

BILL ANALYSIS

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Date of Hearing: June 24, 2008

ASSEMBLY COMMITTEE ON JUDICIARY

Dave Jones, Chair

SB 1136 (Alquist) - As Amended: May 27, 2008

As Proposed to be Amended

SENATE VOTE : 34-0SUBJECT : PUBLIC SOCIAL SERVICES: UNREASONABLE FEES

KEY ISSUE : IN ORDER TO HELP CURB THE FINANCIAL ABUSE OF INDIVIDUALS, INCLUDING SENIOR CITIZENS, WHO ARE MOST NEEDY OF SOCIAL SERVICES, SHOULD IT BE AN UNFAIR OR DECEPTIVE TRADE PRACTICE FOR ANY PERSON TO CHARGE OR RECEIVE AN UNREASONABLE FEE TO PREPARE, AID, OR ADVISE AN APPLICANT OR RECIPIENT IN THE PROCUREMENT, MAINTENANCE, OR SECURING OF PUBLIC SOCIAL SERVICES?

SYNOPSIS

In order to help curb the financial abuse of individuals, including senior citizens, who are most needy of social services, this important measure seeks to make it an unfair or deceptive trade practice to charge or receive an unreasonable fee to prepare, aid, or advise an applicant or recipient seeking public social services. As the author notes, currently, confusion about the Medi-Cal program, combined with justifiable fears of elders who are entering nursing homes or outliving their assets, can result in senior citizens paying for unnecessary planning services, which results in financial abuse.

In 2003, the Senate Insurance Committee held an informational hearing entitled "Financial Planning or Fleecing of Seniors?: Insurance Products and Investments." This hearing highlighted many instances where senior citizens are preyed upon by "Medi-Cal advocates" who convince seniors to spend down their assets through the purchase of annuities so that the seniors will qualify for Medi-Cal. In this tainted scheme, the "advocates" realize the commission for the sale of the annuity and the senior ends up purchasing a product that may not be appropriate for their life expectancy and financial circumstances.

The Consumer Legal Remedies Act (Act) (Civil Code section 1750 et seq.) prohibits unfair and deceptive commercial conduct, and

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authorizes a consumer to commence a civil action for damages resulting from violations of the Act. This bill seeks to logically create a new category of unlawful conduct under the Act by making it an unfair or deceptive trade practice for anyone to charge unreasonable fees in exchange for assistance in procuring public social services. It has no known opposition.

SUMMARY : Seeks to curb the financial abuse of individuals, including senior citizens, who are most needy of social services. Specifically, this bill :

- 1) Provides that it is an unfair or deceptive trade practice for any person to charge or receive an unreasonable fee to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services.

- 2) Defines "unreasonable fee" as a fee that is exorbitant and disproportionate to the services performed.
- 3) Provides that factors to be considered in determining the reasonableness of a fee are based on the circumstances existing at the time of the service and shall include, but not be limited to, all of the following:
- a) The time and effort required;
 - b) The novelty and difficulty of the services;
 - c) The skill required to perform the services;
 - d) The nature and length of the professional relationship;
and
 - e) The experience, reputation, and ability of the person providing the services.
- 4) Defines "Public social services" as those activities and functions of state and local government administered or supervised by the State Department of Health Care Services, the State Department of Public Health, or the State Department of Social Services, and involved in providing aid or services, or both, including health care services and medical assistance, to those persons who, because of their economic circumstances or social condition, are in need of that aid or those services and may benefit from them. The definition is duplicative of that currently codified in Welfare & Institutions Code section 10051.

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- 5) Requires the court to award treble actual damages to the plaintiff whenever it is proven by a preponderance of the evidence that a defendant has charged or received an unreasonable fee for those services.

EXISTING LAW prohibits certain enumerated unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods to any consumer. (Civil Code section 1750 et seq.)

FISCAL EFFECT : As currently in print this bill is keyed non-fiscal.

COMMENTS : This important bill seeks to curb the financial abuse of individuals, including senior citizens, who are most needy of social services. According to the author, seniors are often the target of financial abuse. Among the various scams used to exploit seniors are those employed by unscrupulous individuals who promise to pre-qualify seniors for public social services in exchange for exorbitant amounts of money. Many times these individuals, who often call themselves "Medi-Cal advocates," end up charging seniors outrageous fees merely for providing information or assistance in filling out forms.

New and Necessary Legal Remedy : To help address this serious problem, the measure seeks to create a right of action for an individual who has been charged unreasonable fees for assistance in procuring public social services. Public social services, as defined under current law, are offered to individuals in the state who are most in need of assistance from the state and local government. These services range from subsidies for child care to health care services. Because public social services are need-based, no application fees are charged. Accordingly, any fee that is charged to individuals for assistance in applying for public social services should be nominal as the assistance should largely consist of filling out necessary forms.

Consistent with the goal of helping the general public, many local entities and non-profit organizations already provide free services to individuals who need help in determining which

services they are eligible for and in the application process. However, needy individuals may not be aware of these resources and too often end up paying huge sums to so-call "Medi-Cal

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advocates" for services they could have obtained for free.

As noted above, current law provides civil remedies for individuals who have suffered damages as a result of fraud or deceit. (Civil Code sections 1709-1710; 1572-1573.) A fraudulent misrepresentation is one made with the knowledge that it is or may be untrue, and with the intention that the person to whom it is made act in reliance on it. (Wilke v. Coinway, Inc. (1967) 257 Cal.App.2d 126, 136.) A deceit can be (1) the suggestion, as a fact, of something that is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of something that is not true, by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose it, or who gives information or other facts that are likely to mislead for want of communication of that fact; or (4) a promise, made without any intention of performing it. (Civil Code section 1710.)

Individuals who have been charged exorbitant amounts of money for assistance in procuring public social services may be able to proceed with a civil action on the basis of fraud or deceit. In addition, senior citizens may also be able to pursue a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act. (Welfare & Institutions Code section 15600 et seq.) However, the availability of these remedies largely depends on the specific facts of the case and, in some instances, likely leaves many individuals with no effective legal recourse, particularly in those cases where the victims are senior citizens.

Factors To Be Considered In Determining Whether A Fee Is Unreasonable: Previously, concerns were raised that this bill would affect legitimate organizations and individuals who charge fees in exchange for their services. Because the proportionality of a fee is largely dependent on the type of service provided, it would be difficult to define a specific amount that would be considered overly high in every single circumstance. In response to these concerns, the bill was carefully amended to set forth appropriate criteria for determining whether or not a fee will be considered reasonable in this context. These factors include: (1) the time and effort, and skill required to perform the service, (2) the novelty and difficulty of the service, (3) the nature and length of the professional relationship, and (4) the experience, reputation, and ability of the individual providing the

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services. The factors thus will allow legitimate organizations to continue providing services to individuals in the community so long as their fees are reasonable under the circumstances.

New "Three Times the Actual Damages" Remedy Available to Show the Legislature Means Business : Under the Consumer Legal Remedies Act, an injured consumer is entitled to recover actual damages, injunctive relief, restitution of property, punitive damages, and any other relief that the court deems proper. (Civil Code section 1780.) This bill seeks to create a separate remedy by mandating treble the actual damages whenever a

defendant is found to have violated its provisions by a preponderance of the evidence. The authorization of treble damages permits a court to triple the amount of the actual damages to be awarded to a prevailing plaintiff, generally in order to punish the losing party for willful conduct. Treble damages are a multiple of, and not an addition to, actual damages. Thus, where a person received an award of \$100 for an injury, a court applying treble damages would raise the award to \$300.

Although current law already provides for punitive damages for violations of the Consumer Legal Remedies Act, the addition of mandatory treble damages for violations of this bill's provisions appears reasonable for several reasons. Generally, punitive damages are awarded when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. (Civil Code section 3294(a).) However, the Legislature is free to provide for additional statutory remedies where it deems appropriate. These statutory damages may, for example, take the form of civil penalties or provide for the doubling or trebling of actual damages found by the trier of fact.

The Civil Code already provides for additional remedies in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons. For example, under Civil Code section 1780(a), any consumer who is a senior citizen or a disabled person may seek and be awarded, in addition to the other statutory remedies provided, up to \$5,000. Before making that award, the trier of fact must do all of the following: (1) find that the consumer has suffered substantial damages from the defendant's conduct; (2) make an affirmative finding in regard to one or more of the factors set forth in Civil Code 3345(b); and (3) find that an additional award is appropriate. (Civil

Code section 1780(b)(1).)

Civil Code section 3345 provides for increasing any applicable fine, penalty, or other remedy up to three times the amount authorized or to be imposed in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons to redress unfair or deceptive practices or unfair methods of competition. Before imposing additional damages, the trier of fact must make at least one affirmative finding with respect to (1) whether the defendant's conduct was directed to senior citizens or disabled persons, (2) whether the defendant's conduct caused such persons to suffer losses, and (3) whether the plaintiff(s) was more vulnerable to defendant's conduct than other members of the public. (Civil Code section 3345(b).)

While these additional statutory remedies would cover a significant portion of the intended beneficiaries of this bill, they would not be available to victims who are not senior citizens or disabled persons. This bill would provide for mandatory trebling of compensatory damages in all cases where it is proven by a preponderance of the evidence that a defendant has charged unreasonable fees for assistance in procuring public social services.

Author's Amendments Agreed to in Human Services : When this bill was heard in the Assembly Human Services Committee, the Committee agreed to amend the bill as follows in an effort to distinguish those attorneys providing a valid and valuable type of representation from those who happen to own one of the targeted type of operations that generated the need for the legislation in the first place:

(C) Paragraph (a)(24) and subdivision (c) of this Section shall not apply to attorneys licensed to practice law in California, who are subject to the Rules of Professional Conduct of the State Bar and to the mandatory fee arbitration provisions of

Article 13 of Chapter 4 of Division 3 of the Business and Professions Code, when the fees charged or received are for providing representation in administrative agency appeal proceedings or court proceedings for purposes of procuring, maintaining, or securing public social services on behalf of a person or group of persons.

Previously the bill had exempted all attorneys from the bill's "unconscionable" fees provision, but the Committee was concerned

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that the measure should not exempt those attorneys who own these types of businesses that might provide unnecessary or bogus services or products, or who provide legitimate assistance for outrageous fees. As that Committee analysis noted, these types of businesses may be owned by attorneys, but they are not actually providing "legal services" and they should not be exempt from the bill's protections.

REGISTERED SUPPORT / OPPOSITION :

Support

— Santa Clara County Board of Supervisors (sponsor)
American Federation of State, County and Municipal Employees
California State Association of Counties
County Welfare Directors Association of California
District Attorney of the City and County of San Francisco
Lambda Letters Project

Opposition

— Medi-Cal Consulting Services, Inc.
One individual

Analysis Prepared by : Drew Liebert / JUD. / (916) 319-2334