

Act Against Abusive Website Access Litigation; Senate Sub. for HB 2016

Senate Sub. for HB 2016 enacts the Act Against Abusive Website Access Litigation to create a civil action for determining whether litigation that alleges any website access violation under the federal Americans with Disabilities Act (ADA) or similar law constitutes abusive litigation.

The bill takes effect upon publication in the *Kansas Register*.

Definitions

The bill defines the following terms:

- “Access violation” means any allegation that a public accommodation does not provide sufficient access under:
 - The federal ADA;
 - Chapter 39, 44, or 58 of the *Kansas Statutes Annotated*; or
 - Any similar allegation under state or federal law;
- “Public accommodation” means the same as defined in Title II of the federal Civil Rights Act and, for purposes of this bill, would include a website operated by a resident of Kansas; and
- “Resident of this state” means any person residing in Kansas and any corporation filing with the Office of the Secretary of State.

Legislative Purpose

The bill includes a clause stating the legislative purpose of the bill, recognizing the policy of the state to assure people with disabilities equal opportunities to full access to public accommodations, and allowing the enforcement of that right through litigation if necessary.

The bill states that the Legislature also recognizes that in a small minority of cases, this right is being abused for the primary purpose of obtaining awards of attorney fees for the plaintiff against smaller businesses instead of remedying the alleged website access violation, and, as such, the bill intends to provide a process to curb this type of abusive litigation. The statement also notes that the lack of standards issued by the U.S. Department of Justice (DOJ) concerning website accessibility under the ADA has resulted in the need for this process.

In addition, the statement specifies that the provisions of the bill are not intended to preclude a person with a disability from asserting their right to equal access to a public accommodation under the law either as an individual or as a class through litigation in a Kansas court brought in good faith to remedy an alleged equal access violation, not for the primary purpose of obtaining an award for attorney fees.

Civil Action for Abusive Litigation Determination

The bill allows a Kansas resident, or the Attorney General on behalf of a class of Kansas residents who is subject to litigation that alleges a website access violation to file a civil action in state court against the initiating party, attorney, or law firm for a determination as to whether such litigation alleging a website access violation is abusive litigation.

The trier of fact is required to consider the totality of the circumstances to determine whether the primary purpose of the challenged litigation is to obtain a payment from a defendant due to the costs of defending the action in court. In making such determination, the trier of fact may assess a number of factors, as described by the bill, and any other factors the trier of fact deems relevant.

Rebuttable Presumptions

The bill establishes a rebuttable presumption that litigation is abusive when there is an initiation or continuance of litigation after the defendant in good faith attempts to cure the alleged violation within 30 days after being provided written notice or being served a petition or complaint with sufficient detail to identify and correct the alleged violation.

There is not a rebuttable presumption that such litigation is abusive if an alleged website access violation is not corrected, as determined by the court, within 90 days after being provided the notice or petition described above. The bill specifies the trier of fact may not determine until after a 90-day period expires or the alleged violation is corrected, whichever occurs first, whether the litigation is abusive.

The bill establishes a rebuttable presumption the litigation is not abusive if a written determination by the Attorney General stating the same is attached to the petition in litigation alleging a website access violation.

Attorney Fees; Judgment

If the trier of fact determines that an abusive litigation has occurred pursuant to the bill, the court has discretion to award reasonable attorney fees and costs related to the defense against the abusive litigation, to be paid by the party bringing the abusive litigation. In addition, the bill authorizes the court to award punitive damages or sanctions not to exceed three times the amount of the attorney fees awarded by the court.

The bill also provides that at the conclusion of any litigation alleging a website access violation, the court is required to review any abusive litigation determination and any award of attorney fees under the Kansas Rules of Professional Conduct to determine the reasonableness of the award before issuing a judgment. The results of the litigation alleging a website access violation are to be weighed heavily, particularly if the litigation was resolved in favor of the plaintiff.

ADA Standards; Sunset

The bill requires, if the DOJ issues standards concerning website accessibility under the ADA, the Attorney General to certify to the Secretary of State that such standards have been issued and for the Secretary of State to publish the notice of this certification in the *Kansas Register*. Upon publication of the certification, the provisions of the bill will expire.