

BILL ANALYSIS

SENATE JUDICIARY COMMITTEE
 Senator Ellen M. Corbett, Chair
 2007-2008 Regular Session

SB 1136	S
Senator Alquist	B
As Amended April 14, 2008	
Hearing Date: April 29, 2008	1
Civil Code	1
KB:jd	3
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SUBJECT

Public social services: unreasonable fees

DESCRIPTION

This bill would:

provide that it is an unfair or deceptive trade practice for any person to charge or receive an unreasonable fee to prepare or aid an applicant or recipient in the procurement, maintenance, or securing of public social services;

define "unreasonable fee" as a fee that is exorbitant and disproportionate to the services performed;

provide 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:

1. The time and effort required;
2. The novelty and difficulty of the services;
3. The skill required to perform the services;
4. The nature and length of the professional relationship; and
5. The experience, reputation, and ability of the individual providing the services.

incorporate the definition of "Public social services" codified in Welfare & Institutions Code 10051; and

(more)

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require the court to award treble 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.

BACKGROUND

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. 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 1750 et seq.) prohibits unfair and deceptive commercial conduct, and authorizes a consumer to commence a civil action for damages resulting from violations of the Act. This bill would 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.

CHANGES TO EXISTING LAW

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 1750 et seq.)

This bill would provide that it is an unfair or deceptive trade practice for any person to charge or receive an unreasonable fee to prepare or aid an applicant or recipient in the procurement, maintenance, or securing of public social services.

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This bill would define "unreasonable fee" as a fee that is exorbitant and disproportionate to the services performed.

This bill would provide 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:

- The time and effort required;
- The novelty and difficulty of the services;
- The skill required to perform the services;
- The nature and length of the professional relationship; and
- The experience, reputation, and ability of the individual providing the services.

This bill would define "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 10051.

This bill would require the court to award treble 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.

COMMENT

1. Stated need for the bill

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 prequalify 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

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fees merely for providing information or assistance in filling out forms.

This bill is intended to curb the financial abuse of individuals, including senior citizens, who are most needy of social services.

2. This bill would create a private 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, as that would be contrary to the purpose of offering the services in the first place. Accordingly, any fee that is charged to individuals for assistance in applying for public social services should be nominal as the assistance would 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 end up paying huge sums to so-call "Medi-Cal advocates" for services they could have obtained for free.

Current law provides civil remedies for individuals who have suffered damages as a result of fraud or deceit. (Civil Code 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,

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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 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 15600 et seq.) However, the availability of these remedies would largely depend on the specific facts of the case and, in some instances,

leave individuals with no legal recourse, particularly in those cases where the victims are not senior citizens.

This bill would make it an unfair or deceptive trade practice for any person to charge or receive an unreasonable fee to assist an applicant in procuring public social services, thereby creating a new civil right of action for all individuals under the Consumer Legal Remedies Act.

3. This bill establishes the 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, this bill was amended to set forth criteria for determining whether or not a fee is reasonable, including (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 services. The factors specified in this bill appear to be appropriate in considering whether or not a fee is

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exorbitant in relation to the services performed. These provisions also would allow legitimate organizations to continue providing services to individuals in the community so long as their fees are reasonable under the circumstances.

4. This bill would mandate treble damages for every violation proven by a preponderance of the evidence

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 1780.) This bill would create a separate remedy by mandating treble 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/compensatory 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 is proper 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 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 1780(a), any consumer who is a senior citizen or a disabled person may seek and be awarded, in

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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 1780(b)(1).)

Civil Code 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 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.

5. Opposition

Medi-Cal Consulting Services, Inc. (MCS) is currently opposed to this bill because of the addition of treble damages for violations of the bill's provisions. According to the owner, for a reasonable fee, "MCS offers services to those individuals and/or families seeking direct assistance in the Medi-Cal eligibility processes." MCS has represented that their fees can be up to \$5,000 depending on the services provided.

MCS contends that all chapters in the Consumer Legal

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Remedies Act "should be equally subject to appropriate penalties found in Civil Code Section 1780. Further, subsection (b) of Section 1780 already speaks to additional penalties that are awarded to the aged and disabled population." MCS agrees that the financial abuse of the state's aged and disabled population needs to be addressed, but feels that this bill may only create an avenue for unfounded accusations.

As previously stated, the Legislature may establish additional statutory damages when it determines they are appropriate. In this instance, the desire to deter

unscrupulous individuals from exploiting the most financially vulnerable segments of our population may justify the addition of treble damages.

Support: County Welfare Directors Association of California; Lambda Letters Project; California State Association of Counties; American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO

Opposition: Medi-Cal Consulting Services, Inc.; one individual

HISTORY

Source: Santa Clara County Board of Supervisors

Related Pending Legislation: None Known

Prior Legislation: None Known

Prior Vote: Senate Human Services Committee (Ayes 5, Noes 0)
