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California Disability Anti-Discrimination Law: Lighthouse in the Storm, or Hunt for Buried Treasure?

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I. INTRODUCTION

Since 1968, California has enacted and amended several laws designed to increase the ability of persons with disabilities to access public businesses, facilities, and accommodations, and promote their integration into mainstream society.[1] The comprehensive statutory scheme includes the Unruh Civil Rights

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1. *See* People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 133 (1983) (stating that growth of California's disability laws reflected the Legislature's intent to eliminate impediments encountered by disabled persons and to promote their participation in the community); *infra* Part II.A.1-3.

Act ("Unruh Act"),[2] the Disabled Persons Act ("DPA"),[3] as well as several provisions of the California Government Code[4] and Health and Safety Code.[5] Under these provisions, owners and operators of public businesses are directed to accommodate persons with disabilities in providing goods and services.[6] California businesses must also comply with federal laws and standards relating to disability discrimination.[7]

To redress aggrieved persons who are denied equal access or accommodation, the Unruh Act and the DPA provide statutory damages remedies,[8] whereas suits arising under federal law permit private plaintiffs to obtain only injunctive relief.[9] A sweeping beacon of light, these laws were intended to throw open the doors of shops, restaurants, movie theaters and other public facilities to welcome persons with disabilities into mainstream society by providing them with rights of access afforded other members of society.[10]

Along the path of ensuring equal rights of access, a tug of war has developed. Although federal law provides only injunctive remedial relief,[11] California law permits aggrieved individuals to recover statutory damages.[12] Some business owners and California legislators believe that disability law, intended to secure unfettered freedom from discrimination for disabled persons, has instead been manipulated by some plaintiffs and attorneys for the purpose of recovering a veritable buried treasure.[13] California legislators, concerned about abuse of the

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2. CAL. CIV. CODE §§ 51, 51.3 (West 1982 & Supp. 2004).

3. *Id.* §§ 54.1, 54.3.

4. CAL. GOV'T. CODE §§ 4450-58 (West 1995).

5. CAL. HEALTH & SAFETY CODE § 19955-59 (West 1992).

6. *See generally* CAL. CIV. CODE §§ 51, 54.1 (West 1982 & Supp. 2004); CAL. GOV'T. CODE § 4450 (West 1995); CAL. HEALTH & SAFETY CODE § 19955 (West 1992).

7. *E.g.*, 42 U.S.C.A. § 12181–89 (1995).

8. CAL. CIV. CODE §§ 52, 54.3 (West 1982 & Supp. 2004).

9. 42 U.S.C.A. §§ 2000a-3(a), 12188(a)(1) (1995).

10. *See* Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 248 (1998) (Mosk, J., concurring) (stating that the purpose of section 51 is to prevent racial and other forms of discrimination to the benefit of both individuals and the community); H.R. Rep. No. 101-485(III), at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446 (stating that the ADA was intended to "provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life").

11. 42 U.S.C.A. §§ 2000a-3(a), 12188(a)(1).

12. *See* Doran v. Embassy Suites Hotel, No. C-02-1961, 2002 WL 1968166 at *3 (N.D. Cal. Aug. 26, 2002) (interpreting the Unruh Act and the DPA as providing statutory damages for each offense).

13. *See ADA Notification Act: Hearing on H.R. 3590: Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 106th Cong., 2d Sess. at 128-29 (2000) [hereinafter *ADA Notification Subcomm.*] (including statement of Tammy K. Fields, Assistant County Attorney for Palm Beach County, Fla., that the ADA was intended "to provide access for disabled persons . . . [but not] to enrich attorneys who file cookie cutter lawsuits and seek large attorney fee awards"); Edward Felsenthal, *Disabilities Act is Being Invoked in Diverse Cases*, WALL ST. J., March 31, 1993 at B1 (stating that since enactment of the ADA, "dozens of cases have been filed over issues that many lawmakers never imagined when they voted for it"); Leonard Post, *Vineyards of Litigation: A Disabled Activist Sues 100 Wineries*, 25 NAT'L L. J. 51, 1 (2003) (discussing litigious plaintiff George S. Louie, who has sued over one-hundred wineries with public tasting rooms under both the ADA and the Unruh Civil Rights Act).

law by litigious plaintiffs, and the need to provide protection for businesses, have contemplated ways to balance the rights and interests of all parties.[14]

In response to these concerns, California legislators proposed bills that would impose notice requirements upon disabled individuals who intend to bring suit against businesses for alleged violations of California disability discrimination law.[15] Considering California's long history of advocating for the rights of the disabled and providing damages as a remedy for violation of its anti-discrimination laws, the proposed notice requirements indicate that possible changes are on California's horizon.[16] This Comment suggests that the California Legislature sought to address issues of non-compliance among business owners, and proposed notice requirements in an attempt to strike an equitable balance between the rights and needs of disabled persons and the concerns of business owners.[17]

Part II of this Comment will set forth the legislative histories of California and federal disability anti-discrimination laws, providing insight into the purpose of the laws, and perspective on the current state of the law. Part III evaluates the advantages and disadvantages of the damages remedies available under California law in order to provide an understanding of the issues and concerns facing the California Legislature today. Part IV discusses the proposed California notice requirements and explores the implications of such requirements. Finally, in Part V, the future of the California disability damages debate is examined.

II. HISTORICAL PERSPECTIVE

A. *California Law*

1. The Unruh Civil Rights Act

California has a long-reaching history of anti-discrimination law. Extending as far back as 1897, California law has prohibited discrimination against individuals in places of public accommodation.[18] Codified in section 51 of the California Civil Code, the section[19] has been amended several times over the past

14. *See infra* Part V.B.

15. S.B. 69, 2003-04 Leg., Reg. Sess. (Cal. 2003); A.B. 209, 2003-04 Leg., Reg. Sess. (Cal. 2003).

16. *See* interview with Thomas Hudson, Legislative Director for Senator Rico Oller, in Sacramento, Cal. (Oct. 28, 2003) (notes on file with the *McGeorge Law Review*) [hereinafter Hudson Interview] (asserting A.B. 209 was intended to lead to a paradigm shift in California disability law).

17. *Cf.* Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 248, 17 Cal. 4th 670, 716 (1998) (discussing the purposes of section 51, including an intent to benefit potential discriminatees, and "the community as a whole," and that section 51 thus "effectively strikes a balance between the interests of the potential discriminator and those of the potential discriminatee").

18. *See id.* 952 P.2d at 229 (discussing history of the Unruh Civil Rights Act).

19. CAL. CIV. CODE §§ 51, 51.3 (West 1982).

100 years.[20] The predecessor to section 51 was enacted by the California Legislature in 1897, fourteen years after the United States Supreme Court invalidated the first federal public accommodation statute in the *Civil Rights Cases*.[21] Section 51 in 1905, and after two subsequent amendments in 1919 and 1923, it provided that:

> [a]ll citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.[22]

For as long as California has proscribed discrimination in places of public accommodation under section 51, it has also provided a damages remedy for violation of the law.[23] The remedy available for violation of section 51 was established in section 52, and provided that anyone who denied a citizen access to any public accommodation or facility was liable for an amount not less than one hundred dollars in damages.[24] Thus, from its inception, section 51 sought to obtain equality for its citizens by proscribing discrimination, commanding that public places admit all citizens equally, and allowing aggrieved plaintiffs to recover damages to compensate for the harm.[25]

As a civil rights act, subsequent amendments expanded both the classes of persons protected by the law as well as the types of public accommodations to which the law applied.[26] In 1959, in what the California Supreme Court reasoned was a legislative response to several appellate court rulings holding that section 51 did not protect African-Americans from exclusion from places such as private schools and dentist offices, section 51 was significantly revised in two respects.[27] First, the law was broadened to unequivocally prohibit discrimination in all business establishments.[28] Second, an illustrative list that identified categories of

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20. *Curran*, 952 P.2d at 229 (Mosk, J., concurring); *see generally id.* at 241-42 (discussing the various amendments to section 51).

21. *See id.* at 229 (discussing the *Civil Rights Cases*, 109 U.S. 3 (1883), and the history of the Unruh Act).

22. *See id.* at 229 (quoting stats. 1923, ch. 235, section 1).

23. *See* Swann v. Burkett, 26 Cal. Rptr. 286, 288 (1962) (stating that an 1893 California law permitted recovery by individuals denied admission to "any place of public amusement" of actual damages plus $100 from the proprietor of the business).

24. *See In re* Cox, 3 Cal. 3d 205, 214 n.6 (1970) (discussing evolution of section 52).

25. *Curran*, 952 P.2d at 248 (Mosk, J., concurring).

26. *See id.* at 229-30 (discussing history of section 51).

27. *Id.* at 229.

28. CAL. CIV. CODE § 51(b) (West 1982 & Supp. 2004) (amended 1959).

protected persons was added to the law.[29] As enacted, the 1959 revision stated that:

> [a]ll citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[30]

In addition, section 52 was amended to increase the damages penalty from one hundred dollars to an amount equal to actual damages, plus a two hundred fifty dollar penalty.[31]

In 1974, "sex" was added to prohibit gender-based discrimination,[32] and in 1987, the Unruh Act was broadened to encompass discrimination against blind or otherwise physically disabled individuals.[33] A 1992 amendment eliminated the "blindness" and "physical" distinctions, expanding the law to apply to all persons with disabilities.[34] In its current form, section 51 reads:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[35]

To prevail on a section 51 claim, a plaintiff must plead and prove that the defendant's violation was intentional.[36] Damages are available under section 52 to prevailing plaintiffs in the amount of up to three times the actual damages and no less than $4,000 in statutory damages.[37]

Courts have reasoned that the various amendments to the Unruh Act over the last eighty years indicate the California Legislature's intent to clarify and expand

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29. *See Cox*, 3 Cal. 3d at 216 (stating that the nature of the law, as well as judicial interpretation and legislative history of the Unruh Act, indicate that the specified protected categories listed as part of the 1959 amendments are illustrative rather than restrictive); Harris v. Capital Growth Investors, 805 P.2d 873 (1991) (affirming the *Cox* interpretation).

30. *Curran*, 952 P.2d at 230.

31. *See Cox*, 3 Cal. 3d at 214 (discussing history of the Unruh Act).

32. *Curran*, 952 P.2d at 242 ((Mosk, J., concurring).

33. CAL. CIV. CODE § 51(b) (West 1982 & Supp. 2004) (amended 1987).

34. *Curran*, 952 P.2d at 242 (Mosk, J., concurring).

35. CAL. CIV. CODE § 51(b).

36. Hankins v. El Torito Rests., Inc., 63 Cal. App. 4th 510, 517-18 (1998).

37. CAL. CIV. CODE § 52(a); *see* Boemio v. Love's Rest., 954 F. Supp. 204, 208 (S.D. Cal. 1997) (interpreting "actual damages [to] include both special damages for out-of-pocket losses and general damages for emotional distress").

the coverage of the law to benefit all persons within California, and protect them from arbitrary discrimination in public places.[38]

2. *The Disabled Persons Act*

In 1968, California enacted its first law directed specifically at prohibiting discrimination based on disability.[39] As enacted, section 54.1 of the California Civil Code, known as the DPA,[40] provided an illustrative list of public places in which individuals with disabilities were "entitled to full and equal access" stating that:

> [b]lind persons, visually handicapped persons, and other physically disabled persons shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.[41]

Also enacted in 1968, section 54.3 declared that it was a misdemeanor for anyone to deny a disabled individual equal access to a public place in violation of the DPA.[42] Determining that enforcement of the DPA was proving to be problematic, the Legislature amended section 54.3 four years later to provide a damages remedy, with the goal of increasing compliance and enforcement of the law.[43] In 1976, a violation of the DPA carried a penalty of actual damages plus a maximum of $500 in punitive damages for each offense, and in 1977 the amount of punitive damages was raised to $1,000.[44] A 1981 amendment eliminated the cap on punitive damages and created a statutory penalty of no less than $250, as well as, allowing for recovery of attorney's fees and the right to recover actual damages.[45]

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38. *See Curran*, 952 P.2d at 248 (Mosk, J., concurring) (stating that the purpose of section 51 is to prevent racial and other forms of discrimination to the benefit of both individuals and the community).

39. CAL. CIV. CODE § 54.1 (West 1982) (originally enacted as Stat. 1968, ch. 461, § 1, 1092).

40. *See Goldman*, 341 F.3d at 1027 n.4 (explaining that although courts have sometimes referred to section 54.1 as comprising part of the Unruh Act, only section 51 actually comprises the Unruh Act, and noting that the sections impose different requirements of proof).

41. *See* Marsh v. Edward Theatres Circuit, Inc., 64 Cal. App. 3d 881, 886-87 (1976) (discussing the history of section 54.1) (superseded by statute on other grounds).

42. *See* Donald v. Café Royale, Inc., 218 Cal. App. 3d 168, 179 (1990) (discussing the history of section 54.1 and applicable remedies).

43. *Id.* at 179-80.

44. *Id.* at 179.

45. *Id.*

In 1974, section 55 was enacted, establishing a private right of action for injunctive relief, available to any individual aggrieved or potentially aggrieved by a violation of the DPA.[46] Currently, section 54.3 permits a successful plaintiff to recover actual damages and a statutory penalty "up to a maximum of three times the amount of actual damages but in no case less than $1,000" plus attorney's fees.[47]

Since its enactment, the scope of the DPA has been expanded to include access to leased housing accommodations,[48] and telephone facilities,[49] and has established prohibitions against the refusal of admittance or service to disabled persons with guide or service dogs.[50] However, unlike the Unruh Act, the DPA only requires a plaintiff to establish that she or he was denied access on a particular occasion, not that the defendant intentionally violated the law.[51] Construing this requirement broadly, courts have determined that company policies that result in denial of equal access violate the DPA,[52] as does conduct that merely deters persons with disabilities from seeking access.[53] Such a broad reading of the statute provides maximum protection to individuals who need not make a futile or possibly humiliating gesture of attempting to seek access where it is clear that access will be denied,[54] and requires businesses to modify business policies in order to make reasonable accommodations.[55]

Although actual and statutory damages are available under both the Unruh Act and the DPA, [56] the California Legislature has not provided for unlimited punitive damages or daily damages, the latter defined as damages accruing for each day that a plaintiff is denied access until the facility is brought into compliance.[57] Thus, the Legislature sought to establish reasonable limits of recovery.[58]

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46. CAL. CIVIL CODE § 55 (West 1982); *Donald*, 218 Cal. App. 3d at 179.

47. CAL. CIV. CODE §§ 54.3, 55.

48. *Id.* § 54.1(b)(1) (amended 1969).

49. *Id.* § 54.1(a)(2) (amended 1977).

50. *Id.* § 54.1(c) (amended 1994).

51. *Id.* § 54.1; Boemio v. Love's Rest., 954 F. Supp. 204, 207-08 (S.D. Cal. 1997).

52. *See* Hankins v. El Torito Rests., Inc., 63 Cal. App. 4th 510, 515-16, 522-23 (1998) (holding that the restaurant violated section 54.1 by refusing to permit patrons the use of an employee restroom located on the first floor of the restaurant, despite the inability of a disabled patron to climb the eighteen stairs leading to a second floor public restroom).

53. *See* Arnold v. United Artists Theatre Circuit, Inc., 866 F. Supp. 433, 439 (N.D. Cal. 1994) (ruling in favor of disabled plaintiffs who alleged they were deterred from attempting to attend movie theaters because of their knowledge that the theaters did not provide adequate disabled access).

54. *Id.* at 438.

55. *See Hankins*, 63 Cal. App. 4th at 523-24 (stating that the DPA incorporated ADA Title III standards, and that in accordance with Title III, business owners must "make 'reasonable modifications' in their practices, policies or procedures" to accommodate individuals with disabilities, unless an exception applies).

56. CAL. CIV. CODE §§ 52, 54.3 (West 1982 & Supp. 2004).

57. *See* Doran v. Embassy Suites Hotel, No. C-02-1961, 2002 WL 1968166 at *3-4 (N.D. Cal. Aug. 26, 2002) (interpreting the Unruh Act and the DPA as providing statutory damages for each offense, but not for unlimited punitive or daily damages).

58. *See id.* at *2-3 (denying plaintiff's request for punitive damages in addition to statutory damages).

3. *California Government Code Section 4450 and California Health and Safety Code Section 19955.*

In 1968, California enacted Government Code section 4450.[59] After several subsequent amendments, the law currently states that:

> [i]t is the purpose of this chapter to ensure that all buildings, structures, sidewalks, curbs and related facilities constructed in this state by the use of the state, county, or municipal funds . . . shall be accessible and usable by persons with disabilities. The State Architect shall develop and submit proposed building standards to the California Building Standards Commission for approval and adoption . . . and shall develop other regulations for making buildings, structures, sidewalks, curbs and related facilities accessible to and usable by persons with disabilities.[60]

As enacted, section 4450 applied only to publicly funded buildings. In 1969, California added section 19955 of the Health and Safety Code to make section 4450 applicable to privately funded construction.[61] Currently, section 19955 states that:

> [t]he purpose of this part is to insure that public accommodations or facilities constructed in this state with private funds adhere to the provisions of Chapter 7 (commencing with Section 4450) . . . [f]or purposes of this part "public accommodation or facilities" means a building, structure, facility, complex, or improved area which is used by the general public and shall include auditoriums, hospitals, theaters, restaurants, hotels, motels, stadiums and convention centers.[62]

These statutes require that affirmative action need only be taken in the design and construction of new facilities, or in the repair and alteration of existing facilities.[63] Additionally, the law provides for certain exceptions, including a hardship exception.[64] Historically, an action based on violation of sections 4450 and 19955 may seek enforcement of the provisions, but damages were not available.[65] In October 2003, however, the California Legislature passed a controversial bill calling for strict liability for building code violations that deny access to persons with disabilities, and permitting the government to recover a

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59. CAL. GOV'T CODE § 4450 (West 1995) (added by Stat. 1968, ch. 261, § 1).

60. *Id.*

61. People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 132 (1983).

62. CAL. HEALTH & SAFETY CODE § 19955 (West 1992).

63. Hankins v. El Torito Rests., 63 Cal. App. 4th 510, 522 (1998).

64. *See* CAL. HEALTH & SAFETY CODE § 19957 (providing that an exception may be granted from the literal requirements of the law where there are practical difficulties or unnecessary hardships).

65. Donald v. Café Royale, Inc., 218 Cal. App. 3d 168, 183-84 (1990); Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1052 (S.D. Cal. 1998) (quoting *Donald*).

statutory damages penalty of $2,500.[66] Courts have interpreted the various provisions of Chapter 872 as part of California's goal of furthering the state's policy of providing broad protections to persons with disabilities, and maximizing business' incentive for compliance.[67]

Taken together, the combined statutory scheme of California disability law reflects the Legislature's sensitivity to the hardships endured by individuals with disabilities, and the firm commitment to policy that encourages participation of persons with disabilities in the social and economic mainstream of society.[68] Moreover, the many amendments to the Unruh Act and the DPA that expanded the scope of disability anti-discrimination law, as well as the increase in the amount of statutory damages available to remedy violations, demonstrate the Legislature's intent to guarantee access, promote safety, compensate disabled persons for injuries suffered, and compel business owners to comply with the law.[69]

B. Federal Law: The Americans with Disabilities Act

Federal anti-discrimination law, as applicable to individuals with disabilities, was slower to evolve. In 1990 Congress enacted the Americans with Disabilities Act ("ADA").[70] Title III of the ADA ("Title III") specifically prohibits discrimination against individuals on the basis of disability in places of public accommodation.[71] Title III states that:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[72]

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66. CAL. GOV'T CODE § 4458 (West 1995) (amended by Chapter 872); *id.* §§ 4459.5-9.8 (added by Chapter 872); CAL. HEALTH & SAFETY CODE §§ 19954, 19958.5 (amended by Chapter 872); *id.* § 19958.6 (added by Chapter 872); *see infra* Part IV.

67. *Hankins*, 63 Cal. App. 4th at 523.

68. *Cf.* People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 133 (1983) (stating that section 54.1 and other codes designed to remedy disability discrimination "were part of 'a growing body of legislation intended to reduce or eliminate the physical impediments" faced by the disabled) (quoting Marriage of Carney, 598 P.2d 36 (1979)).

69. *See Hankins*, 63 Cal. App. 4th at 522 (noting section 54.1 is intended to facilitate access to public accommodations by the physically handicapped); *see also Donald*, 218 Cal. App. 3d at 179 (discussing expansion of the DPA); Doran v. Embassy Suites Hotel, No. C-02-1961, 2002 WL 1968166 at *3 (N.D. Cal. Aug. 26, 2002) (concluding that the Legislature took the importance of disability rights into account when it drafted the minimum statutory damages).

70. *See* Elizabeth Keadle Markey, *The ADA's Last Stand?: Standing and the Americans with Disabilities Act*, 71 FORDHAM L. REV. 185, 187-88 (2002) (discussing enactment of the ADA).

71. 42 U.S.C.A §§ 12181–12189 (1995).

72. *Id.* § 12182(a).

Congress declared that the ADA was intended to "provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[73]

As introduced, the various ADA bills proposed rights and remedies that were stronger than those ultimately enacted.[74] Primarily, the original bills called for the right of an aggrieved individual to seek both injunctive relief and monetary damages.[75] However, legislative hearings culminated in a compromise between those who sought strict provisions that would compel compliance by providing a compensatory and punitive damages remedy, and proponents who desired to limit litigation, avoid the imposition of undue hardship on small businesses, and yet provide a broad scope of coverage.[76]

The successful argument propounded by Attorney General Dick Thornburgh cautioned that many people in a litigious society such as ours are quick to bring suit where punitive damages are available, and that the injunctive relief remedies available under Title II of the Civil Rights Act ("CRA" or "CRA Title II")[77] would be an appropriate remedy for ADA Title III violations.[78] Senator Tom Harkin, however, believed that a damages remedy would be necessary in order to achieve widespread voluntary compliance, and that a limited remedial scheme would lead to under-enforcement of Title III.[79]

Under the resulting compromise, Title III permits the United States Attorney General to bring an action against anyone determined to be engaging in discriminatory practices that deny an individual with a disability access to a public accommodation.[80] An action brought by the Attorney General may seek equitable remedies including injunctive relief, as well as, monetary damages not to exceed $50,000 for a first violation, or $100,000 for any subsequent violation.[81] Private parties who bring suit for violation of ADA Title III, however, may recover only the remedies available under the CRA as set forth in section 2000a-3(a) of Title 42.[82]

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73. H.R. REP. NO. 101-485(III), at 23 (1990) *reprinted in* 1990 U.S.C.C.A.N. 445, 446.

74. Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. 377, 382-83 (2000).

75. *Id.* at 383.

76. *See id.* at 392-93 (describing the exchange between Senator Tom Harkin and Attorney General Dick Thornburgh over the appropriate remedial structure).

77. 42 U.S.C.A. § 2000a-3(a) (1995).

78. Colker, *supra* note 74, at 393-94.

79. *Id.* at 392-93.

80. 42 U.S.C.A. § 12188(b)(1)(B) (1995).

81. *Id.* §§ 12188(b)(1)-(b)(2)(C).

82. *Id.* §§ 2000a-3(a), 12188(a)(1).

Enacted in 1964, CRA Title II prohibits discrimination in places of public accommodation based on race, color, national origin, or religion,[83] and provides an aggrieved individual the right to bring a civil action for injunctive relief and recovery of attorney's fees.[84] However, the statute first requires the aggrieved party to give written notice of the alleged violation to the appropriate State or local authority, and imposes a subsequent thirty-day waiting period before suit can be filed.[85] However, because ADA Title III has been interpreted by courts to incorporate only the injunctive relief provision of CRA Title II, it does not impose an administrative exhaustion or notice requirement.[86] Attorney's fees, however, are available under Title III to a prevailing party.[87]

Congress thus sought to balance the goal of promoting access for persons with disabilities with a need to protect small business owners from undue hardship.[88] Although there was some disagreement among legislators, a compromise was eventually reached.[89] To advance the rights of disabled individuals, ADA Title III mandates that the owner or operator of a business may not deny a person with a disability the opportunity to participate in the services, facilities or accommodations offered by the business,[90] or provide accommodation that is different or separate from that provided to the general public.[91] An owner must make reasonable modifications to any policies, practices, or procedures that would result in discrimination against anyone with a disability.[92] However, no such modification is required where the result would fundamentally alter the nature of the goods, services, facilities, privileges or advantages of the business, or where such modification would impose an undue burden on the business.[93]

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83. *See id.* § 2000a(a) (stating that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.").

84. *Id.* § 2000a-3(a)–(b).

85. *Id.* § 2000a-3(c).

86. *Id.* §§ 2000a-3(a), 12188(a)(1); *see, e.g.*, Am. Bus Ass'n v. Slater, 231 F.3d 1, 5 (D.C. Cir. 2000) (denying recovery of damages to private plaintiff for Title III violation, reasoning that the language of the statute restricting recovery of money damages to suits brought by the Attorney General evidences Congress' intent that damages would not be available to other plaintiffs); Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1050 (S.D. Cal. 1998) (holding that Title III does not require exhaustion of administrative remedies as is required under Title I employment claims); Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9th Cir. 2000) (holding that Title III does not require plaintiffs to give notice to any state agency prior to filing suit).

87. 42 U.S.C.A. § 20020a-3(b).

88. *See* Colker, *supra* note 74, at 384 (explaining Attorney General Thornburgh's objections to a broader version of Title III, including a recommendation that "the scope of businesses covered by ADA Title III should be narrowed so as not to impose undue hardship on small businesses").

89. *Id.* at 383-85.

90. 42 U.S.C.A. § 12182(b)(1)(A)(i)-(ii) (1995).

91. *Id.* § 12182(b)(1)(A)(iii).

92. *Id.* § 12182(b)(2)(A)(ii).

93. *Id.* §§ 12182(b)(2)(A)(ii)-(iii).

Additionally, the requirements imposed upon facilities vary, depending on whether the facility is newly designed and constructed,[94] is altered or renovated after the enactment of the ADA,[95] or existed prior to the enactment of the ADA.[96] Design and construction of any new facility must conform to ADA standards.[97] Similarly, any alterations made to an existing facility must also comply with ADA standards and be readily accessible to persons with disabilities.[98] However, existing facilities not undergoing renovation are required to remove architectural barriers only where such removal is "readily achievable," as determined by the consideration of a number of factors.[99] The factors to be considered include the nature and cost of the action that would need to be undertaken, the business' overall financial resources, the impact of modification upon the business, the number of employees, the function of the workforce, and the type of operations conducted by the business and its location.[100] Determination of whether a particular modification is "reasonable" therefore requires a fact-specific, case-by-case analysis.[101]

Finally, ADA Title III directed the United States Department of Justice ("DOJ") to promulgate regulations that would implement Title III standards.[102] The resultant regulations were adopted in July 1991 in Title 28 C.F.R., Part 36, and are generally known as the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").[103] The ADAAG regulations set forth the specific and detailed requirements and measurements that facilities must comply with, and regulate everything from public restrooms and wheelchair ramps to automated teller machines and parking spaces.[104]

C. *Changes to California Law after Enactment of ADA Title III*

After enactment of the ADA, both the Unruh Act and the DPA were amended to incorporate ADA standards, declaring that a violation of the ADA would also

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94. *Id.* § 12183(a)(1).

95. *Id.* § 12183(a)(2).

96. *Id.* §§ 12182(b)(2)(A)(iv)-(v).

97. *Id.* § 12183(a)(1).

98. *Id.* § 12182(a)(2).

99. *Id.* § 12182(b)(2)(A)(iv).

100. *Id.* §§ 12181(9)(A)-(D).

101. Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995); *see, e.g.*, Martin v. PGA Tour, Inc., 204 F.3d 994, 1000 (9th Cir. 2000) (holding that the fundamental nature of services provided by professional golfers' association would not be altered by permitting disabled golfer to use golf cart during tournaments), *aff'd*, 532 U.S. 661; Ass'n for Disabled Ams., Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353, 1365 (S.D. Fla. 2001) (holding that installation of an elevator in a casino ship was not "readily achievable" based on a projected cost of $200,000, the necessity to dry-dock the ship for two months during installation, and the need to obtain re-certification as a commercial passenger vessel).

102. *See* United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094, 1100 (C.D. Cal. 2003) (discussing role of United States Attorney General and DOJ in promulgating of ADAAG regulations).

103. 28 C.F.R. Pt. 36 App. A (2003).

104. *See, e.g., id.* §§ 4.16-4.24.7 (restrooms and water closets), 4.8–4.84 (wheelchair ramps), 4.34-4.34.5 (automated teller machines), 4.6–4.6.6 (parking spaces).

constitute a violation of the Unruh Act and the DPA.[105] The incorporation of ADA standards into California law has been interpreted by courts as an indication of legislative intent to strengthen California disability law where it is weaker than the ADA, but retaining state law where it provides more protection for individuals with disabilities than does the ADA.[106] Accordingly, places of public accommodation in California must meet minimal ADA Title III requirements in order to comply with California law.[107] The result is a comprehensive blueprint requiring compliance both with state law and with the detailed and complex provisions of the federal ADAAG regulations, and which also retains the ability of private plaintiffs to recover statutory damages and attorney's fees.[108]

III. THE DEBATE OVER DAMAGES

The myriad of California and federal disability discrimination law might lead one to conclude that persons with disabilities are well protected and afforded the greatest possible degree of access to public accommodations. However, this is not always the case.[109] To complicate matters, the California Legislature is facing growing and multi-faceted issues related to disability discrimination.[110] Some legislators and business owners claim that the laws are being manipulated by litigious plaintiffs to accomplish ends not intended by the laws.[111] Competing interests and concerns of fairness have divided legislators.[112] It has been suggested that without the availability of damages, the law would be ineffective in commanding full compliance by business owners,[113] and would deter individuals from filing suit.[114] This would hinder achievement of the ultimate

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105. CAL. CIV. CODE §§ 51(f), 54.1(d) (West 1982 & Supp. 2004); A.B. 1077, 1992 Leg., Reg. Sess. (Cal. 1992).

106. Goldman v. Standard Ins. Co., 341 F.3d 1023, 1030 (9th Cir. 2003).

107. *See id.* at 1031 (stating that that incorporation of Title III standards was intended as a model for California law, "putting a floor on coverage for the disabled, not a cap on liability").

108. CAL. CIV. CODE §§ 51(f), 52, 54.1(d), 54.3.

109. *See ADA Notification Subcomm.*, *supra* note 13, at 60 (including statements from Christine Griffin, Executive Director, Disability Law Center).

110. *See, e.g.*, Interview with Kevin O'Neill, Legislative Director for Assemblyman Tim Leslie, in Sacramento, Cal. (Feb. 10, 2004) (notes on file with the *McGeorge Law Review*) [hereinafter O'Neill Interview] (affirming the legislature's goal of promoting access for the disabled, but expressing concern for small businesses forced to shut down because they can't afford to pay damages and attorney's fees when sued for technical violations of the law).

111. *See* Felsenthal, *supra* note 13, at B1 (stating that since enactment of the ADA, "dozens of cases have been filed over issues that many lawmakers never imagined when they voted for it"); Post, *supra* note 13, at 1 (2003) (discussing litigious plaintiff George S. Louie).

112. *See* Hudson Interview, *supra* note 16 (discussing partisan character of proposed notice requirement in California).

113. *Cf.* Colker, *supra* note 74, at 392 (quoting Senator Harkin's position during ADA hearings that "without the existence of damages as a remedy, [there would not be] widespread voluntary compliance or negotiated settlements, short of litigation").

114. *Cf. id.* at 399-401 (supporting conclusion that Title III's remedial scheme deters individuals from bringing suit based on research of reported court data).

goal of disability discrimination law: to ensure that no individual is discriminated against because of a disability and to ensure the full and equal enjoyment of public accommodations.[115]

Conversely, some critics contend that self-serving plaintiffs file lawsuits based on alleged violations of state and federal disability law for the sole purpose of recovering damages,[116] and that unscrupulous attorneys have their eyes set on large attorney's fees.[117] Outcry and protest by business owners raise concerns of unreasonable punishment imposed upon them. These punishments take the form of having to pay damages for minor infractions of the law, or for violations of which they were not aware, believing in good faith that their business complied with the laws.[118]

Legislators are sensitive to both sides of the issue, and are aware that many persons with disabilities continue to encounter exclusion or hindrance in their ability to access public businesses and services.[119] The competing concerns have led legislators to propose possible means of balancing the interests of individuals with disabilities with those of business owners.[120]

A. *Advancing Access versus Litigiousness*

No one appears to dispute that the goal of California and federal disability law is to promote access to public places for persons with disabilities.[121]

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115. *Cf. id.* at 394 (stating that "Title III has not been sufficiently effective in eliminating barriers to access for individuals with disabilities").

116. *See* Shannon Lafferty, *Jury Rejects ADA Claim Against Clint Eastwood*, RECORDER, Oct. 2, 2000, at 3 (discussing opinion of Clint Eastwood concerning plaintiff who sued a resort owned by Eastwood); Mary Fricker, *Taking Access Issues to Court: Advocates for Disabled Have Filed More Than 100 Suits Against North Coast Businesses, Drawing Praise, Criticism*, PRESS DEMOCRAT (Santa Rosa), Sept. 14, 2003, at E1 (discussing prolific plaintiff, George S. Louie, who has recovered significant amounts of money in attorney's fees and damages under California disability laws, as well as money from settlement agreements).

117. *See* Snyder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1211 (S.D. Cal. 1998) (stating that the "goals of the ADA do not include creating an incentive for attorneys to seek statutory fees by laying traps for those who are ignorant of the law."), *rev'd on other grounds*, Botosan v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000); *Sen. Inouye's Statement on the Introduction of S. 782*, 107th Cong. (2001), Congressional Record, at S3998, http://www.ohiosilc.org/il/hr3590/inouye_remarks.html (copy on file with the *McGeorge Law Review*) [hereinafter *Inouye's Statement*] (stating that Title III's lack of a notice requirement has prompted some attorneys to sue businesses for minor infractions that would be inexpensive to remedy, seeking costly attorneys fees and expenses).

118. *See, e.g.*, *ADA Notification Subcomm.*, *supra* note 13, at 45-46 (statement of Terri L. Davis, Business Manager, discussing utilization of independent consultants to ensure ADA compliance, and subsequent lawsuit that alleged the company provided an inadequate number of handicapped parking spaces).

119. *See* O'Neill Interview, *supra* note 110 (stating that no one wants to deny disabled persons access to public facilities, and that businesses must work in good faith toward compliance).

120. Hudson Interview, *supra* note 16.

121. *See* O'Neill Interview, *supra* note 110 (affirming that the legislature does not seek to deny access to any individual); *cf. Inouye's Statement*, *supra* note 117 (supporting ADA notification requirement, but stating that "I do not suggest or approve of any changes to the ADA that would weaken its substantive requirements for reasonable accommodation to persons with disabilities."); *ADA Notification Subcomm.*, *supra* note 13, at 8

Disability activists and legislators alike agree that all individuals are entitled to equal access to public accommodations.[122] The many amendments to the Unruh Act and the DPA, as well as the enactment of ADA Title III are clear evidence of this goal.[123] Moreover, the availability of damages under the Unruh Act and the DPA demonstrate the California Legislature's desire to compensate aggrieved individuals and compel compliance among businesses.[124]

In attempting to take advantage of the goods and services offered by public places such as movie theaters, restaurants, and stores, persons with disabilities have faced multiple obstacles depriving them of equal access, sometimes to the point of embarrassment.[125] Several California cases describe such situations and the predicaments encountered by persons with disabilities on a daily basis.[126]

For example, in *Hankins v. El Torito Restaurants*,[127] a restaurant patron who was disabled as a result of a partial leg amputation faced the nearly impossible feat of having to climb eighteen steps on crutches in order to use the only public restroom in the restaurant.[128] The manager denied the patron's request to use an employee restroom located on the first floor, and instead directed the patron to try the restaurant next door.[129] The difficult journey to the other restaurant included navigation across seventy-five yards of parking lot. Upon finding that the other restaurant was also inaccessible, the patron, unable to wait any longer, relieved himself in a bush located in the parking lot.[130] This is not an isolated occurrence—other disabled persons have also had to resort to public urination.[131] In a similar incident,[132] plaintiff Theodore A. Pinnock alleged that while patronizing a restaurant, he discovered that the restroom would not accommodate

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(quoting Chairman Charles T. Canady as saying "There is widespread agreement that the [ADA] furthers the admirable goal of providing for an accessible environment for the disabled").

122. *See* People *ex rel.* Deukmajian v. CHE, Inc., 150 Cal. App. 3d 123 (1983); *see ADA Notification Subcomm.*, *supra* note 13, at 56 (including statement of Christine Griffin, Executive Director of Disability Law Center, Inc. of Boston, Massachusetts, describing the law center's mission of promoting access and independence for disabled persons).

123. *See, e.g.*, Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 229 (1998) (Mosk, J., concurring) (discussing amendments to the Unruh Act); People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 135 (1983), *quoting* Marriage of Carney, 598 P.2d 36 (1979) (stating that section 54.1 and other codes designed to remedy disability discrimination "were part of 'a growing body of legislation intended to reduce or eliminate the physical impediments" faced by the disabled).

124. CAL. CIV. CODE §§ 52, 54.3 (West 1982); *see, e.g.*, Donald v. Café Royale, Inc., 218 Cal. App. 3d 168, 179-80 (1990) (discussing enactment of damages remedy for violations of the DPA).

125. *See, e.g., infra* notes 127-145 and accompanying text.

126. *Id.*

127. 63 Cal. App. 4th 510 (1998).

128. *Id.* at 515.

129. *Id.*

130. *Id.* at 515-16.

131. *See, e.g.*, Boemio v. Love's Rest., 954 F. Supp. 204, 206 (S.D. Cal. 1997) (holding that wheelchair-bound patron was entitled to actual damages after patron discovered that the restaurant's restroom would not accommodate his wheelchair, and alleging he was forced to urinate in the parking lot).

132. Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574 (S.D. Cal. 1993).

his wheelchair.[133] In order to use the restroom facilities, Pinnock removed himself from his wheelchair and crawled into the restroom.[134]

Persons with disabilities have also found themselves excluded from elevated dining areas because of wheelchair inaccessibility.[135] In *Donald v. Café Royale, Inc.*,[136] patron James Donald decided to leave a restaurant rather than choose either to dine with his companion in the lower bar area, or accept an employee's offer to physically carry Donald up the steps to the raised dining area.[137] In addition to humiliation, the latter option also posed the potential for physical danger to Donald should he be dropped during the transfer.[138]

People ex rel. *Deukmejian v. CHE*[139] provides another example of unequal accommodation. There, the government alleged that the handicapped entrance into a certain restaurant was not equivalent to the entrance provided to able-bodied persons.[140] The public entrance offered a glass and wood door and led into a foyer decorated with plants and skylights. Customers proceeded to a wood-paneled staircase, atop of which stood the maitre d'. Physically disabled persons, on the other hand, had to use an undecorated first floor employee entrance that remained locked during business hours.[141]

Persons with disabilities have also faced obstacles due to noncompliance with ADAAG regulations. Examples of noncompliance leading to unequal access include inadequate handicapped parking, entrance ramps that are difficult to navigate,[142] and grossly disparate and non-integrated wheelchair seating areas in theaters where persons who use wheelchairs are required to sit very close to the screen.[143] For some individuals, a minor deviation from specific regulations can amount to a major obstacle.[144] For example, seemingly inconsequential variations from ADAAG code regulations can mean the difference between a paraplegic individual having or not having enough space to accomplish a successful wheelchair-to-toilet transfer.[145] The nature and extent of frustrating

133. *Id.* at 578.

134. *Id.*

135. Donald v. Café Royale, Inc., 218 Cal. App. 3d 168, 173 (1990).

136. *Id.* at 173-74.

137. *Id.*

138. *Id.*

139. 150 Cal. App. 3d 123 (1983).

140. *Id.* at 128.

141. *Id.*

142. Sharp v. Waterfront Rests., No. 99-CV-200, 1999 WL 1095486, at *1 (S.D. Cal. Aug. 2, 1999).

143. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1127-28 (9th Cir. 2003).

144. *See* Fricker, *supra* note 116, at E1 (stating that matters that seem insignificant to other members of the public can be important to a person who uses a wheelchair, such as the height of a grab bar needed to transfer to a toilet).

145. *See id.* (discussing how small deviations from code regulations may make a wheelchair to toilet transfer more difficult).

experiences frequently endured by persons with disabilities are virtually endless, and are the experiences disability laws seek to remedy.[146]

Lawsuits filed for violation of disability discrimination laws often seek injunctive relief, in the hope that courts will order removal of the barriers that prevent individuals with disabilities from enjoying public places in the same manner as able-bodied individuals.[147] In addition, many aggrieved persons seek and are awarded damages under California law as compensation for their injury.[148] The Legislature's adoption of a damages remedy and the award of such damages by courts indicate recognition of the hardships and obstacles faced regularly by persons with disabilities, and the desire to create a public environment accessible to all people.[149]

Four years after the enactment of the DPA, the California Legislature recognized that providing a damages remedy would help compel enforcement.[150] Many disability activists believe that without the ability to recover damages, businesses would simply choose to remain out of compliance with the law, gambling that, even if sued, the most severe consequence would amount only to a mandate to modify existing policies and practices.[151] What this argument does not account for, however, is that attorney's fees, recoverable under both federal and state disability law, can amount to significantly greater sums than the cost to modify a restroom or to add a wheelchair ramp.[152] The fact that numerous courts have awarded substantial costs and attorney's fees to successful plaintiffs

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146. *See* Donald v. Café Royale, Inc., 218 Cal. App. 3d 168, 177-78 (1990) (stating that "[t]he various legislative pronouncements of our state's policy leave no doubt that the purpose of section 54 et seq. and section 19955 et seq. is to reduce or eliminate the physical impediments to participation in community life by the physically handicapped") (referencing *In re* Marriage of Carney, 24 Cal. 3d 725, 738 (1979)).

147. *See, e.g.*, People *ex rel.* Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 127 (1983) (seeking order to compel restaurant to provide handicapped entrance equal to general public entrance that was not navigable by wheelchairs); Hankins v. El Torito Rests., Inc., 63 Cal. App. 4th 510, 514 (1998) (seeking order compelling restaurant to alter it's policy in order to provide patrons with a handicapped accessible restroom).

148. *See, e.g., Hankins*, 63 Cal. App. 4th at 516, 531 (affirming trial court's award of $80,000 to disabled restaurant patron as damages for restaurant's violation of California's disability discrimination laws).

149. *See, e.g., ex rel.* Deukmejian, 150 Cal. App. 3d at 135 (stating that enactment of the various disability laws reflects the California Legislature's "sensitivity to the hardships suffered by those afflicted with a wide range of physical disabilities [and] are part of an expanding legislative effort to attain" the goal of integration with mainstream society).

150. *See Donald*, 218 Cal. App. 3d at 179 (stating that "[i]t is plain to see the Legislature's purpose in imposing increased penalties and additional enforcement methods [under the DPA] is to guarantee compliance with equal access requirements").

151. *See ADA Notification Subcomm., supra* note 13, at 92 (including statement of Baltimore attorney Andrew Levy that the ADA is weak legislation because it does not provide for damages, and thus a person or business could knowingly or intentionally violate it for years, and still not be liable for damages. Additionally, because there is no risk of having to pay damages "the effect of requiring notice is to encourage people to do nothing until they get a letter").

152. *Cf.* Mike Hoyem, *ADA Cases Catch Defendants by Surprise*, NEWS-PRESS (Fort Myers), Sept. 15, 2003, at 6A (stating that attorney's fees can range from $5,000 to $10,000 or more per case).

suggests that most business owners would rather no be sued simply to postpone compliance with the law.[153]

Accordingly, those opposed to the availability of damages allege that some plaintiffs are litigious simply for the purpose of recovering damages, and not for the purpose of advancing access for disabled persons.[154] Plaintiffs can plead ADA violations to get into federal court, and attach California state law claims in order to recover damages.[155] Because the Unruh Act and the DPA incorporate the ADA, technical violations of the ADAAG may entitle plaintiffs to "hang their hat" on the strict minutiae of the federal regulations in order to recover state law damages, or alternatively, demand an essentially coerced settlement.[156] Even courts and legislators have recognized the litigiousness of certain individual plaintiffs.[157]

For example, in *Louie v. Ideal Cleaners*,[158] a California federal court acknowledged that the plaintiffs, George S. Louie and Barnabus Fairfield, had filed more than thirteen disability discrimination suits in that court alone, and that these plaintiffs often filed separate lawsuits against the same defendants.[159] Louie and Fairfield, both disabled, alleged that while patronizing a dry cleaning business, they were denied access to the restroom because of a too-narrow doorway.[160] The court made short work of granting summary judgment to the defendant.[161] The court found that the restroom was an employee-only restroom, and that Fairfield's unilateral attempt to use it did not make it a public restroom.[162] Both federal and California disability law state that individuals with

153. *See, e.g.*, Chabner v. United of Omaha Life Ins. Co., No. C-95-0447, 1999 WL 33227443, at *1, 7 (N.D. Cal. Oct. 12, 1999) (awarding plaintiff $538,249 in costs and attorney's fees after plaintiff was granted summary judgment on his ADA claims); MacDougal v. Catalyst Nightclub, 58 F. Supp. 2d 1101, 1102, 1107 (N.D. Cal. 1999) (awarding plaintiff more than $43,000 in costs and attorney's fees after the parties entered into a settlement agreement).

154. *See* Hoyem, *supra* note 152, at 6A; *see* L. Stuart Ditzen, *Business Owners Call Flood of Disability Suits an Ambush*, PHILA. INQUIRER, Aug. 31, 2003, at A1 (quoting one business owner's response to being sued for Title III violations as saying, "[a]re you sure you have the right place? . . . I've had wheelchairs in here for 21 years . . . . You could put a golf cart in our men's room").

155. *See ADA Notification Subcomm.*, *supra* note 13, at 47 (including statement of business manager Terri L. Davis that because plaintiffs are only able to obtain injunctive relief under federal law, they add state law claims in order to recover money damages).

156. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 3-4 (Mar. 10, 2003) (stating that businesses sued for even minor ADA violations can be liable for money damages under state law, and are often compelled to settle for more than the problem would cost to fix).

157. *See* Sharp v. Waterfront Rests., No. 99-CV-200, 1999 WL 1095486, at *6 n.1 (S.D. Cal. Aug. 2, 1999) (sympathizing with defendant's contention that "vexatious private suits brought by professional ADA plaintiffs menace innocent businesses and undermine the legitimate purposes of the ADA", but stating that "the change of law advocated by Defendant must come from Congress, not the courts"); O'Neill Interview, *supra* note 110 (discussing issues that AB 209 sought to address).

158. Nos. C 99-1557, C 99-1814, WL 1269191 (N.D. Cal. Dec. 14, 1999).

159. *Id.* at *1.

160. *Id.* at *2.

161. *Id.* at *3.

162. *See id.* at *2. (stating that the plaintiff needs to show that the restroom was available to the public and that his mere assertion was insufficient evidence).

disabilities are entitled to access that is full and *equal to that enjoyed by members of the general public.*[163] Because the general public had no right to access the restroom, the court held that the plaintiffs likewise had no right, and ruled in favor of the defendant.[164]

Louie, who suffers from diabetes and a right leg amputation resulting from the disease, is not unknown among California business owners.[165] Despite the fact that Louie does not consume alcohol because of his diabetes, he has sued more than one hundred wineries in California, alleging that the winery tasting rooms violate federal and state law because they do not provide full accessibility to the disabled.[166] The suits, usually brought by Louie in conjunction with a second plaintiff, often result in settlements averaging close to $10,000 per suit, with each plaintiff collecting $4,000 in statutory damages, and another $2,000 in attorney's fees and costs.[167] Although Louie claims to be an activist whose goal is simply to bring businesses into compliance with the law,[168] others condemn him as a "professional plaintiff," citing the one million dollars in damages and legal fees Louie's efforts have garnered.[169] His opponents describe his tactics as tantamount to a "cottage industry," and claim that he is interested only in money.[170]

Such activism is not confined to California. In Philadelphia, Pennsylvania, a small group of activists filed nearly forty lawsuits against local businesses, claiming disability discrimination and demanding money damages and attorney's fees.[171] Waves of lawsuits have also flooded Florida, targeting businesses ranging in type from diners to strip clubs. A suit was even filed against a store that sold wheelchairs, suggesting the plaintiff's motive was profit-driven.[172] Some of these suits include seemingly frivolous claims.[173]

Additional evidence supports the theory that some plaintiffs are more interested in recovering damages than advancing public access for individuals with disabilities. For example, in *Botosan v. Fitzhugh*,[174] a restaurant patron who

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163. *See id.* at *1, *3 (setting forth the language and intent behind Title III and the DPA).

164. *Id.* at *3.

165. Post, *supra* note 13, at 1.

166. *Id.*

167. *Id.*

168. *See* Fricker, *supra* note 116, at E1 (quoting Mr. Louie as saying, "If [businesses] were in compliance, I'd be put out of business in one day").

169. *Id.*

170. *See id.* (reporting opinion of Rob Carrol, a San Francisco attorney who represented approximately fifty companies sued by Mr. Louie, including approximately thirty-five wineries); Post, *supra* note 13, at 1 (stating that in 2002, Mr. Louie met with members of the Wine Institute, a San Francisco based association of wineries, offering not to sue for one year any member winery that agreed to pay him $200).

171. Ditzen, *supra* note 154, at A1.

172. *Id.*

173. *See id.* (discussing suit in which a plaintiff alleged he had suffered emotional distress after finding that a restaurant he sought to patronize had no van-accessible parking – to which the restaurant's attorney pointed out that the restaurant *had* no parking lot).

174. 13 F. Supp. 2d 1047, 1049 (S.D. Cal. 1998).

required the use of a wheelchair alleged that the restaurant violated ADA Title III, the Unruh Act, the DPA and sections of the California Health and Safety Code by not providing handicapped parking, wheelchair ramps, accessible restroom facilities, or accessibility signage.[175] Although the plaintiff's complaint was valid, and the court rejected the defendant's motions for dismissal and summary judgment, the plaintiff's motives were still questionable. The plaintiff sought to recover compensatory damages under the ADA,[176] daily damages in the amount of $1,000 per day (although he only patronized the restaurant once), damages under California Health and Safety Code section 19955, uncapped punitive damages under the Unruh Act[177] and the DPA,[178] and special damages based on allegations that he suffered humiliation, frustration, embarrassment and serious emotional and physical injuries.[179] This particular plaintiff, Kornel Botosan, filed more than 160 lawsuits in Southern California, demanding monetary damages in a pattern of conduct that some characterize as a "shakedown" of local businesses.[180]

These types of suits may lead one to wonder whether plaintiffs such as Louie and Botosan are heroic activists, carrying the torch for greater disability access, or self-serving opportunists, looking to make a quick buck.[181] Even if Louie and Botosan fall into the latter category, California legislators cannot ignore the foundational goals of disability law. They must find a way to advance access for persons with disabilities, while looking for ways to reduce the need for litigation.[182]

Ultimately it is usually lawyers who file lawsuits. This fact has led some to contend that disability law has turned into "the goose that lays golden eggs" for greedy attorneys.[183] Many business owners and the attorneys who represent them, refer to the rash of lawsuits seeking damages as "drive-by litigation" because it appears that either the plaintiff or the attorney is driving around a particular area looking for businesses to sue.[184]

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175. *Id.*

176. *See id.* at 1051 (striking this portion of plaintiff's complaint because damages are not available under Title III).

177. CAL. CIV. CODE §§ 51, 51.3 (West 1982).

178. *Id.* §§ 54.1, 54.3.

179. *See* Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1051-53 (S.D. Cal. 1998) (noting that this opinion ruled on defendant's motions, and there is no discussion of the exact nature of the injuries suffered by the plaintiff, nor is the ultimate outcome of each of the plaintiff's allegations reported).

180. Adam A. Milani, *Go Ahead, Make My 90 Days: Should Plaintiffs be Required to Provide Notice to Defendants Before Filing Suit Under Title III of the Americans With Disabilities Act?*, 2001 WIS. L. REV. 107, 132-33 (2001).

181. *See generally* Hudson Interview, *supra* note 16 (discussing goals of SB 69); O'Neill Interview, *supra* note 110 (discussing goals of AB 209).

182. *See generally* Hudson Interview, *supra* note 16 (discussing goals of SB 69); O'Neill Interview, *supra* note 110 (discussing goals of AB 209).

183. Hoyem, *supra* note 152, at 6A.

184. *Id.*

In sum, although promoting access for individuals with disabilities is an important and legitimate interest that no one disputes, concerns about misuse of the law by those whose primary goal is to line their own pockets has some legislators looking for ways to keep the purpose of the laws in focus.[185]

B. Long Standing Law versus Good Faith Belief

Another facet of the damages controversy lies in the argument that laws governing disability access have been on the books in California for many years.[186] Indeed, the most outspoken disability advocates cite the fact that the DPA has existed since 1968, disability law under the Unruh Act has been around since 1987, and ADA Title III was enacted in 1990.[187] Thus, it is argued that business owners are well aware of the laws and have had more than enough time to come into compliance.[188] Moreover, disability activists assert that non-compliant business owners and operators simply choose not to comply, and then become angry when they are "caught."[189]

Most business owners take another view.[190] They claim that the long-time existence of these three laws does not mean that the majority of business owners are aware of them.[191] Further, some businesses forced to pay thousands of dollars in settlement or litigation costs face the possibility of going out of business due to minor or technical violations that might have cost less than five dollars to fix.[192] These businesses merely seek a remedy that is fair to both the aggrieved individual and the business, particularly where violation was unintentional and the business owner demonstrates a willingness to comply with the law.[193]

Targeted businesses may escape liability if they fall within one of the various federal law .[194] One exception is triggered when a court determines that renovation or

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185. *See* Hudson Interview, *supra* note 16 (discussing motivation behind initiation of a notice requirement bill in California); *cf.* Hoyem, *supra* note 152, at 6A (quoting attorney Fields as saying, "[t]he Americans with Disabilities Act is a great idea. It's just being used incorrectly for a bad purpose").

186. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 5 (Mar. 10, 2003).

187. *See* Post, *supra* note 13, at 1 (discussing opinion of George S. Louie).

188. *See id.* (quoting plaintiff George S. Louie as saying, "How much more notice do they need?").

189. *See* Hoyem, *supra* note 152, at 6A (interviewing John Mallah, a Florida attorney who has filed hundreds of lawsuits based on ADA violations).

190. *See, e.g.*, Sharp v. Waterfront Rests., No. 99-CV-200, 1999 WL 1095486, at *6 n.1 (S.D. Cal. Aug. 2, 1999) (discussing business owner's contention that "vexatious private suits brought by professional ADA plaintiffs menace innocent businesses and undermine the legitimate purposes of the ADA").

191. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 5 (Mar. 10, 2003) (acknowledging that the ADA was enacted more than twelve years ago, but stating that many businesses that are in violation of the law are unaware of the violations).

192. *Id.* at 3-4.

193. *See id.* at 4 (stating that the cost to defend a lawsuit may be disproportionate to the cost of correcting the problem, and that many lawsuits are based on minor violations that are technical violations "rather than deliberate attempts to circumvent the law").

194. *See* 42 U.S.C.A. § 12182(b)(2)(A)(ii) (1995) (stating that modifications that would fundamentally alter the nature of goods, services or facilities offered by a business need not be undertaken); *id.*

accommodation is not "readily achievable."[195] In these cases, a business is excused from making the renovations. Although courts can often balance the interests of businesses and persons with disabilities, legislators continue to seek ways to reduce the need for such litigation and unnecessary consumption of valuable court time.[196] In any case, common sense seems to dictate that anyone hoping to operate a successful business would not want to turn away a paying customer, whether the customer walks in unassisted or rolls through the door in a wheelchair. Most business owners probably prefer compliance so that their doors remain open to all prospective customers.[197]

Even owners who believe in good faith that they are in compliance with disability laws may find themselves in the middle of a non-compliance lawsuit.[198] These suits take many business owners by surprise because although most are knowledgeable in business and management practices, they may be unfamiliar with the numerous legal requirements of running a business.[199] As a result, rather than facing the prospect of paying statutory damages and attorney's fees and costs, many businesses settle out of court, often for significantly more than the violation would have cost to correct.[200]

In fact, some business owners have gone to great lengths and expense to have their facilities examined by inspectors for the very purpose of ensuring

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§ 12182(b)(2)(A)(iii) (providing an undue burden exception); *id.* § 12182(b)(2)(A)(v) (providing that removal of architectural barriers and provision of goods and services must be readily achievable).

195. *See id.* § 12181(9) (defining "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense" and listing factors to be considered in determining whether an action is readily achievable, including the nature and cost of the action, the financial resources of the facility, the size of the facility and number of employees, and the location and nature of the business); *see, e.g.*, Martin v. PGA Tour, Inc., 204 F.3d 994 (9th Cir. 2000) (holding that fundamental nature of services provided by professional golfers' association would not be altered by permitting disabled golfer to use golf cart during tournaments), *aff'd*, 532 U.S. 661; Ass'n for Disabled Ams., Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353 (S.D. Fla. 2001) (holding that installation of an elevator in a casino ship was not "readily achievable" based on a projected cost of $200,000, the necessity to dry-dock the ship for two months during installation, and the need to obtain re-certification as a commercial passenger vessel).

196. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 1 (Mar. 10, 2003) (seeking to restrict the need to litigate minor infractions of the law by imposing notice requirements upon would-be plaintiffs); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 1 (Jan. 20, 2004) (proposing imposition of a pre-litigation notice requirement to provide business owners ninety days to remedy the access violation).

197. *See* Post, *supra* note 13, at 1 (quoting attorney Wendell Lee, staff attorney for the Wine Institute, a San Francisco based association of wineries, as saying, "Our people are in the hospitality business. They want to comply").

198. *See id.* (quoting attorney Rob Carrol who defends businesses sued for Title III and California disability law violations as saying, "Every one of my clients thought they were in compliance until they got sued").

199. *See ADA Notification Subcomm.*, *supra* note 13, at 67 (including statement of business manager Terri L. Davis that she was unaware of any violations, relying upon the consultants hired by the previous property manager); Milani, *supra* note 180, at 156 (stating that "[e]ven business owners who are aware of the accessibility rules are probably unfamiliar with their specifics—especially with regard to technical requirements like the slope of ramps or bathroom dimensions").

200. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 3 (Mar. 10, 2003).

compliance with ADA regulations.[201] Yet reliance upon building inspectors is not an affirmative defense; there is no "reasonable reliance" exception in any of the laws.[202]

The DPA, Unruh Act and ADA Title III make clear that persons with disabilities are entitled to full and equal access in places of public accommodation. However, these laws do not mention requirements pertaining to angles of incline for wheelchair ramps, size of restroom stalls, or required aisle width in stores.[203] These details are found in other legislative provisions.[204] Many business owners have relied on the expertise of professionals, such as general contractors and inspectors, to navigate through the virtually bottomless sea of regulations. Unfortunately, even these owners are not assured of compliance.[205]

The problem is that the building codes are numerous, complex, and extremely detailed.[206] The ADAAG sets forth exact measurements for hundreds, potentially thousands, of items such as wheelchair seating space width,[207] maximum ramp slopes,[208] pay phone height,[209] restroom sink height,[210] maximum pounds of pressure required to activate restroom soap dispensers,[211] and various grab bar requirements.[212] Moreover, the ADAAG contains six separate provisions relating to the position and appearance of signs, regulating items such as character height and proportion, background color, sign finish and mounting

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201. *See, e.g., ADA Notification Subcomm., supra* note 13, at 45-46 (statement of business manager Terri L. Davis that her "company hired independent consultants to inspect all the properties . . . [and that] necessary modifications to the properties were ordered and completed shortly thereafter to ensure that to the best of our knowledge, all of the properties were in compliance with the regulations," but that the company was nonetheless sued for ADA and California disability law violations).

202. *See id.*; *see also* United States v. Cinemark USA, Inc., 348 F.3d 569, 581 n.9 (6th Cir. 2003) (considering defendant's affirmative defense that it complied with state regulations that had been certified by the DOJ as meeting or exceeding ADA standards, and that defendant relied upon the certification, but noting that the "DOJ has expressly stated that certification is not a process on which architects can completely rely"); O'Neill Interview, *supra* note 110 (discussing purposes for proposing AB 209).

203. 42 U.S.C.A. § 12182 (1995); CAL. CIV. CODE §§ 51(b), 54.1 (West 1982 & Supp. 2004).

204. 28 C.F.R. Pt. 36, App. A (2003).

205. *See* O'Neill Interview, *supra* note 110 (discussing difficulty that inspectors encounter when trying to interpret ADAAG provisions).

206. *See* Post, *supra* note 13, at 1 (noting that there are approximately ninety regulations alone that govern public restrooms, and describing the multitude of regulations as "minefields," noting there are different requirements depending on whether an accommodation was built before or after enactment of the laws).

207. *See* 28 C.F.R. Pt. 36, App. A § 4.2.4.1 (requiring thirty inches by forty-eight inches as the minimum clear floor space to accommodate a single, stationary wheelchair).

208. *See id.* § 4.8.2 (stating the maximum ramp slope for a newly constructed ramp must be 1:12).

209. *Id.* § 4.3

210. *See id.* § 4.24.2 (stating that sink counters should be no higher than thirty four inches above the floor).

211. *See id.* § 4.27.4 (stating that the required force shall not exceed five pounds of pressure).

212. *See id.* § 4.16.4 (stating that grab bars located behind a water closets must be a minimum of thirty-six inches—although it is not indicated whether this applies to the length of the bar or the height from the floor—and that the grab bar must also comply with section 4.26 and Figure 29, as well as providing for further recommendations in the ADAAG's appendix).

height.[213] For instance, a sign designating handicapped accessible services must be mounted at a height of sixty inches, as measured from the finished floor to the centerline of the sign.[214]

Indeed, interpreting the many regulations found in the ADAAG has proved problematic even for judges, who are unquestionably among the most skilled at interpreting statutes.[215] The difficulty in interpretation has led to divided court decisions and splits of authority, requiring architects and contractors to juggle the various interpretations in determining exactly which construction designs will comply with the law.[216]

Considering the interpretation difficulties encountered by judges and design professionals, what chance do business owners have of understanding the voluminous provisions when they generally lack any sort of legal or engineering training?[217] As a result, even astute business owners who obtained guidance from and followed recommendations of state contractors, or who obtained approval from state agencies or architects, have not been exempt from the law if violations are subsequently identified.[218]

Another frequent situation involves lawsuits for minor or technical violations that have little, if any, negative impact on disabled individuals.[219] The problem is that the laws, as they currently stand, make no exception or distinction between minor and major infractions.[220] Disabled individuals might familiarize themselves with a few of the more technical requirements of the building codes, like the sixty-inch height requirement for handicapped signs,[221] then simply patronize a store and bring suit against the owner if the sign varies even one inch from code.[222] Indeed,

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213. *Id.* §§ 4.30–4.30.6.

214. *Id.* § 4.30.6.

215. *See* Indep. Living Res. v. Or. Arena Corp., 1 F. Supp. 2d 1124, 1132, 1140, 1143, 1145 (D. Or. 1998) (expressing repeated frustration with numerous provisions of the ADAAG regulations, characterizing various regulations as circular in definition, lacking adequate specificity, unhelpful at times, and acknowledging that "there may be instances where the court is either unable to comprehend what regulation requires, or the explanation proffered by DOJ is simply illogical, or conflicts with the plain language of the regulations").

216. *See* Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1133-34 (9th Cir. 2003) (Kleinfeld, J., dissenting) (stating the majority's ruling results in a split of authority that will require design professionals to make architectural inferences rendered obscure and debatable by the split).

217. *See id.* at 1134 (Kleinfeld, J., dissenting) (querying "[i]f a judge on the panel cannot say just what is required, how can a movie theater owner?"); Ditzen, *supra* note 154, at A1 (stating that even ADA experts admit that "the regulations for the 1990 [ADA] law are so detailed that perfect compliance is almost impossible. That makes almost any business a potential target for suit").

218. Post, *supra* note 13, at 1.

219. *See, e.g.*, Fricker, *supra* note 116, at E1 (stating that plaintiff George S. Louie sued a California bank over print on a parking sign that was too small and a wheelchair ramp that was .07 to 3.47 degrees steeper than required by law).

220. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 3 (Mar. 18, 2003) (stating that a minor violation, such as a non-compliant door handle that might cost only four dollars to replace, would nonetheless require payment of $1,000 statutory damages under the DPA).

221. 28 C.F.R. Pt. 36, App. A § 4.30.6 (2003).

222. CAL. CIV. CODE §§ 52, 54.3 (West 1982 & Supp. 2004).

California law entitles these individuals to statutory damages.[223] Business owners have no recourse against these types of suits, and are not entitled to notification of the infraction prior to the lawsuit.[224] Thus, the degree of infraction may be minor or essentially harmless, yet entitle a plaintiff to recover damages that significantly exceed the cost to modify, such as a modification requiring a handicapped sign to be repositioned by one inch.[225] Undoubtedly, some minor violations have significant impact upon individuals, but other violations, such as a one-inch sign displacement, do not.[226]

It is unfair to punish business owners who were aware of the laws, took affirmative steps to comply, and believed in good faith that they were in compliance. Moreover, it is possible to conceive of a savvy attorney who directs multiple plaintiffs to lodge complaints against the same business, forcing the business to settle, or face paying statutory damages to each plaintiff, plus attorney's fees and costs.[227] This is not what legislators intended when they enacted disability discrimination laws.[228] The laws were intended to make public places accessible to individuals with disabilities, not provide them with a convenient cash cow.[229] Yet neither the DPA nor ADA Title III requires discriminatory acts to be intentional.[230] Furthermore, notice is not required under any of the California disability anti-discrimination laws or Title III.[231]

IV. ENACTMENT OF CHAPTER 872

In October 2003, the California Legislature enacted Chapter 872,[232] which directed the California State Architect to implement a program for voluntary

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223. *Id.*; *see* Hudson Interview, *supra* note 16 (discussing motivation behind initiation of a notice requirement bill in California).

224. Post, *supra* note 13, at 1.

225. *See* Hudson Interview, *supra* note 16 (discussing inequities that SB 69 is intended to address).

226. *See, e.g.*, Fricker, *supra* note 116, at E1 (stating that matters that seem insignificant to other members of the public can be important to a person who uses a wheelchair, such as the height of a grab bar needed to transfer to a toilet).

227. *See* O'Neill Interview, *supra* note 110 (discussing scenario in which an attorney directed ten disabled individuals to bring suit against one business, compelling a $20,000 settlement from which the attorney kept $10,000 as his fee).

228. *Cf.* Felsenthal, *supra* note 13, at B1 (referring to the ADA, stating that lawsuits have been filed over issues not imagined by lawmakers, and speculating that Congress did not realize "the extent to which laws are stretched out of proportion").

229. *See* O'Neill Interview, *supra* note 110 (discussing purpose of California disability law, the need to provide access, and the goal of imposing reasonable restrictions to protect businesses).

230. *See* Parr v. L&L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1069 (D. Hi. 2000) (stating that the ADA applies to discriminatory effects resulting from indifference and benign neglect as well as intentional discrimination); Boemio v. Love's Rest., 954 F. Supp. 204, 207-08 (S.D. Cal. 1997) (holding that the DPA does not require a plaintiff to plead intentional discrimination).

231. 42 U.S.C.A. § 12182 (West 1995); CAL. CIV. CODE §§ 51, 54.1 West 1982); *see* Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9th Cir. 2000) (holding that Title III does not require plaintiffs to give notice to any state agency prior to filing suit).

232. CAL. HEALTH & SAFETY CODE § 19958.6(a)–(c) (enacted by Chapter 872).

certification of persons as "access specialists" for the purpose of providing guidance and advice to business owners.[233] Although specialists may inspire more confidence in business owners to rely upon recommendations, the law provides no safe harbor for such reliance.[234] The law imposes strict liability in the amount of $2,500 for any violation.[235] Suit for violation of Chapter 872 must be brought by either the district attorney, city attorney, or by the Attorney General,[236] and any imposed penalties are directed into a government coffer.[237]

Proponents of the law recognized that despite the ADA and the various California laws addressing disability discrimination, persons with disabilities have continued to experience impeded access to public places of business.[238] Chapter 872 was promulgated to promote compliance and enforcement of existing laws.[239]

Conversely, opponents deemed the automatic statutory penalty as "excessive and duplicative" in light of the fact that the Unruh Act and the DPA already permit aggrieved persons to collect damages.[240] The only possible relief for business owners is a provision permitting a court to suspend a portion of the penalty, subject to an imposed schedule for correcting violations.[241]

V. PROPOSED NOTICE REQUIREMENTS

Focusing on the fact that business owners are not entitled to receive notice of alleged violations prior to suit being brought against them, and with the intent of providing needed balance between the rights of disabled persons and the rights of business owners, both federal and state legislators have proposed changes in the laws to achieve the desired balance.[242] Protecting the right of persons with disabilities to access places of public accommodation remains paramount.[243]

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233. CAL. GOV'T CODE §§ 4459.5-4459.8 (added by Chapter 872); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 262, at 2 (Sept. 8, 2003) (stating that the law is designed so that "business owners who legitimately desire to come into compliance with the [sic] California's access standards can find good advice and guidance").

234. *See generally* CAL. HEALTH & SAFETY CODE § 19958.6(a)-(c) (enacted by Chapter 872).

235. *See id.* § 19958.6(a)-(b) (imposing a "civil penalty of . . . $2,500 for each violation" and if the violation remains uncorrected ninety days after the business owner receives written notice from a government agency, an additional penalty of "not less than five hundred dollars ($500) nor more than . . . $2,500 for each violation for each additional day that the violation remains").

236. *Id.* § 19958.5 (amended by Chapter 872).

237. *Id.* § 19958.6(e)(1)-(3) (enacted by Chapter 872).

238. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 262, at 4 (Sept. 10, 2003).

239. *See id.* at 5 (quoting the California Attorney General's argument that the point of a significant initial fine is to deter violations and spur compliance).

240. *Id.* at 6.

241. CAL. HEALTH & SAFETY CODE § 19958.6(b) (enacted by Chapter 872).

242. *See infra* Part V.A-B.

243. *See Inouye's Statement*, *supra* note 117 (stating "[p]lease be assured that I simply want to close a loophole in the ADA . . . . I do not suggest or approve of any changes to the ADA that would weaken its substantive requirements for reasonable accommodation . . . . [and w]e must ensure that the progress begun more than a decade ago continues as we work to make public accommodations more accessible to everyone").

Thus, federal and state legislators were faced with the dilemma of how best to achieve the desired balance.[244] Federal legislators settled on an option that appears to bring ADA Title III into closer alignment with CRA Title II requirements.[245] Specifically, federal legislators introduced a bill that would impose a notice requirement on ADA Title III actions.[246]

A. ADA Title III—The ADA Notification Act Proposition

Title III remedies for private suits are patterned after the injunctive relief provision found under CRA Title II.[247] Although there was an initial split as to whether ADA Title III adopted the notice requirement provision of CRA Title II, California case law ultimately concluded that there is no notice requirement under ADA Title III.[248] Defendant business owners adversely affected by plaintiffs' manipulation of the law must lobby the Legislature, rather than the courts, to respond to their concerns.[249]

In 2000, federal legislators introduced the ADA Notification Act.[250] The proposed law would require an individual to provide a business with written ninety-day notice of perceived ADA Title III violations prior to filing suit.[251] The primary sponsor of the bill, Rep. Mark Foley (R-Fla.), believed the notice requirement would effectively end the "blizzard of lawsuits" filed by "rogue attorneys."[252] The notice requirement would have given business owners an opportunity to correct violations prior to being subject to suit.[253] However, businesses that did not begin to make necessary modifications would remain subject to suit.[254]

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244. *See ADA Notification Subcomm.*, *supra* note 13, at 132 (including statement of Melvin L. Watt, member of the Subcomm. on the Constitution, considering arguments on the proposed ADA Notification Act, and stating that "I am a legislator, I am in the middle here, I am trying to work toward a solution to a problem"); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 6 (Mar. 10, 2003) (discussing the goal of eliminating the disproportionate price gap between the cost of achieving compliance and the cost of litigating claims).

245. 42 U.S.C.A. § 2000a-3(a) (1995).

246. H.R. 3590, 106th Cong. (2000).

247. 42 U.S.C.A. § 12188(a)(1); *id.* § 2000a-3(a).

248. Sharp v. Waterfront Rests., No. 99-CV-200, 1999 WL 1095486, at *6 (S.D. Cal. Aug. 2, 1999).

249. *See id.* at *6 n.1 (sympathizing with defendant's contention that "vexatious private suits brought by professional ADA plaintiffs menace innocent businesses and undermine the legitimate purposes of the ADA," but stating that "the change of law advocated by Defendant must come from Congress, not the courts").

250. H.R. 3590, 106th Cong. (2000); *see* Milani, *supra* note 180, at 110 (discussing events leading up to the proposed federal notification bill).

251. Milani, *supra* note 180, at 110.

252. *Id.*

253. *See* H.R. 3590, 106th Cong. (2000) (requiring plaintiff to provide defendant with notice of the alleged violation, followed by a ninety day waiting period requirement before commencing a civil action).

254. *See id.* (allowing plaintiff to file suit at the expiration of the ninety day waiting period if the defendant had not corrected the alleged violation).

Many disability advocates vehemently opposed the bill, arguing that a notification requirement would eliminate all incentive for business owners to voluntarily comply with access requirements.[255] Moreover, it seems patently unfair to require the victims of disability discrimination, who already suffer the daily frustration of being denied access to places and services, to shoulder the additional burden of providing notice to violators. Then, after giving notice, victims of discrimination must wait for modifications to occur—during which time they continue to be denied access.[256] Furthermore, some argue that no other class of persons alleging violation of their civil rights is required to provide the defendant with notice before filing suit.[257] Ultimately, the federal bill failed, but was proposed anew in 2001[258] and 2003.[259] Currently, no federal notice requirement has been enacted.

B. *California's Approach to a Notice Requirement*

Like federal legislators, California legislators sought to balance the interests of business owners with the rights of persons with disabilities, reduce litigation, and virtually eliminate suits based on minor and easily correctible infractions.[260] In light of California's history of providing for the right to recover damages for violations of the Unruh Act and the DPA, it was unlikely that elimination of such damages would be pursued by the legislators. Instead, like the federal legislature, California proposed a notice requirement.[261]

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255. *See ADA Notification Subcomm.*, *supra* note 13, at 62 (including statement by Christine Griffin, Executive Director of Disability Law Center, Inc., Boston, MA that enactment of the ADA Notification Act would eliminate the incentive for voluntary compliance by businesses, and would simply allow business owners to take the chance that they will not be sued).

256. *See id.* at 53 (including statement of disabled individual Kyle Glozier of New Freeport, Pennsylvania in opposition to H.R. 3590, stating "I always have to be segregated from my classmates to enter the building that we are visiting [during school field trips]. What if this building was not accessible? Why should I have to wait 90 days to file a lawsuit?").

257. *See id.* at 54 (including statement of disabled individual Kyle Glozier of New Freeport, Pennsylvania); *but see supra* notes 83-85 and accompanying text (describing the notice requirement under CRA Title II at 42 U.S.C. § 2000a-3(c)).

258. H.R. 914, 107th Cong. (2001).

259. S. 782, 107th Cong. (2001); HR 728, 108th Cong. (2003).

260. Hudson Interview, *supra* note 16; *see* Letter of Co-Author Request from Senator Rico Oller, First Senatorial District of Cal., to Fellow Legislators (Jan. 21, 2003) (copy on file with the *McGeorge Law Review*) (stating that because existing compliance requirements are complex and confusing, "it is only fair to give property owners a chance to repair their facilities before being hauled into court," and acknowledging that under current law, "even minor and harmless violations of little-known and ever-changing federal regulations constitute illegal discrimination under state law"); O'Neill Interview, *supra* note 110 (stating that the issue is not about denying access, but relieving businesses from unfair threats and finding a compromise to "get things done").

261. *See generally* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209 (Mar. 10, 2003); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69 (Jan. 20, 2004).

1. The Proposals—S.B. 69 and A.B. 209

Taking their lead from federal proposals, California Senator Rico Oller and Assemblyman Tim Leslie proposed similar legislation in 2003 to amend the DPA.[262] Senate Bill 69 ("S.B. 69"), sponsored by Senator Oller, sought to impose a notice requirement on individuals with disabilities who believed that a business failed to provide them with equal access as required by the DPA, the Unruh Act, or Section 4450 of the Government Code.[263]

Under S.B. 69, the aggrieved individual would be required to send a certified letter identifying the specific access problem to the owner or manager of the facility.[264] The aggrieved individual would be entitled to receive a return letter describing the improvements to remedy the problem.[265] Within ninety days of receiving notice, the owner or manager must act in good faith to correct the problem and make any necessary improvements. However, the improvements need not be fully completed within that time frame.[266] During the ninety-day period, the disabled individual could not file a related lawsuit against the business.[267] If a suit was filed within that timeframe, a successful plaintiff would not be entitled to recover attorney's fees, treble damages, or any other costs under the damages provision of the DPA.[268]

Assembly Bill 209 ("A.B. 209"), initiated by Assemblyman Leslie, proposed a notice requirement that would provide some protection for small businesses that demonstrate good faith efforts to comply with the ADA.[269] Under A.B. 209, an aggrieved individual would be required to provide violation notice to small business via a certified letter. The letter must detail the alleged ADA violations and the date and location at which the violation occurred.[270] The business then would have sixty days to correct the alleged problems, and the individual could file suit only if the business failed to correct the problem within sixty days.[271]

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262. *See generally* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209 (Mar. 10, 2003); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69 (Jan. 20, 2004).

263. CAL. CIV. CODE §§ 51, 54.1 (West 1982); CAL. GOV'T CODE § 4450 (West 1992); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 5 (Jan. 20, 2004).

264. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 5 (Jan. 20, 2004).

265. *Id.*

266. *Id.*

267. *Id.* at 3.

268. *Id.* at 6; CAL. CIV. CODE § 54.3 (West 1982).

269. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 2 (Mar. 10, 2003) (defining "small business" as one having fewer than fifty employees).

270. *Id.*

271. *Id.*

Under A.B. 209, plaintiffs would be required to make reasonable efforts to inform a large business of alleged ADA violations, and allow the business sixty days to correct the violation prior to filing suit.[272] A plaintiff's failure to provide the sixty-day notice to a large business would limit the plaintiff's damages recovery to $2,000 per violation.[273]

2. Analysis of S.B. 69 and A.B. 209

Early in 2004, both S.B. 69 and A.B. 209 failed to pass. Senate Bill 69 failed to acquire enough votes during its first committee hearing,[274] while Assembly Bill 209 expired because of time limitations set forth in the California Constitution.[275] Because notice requirement legislation continues to fail, an examination of the strengths and weaknesses of such legislation is warranted.

First, state and federal disability laws are independent of each other. Thus, notice requirements imposed under state law would not affect a plaintiff's right to bring immediate suit based on a claim under ADA Title III.[276] Accordingly, a plaintiff may seek to enjoin a Title III violator without providing notice to the business owner.[277] The successful plaintiff could enjoin a business from denying access, the plaintiff's attorney would recover his or her fee, and the business would be compelled to correct the violation.[278]

Proponents of the California notice requirements contend that a notice requirement is a fair and reasonable means to address a variety of problems facing good faith business owners.[279] The burden of sending a letter to notify a business of an alleged violation is arguably slight as compared to the costs incurred by a business to defend a lawsuit, which may in some cases be grossly disproportionate to the cost of remedying the violation.[280] Good faith business

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272. *See id.* (defining "large business" as one having fifty or more employees).

273. *Id.*

274. *See* S.B. 69, 2003-2004 Leg., Reg. Sess. (Cal. 2003), *Complete Bill History*, *at* http://www.leginfo.ca.gov/pub/bill/sen/sb_0051-0100/sb_69_bill_20040202_history.html (last visited Sept. 27, 2004) (stating that the bill failed to pass by a committee vote of two to five).

275. *See* A.B. 209, 2003-04 Leg., Reg. Sess. (Cal. 2003), *Current Bill Status*, *at* http://www.leginfo.ca.gov/pub/bill/asm/ab_0201-0250/ab_209_bill_20040205_status.html (last visited Sept. 27, 2004) (stating that the bill died "pursuant to Art. IV, Sec. 10(c) of the [California] Constitution).

276. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 6 (Mar. 10, 2003).

277. *See id.* (stating that an aggrieved individual could obtain equitable relief and attorney's fees to remedy a Title III violation).

278. *Id.*

279. *See id.*, at 4 (providing supporting opinion of the National Federation of Independent Business, stating that "[t]his bill provides a simple legal mechanism that allows employers to address the violation and move on without the egregious costs of a court battle").

280. *Id.*; *cf.* Snyder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1210-11 (S.D. Cal. 1998) (construing ADA Title III to contain an administrative exhaustion requirement, reasoning that a notice requirement would "solve access problems more efficiently than allowing all violators to be dragged into litigation regardless of their willingness to comply voluntarily with the ADA once informed of its infractions") (abrogated by Botosan v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000)).

owners may avoid being coerced to defend a costly lawsuit, and could instead finance the necessary access modifications.[281] Non-compliant or bad-faith business owners may be sued and enjoined, thus compelling them to comply with the law.[282] Disabled persons would gain increased access for the mere cost of mailing a letter.[283] This appears to be a "win-win" situation.

However, opponents contend that the notice requirement tips decidedly against the interests of persons with disabilities.[284] The law already requires that businesses make their goods and services available to disabled persons.[285] Why should disabled persons be required to take an additional step of mailing a certified letter? Why should the burden be upon the already-aggrieved party to inform business owners of laws about which the owners should already be aware? Additionally, after mailing the letter, an aggrieved individual would be required to wait for repairs to be made, during which time they continue to be denied access to the facility, or compensation for the exclusion.[286] Finally, imposing a notice requirement permits business owners to avoid taking affirmative steps to make their facilities accessible, unless and until they receive a notification letter.[287]

The answer may be "balance." Courts and legislators have suggested that because many building inspectors do not fully understand the law and complex regulations, it is implausible to expect business owners to properly interpret them.[288] Therefore, it is virtually impossible to expect complete adherence to the

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281. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 3 (Mar. 10, 2003) (stating that "[m]any small businesses cannot afford lawsuits brought against them so that they are settling out of court for more than what the violation would cost to fix").

282. *See id.* at 2 (establishing procedural hurdles that plaintiffs must comply with, not elimination of the right to seek redress).

283. *See id.* at 6 (stating that a small business is not afforded all the protections of AB 209 when the plaintiff complies with the procedural hurdles, and "the business has not corrected the alleged violation within 60 days of receiving the notice").

284. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 4 (Jan. 20, 2004) (expressing the opinion of opponents to SB 69, "that imposing unnecessary and unprecedented pre-litigation hurdles on disabled persons would result in yet another inequity, since no other protected class of persons is subject to such procedural hurdles. It would be tantamount . . . to punishing the larger community of persons with disabilities and medical conditions for the sins of a few and their lawyers").

285. *See generally* 42 U.S.C.A. § 12182 (1995); CAL. CIV. CODE §§ 51, 54.1 (West 1982).

286. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 5 (Jan. 20, 2004) (stating that after receiving a certified letter of alleged violations, a business owner would have ninety days to "act in good faith to make appropriate access improvements").

287. *See ADA Notification Subcomm.*, *supra* note 13, at 62 (providing statement of Christine Griffin, Executive Director, Disability Law Center, Inc. regarding ADA notification bill, that "[p]assage of this notification requirement would clearly remove the primary incentive for businesses to take the initiative to ensure access to their goods and services").

288. *See* Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1134 (Kleinfeld, J., dissenting) (querying "[i]f a judge on the panel cannot say just what is required, how can a movie theater owner?"); Ditzen, *supra* note 154, at A1 (stating that even ADA experts admit that 'the regulations for the 1990 [ADA] law are so detailed that perfect compliance is almost impossible. That makes almost any business a potential target for suit").

law, despite good faith efforts.[289] Moreover, disabled persons are not altogether denied the opportunity to bring suit, because a notice requirement would simply call for certain procedures to be followed for the purpose of obtaining business compliance, before filing suit for failure to comply.[290] The California Legislature may presume that business owners have an incentive to accommodate all potential customers, and that they will take steps to make their facilities as accessible as reasonably possible.[291]

For advocates who seek to expand access for persons with disabilities to public accommodations, a sixty- or ninety-day waiting period is not overly burdensome when the result potentially may benefit thousands of disabled persons.[292] Although placing the burden of the notice requirement upon the aggrieved individual is unfair to some degree, the decision to propose such a requirement appears to be a legislative response to the actions of a handful of greedy plaintiffs and attorneys.[293] Moreover, although aggrieved individuals contend that they would continue to be denied access during the sixty- or ninety-day notice period, litigation typically is far more time consuming than the notice requirement waiting period.[294] Finally, because the ultimate goal is business compliance and access for persons with disabilities, good faith effort and compromise is integral to any meaningful solution.[295]

Although both of the California bills were drafted with the goal of equitable balance in mind,[296] there are some logistical problems with some of the provisions. Senate Bill 69 sought to eliminate the recovery of attorney's fees in certain cases as a disincentive to golden-egg-seeking attorneys.[297] However, denying attorney's fees and costs may go too far.[298] Without the ability to recover

289. *See* O'Neill Interview, *supra* note 110 (stating that because the many guidelines are difficult to interpret, there is virtually no way to get complete compliance).

290. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 2 (Mar. 10, 2003) (discussing procedural hurdles imposed by AB 209).

291. O'Neill Interview, *supra* note 110; Hudson Interview, *supra* note 16.

292. *See* O'Neill Interview, *supra* note 110 (stating that business owners must act in good faith to comply with access laws, but that they should be given reasonable time to comply).

293. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 5 (Mar. 10, 2003) (acknowledging that there continues to be widespread non-compliance with ADA regulations, but stating that many business owners may be unaware of the violation, and as a result face potential financial ruin because of the damages that a victim may recover).

294. *See ADA Notification Subcomm.*, *supra* note 13, at 135 (stating that 'if you file a lawsuit in Federal court, if you take it to trial, it is going to be 18 months or 2 years").

295. O'Neill Interview, *supra* note 110.

296. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 4 (Jan. 20, 2004) (stating that the goal is to permit businesses an opportunity to come into compliance with the ADA before being subject to suit); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 3 (Mar. 10, 2003) (stating that the goal is to restrict the ability of plaintiffs to recover statutory damages for minor and easily correctible violations).

297. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 69, at 4 (Jan. 20, 2004) (stating opinion of Senator Oller that "this bill is necessary because '[u]nscrupulous lawyers have been running what is tantamount to an extortion racket on businesses throughout California . . .'").

298. *See id.* at 6 (expressing opinion of opposition that recovery of attorney's fees and costs is necessary because without them, plaintiffs could not afford to file suits against non-compliant businesses).

attorney's fees and costs, even legitimate complaints may not be filed for fear of having to pay one's own attorney's fees.[299]

Similarly, under A.B. 209, aggrieved persons must both provide notice and acquire the employment information of the business to determine whether the business is "small" or "large."[300] Legislators have legitimate concerns about protecting small businesses from potential hardship or failure.[301] However, by creating a distinction between small and large businesses, the Legislature imposes a more significant burden on aggrieved individuals.[302]

Alternatively, notice requirements give rise to certain political issues. Proponents of S.B. 69 and A.B. 209 admit that efforts aimed at reducing the incidence of litigation, and in turn reducing attorney's fees, begets a highly partisan dispute.[303] It has been suggested that some trial lawyers, in the name of civil rights, file lawsuits for their own benefit and advantage.[304] Historically, Democrats have not favored federal bills requiring notice.[305] Thus, a successful proposal will require a compromise that benefits all interested parties.[306]

Although the California Senate and Assembly each sought to strike an equitable balance between competing interests of disabled persons and business owners, both proposed bills ultimately failed.[307] These failures may indicate that a majority of the California Legislature endorses strong protections for disabled persons, or perhaps that partisanship prevailed, or that the proposed bills offered unacceptable compromises.

VI. LOOKING TO THE FUTURE

The ADA adopts a forward-looking approach to providing access for the disabled.[308] Accordingly, higher standards apply to the regulation, design and construction of new facilities, as compared to existing facilities, which are only required to make "readily achievable" modifications.[309] Therefore, with the construction or alteration of each successive building or facility, access for

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299. *Id.*

300. *See id.* at 2 (requiring that notice be given to businesses with fifty or fewer employees, but requiring only reasonable effort to provide notice to businesses with more than fifty employees).

301. *See id.* at 3-4 (discussing hardships faced by targeted businesses).

302. *See id.* at 7 (opposing AB 209, stating that "only victims of disability discrimination are singled out for the special obligations and higher liability standard established [by A.B. 209]").

303. O'Neill Interview, *supra* note 110; Hudson Interview, *supra* note 16.

304. O'Neill Interview, *supra* note 110; Hudson Interview, *supra* note 16.

305. *See ADA Notification Act: 2003 Bill Tracking H.R. 728*, 108th Cong. (2003) (listing co-sponsors of the bill as including fifty-four Republicans and two Democrats).

306. *See id.* (stating that proponents of a notice requirement must be willing to compromise with the other side to find common ground and get things done).

307. *See supra* notes 275-76 and accompanying text.

308. 136 CONG. REC. E1913-01, *E1919 (May 22, 1990) (speech of Hon. Steny H. Hoyer).

309. *Id.*

disabled persons to an increasing number of accommodations should likewise increase.

The previous failure of federal notice requirement bills likely foreshadowed the fate of S.B. 69 and A.B. 209.[310] The senate and assembly members introducing the California bills were not taken unaware.[311] One might wonder why legislators would propose bills they know are likely to fail. The answer given is that solutions to problems, even solutions initially rejected, must begin somewhere. [312] Ideas must be born and shared and the public needs to be educated about important issues facing minority groups, business owners, and the California and Federal Legislatures.[313] Public exposure to potential solutions stimulates popular support, and promotes development of resolutions.[314]

For the time being, California does not impose a notice requirement upon individuals before filing disability discrimination claims against owners and operators of public businesses.[315] Any successful legislative enactment will likely require compromise.[316] Meanwhile, business owners continue to be subject to surprise lawsuits.[317] Should a notice requirement eventually be enacted, it would seem fair to exempt the issuance of preliminary injunctive relief or temporary restraining orders from the notice requirement.[318]

One possible solution that has been suggested involves a safe harbor provision for business owners who rely in good faith upon direction and recommendations from access specialists certified under Chapter 872.[319] Those who argue for such changes suggest that with access specialist approval, a business would obtain a certificate identifying that the business met and complied with ADA standards and regulations.[320] Once certified, the business would have a good-faith defense to subsequent lawsuits, entitling it to notice of alleged violations prior to being sued.[321] Those not certified would not be entitled to notice.[322]

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310. *See* Hudson Interview, *supra* note 16 (stating that proponents of SB 69 did not expect it to pass).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *See supra* notes 275-76 and accompanying text.

316. *See* O'Neill Interview, *supra* note 110 (discussing possible alternatives to protect the interests of both disabled individuals and business owners, and the need for compromise).

317. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 209, at 3-4 (Mar. 10, 2003) (commenting on the need to protect good-faith businesses).

318. *See ADA Notification Subcomm.*, *supra* note 13, at 102 (including statement of Minneapolis attorney Christopher G. Bell).

319. *See* O'Neill Interview, supra note 110 (discussing possible alternatives to protect the interests of both disabled individuals and business owners).

320. A.B. 2594, 2003 Leg. Reg. Sess. (Cal. 2003).

321. *Id.*

322. *Id.*

Alternatively, Assemblywoman Ellen Corbett proposed a bill that would increase the availability of damages under section 54.3 of the California Civil Code from $1,000 to $4,000. The proposal would prohibit recovery of treble and statutory damages in lawsuits filed against small businesses unless the plaintiff proves that his or her access to the facility was actually impaired, or that he or she suffered actual physical harm.[323]

It is apparent from the various failed and pending California bills that legislators continue to struggle for an equitable means of striking balance between the various competing interests.

VII. CONCLUSION

California and federal disability law seeks to promote public access for disabled individuals.[324] The statutory scheme in California, incorporating both state and federal law, imposes strict requirements upon business owners, and does not provide a good-faith exceptions.[325] Thus, it has been argued that some litigious plaintiffs and attorneys are manipulating the laws for the purpose of recovering statutory damages and attorney's fees, rather than for the purpose of advancing access for disabled individuals.[326]

In response to the outcry from business owners, some California legislators have attempted to impose a notice requirement that would provide good-faith business owners with the opportunity to correct minor or technical violations prior to being sued.[327] Whether the imposition of such a notice requirement would be fair or not, every federal and state attempt to pass such legislation has failed.[328]

Enactment of Chapter 872 imposes further potential liability for damages upon business owners by creating strict liability for various violations of the California Government or Health and Safety Code.[329] Undeterred, California legislators continue to seek alternative means of balancing the interests of disabled persons and business owners.[330] There is much at stake for all concerned. Any ultimate resolution must take into account the concerns and interests of both.[331]

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323. *See generally* A.B. 1707, 2003 Leg. Reg. Sess. (Cal. 2003) (defining "small business" as one with fewer than ten employees).

324. *See supra* note 121 and accompanying text.

325. *See generally* CAL. CIV. CODE §§ 51, 54.1 (West 1982); CAL. GOV'T CODE § 4450 (1995); CAL. HEALTH & SAFETY CODE § 19955 (1992).

326. *See supra* Part III.A.

327. *See supra* Part V.B.1.

328. *See supra* notes 258-59, 275-76 and accompanying text.

329. *See supra* Part IV.

330. O'Neill Interview, *supra* note 110.

331. *Id.*

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