

SESSION OF 2023

**SUPPLEMENTAL NOTE ON SENATE SUBSTITUTE FOR
HOUSE BILL NO. 2016**

As Amended by Senate Committee of the Whole

Brief*

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

The bill would be in effect upon publication in the *Kansas Register*.

Definitions

The bill would define the following terms:

- “Access violation” would mean any allegation that a public accommodation does not provide sufficient access under:
 - The federal ADA;
 - Chapter 39, 44, or 58 of the Kansas Statutes Annotated; or
 - Any similar allegation under state or federal law;
- “Public accommodation” would mean the same as defined in Title II of the federal Civil Rights Act and,

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

for purposes of this bill, would include a website operated by a resident of Kansas; and

- “Resident of this state” would mean any person residing in Kansas, and any corporation filing with the Kansas Secretary of State’s Office.

Legislative Purpose

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

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

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

Civil Action for Abusive Litigation Determination

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

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

Rebuttable Presumptions

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

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

The bill would establish a rebuttable presumption the litigation is not abusive if a written determination by the

Attorney General stating the same is attached to the petition in litigation alleging a website access violation.

Attorney Fees; Judgment

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

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

ADA Standards; Sunset

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

Background

The Senate Committee on Judiciary recommended a substitute bill incorporating provisions enacting the Act Against Abusive Access Litigation originally contained in SB 258, as amended by the Senate Committee on Judiciary.

HB 2016, as passed by the House, would have clarified how property held under a transfer-on-death deed is distributed when one beneficiary predeceases the grantor. [Note: These provisions are contained in HB 2130, as amended by the Senate Committee on Judiciary.]

SB 258 (Act Against Abusive Access Litigation)

SB 258 was introduced by the Senate Committee on Federal and State Affairs at the request of Senator Blasi.

Senate Committee on Judiciary

In the Senate Committee hearing on March 6, 2023, two representatives of the Kansas Chamber, a representative of the National Federation of Independent Business, and a business owner testified as **proponents** of the bill. The business owner provided an account of litigation that has been filed against him that he believes would be considered abusive under the bill, and other proponents stated plaintiffs have increasingly targeted Kansas businesses for allegedly managing websites not compliant with the ADA. Written-only proponent testimony was submitted by a representative of the Kansas Bankers Association.

Representatives of the Disability Rights Center of Kansas and the Topeka Independent Living Resource Center testified as **opponents** of the bill, expressing concerns that the provisions of the bill are too broad and suggesting the bill should be limited to determining whether abusive litigation has occurred specific to website access. Written-only opponent testimony was submitted by representatives of the

KanCare Advocates Network, Kansas Bar Association, and Kansas Trial Lawyers Association.

The Senate Committee recommended a substitute for HB 2016 be passed, incorporating amended provisions of SB 258. Before recommending the substitute bill be passed, the Senate Committee amended SB 258 to:

- Add a legislative purpose statement;
- Add additional factors that could be used by the trier of fact in making a determination of abusive litigation;
- Add a provision allowing for the Attorney General to determine whether litigation is abusive;
- Require the court to award attorney fees when litigation has been determined abusive; and
- Add a provision directing the court to review the abusive litigation determination and award of attorney fees before making a judgment.

Senate Committee of the Whole

The Senate Committee of the Whole amended Senate Sub. for HB 2016 to:

- Limit the bill's provisions to website access litigation;
- Further clarify the legislative purpose statement;
- Further modify the list of factors that could be used by the trier of fact in making a determination of abusive litigation;
- Add language regarding rebuttable presumptions;

- Make the award of attorney fees a discretionary function of the court rather than mandatory; and
- Add a provision making the bill's provisions sunset if standards concerning website accessibility are issued by the DOJ and notice of those standards is published in the *Kansas Register*.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on SB 258, as introduced, the Office of Judicial Administration states enactment of SB 258 could increase the number of cases filed in district court because the bill's provisions would allow for a civil suit to be filed by the Attorney General, which would increase the time spent by judges and court employees processing and hearing cases. The Office states a fiscal effect cannot be estimated until the Judicial Branch has had an opportunity to operate under the bill's provisions.

The Office of the Attorney General (OAG) estimates additional expenditures of \$196,825 from the State General Fund, along with an additional 1.50 FTE positions in FY 2024, to carry out the bill's provisions if it is enacted. Of this amount, \$178,837 would be for salaries and wages for 1.00 attorney FTE position and for a 0.50 administration specialist FTE position. The remaining \$17,988 would be for other operating expenditures. The agency indicates the civil cause of action would likely be filed by the Civil Litigation Division of the OAG. The agency expects additional casework in preparing for lawsuits against violators of the Act.

Any fiscal effect associated with enactment of SB 258 is not reflected in *The FY 2024 Governor's Budget Report*.

The Kansas Association of Counties states the enactment of SB 258 could have a fiscal effect on counties if

certain counties are constantly being faced with litigation regarding access violations.

The League of Kansas Municipalities states enactment of SB 258 would not have a fiscal effect on cities.

No fiscal note on Senate Sub. for HB 2016 was available when the Senate Committee or Senate Committee of the Whole took action on the bill.

Act Against Abusive Access Litigation; Civil actions; civil procedure; Americans with Disabilities Act