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If You Build It, Can They Sue? Architects' Liability Under Title III of the ADA

Cover Page Footnote

Registered Architect licensed to practice in the state of New York, technical staff with the New York City Department of Buildings, and J.D. Candidate, Evening Division, Fordham University School of Law. The views expressed herein are my own. I would like to thank Professor Katherine Franke, Carolyn Jackson, and Kristin Kiehn, and also my lover David Fields for being so patient. I would also like to credit Emily Alexander's footnote number 223 for providing the initial inspiration. See Emily Alexander, Note, The Americans with Disabilities Act and State Prisons: A Question of Statutory Interpretation, 66 *Fordham L. Rev.* 2233, 2263 n.223 (1998) (noting the emerging split on architects' liability under the ADA). Additional inspiration has come from working in city government for many years, where I dealt with hundreds of private architects, several of whom resented the ADA, treating it as an unreasonable imposition.

NOTES

IF YOU BUILD IT, CAN THEY SUE? ARCHITECTS' LIABILITY UNDER TITLE III OF THE ADA

*James P. Colgate**

INTRODUCTION

Can an architect¹ who designs a building in violation of the accessibility requirements of the Americans with Disabilities Act² ("ADA" or "Act") be held liable for discrimination? Since the passage of the ADA in 1990, that question has elicited a range of contradictory rulings.

Liability for inadequate design has long been recognized. In ancient Babylonia, a master builder³ was put to death if the owner of a house died from its collapse; if the owner's son died, the builder's son was put to death.⁴ Although no state today imposes such harsh

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1. This Note focuses primarily on architects, although similar if not identical analyses may be made for engineers and other design professionals, see Bibb Allen, *Liabilities of Architects and Engineers to Third Parties*, 22 Ark. L. Rev. 454, 454 (1968) (noting that legal principles regarding liability that apply to architects generally apply to engineers), and, in some cases, franchisors and contractors, see *infra* Part II.B-C.

2. See Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 225, 611 (1994)).

3. The historical master builder controlled all aspects of design and construction. See Jay A. Felli, Comment, *The Elements of Ohio's Liability Provisions for Contemporary Design-Build Architects—An Unwillingness to Expand the Plan*, 17 U. Dayton L. Rev. 109, 111 (1991).

4. See Robert Francis Harper, *The Code of Hammurabi: King of Babylon* §§ 229-230, at 81 (Wm. W. Gaunt & Sons 1994) (1904). The law read:

If a builder build a house for a man and do not make its construction firm,
and the house which he has built collapse and cause the death of the owner

penalties, architects are nonetheless held accountable under negligence theories of liability to foreseeable users of the buildings that they design.⁵ Thus, an architect who negligently designs a stairwell with inadequate handrails can be liable for injuries to a person who falls on the stairs as a result of this deficiency.⁶ An architect who negligently designs a building that collapses on a person can be found guilty of manslaughter.⁷

Licensed, trained professionals are thus charged with the important duty of safe building design, and are held accountable in causes of action arising under negligence to persons injured as a result of the unsafe design of their buildings. In causes of action brought under the ADA, however, some courts ascribe liability to the architect while others do not. This Note examines the arguments for and against such liability, and argues that architects should be held accountable for the inaccessibility of the buildings they design and are proper defendants in suits alleging discrimination resulting from designs that are non-compliant with the ADA.

Courts addressing the issue of architects' liability under the ADA have focused on section 303(a), which makes the design and construction of inaccessible commercial facilities a discriminatory practice.⁸ Some courts have adhered to a literal, textual interpretation of section 303(a), assigning liability only to owners, lessees, lessors, and operators of buildings⁹—a reading that excludes architects from

of the house, that builder shall be put to death.

If it cause the death of a son of the owner of the house, they shall put to death a son of that builder.

If it cause the death of a slave of the owner of the house, he shall give to the owner of the house a slave of equal value.

If it destroy property, he shall restore whatever it destroyed, and because he did not make the house which he built firm and it collapsed, he shall rebuild the house which collapsed from his own property [i.e., at his own expense].

If a builder build a house for a man and do not make its construction meet the requirements and a wall fall in, that builder shall strengthen that wall at his own expense.

Id. §§ 229-233, at 81, 83, (alteration by Harper). The Code apparently placed no value on the life of the wife or daughter of the owner. *See id.*

5. *See generally* Constance Frisby Fain, *Architect and Engineer Liability*, 35 Washburn L.J. 32 (1995) (discussing the scope of architects' and engineers' liability).

6. *See, e.g.,* Montijo v. Swift, 33 Cal. Rptr. 133, 134-35 (Ct. App. 1963). In *Montijo*, an architect designed a stairway with handrails that did not extend to the bottom of the steps, thereby giving the false impression that the plaintiff had reached the bottom. *See id.* at 134. The court held that the architect owed a duty to the plaintiff and remanded the case to trial. *See id.* at 135.

7. *See, e.g.,* State v. Ireland, 20 A.2d 69, 70 (N.J. 1941) ("An architect, through neglect or violation of a building code by the preparation of defective plans for a building, which collapses due to his fault, is subject to indictment for manslaughter where an occupant has been killed through his neglect.").

8. *See* ADA § 303(a) (codified at 42 U.S.C. § 12183(a) (1994)).

9. *See* United States v. Days Inns of Am., Inc., 22 F. Supp. 2d 612, 615-16 (E.D. Ky. 1998) (holding that section 303(a) is limited to owners, lessees, lessors, and

liability. Most of these courts have also strictly construed section 303(a) to impose liability only on those who both "design and construct"¹⁰ a facility, thus excusing from liability anyone who designs but does not construct that facility.¹¹ These narrow interpretations of the ADA are examples of what some deem a growing trend of judicial backlash against the ADA and civil rights laws in general.¹²

Part I of this Note describes the enactment of the ADA, and contrasts its broad purpose with the narrow judicial interpretations that have sought to limit or invalidate it. Part II introduces sections 302(a) and 303(a) of the ADA, and explains the conflict in the statutory language between these two provisions that has resulted in a split of authority on architects' liability for non-compliant design and construction. Part II then contrasts the arguments advanced by courts that have exempted architects from liability under section 303(a) with those that have found liability. Part II argues that interpreting the language of the ADA broadly, and thus holding architects liable for non-compliant design, is both consistent with the intent of Congress in passing the ADA and follows from a proper interpretation of the statutory text itself. Part III examines the role of the architect in designing buildings in legal compliance with acceptable codes and practices, and concludes that interpreting the ADA as holding architects liable for failure to design compliant buildings is consistent with this important role.

I. CONGRESSIONAL INTENT, TEXTUALISM, AND JUDICIAL BACKLASH

This part provides a brief history of the ADA's enactment and describes the trend toward "judicial backlash" decisions limiting the scope of the ADA. This part then examines how this trend has impacted the question of architect's liability.

The ADA's stated purpose was to comprehensively eliminate discrimination¹³ against the estimated 43 million Americans with disabilities¹⁴ by legislating clear, consistent, and enforceable

operators); *United States v. Days Inns of Am., Inc. (California DIA)* 8 Am. Disabilities Cas. (BNA) 491, 493 (E.D. Cal. Jan. 12, 1998) (same), *appeal docketed*, No. 98-15433 (9th Cir. Mar. 17, 1998); *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1, 2 (D.D.C. 1996) (same), *aff'd on other grounds sub nom. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997); *see also infra* Part II.C.

10. ADA § 303(a)(1) (emphasis added) (codified at 42 U.S.C. § 12183(a)(1)).

11. *See California DIA*, 8 Am. Disabilities Cas. (BNA) at 492 & n.1 (holding that under section 303(a), only owners lessors, lessees, and operators of commercial facilities who also both design and construct a facility may be liable); *Paralyzed Veterans of Am.*, 945 F. Supp. at 2 (same); *see also infra* Part II.B-C.

12. *See infra* Part I.

13. *See* ADA § 2(b)(1) (codified at 42 U.S.C. § 12101(b)(1)).

14. *See id.* § 2(a)(1) (codified at 42 U.S.C. § 12101(a)(1)). The term "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more

standards.¹⁵ The Act, dubbed the "emancipation proclamation" for the disabled¹⁶ and "the most sweeping piece of civil rights legislation possible in the history of our country, but certainly since the Civil War era,"¹⁷ passed in 1990 with overwhelming majorities in both the House and Senate.¹⁸ President Bush signed it into law amid great fanfare at an emotional ceremony at the White House, stating:

And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America. . . . Let the shameful wall of exclusion finally come tumbling down.¹⁹

The ADA comprises five titles. Title I, "Employment," covers issues relating to employment and prohibits employers from discriminating on the basis of disability against qualified individuals in hiring, compensation, discharge, and job assignment.²⁰ Title II, "Public Services," prohibits discrimination by public entities in providing access to services, programs, and activities, and covers almost every state or local government subdivision in areas such as transportation, access to public buildings, public benefits and programs, and public employment.²¹ Title III, "Public Accommodations and Services Operated by Private Entities," mandates access to privately owned businesses and other establishments.²² Title III was included after testimony illustrating that "an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation."²³ Specifically, Congress explained that "[t]he large majority of people with disabilities do not go to movies, do not go to the theatre, do not go to see musical performances, and do not go to sports events."²⁴

major life activities . . . (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* § 3(2) (codified at 42 U.S.C. § 12102(2)).

15. *See Id.* § 2(b)(2) (codified at 42 U.S.C. § 12101(b)(2)).

16. *See* 135 Cong. Rec. 8505, 8506 (1989) (statement of Sen. Harkin).

17. 135 Cong. Rec. 19,833, 19,847 (1989) (statement of Sen. Hatch).

18. The vote was 355-58 in the House of Representatives. *See* 136 Cong. Rec. 17,251, 17,280 (1990). The vote was 91-6 in the Senate. *See* 136 Cong. Rec. 17,364, 17,376 (1990).

19. Remarks on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1162, 1164-65 (July 26, 1990).

20. *See* ADA §§ 101-108 (comprising Title I) (codified at 42 U.S.C. §§ 12111-12117).

21. *See id.* §§ 201-246 (comprising Title II) (codified at 42 U.S.C. §§ 12131-12165).

22. *See id.* §§ 301-318 (comprising Title III) (codified at 42 U.S.C. §§ 12181-12189).

23. H.R. Rep. No. 101-485, pt. II, at 34 (1990) (citing the National Council on Disability), *reprinted in* 1990 U.S.C.C.A.N. 303, 316.

24. *Id.*

Title IV, "Telecommunications," requires access for the hearing- and speech-impaired to certain telecommunications systems.²⁵ Title V, "Miscellaneous Provisions," includes provisions on plaintiffs' remedies, retaliation, agency regulations, and alternate dispute resolution.²⁶

Some courts have interpreted provisions of the ADA broadly, consistent with the ADA's stated purpose of eliminating discrimination against individuals with disabilities.²⁷ For instance, in *Bragdon v. Abbott*,²⁸ a dentist refused to treat an asymptomatic HIV-positive patient in his office.²⁹ Although the Court did not rely heavily on the statute's remedial purpose or on Congress's intent that the ADA protect people with HIV,³⁰ it nonetheless held that asymptomatic HIV may be a disability.³¹ In *Cleveland v. Policy Management Systems Corp.*,³² the Court considered whether the ADA's Title I employment provisions protect an individual who at the same time qualifies for Social Security Disability Insurance ("SSDI") benefits.³³ Although an individual must be unable to work in order to receive SSDI, an individual must be able to perform the essential job functions with reasonable accommodation to prevail under an employment discrimination claim under ADA's Title I.³⁴ Citing differences in the statutes, the Court held that "an SSDI claim and an ADA claim can comfortably exist side by side."³⁵

In spite of decisions like *Bragdon* and *Cleveland*, many judges presiding over ADA claims appear reluctant to endorse either Congress's broad mandate or its explicitly stated intentions, and are instead dismissing ADA cases.³⁶ This "backlash"³⁷ is viewed as part of

25. See ADA §§ 401-402 (comprising Title IV) (codified at 47 U.S.C. §§ 225, 611 (1994)).

26. See *id.* §§ 501-514 (comprising Title V) (codified at 42 U.S.C. §§ 12201-12213). Additional miscellaneous provisions include a section making clear that the ADA does not find homosexuality, bisexuality, transvestitism, or transexualism a disability, conveniently lumping these with pedophilia, compulsive gambling, kleptomania, pyromania, and disorders from illegal drug use. See *id.* § 511 (codified at 42 U.S.C. § 12211).

27. See *id.* § 2(b)(1) (codified at 42 U.S.C. § 12101(b)(1)).

28. 118 S. Ct. 2196 (1998).

29. See *id.* at 2201.

30. See Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 Berkeley J. Emp. & Lab. L. (forthcoming 2000) (noting that Justice Kennedy in *Bragdon* ruled without reliance on the statute's remedial goals or legislative history, instead using the legislative history only to confirm, but not guide, his textually-based interpretations).

31. See *Bragdon*, 118 S. Ct. at 2201.

32. 119 S. Ct. 1597 (1999).

33. See *id.* at 1599.

34. See *id.*

35. *Id.* at 1602.

36. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 Berkeley J. Emp. & Lab. L. (forthcoming 2000).

37. The pattern of judicial rulings refusing to enforce the ADA has raised concern

a larger trend of skepticism toward civil rights laws in general, including affirmative action and sexual orientation non-discrimination laws, which are seen as conferring special rights or subsidies on classes of people.³⁸ Fueling this trend in the case of the ADA are businesses that are reluctant to meet ADA requirements³⁹ and the media's publicizing of frivolous claims.⁴⁰ In addition, courts' failure to recognize that the ADA is derived from a civil rights model intended to promote equality has allowed ideological skepticism toward the ADA to foment.⁴¹

Layered over this ideological framework is the growing use by the courts of "textualism" in statutory interpretation.⁴² As a method of statutory construction, textualism "discounts extra-textual sources of interpretation in favor of 'plain meaning' constructions."⁴³ For example, the Supreme Court recently dismissed, on textual grounds, ADA employment claims by plaintiffs who would be disabled but for mitigating measures, such as corrective eyeglasses or medication.⁴⁴

in the academic community, so much so that in March 1999 the Berkeley Journal of Employment and Labor Law sponsored a symposium: *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*. See *Backlash Against the ADA* (visited June 11, 1999) <<http://www.law.berkeley.edu/academics/csj/symposium>>. The symposium included thirty-one speakers. See *id.* at <<http://www.law.berkeley.edu/academics/csj/symposium/speakers.html>>. The thirteen papers presented will be published in the Berkeley Journal of Employment and Labor Law. See *id.* at <<http://www.law.berkeley.edu/academics/csj/symposium/abstracts.html>>.

38. See Diller, *supra* note 36.

39. See Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities under United States Law*, 9 Yale J.L. & Feminism 213, 213 ("The backlash against the [ADA] . . . has been immediate and strong. Exaggeration and misstatement have been rampant from the leaders of American capitalism.").

40. See *id.* at 251 ("[C]onservative newspapers have fueled this backlash by exaggerating the scope of success for claimants under the ADA.").

41. See Diller, *supra* note 36 (arguing that "the courts do not fully grasp, let alone accept, the ADA's reliance on a civil rights model for addressing problems that people with disabilities face in the workplace"). Cases cited at the Berkeley symposium as examples of a "backlash" against the ADA typically involve seemingly valid claims that are nonetheless dismissed on technicalities, often by a finding that the plaintiff does not qualify as disabled under the ADA. See, e.g., *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 193 (5th Cir. 1996) (holding that a woman with breast cancer who suffered side effects from chemotherapy was not disabled under the ADA because she continued to work despite her impairments); *Schulter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1444 (W.D. Wis. 1996) (holding that an insulin-dependant diabetic was not disabled under the ADA because medication controlled or lessened the impairment to the point the diabetes no longer restricted a major life activity).

42. See Parmet, *supra* note 30 (discussing the increasing influence of textualism as a method of statutory interpretation in federal courts).

43. Wendy E. Parmet, Abstract, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability* (visited June 11, 1999) <<http://www.law.berkeley.edu/academics/csj/symposium/papers/parmet.html>>.

44. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150 (1999) (holding that two pilots with severe myopia were not "disabled" under the ADA because their corrective lenses removed the disability). The Court made a similar ruling the same

In *Sutton v. United Air Lines, Inc.*,⁴⁵ the defendant airline declared two myopic sisters unqualified to serve as commercial airline pilots.⁴⁶ With corrective lenses, their vision functioned identically to individuals without visual impairments.⁴⁷ Focusing on the precise wording of ADA provisions, the majority found that the petitioners were not "disabled" within the meaning of the ADA,⁴⁸ in part due to the grammatical construction of the Act's definition of disability as an "impairment that substantially *limits* one or more of the major life activities."⁴⁹ Because the phrase is in the "present indicative"⁵⁰ verb tense, the majority held that while an individual who uses corrective lenses is impaired, that impairment does not *presently* substantially limit a major life activity.⁵¹ The majority explicitly refused to consider the legislative history of the ADA,⁵² which, the dissent pointed out, is "replete with references to the understanding that the Act's protected class includes individuals with various medical conditions that ordinarily are perfectly 'correctable' with medication or treatment."⁵³

In *Sutton*, the Court addressed the issue of disability itself, rather than who is liable under the Act for violations in building design. Nonetheless, its hypertextual interpretations of the ADA's language are further examples of the judicial trend toward "plain-meaning" construction that often goes so far as to contradict Congress's plainly-stated intent. Similarly narrow "backlash" interpretations do address liability for discrimination in designing or constructing non-compliant privately owned commercial facilities.⁵⁴ The next part outlines the

day in *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133, 2137 (1999) (holding that a mechanic with high blood pressure was not disabled under the ADA because his medication remedied the disability).

45. 119 S. Ct. 2139.

46. *See id.* at 2143.

47. *See id.* at 2150.

48. *See id.*

49. ADA § 3(2)(A) (emphasis added) (codified at 42 U.S.C. § 12102(2)(A) (1994)).

50. *Sutton*, 119 S. Ct. at 2146.

51. *See id.* at 2146-47.

52. *See id.* at 2146 ("Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."); *see also infra* text accompanying notes 203-05 (criticizing the Court for ignoring congressional intent in *Sutton*).

53. *Id.* at 2155 (Stevens, J., dissenting); *see also, e.g.*, H.R. Rep. No. 101-485, pt. II, at 52 (1990) ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures such as reasonable accommodations or auxiliary aids."), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. Rep. No. 101-485, pt. III, at 28 (1990) (stating that in determining whether an impairment substantially limits a major life activity, "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation"), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. Rep. No. 101-116, at 23 (1989) ("[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.").

54. *See infra* Part II.B-C.

provisions in the ADA relating to architects' liability, examines the conflicting decisions interpreting these provisions, and argues in favor of the rulings by courts finding architects liable for discrimination for building design in violation of the ADA.

II. STATUTORY CONSTRUCTION: ADA SECTIONS 302(a) AND 303(a)

This part outlines sections 302(a) and 303(a) of the ADA, the two sections that have triggered differing interpretations of the parameters of liability for non-compliant newly constructed buildings. It then discusses courts' varying approaches to the questions of whether a liable party under section 303(a) must both design *and* construct a facility, and whether section 303(a) applies only to owners, lessees, lessors, and operators of privately owned buildings. This part argues that a broad interpretation of section 303(a), which would find architects liable for non-compliant design, is consistent with Congress's intent and proper interpretation of the statute itself.

A. Sections 302(a) and 303(a) of the ADA

Title III of the ADA features two overlapping provisions that define discriminatory conduct relating to privately owned facilities: sections 302(a) and 303(a). Section 302(a) states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.⁵⁵

This section applies to *existing* places of public accommodation, including restaurants, bars, retail stores, hotels, and movie theaters.⁵⁶ It requires that owners, lessees, lessors, and operators of places of public accommodation affirmatively act to, among other things, remove architectural barriers where such removals are "readily achievable."⁵⁷ It does not apply to existing "commercial facilities" that are not places of public accommodation, such as office buildings,

55. ADA § 302(a) (codified at 42 U.S.C. § 12182(a) (1994)).

56. *See id.* § 301(7) (defining public accommodations) (codified at 42 U.S.C. § 12181(7)); 28 C.F.R. § 36.104 (1998) (same).

57. *See* ADA § 302(b)(2)(A)(iv) (codified at 42 U.S.C. § 12182(b)(2)(A)(iv)). Readily achievable "means easily accomplishable and able to be carried out without much difficulty or expense." *Id.* § 301(9) (codified at 42 U.S.C. § 12181(9)); 28 C.F.R. § 36.104. Determinations of what is readily achievable are made on a case-by-case basis depending on the available resources of the owner, lessor, lessee, or operator of the place of public accommodation. *See* ADA § 301(9) (codified at 42 U.S.C. § 12181(9)); 28 C.F.R. § 36.104. For a thorough discussion of what is readily achievable, see Kari L. Rutherford, Comment, *The Americans with Disabilities Act (ADA); Title III: "What is Readily Achievable?"*, 22 W. St. U. L. Rev. 329 (1995).

factories, and storage facilities.⁵⁸ The ADA affects these existing office buildings and factories only to the extent that an employer must make reasonable accommodation to a disabled employee pursuant to Title I.⁵⁹

Under section 303(a), by contrast, any *newly* constructed or altered facility, including *both* new places of public accommodation and all other new commercial facilities, must be designed and constructed to the higher standard of "readily accessible . . . and usable."⁶⁰ Section 303(a) states:

[A]s applied to public accommodations and commercial facilities, discrimination for the purposes of section 302(a) includes—

(1) a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities . . . and

(2) . . . a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities . . .⁶¹

Thus, with the enactment of sections 302(a) and 303(a) in 1990, Congress envisioned that all existing places of public accommodation would be made accessible to the disabled to the extent that modifications are readily achievable by their owners, lessees, lessors, or operators. In addition, all newly constructed commercial facilities, including new places of public accommodation, would from the outset be designed and constructed to be completely "readily accessible to and usable by"⁶² persons with disabilities.⁶³ Section 303(a) has an "intended conceptual connection"⁶⁴ to Title I's employment provisions in that the section's accessibility and usability

58. "Commercial Facilities" are broadly defined to include all facilities that are intended for non-residential use and whose operations affect commerce. See ADA § 301(2) (defining commercial facilities) (codified at 42 U.S.C. § 12181(2)); 28 C.F.R. § 36.104 (same).

59. See generally ADA §§ 101-108 (comprising Title I) (codified at 42 U.S.C. §§ 12111-12117); see also *infra* notes 64-65 and accompanying text (discussing the link between ADA section 303(a) and Title I).

60. ADA § 303(a) (codified at 42 U.S.C. § 12183(a)). The standard of readily accessible and usable is more stringent than the readily achievable standard applied to existing places of public accommodation. See *supra* note 57. To be readily accessible and usable, all portions of the facility, whether for public accommodation or not, must be accessible and usable, except "only in those rare circumstances when the unique characteristics of terrain" make incorporation of accessibility features structurally impracticable. 28 C.F.R. § 36.401(c)(1).

61. ADA § 303(a) (codified at 42 U.S.C. § 12183(a)).

62. *Id.*

63. See H. Rep. No. 101-485, pt. III, at 63 (1990) ("The ADA is geared to the future—the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible."), *reprinted in* 1990 U.S.C.C.A.N. 445, 486.

64. H.R. Rep. No. 101-485, pt. II, at 117 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 400.

requirements, which new office buildings and other commercial facilities must meet, makes providing reasonable accommodation to disabled employees easier.⁶⁵

Section 302(a) explicitly states who may be liable under its provisions.⁶⁶ The section is enforceable only against "any person who owns, leases (or leases to), or operates a place of public accommodation."⁶⁷ Liability under section 303(a), however, is not delineated.⁶⁸ Section 303(a) merely defines discrimination as a failure to design and construct facilities in a manner that is accessible and usable.⁶⁹ This discrepancy is at the center of the debate surrounding architects' liability.

In addressing architects' liability under section 303(a), some courts have examined whether only those who both design and construct a commercial facility may be held liable. The narrow textual view strictly interprets the plain language of section 303(a)'s phrase "design and construct" as necessarily conjunctive, and thus holds a party liable only if she both designs *and* constructs a facility.⁷⁰ Under this view, an architect who designs but does not construct a privately owned facility would not be held liable for discrimination under the ADA for a non-compliant design. The broader view holds that "design and construct" should be read, functionally if not grammatically, as "design *or* construct," so that either the designer or constructor may be liable.⁷¹ Under this broader view, a designing architect may be held liable for a non-compliant design, even if she did not also construct the facility.

The second and more fundamental analysis examines whether proper defendants are limited solely to owners, lessees, lessors, and operators of privately owned commercial facilities. The narrow view

65. See *id.* ("To the extent that new facilities are built in a manner that make [sic] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees.").

66. See ADA § 302(a) (codified at 42 U.S.C. § 12182(a)).

67. *Id.*

68. See *id.* § 303(a) (codified at 42 U.S.C. § 12183(a)).

69. See *id.*

70. See *United States v. Days Inns of Am., Inc. (8th Circuit DIA)*, 151 F.3d 822, 825 n.2 (8th Cir. 1998) (holding that under section 303(a) only one who both designs and constructs a facility may be liable), *cert. denied*, 119 S. Ct. 1249 (1999); *United States v. Days Inns of Am. (California DIA)*, 8 Am. Disabilities Cas. (BNA) 491, 492 n.1 (E.D. Cal. Jan. 12, 1998) (same), *appeal docketed*, No. 98-15433 (9th Cir. Mar. 17, 1998); *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1, 2 (D.D.C. 1996) (same), *aff'd on other grounds sub nom. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997); see also *infra* Part II.B (same).

71. See *United States v. Days Inns of Am., Inc. (Illinois DIA)*, 997 F. Supp. 1080, 1083-84 (C.D. Ill. 1998) (holding that under section 303(a) either a designer or a constructor may be liable); *Johanson v. Huizenga Holdings Inc.*, 963 F. Supp. 1175, 1178 (S.D. Fla. 1997) (rejecting architect's argument that "design and construct" should be read conjunctively); see also *infra* Part II.B (same).

strictly construes the plain language of section 303(a)'s reference to section 302(a)⁷² to hold only owners, lessees, lessors, and operators⁷³ liable for non-compliant design.⁷⁴ The alternative and broader view holds that any party, and not simply owners, lessees, lessors, and operators, may be liable under section 303(a).⁷⁵ Under this broad interpretation, section 303(a)'s reference to section 302(a)⁷⁶ is interpreted solely as a definition of discrimination, and not as an assignation of liability.

The first district court to rule on the scope of liability under section 303(a) of the ADA was the District of Columbia in 1996 in *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.*⁷⁷ ("PVA"). In PVA, plaintiffs brought suit against the architect as well as the owners and operators⁷⁸ of the MCI Center,⁷⁹ seeking declaratory and injunctive relief.⁸⁰ Plaintiffs alleged that the design and construction of the arena, which was then being erected, violated section 303(a) of the ADA.⁸¹ The court granted the defendant

72. See ADA § 303(a) ("[A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes . . . a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities" (emphasis added)) (codified at 42 U.S.C. § 12183(a)).

73. See *id.* § 302(a) ("No individual shall be discriminated against . . . by any person who owns, leases (or leases to), or operates a place of public accommodation." (emphasis added)) (codified at 42 U.S.C. § 12182(a)).

74. See *United States v. Days Inns of Am., Inc.*, 22 F. Supp. 2d 612, 615-16 (E.D. Ky. 1998) (holding that section 303(a) is limited to owners, lessees, lessors, and operators); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 493-94 (same); *Paralyzed Veterans of Am.*, 945 F. Supp. at 2 (same); see also *infra* Part II.C.

75. See *8th Circuit DIA*, 151 F.3d at 825 (holding that section 303(a) is not limited to owners, lessees, lessors, and operators); *Illinois DIA*, 997 F. Supp. at 1084-85 (same); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1267 (D. Minn. 1997) (same); *Johanson*, 963 F. Supp. at 1178 (same); see also *infra* Part II.C (same).

76. See ADA § 303(a) ("[A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes . . . a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities" (emphasis added)) (codified at 42 U.S.C. § 12183(a)).

77. 945 F. Supp. 1.

78. The case originally had eight defendants: Ellerbe Becket Architects & Engineers, P.C.; Ellerbe Becket, Inc.; D.C. Arena Associates, Inc.; D.C. Arena, L.P.; Washington Sports and Entertainment, Inc.; Centre Group, L.P.; Abe Pollin Sports, Inc.; and Abe Pollin. See *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 950 F. Supp 393, 396 (D.D.C. 1996) (listing all original defendants), *aff'd sub nom.* *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

79. The MCI Center is a sports and multi-purpose arena which is now home to the National Basketball Association's Wizards and the National Hockey League's Capitals.

80. See *Paralyzed Veterans of Am.*, 945 F. Supp. at 1.

81. See *id.* at 1-2. Although the architects were ultimately dismissed from the case, see *id.* at 2-3, the court did hold in a subsequent ruling that the arena had been designed in violation of section 303(a) of the ADA in that a substantial number of the wheelchair seats did not provide unobstructed views for disabled patrons when the non-disabled patrons stood up. See *Paralyzed Veterans of Am.*, 950 F. Supp at 405. For a thorough discussion and critical review of the PVA's line-of-sight requirements,

architects' motions to dismiss, holding that an architect may not be liable under section 303(a) as a matter of law.⁸² The court narrowly interpreted section 303(a) under both analyses, holding that architects are not proper defendants in Title III suits because (1) proper defendants as defined in the statute include only persons who both "design and construct"⁸³ a facility,⁸⁴ and (2) liability is limited to owners, lessees, lessors, or operators.⁸⁵

PVA did not, however, result in uniform holdings regarding architects' liability under section 303(a). Although six subsequently reported cases have addressed liability under section 303(a) of the ADA, including four initiated by the Department of Justice ("DOJ") against the hotel chain Days Inns of America,⁸⁶ some have accepted *PVA*'s analysis in whole or in part, while others have rejected it entirely.⁸⁷

B. "[D]esign and [C]onstruct"⁸⁸

The Eighth Circuit in *United States v. Days Inns of America, Inc.*⁸⁹ ("8th Circuit *DIA*") and the Eastern District of California in *United States v. Days Inns of America*⁹⁰ ("California *DIA*") followed *PVA* by narrowly interpreting the plain language of section 303(a) to insulate from liability anyone who does not both design and construct a

see generally Jonathan C. Fritts, Note, "Down in Front!": Judicial Deference, Regulatory Interpretation, and the ADA's Line of Sight Standard, 86 Geo. L.J. 2653 (1998).

82. See *Paralyzed Veterans of Am.*, 945 F. Supp. at 2 ("[T]he plain language of the statute makes clear that architects are not covered by §§ 302 and 303 of the ADA.").

83. ADA § 303(a) (codified at 42 U.S.C. § 12183(a) (1994)).

84. See *Paralyzed Veterans of Am.*, 945 F. Supp. at 2.

85. See *id.*

86. The four *Days Inns* decisions resulted from a DOJ investigation of 28 newly-constructed *Days Inns* hotels in 17 states. See United States Department of Justice, Press Release, *Justice Department Sues Days Inns Chain for Building Inaccessible Hotels*, at 2 (Feb. 8, 1996) (visited Feb. 24, 1999) <<http://www.usdoj.gov/crt/foia/dius1.txt>>. After entering into settlements with over 23 hotels, the DOJ filed suit against the remaining five hotels' individual owners, architects, and general contractors, as well as the franchisor and its parent company. See *id.* at 2; see also *Days Inns of Am., Inc. v. Reno*, 935 F. Supp. 874, 875-76 (W.D. Tex. 1996) (outlining the history of the *Days Inns* litigation). Four of the five *Days Inns* cases resulted in published decisions. See *United States v. Days Inns of Am., Inc.*, 151 F.3d 822 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1249 (1999); *United States v. Days Inns of Am., Inc.*, 22 F. Supp. 2d 612 (E.D. Ky. 1998); *United States v. Days Inns of Am., Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998); *United States v. Days Inns of Am., Inc.*, 8 Am. Disabilities Cas. (BNA) 491 (E.D. Cal. Jan. 12, 1998), *appeal docketed*, No. 98-15433 (9th Cir. Mar. 17, 1998). The other two cases that address liability under section 303(a) did not involve *Days Inns*. See *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997); *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175 (S.D. Fla. 1997).

87. See *infra* Part II.B-C.

88. ADA § 303(a)(1) (codified at 42 U.S.C. § 12183(a)(1)).

89. 151 F.3d 822 (1998) (8th Circuit *DIA*).

90. 8 Am. Disabilities Cas. (BNA) 491 (E.D. Cal. Jan. 12, 1998) (California *DIA*).

facility.⁹¹ Three courts thus literally read the grammatical construction of the phrase “design and construct” to be “distinctly conjunctive.”⁹² The court in *PVA* had relied solely on the grammatical construction of the plain language of the phrase “design and construct,”⁹³ and made no mention of policy issues or congressional intent in enacting the ADA. The courts in *8th Circuit DIA* and *California DIA* followed *PVA*'s holding closely, applying the “design and construct” language conjunctively to exclude from liability a franchisor who did not both design *and* construct hotels.⁹⁴ Both courts did so by citing *PVA* only in footnotes and without discussion.⁹⁵ Again, neither court addressed policy issues or congressional intent.

The arguments for a broad interpretation of “design and construct,” however, are persuasive. Congress's inclusion of the word “design” itself indicates an intent to cast liability on designers. Most architects serve only as a building's designer and do not also serve as contractors.⁹⁶ If Congress's exclusive focus were only on those ultimately responsible for the completed facility, the inclusion of the word “design” would be redundant;⁹⁷ a more sensible approach in that case would have been to prohibit only non-compliant construction of a facility.⁹⁸

Moreover, Title III's remedies include a private right of action

91. See *8th Circuit DIA*, 151 F.3d at 825 n.2 (applying the “design and construct” language conjunctively), *rev'g* 8 Am. Disabilities Cas. (BNA) 671, 677 (D.S.D. Oct. 29, 1997) (finding that a “designer of a public accommodation or commercial facility [who is not also a constructor] is by definition liable under § 303 of the ADA”); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 492 n.1 (applying the “design and construct” language conjunctively).

92. *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1, 2 (D.D.C. 1996), *aff'd on other grounds sub nom. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997); see also *8th Circuit DIA*, 151 F.3d at 825 n.2 (applying the “design and construct” language conjunctively); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 492 n.1 (same).

93. See *Paralyzed Veterans of Am.*, 945 F. Supp. at 2 (“[T]he phrase ‘design and construct’ is distinctly conjunctive.” (quoting ADA § 303(a) (codified at 42 U.S.C. § 12183(a))))).

94. See *8th Circuit DIA*, 151 F.3d at 825 n.2; *California DIA*, 8 Am. Disabilities Cas. (BNA) at 492 n.1.

95. See *8th Circuit DIA*, 151 F.3d at 825 n.2; *California DIA*, 8 Am. Disabilities Cas. (BNA) at 492 n.1.

96. See Murray H. Wright & David E. Boelzner, *Quantifying Liability Under the Architect's Standard of Care*, 29 U. Rich. L. Rev. 1471, 1473 (1995) (outlining an architect's usual functions). *But see* Barry Joseph Miller, Note, *The Architect in the Design-Build Model: Designing and Building the Case for Strict Liability in Tort*, 33 Case W. Res. L. Rev. 116, 125-30 (1982) (addressing the “design-build” approach under which architects perform both the design and construction functions).

97. See United States's Memorandum in Opposition to Defendant's Motion to Dismiss at 19, *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997) (Civ. No. 4-96-995) (visited Feb. 24, 1999) <<http://www.usdoj.gov/crt/foia/minn1.txt>>.

98. See *id.* at 18.

before a facility is built.⁹⁹ The Act permits an action to be brought by “any person . . . who has reasonable grounds for believing that such person is about to be subjected to discrimination.”¹⁰⁰ This provision evinces Congress’s intent to apply the language “design and construct” to either designers or constructors.¹⁰¹ For instance, in *Johanson v. Huizenga Holdings, Inc.*,¹⁰² the plaintiffs brought such a suit against the architect of the Broward Arena¹⁰³ before construction had begun.¹⁰⁴ The plaintiffs asserted that they had reasonable grounds to believe that they would be discriminated against because the architect, Ellerbe Becket, had designed several other arenas in violation of the ADA.¹⁰⁵ Although the arena had only been designed and not yet constructed, the court, although without elaboration, rejected the “design and construct” reasoning in *PVA* and denied the architect’s motion to dismiss.¹⁰⁶

To read section 303(a)’s “design and construct” language so literally as to impose liability only on those who both design *and* construct a facility appears to defeat Congress’s intent. Under this literal reading, the DOJ has argued that as long as a facility was designed in compliance with the provisions of the ADA, the owner and constructor may freely depart from the design during construction to eliminate accessible features with impunity,¹⁰⁷ an act for which no one would be liable. Such a “large loophole” of accountability would “effectively nullify” section 303(a).¹⁰⁸

The Central District of Illinois in *United States v. Days Inns of America, Inc.*¹⁰⁹ (“*Illinois DIA*”) agreed with this analysis, explicitly rejecting the holding in *PVA* that liability under section 303(a) falls only to those who both design and construct a commercial facility.¹¹⁰

99. See ADA § 308(a)(1) (codified at 42 U.S.C. § 12188(a)(1) (1994)).

100. *Id.*

101. See United States’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 18 n.12, *Ellerbe Becket* (Civ. No. 4-96-995).

102. 963 F. Supp. 1175 (S.D. Fla. 1997).

103. Broward Arena is the home of the National Hockey League’s Florida Panthers.

104. See *Johanson*, 963 F. Supp. at 1176.

105. See *id.* at 1177.

106. See *id.* at 1178. *But see* Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng’rs, P.C., 945 F. Supp. 1, 2 (D.D.C. 1996) (dismissing the architects from liability under section 303(a) because they did not both design and construct the MCI Center, even though the arena was still under construction and not yet completed), *aff’d on other grounds sub nom.* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997).

107. See United States’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 18, *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997) (Civ. No. 4-96-995) (visited Feb. 24, 1999) <<http://www.usdoj.gov/crt/foia/minn1.txt>>.

108. *Id.*

109. 997 F. Supp. 1080 (C.D. Ill. 1998) (*Illinois DIA*).

110. See *id.* at 1083.

In *Illinois DIA*, the DOJ sued the franchisor, owner, and architect, alleging that a hotel in Champaign, Illinois was designed and constructed in non-compliance with the ADA.¹¹¹ The owner and architect settled with the DOJ,¹¹² leaving Days Inns as defendant. The court then dismissed Days Inns' Motion for summary judgement,¹¹³ finding that PVA's design and construct interpretation afforded a "narrow, literal" reading of section 303(a) which is "inappropriate to carry out the intent of the ADA."¹¹⁴

Additional guidance in interpreting section 303(a)'s statutory language is found in courts' interpretations of a similar provision in the Fair Housing Amendments Act of 1988¹¹⁵ ("FHAA"). Congress, in enacting the ADA, consciously incorporated exact language from the FHAA into several provisions of the ADA to obtain an analogous and consistent statutory scheme.¹¹⁶ The "design and construct" language contained in section 303(a) of the 1990 ADA resembles nearly identical language in the 1988 FHAA. Under the FHAA, "in connection with the design and construction of covered multifamily dwellings," discrimination includes "a failure to design and construct" in compliance with accessibility requirements.¹¹⁷ The FHAA, like ADA section 303(a), contains no language limiting liability for designing and constructing non-compliant buildings to specified categories of defendants.¹¹⁸ Liability under the FHAA is guided solely by the phrase "design and construct."

Two courts have addressed the "design and construct" provision of the FHAA. Both have refused to apply PVA's textual reasoning to the FHAA provision, instead arriving at a broader reading of the FHAA.¹¹⁹ In *United States v. Hartz Construction Co.*,¹²⁰ the plaintiff

111. See Complaint, *Illinois DIA* (No. 96-2028) (visited Feb. 24, 1999) <<http://www.usdoj.gov/crt/foia/diil1.txt>>.

112. See Consent Order and Final Judgement as to Defendants Panchal & Patel, Inc., and Brian J. Pape, *Illinois DIA* (No. 96-2028) (visited Feb. 24, 1999) <<http://www.usdoj.gov/crt/foia/diil2.txt>>.

113. *Illinois DIA*, 997 F. Supp. at 1085.

114. *Id.* at 1083; see also *id.* ("[PVA] correctly notes that the 'and' in 'design and construct' is a conjunctive term, but does this obvious grammatical truth necessarily require a narrow literal reading of liability?").

115. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at scattered sections of 28 U.S.C. and 42 U.S.C.).

116. See, e.g., H.R. Rep. No. 101-485, pt. II, at 117, 120 (1990) (explaining that FHAA phrases such as "readily accessible to and usable by" and "structurally impracticable" were purposely incorporated into the ADA), reprinted in 1990 U.S.C.A.N. 303, 400, 403; S. Rep. No. 101-116, at 69-71 (1989) (same).

117. See 42 U.S.C. § 3604(f)(3) (1994).

118. See generally 42 U.S.C. § 3604; see also Robert G. Schwemm, Housing Discrimination: Law and Litigation § 12.3(1), at 12-22 (8th release 1998) (stating that the FHAA's provisions "simply declare certain housing practices to be unlawful without specifying who may be held responsible for these practices" and that "anyone [who is not specifically exempted and] who commits one of the acts proscribed by the statute's substantive provisions is liable to suit").

119. See *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d

sued the architect and general contractor of a condominium development alleging inadequate accessibility to individuals with disabilities in a variety of aspects of the residential units.¹²¹ The architect relied on *PVA*'s grammatical arguments to support his motion to dismiss.¹²² The court, however, held that "the notion that [the builder and the architect] working together, one performing the first function and the other performing the second function, [are] thereby insulated from liability is a frank absurdity."¹²³ Similarly, in *Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*,¹²⁴ a non-profit corporation, which promotes equal housing opportunities, and a disabled individual who uses a wheelchair for mobility sued the general contractor of a condominium development, alleging violations of the accessibility requirements of the FHAA.¹²⁵ The contractor argued that *PVA*'s narrow interpretation of the ADA's "design and construct" language should be utilized to interpret the FHAA as well.¹²⁶ The court, however, rejected *PVA*'s approach, finding that to conclude that liability can attach only to one who both designs and constructs "would defeat the purpose of the FHAA."¹²⁷

A broader reading of "design and construct" is also consistent with the reasoning used by the Supreme Court in interpreting the ADA to include as disabled those with asymptomatic HIV. In *Bragdon v. Abbott*,¹²⁸ the Court relied heavily on the fact that at the time the ADA was enacted, the then-existing Rehabilitation Act,¹²⁹ on which the ADA's definition of disability was based, had consistently been interpreted to include asymptomatic HIV.¹³⁰ The Court held that "[w]hen administrative and judicial interpretations have settled the

661, 664 (D. Md. 1998) (finding *PVA*'s reasoning "unpersuasive" and rejecting the contractor's motion for summary judgement); *United States v. Hartz Constr. Co.*, No. 97-C-8175, 1998 U.S. Dist. LEXIS 973, at *2, *5 (N.D. Ill. Jan. 26, 1998) ("disagree[ing] totally" with *PVA* and rejecting the architect's motion to dismiss).

120. 1998 U.S. Dist. LEXIS 973.

121. *See id.* at *1-2.

122. *See id.* at *2.

123. *Id.* at *3.

124. 3 F. Supp. 2d 661.

125. *See id.* at 661-62.

126. *See id.* at 662, 664.

127. *Id.* at 664. The court in *Baltimore Neighborhoods* attempted to distinguish the holding in the ADA case of *PVA* from the contradictory rulings in the FHAA cases by noting that there is "no express limitation on possible defendants in the [FHAA] like there is in the [ADA]." *Id.* If one accepts, however, that ADA section 302(a)'s language limiting possible defendants to owners, lessees, lessors, and operators of places of public accommodation does not apply to section 303(a)'s new construction provisions, *see infra* Part II.C, then *Baltimore Neighborhoods* need not be distinguished from *PVA*. Rather, the arguments in *Baltimore Neighborhoods* for "and" meaning "or" should logically apply to ADA cases as well, suggesting that *PVA* was wrongly decided.

128. 118 S. Ct. 2196 (1998).

129. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 791 to 794-d (1994).

130. *See Bragdon*, 118 S. Ct. at 2207-09 (1998).

meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."¹³¹ The record of interpretation of the "design and construct" language of the FHAA was at the time of the ADA's passage nowhere near as definitive as interpretations of HIV as a disability under the Rehabilitation Act.¹³² Nevertheless, Congress's passage of the FHAA in 1988 with no ambiguity as to possible defendants and subsequent passage two years later of the ADA with nearly identical language signals its intent to treat the two statutory schemes similarly.¹³³

The text of section 303(a) referring to the liability of those who "design and construct" facilities is, undoubtedly, sufficiently ambiguous to have elicited contradictory interpretations. When considering congressional intent and the viability of the ADA as an effective piece of legislation, however, "design and construct" must be read in its broader interpretation. To do otherwise would be to interpret the phrase "design and construct" as intentionally exempting from liability both the designers and the constructors of the overwhelming majority of commercial facilities in this country—facilities which are not, nor historically have been, designed and constructed by the same party.

C. Owners, Lessees, Lessors, and Operators

Courts have also struggled with the question of whether section 303(a)'s explicit reference to section 302(a)¹³⁴ limits liability to the same enumerated list of possible defendants as those listed in section 302(a), that is: to owners, lessees, lessors, and operators. In addressing this larger issue of statutory construction, the Eastern District of Kentucky in *United States v. Days Inns of America, Inc.*¹³⁵ ("Kentucky DIA") and the Eastern District of California in *California DIA* followed *PVA*, narrowly interpreting the language of section 303(a) to restrict liability only to owners, lessees, lessors, and

131. *Id.* at 2208.

132. Compare *Baltimore Neighborhoods, Inc.*, 3 F. Supp. 2d at 664 (noting that the FHAA regulations "do not specify the parties who may be liable"), with *Bragdon*, 118 S. Ct. at 2208 (noting the "unwavering line of administrative and judicial interpretation" of HIV as a disability under the Rehabilitation Act).

133. See Brief for the United States as Appellant at 30, *United States v. Days Inns of Am., Inc.*, No. 98-15433 (9th Cir. Filed Oct. 13, 1998) (arguing that the identical "design and construct" language in the ADA and FHAA "should generally be interpreted consistently where both statutes address a similar subject matter and serve common goals" (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979))).

134. See ADA § 303(a) ("[A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes . . . a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities . . ." (emphasis added)) (codified at 42 U.S.C. § 12183(a)).

135. 22 F. Supp. 2d 612 (E.D. Ky. 1998) (*Kentucky DIA*).

operators of newly constructed buildings by directly transferring the language of section 302(a) into section 303(a).¹³⁶

In both cases, the DOJ had sued the hotels' builders, architects, owners, and the franchisor.¹³⁷ The DOJ alleged that the newly constructed hotels in Hazard, Kentucky, and Willows, California, did not comply with ADA accessibility requirements.¹³⁸ The architects, builders, and owners settled the suits against them, leaving only Days Inns as a defendant.¹³⁹ Citing *PVA*, both courts held that, regardless of whether Days Inns designed or constructed the hotels, because it was not the owner, lessee, lessor, or operator, and therefore could not be held liable.¹⁴⁰ Because section 303(a) states that "discrimination for the purposes of section 302(a) includes a failure to design and construct facilities . . . that are readily accessible . . . and usable,"¹⁴¹ these courts held that section 303(a) strictly incorporates section 302(a)'s enumeration of possible defendants.¹⁴²

This transference is contradicted, however, by the inapplicability of

136. See *id.* at 615-16 (holding that section 303(a) is limited to owners, lessees, lessors, and operators); *United States v. Days Inns of Am. (California DIA)*, 8 Am. Disabilities Cas. (BNA) 491, 493-94 (E.D. Cal. Jan. 12, 1998) (same), *appeal docketed*, No. 98-15433 (9th Cir. Mar. 17, 1998).

137. See Complaint at 1, *Kentucky DIA* (No. 96-26) (visited Feb. 24, 1999) <<http://www.usdoj.gov/ctr/foia/diky1.txt>>; Complaint at 2, *California DIA* (No. Civ. S-96-260) (visited Feb. 24, 1999) <<http://www.usdoj.gov/ctr/foia/dical1.txt>>.

138. For detailed lists of the alleged non-compliant features of the hotels and hotel rooms, see Complaint at 6-9, *Kentucky DIA* (No. 96-26); Complaint at 6-8, *California DIA* (No. Civ. S-96-260).

139. See Consent Order and Final Judgement as to Defendants Hazard Management Group, Inc., J. Douglas Kidd, and Napier & Sebastian Construction at 2, *Kentucky DIA* (No. 96-26) (settling with the owner, architect, and general contractor) (visited Feb. 24, 1999) <<http://www.usdoj.gov/ctr/foia/diky2.txt>>; Consent and Final Judgement as to Defendant Iyer and Associates at 4, *California DIA* (No. Civ. S-96-260) (visited Feb. 24, 1999) <<http://www.usdoj.gov/ctr/foia/dical2.txt>>; Consent Order and Final Judgement Dismissing Claims of the United States Against Dilip Patel at 6, *California DIA* (No. Civ. S-96-260) (settling with the owner) (visited Feb. 24, 1999) <<http://www.usdoj.gov/ctr/foia/dical3.txt>>; Consent Order and Final Judgment against Defendant R.E. Huffman, Inc. at 5(A), *California DIA* (No. Civ. S-96-260) (settling with the general contractor), (visited Feb. 24, 1999) <<http://www.usdoj.gov/ctr/foia/dical4.txt>>.

140. *Kentucky DIA*, 22 F. Supp. 2d at 617; *California DIA*, 8 Am. Disabilities Cas. (BNA) at 495.

141. ADA § 303(a) (emphasis added) (codified at 42 U.S.C. § 12183(a) (1994)).

142. See *Kentucky DIA*, 22 F. Supp. 2d at 615 ("[S]ection 303 itself refers back to § 302 in a manner that makes it clear that the prohibitions relating to new construction apply to owners, operators, lessors, and lessees."); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 493 ("Section 303(a) depends on § 302(a) for prohibitory language. Therefore, § 303(a) must incorporate the language of § 302(a)."); see also *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1, 2 (D.D.C. 1996) ("[Section] 303 defines 'discrimination for the purposes of § 302(a).' Therefore, the limitation in § 302 to owners, operators, and lessors also applies to § 303 and thereby excludes architects from liability under the section." (quoting ADA § 303(a) (codified at 42 U.S.C. § 12183(a))), *aff'd on other grounds sub nom. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

section 302(a)'s specific prohibitions to section 303(a)'s broader category of applicable commercial facilities.¹⁴³ In *8th Circuit DIA*, *Illinois DIA*, *Johanson*, and *United States v. Ellerbe Becket, Inc.*¹⁴⁴ ("Ellerbe"), the courts observed that section 302(a)'s enumerated list of defendants restricts liability to "any person who owns, leases (or leases to), or operates a *place of public accommodation*."¹⁴⁵ Thus, the direct importation of this list of possible defendants into section 303(a) would have section 303(a) apply only to owners, lessees, lessors, and operators of *places of public accommodation*, when, however, section 303(a)'s new construction provisions apply to *all* commercial facilities including office buildings and factories.¹⁴⁶ Indeed, by transferring the list of defendants into section 303(a), no entity would be liable for the new construction or alteration of office buildings and factories.¹⁴⁷ Such an "inexplicable gap in coverage" would "render[] meaningless" section 303(a)'s inclusion of commercial facilities.¹⁴⁸ Thus, the list from section 302(a) could only be transferred to section 303(a) if section 302(a)'s phrase "owns, leases (or leases to), or operates a *place of public accommodation*"¹⁴⁹ is not transferred literally, but is instead rewritten as "owns, leases (or leases to), or operates *commercial facilities*."¹⁵⁰ Such a reading, however, would contradict the plain-language argument that is the basis for the narrow interpretation in the first place.¹⁵¹

143. Section 302(a) only applies to places of public accommodation. See ADA § 302(a) (codified at 42 U.S.C. § 12182(a)).

144. 976 F. Supp. 1262 (D. Minn. 1997).

145. ADA § 302(a) (emphasis added) (codified at 42 U.S.C. § 12182(a)).

146. See *id.* § 303(a) (codified at 42 U.S.C. § 12183(a)); see also *supra* note 60 and accompanying text.

147. See *United States v. Days Inns of Am., Inc. (8th Circuit DIA)*, 151 F.3d 822, 825 (8th Cir. 1998) ("The practical application of [the defendant's] interpretation would leave no entity liable for violations of the new construction accessibility standards for buildings which are commercial facilities only."), *cert. denied* 119 S. Ct. 1249 (1999); *United States v. Days Inns of Am., Inc. (Illinois DIA)*, 997 F. Supp. 1080, 1084 (C.D. Ill. 1998) ("The defendants... argue for a judicial transference of statutory language which when accomplished would make it conceivable that no entity would be liable for construction of a new commercial facility which violates the ADA." (quoting *Ellerbe Becket*, 976 F. Supp. at 1268 (quoting *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1178 (S.D. Fla. 1997)))).

148. See *8th Circuit DIA*, 151 F.3d at 825 (citing *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)); *Ellerbe Becket*, 976 F. Supp. at 1267 (same).

149. ADA § 302(a) (emphasis added) (codified at 42 U.S.C. § 12182(a)).

150. See *8th Circuit DIA*, 151 F.3d at 825 (declining to transfer section 302(a)'s list of defendants into section 303(a)); *Illinois DIA*, 997 F. Supp. at 1084 (same); *Ellerbe Becket*, 976 F. Supp. at 1267-68 (same); *Johanson*, 963 F. Supp. at 1178 (same).

151. See *8th Circuit DIA*, 151 F.3d at 825 (holding that transferring section 302(a)'s "owns, leases (or leases to), or operates" language without also transferring "a place of *public accommodation*" would "violate[] the maxim of statutory interpretation that courts should give effect to the plain language of the statute" (citing *Western Nat'l Mut. Ins. Co. v. Commissioner of Internal Revenue*, 65 F.3d 90, 93 (8th Cir. 1995))); *Illinois DIA*, 997 F. Supp. at 1084 ("The inclusion of that language in the new construction of commercial facilities provisions would negate the plain language of

The distinctions between the two categories of facilities covered by sections 302¹⁵² and 303¹⁵³—existing places of public accommodation versus newly constructed commercial facilities, each with its own standards for accessibility requirements¹⁵⁴—highlight the appropriateness of differentiating between categories of defendants.¹⁵⁵ Section 302 defines various unlawful activities, including the imposition of discriminatory eligibility criteria, failure to modify policies and practices, failure to provide auxiliary aids and services, as well as the failure to remove existing architectural barriers from places of public accommodation.¹⁵⁶ The nature and scope of these prohibited acts is broad and varied, thus making appropriate the imposition of liability on a limited and easily identifiable list of individuals such as owners, lessees, lessors, and operators.¹⁵⁷ Section 303, by contrast, defines one category of unlawful activity, the design and construction of non-compliant facilities.¹⁵⁸ The parties responsible for complying with section 303 are evident from the nature of the activity itself, as “the definition of the prohibited activity inherently carries with it an identification of the responsible parties,”¹⁵⁹ such as architects.

Courts using congressional-intent arguments in applying a strict

the statute and would require a [c]ongressional intent analysis on the part of the court.”); *Ellerbe Becket*, 976 F. Supp. at 1267 (holding that such a reading would “undercut[] . . . [the] ‘plain language’ logic” which is the basis for judicial transference of section 302(a)’s prohibitory language into 303(a)). *But see* *United States v. Days Inns of Am. (California DIA)*, 8 Am. Disabilities Cas. (BNA) 491, 494 (E.D. Cal. Jan. 12, 1998) (arguing for a restructured reading in order to eliminate the suggested gap in coverage and finding such a reading consistent with Congress’s clear intent), *appeal docketed*, No. 98-15433 (9th Cir. Mar. 17, 1998).

152. *See* ADA § 302 (relating to existing places of public accommodation) (codified at 42 U.S.C. § 12182).

153. *See id.* § 303 (relating to newly-constructed commercial facilities including places of public accommodation) (codified at 42 U.S.C. § 12183).

154. *See supra* Part I.A.

155. *But see* *United States v. Days Inns of Am., Inc. (Kentucky DIA)*, 22 F. Supp. 2d 612, 615-16 (E.D. Ky. 1998) (holding that because sections 301 and 303 “deal with the same subject, they are to be read *in pari materia* and harmonized” (quoting *Jones v. St. Louis-San Francisco Realty Co.*, 728 F.2d 257, 262 (6th Cir. 1984))); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 493 & n.6 (concluding that because “[t]he distinction between sections 302(a) and 303(a) reflects the cost difference of new construction as opposed to retrofitting,” and that the statute “does not differentiate between the parties held to those higher standards . . . the liability provisions remain the same”).

156. *See* ADA § 302(b)(1) (codified at 42 U.S.C. § 12182(b)(1)).

157. *See* *United States’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 13, United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997) (No. 4-96-995) (visited Feb. 24, 1999) <<http://www.usdoj.gov/crt/foia/minn1.txt>>.

158. *See* ADA § 303(a) (codified at 42 U.S.C. § 12183(a)).

159. *United States’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 13-14, Ellerbe Becket* (No. 4-96-995).

reading of section 303(a)¹⁶⁰ as a basis for excluding architects from liability have relied on reasoning that could just as easily be used to arrive at opposite and more persuasive interpretations. For example, because an earlier draft of the ADA included the provisions now in sections 302(a) and 303(a) as part of the same section,¹⁶¹ these courts held that the two enacted sections were initially intended to operate as one, and the limitation of liability to owners, lessees, lessors, and operators in section 302(a) should thus be interpreted as applying to both sections.¹⁶² Conversely, however, these same facts could more plausibly be read to demonstrate that the two provisions were intentionally separated in order to distinguish between them and the parties liable pursuant to them. That the phrase "owns, leases (or leases to), and operates" appears in the legislative history only when referring to places of public accommodation¹⁶³ reinforces this latter conclusion.

Similarly, the court in *Kentucky DIA* held that section 303(a)'s lack of explicit reference to liable parties evinced Congress's intent to incorporate section 302(a)'s list of possible defendants into section 303(a),¹⁶⁴ even though the same reasoning could be used to conclude the opposite. In looking to a provision in Title II of the ADA that holds parties liable for constructing inaccessible rail stations,¹⁶⁵ the court noted that liability under that provision is ascribed only to those with "control over the selection, design, construction, or alteration of the property."¹⁶⁶ The court then concluded that because Congress knew how in Title II to impose liability for non-compliant design and construction to persons other than owners, lessees, lessors, and operators,¹⁶⁷ the omission of similar language from Title III's section

160. See *Kentucky DIA*, 22 F. Supp. 2d at 616-17 (limiting liability under section 303(a) to owners, lessees, lessors, and operators); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 493-94 (same).

161. See S. 933, 101st Cong. § 402 (May 9, 1989). Section 402 of Senate Bill 933 eventually became sections 302 and 303 of the ADA. See S. 933, 102d Cong. §§ 302, 303, 104 Stat. 327 (1990).

162. See *Kentucky DIA*, 22 F. Supp. 2d at 615 ("Based on similarities in the purpose and in the drafting of §§ 302 and 303, it is apparent to this Court that Congress intended to limit liability under § 303 to owners, operators, lessors, and lessees."); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 493 n.6 ("The two sections were intended to operate as one, so the liability provisions apply to both.").

163. See *infra* notes 171-76 and accompanying text.

164. See *Kentucky DIA*, 22 F. Supp. 2d at 616 ("[Section] 303 is devoid of any additional entity that is subject to compliance with ADA standards.").

165. See ADA § 242(e)(1) ("It shall be considered discrimination for purposes of section 202 of this Act . . . for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities . . .") (codified at 42 U.S.C. § 12162(e)(1) (1994)).

166. *Id.* § 241(6) (codified at 42 U.S.C. § 12161(6)); *California DIA*, 8 Am. Disabilities Cas. (BNA) at 494.

167. See *California DIA*, 8 Am. Disabilities Cas. (BNA) at 494 ("Congress thus knew how to impose precisely [liability under section 303(a) to persons other than owners, lessees, lessors, and operators].").

303(a) is presumed intentional.¹⁶⁸ Again, however, using the court's own reasoning, the precisely opposite conclusion would be equally valid. The "disparate . . . exclusion" of language found in section 302(a)'s terms "any person who owns, leases (or leases to) or operates" from section 303(a) could be interpreted as proof "that Congress act[ed] intentionally and purposely"¹⁶⁹ to treat the two sections *differently*.

The legislative history of the ADA reveals that, contrary to courts' narrow interpretations, section 303(a)'s reference to section 302(a)¹⁷⁰ was not added for the purpose of transferring section 302(a)'s list of possible defendants¹⁷¹ to section 303(a).¹⁷² In the Senate's 1989 version of the bill, section 302(a) did not yet include a list of possible defendants.¹⁷³ Significantly, however, section 303(a) of the same 1989 bill already referenced the "'discrimination' as used in section 302(a)."¹⁷⁴ Thus, the 1989 bill would have made the design and construction of new facilities¹⁷⁵ discrimination without restriction to particular types of defendants. The House later inserted into section 302(a) the phrase "owns, leases (or leases to), or operates" for the particular purpose of expanding the scope of liability for places of public accommodation to include not only the owner and operator of places of public accommodation, but also the owner of the building that houses the place of public accommodation.¹⁷⁶ The insertion of

168. *See id.* ("[Where Congress] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *see also Kentucky DIA*, 22 F. Supp. 2d at 616 ("Had Congress intended to extend liability further in [section] 303, it could have easily done so.").

169. *California DIA*, 8 Am. Disabilities Cas. (BNA) at 494.

170. *See ADA* § 303(a) ("[A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes . . . a failure to design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities . . ." (emphasis added)) (codified at 42 U.S.C. § 12183(a)).

171. Owners, lessees, lessors, and operators of places of public accommodation constitute this list. *See id.* § 302(a) (codified at 42 U.S.C. § 12182(a)).

172. *See infra* note 176 and accompanying text.

173. *See S. 933*, 101st Cong., § 302(a) (Sept. 6, 1989), *reprinted in* 135 Cong. Rec. 19,823, 19,827 (1989).

174. *Id.* § 303(a) (emphasis added), *reprinted in* 135 Cong. Rec. 19,823, 19,828 (1989).

175. The categories of new facilities covered by section 303(a) of the September 6, 1989 version of the bill included new "public accommodation[s]" and "potential place[s] of employment." *Id.* These categories of facilities were later changed to the more general "commercial facilities" to eliminate confusion with Title I's employment provisions. *See* 136 Cong. Rec. 11,467, 11,473 (1990) (statement of Rep. Hoyer).

176. *See H.R. Rep. No. 101-485*, pt. III, at 55 (1990) ("This amendment makes it clear that the owner of the building which houses the public accommodation, as well as the owner or operator of the public accommodation itself, has obligations under this Act."), *reprinted in* 1990 U.S.C.C.A.N. 445, 478; 136 Cong. Rec. 11,425, 11,452 (1990) (statement of Rep. Fish) (substantially same).

the list does not appear to have been intended to limit defendants for non-compliant design and construction of the larger category of commercial facilities.

Interestingly, none of the courts that have addressed the issue of whether section 303(a) is limited to owners, lessees, lessors, or operators has relied on the DOJ's interpretation of liability,¹⁷⁷ which requires that all parties involved in the design and construction of new facilities conform their involvement, whatever its scope, to the requirements of the ADA.¹⁷⁸ When confronted with an ambiguous statute, courts may give deference to agency interpretations.¹⁷⁹ The court in *California DIA*, however, followed *PVA* in choosing not to defer to these regulations, finding Congress's clear intent to limit section 303(a) to the owners, lessees, lessors, and operators enumerated in section 302(a).¹⁸⁰

Ironically, the courts in *Illinois DIA* and *Ellerbe* relied on the same argument—that the intent of the statute is clear and thus deference to agency interpretations is unwarranted—to reach the exact opposite conclusion, finding that Congress clearly intended that section 303(a) *not* be limited to the defendants enumerated in section 302(a).¹⁸¹ Arguably, because several courts have used the same intent argument to arrive at opposite results, the statute may not be wholly unambiguous.¹⁸² As such, deference to the DOJ's interpretation,

177. *But see* *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1267 n.4 (D. Minn. 1997) (stating in dicta that had the court been unable to determine Congress's intent from the plain language of the statute, it would have deferred to the DOJ's interpretation).

178. *See* Civil Rights Division, United States Department of Justice, *The Americans with Disabilities Act: Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, III-5.1000, at 46 (Nov. 1993) [hereinafter *ADA Technical Assistance Manual*].

179. *See* *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

180. *See* *United States v. Days Inns of Am., Inc. (California DIA)*, 8 Am. Disabilities Cas. (BNA) 491, 494 n.8 (E.D. Cal. Jan. 12, 1998) ("Deference to the interpretation of the Department of Justice is unwarranted here. Congressional intent on the question of liability for violations of the new construction requirements in public accommodations is clear."), *appeal docketed*, No. 98-15433 (9th Cir. Mar. 17, 1998); *see also* *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1, 2 (D.D.C. 1996) (holding that deference to the DOJ's interpretation is unwarranted "[b]ecause the plain language of the statute makes clear that architects are not covered by [sections] 302 and 303 of the ADA"), *aff'd on other grounds sub nom.* *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

181. *See* *United States v. Days Inns of Am., Inc. (Illinois DIA)*, 997 F. Supp. 1080, 1084 (C.D. Ill. 1998) (finding that the plain language of the statute did not limit liability under section 303(a) to owners, lessees, lessors, and operators, and thus not applying a "[c]ongressional intent analysis"); *Ellerbe Becket*, 976 F. Supp. at 1267 & n.4 (finding that the plain language of the statute did not limit liability under section 303(a) to owners, lessees, lessors, and operators, and refusing to defer to the DOJ's interpretation under *Chevron*).

182. *Compare* *Illinois DIA*, 997 F. Supp. at 1084 (holding that the plain language of

which holds an architect liable for non-compliant design under section 303(a),¹⁸³ would be appropriate.¹⁸⁴

Statutory interpretations that find architects liable for discrimination under section 303(a) are consistent with both the statutory language of the ADA and with congressional intent. The next part examines the broader issue of the architect's role in building design and concludes that this too supports finding architects liable under the ADA.

III. THE ARCHITECT'S ROLE: WHY LIABILITY UNDER THE ADA IS APPROPRIATE

This part examines the role of the architect in the design and construction process and concludes that both precedent and public policy rationales argue for holding architects responsible under section 303(a) for the design of commercial facilities not in compliance with the ADA.

Architects' liability to third parties for negligent design is now a firmly rooted concept in American law.¹⁸⁵ Although under the common law doctrine of privity, architects once had a duty only to those with whom they contracted,¹⁸⁶ this precedent began to erode with the seminal 1916 decision of *MacPherson v. Buick Motor Co.*¹⁸⁷ *MacPherson* led to a series of decisions that ultimately established architects' liability in tort to foreseeable users of the buildings they negligently design.¹⁸⁸ Because under the simple-negligence construct

the statute does not limit liability under section 303(a) to owners, lessees, lessors, and operators), and *Ellerbe Becket*, 976 F. Supp. at 1267 & n.4 (same), with *California DIA*, 8 Am. Disabilities Cas. (BNA) at 494 n.8 (holding that the plain language of the statute limits liability under section 303(a) to owners, lessees, lessors, and operators), and *Paralyzed Veterans of Am.*, 945 F. Supp. at 2 (same).

183. See ADA Technical Assistance Manual, *supra* note 178, III-5.1000, at 46.

184. See *Ellerbe Becket*, 976 F. Supp. at 1267 n.4 (noting that deference to the DOJ's interpretation would be appropriate absent clarity in the statutory language).

185. See William David Flatt, Note, *The Expanding Liability of Design Professionals*, 20 Mem. St. U. L. Rev. 611, 615 (1990) ("The relegation of the privity requirement and the acceptance rule to the dustbin of history cleared the way for the modern approaches to design professional liability . . . on the theory of negligence in tort."); see also *infra* notes 186-88 and accompanying text.

186. See James Acret, *Architects and Engineers* 36-38 (3d ed. 1993) (describing the privity of contract defense by design professionals as the "old rule" which has since been rejected in most jurisdictions).

187. 111 N.E. 1050, 1050, 1055 (N.Y. 1916) (holding an automobile manufacturer responsible for injuries sustained by a rider when the defective wooden spokes of a wheel manufactured by an independent supplier crumbled into fragments on an automobile that it manufactured but did not sell to plaintiff).

188. See, e.g., *Inman v. Binghamton Hous. Auth.*, 143 N.E.2d 895, 898-99 (N.Y. 1957) (abandoning the privity doctrine for architects and subjecting them to tort liability for negligent design). Most jurisdictions reject a strict liability standard for architects and engineers. See Flatt, *supra* note 185, at 622-25 (discussing courts' reasoning in rejecting strict liability for design professionals). But see *id.* at 619-22 & n.58 (noting that some states impose implied warranties that can be tantamount to a

architects are held liable to persons in the absence of privity, it is both reasonable and appropriate for a civil rights law to apply the same or a higher standard.

The responsibilities of architects for code-compliance are clearly defined and significant. Architects may not violate building code or other construction requirements, even at the client's request,¹⁸⁹ nor, in most jurisdictions, may architects delegate design functions to non-professionals, such as owners.¹⁹⁰ Indeed, an architect who heeds the demand of an owner to design a building in an unauthorized (perhaps less expensive) way is held liable for professional misconduct under applicable ethical codes.¹⁹¹ The responsibility for proper building design is thus ascribed not to clients, who may have limited knowledge of design regulations and little incentive to meet them, but to licensed architects, whose "training and professional status place them in the best position to protect the public by assuring that their designs safeguard life, health, and property to the fullest extent possible."¹⁹²

State ethics codes stipulate that the architect's "duty to the public [i]s higher than any other."¹⁹³ Consistent with this responsibility is a broad reading of the ADA's section 303(a),¹⁹⁴ which would hold an

strict-liability standard). *See generally* Miller, *supra* note 96, at 117 (arguing for strict liability where the architect acts as both the designer and the general contractor).

189. *See* Brian M. Samuels, *Construction Law* 125 (1996) (describing the problems associated with clients' attempts to compromise design professionals' judgment); *see also, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 8, § 29.1(b)(1) (1997) (defining unprofessional conduct as the "negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of the profession").

190. *See* Acret, *supra* note 186, at 23-24 (discussing the doctrine of non-delegable duty, under which an "architect's duty to exercise professional . . . judgment is nondelegable"); *see also, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 8, § 29.1(b)(10) (1997) (defining unprofessional conduct as the delegating of professional responsibilities to non-professionals).

191. *See* Samuels, *supra* note 189, at 125. Architects are frequently in the position of working for clients desiring the most inexpensive buildings possible. Many such clients might, were it permitted, take a calculated risk and instruct the architect not to comply with certain codes. Because the architect is a licensed professional, accountable to the public and to her licensing board for substandard design, she must refuse such requests.

192. Flatt, *supra* note 185, at 615. For example to be licensed to practice architecture in New York, an individual must generally receive a bachelor or master of architecture degree, undergo a three-year post-graduate internship, and pass a rigorous four-day examination. *See* N.Y. Comp. Codes R. & Regs. tit. 8, §§ 69.1-69.2 (1995). The uniform "Architect Registration Exam," given in all fifty states, tests not only prospective architects' knowledge of fire safety, structural support systems, construction materials and methods, mechanical and ventilation systems, site planning, and design, *see* David Kent Ballast, 2 *Architecture Review Exam: Non-Structural Topics* xix-xx (4th ed. 1998), but also their ability to design spaces accessible to persons with physical disabilities, *see id.* at 8-1 ("Barrier-free design is an important part of the [Architecture Review Exam], especially since the [ADA] became law . . .").

193. Samuels, *supra* note 189, at 125.

194. *See supra* Part II.B-C (arguing for a broad reading of section 303(a) that

architect liable for discrimination in designing commercial facilities without accessibility features such as elevators or ramps. Holding only owners liable, and permitting them to then sue architects separately for damages under state tort law, would place architects in the untenable position of being able to contract away their state-imposed ethical obligations to the public, and put compliance with the ADA at risk by allowing building owners to take calculated risks that non-compliant designs would escape suit. No life-safety building code requirement would be treated in this manner, nor should the accessibility requirements of the ADA.

Exempting architects from liability under the ADA would serve not only to treat architects differently than other licensed professionals, but to treat the ADA as something less than other civil rights laws. If a licensed real estate professional, for example, accedes to the request of a building owner to show her apartments only to persons of certain ethnic groups, both the owner and the broker would be guilty of discrimination, the broker not less so because her client had requested it.¹⁹⁵ Similarly, an employment agency illegally agreeing not to refer applicants of certain religions is not relieved of a claim of discrimination merely because it was complying with the employer's request.¹⁹⁶ So, too, in the context of the design of commercial facilities not in compliance with the ADA, should architects be susceptible to claims of discrimination.

From a public policy perspective, finding architects liable for non-compliant design is likely to serve as a powerful deterrent, resulting in more careful incorporation of ADA standards into the design of buildings, a greater number of compliant facilities, and thus fewer lawsuits. Additionally, front-loading the cost of compliance with the ADA will result in a more efficient allocation of resources by avoiding the greater cost of reconstructing non-compliant newly-built facilities.¹⁹⁷ Thus, society as a whole would save the dead-weight costs associated with rebuilding facilities constructed in non-compliance, ensuing litigation costs, and not having the use of the structures during the reconstruction necessary to retrofit them with accessibility features.

would find anyone who designs or constructs a non-compliant facility guilty of discrimination, regardless of whether the person was an owner, lessee, lessor, or operator).

195. See 15 Am. Jur. 2d *Civil Rights* § 250 (1976 & Supp. 1999) (noting that "where a realtor, engaging in [discriminatory] conduct, is acting as the agent of a codefendant, and within the scope of [her] apparent authority, both defendants are liable to the plaintiff").

196. See generally 45B Am. Jur. 2d *Job Discrimination* § 1178 (1993) (noting that "employment agencies are subject to many of the federal and state job discrimination and other fair employment practices laws").

197. See Steven A. Holmes, *Disabled Find Housing Fails On Access Test*, N.Y. Times, Mar. 22, 1999, at A1 (noting that it is more cost effective to design buildings in compliance with accessibility requirements than to retrofit them afterward).

The courts in *Kentucky DIA* and *California DIA* predicted that defining proper defendants as anyone who designs or constructs a non-compliant facility would be so expansive that every carpenter, subcontractor, and material supplier could be liable under section 303(a).¹⁹⁸ The court in *8th Circuit DIA*, however, held that the "design and construct" language of section 303(a) is not overly broad and is sufficient to guide liability.¹⁹⁹ Adopting the test used in *United States v. Bestfoods*,²⁰⁰ the court provided an appropriate mechanism for establishing liability, holding that to be liable under section 303(a)'s "design and construct" language, the defendant must have had "a significant degree of control over the final design and construction of a facility."²⁰¹

Architects, granted virtual monopolies in providing the service of safe building design in most jurisdictions,²⁰² possess this significant level of control, and are thus, by the nature of their role in the design process and under the terms and intent of the ADA, proper defendants in a suit alleging discrimination on the basis of building design in violation of the ADA.

CONCLUSION

Architects are proper defendants in a suit alleging discrimination resulting from non-compliant building design under section 303(a) of the ADA. The hypertextual interpretations set forth by some courts in order to restrict architects' liability are not only susceptible to opposite and arguably more persuasive interpretations using identical facts and reasoning, but fail to take into account Congress's intent in enacting the ADA.

As with many civil rights law controversies, courts' varying approaches to the ADA appear to turn in part upon fundamental differences in the conception of government. A parking violations

198. See *United States v. Days Inns of Am., Inc.*, 22 F. Supp. 2d 612, 615 (E.D. Ky. 1998) (subcontractors and material suppliers); *United States v. Days Inns of Am.*, 8 Am. Disabilities Cas. (BNA) 491, 492-93 (E.D. Cal. Jan. 12, 1998) (individual carpenters), *appeal docketed*, No. 98-15433 (9th Cir. Mar 17, 1998).

199. See *United States v. Days Inns of Am., Inc.* (*8th Circuit DIA*), 151 F.3d 822, 826 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1249 (1999).

200. 118 S. Ct. 1876 (1998). In *Bestfoods*, the Supreme Court held that a parent company could be held liable for its subsidiary's violation of environmental laws if the parent company "manage[d], direct[ed], or conduct[ed] operations specifically related to," the environmental law. See *id.* at 1887.

201. *8th Circuit DIA*, 151 F.3d at 826. Oddly, despite the court's broad reading of section 303(a) as not limiting liability to owners, lessees, lessors, and operators, it adopted PVA's narrow requirement that only those who both design and construct may be liable under section 303(a). See *id.* at 825 n.2.

202. See, e.g., N.Y. Educ. Law § 7302 (McKinney 1985) ("Only a person licensed or otherwise authorized to practice under this article shall practice architecture or use the title 'architect.'"); see also *id.* § 6512 (making unauthorized practice a felony). Engineers carry similar responsibilities. See *supra* note 1.

administrative law judge once said to me, in dismissing a parking ticket because it had been filled out incorrectly, "Before I use the power of government against people, the government had better make sure it at least filled the forms out properly." To some extent, this quote summarizes what judicial disputes concerning civil rights boil down to: Is Congress, in writing law, using the power of government against people (building owners, lessees, lessors, and operators, for example) or for people's benefit (the disabled)?

In examining rulings limiting liability under the ADA to the narrowest possible category of defendants, it is difficult to conclude that this question of basic philosophy did not play a significant role. These rulings, to be consistent with congressional intent, would have to assume that Congress enacted the ADA with the goal of making discrimination against the disabled legal in the overwhelming majority of the nation's public and commercial facilities, yet inexplicably prohibiting inaccessibility to the disabled only in the small fraction of such structures designed, constructed, and owned by the same party. Such a law would have less to do with providing access for the disabled than with discouraging that particular category of building ownership. Courts, instead, essentially threw out the ticket because it was not filled out properly. When the Supreme Court is reduced to relying on definitions from Webster's Dictionary²⁰³ and on discussion of the ADA's use of the "present indicative" tense of the verb "substantially limits"²⁰⁴ to contradict intentions explicitly stated in the ADA's House and Senate Reports,²⁰⁵ it is not interpreting the ADA, it is grammatically circumventing it.

203. See, e.g., *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150 (1999) (citing the Oxford English and Webster's New World dictionaries to define "substantially limits"). For a critical analysis of the recent increased use of the dictionary in Supreme Court statutory construction, see generally Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437 (1994).

204. See *Sutton*, 119 S. Ct. at 2146-47; see also text accompanying notes 48-51 (discussing the Court's reliance on Dictionaries and verb tense in *Sutton*).

205. See *supra* notes 52-53 and accompanying text.