

## **ADA and FHA Bar Indemnification of Building Owner by Design Professional**

J. Kent Holland  
Construction Risk Counsel, PLLC

In litigation against a property owner alleging violations of the Fair Housing Act (FHA) and Americans with Disabilities Act (ADA), the owner settled litigation with the plaintiff, a non-profit group that files suits to enforce the FHA and ADA . By settlement it agreed to pay \$1.4 million in damages, plus attorneys fees, costs and other expenses. It also agreed to survey and retrofit 71 properties to bring them into compliance with the FHA and ADA . The owner then sought to recover its damages from the architect pursuant to an indemnification clause in the architect's contracts. The court held that the federal statutes prevented the owner seeking indemnification under the theories of breach of contract and professional malpractice -- alleging the firm specified incorrect dimensions or other details in its construction documents. The court granted the design firm's motion for summary judgment on the basis that under the FHA and ADA , the owner is barred from seeking indemnification or contribution against the design firm.

In *Equal Rights Center v. Archstone Smith Trust*, 603 F.Supp. 814 (D.C. Md. 2009), the court cited a U.S. Supreme Court decision of *Northwest Airlines, Inc. v. Transport Workers Union of America*, for the proposition that there can be no right to indemnification under the FHA or the ADA because there is no expressed right under the statutes and there is no evidence that Congress intended to create a private remedy. Numerous federal court decisions are cited by the court as having held that no claim for indemnity or contribution exists in connection with liability under the two laws.

Since no federal law afforded Archstone the right to indemnity or contribution against the design professional, Archstone argued it was entitled to such remedy under state law. Archstone argued that in addition to a statutory duty owed to the plaintiffs, the designer had contractual and professional duties to the defendant to design consistent with the FHA and ADA . In the face of breach of those duties, Archstone argued that the designer should be liable to it under state law for negligence and for breach of contract. In addition, Archstone argued that under the express indemnification provisions of its contracts with the design firm, indemnity was available as a contractual duty. The court rejected both of these arguments.

The court states that both the design firm and the owner had non-delegable duties to design ADA/FHA compliant dwellings, and that the design firm's failure to fulfill its independent obligation under the federal statutes subjects it to liability directly to the plaintiffs on first-party claims under the FHA and ADA if claims were properly asserted. Nothing in the federal law, however, would make the designer liable to Archstone on a derivative indemnification claim based on the FHA or the ADA . As a matter of law, the court also concluded that the state law claims for breach of contract and professional negligence "are wholly derivative of Archstone's primary liability and are therefore what federal law regards as de facto claims for indemnification. "Accordingly, those state law claims are barred because any recovery by Archstone would frustrate the achievement of Congress' purposes in the FHA and ADA ."

In further explaining why the express indemnification obligations in the design professional contract would be unavailing to Archstone in this case, the court stated that the goal of the statutes is to make each responsible party meet the purposes of the laws. The court believed those goals would be undermined if parties could "contract around" their non-delegable duties imposed by statute by using indemnification provisions of contracts with others.

Based on the court's reasoning, it found that the express indemnity claim based on the contract language "is barred by federal law every bit as much as its implied indemnity claim is barred."

**Risk Management Note:** This decision should be carefully studied by design professionals and their counsel to determine what it means to the enforceability of certain contract terms and conditions. Assuming the logic of this decision is adopted by other courts it appears to mean that the design professional's liability for ADA and FHA violations is limited to the persons intended to be protected by the laws, and that the design professional's client cannot be indemnified by the design professional for its share of damages for ADA and FHA violations, regardless of what language is contained in the professional services agreement.

In the indemnity provisions of design professional contracts, attorney and insurance professionals typically advise that indemnification by the design professional be limited to damages actually caused by negligent performance of services by the design professional. In the "compliance with law" provision of design professional contracts, design professionals are generally advised to agree only to exercise the generally accepted standard of care to comply with laws, codes, regulations, etc. (hereinafter "laws"). The reasoning is that it is inappropriate and uninsurable for a design professional to warrant or guarantee that its services will meet the requirements of all laws.

Laws, ordinances, and regulations may be ambiguous, or subject to more than one reasonable interpretation, or just so arcane that not every reasonable person even knows that they apply, or how they apply, to a situation. Instead of assuring compliance with all laws, the design professional should exercise reasonable care to comply. Not every error or mistake is a negligent one. It is important to remember, that professional liability insurance only covers "negligent" acts, errors and omissions. If liability is imposed and damages sustained by the design professional to the third-party plaintiff due to its negligent failure to comply with the ADA, FHA or other laws, there might be coverage for some of the damages under the policy (although fines and penalties will probably be excluded). On the other hand, if the design firm was not negligent -- since it met the standard of care in endeavoring (but yet failing) to comply with the laws -- it would have no insurance coverage to cover losses that its client might try to recover from it based on the design firm's broad-form (non-negligence based) indemnification or unconditional promise/guarantee to comply with all laws.

---

J. Kent Holland – Construction Risk Counsel, PLLC

About the Author: His case note or article was originally published in ConstructionRisk.com Report (see [www.ConstructionRisk.com](http://www.ConstructionRisk.com)) and is written by J. Kent Holland, a construction lawyer located in Viena -Tysons Corner, Virginia, with a national practice (formerly with Wickwire Gavin, P.C. and now with Construction Risk Counsel, PLLC) representing design professionals, contractors and project owners. He is also founder and president of ConstructionRisk, LLC, a consulting firm providing risk management consulting services to owners, design professionals, contractors, attorneys, and insurers on construction projects. He may be reached at 703-623-1932 or [Kent@ConstructionRisk.com](mailto:Kent@ConstructionRisk.com)