



# BEST & FLANAGAN

A PRESENTATION TO

**BOMA OF GREATER  
MINNEAPOLIS**

## Title III ADA Lawsuits

The Americans with Disabilities Act is a 1990 federal law aimed at eliminating discrimination against the disabled. Title I prohibits discrimination in employment; Title II requires state and local governments to make their services accessible; Title III requires places of public accommodation to remove architectural barriers; Title IV requires accessibility in telecommunications; and Title V prohibits retaliation.

ADA lawsuits can be in either federal or state court. If in state court, a defendant can move the case to federal court within 30 days of being served.

The differences are important.

- In federal court, the case must be filed, it's public, it's set on a discovery and trial schedule and overseen by a magistrate judge, and the rules and procedures are more formal and strict. Defendants often see federal court as more friendly.
- State court cases are frequently “pocket filed” meaning they are only served, they are not immediately public, and the rules and procedures are less formal.

In either court, an answer or response to the lawsuit must be served on the plaintiff within three weeks of being served (20 days for state court, 21 days for federal court).

Defendants have 3 choices when served:

- Serve an “answer” (responding to each allegation with an admission or denial).
- Move to dismiss (based on a defect in the complaint or, for ADA cases, if the alleged violations have been fixed).
- Try to settle.

## Statistics on ADA Lawsuits

Since 2014, there have been over 500 hundred “drive-by” ADA cases filed in federal and state courts in Minnesota, mostly by the same 3 groups.

- **Disability Support Alliance.** Filed 85 federal cases between September 3, 2014 and February 1, 2016, and 25 state court cases from November 10, 2014 through October 3, 2016. DSA’s members are still active:
  - Eric Wong—9 federal and 28 state
  - Aaron Dalton—40 federal and 6 state
  - Melanie Davis—62 federal and 10 state
  - Zach Hillesheim—77 federal and 19 state
  - Scott Smith—91 federal and 17 state
  - Attorney Hansmeier listed for 85 federal cases and 51 state cases
  - Attorney Padraigin Browne listed for 161 federal and 23 state cases. Also active in Wisconsin and Nebraska.

- **Midwest Disability Initiative.** Filed 31 federal cases and 17 state cases. “Pocket filed” state court cases unknown. Still active. Uses one of these plaintiffs:
  - Gerald Doyen, Michael Marchand, or Jerald Boitnott
- **David Ketroser.** Filed 7 federal case and 89 state cases. Still active. “Pocket filed” state court cases unknown. Doctor/lawyer/plaintiff.

Total pocket filed state court cases unknown but likely high based on anecdotal data from speaking with attorneys, process servers, and others.

Only 1 of all these went to trial (win for plaintiff). Vast majority settle quickly or after some nominal litigation. About a dozen have been dismissed by the court after the business owner remedied the violations or proved the violations could not be remedied in a readily achievable manner and other accommodations were made.



## What's in an ADA lawsuit?

Until last year, the lawsuits contained 2 claims—an ADA claim and an MHRA claim. After May 2017, they just contain ADA claims, since the new law requires a pre-suit notice and a 60-day chance to cure.

Some new ADA suits have had the MHRA notice attached to it, to skirt the 60-day notice. So the idea is the plaintiff sues under the ADA while giving you notice you'll be sued under the MHRA. One court has disapproved of this practice.

You may also not receive a lawsuit but only the pre-suit notice under the MHRA, saying a suit will come 60 days later if the alleged violations are not fixed.

The ADA grants a plaintiff 2 things: injunctive relief and attorneys' fees. An injunction is a court order making you do something (i.e., remove a barrier). Attorneys' fees may be allowed, in the court's discretion, to a plaintiff who prevails in obtaining an injunction. Otherwise, there are no damages.

The MHRA allows both an injunction and damages, plus attorneys' fees, although there appears to be little precedent for damages. Despite the change in state law, the ADA largely allows a plaintiff the same relief as the MHRA, so the change has not had much impact on overall lawsuits.

The lawsuits are based on the ADA Guidelines, which have detailed and specific access requirements. Most complaints are virtually identical.

- Parking spaces (number, size, striping, access aisles, signage, location)
- Access path (clear, flat, location, condition, width, ramp, maneuvering clearance)
- Entry (pressure to open door, signs indicating accessible entry)
- Countertop height
- Restrooms (door entry, maneuvering clearance, stall, grab bars, height of sink, soap, towel dispenser, pipes under sink exposed, etc.)
- Temporary and other barriers (tables/chairs, kiosks, etc.).

## Insurance and other sources of coverage

- **Insurance coverage.** Check with your broker and if denied get an explanation for why not covered. Policies may not cover discrimination or lawsuits that seek no damages (like the ADA). The amounts demanded to settle are typically around what most legal counsel would require just for the initial retainer and work, or less than the legal expense of fighting for insurance coverage.
- **Landlord v. tenant.** Both may be sued and are jointly responsible to the ADA plaintiff. Leases may contain requirements tenants are responsible for ADA compliance, at least in tenant spaces. This provides the landlord a right to indemnity.
- **Contractors and architects.** If recent work was done and was supposed to be ADA and code complaint—they may be liable for indemnity, and they may have insurance.

**Once you're sued**

- **Look for insurance or others who may be responsible.**
- **Verify allegations, document and photograph, retain all records, and fix what can be fixed.**
- **Get expert help.**
- **Remember the deadlines.**



- **Settle or Defend?**
  - **Settlement:** may be cheap and quick but must be long term. If you manage a large portfolio, think about repeat lawsuits. Get global release from all plaintiffs and their organization. Lawyers can't commit to never suing again, but plaintiffs can. New or ongoing violations will subject you to new suits.
  - **Defenses:** remove the barriers if you can quickly. Courts may lose jurisdiction if they can't order you do something, making the plaintiff's demands moot. The fix must be permanent. Show the plaintiff lacks standing—if the plaintiff didn't personally encounter a barrier or know about a barrier, they weren't harmed, and just saying they're deterred from visiting isn't enough. (Standing is harder to attack than mootness.) Show the alleged violations cannot be remedied through readily achievable means (for older construction), or you've done all you can that's economically feasible (for new construction). The plaintiff must initially come up with construction or other estimates showing what is required is "readily achievable," which is a multi-factor consideration of cost to repair, funds available, effect on the facility, etc.

## Best Practices

- Look at your properties now, with an eye toward what you're likely to be sued for (items listed above), and fix them.
- Proactively audit the property for compliance. Start with older properties and start with obvious areas.
- Involve an accessibility specialist for long-term and permanent fixes and barrier removal plans.
- Check insurance coverage in case you're sued.

**More on ADA lawsuits**

- There is considerable press on this issue. See, for example only, <http://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/>. See also <http://www.bizjournals.com/sacramento/news/2015/09/08/disabled-man-wins-ada-judgment-against-corner.html>, where a plaintiff sued under the ADA for a cash register counter too high. It has been more common in places like California, Florida, and New York, but there has been a spike in Minnesota since 2014. Cases are published about drive-by ADA suits in about a dozen cases.
- A Drive-By ADA Lawsuit is where a disabled person or their attorney drives around looking to “test” businesses for compliance with the ADA’s accessibility requirements, usually the most obvious places (the “low-hanging fruit”) such as parking lots and bathrooms. The tester maybe never wanted to patronize the business—just see if it was compliant—and the tester then sues without asking for accommodations. Courts have approved testers for civil rights cases, so nothing is illegal or unethical, per se, about the practice.
- The irony of most settlements is they do not involve bringing the property into the compliance demanded by the lawsuit in the first place.

- The usual result is for the owner to simply pay a settlement to make the case go away, since the legal costs to defend exceed what the plaintiff wants. Settlements have been reported between \$500 to \$8,000. Legal fees to “quickly” dismiss a case (i.e., in 6 months) can be over \$10,000, while a longer battle may be well over \$20,000. The plaintiff can appeal a dismissal, which adds time and expense. And if you prevail in dismissal, you may or may not recover legal fees from the court, since it’s discretionary.
- See <http://www.startribune.com/minneapolis-bar-owner-appeals-to-congress-for-relief-from-serial-disability-suits/335405521/>, where the owner of Minneapolis’s Bulldog Northeast reported spending \$15,000 in legal fees and then settled for \$8,000.
- See <http://minnlawyer.com/2016/08/04/court-delivers-rare-win-for-hansmeier/>, and <http://www.bizjournals.com/twincities/news/2015/09/04/chatterbox-pub-files-for-bankruptcy-protection.html>, where the Chatterbox Pub, took the case to trial, lost, and filed for Chapter 11 bankruptcy.

- **See St. Clair Broiler and Red's Savoy Pizza, who were sued and later closed.**
- **The complaint in each case is almost identical for each group: it recites generic information about the importance of the ADA and MHRA, it recites that the plaintiff tried to visit the business on a particular day but encountered obstructions that constituted violations of the federal and state accessibility requirements, and demands that the business fix the problems and pay attorney's fees, penalties, and damages.**

- The Minnesota Accessibility Code differs from the federal one, and more stringent in some ways, and you must comply with the more stringent code. You need an expert to help comply. The state provides resources on ADA compliance specialists.
- Check out the allegations. Are they legitimate? Many are not, some are stale, and some are technical violations of the building code but could not have been barriers to access for that individual plaintiff. Did the plaintiff really visit the property? Did they visit on a day the business was closed? Has the property since been renovated? Sometimes there are grounds to have the case dismissed outright, while other times fixing the alleged areas quickly can “moot” the case.
- Bet a “global release” so the plaintiff can never sue again (your tenants, etc., or any other property you own).