

ALLIED MEMBER SPOTLIGHT

Limiting Your Exposure to Drive-By Lawsuits

By Aaron Hartman, Monroe Moxness Berg, PA

During the last several years, hundreds of Minnesota businesses have fallen victim to “drive-by” lawsuits. The name pretty much sums it up: A disabled person or his/her lawyer drives through commercial districts looking for perceived violations on a building’s exterior. Weeks or months later, the business owner and the landlord receive a summons and complaint indicating that they have been sued in federal or Minnesota state court for violating anti-discrimination laws.

Such anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA), prohibit “places of public accommodation” from discriminating against individuals with disabilities. Is your retail store or restaurant a place of public accommodation? If it offers goods and services to the consuming public, most likely yes.. And when your retail store or restaurant fails to provide architectural accommodations -- like sufficient handicapped accessible parking spots, wheelchair ramps or restroom grab bars, by way of example -- it becomes the potential target of a drive-by lawsuit.

The Attorney Fee Paradox

Resources like Google Earth can make it easy to identify perceived violations. A missing handicapped sign or parking lot striping that appears off, even by mere inches, triggers a more detailed inspection of the property. A motivated plaintiff, a computer, and an internet connection is all it takes to touch off a legal dispute that almost inevitably costs owners thousands of dollars in legal fees. Sometimes much more.

While the lawsuits do frequently identify genuine accessibility concerns, the law can require the business and property owners to pay the plaintiffs’ attorneys’ fees. Aggressive plaintiffs and their lawyers take advantage of these fee-shifting provisions of the law to the fullest. As critics of the drive-by lawsuit point out, these cases are often handled in a way that suggests their objective is a quick settlement rather than a meaningful improvement in access to persons with disabilities. Facing the prospect of substantial legal fees, most business owners make the economically rational decision to pay a settlement, even though they believe they have done nothing wrong.

No One-Size-Fits-All Solution

In this author’s experience with drive-by lawsuits, the business owner and landlord had no idea that violations existed. Even the most conscientious owners tend to rely on seemingly knowledgeable building contractors to conclude that their properties comply with ADA requirements. Other business and property owners incorrectly assume that older properties are protected by “grandfathering” provisions in the law.

Generally speaking, buildings constructed or remodeled after the ADA was enacted (and later amended) must comply with all ADA requirements. In older buildings, architectural barriers must be removed when removal is “readily achievable.” The “readily achievable” standard considers many factors such as the size, type, and the overall financial picture of the business compared with cost of the access improvements. No one factor carries the day. As a result, there is no easy solution. So long as perceived violations exist, whether major or minor, the owners and operators of the property remain at risk of a lawsuit.

Steps You Can Take

You can reduce the likelihood of becoming the target of a drive-by lawsuit

by starting outside. Address potential violations that can be seen without entering the building first. This includes, for example, the number and size of accessible parking spaces and related signage, grade changes in the parking lot and route(s) of travel to the entrance(s), and entrance(s) that are wide enough and can be used without stairs. Once you have determined that the exterior of the building complies, move inside. While a Google search should never be a substitute for sound legal advice, the United States Department of Justice and similar government agencies publish numerous checklists and publications that describe key exterior and interior compliance issues -- see, for example, <https://www.ada.gov/rachek.pdf>. If you are concerned that a violation exists, both legal and non-legal professionals can help you identify and correct any concerns before you are sued.

Beyond remediating potential violations, business and property owners can also help insulate themselves from personal liability by forming a business entity, such as a corporation or limited liability company, to operate the business. If you personally own the property where the business is located, the property should likewise be owned in the name of a business entity. Some forms of business or property insurance may also be available to help cover the costs of defending against a drive-by lawsuit.

If your business is served with a lawsuit, the first telephone call you should make is to an attorney with experience in handling ADA claims. The law is complex, and court rules governing legal disputes are chock full of procedural limitations, protections, and deadlines. Court rules require defendants to respond to a complaint within a specific time frame, usually 20 days. If defendants do not respond within the time and in the manner required by the rules, the plaintiff may obtain a court judgment against the unwary defendant. And though you may be perfectly capable of negotiating the business terms of a settlement, proper legal advice is essential to protecting you – at least as much as it is possible – from future claims by similar plaintiffs.

A shareholder at Monroe Moxness Berg PA, Aaron Hartman is a trial attorney who focuses on practical solutions that solve problems and advance the client’s business objectives. He provides advice and litigation representation to clients in a variety of industries, with a particular emphasis on discrimination matters involving disabilities and whistleblower claims, employment advice and claims, contract disputes, partnership, management and governance disputes in companies small and large, and franchising litigation.

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