THE STATE BAR OF CALIFORNIA

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Title of Report: Report of the State Bar of California on Construction-Related Accessibility Demand Letters Received by the State Bar
Statutory Citation: Civil Code section 55.32
Date of Report: July 31, 2013

The laws governing construction-related accessibility claims involving a place of public accommodation were revised by the enactment of Senate Bill 1186, Statutes of 2012, Chapter 383 ("SB 1186"). SB 1186 contains several requirements and restrictions concerning demand letters and demands for money in construction-related accessibility claims. Under Civil Code section 55.32(f)(1), enacted as part of SB 1186, the State Bar of California is required, commencing July 31, 2013, and annually each July 31 thereafter, to report to the Legislature and the Chairs of the Senate and Assembly Committees on Judiciary on 1) the number of investigations opened to date on a suspected violation of subdivision (b) or (c) of Civil Code section 55.31, restricting demands for money and statements of monetary liability; and 2) whether any disciplinary action resulted from the investigation, and the results of that disciplinary action. The following summary of that report is provided under Government Code section 9795.

From January 1, 2013 through July 30, 2013, the State Bar received 127 copies of demand letters. Although the statutory obligation to send demand letters to the State Bar was not effective until January 1, 2013, the State Bar received 15 copies of demand letters between September 19, 2012 – the date SB 1186 was enacted – and January 1, 2013. Of the letters received, six involved possible violations of the prohibitions against demands for money and/or specific statements of monetary liability. Three letters resulted in the issuance of Warning Letters and one resulted in the issuance of a Resource Letter. Two letters, upon completion of an investigation, were determined to be permissible under statutory provisions contained in SB 1186 that apply to specified factual circumstances.

The full report is available at http://www.calbar.ca.gov/AboutUs/Reports.aspx.

A printed copy of the report may be obtained by calling 916-442-8018.

The State Bar of California

Annual Report on Construction-Related Accessibility Demand Letters Received by the State Bar
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ANNUAL REPORT OF THE STATE BAR OF CALIFORNIA ON CONSTRUCTION-RELATED ACCESSIBILITY DEMAND LETTERS

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INTRODUCTION AND BACKGROUND

The laws governing construction-related accessibility claims involving a place of public accommodation were revised by the enactment of Senate Bill 1186, Statutes of 2012, Chapter 383 ("SB 1186"). SB 1186 was passed by the Legislature as an urgency bill and took effect immediately upon approval by the Governor on September 19, 2012. Certain provisions of the bill had later effective dates given the specific terms of those provisions. Also, some are subject to a sunset provision and will be repealed on January 1, 2016, unless extended by subsequent legislation.

The purpose of SB 1186 is set forth in uncodified sections of the bill. One of these sections states:

> The Legislature finds and declares that a very small number of plaintiffs' attorneys have been abusing the right of petition under Sections 52 and 54.3 of the Civil Code by issuing a demand for money to a California business owner that demands the owner pay a quick settlement of the attorney's alleged claim under those laws or else incur greater liability and legal costs if a lawsuit is filed. These demands for money allege one or more, but frequently multiple, claims for asserted violations of a construction-related accessibility standard and often demand a quick money settlement based on the alleged multiple claims without seeking and obtaining actual repair or correction of the alleged violations on the site. These pay me now or pay me more demands are used to scare businesses into paying quick settlements that only financially enrich the attorney and claimant and do not promote accessibility either for the claimant or the disability community as a whole. These practices, often involving a series of demand for money letters sent to numerous businesses, do not promote compliance with the accessibility requirements and erode public support for and confidence in our laws. (SB 1186 uncodified sec. 24).

SB 1186 contains several requirements and restrictions concerning demand letters and demands for money in construction-related accessibility claims. The following provisions relate directly to the State Bar:

- Commencing January 1, 2013, SB 1186 requires a lawyer to timely submit a copy of a demand letter to the California Commission on Disability Access ("CCDA") (Civ. Code sec. 55.32, subd. (a)(3) and (c)) and, until January 1, 2016, to the State Bar (Civ. Code sec. 55.32, subd. (a)(2) and (c)). Commencing January 1, 2013, a lawyer's violation of these

copying requirements constitutes a cause for State Bar discipline. (Bus. & Prof. Code sec. 6106.2, subd. (b)).

- Commencing January 1, 2013, SB 1186 requires a lawyer to timely submit a copy of a complaint to the CCDA. (Civ. Code sec. 55.32, subd. (b)). Commencing January 1, 2013, a lawyer's violation of this copying requirement constitutes a cause for State Bar discipline (Bus. & Prof. Code sec. 6106.2, subd. (b)). Although complaints are not required to be copied to the State Bar, if the State Bar receives information indicating that an attorney has failed to send a copy to the CCDA, the State Bar is required to investigate that possible violation. (Civ. Code sec. 55.32, subd. (c)).

- SB 1186 prohibits a demand letter from including a request or demand for money or an offer or agreement to accept money and also prohibits a lawyer, or other person acting at the direction of a lawyer, from issuing a demand for money to a building owner or tenant, or an authorized agent or employee of a building owner or tenant. (Civ. Code sec. 55.31, subd. (b) and (c)). Commencing January 1, 2013, a lawyer's violation of these prohibitions constitutes a cause for State Bar discipline. (Bus. & Prof. Code sec. 6106.2, subd. (b)). A copy of a demand letter received by the State Bar from either the sender or recipient of the demand letter shall be reviewed by the State Bar to determine if the prohibition on a demand for money has been violated. (Civ. Code sec. 55.32, subd. (e)).

- SB 1186 mandates that with respect to potential monetary damages for an alleged construction-related accessibility claim or claims, a demand letter shall 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." (Civ. Code sec. 55.31, subd. (b)(1)). Commencing January 1, 2013, a lawyer's violation of this requirement constitutes a cause for State Bar discipline. (Bus. & Prof. Code sec. 6106.2, subd. (b)).

- SB 1186 amends the preexisting requirement that an attorney provide a written advisory with a demand letter or complaint, as defined, sent to or served upon a defendant or potential defendant for any construction-related accessibility claim as specified (Civ. Code sec. 55.3, subd. (b)). A lawyer's violation of the requirement to provide a written advisory constitutes a cause for State Bar discipline. (Bus. & Prof. Code sec. 6106.2, subd. (a)).

- Commencing January 1, 2013, SB 1186 requires a lawyer to include his or her State Bar number in a demand letter. (Civ. Code sec. 55.32, subd. (a)(1)).

The legislative history of SB 1186 makes clear that the State Bar retains prosecutorial discretion to determine what, if any, disciplinary action should be taken in a particular case. As the September 1, 2012 Senate Judiciary Committee analysis notes, at pages 22 – 23:

> The author notes that "even though certain acts shall be subject to discipline, the commencement of an actual disciplinary action is at the prosecutorial discretion of the State Bar's Office of Chief Trial Counsel. Nothing in the bill would require the Bar to bring an action for any offense, and it is certainly possible that the Bar may just send the lawyer offending the provision an advisory letter for a first violation."

STATE BAR REPORTING REQUIREMENT

SB 1186 requires an annual report from the State Bar to the Legislature. Specifically, Civil Code section 55.32(f)(1) provides:

> (f) (1) Commencing July 31, 2013, and annually each July 31 thereafter, the State Bar shall report to the Legislature and the Chairs of the Senate and Assembly Committees on Judiciary, both of the following with respect to demand letters received by the State Bar:
>
> (A) The number of investigations opened to date on a suspected violation of subdivision (b) or (c) of Section 55.31[the prohibitions on demands for money and statements of monetary liability],
>
> (B) Whether any disciplinary action resulted from the investigation, and the results of that disciplinary action.
>
> (2) A report to be submitted pursuant to this subdivision shall be submitted in compliance with Section 9795 of the Government Code.

DEMAND LETTERS RECEIVED BY THE STATE BAR

From January 1, 2013 through July 30, 2013, the State Bar received 127 copies of demand letters. Although the statutory obligation to send demand letters to the State Bar was not effective until January 1, 2013, the State Bar received 15 copies of demand letters between September 19, 2012 – the date SB 1186 was enacted – and January 1, 2013.

INVESTIGATION AND DISCIPLINE

Of the demand letters received, six involved possible violations of the prohibitions against demands for money and/or specific statements of monetary liability. Each letter, the investigation resulting from that letter, and the resulting disciplinary action, if any, is described below. Several recurring issues required further investigation because it could not be confirmed from the face of the letter whether the letter contained a prohibited demand for money or statement of monetary liability, or whether it contained language that is permissible under one or more statutory provisions. The most common issues were:

- Civil Code section 55.31(d)(1) provides that the SB 1186 prohibitions against demands for money and statements of specific monetary liability "do not prohibit an attorney from presenting a settlement figure or specification of damages *in response to a request* from the building owner or tenant, or the owner's or tenant's authorized agent or employee, *following a demand letter* provided pursuant to Section 55.3." (emphasis added). In some cases, further investigation is required to determine if a letter falls within the permissible activity set forth in section 55.31(d)(1).

- Civil Code section 55.31(e) provides that the prohibition against demands for money found in section 55.31(c) "does not prohibit any prelitigation settlement discussion of

liability for damages and attorney's fees that occurs *after a written or oral agreement is reached between the parties for the repair or correction* of the alleged violation or violations of a construction-related accessibility standard." (emphasis added). In some cases, further investigation is required to determine if a letter falls within the permissible activity set forth in section 55.31(c).

- Civil Code section 55.31(f) provides that a "claim involving *physical injury* and resulting in special damages" is not subject to the prohibition on demands for money found in section 55.31(c). (emphasis added). In some cases, further investigation is required to determine if a letter falls within the permissible activity set forth in section 55.31(f).

THE SIX DEMAND LETTERS WARRANTING INVESTIGATION

1) Letter dated March 25, 2013 - File No. 13-S-H-56

The letter:

This demand letter itself does not include a demand for money or a statement of specific monetary liability, but the letter enclosed, and referred to, a "proposed" summons and complaint for ADA accessibility violations. In that proposed summons and complaint, the defendant's monetary liability was described to include actual damages and a potential treble damages multiplier in connection with claims for accessibility violations and a physical injury resulting from those violations. In addition, the proposed complaint specifically stated that the defendant's liability would be no less than $1,000 plus attorney fees.

Results of the investigation, including disciplinary action, if any:

This matter resulted in the issuance of a Warning Letter. That is a letter from the Office of the Chief Trial Counsel to a lawyer who violated the Rules of Professional Conduct and/or the State Bar Act, but the violation is minimal in nature, does not involve significant harm to the client or the public and does not involve the misappropriation of client funds. The letter explains that, in the exercise of the Office of the Chief Trial Counsel's prosecutorial discretion, the matter was closed without disciplinary action.

2) Letter dated April 30, 2013 – File No. 13-S-H-84

The letter:

This demand letter involves a situation where the lawyer is the claimant and the letter includes a possible specific statement of the defendant's monetary liability. The demand letter states an offer to settle that could be attributed to physical injuries sustained in a wheelchair incident or attributed to alleged construction-related deficiencies in the provision of wheelchair pathways and ramps. In addition, this demand letter appears to be a subsequent letter in the same matter. Under Civil Code section 55.32(d), a lawyer is *not required* to copy the State Bar *unless* a subsequent letter in the same matter alleges a *new* construction-related accessibility claim, which was a potential issue in this matter. Although not required to send such letters to the State Bar, lawyers may in fact do so.

Results of the investigation, including disciplinary action, if any:

This matter resulted in the issuance of a Resource Letter. That is a letter from the Office of the Chief Trial Counsel to a lawyer who probably violated, or potentially will violate, the Rules of Professional Conduct and/or the State Bar Act, where the violation is minimal in nature and would not lead to discipline of the member. The letter refers the lawyer to various resources that may assist the lawyer in avoiding problems and/or the filing of complaints against him or her in the future.

3) Letter dated May 13, 2013 – File No. 13-S-H-86

The letter:

This demand letter alleges that there are an inadequate number of handicapped accessible parking spaces, excessive slopes in certain locations, and insufficient signage. The plaintiff appears to be a business owner who is seeking damages for accessibility barriers at the property where the business is located. The plaintiff's attorney indicates that the amount of actual damages is an uncertain amount but then states that the amount is believed to be in excess of $10,000.

Results of the investigation, including disciplinary action, if any:

Further investigation confirmed that the statement of alleged damages in this letter was a prelitigation claim presented to a governmental entity as required by state law, permissible under Civil Code section 55.31(g). The matter has therefore been closed without further action.

4) Letter dated May 9, 2013 – File No. 13-S-H-92

The letter:

This demand letter is directed to the defendant's insurer and appears to be a subsequent, as opposed to initial, communication between the parties. In the demand letter, the lawyer states that the plaintiff is seeking damages for physical injuries based, in part, on claims that the stairs used by the plaintiff did not have required handrails or slip resistant tread striping. The demand letter states a policy limits demand in the amount of $1,000,000.

Results of the investigation, including disciplinary action, if any:

Further investigation confirmed that the demand in this letter concerned a claim involving physical injury, permissible under Civil Code section 55.31(f). The matter has therefore been closed without further action.

5) Letter dated June 23, 2013 – File No. 13-S-H-113

The letter:

In this demand letter, the plaintiff's attorney purports to confirm that the defendant desires an out-of-court settlement of the plaintiff's claims. The demand letter states that the defendant must agree to correct construction-related accessibility problems at the business. Monetary liability is described to include actual damages, a treble damages multiplier, and minimum statutory damages multiplied by the number of visits at which the plaintiff encountered barriers. Liability for attorney fees and costs is specified as being over $5,600 and described as including expert witness fees. A total monetary liability demand amount of $27,600 is summarized towards the end of the demand letter.

Results of the investigation, including disciplinary action, if any:

This matter resulted in the issuance of a Warning Letter.

6) Letter dated June 23, 2013 – 13-S-H-114

The letter:

In this demand letter, the plaintiff's attorney purports to confirm that the defendant desires an out-of-court settlement of the plaintiff's claims. The demand letter states that injunctive relief will require defendant's agreement to correct construction-related accessibility problems at the business. Monetary liability is described to include actual damages, a treble damages multiplier, and minimum statutory damages multiplied by the number of visits at which the plaintiff encountered barriers. Liability for attorney fees and costs is specified as being over $5,000 and described as including expert witness fees. A total monetary liability demand amount of $25,000 is summarized towards the end of the demand letter.

Results of the investigation, including disciplinary action, if any:

This matter resulted in the issuance of a Warning Letter.

CONCLUSION

This is the first Annual Report on a newly enacted statutory scheme, and the State Bar welcomes any questions from the interested stakeholders.