



# Disability, Accessibility & Liability: What an Architect Should Know

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*“On the road to Mandalay  
Every mistake I’ve ever made  
Has been rehashed and then replayed . . . .”*

–The Road to Mandalay, by Robbie Williams

## Introduction

President George H.W. Bush signed the Americans with Disabilities Act (“ADA”) on July 26, 1990. Effective July 29, 1992, the ADA prohibits discrimination against the disabled in employment, public services, public accommodations and telecommunications. The ADA was enacted to address the “pervasive social problem” of the disabled being excluded from full participation in society. It was the world’s first civil rights law protecting the disabled. The ADA was amended in 2008 to broaden the definition of those covered by the Act and their protections.

Congress set forth the multiple purposes of the ADA as follows: (1) to provide a clear and comprehensive mandate for elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination; (3) to ensure that the federal government enforces standards on behalf of individuals with disabilities; and (4) to invoke congressional authority to address discrimination.

The ADA is divided into five sections, or “titles”. Title I governs discrimination against disabled individuals in employment. Title II prohibits disability discrimination by public entities at the state and local (*i.e.*, county, city, municipal, school district) level, and applies to public transportation. Title III is the section of the ADA which most impacts architects, as it governs places of public accommodations. Title IV addresses telecommunications, and Title V includes a number of miscellaneous provisions, including an anti-retaliation or coercion provision to protect those who exercise their rights under the Act.

The ADA applies to both public and private places of public accommodation. A place of public accommodation is defined as essentially any place (public or private) which is open to members of the public and relates to “commerce”, but is not “residential”. There are, however, exemptions for private clubs and religious organizations, and special rules for historic properties.

Under the ADA an individual is defined as having a “disability” if he or she has a physical or mental impairment that substantially limits one or more “major life activities” of such individual.

A “major life activity” consists of 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 and Who Can Sue?**

Those who own, operate, maintain and control public and private places of public accommodation must comply with the ADA. Such entities could include, but are not limited to, owners, developers, operators, licensees, landlords and tenants. Additionally, potentially everyone involved in the design and construction of such places must comply, including the entire design and construction team whose scopes of work touch upon ADA compliance. These parties can include construction managers, general contractors, subcontractors, design professionals (usually architects, MEPs and civil engineers), consultants (usually ADA and Specialty Consultants, *i.e.*, for restaurants, theatres, stadiums, convention centers, hotels, etc.) and interior designers.

The language of the ADA is broadly written so as to authorize the ADA to be enforced by “any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . .” As applied in practice, numerous potential plaintiffs have standing to sue under the ADA. These include: (1) Any individual with a disability who has been denied equal access to a public or private place of public accommodation; (2) any qualified organization representing the disabled who have been denied equal access; and (3) the Department of Justice (“DOJ”) seeking to enforce standards of compliance to ensure equal access.

Private disabled citizens who become plaintiffs in an ADA action are only permitted to receive injunctive relief (a court order requiring the defendant to remedy ADA violations at its own expense) and attorneys’ fees. The ADA does *not* authorize them to recover money damages. However, some states have enacted state laws which supplement the ADA so as to permit individual disabled plaintiffs to directly recover money damages from businesses which do not comply with the ADA. For example, California Civil Code section 54.3 provides for the imposition of three times the amount of actual damages against any person, firm or corporation which “interferes with the rights of an individual with a disability” with respect to “admittance to or enjoyment of public facilities.” Consequently some lawyers are incentivized to institute “serial” ADA litigation, in part due to the recoverability of attorneys’ fees under the ADA.

### **Who’s Responsible for FHA Compliance and Who Can Sue?**

Litigation and governmental enforcement actions often encompass both the ADA and the Fair Housing Act (“FHA”) due to an overlap in the subject matter of those two acts, particularly since the FHA was amended in 1988. The original Act, which became law in 1968, 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 by the Act.

The purpose of the FHA is to eliminate housing discrimination against multiple classes of individuals, including disabled individuals, and to promote residential integration. The FHA applies to all single family homes owned by private persons where a real estate broker is used, and all single family homes owned by corporations or partnerships. However, it does *not* however require

single family homes to be accessible to the disabled. Rather, one cannot *discriminate* against the disabled (among other classes) in any transaction covered by the Act.

The FHA applies to all “multifamily dwellings”, including townhouses, condominiums and apartments. A certain percentage of the dwelling must be modifiable to accommodate the disabled. There are however exemptions: (1) if the dwelling has four or less units and if the owner lives in one of the units; (2) qualified senior housing; and (3) private clubs and organizations (if limited to members only).

“Direct providers” of housing must comply with the FHA, including, but not limited to, landlords, real estate companies, municipalities, banks and other lending institutions, and homeowners’ insurance companies. In addition, those who must comply with the FHA could also include the same universe of entities who must comply with the ADA, including the entire design and construction team. There is also an express “catch all” provision in the FHA, which encompasses 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.” This “catch all” provision could substantially broaden the class of individuals and organizations which may be subject to FHA compliance.

Those who clearly have standing to sue under the disabilities provision of the FHA include: (1) individuals with disabilities (or their parents and associates); (2) housing providers which were prevented from building or operating housing; and (3) Fair Housing organizations representing the disabled or others denied housing.

From the foregoing, typical scenarios in which architects are sued for ADA or FHA violations include: (1) a direct suit by disabled person; (2) a direct suit by an organization representing the disabled; (3) a direct suit by Department of Housing and Urban Development (“HUD”); (4) an action by the DOJ as the enforcement arm for the ADA and FHA; or (5) a cross-action by others who have been sued directly by one or more of the above.

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. They can be sued directly by multiple classes of plaintiffs, and they have historically been sued by owners and developers who hired them and are seeking indemnity for their damages.

## Case Study #1

Recent case law provides a defense in some jurisdictions with respect to indemnity actions. In *Equal Rights Center v. Niles Bolton*<sup>i</sup>, (“Niles Bolton”) the architect was retained by the developer, Archstone, to design multiple apartment complexes nationwide. An organization representing the disabled, the Equal Rights Center (“ERC”) sued Archstone and Niles Bolton for violations of ADA and FHA. Archstone settled with the ERC. Under the terms of the settlement, 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 the ERC with no admission of fault. Archstone then filed a cross-claim in federal court against Niles Bolton for express indemnity, implied indemnity, breach of contract and negligence. Archstone sought to recover from Niles Bolton all monies paid to ERC, the cost of the retrofits, plus attorneys’ fees and costs.

In response to Archstone’s cross-claims, Niles Bolton filed a motion for summary judgment, arguing that: (1) the ADA and FHA do not expressly provide rights of indemnity except in limited context of landlord/tenant relationships. Niles Bolton contended that it would therefore undermine the purpose of the ADA and FHA if Archstone could seek indemnity, and that Archstone’s state-law claims were therefore preempted by federal law under the doctrine of obstacle preemption.

In its opposition to the motion, Archstone argued that Niles Bolton was hired to comply with the ADA and FHA, and had superior knowledge and skills, and that it would be “unfair” if it could not recover its damages. The trial court disagreed with Archstone, and held that: (1) the ADA and FHA did not expressly permit indemnity; (2) all of Archstone’s claims were, at their core, merely *de facto* indemnity claims; and (3) allowing such claims would indeed undermine the purpose of the ADA and FHA, and were thus preempted.

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

The Court of Appeals stressed the underling purposes of the ADA. As referenced above, those express purposes set forth by Congress are as follows: (1) To provide a clear and comprehensive mandate for elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination; (3) to ensure the federal government enforces standards on behalf of individuals with disabilities; and (4) to invoke congressional authority to address discrimination.

As also referenced above, the purposes of the FHA are as follows: (1) to eliminate housing discrimination against multiple classes of individuals, including disabled individuals; and (2) to promote residential integration.

The Court of Appeals reasoned that the above purposes would be undermined if parties could seek indemnity for their own ADA or FHA violations. Thus, it did not matter if the result was “unfair” to Archstone. Rather, all that mattered is what would *maximize* compliance and accessibility in the long run.

## **Case Study #2**

In the same time frame that *Niles Bolton* was working its way through the federal lower and appellate courts, Weil & Drage was litigating a similar case in Nevada state court. In 2005/2006, the DOJ investigated Mandalay Corporation (“Mandalay”) and its related entities for alleged ADA violations. The investigation focused on multiple properties, including the Mandalay Bay Hotel and Casino and an expansion project, THEhotel in Las Vegas. In approximately 2006, MGM Mirage (“MGM”) acquired Mandalay as a subsidiary. In 2007, MGM settled with the DOJ on behalf of its subsidiary, Mandalay, 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 who worked on the project. In 2008, Mandalay amended its complaint to name Rolf Jensen & Associates (“RJA”) as a defendant.

By way of background, in 1996 RJA served as a fire protection consultant retained by the architect on the original hotel. In 1997, during construction, a question arose as to whether toilet room doors in *non-accessible* rooms needed to be “extra wide.” Although RJA was not serving in the capacity of an ADA consultant, it was asked to review the general contractor’s Request for Information (“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.

Despite RJA’s comment, Mandalay elected not to stop work in order to change out the toilet room doors. Mandalay thus avoided a significant time and cost impact associated with changing out some 4000 doors that had been partially framed or installed. In 1998, the project opened up on time and within budget. Ultimately, however, RJA’s words about a potential civil lawsuit proved prophetic.

Fast forward to 2002, Mandalay retained RJA directly as an ADA consultant for the expansion project. At that time, 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 its advice was not followed.

As mentioned above, Mandalay brought RJA into its lawsuit as a defendant in 2008. Shortly after the *Niles Bolton* case was published in 2010, Weil & Drage filed a motion for summary judgment on behalf of RJA seeking dismissal of all of Mandalay's state-based claims for: (1) express indemnity; (2) breach of contract; (3) breach of warranty; and (4) negligent misrepresentation. In the motion, Weil & Drage argued the facts and law of *Niles Bolton* and asserted that, while not binding authority in Nevada, the decision was nonetheless very persuasive. Mandalay, in turn, made all the same arguments that Archstone had made. The trial court found that the *Niles Bolton* decision was *not* binding on a Nevada state court and declined to follow it, thus denying summary judgment.

On behalf of RJA, Weil & Drage 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 motion for 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*<sup>ii</sup> ("*Rolf Jensen*"). 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 on the conclusion that all of Mandalay's pending state-based claims were obstacles 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. Applying the law, the Court found that allowing Mandalay to maintain its indemnity claims would weaken owners' incentives to prevent violations. Accordingly, Mandalay's claims 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. 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.

*Niles Bolton* and *Rolf Jensen* have changed the legal landscape of ADA and FHA cases. Other federal courts outside of *Niles Bolton*'s Fourth Circuit (which includes Maryland, Virginia, West Virginia, North Carolina and South Carolina) have now followed the Fourth Circuit's lead, beginning with the Southern District of Ohio (*Miami Valley Fair Housing Center, Inc. v. Campus Village Wright State, LLC*<sup>iii</sup>) and the Southern District of Mississippi (*United States v. Bryan Co.*<sup>iv</sup>). To date, however, Nevada's Supreme Court is the first high state court in the nation to rule on this issue.

## Lessons Learned

Owners and developers across the country routinely sue design professionals 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, it has historically been dragged into these costly and protracted cases.

Ultimately, what can architects do to prevent themselves being dragged into a costly and protracted ADA or FHA case? Several steps can help, including: (1) maximize compliance in every project, especially in the “gray areas”; (2) do *not* succumb to pressure from the client; (3) if the client disregards the architect’s recommendations, the architect should document his or her file in writing (note, if it is not in writing, “it didn’t happen”); and (4) if the architect sees construction team members disregarding or misapplying design intent, he or she should call it to the owner’s attention and document same *in writing*.

With respect to the “gray areas” alluded to above,<sup>v</sup> there are various provisions in the ADA which do not call for a specific height, width, size, or location of a particular feature such as, for example, a door opening, handle, braille signage, etc. These provisions are often referred to as “prescriptive” standards. Other aspects of the ADA are phrased in terms of broad general parameters. These parameters, in contrast to prescriptive standards, consist of performance requirements set forth as a range or spectrum of acceptable results.

For example, under Title II of the ADA, public facilities must be made accessible to such an extent that compliance does not impose an “undue financial and administrative burden”, and under Title III of the ADA, places of public accommodation must be brought into compliance “to the maximum extent feasible.” In the 1995 case of *Vande Zande v. State of Wisconsin Dept. of Administration*<sup>vi</sup>, the Seventh Circuit Court of Appeals adopted a two-part test for demonstrating compliance with these standards: (1) the accommodation must be shown to be “reasonable in the sense both of efficacious and of proportional to costs”; and (2) the costs must not be excessive in relation either to the benefits of the accommodation or to the provider’s financial health or survival. Doubtless, there will be many instances in which attorneys could make valid arguments on both sides as to these standards. The litigation-averse architect should adopt a broad interpretation of the phrase “to the maximum extent feasible” when seeking to design an accommodation.

As another example of a “gray area”, some provisions of the ADA call for accommodations which provide access to the disabled in a manner which is “functionally equivalent” to the manner in which that accommodation would be utilized by someone who is not disabled. Regarding the “functionally equivalent” standard, in the 2011 case of *Sorenson Communications, Inc. v. Federal Communications Commission*<sup>vii</sup>, the United States Tenth Circuit Court of Appeals dealt with a provision of the ADA which requires people with hearing and speech disabilities to have access to telecommunications relay services (“TRS”) which are “functionally equivalent” to the voice

telephone services used by the general population. TRS providers are compensated at rate determined by the FCC and, in *Sorenson*, one of those providers sued because the FCC cut its rate of compensation. The provider argued, in part, that it could not provide “functionally equivalent” TRS services to the hearing and speech impaired without a higher compensation. (The provider produced evidence that average wait times for TRS services would increase as a result of the rate reduction.) The Court of Appeals noted that the term “functionally equivalent” is not defined by the ADA, and therefore deferred to the finding of the agency in charge (in this instance, the FCC) that the provider could meet the standard even with decreased funding.

To date, the *Sorenson* case is the only one in which the “functionally equivalent” language in the ADA has resulted in a published appellate opinion. Nevertheless, the *Sorenson* Court cited to United States Supreme Court authority holding that, in the event of an ambiguous statute, interpretation should be left up to the controlling agency so long as that interpretation is reasonable. Accordingly, *Sorenson* is likely to be persuasive authority should this issue arise in other jurisdictions. The lesson here is that the government’s interpretation will likely be found to be the correct one; therefore architects should err on the side of caution.

Another potential “gray area” arises from the overlap of the ADA and its purposes with other sources of legislation and/or guidelines concerning accommodation of the disabled. One such area has to do with the concept of “visitability”. Visitability attempts to fill the gap left by ADA, which applies to public buildings, and the FHA, which applies to multi-family residences. Thus, visitability addresses single-family homes, duplexes and triplexes. The general idea behind visitability is that nearly any new home can be constructed to be easily and safely visited by anyone in the community, including those with disabilities. In practical terms, a residence which has been designed utilizing concepts of visitability will include basic access features, prioritizing wide doors, a no-step entrance, and a bathroom on the first level.

Neither the ADA nor the FHA actually utilizes the term “visitability”. However, various communities have enacted visitability statutes or ordinances as components of their building codes. Where that has occurred, the concept of visitability clearly overlaps with the purposes of both federal acts. Communities which have enacted visitability laws include Pima County, Arizona; Atlanta, Georgia; Austin, Texas; Urbana, Naperville and Bolingbrook Illinois; San Antonio, Texas; St. Petersburg, Florida; and Vancouver, British Columbia.

The Pima County ordinance, like the other above-mentioned ordinances, applies to the construction of new single-family homes. The ordinance was challenged by two homeowners and a number of developers in the 2003 case of *Washburn v. Pima County*<sup>viii</sup>. The plaintiffs made a number of arguments, including that the County lacked statutory grounds to adopt the ordinance, and that it violated the right to privacy and equal protection rights of homeowners. The Arizona Court of Appeals rejected each of those contentions, and upheld the ordinance as a proper exercise of the County’s police power.

As can be surmised from the foregoing discussion, although the ADA and FHA are federal standards, there will also be significant local variances as to the manner in which accommodation of the disabled is dealt with in each jurisdiction. In California, the Department of Rehabilitation (“DOR”) was “established by the Office of the Governor to serve as the lead state agency in



California's efforts to implement the Americans with Disabilities Act in state government", and the DOR has established Disability Access Services ("DAS") which include information, training, and technical assistance regarding accessibility issues.

Another California State agency, the Division of the State Architect ("DSA"), provides design oversight for K-12 schools, community colleges, and various other state-owned and leased facilities. DSA is also charged with the authority of developing the accessibility language of the California Building Code ("CBC") Chapters 11A and 11B. The DSA's publication, the California Accessibility Reference Manual ("CARM"), should be looked to as the State-authorized reference for compliance with the ADA and CBC accessibility requirements.

As part of California's biannual architectural licensing renewal requirements, each licensee must complete a minimum of 5 hours of Continuing Education Units ("CEU"s) on the subject of access. Additionally, just as many architects seek Leadership in Energy and Environmental Design ("LEED") certification (which was developed by the U.S. Green Building Council), in California they may also avail themselves of the Certified Access Specialist ("CASP") certification, or consult with a Certified Access Specialist to verify the compliance of their projects with access requirements prior to the submittal of drawings for permit. California law now requires each jurisdictional authority to have on staff or retain a CASp to verify plan compliance with Chapters 11A and/or B of the CBC, and to verify prior to the issuance of a certificate of occupancy that as-built conditions are in compliance with the as-approved plans and specifications.

## **Recommendations**

Obviously, each jurisdiction will be different, and architects should take the time to become aware of the requirements and/or guidelines in the jurisdictions encompassing the projects on which they are involved. Architects should keep the following tips in mind to avoid a lawsuit:

- Help owners understand ADA and FHA requirements and their impacts;
- Check to see if your community or state has enacted a "visitability" law and what the requirements are regarding a home and/or public facility to be easily and safely visited by anyone in the community, including those with disabilities;
- Maximize ADA compliance in every project, especially in the "gray areas" discussed above;
- Do *not* succumb to pressure from the client to minimize measures that address ADA compliance;
- If the client disregards the architect's recommendations regarding compliance measures, the architect should document his or her file *in writing* (note, if it is *not* in writing, the other side can argue it never happened);
- If the architect sees construction team members disregarding or misapplying design intent, he or she should call it to the owner's attention immediately and document same *in writing*;

- Meet the two-part test for demonstrating compliance with these standards: (1) the accommodation must be shown to be “reasonable in the sense both of efficacious and of proportional to costs”; and (2) the costs must not be excessive in relation either to the benefits of the accommodation or to the provider’s financial health or survival; and
- Be aware that the government’s interpretation will likely be found to be the correct one; therefore architects should err on the side of caution.

Finally, what can architects do if, despite their best efforts, they are still dragged into a lawsuit? If the matter is venued in a state court (other than Nevada), counsel should seek to have it transferred to federal court. Such a court should follow *Niles Bolton* and federal law regardless of the circuit in which it is venued, since there is no authority contrary to *Niles Bolton*. As one federal court has stated, an “informed person” would expect a federal circuit court “to look to the opinions of other circuits for persuasive guidance, always chary to create a circuit split.” *Wheeler v. Pilgrim's Pride Corp.*<sup>ix</sup> Accordingly, counsel for the architect should file early motions seeking dismissal based on new law such as *Niles Bolton* as persuasive authority. If unsuccessful, counsel should seek to demonstrate that the architect employed all reasonable efforts to secure compliance.

Clearly, the ADA and FHA have had, and will continue to have, a significant impact on architects. It is imperative that architects make themselves aware of the potential legal implications of their involvement in projects governed by the ADA and FHA, and take all reasonable steps to protect themselves.

## ENDNOTES

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- <sup>i</sup> *Equal Rights Center v. Niles Bolton*, 602 F.3d 597 (4<sup>th</sup> Cir. 2010)
- <sup>ii</sup> *Rolf Jensen v. Eighth Judicial District Court* 128 Nev. Advance Opinion 42, 282 P.3d 743 (2012)
- <sup>iii</sup> *Miami Valley Fair Housing Center, Inc. v. Campus Village Wright State, LLC* 2012 WL 4473236 (S.D. Ohio)
- <sup>iv</sup> *United States v. Bryan Co.* 2012 WL 2051861 (S.D. Miss.)
- <sup>v</sup> Weil & Drage acknowledges the contributions to the content of this article made by James Vitale, AIA, particularly with respect to the discussion about the “gray areas.”
- <sup>vi</sup> *Vande Zande v. State of Wisconsin Dept. of Administration*, 44 F.3d 538 (7<sup>th</sup> Cir. 1995)
- <sup>vii</sup> *Sorenson Communications, Inc. v. Federal Communications Commission*, 2013 WL 5975034 (D.C.Cir.)
- <sup>viii</sup> *Washburn v. Pima County*, 206 Ariz. 571, 81 P.3d 1030 (2003)
- <sup>ix</sup> *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 363 (5<sup>th</sup> Cir. 2009)