

# Rapid Research Report: ADA “Drive-by” Lawsuits in the Rocky Mountain Region (Region VIII)

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Submitted June 7, 2018

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## Research Question

How many “drive-by lawsuits” have been filed in each state in the Rocky Mountain Region (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming) and what are the top 5 most common charges in each state (2016-2017 timeframe)?

### Sub-Issue One: How many “drive-by lawsuits” have been filed in each state in the Rocky Mountain Region?

#### Brief Answer

Though drive-by lawsuits are increasing in number each year, all but two states within the Rocky Mountain Region have avoided drive-by lawsuits completely. However, the two states that are impacted are certainly not immune to this trend.

#### Familiarization/Introduction

This research began with familiarization with the Americans with Disabilities Act<sup>3</sup> generally, and then the ADA National Network website<sup>4</sup> and in particular, the Rocky Mountain Region information.<sup>5</sup> Then, the transcript of the 60 Minutes piece on “What’s a ‘Drive-By Lawsuit?’”<sup>6</sup> Through this initial research, a lens through which to move forward was gained.

#### Methodology/Steps/Familiarization

Next, searched in Ecosia,<sup>7</sup> each state within the RMR and “drive by lawsuit.”<sup>8</sup>

1. “drive by lawsuit” and Montana
2. “drive by lawsuit” and North Dakota
3. “drive by lawsuit” and South Dakota
4. “drive by lawsuit” and Colorado
5. “drive by lawsuit” and Utah

Next, H.R. 620 was searched through several avenues beginning with GovTrack.org. Through this initial search, a series of hyperlinks within the summary of the bill on the GovTrack.org website were followed.

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<sup>3</sup> 42 U.S.C. §12101, et seq. (legal search engine Lexis Nexis, available to law students for free).

<sup>4</sup> <http://adata.org>

<sup>5</sup> <http://www.rockymountainada.org>

<sup>6</sup> <https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/>

<sup>7</sup> A search engine like Google, anyone may access Ecosia by searching it in whatever search engine used. If one does not have access to Ecosia, use Google, Bing, or any similar search engine.

<sup>8</sup> For example, in the search engine: “Montana” and “drive by lawsuit”

Next, "drive by" and "lawsuit" were each searched with Lexis Nexis.<sup>9</sup> The search was unsuccessful when "'drive' and 'by' and 'lawsuit'" or "'ada' and 'drive by' and 'lawsuit'" was searched. Please note, in each of these initial searches, the timeline was open.

A few of the articles below, highlighted their methodologies; the system PACER<sup>10</sup> was mentioned several times.

Searched "Title III lawsuit"

### Case Research/Initial Findings

Montana, Wyoming, and the Dakotas all led to a dead end using Ecosia. Interestingly, Colorado and Utah saw drive-by lawsuit action.

#### I. Colorado

"Several 'drive-by' ADA lawsuits filed against Breckenridge businesses" article by the Summit Daily<sup>11</sup> provided a nice overview of the situation in Colorado and the ADA drive-by lawsuits in general. Notably, several of these lawsuits were filed by an out-of-state plaintiff, from Florida. The next article was from the law firm Baker-Hostetler, offering "Guidance Regarding 'Drive-By' Lawsuits over ADA Title III Rules."<sup>12</sup> And while not completely on point, it is notable that "[i]n many cases, there are no damages available unless the case can be coupled with a state statute that provides for such an award."<sup>13</sup> The next article, "Can ADA 'Drive by Lawsuits' Hit Colorado?"<sup>14</sup> emphasized that drive by lawsuits "can happen anywhere unless laws already exist on the books that can prevent this from occurring."

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<sup>9</sup> Legal search engine available to law students for free. Attorneys are able to purchase access to this legal search engine.

<sup>10</sup> "Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator. PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service;" "PACER is available to anyone who [registers](#) for an account. The more than one million PACER users include attorneys, *pro se* filers, government agencies, trustees, data collectors, researchers, educational and financial institutions, commercial enterprises, the media, and the general public." <https://www.pacer.gov>; Register for a PACER account at <https://pacer.psc.uscourts.gov/pscof/registration.jsf>

<sup>11</sup> <https://www.summitdaily.com/news/business/several-drive-by-ada-lawsuits-filed-against-breckenridge-businesses/>

<sup>12</sup> <https://www.bakerlaw.com/articles/blair-clark-article-offers-guidance-regarding-drive-by-lawsuits-over-ada-title-iii-rules>

<sup>13</sup> Note, what about state claims? Or state statutes that mirror the ADA?

<sup>14</sup> <https://www.advocacydenver.org/can-ada-drive-by-lawsuits-hit-colorado/>

## II. Utah

The article directly on point for Utah is, “*Utah Is a New Hotbed of ADA Title III Federal Suits.*”<sup>15</sup> Note, “[i]n 2013, 2014, and 2015 combined, plaintiffs only filed a total of eight such lawsuits in federal court (1, 6, and 1, respectively). In 2016, the number surged to 124, making Utah the seventh most busy federal venue for such filings for that year. In just the first five months of 2017, plaintiffs have filed 125 lawsuits in the Utah federal courts, the highest number since we started tracking them in 2013.”

This search also led to HR 620, “*House Passes Bill to Amend Title III of the ADA In Attempt to Curb Drive-By Lawsuits*”<sup>16</sup> and “How to File an ADA Complaint with the U.S. Department of Justice.”<sup>17</sup> No success when, from the main page, clicked the “Law/Regulations” link, then followed the “Technical Assistance Materials” link.

## III. H.R. 620: ADA Education and Reform Act of 2017

Searched HR 620 on GovTrack.<sup>18</sup> The summary provided a series of hyperlinks in the “Context” section. In order, they were:

- a. “H.R. 620: ADA Education and Reform Act of 2017”<sup>19</sup>
- b. “ADA Title III Lawsuits Increase by 16% Percent in 2017 Due Largely to Website Access Lawsuits; Physical Accessibility Legislative Reform Efforts Continue”<sup>20</sup>

This article mostly discussed the overall increase in drive-by ADA lawsuits, but did mention, “Utah moved up in the ranks, with a more than doubling of federal lawsuits,” and “Colorado’s numbers also more than doubled, from 92 in 2016 to 215 in 2017.” Utah and Colorado even made the top ten states, number four and six, respectively.

“2014 May Be a Banner Year for ADA Title III Lawsuit Filings”<sup>21</sup>

This article spoke about the importance of PACER and their methodologies/disclaimers of research.

- “Miami Local 10 News Reports On ADA Title III Drive-By Lawsuits”<sup>22</sup>

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<sup>15</sup> <https://www.adatitleiii.com/tag/lawsuit/>

<sup>16</sup> <https://www.adatitleiii.com/lawsuits-investigations-settlements/>

<sup>17</sup> [https://www.ada.gov/filing\\_complaint.htm](https://www.ada.gov/filing_complaint.htm)

<sup>18</sup> <https://www.govtrack.us/congress/bills/115/hr620/summary>

<sup>19</sup> *Id.*

<sup>20</sup> <https://www.adatitleiii.com/2018/02/ada-title-iii-lawsuits-increase-by-14-percent-in-2017-due-largely-to-website-access-lawsuits-physical-accessibility-legislative-reform-efforts-continue/>

<sup>21</sup> <https://www.adatitleiii.com/2014/08/2014-may-be-a-banner-year-for-ada-title-iii-lawsuit-filings/>

<sup>22</sup> <https://www.adatitleiii.com/2016/02/miami-local-10-news-reports-on-ada-title-iii-drive-by-lawsuits/>

- “Federal courts in Alaska, Montana, North Dakota, South Dakota, and Wyoming had no ADA Title III lawsuits” (emphasis added).<sup>23</sup>
- “Hobbling businesses”<sup>24</sup>
- “ADA Title III Lawsuits Increase by 37 Percent in 2016”<sup>25</sup>
- “2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses”<sup>26</sup>
- “It’s time to restore the integrity of the ADA”<sup>27</sup>

#### IV. Other Findings

“Drive by lawsuit” may also be known as “Title III lawsuit” or “Serial Title III ADA lawsuit.”<sup>28</sup>

### Sub-Issue Two: What are the top 5 most common charges in Colorado and Utah?

What are the common elements between complaints? Are there consistent plaintiffs? What are the commonalities? Is there a trend? Anything specific within Title III that people are going after?

#### Brief Answer

*Accessibility in general*; a lot of access to bathroom sinks and soap as well as parking and ramps. Though, there was one reference to getting burnt by a heater due to improper safety measures taken and one regarding segregation. Another common theme was that businesses were not contacted and asked to comply with the ADA prior to litigation.

*Common plaintiffs/attorneys in both states*; sometimes common plaintiffs/attorneys were even regular complainants in more than one state.

#### Methodology/Steps

Searched "Colorado" and "serial" and "ADA" and "lawsuit" in Lexis Nexis and found 16 cases:

- Looked at the first one, *Nekouee v. H.V. Real Estate Corp.*, 2017 U.S. Dist. LEXIS 181433
  - *Nekouee* cited a case from Colorado, *Colo. Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205, which held: “Thus, anyone who has suffered an invasion of the legal interest protected by Title III may

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<sup>23</sup> As of February 29, 2016.

<sup>24</sup> <https://www.economist.com/news/united-states/21649512-law-designed-help-people-disabilities-enriches-lawyers-instead-hobbling>

<sup>25</sup> <https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/>

<sup>26</sup> <https://www.adatitleiii.com/2018/01/2017-website-accessibility-lawsuit-recap-a-tough-year-for-businesses/>

<sup>27</sup> <http://thehill.com/blogs/congress-blog/judicial/373555-its-time-to-restore-the-integrity-of-the-ada>

<sup>28</sup> <https://www.burnhamnationwide.com/final-review-blog/essential-guide-to-ada-title-iii-enforcement-private-party-lawsuits>

- have standing, regardless of his or her motivation in encountering that invasion.”
- Second case, *Carton v. Carroll Ventures, Inc.*, 2017 U.S. Dist. LEXIS 107135
  - One of the parties alleged actions by attorneys similar to those in Colorado, that is filing “virtually identical complaints...by attorneys with similar ‘litigation funding agreements.’”
  - This case also cited Colorado Cross Disability Coalition
- Third case, *Adams v. Capko, Capko & Griffith, LLC*, 2015 U.S. Dist. LEXIS 160021

Searched "Colorado" and "serial" and "ADA" and "lawsuit" in Ecosia. First article: “64 lawsuits in two months: Are recent ADA suits ‘drive-by’ litigation or a tool to help the disabled? *Hickenlooper appointee sues 64 small businesses over alleged disability violations*”

- <https://www.denverpost.com/2017/02/13/hickenlooper-appointee-sues-businesses-ada/>
- “The 64 lawsuits filed so far by Mellisa Umphenour of Arvada are nearly identical in content and scope to scores of others filed in U.S. District Court last year in Colorado – and thousands of others filed in federal courts nationwide the past few years.”
- “The suits are often geographical in scope, reflecting a pattern of visitation, such as a row of shops or stores along a specific street, or eateries in a certain part of town.”
- “The words echo 71 lawsuits filed last year by Santiago Abreu, a disabled Floridian who travels to Colorado frequently. The lawsuits he filed were against businesses from locations as varied as Colorado Springs, Breckenridge and Denver. Nearly all of Abreu’s lawsuits were settled out of court for undisclosed terms, records show.”
- Second article: “ADA serial lawsuit filer abruptly dismisses case days before deposition; Motives questioned”
  - <https://www.thedenverchannel.com/news/investigations/ada-serial-lawsuit-filer-abruptly-dismisses-case-days-before-deposition-motives-questioned>
  - Plaintiff here was also Santiago Abreu
- Third article: “Controversial ADA serial suer tied to lawsuit-filing operations in other states”
  - <https://www.abc15.com/news/local-news/investigations/controversial-ada-serial-suer-tied-to-lawsuit-filing-operations-in-other-states>
  - Plaintiff Advocates for Individuals with Disabilities (AID) has filed federal ADA lawsuits in Colorado
  - “ABC15 has linked AID employees to four different entities that are operating in three states – each entity has its own plaintiff and attorney.” In Colorado: (1) ADA Justice Advocates (so far they’ve filed 125 suits, attorney James Carr, who is filing on behalf of Melissa Umphenour, cited above), and (2) ADA Civil Rights (attorney is Jeff Emberton on behalf of Terrell Fredrik)
  - “In the fall, ABC15 learned that AID began posting job opportunities for attorneys and employees in multiple other states: Colorado [and] Utah.”

- Story linked in article: <https://www.thedenverchannel.com/news/investigations/new-wave-of-ada-lawsuits-hit-colorado-southwest-us-hard>
  - “Arvada [(cited above)] has filed nearly 70 cases in less than two months.”
  - Note: Umphenour — ADA Lawsuits — Denver7 - <https://www.google.com/maps/d/viewer?mid=1T1O2PLfPlvvqGTVVvRdFWkEpH6k&usp=sharing>
- Fourth article: “ADA Defense Lawyer: Judge dismisses ADA website lawsuit” (irrelevant)
- Fifth article: “Colorado Businesses Beware – ADA Public Accommodation ‘Drive-By’ Lawsuits on the Rise”
  - <https://www.coloradoemployerslaw.com/colorado-businesses-beware-ada-public-accommodation-drive-by-lawsuits-on-the-rise/>
  - This article is from 2012
- Sixth article: <https://www.adatitleiii.com/tag/serial-plaintiff/> (irrelevant)

Searched "Utah" and "serial" and "ADA" and "lawsuit" in Ecosia

- First article: “Disabled persons advocate says piles of lawsuits show ADA working as designed” <http://kutv.com/news/get-gephardt/disables-persons-advocate-says-piles-of-lawsuits-show-ada-working-as-designed> (irrelevant)
- Second article: “Skepticism over ADA lawsuits filed in federal court | Utah”
  - <http://www.good4utah.com/news/skepticism-over-ada-lawsuits-filed-in-federal-court/998972400>
  - Plaintiffs Trevor Kelly, Samuel Burningham, and Tammy Shelton “are named as plaintiffs in separate lawsuits against businesses.”
    - Ord is the attorney in 179 lawsuits filed in federal court
  - An Arizona company, Litigation, Management and Financial Services (LMFS) “has filed hundreds of lawsuits” in states, including Colorado, and now “targeting Utah businesses.”
- Third article: “Utah Is a New Hotbed of ADA Title III Federal Suits”
  - <https://www.adatitleiii.com/2017/06/utah-is-a-new-hotbed-of-ada-title-iii-federal-suits/>
  - “Nine plaintiffs are responsible for the 2017 numbers so far, with one who has filed 57 such suits. Another six plaintiffs have each filed between 9 and 15 cases, and two have only filed one case each. These plaintiffs have been represented by one of six law firms, one of which was counsel in 105 of the 124 cases filed in 2016. Most of these cases appear to concern alleged architectural barriers in public accommodations facilities.”
- Fifth article: “Utah lawmaker aims to stop ‘drive-by’ ADA lawsuits”
  - <http://kutv.com/news/get-gephardt/utah-lawmaker-aims-to-stop-drive-by-ada-lawsuits> (irrelevant)
- Seventh article: “Disability Law Center files lawsuit against departments and services”
  - <http://fox13now.com/2018/01/15/disability-law-center-files-lawsuit-against-utah-departments-and-services/>

- Plaintiff Staci Christiansen, “plaintiffs claim the state’s actions unfairly segregate people living with intellectual disabilities.”

Searched "Utah" and "serial" and "ADA" and "lawsuit" in LexisNexis

- Only 8 cases came up with these search terms (not all are relevant):
  - *Kelley v Seagull Book & Tape*, 2017 U.S. Dist. LEXIS 182778

Searched “Colorado” and “ADA” and “frivolous” and “lawsuit” in Ecosia

- Second article: <http://www.co-law.org> (irrelevant)
- Third article: “The ADA Lawsuit Contagion Sweeping U.S. States”
  - <https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/#1bdcead534ee> (irrelevant)
- Fifth article: “Dozens of Colorado businesses hit with Americans with Disabilities Act lawsuits filed by Florida man”
  - <https://www.thedenverchannel.com/news/investigations/dozens-of-colorado-businesses-hit-with-americans-with-disabilities-act-lawsuits>
  - “The same man, Santiago Abreu, brought complaints against 65 businesses throughout Colorado claiming he visited the businesses during frequent trips to the state.”
  - “The court filings describe Abreu as a “tester” for the purpose of discovering, encountering and engaging discrimination against the disabled in public accommodations.”
  - “Santiago Abreu hit Riverbend with a lawsuit, claiming a number of ADA violations, mostly in the restroom, including:
    - Improper clearance in doorways
    - Grab bars of the wrong length
    - Toilet paper dispensers in the wrong place
    - Bar countertops placed too high”
  - “Court records show Abreu made at least two trips through the city of Denver in the past two years, suing seven of the businesses he visited in that time.
    - Abreu’s lawsuits show he visited five of those businesses all in one day: July 2<sup>nd</sup>, 2015.
      - At 12:42 PM he visited Highlands Cork & Coffee, buying a soda, San Pellegrino and a scone.
      - At 5:06 PM he checked out at Canvas & Cocktails in Cherry Creek.
      - He stayed in Cherry Creek for dinner, closing out his bill at 6:33 PM dinner at Hapa Sushi.
      - At some point in the day he also wrote in his lawsuits he visited Mead St. Station and Pizza Alley (identified in the litigation as



- Alley Pizza), on the same street in the Highlands as the coffee shop. Those two lawsuits did not include receipts for his visits.
- At each of the above businesses, Abreu said he encountered bathrooms that did not meet ADA requirements.”

## State Summary: Top 5 Causes of Action (COA) in the Rocky Mountain Region

Montana: 0  
 North Dakota: 0  
 South Dakota: 0  
 Wyoming: 0

### Colorado District Court Filings:

2013 – 47  
 2014 – 42  
 2015 – 66  
 2016 – 119  
 2017 – 254  
 2018 – 54 (as of 05/22/2018)

### COA from 01/01/2013 – 05/22/2018

42:12101	ADA	(329)
42:12102	ADA, Disability Definition	(11)
42:12111	ADA, Employment	(36)
42:12112	ADA, Discrimination	(31)
42:12117	ADA	(7)
42:12131	ADA, Accommodations	(13)
42:12132	ADA, Discrimination	(7)
42:12181	ADA	(136)
42:12188	ADA, Civil Enforcement Actions	(6)

### Utah District Court Filings:

2013 – 12  
 2014 – 11  
 2015 – 22  
 2016 – 142  
 2017 – 367  
 2018 – 26 (as of 05/22/2018)

### COA from 01/01/2013 – 05/22/2018

42:12101	ADA of 1990	(344)
42:12112	ADA, Discrimination	(17)
42:12117	ADA, Enforcement	(4)
42:12132	ADA, Discrimination	(1)
42:12188	ADA, Civil Enforcement Actions	(214)

The numbers (for example “42:12101”) and titles (“ADA”) are how each court listed an ADA relevant COA. As stated above, it is difficult to note the actual allegation of each COA without examining each case individually.

### Methodology for Summary

On PACER, search each state’s District Court; Colorado first, and then Utah.

The Colorado District Court: searched their particular causes of actions or “COAs” applicable to the American Disabilities Act. The COAs were chosen out of each District Court’s “Query” page. The “Query” page was individually sorted through until ADA COAs appeared relevant. Those relevant ADA COAs were then searched within the 2013, 2014, 2015, 2016, 2017, and 2018 timeframes.

### Initial Findings

Interestingly, “serial” plaintiffs were present in each COA in both Colorado and Utah District Courts. One may easily see the “serial” filings while scrolling through the hundreds of COAs, depending upon the year or COA.

Colorado “serial” plaintiffs 01/01/2016-12/31/2017 timeframe

- 42:12101      ADA
  - Umphenour
  - Frederick
  - Mize
  - Brooke
  - Chandler
- 42:12181      ADA
  - Abreu
  - Mosley
  - Kurlander
  - Brito

Utah “serial” plaintiffs 01/01/2016-12/31/2017 timeframe

- 42:12101      ADA of 1990
  - Shelton
  - Access 4 All
  - Burningham
  - Kelley
- 42:12188      ADA, Civil Enforcement Actions
  - Shelton
  - Ford
  - Access 4 All
  - Clawson
  - Whitney
  - Suda
  - Burningham

Often, settlement amounts are kept confidential, so determining the final outcome of a case is hard. PACER provides when cases were closed and the final disposition, but several were “dismissed-voluntarily” without details.

### Top 5 Causes of Actions

The actual alleged complaints are difficult to analyze without in-depth examination into each case. Sometimes, cases have several COAs, so the number of times each COA appears, may be skewed. Nevertheless, the top 5 COAs for each state are as follows:

#### Colorado District Court Filings

COA from 01/01/2013 – 05/22/2018

42:12101	ADA	(329)
42:12181	ADA	(136)
42:12111	ADA, Employment	(36)
42:12112	ADA, Discrimination	(31)
42:12131	ADA, Accommodations	(13)

#### Utah District Court Filings

COA from 01/01/2013 – 05/22/2018

42:12101	ADA of 1990	(344)
42:12188	ADA, Civil Enforcement Actions	(214)
42:12112	ADA, Discrimination	(17)
42:12117	ADA, Enforcement	(4)
42:12132	ADA, Discrimination	(1)

Below is a “sample” of 2 cases from each District Court, 1 from each top 2 COAs (01/01/2016-12/31/2017 timeframe).

#### Colorado Sample Cases

Colorado Case One:           42:12101     ADA  
Umphenour v. Rocky Mountain Properties – COMPLAINT

“Plaintiff and Plaintiff’s minor child were prevented from the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Defendant’s PPA due to Defendant’s violation of the ADA and its accompanying Accessibility Guidelines and is discriminating against Plaintiff and Plaintiff’s minor child as a result of specific violations including but not limited to the following:

- a. Failure to provide a parking space identified with a sign that includes the International Symbol of Accessibility as required by 36 C.F.R Part 1191, Appendix D, Guideline 502.6 and;
- b. Failure to make the accessible spaces located on shortest accessible route from parking to an entrance as required by 36 C.F.R Part 1191 Appendix B, Guideline 208.3.1 and;
  - c. Failure to prevent doors swinging into the clear floor space or turning space as required by 36 C.F.R Part 1191, Appendix D, Guideline 304 et seq., Guideline 603.2.3 and;
- c. Failure to provide a toilet with a seat height between 17 inches (430 mm) minimum and 19 inches (485 mm) maximum above the floor as required by 36 C.F.R Part 1191, Appendix D, Guideline 604.4.”

Colorado Case Two:            42:12181        ADA  
 Abrue v. Butcher and the Baker, LLC – COMPLAINT

“At the time of Plaintiff’s visits to the Premises on July 1, 2015 and again on March 15, 2016 (and prior to instituting this action), Plaintiff suffered from a “qualified disability” under the ADA and required accessible means of entry at the Premises. Plaintiff personally visited the Premises, but was denied full and equal access and full and equal enjoyment of the facilities, services, goods and amenities within the Premises, even though he was a “bona fide patron.” A true and correct copy of Plaintiff’s Purchase Receipt is attached hereto as Exhibit “1.”

- a. ...Defendant has discriminated, and continues to discriminate against Plaintiff and others who are similarly situated by denying access to and full and equal enjoyment of goods, services, facilities, privileges, advantages and/or accommodations located at the Premises, as prohibited by 42 U.S.C. §12182, and 42 U.S.C. §12101 et. seq., and by failing to remove architectural barriers pursuant to 42 U.S.C. §12182(b)(2)(A)(iv).
- b. ...Based on a preliminary inspection of the Premises, Defendant is in violation of 42 U.S.C. §12182 et. seq. and the 2010 American Disabilities Act Standards et. seq., and is discriminating against Plaintiff as a result of, *inter alia*, the following specific violations found in the Restroom:
  - c. Failing to provide operable parts that are functional or are in the proper reach ranges as required for a person with a disability in violation of 2010 ADAAG<sup>29</sup> §§309, 309.1, 309.3 and 309.4 and/or §§4.27 and 4.27.4 of the 1991 ADA Standards.
  - d. Providing sinks and/or countertops greater than 34 inches high or providing the same without clear space underneath to allow for knee or toe clearance in violation of 2010 ADAAG §§305, 306, 606, 606.2 and 606.3 and/or §§4.32.3 and 4.32.4 of the 1991 ADA Standards.

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<sup>29</sup> The ADAAG, Americans with Disabilities Accessibility Guidelines, was superseded by the 2010 ADA Standards for Accessible Design on September 15, 2010. See: <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm>

- e. Failing to provide the proper insulation or protection for the plumbing under a sink or countertop in violation of 2010 ADAAG §§606 and 606.5 and/or §4.24.6 of the 1991 ADA Standards.
- f. Failing to provide grab bars at 33 inches minimum and 36 inches maximum above the finished floor measured to the top of the gripping surface in violation of 2010 ADAAG §§604, 609 and 609.4 and/or §§4.17.6, 4.26 and 4.26.2 of the 1991 ADA Standards.
- g. Failing to provide mirror(s) located above lavatories or countertops at the proper height above the finished floor in violation of 2010 ADAAG §§603 and 603.3 and/or §§4.19 and 4.19.6 of the 1991 ADA Standards.”

Note, this case also alleges violations of counter heights along with pathways and surfaces that are too steep.

### Utah Sample Cases

Utah Case One: 42:12101 ADA of 1990  
Burningham v. Old Navy – COMPLAINT

On or about February 20, 2017, Plaintiff visited Defendant’s PPA. Plaintiff was prevented from the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Defendant’s PPA due to Defendant’s violation of the ADA and its accompanying Accessibility Guidelines and is discriminating against Plaintiff as a result of specific violations including but not limited to the following:

- a. Failure to provide signs containing the designation "van accessible" that identify van parking spaces as required by 36 CFR § 1191 App. D Guideline 502.6;
- b. Failure to insulate or otherwise configure water supply and drain pipes under sinks to protect against contact as required by 36 CFR § 1191 App. D Guideline 606.5.

In addition to the precise difficulties experienced by Plaintiff on the date he attempted to access Defendant’s PPA, under the ADA, the existence of architectural barriers alone, when removal is readily achievable, constitutes discrimination. 42 U.S.C. § 12181(2)(A).

Having been deterred from equal enjoyment of Defendant’s PPA, Plaintiff has not conducted a complete review of Defendant’s PPA; however, Plaintiff shall seek to amend the Complaint to allege additional ADA violations upon the completion of discovery and disclosure process. Since most barriers involve measurement of inches or degrees, to identify all architectural barriers requires a person to have unfettered access to a property with tools such as a tape measure, inclinometer and note pad. Plaintiff therefore, requires an on-site inspection including the entry on Defendant’s PPA to gather additional evidence pursuant to Rule 34 of the Federal Rules of Civil Procedure to provide a comprehensive list of all barriers which existed on or before the date of this Complaint.

Defendant has discriminated against Plaintiff and others in that it has failed to make its PPA fully accessible to, and independently usable by, individuals who are disabled in violation of the ADA.

Defendant has discriminated against Plaintiff in that it has failed to remove architectural barriers to make its PPA fully accessible to, and independently usable by, individuals who are disabled.

Defendant's conduct is ongoing. Plaintiff invokes the statutory right to declaratory and injunctive relief, as well as costs, expenses and attorneys' fees. *See* 28 U.S.C. §§ 2201, 2202, 28 C.F.R. 36.501.

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Plaintiff incorporates the foregoing paragraphs herein. Title III of the Americans with Disabilities Act expressly prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, privileges or accommodations by any person that owns, leases or operates any place of public accommodation.

Under the ADA, failure to remove architectural barriers to access by disabled persons, where readily achievable, constitutes discrimination.

Plaintiff Linda Suda lives with a permanent disability and must use a wheelchair for mobility.

Defendants own the Premises and/or lease space or operate a business located at the Premises. Defendants offer goods and services to the general public and the Premises is a place of public accommodation as defined by C.F.R. §36.104 and 42 U.S.C. §12181(7).

The architectural barriers to access on Defendants' Premises include, but are not limited to, the following:

- a. Accessible parking spaces and their access aisles have surface areas with slopes exceeding the 1:48/2.083% (2010) and 1:50/2% (1991) maximum allowed by ADAAG (with slopes as great as 8.0%).
- b. The curb ramp exceeds the maximum allowable slope under both standards of ADAAG of 1:12/8.33% (with slopes as high as 17.6%).
- c. The accessible route from accessible parking to the entrance crosses large gaps, cracks and other barriers that violate rules against changes in level under ADAAG.
- d. The access aisle is only 36 inches wide, less than the size mandated by ADAAG.
- e. The handrails on the route from the accessible parking to the entrance do not comply with ADAAG in that they do not have proper edge protection.

Removal of the architectural barriers to access is readily achievable and could be completed by Defendants by repaving the accessible parking and access aisle, replacing the curb ramp, repairing gaps, cracks and other barriers, painting an access aisle with the proper width and installing edge protection on the existing ramp without significant difficulty or expense.

No notice to Defendants is required under ADAAG as a result of Defendants' failure to cure the violations contained herein during the many decades since ADAAG's adoption. Congress did not require disabled people to beg for access—the duty lies with the property owner and business to comply with the law.

Plaintiff has visited the Premises many times to eat meals and she will continue to visit the Premises in the future. She has encountered the barriers described in this Complaint and will continue to encounter them until they are remedied.

The barriers to access on the Premises exclude persons with disabilities such as Plaintiff from full and equal enjoyment of the goods, services, privileges and accommodations offered by Defendants.

As a result of Defendants' unlawful architecture and failure to remedy, Plaintiff and other disabled persons are subject to ongoing discrimination due to their disability, as well as embarrassment, distress, indignity and limitations to their personal freedom.

Plaintiff's knowledge of the barriers described in this Complaint deterred Plaintiff's access to, or full use and enjoyment of the Premises.

## Conclusion

Litigation surrounding violations of the ADA in Utah and Colorado of the Rocky Mountain Region are on the rise. Whether these are related to long-standing issues in the community or are the result of so-called "drive-by lawsuits" is difficult to determine. What is certain is that an increasing number of lawsuits is evident and that several serial plaintiffs are alleging various violations of accessibility against numerous commercial defendants. These several serial plaintiffs are not from Utah or Colorado. While "drive-by lawsuits" may create a negative impression of the ADA and its enforcement in the business community, the issues they raise are real for individuals with disabilities. It is true that using these lawsuits may be an unwelcome "enforcement stick," but it is also true that they prompt compliance action that was originally called for in the 1990 passage of the Americans with Disabilities Act.

## Suggested citation

Alvernaz, L.M & Blair, M.E. (2018). Rapid Research Report: ADA "Drive-by" Lawsuits in the Rocky Mountain Region (Region VIII). Colorado Springs, CO: Rocky Mountain ADA Center, Meeting the Challenge, Inc.