Are Architects and Contractors Potentially Liable under the Americans with Disabilities Act for the Design and Construction of Inaccessible Facilities?

By Aaron Silberman

Title III of the Americans with Disabilities Act of 1990 (ADA, or the Act), 42 U.S.C. § 12181, et seq., prohibits discrimination against persons with disabilities in the design and construction of certain facilities. It is clear that owners and operators of inaccessible facilities are liable under the Act, but it is less clear whether liability also extends to the architects or construction contractors who design and/or build the facilities. In the opinion of this author, a logical reading of the Act, taken as a whole, reveals that architects and construction contractors cannot be held liable, if they themselves do not own or operate the inaccessible facilities.

A number of federal courts, including two circuit courts of appeals, have considered the issue of who is liable under Title III of the ADA and have reached different conclusions. Some courts have considered the issue specifically with regard to architects and contractors, while others have evaluated the potential liability of other entities, such as franchisors. Still other courts have examined the issue of liability under another disabled access statute—the Fair Housing Amendments Act of 1988 (“FHAA”), 42 U.S.C. § 3604(f)(3)(c)—that has language very similar to that found in Title III of the ADA.

This debate has centered on two questions: First, does the language in one section of the Act, Section 302, which creates liability for owners and operators of public accommodations, limit another section of the Act, Section 303, which generally establishes that failure to design and construct an accessible public accommodation or commercial facility is impermissible discrimination? The Ninth Circuit says “no”; the Eighth Circuit says “no”; and there is a number of District Court decisions going both ways. Second, since Section 303 creates liability for one who designs and constructs inaccessible facilities, does it apply where one either designs or constructs but does not do both? While no circuit court decision has answered this question, the district court decisions are split.

If architects and contractors are potentially liable, the consequences are profound. Such liability would apply regardless of the terms of their contracts with owners and regardless of fault. If they are found liable, architects and contractors could be compelled to correct inaccessible facilities themselves (42 U.S.C. § 12188(a)(2)), potentially without pay. In addition, if the United States sues, the architects and contractors could be subject to monetary damages and civil penalties of up to $50,000 for a first violation and up to $100,000 for any subsequent violations. 42 U.S.C. § (b)(2)(B),(C). Finally, many states have their own disabled access laws similar to the ADA, and some of these laws provide for additional remedies, including recovery of damages, against violators; architects and contractors in those states could face liability for these additional remedies as well if courts in those states were to choose to follow federal decisions assigning liability to architects and contractors with liability.

Are Only Owners and Operators Subject to ADA “Design and Construct” Liability?

Relevant ADA Language

Sections 302(a) and 303(a) are the two provisions in Title III of the ADA that could create architect and contractor liability. Section 302(a) provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a) (emphasis added); see also 28 C.F.R. § 36.201(a).

Section 303(a) provides, in relevant part:

[A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes (1) a failure to design and construct facilities for first occupancy … that are readily accessible to and usable by individuals with disabilities … and (2) with respect to [alterations of] a facility … a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities. … 42 U.S.C. § 12183(a).

The Ninth Circuit’s Position

The Ninth Circuit and three district courts have held that parties must own, lease or operate a facility to be subject to “design and construct” liability under the ADA. Lonberg v. Sanborn Theaters, Inc., 259 F.3d 1029, 1035-6 (9th Cir. 2001); Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers (PVA), 945 F. Supp. 1, 2 (D.D.C. 1996), aff’d. on other grounds, 117 F.3d 579 (D.C. Cir. 1997); United States v. Days Inns of America, Inc. (Days Inns IV), 22 F. Supp. 2d 612 (E.D. Ky. 1998); United States v. Days Inns of America, Inc. (Days Inns I), 1998 WL 461203 at *2-4 (E.D. Cal. 1/12/98); see also Baltimore Neighborhoods, Inc. v. Rommel Builders,
stating that the ADA, unlike America, distinguishes

The Eighth Circuit and the district courts have held that architects and contractors are potentially liable under Title III of the ADA.

The appellants (and the United States as amicus) in Lonberg had argued that, because Section 302 only applies to “public accommodations” and Section 303 applies to both “public accommodations” and “commercial facilities,” application of Section 302’s owner/operator limitation to Section 303 would create a gap in ADA coverage that Congress could not have intended. Specifically, they argued that limiting liability under Section 303(a) to owners and operators would leave no one liable for failure to design and construct commercial facilities in accordance with ADA accessibility requirements. The court rejected this argument.

The Eighth Circuit’s Position

The Eighth Circuit and the district courts have held that parties such as architects and contractors are potentially liable under Title III of the ADA because, in their view, ADA Section 302(a) does not limit Section 303(a); they believe that parties which do not own, lease or operate an inaccessible facility may be held liable for failure to design and construct accessible facilities. United States v. Days Inns of America, Inc. (Days Inns III), 151 F.3d 822 (8th Cir. 1997), cert. denied, 119 S. Ct. 1249 (1999); Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1177-8 (S.D. Fla. 1997); United States v. Days Inns of America, Inc. (Days Inns II), 997 F. Supp. 1080, 1083-4 (C.D. Ill. 1998); United States v. Ellerbe Becket, Inc., 976 F. Supp. at 1267-8.

The Eighth Circuit opinion in United States v. Days Inns of America, Inc. (Days Inns III) predates Lonberg by three years. In Days Inn III, the United States sued a hotel franchisor, arguing that it should be held liable for ADA violations in one of its franchised hotels. The district court granted the franchisor’s motion for summary judgment on the ground that it did not design, construct, own or operate the hotel. The Eighth Circuit reversed, holding that a party need not own or operate a facility to be liable under the ADA and remanding the case for trial on the disputed issue of whether the franchisor designed or built the hotel. 151 F.3d at 824.
303 creates “design and construct” liability for both public accommodations and commercial facilities. Section 302 only prohibits discrimination with regard to public accommodations. Both “public accommodation” and “commercial facilities” are defined in Section 301 in Title III (42 U.S.C. § 12181). While the definitions of “commercial facilities” and “public accommodation” are both extremely broad and cover similar entities, the definition of “commercial facilities” is technically broader. Section 301 defines “commercial facilities” as “nonresidential” facilities “whose operations will affect commerce” (42 U.S.C. § 12181(2)); it defines places of “public accommodation” as private entities included on an expansive list, so long as they affect commerce (42 U.S.C. § 12181(7)). Certain commercial facilities, such as factories or some offices, would not qualify as public accommodations because they are not listed in Section 301(7).

The Eighth Circuit rejected the franchisor’s argument that Section 302’s limitation of liability to owners and operators “clarifies the parties who may be liable” for non-compliant design and construction under Section 303. In the court’s view, the franchisor’s interpretation “would improperly create a gap in coverage that Congress did not intend” by omitting commercial facilities (as opposed to public accommodations) from design and construct liability. The franchisor argued that the court should remedy this gap by reading Section 302 to apply not only to public accommodations but also to commercial facilities. The court rejected this argument, concluding that such a reading would violate the plain language of that Section. 151 F.3d at 825.

Having concluded that Section 302 does not limit and define who may be liable under Section 303, the Eighth Circuit then evaluated Section 303 on its own terms. The court noted that Section 303 “is silent with respect to who is liable” under that Section. 151 F.3d at 825. It then concluded that any party possessing a significant degree of control over the final design and construction of a facility may be liable under Section 303 of the Act. Id. at 825-6.

The Eighth Circuit in Days Inn III appears to give some weight to the position taken by the United States Department of Justice (DoJ), the executive agency responsible for enforcing Title III of the ADA. Id. at 826. In support of its broad definition of who may be liable under Section 303, the court cited the DoJ Technical Assistance Manual (TAM), which addresses the application of Title III to public accommodations and commercial facilities. Id. (citing ADA, DoJ, TAM § III-5.1000 (Jan. 1993)). The DoJ manual addresses ADA liability in its Section III-5.1000 (General) and, as to new construction and alterations, asserts that anyone who participates in design or construction of a noncompliant facility, including architects and contractors, may be liable under the Act. Specifically, the TAM states:

All newly constructed places of public accommodation and commercial facilities must be readily accessible to and usable by individuals with disabilities to the extent that it is not structurally impracticable. This requirement, along with the requirement for accessible alterations, are the only requirements that apply to commercial facilities.4

Following this assertion, the DoJ manual then provides an illustration in which an owner incorrectly directs his architect and contractor that facilities on the central and western sections of his property need not be ADA compliant. The manual poses the question: “Who is liable for violation of the ADA in the above example?” And it answers: “Any of the entities involved in the design and construction of the central and western Sections might be liable. Thus, in any lawsuit, [the owner], the architect, and the construction contractor may all be held liable. …” Id.

The Ninth Circuit’s Position Better Comports with the Plain Language of the Act

Title III of the ADA is by no means a model of clarity; if it were, there would be no disagreements in the courts. However, the most reasonable reading of Title III as a whole is that of the Ninth Circuit, i.e., that Title III does not make architects and contractors potentially liable for designing or constructing inaccessible facilities. The plain language of Section 303 states that the section is meant to set forth examples of “discrimination for purposes of” Section 302. The Eighth Circuit’s reasoning in Days Inn III, 151 F.3d 822 (and that in the District Court decisions and the DoJ position in accord) ignores this cross-reference. On their faces, Section 303 does not define who is or is not to be held liable for the discrimination under Title III, and Section 302 does. Because Section 302 limits potentially liable entities to owners and operators of non-compliant facilities, Section 303, in defining the acts creating liability, cannot reasonably be read to extend potential liability to other entities, such as architects and contractors, who neither own nor operate facilities.

If ADA “Design and Construct” Liability Were to be Found to Extend Beyond Owners and Operators to Architects and Contractors, Would Contractors or Architects Have to Design and Construct an Inaccessible Facility to Be Found Liable?

As set forth above, the second issue courts have considered relevant to the potential ADA liability of architects and contractors is whether liability would extend to parties who design or construct a facility, but do not do both. This issue arises because plaintiffs and the United States have argued in a number of cases, with varying success, that the unambiguous conjunctive phrase, “failure to design and construct,” in Section 303(a) is meant to be disjunctive.

The District Court for the District of Columbia has held that an entity must have both designed and constructed a facility to be liable. Paralyzed Veterans of America 945 F. Supp. at 2; see also Days Inns I 1998 WL 461203 at *2-4 n. 1 (although the court found that the defendant nei-
ther designed nor constructed the hotel at issue, it criticized the government’s argument that Section 303 “makes it illegal to design or construct a non-accessible structure,” such that persons such as plumbers could be liable, as “inconsistent with conjunctive ‘design and construct’ language of the statute”).

In Paralyzed Veterans of America, an association of disabled persons sued an architect for allegedly designing a sports arena in violation of the ADA. The district court granted the architect’s motion to dismiss on the grounds that Section 303’s “design and construct” liability extends only to owners and operators of a facility and to persons who both design and build the facility. 945 F. Supp. at 1-2. With regard to the second ground, the court stated, “the phrase ‘design and construct’ is distinctly conjunctive. It refers only to parties responsible for both functions, such as general contractors or facilities owners who hire the necessary design and construction experts for each project.” The court concluded that its interpretation “does not frustrate the intent of the statutory scheme” because entities who are potentially liable (i.e., who are responsible for both design and construction) are in a position to ensure that the design or construction entities with whom they contract perform in accordance with ADA accessibility requirements. Id. at 2.

On the other hand, surprisingly, the District Courts for the Southern District of Florida and the Central District of Illinois have held that an entity need only to have either designed or constructed a facility to be liable. Johnson v. Huizenga Holdings, Inc., 963 F. Supp. at 1177-8 Days Inns II, 997 F. Supp., 1083-4; see also Days Inns III, a at 151 F.3d, 825-826. And a number a district courts have held that similar language in the federal Fair Housing Amendments Act (“FHAA”), 42 U.S.C. § 3604, et seq., does not require that an entity both design and construct a facility to be liable. Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 3 F. Supp. 2d at 664-5; Doering v. Pontarelli Builders, Inc., 2001 U.S. Dist. LEXIS 18856 at *1-2 (N.D. Ill. 11/16/01); United States v. Hartz Constr. Co., Inc., 1998 U.S. Dist. LEXIS 973 at *2-3 (N.D. Ill. 1/26/98); Montana Fair Housing, Inc. v. American Capital Development, Inc., 81 F. Supp. 2d 1057, 1068-9 (D. Mont. 1999); see also Days Inns II, 997 F. Supp. at 1083-4 (dicta); United States v. Edward Rose & Sons, 246 F. Supp. 2d 744, 756 n. 13 (E.D. Mich. 2003) (noting in dicta that, “[w]hile there is a split of authority on the issue, several courts have held that architects and contractors who were only involved in either the design or construction of noncompliant buildings can be held liable under [the FHAA]

Some courts have held that an entity need only to have either designed or constructed a facility to be liable.

In Johnson v. Huizenga Holdings, Inc., a group of disabled minors sued several entities, including the architect, involved in the design and construction of a hockey arena, alleging the proposed arena would violate ADA accessibility requirements. 963 F. Supp. at 1176. The defendants, including the architect, moved to dismiss the complaint. The architect relied on Paralyzed Veterans of America, 945 F. Supp. 1, arguing that an entity must both design and construct a facility in order to be potentially liable under ADA Section 303.* Johnson, 963 F. Supp. at 1177-8. The court rejected this argument without discussion and denied the motion. Id. at 1178.

Cases interpreting similar language in the FHAA discuss this issue in more depth. For example, in Doering v. Pontarelli Builders, Inc., the district court discusses all of the prior reported decisions and concludes that the correct interpretation of the FHAA is that it applies to entities who either design or construct inaccessible facilities. 2001 U.S. Dist. LEXIS 18856 at *9-11. It agreed with the court’s statement in Hartz Construction, 1998 U.S. Dist. LEXIS 973, at *1, that interpreting the FHAA such that entities could insulate themselves from liability by segregating the design and construction of a facility “is a frank absurdity.” Id. at *3. It also agreed with the court’s conclusion in Montana Fair Housing, 81 F. Supp. 2d at 1069, that the FHAA’s “design and construct” language “should be read disjunctively to effectuate the broad remedial sweep of the statute.” Id. Finally, the Doering court notes that the FHAA does not describe who is liable and, as a result, it is “more naturally read as attempting to make clear that discrimination occurs when premises subject to the statute are improperly both designed and constructed.” Id. at *11.

Architects and Contractors May Still Be Indirectly Liable

Thus far, this article has focused on architect and contractor statutory liability under the ADA. It is important to note, however, that architects and contractors may also be held liable for failure to design and/or build compliant facilities based on contract or tort. Thus, even if architects and contractors may not be held liable directly under the ADA, they still may be indirectly liable if their contracts mandate ADA compliant work, or if they were negligent in failing to design or construct compliant facilities. There is nothing in the Act, or any cases interpreting it, that prevents an owner or operator held liable for ADA violations from seeking indemnity from its architect or contractor for its costs in correcting violations and paying damages and penalties, based either on an express contractual provision or a theory of negligence.

In other contexts, regulations implementing and cases interpreting
the ADA have recognized that entities may allocate responsibility for ADA compliance among themselves by contract. Landlords and tenants may allocate this responsibility. 28 C.F.R. § 36.201(b) (landlord-tenant responsibilities); ADA, DoJ, TAM § III-1.2000 (Jan. 1994); Botosan v. Paul McNally Realty, 216 F.3d 827, 832-3 (9th Cir. 2000) (citing TAM); see also Independent Living Resources v. Oregon Arena Corp. (Independent I), 982 F. Supp. 698, 767-8 (D. Or. 1997). Other entities may be able to allocate ADA responsibility by contract as well. See Independent Living Resources v. Oregon Arena Corp. (Independent II), 1 F. Supp. 2d 1124, 1148 (D. Or. 1998) (stadium owner contended it was entitled to contractual indemnification from the city of Portland for any ADA liability).

Whether an architect or contractor will be liable to an owner or operator for ADA violations will depend first upon the terms of their contract regarding who is responsible for ensuring ADA compliance and regarding indemnification. If there are no such terms in the parties’ contract, or if the parties are not in contractual privity, the applicable jurisdiction’s law regarding extra-contractual indemnity, also known in some jurisdictions as equitable indemnity, may determine whether an owner or operator will be entitled to indemnification from an architect or contractor. To the extent it may be negligent to design or build non-compliant facilities, the architect or contractor may owe indemnity.9

Conclusion

There is a strong argument that the Ninth Circuit position is correct and that architects or contractors may not be held statutorily liable for designing or building work that does not comply with ADA requirements. However, there is a split of authority, and potential exposure does exist, particularly in the Eighth Circuit and jurisdictions that have followed its rule. Moreover, no matter where a project is located, architects and contractors may be held indirectly liable under contractual or equitable indemnity principles. Therefore, though the architect or contractor may not be exposed to statutory liability, their clients are, and the architect or contractor should know ADA access requirements well. In order to avoid or at least limit their liability on an indemnity theory, they should be certain they disclose ADA responsibility in their contracts, and limit their indemnity exposure if they can.

Aaron Silverman is a shareholder at Rogers Joseph O’Donnell & Phillips and a member of the firm’s Construction, Government Contracts, and Employment Practice Groups. He can be reached at asilverman@rjp.com.

Endnotes


5 Under the second prong of the PVA court’s decision, a general contractor would not be liable under Section 303, even if it both designed and built a facility, because it would not qualify as an owner or operator of the facility. Id. at 2.

6 While the District Court in United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262, 1267-8 (D. Minn. 1997), also mentions this issue, it did not have to decide the issue on the defendant architect’s motion to dismiss because the plaintiff’s complaint alleged that the architect both designed and constructed the allegedly inaccessible facility.

7 Section 3604(f) of the FHA prohibits discrimination in the sale or rental of a dwelling and defines discrimination as including discrimination “in connection with the design and construction of covered multifamily dwellings” such as “failure to design and construct those dwellings in such a manner . . .” that the dwellings are accessible. 42 U.S.C. § 3604(f)(3)(c); see also Doering v. Pontarelli Builders, Inc., 2001 U.S. Dist. LEXIS 18856 at *1-2 (N.D. Ill. 11/16/01).

8 The architect also argued that Section 302’s limitation of liability to owners and operators applies to Section 303 “design and construct” liability and, since it neither owned nor operated the arena, it could not be liable under that section. The court rejected this argument because it would create an unintended gap in ADA coverage. Johnson, 963 F. Supp. at 1178.