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Design Professionals Not Subject to Liability under Title III of the ADA and Washington's Law Against Discrimination.

In 2004, the United States District Court for Western District of Washington held that Title III of the Americans with Disabilities Act (ADA) and Washington's Law Against Discrimination (WLAD) do not provide a statutory basis for direct or third party claims against design professionals.

Title III and WLAD

Generally, Title III of the ADA prohibits discrimination against the disabled with regard to access to places of public accommodation. It provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, or accommodations of any place of public accommodation **by any person who owns, leases (or leases to), or operates a place of public accommodation.** 42 U.S.C. § 12182(a).

Types of discrimination expressly prohibited by Title III include the design and construction of facilities that are not readily accessible and usable by individuals with disabilities. 42 U.S.C. § 12183(a)(1).

Courts interpreting WLAD generally apply the same analysis used to interpret federal antidiscrimination laws. Accordingly, prohibitions against discrimination on the basis of disabilities in WLAD are subject to the same analysis applicable to the ADA.

Lonberg v. Sanborn Theaters, Inc.

In *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, *am.* 271 F.2d 953 (9th Cir. 2001), an architect was sued by the owner of a movie theater for failing to design and construct the theater so that it was readily accessible to individuals with disabilities, specifically individuals in wheelchairs. The architect moved for summary judgment on the basis that only owners, lessees, lessors, and operators can be liable for discrimination under Title III of the Act, or in the alternative, only persons who both design and construct a building can be liable and the architect was not involved in the construction of the building.

The Ninth Circuit agreed with the architect and refused to extend Title III liability to designers and contractors responsible for construction of buildings that failed to conform with the ADA. *See* 42 U.S.C. § 12183(a)(1). In doing so, the Ninth Circuit found that the "general" rule set forth in 42 U.S.C. § 12182(a), which specifically limited Title III liability to persons "who own[], lease[] . . ., or operate[] a place of public accommodation" clearly established Congress' intent to restrict ADA liability to owners, lessors and operators of public facilities.

Marshall v. Cafaro Co.

A similar case was filed in the Western District of Washington in 2002. In *Marshall v. Cafaro Co.*, a disability rights group sued a mall owner for violation of Title III. In response to this lawsuit, the Owner filed third party complaints against various design professionals and contractors who had worked on expansion of the mall over the previous 10 years. Among other things, the Owner asserted third party claims against one of the

mall's architects, including breach of contract, professional negligence, and statutory and common law indemnification and contribution. With regard to the statutory claims, the Owner alleged that the Architect's design failed to conform to ADA requirements and, therefore, the Architect should be held liable for any damages the Owner might incur as a result of the plaintiff's ADA and WLAD claims.

The Architect responded with a general denial of all liability based on the fact that the Architect's design satisfied all ADA requirements in effect at the time of construction. When the Owner refused to voluntarily dismiss its claims, the Architect filed a motion for summary judgment, arguing that the Owner had failed to state a cognizable claim under Title III of the ADA or the WLAD. The Architect also argued that the Owner's contract, tort, indemnification and contribution claims were barred by the applicable statutes of limitation and by Washington's six year statute of repose for construction-related claims.

The District Court granted summary judgment in 2004 and dismissed the Architect from the case. The Court cited to *Lonberg* in rejecting the Owner's Title III contribution claim.

Although noting that *Lonberg* did not specifically address contribution claims, the District Court found that the Ninth Circuit's holding that architects were not within the scope of parties subject to Title III liability was persuasive. Accordingly, it concluded that the Owner had failed to meet its burden of establishing that there was an implied right of contribution available against architects under Title III and dismissed the claim.

Because the WLAD is subject to the same legal analysis as the ADA, the District Court held that the Owner's contribution claim under WLAD failed for the same reasons that its ADA claim failed.

Marshall remains unpublished, but a copy of the Court's opinion can be obtained by contacting Skellenger Bender.

Conclusion

All design professionals have a professional and ethical obligation to design structures that comply with the applicable laws and building codes, including the ADA. While *Marshall* and *Lonberg* stand for the proposition that Title III does not provide a statutory cause of action against design professionals, failure to comply with the ADA may still result in liability for malpractice or breach of contract (claims the *Marshall* court did not have to address because they were barred by the applicable statutes of limitation and the six year statute of repose).

If you have questions regarding design professional liability and the WLAD, please give us a call (206 623-6501) or contact us by email.

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