Industry News

Ninth Circuit Holds Architects Not Liable Under ADA

Ruling governs liability in Western States

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The United States Court of Appeals for the Ninth Circuit weighed in on the side of designers regarding liability under the Americans with Disabilities Act (ADA). Courts have ruled both ways on the question of designer liability under the ADA, but until August 6, 2001, no case had reached the Court of Appeals level in the Ninth Circuit. That silence came to an end in *Lonberg v. Sanborn Theaters, Inc.*, ___ F.2d ___ (9th Cir. 2001) when the Court of Appeals held that designers are *not* within the class of persons who can be sued under the ADA. Until the Supreme Court addresses this issue, designers in the western states are not subject to lawsuits under the ADA based on their designs.

One Caveat ...

Although designers are not directly liable under lawsuits for the failure to design or construct in accordance with the ADA, this does not mean that the designer will escape all liability for designs that do not comply with the Act's requirements. It is very likely that any owner or operator sued for a project designed out of compliance will probably assert a negligence claim against the designer. But such a claim will concern standard of care issues, rather than the civil rights claims involved in an ADA suit.

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The Unsettled Question of Designer Liability Under the ADA

Designers' exposure to ADA liability is an unsettled area of law, with courts in different jurisdictions arriving at opposite results on essentially similar sets of facts. Thus, the question of whether a designer could be directly sued for ADA discrimination depends on where the lawsuit occurred. In Minnesota and Florida, a person could hold an architect accountable under the ADA for discrimination if the design did not provide equal accommodation to persons with disabilities.[1] These courts held that the architect's "significant degree of control over the design and construction" of the facilities justified liability under Section 12183(a) of the ADA. But in the District of Columbia, the federal courts have held that the ADA does not impose liability on designers because they are neither the owners nor operators of the facilities.[2]

The principal distinction between the two lines of case lies in how the courts apply the language regarding "design and construct" that appears in Section 12183(a) and its relationship to the preceding section. That section (Section 12182) provides the "general rule" for places of public accommodation. The general rule prohibits discrimination in places of public accommodation and limits liability for discrimination in such places to those persons who own, lease (or lease to another), or operate the place of public accommodation. The section does not define discrimination, but subsequent sections fulfill that function. But the next section (12183) states:

> [A]s applied to public accommodations and commercial facilities, discrimination for the purposes of Section 12182(a) of this title includes—
>
> 1) a failure to design and construct facilities for first occupancy … that are readily accessible to and usable by individuals with disabilities ….

The divergence between the competing views in the courts is the result of different views over whether inclusion of "commercial facilities" in Section 12183 establish "design and construct" activities as a separate basis for liability. Section 12182 refers only to places of public accommodation and makes no mention of commercial facilities.

The courts imposing liability on designers interpret liability for the design of *commercial facilities* as distinct from that for places of public accommodation. In their view, liability for discrimination in the design and construction of any *commercial facility* is not limited to owners, lessors/lessees, and operators. Rather, it can extend to anyone who designs or constructs a noncompliant building.

In contrast, courts that do not hold designers liable have interpreted Section 12183's "design and construct" language as only referring to the definition of what constitutes discrimination—not who may be held liable. In the view of those courts, the failure to design and construct in accordance with the ADA results in liability similar to that under the "general rule" of Section 12182(a) and thus applies only to owners, lessors/lessees, and operators of a public accommodation or of a commercial facility.

Footnotes

1 *United States v. Ellerbe Becket, Inc.*, 976 F.Supp. 1262 (D.Minn. 1997) (holding architect liable for seating with unequal sightlines); *Johanson v. Huizenga Holdings, Inc.*, 963 F.Supp. 1175 (S.D. Fla. 1977) (also holding architect liable for sight-lines).

2 *Paralyzed Veterans of America v. Ellerbe Becke*t, 945 F.Supp. 1 (D.D.C. 1996) (refusing to extend ADA liability to architects).

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The New Law of the Ninth Circuit

In *Lonberg v. Sanborn Theaters, Inc.*, two plaintiffs sued a theater owner and its architect for a new facility in which the plaintiffs claimed the seating and restroom facilities were designed and built out of compliance with the ADA. The only claim against the architect was for an injunction to compel it to design in compliance with the ADA.

The district court refused to grant the architect summary judgment on its claim that it could not be held liable because it was not the owner, lessor/lessee, or operator of the facility; holding that an architect can be liable based on its having a significant control over the design and construction.

But the Ninth Circuit rejected the argument that Section 12183 imposed liability on a broader class of persons regarding commercial facilities than Section 12182 holds liable regarding public accommodations. In reaching its conclusion, the court examined the legislative history in an attempt to determine whether Congress intended broader liability for commercial facilities.

Although the evidence it found was inconclusive, on the balance the court decided against the broader liability. Originally both Sections 12182 and 12183 were in a single section, making the types of prohibited discrimination uniform for both places of public accommodation and commercial facilities. The legislative history indicated that Congress split the provision into two sections because it intended to make the ADA provisions apply less broadly to commercial facilities than to places of public accommodation.[3]

In addition, the court noted, Congress gave no indication that it intended to include any different parties as potentially liable for the two categories of projects. On the other hand, the court noted that the language regarding *who* could be held liable for ADA discrimination was added only after the two sections were divided. Some commentators have read Congress' decision to specify liability for owners, lessors/lessees, and operators for only one of the two categories as an indication that it intended something different for the other category.[4]

Courts following that reasoning had developed the "significant degree of control" test to hold designers liable. The Ninth Circuit found the significant degree of control test unsupported by any language either in the ADA or in the legislative history. In the court's view, the two sections call for a parallel interpretation, which is consistent with the other two parts of the ADA (prohibiting employment discrimination and discrimination by public entities). The "design and construct" language specifies one of the activities that may constitute discrimination if not conducted in compliance with the ADA. But it does not expand the class of persons who can be held liable.

Thus, designers are not liable under the ADA if they are not also the owner, lessor/lessee, or operator of a noncomplying facility.

Footnotes

3 *Lonberg v. Sanborn Theaters, Inc.*, ___ F.2d ___, ___ (9 th Cir. 2001) (citing William L. Killion & Gregory R. Merz, *Franchisor Liability for Failure by Franchisees to Comply with the Americans with Disabilities Ac*t, 19 Franchise L.J. 141, 152 (2000)).

4 *Id.* (citing James P. Colgate, Note, *If you Build It, Can They Sue? Architects' Liability Under Title III of the AD*A, 68 Fordham L. Rev. 137, 158-159 (1999)).