Disability, Accessibility, and Liability: Who’s Responsible for ADA and FHA Compliance?

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RECENT CASE LAW ON INDEMNITY FOR ADA AND FHA VIOLATIONS

• In 2010 a Federal Appellate Court sitting in Maryland (4th Circuit) broke new ground on whether owners and developers can seek indemnity from third parties for their own ADA and FHA violations.

• In 2012 the Nevada Supreme Court became the first high state court in the country to rule on this controversial issue.

• Before we get to those cases, let’s take a step back to review the ADA and the FHA.
WHY WAS THE ADA ENACTED?

The Americans with Disabilities Act (ADA) of 1990 (and amended 2008)

- ADA enacted to address “pervasive social problem” of the disabled being excluded from full participation in society
- George Bush signed the ADA on July 26, 1990 (amended in 2008 to broaden the definition of those covered and their protections)
- Effective July 29, 1992, ADA prohibits discrimination against the disabled in employment, public services, public accommodations and telecommunications
- ADA was the world’s first civil rights law protecting the disabled
WHAT IS THE PURPOSE OF THE ADA?

To provide a clear and comprehensive mandate for elimination of discrimination against individuals with disabilities

To provide clear, strong, consistent, enforceable standards addressing discrimination

To ensure the federal government enforces standards on behalf of individuals with disabilities

To invoke congressional authority to address discrimination
WHO’S RESPONSIBLE FOR ADA COMPLIANCE?

• What does the ADA apply to?
  – The ADA applies to both public and private places of public accommodation
  – Essentially any place (public or private) which is open to members of the public and relates to “commerce” but not “residential”
  – Exemptions for private clubs and religious organizations and special rules for historic properties
WHO’S RESPONSIBLE FOR ADA COMPLIANCE?

• What is a “disability”?  
  – An individual with a physical or mental impairment that substantially limits one or more major life activities of such individual

• What is a “major life activity”?  
  – Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, communicating and working
WHO’S RESPONSIBLE FOR ADA COMPLIANCE?

• Who must comply with the ADA as related to public and private places of public accommodation”?
  – Potentially everyone involved in the design and construction of such places and those who own, operate, maintain and control such places
  – Includes the entire design and construction team whose scopes of work touch upon ADA compliance
WHO’S RESPONSIBLE FOR ADA COMPLIANCE?

Such entities could include, but are not limited to:

- Owners
- Developers
- Licensees
- Operators
- Landlords
- Tenants
WHO’S RESPONSIBLE FOR ADA COMPLIANCE?

- Construction Managers
- Consultants and Interior Designers
  - Usually ADA and Specialty Consultants (i.e., restaurants, theatres, stadiums, convention centers, hotels, etc.)
- General Contractors
- Design Professionals
  - Usually Architects, MEP’s and Civil Engineers
- Subcontractors

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WHO’S RESPONSIBLE FOR ADA COMPLIANCE?

• Who has standing to sue under the ADA?
  – Generally any individual with a disability who has been denied equal access to a public or private place of public accommodation
  – Any qualified organization representing the disabled who have been denied equal access
  – The Department of Justice (DOJ) seeking to enforce standards of compliance to ensure equal access
WHO’S RESPONSIBLE FOR FHA COMPLIANCE?

• Who is protected by the Fair Housing Act (FHA) of 1968 (and as amended 1988)?

  – The original act protected against discrimination based on race, religion, national origin and sex

  – The 1988 amendment added disability and family status to the list of those protected
WHO’S RESPONSIBLE FOR FHA COMPLIANCE?

• What is the purpose of the Fair Housing Act (FHA) of 1968 (and as amended 1988)?

  – To eliminate housing discrimination against multiple classes of individuals including disabled individuals
  – To promote residential integration
WHO’S RESPONSIBLE FOR FHA COMPLIANCE?

• What does the FHA apply to?
  – Applies to all single family homes owned by private persons where a real estate broker is used
  – All single family homes owned by corporations or partnerships
  – Does not require single family homes to be accessible; rather cannot not discriminate against the disabled (among other classes) in any transaction
WHO’S RESPONSIBLE FOR FHA COMPLIANCE?

– All multifamily dwellings including:
  • Townhouses
  • Condominiums
  • Apartments
  • Certain % must be modifiable

– Exemptions:
  • If dwelling has four or less units and if the owner lives in one of the units
  • Qualified senior housing
  • Private clubs and organizations (if limited to members only)
WHO’S RESPONSIBLE FOR FHA COMPLIANCE?

Who must comply with the FHA?
Direct providers of housing including, but not limited to:

- Landlords
- Real estate companies
- Municipalities
- Banks and other lending institutions
- Homeowners insurance companies
WHO IS RESPONSIBLE FOR FHA COMPLIANCE?

But could also include the same universe of entities who must comply with the ADA, including but not limited to, the entire design and construction team due to “Catch All” provision.

“Catch-all” Provision: Any person or entity who has “engaged in a pattern or practice of discrimination or where denial of rights to a group of persons raises an issue of general public importance”
WHO IS RESPONSIBLE FOR FHA COMPLIANCE?

Who has standing to sue under the disabilities provision of the FHA?

- Individuals with disabilities (or their parents or associates who were denied housing)
- Housing providers prevented from building or operating housing
- Fair Housing organizations representing the disabled or others denied housing
ADA/FHA LAWSUITS AGAINST DESIGN PROFESSIONALS

• What are the typical scenarios where architects are sued for ADA or FHA violations?
  – Direct suit by disabled person
  – Direct suit by organization representing the disabled
  – Direct suit by Department of Housing and Urban Development (HUD)
  – DOJ as enforcement arm for ADA and FHA
  – Cross-action by others who have been sued directly by one or more of the above
ADA/FHA LAWSUITS AGAINST DESIGN PROFESSIONALS

Thus architects can be sued a number of ways by a number of parties for a number of violations all relating to the same design of one or more projects.

Can be sued directly by multiple classes of plaintiffs; and

Have historically been sued by owners who hired them and are now seeking indemnity for their damages.
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• In Equal Rights Center v. Niles Bolton 602 F.3d 597 (2010) ("Niles Bolton") the architect was retained by developer Archstone to design multiple apartment complexes nationwide

• Equal Rights Center ("ERC") sued Archstone and Niles Bolton for violations of ADA and FHA

• Archstone settled with the ERC
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• Archstone agreed to pay $1.4 million to ERC and agreed to retrofit 71 properties (15 of which were designed by Niles Bolton)

• Niles Bolton settled separately with ERC with no admission of fault

• Archstone filed a cross-claim in federal court against Niles Bolton for express indemnity, implied indemnity, breach of contract and negligence
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• Archstone sought to recover from Niles Bolton all monies paid to ERC, the cost of the retrofits plus attorneys’ fees and costs

• Niles Bolton filed summary judgment arguing:
  – ADA/FHA do not expressly provide rights of indemnity
    • ADA exception for landlord/tenant relationships
  – Thus it would undermine the purpose of ADA and FHA if Archstone could seek indemnity
  – Archstone’s state-law claims were preempted by federal law under the doctrine of obstacle preemption
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• Archstone argued that Niles Bolton was hired to comply with ADA and FHA and had superior knowledge and skills and it would be “unfair” if it could not recover their damages

• Trial court disagreed and held that:
  – ADA and FHA do not expressly permit indemnity
  – All of Archstone’s claims were at their core, merely de facto indemnity claims
  – Allowing such claims would undermine the purpose of ADA/FHA and were thus preempted
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• Archstone appealed to the United States Court of Appeals (Fourth Circuit in Maryland)
• Archstone argued that allowing it to pursue its state-law claims did not pose an obstacle to enforcement of the underlying purpose of the ADA or FHA and that there was no conflict with any federal law
• However, the federal appellate court affirmed the lower court’s ruling and upheld summary judgment in favor of Niles Bolton
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• The Niles Bolton appellate decision was published in 2010

• The appellate court went to great lengths to explain the doctrine of obstacle preemption which applies “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”.

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RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

Recall the purposes of the ADA:

- To provide a clear and comprehensive mandate for elimination of discrimination against individuals with disabilities
- To provide clear, strong, consistent, enforceable standards addressing discrimination
- To ensure the federal government enforces standards on behalf of individuals with disabilities
- To invoke congressional authority to address discrimination
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

Recall the purposes of the FHA:

- To eliminate housing discrimination against multiple classes of individuals including disabled individuals
- To promote residential integration
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

• In Niles Bolton the Court of Appeal reasoned that those purposes would be undermined if parties could seek indemnity for their own ADA or FHA violations

• Thus it didn’t matter if it was “unfair” to Archstone

• All that mattered is what would maximize compliance and accessibility in the long run
The legal community was watching the Niles Bolton action very closely, especially those of us with ADA or FHA lawsuits pending in other states.

The problem is that while the Niles Bolton case would be very persuasive in another federal court hearing the same issue, it was not binding authority on other state courts (except perhaps Maryland).
RECENT ADA/FHA CASE INVOLVING AN ARCHITECT

Further, even legal scholars had to overcome the “it’s not fair” argument.

Topically, there were good reasons why owners should be able to “pass through” monies paid to settle lawsuits and to retrofit non-compliant conditions.

After all, they hired the ADA “experts” to help them be fully compliant.
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• In the same timeframe that Niles Bolton was working its way through the federal lower and appellate courts, our office was litigating a similar case in Nevada state court.

• In 2005/2006, the DOJ investigated Mandalay Corporation and its related entities for alleged ADA violations.

• The investigation focused on multiple properties including Mandalay Bay Hotel and Casino and THEhotel in Las Vegas.
RECENT ADA/FHA CASES INVOLVING DESIGN PROFESSIONALS

• In approximately 2006, MGM acquired Mandalay Bay
• In 2007 MGM settled with the DOJ and agreed to pay a fine and retrofit aspects of both the original hotel as well as the expansion project
• Shortly after the settlement, Mandalay sued multiple design professionals and contractors that worked on the project
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• In 2008, Mandalay amended its complaint to name Rolf Jensen & Associates (RJA) as a defendant
• Back in 1996, RJA served as a fire protection consultant retained by the architect on the original hotel
• In 1997, during construction, a question arose about toilet room doors in non-accessible rooms
• Do they need to be “extra wide”?
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

- Although RJA was not serving in the capacity of an ADA consultant, it was asked to review the general contractor’s RFI
- RJA commented that while the issue was not definitive (under the then-current guidelines) the owner would be wise to take the most conservative approach and maximize accessibility to avoid a civil lawsuit
- Impact of the emerging “doctrine of visitability”
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• Mandalay elected not to change out the doors
• Mandalay thus avoided a significant time and cost impact associated with changing out some 4000 doors that had been partially framed or installed (which would arguably serve as an offset to Mandalay’s later claimed damages)
• In 1998, the project opened up on time and within budget
• But, RJA’s words about a potential civil lawsuit turned out to be prophetic
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

In 2002, Mandalay retained RJA directly as an ADA consultant for the expansion project.

RJA was tasked with reviewing only limited portions of the project wherein the owner had questions about ADA compliance.

Later, RJA learned that much of their advice was ignored.
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• Shortly after the Niles Bolton case was published, on behalf of RJA, we filed a motion for summary judgment seeking dismissal of all of Mandalay’s state-based claims for:
  – Express indemnity
  – Breach of contract
  – Breach of warranty
  – Negligent misrepresentation
We argued the facts and law of Niles Bolton and asserted while not binding authority in Nevada, the decision was nonetheless very persuasive.

Mandalay made all the same arguments that Archstone had made.

The trial court found that Niles Bolton was not binding on a Nevada state court and declined to follow it, thus denied summary judgment.
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• On behalf of RJA we filed a Petition for Writ of Mandamus to the Nevada Supreme Court seeking review and reversal of the trial court’s denial of RJA’s summary judgment

• After nearly two years, on August 9, 2012, the Nevada Supreme Court issued its opinion in Rolf Jensen v. Eighth Judicial District Court 128 Nev. Advance Opinion 42 (“Rolf Jensen”)
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

In a 17 page *en banc* decision with no dissent, the Court ordered the trial court to reverse its denial of RJA’s motion for summary judgment and instead order judgment in RJA’s favor.

The Court based its ruling that all of Mandalay’s pending state-based claims were an obstacle to the objectives of the ADA and therefore preempted by federal law.
The Court held that the ADA was enacted to remedy discrimination against the disabled and therefore any owner who constructs a facility of public accommodation not readily accessible is liable for unlawful discrimination.

The Court further held that except for landlord-tenant relationships, the ADA does not provide for a private right of indemnity and that Mandalay’s claims were merely *de facto* indemnity claims and thus barred.
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• Applying the law, the Court found that allowing Mandalay to maintain its indemnity claims would weaken owners’ incentives to prevent violations and thus conflicted with the ADA’s purpose and intent because owners could contractually maneuver themselves to ignore their non-delegable duties to comply with the ADA.
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

• The Court stated that allowing such maneuvering would frustrate Congress’ goal of preventing discrimination and intrude on the remedial scheme of the ADA which, does not expressly or impliedly permit rights of indemnity (except in the limited landlord-tenant relationship)

• Relying on Niles Bolton, the Court found that Mandalay’s state-law claims were preempted and thus barred under the doctrine of obstacle preemption
RECENT ADA/FHA CASE INVOLVING DESIGN PROFESSIONALS

- Niles Bolton and Rolf Jensen have changed the legal landscape of ADA and FHA cases
- Owners and developers across the country routinely sue architects during or after settlement of lawsuits brought by HUD, DOJ or other organizations representing the disabled
Owners and developers uniformly have decision-making authority on ADA compliance and may exert pressure on all members of the design team to minimize the scope and cost of compliance, or worse, override their recommendations.

Design team members are almost always incentivized to maximize compliance and rarely if ever have any financial incentive to do otherwise.
By contrast, owners are almost always financially incentivized to minimize compliance, particularly where there is a time or cost impact at stake.

Even if the design team has good defenses, they have historically been dragged into these costly and protracted cases.
WHAT CAN ARCHITECTS DO?

• What can architects do to prevent being dragged into a costly and protracted ADA or FHA case?
  – Educate their clients as to ADA and FHA requirements and their impacts
  – Check local and state laws re: visitability
  – Maximize compliance in every project, especially in the “gray areas”
  – Do not succumb to pressure from the client to minimize compliance
WHAT CAN ARCHITECTS DO?

• What can architects do to prevent being dragged into a costly and protracted ADA or FHA case?
  – If the client disregards the architect’s recommendations, they must document their file in writing
  – If the architect sees construction team members disregarding or misapplying design intent, they must call it to the owner’s attention and document same in writing
  – Be aware that the governing body’s interpretation will likely be upheld
WHAT CAN ARCHITECTS DO?

• What can architects do if despite their best efforts, they are still dragged into a lawsuit?

  – If the matter is venued in state court, counsel should seek to have it transferred to federal court which should follow Niles Bolton and federal law
  – Counsel should file early motions seeking dismissal based on recent law
  – If unsuccessful, seek to demonstrate that the architect employed all reasonable efforts to secure full compliance
QUESTIONS?