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Construction Law Practice Tip: Owners Beware: Federal Accessibility Requirements are not Delegable

By Pierre Grosdidier and Ryan Gardner

An ever-present concern when building new structures is assuring compliance with the accessibility requirements of the American with Disabilities Act of 1990 ("ADA"), the Fair Housing Act ("FHA"), and Section 504 of the Rehabilitation Act of 1973 ("Section 504").[1] To address this concern, some property owners include provisions in their contracts with designers and contractors requiring them to certify the properties comply with all applicable federal building codes, including these statutes, or to cure any defects resulting from failure to comply. Thus, should an issue arise in the future regarding these statutes, the property owner could then theoretically recoup any resulting losses from those originally responsible for the design or construction of the property. But, the prevailing view among courts is that a party may not seek indemnity or otherwise seek to delegate duties under these statutes to a third party. Even though there is some disagreement among courts as to whether contribution claims should be treated the same as indemnity claims, property owners should know that such contractual provisions likely offer little protection for any losses resulting from a failure to comply with the ADA, the FHA, or Section 504.

For example, in *Equal Rights Center v. Niles Bolton Associates*, the Fourth Circuit Court of Appeals held a property owner could not insulate itself from liability under the ADA or FHA by allocating any risk of loss to the architect who designed the properties at issue in the case.[2] There, the property owner hired an architect to design numerous apartment buildings on the East Coast in the 1990's. Years later, various plaintiffs filed suit against the property owner alleging that its structures violated the ADA and FHA. The property owner ultimately settled the claims and agreed to retrofit the properties to make them compliant with federal law. Upon completion of the retrofit, it sought to recoup its losses from the architect by filing cross-claims pursuant to clauses in the parties' contracts requiring the architect to cure any defects in its service and to indemnify the property owner against all losses arising from or in connection with the architect's services.[3]

The district court rejected these cross-claims, and the Fourth Circuit Court of Appeals affirmed. The appellate court held that the ADA and FHA preempted any indemnity or *de facto* indemnity claim brought for failure to comply with the statutes.[4] The court reasoned that the statutes' goals were regulatory and that compliance with them was nondelegable because they did not allow property-owners to insulate themselves for liability by relinquishing the responsibility for preventing unlawful discrimination to another party. The court found the property owner's attempt to allocate the full risk of loss under the statutes to an architect would diminish the owner's incentive to ensure compliance with federal law and prevent unlawful discrimination. Thus, these types of claims would create an obstacle to enforcing federal law and were, therefore, preempted by the doctrine of obstacle preemption.

Likewise, in *Shaw v. Cherokee Meadows, LP*, an Oklahoma district court recently considered whether a property-owner's cross-claim was preempted by the ADA, the FHA, and Section 504.[5] At issue in the case was whether a property owner could bring a cross-claim against a defendant who provided architectural services for any damages suffered as a result of alleged violations of these statutes.[6] The court first examined the nature of the cross-claim and concluded it was at its core an indemnity claim, and not a contribution claim. Then, relying heavily on the Fourth Circuit's reasoning in *Equal Rights Center*, the court held the cross-claim was preempted. The court reasoned that the federal anti-discrimination statutes do not permit the allocation of liability among entities subject to them. It held the defendant's attempt to recover all damages sustained in a lawsuit because of a failure to comply with federal law would be antithetical to the purposes of those laws. Such a claim was, therefore, preempted because it conflicted with federal law.[7]

Many other district courts around the country have adopted the Fourth Circuit's analysis in *Equal Rights Center*, thereby forming an apparent consensus on the issue.[8] But, courts are not unanimous. In *City of Los Angeles v. AECOM Services, Inc.*, the Ninth Circuit Court of Appeals held the City of Los Angeles's claim for *de facto* contribution against the successors-in-interest to its contractors for failing to construct a bus facility in compliance with the ADA and Section 504 were not preempted.[9] The court found this case to be distinguishable from *Equal Rights Center* because the City did not seek a claim for indemnification or contribution for its own failure to implement federal policies and exercise oversight but rather sought contribution for specific construction and design failures caused by the defendants' own negligence or wrongdoing, which did not have the effect of insulating the City from its ADA obligations.[10] Moreover, the court held the omission of a federal cause of action for indemnification did not indicate an intent to preempt state law based on the general presumption against preemption.[11] The court also held the City's status as a public entity to be significant because public entities must delegate the design and construction of public projects to contractors by necessity, and precluding the enforceability of contract provisions requiring compliance with federal laws like the ADA and Section 504 would reduce the contractor's incentive for complying with these statutes. Thus, the court concluded the City had a right to seek contribution.

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[1] 42 U.S.C. §§ 12101 *et seq.*; *id.* §§ 3601 *et seq.*; 29 U.S.C. § 794. The Rehabilitation Act is designed to prevent discrimination against disabled individuals by recipients of federal funds.
[2] 602 F.3d 597, 598, 602 (4th Cir. 2010).
[3] *Id.* at 599.
[4] *Id.* at 601–02.
[5] 17-CV-610-GKF-JFJ, 2018 WL 2967708, at *1 (N.D. Okla. June 12, 2018).
[6] *Id.* at *1.
[7] 2018 WL 2967708, at *4.
[8] *See Shaw*, 17-CV-610-GKF-JFJ, 2018 WL 2967708, at *4 (listing cases) (slip op.). There are no case from Texas district courts or the Fifth Circuit Court of Appeals.
[9] 854 F.3d 1149, 1151 (9th Cir. 2017). *Contra Chicago Hous. Auth. v. DeStefano & Partners, Ltd.*, 45 N.E.3d 767, 776 (Ill. App. Ct. 2015) (holding whether a property-owner's breach of contract claim was a *de facto* indemnity claim that was preempted by federal law, including Section 504 of the Rehabilitation Act).
[10] *City of Los Angeles*, 854 F.3d at 1157–61
[11] In reaching this conclusion, the Ninth Circuit rejected *Equal Rights Center* to the extent its analysis "relies on congressional omission of a federal cause of action for indemnification." *Id.* at 1160. *Contra Equal Rights Ctr.*, 602 F.3d 597, 601 (4th Cir. 2010) (noting an earlier precedent's reliance on Congress's omission of a right to indemnity in federal securities laws to support its preemption holding and stating that precedent's "reasoning applies with equal force to an indemnity claim brought under the FHA and ADA").