without providing clear written notice of the problem to management and an opportunity to fix it, they should not be able to repeatedly claim damages for that problem.