

Construction Law Practice Tip: Owners Beware: Federal Accessibility Requirements Are Not Delegable

January 31, 2019

PRACTICES Construction Litigation, Litigation

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”). 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. 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.

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. 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.

To read the full publication, click on the PDF linked below.

[Federal-Accessibility-Requirements-Are-Not-Delegable.PDF](#)