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

James P. Colgate

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol68/iss1/4

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
NOTES

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

James P. Colgate*

INTRODUCTION

Can an architect who designs a building in violation of the accessibility requirements of the Americans with Disabilities Act (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 builder 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. Although no state today imposes such harsh

* 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.

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 I.B-C.


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. 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. An architect who negligently designs a building that collapses on a person can be found guilty of manslaughter.

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. Some courts have adhered to a literal, textual interpretation of section 303(a), assigning liability only to owners, lessees, lessors, and operators of buildings—a reading that excludes architects from

\[\text{of the house, that builder shall be put to death.}\]
\[\text{If it cause the death of a son of the owner of the house, they shall put to death a son of that builder.}\]
\[\text{If it cause the death of a slave of the owner of the house, he shall give to the owner of the house a slave of equal value.}\]
\[\text{If it destroy property, he shall restore whatever it destroyed, and because he did not make the house which he built firm and it collapsed, he shall rebuild the house which collapsed from his own property [i.e., at his own expense].}\]
\[\text{If a builder build a house for a man and do not make its construction meet the requirements and a wall fall in, that builder shall strengthen that wall at his own expense.}\]

\[\text{\textit{Id.} §§ 229-233, at 81, 83, (alteration by Harper). The Code apparently placed no value on the life of the wife or daughter of the owner. See \textit{id}.}\]


6. \textit{See, e.g.,} Montijo v. Swift, 33 Cal. Rptr. 133, 134-35 (Cl. App. 1963). In \textit{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. \textit{See id.} at 134. The court held that the architect owed a duty to the plaintiff and remanded the case to trial. \textit{See id.} at 135.

7. \textit{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. \textit{See ADA} § 303(a) (codified at 42 U.S.C. § 12183(a) (1994)).

9. \textit{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" a facility, thus excusing from liability anyone who designs but does not construct that facility. 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.

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 discrimination against the estimated 43 million Americans with disabilities 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
The Act, dubbed the "emancipation proclamation" for the disabled and "the most sweeping piece of civil rights legislation possible in the history of our country, but certainly since the Civil War era," passed in 1990 with overwhelming majorities in both the House and Senate. 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.

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. 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. Title III, "Public Accommodations and Services Operated by Private Entities," mandates access to privately owned businesses and other establishments. 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." 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."

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

Some courts have interpreted provisions of the ADA broadly, consistent with the ADA's stated purpose of eliminating discrimination against individuals with disabilities. For instance, in Bragdon v. Abbott, a dentist refused to treat an asymptomatic HIV-positive patient in his office. 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, it nonetheless held that asymptomatic HIV may be a disability. In Cleveland v. Policy Management Systems Corp., 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. 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. Citing differences in the statutes, the Court held that "an SSDI claim and an ADA claim can comfortably exist side by side."

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. This "backlash" 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, transvestism, or transsexualism 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)).
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.
33. See id. at 1599.
34. See id.
35. Id. at 1602.
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.\textsuperscript{38} Fueling this trend in the case of the ADA are businesses that are reluctant to meet ADA requirements\textsuperscript{39} and the media’s publicizing of frivolous claims.\textsuperscript{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.\textsuperscript{41}

Layered over this ideological framework is the growing use by the courts of “textualism” in statutory interpretation.\textsuperscript{42} As a method of statutory construction, textualism “discounts extra-textual sources of interpretation in favor of ‘plain meaning’ constructions.”\textsuperscript{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.\textsuperscript{44}
In Sutton v. United Air Lines, Inc., the defendant airline declared two myopic sisters unqualified to serve as commercial airline pilots. With corrective lenses, their vision functioned identically to individuals without visual impairments. Focusing on the precise wording of ADA provisions, the majority found that the petitioners were not “disabled” within the meaning of the ADA, 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.” Because the phrase is in the “present indicative” 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. The majority explicitly refused to consider the legislative history of the ADA, 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.”

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. 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.

This section applies to existing places of public accommodation, including restaurants, bars, retail stores, hotels, and movie theaters. 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." 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)).
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. 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.

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." Section 303(a) states:

[As 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 . . . .

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" persons with disabilities. Section 303(a) has an "intended conceptual connection" 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.

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)\textsuperscript{22} to hold only owners, lessees, lessors, and operators\textsuperscript{73} liable for non-compliant design.\textsuperscript{24} The alternative and broader view holds that any party, and not simply owners, lessees, lessors, and operators, may be liable under section 303(a).\textsuperscript{75} Under this broad interpretation, section 303(a)'s reference to section 302(a)\textsuperscript{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.\textsuperscript{77} ("PVA"). In PVA, plaintiffs brought suit against the architect as well as the owners and operators\textsuperscript{78} of the MCI Center,\textsuperscript{79} seeking declaratory and injunctive relief.\textsuperscript{80} Plaintiffs alleged that the design and construction of the arena, which was then being erected, violated section 303(a) of the ADA.\textsuperscript{81} The court granted the defendant

\textsuperscript{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)).

\textsuperscript{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)).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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)).

\textsuperscript{77} 945 F. Supp. 1.


\textsuperscript{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.

\textsuperscript{80} See Paralyzed Veterans of Am., 945 F. Supp. at 1.

\textsuperscript{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. 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" a facility, and (2) liability is limited to owners, lessees, lessors, or operators.

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, some have accepted PVA's analysis in whole or in part, while others have rejected it entirely.

B. "[D]esign and [C]onstruct"

The Eighth Circuit in United States v. Days Inns of America, Inc. ("8th Circuit DIA") and the Eastern District of California in United States v. Days Inns of America ("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

---

82. See Paralyzed Veterans of Am., 945 F. Supp. at 2 ("The 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.
87. See infra Part ILB-C.
88. ADA § 303(a)(1) (codified at 42 U.S.C. § 12183(a)(1)).
facility. Three courts thus literally read the grammatical construction of the phrase “design and construct” to be “distinctly conjunctive.” The court in PVA had relied solely on the grammatical construction of the plain language of the phrase “design and construct,” 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. Both courts did so by citing PVA only in footnotes and without discussion. 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. If Congress's exclusive focus were only on those ultimately responsible for the completed facility, the inclusion of the word “design” would be redundant; a more sensible approach in that case would have been to prohibit only non-compliant construction of a facility.

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'd 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.


98. See id. at 18.
before a facility is built. 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.” This provision evinces Congress’s intent to apply the language “design and construct” to either designers or constructors. For instance, in Johanson v. Huizenga Holdings, Inc., the plaintiffs brought such a suit against the architect of the Broward Arena before construction had begun. 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. 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.

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, an act for which no one would be liable. Such a “large loophole” of accountability would “effectively nullify” section 303(a).

The Central District of Illinois in United States v. Days Inns of America, Inc. (“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.

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).
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).
108. Id.
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. The owner and architect settled with the DOJ, leaving Days Inns as defendant. The court then dismissed Days Inns' Motion for summary judgement, 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."

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 1988 ("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. 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. The FHAA, like ADA section 303(a), contains no language limiting liability for designing and constructing non-compliant buildings to specified categories of defendants. 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. In *United States v. Hartz Construction Co.*, the plaintiff...
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. The architect relied on PVA's grammatical arguments to support his motion to dismiss. 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." Similarly, in *Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*, 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. 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. 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."

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*, the Court relied heavily on the fact that at the time the ADA was enacted, the then-existing Rehabilitation Act, on which the ADA's definition of disability was based, had consistently been interpreted to include asymptomatic HIV. The Court held that "[w]hen administrative and judicial interpretations have settled the

---

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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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)\textsuperscript{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.\textsuperscript{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 operators.

\textsuperscript{131} Id. at 2208.

\textsuperscript{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).

\textsuperscript{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))).

\textsuperscript{134} See ADA § 303(a) ("As 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)).

\textsuperscript{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). In both cases, the DOJ had sued the hotels' builders, architects, owners, and the franchisor. The DOJ alleged that the newly constructed hotels in Hazard, Kentucky, and Willows, California, did not comply with ADA accessibility requirements. The architects, builders, and owners settled the suits against them, leaving only Days Inns as a defendant. 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. 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," these courts held that section 303(a) strictly incorporates section 302(a)'s enumeration of possible defendants.

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).
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).
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 ("Section 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 495 ("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. In 8th Circuit DIA, Illinois DIA, Johanson, and United States v. Ellerbe Becket, Inc. ("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." 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. 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. Such an "inexplicable gap in coverage" would "render[] meaningless" section 303(a)'s inclusion of commercial facilities. 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" is not transferred literally, but is instead rewritten as "owns, leases (or leases to), or operates commercial facilities." Such a reading, however, would contradict the plain-language argument that is the basis for the narrow interpretation in the first place.

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))))
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 302\textsuperscript{152} and 303\textsuperscript{153}—existing places of public accommodation versus newly constructed commercial facilities, each with its own standards for accessibility requirements\textsuperscript{154}—highlight the appropriateness of differentiating between categories of defendants.\textsuperscript{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.\textsuperscript{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.\textsuperscript{157} Section 303, by contrast, defines one category of unlawful activity, the design and construction of non-compliant facilities.\textsuperscript{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,”\textsuperscript{159} such as architects.

Courts using congressional-intent arguments in applying a strict...
reading of section 303(a)\textsuperscript{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,\textsuperscript{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.\textsuperscript{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 accommodation\textsuperscript{163} reinforces this latter conclusion.

Similarly, the court in \textit{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),\textsuperscript{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,\textsuperscript{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."\textsuperscript{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,\textsuperscript{167} the omission of similar language from Title III's section

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


\textsuperscript{162} See \textit{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."). \textit{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.").

\textsuperscript{163} See infra notes 171-76 and accompanying text.

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

\textsuperscript{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)).

\textsuperscript{166} Id. § 241(6) (codified at 42 U.S.C. § 12171(6)); \textit{California DIA}, 8 Am. Disabilities Cas. (BNA) at 494.

\textsuperscript{167} See \textit{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.\textsuperscript{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"\textsuperscript{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)\textsuperscript{170} was not added for the purpose of transferring section 302(a)'s list of possible defendants\textsuperscript{171} to section 303(a).\textsuperscript{172} In the Senate's 1989 version of the bill, section 302(a) did not yet include a list of possible defendants.\textsuperscript{173} Significantly, however, section 303(a) of the same 1989 bill already referenced the "discrimination as used in section 302(a)."\textsuperscript{174} Thus, the 1989 bill would have made the design and construction of new facilities\textsuperscript{175} 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.\textsuperscript{176} The insertion of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{168} See id. ("[W]here 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.").

\item \textsuperscript{169} California DIA, 8 Am. Disabilities Cas. (BNA) at 494.

\item \textsuperscript{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)).

\item \textsuperscript{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)).

\item \textsuperscript{172} See infra note 176 and accompanying text.

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

\item \textsuperscript{174} Id. § 303(a) (emphasis added), reprinted in 135 Cong. Rec. 19,823, 19,828 (1989).

\item \textsuperscript{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).

\item \textsuperscript{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).
\end{itemize}
\end{footnotesize}
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, 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. When confronted with an ambiguous statute, courts may give deference to agency interpretations. 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).

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). Arguably, because several courts have used the same intent argument to arrive at opposite results, the statute may not be wholly unambiguous. As such, deference to the DOJ's interpretation,
which holds an architect liable for non-compliant design under section 303(a),\textsuperscript{183} would be appropriate.\textsuperscript{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.\textsuperscript{185} Although under the common law doctrine of privity, architects once had a duty only to those with whom they contracted,\textsuperscript{186} this precedent began to erode with the seminal 1916 decision of MacPherson v. Buick Motor Co.\textsuperscript{187} MacPherson led to a series of decisions that ultimately established architects' liability in tort to foreseeable users of the buildings they negligently design.\textsuperscript{188} Because under the simple-negligence construct

\textsuperscript{183} See ADA Technical Assistance Manual, \textit{supra} note 178, III-5.1000, at 46.

\textsuperscript{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).

\textsuperscript{185} See William David Flatt, Note, \textit{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.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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, \textit{supra} note 185, at 622-25 (discussing courts' reasoning in rejecting strict liability for design professionals). But see \textit{id.} at 619-22 & n.38 (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, nor, in most jurisdictions, may architects delegate design functions to non-professionals, such as owners. 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. 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."

State ethics codes stipulate that the architect's "duty to the public is higher than any other." Consistent with this responsibility is a broad reading of the ADA's section 303(a), 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. 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. 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. 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).

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. Adopting the test used in United States v. Bestfoods, 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.”

Architects, granted virtual monopolies in providing the service of safe building design in most jurisdictions, 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

---


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 Dictionary and on discussion of the ADA's use of the "present indicative" tense of the verb "substantially limits" to contradict intentions explicitly stated in the ADA's House and Senate Reports, it is not interpreting the ADA, it is grammatically circumventing it.


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.