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CONTRACTOR LIABILITY UNDER FEDERAL AND STATE DISABLED ACCESS LAWS

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Both Title III of the Americans with Disabilities Act of 1990 ("ADA") and the California Unruh Act prohibit discrimination against persons with disabilities in the design and construction of certain facilities. While owners and operators of inaccessible facilities are clearly liable under both laws, it is less clear whether liability under either law also extends to construction contractors.

The general rule of liability under Title III is contained in ADA section 202(a): "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." The rest of Title III describes what constitutes discrimination prohibited under the Title and remedies available for violations. Section 203(a) provides: "a failure to design and construct facilities for first occupancy . . . that are readily accessible to and usable by individuals with disabilities . . ." violates the ADA.

Fortunately for California contractors, the Ninth Circuit Court of Appeals, which includes California, has concluded that parties, such as contractors, that neither own nor operate inaccessible facilities are not liable under the ADA. *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1035-6 (9th Cir. 2001). The Ninth Circuit's ruling departs from a prior decision by another Court of Appeals (*United States v. Days Inns of America, Inc.*, 151 F.2d 822 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1249), which means that the issue of contractor liability under the ADA might eventually be taken up by the United States Supreme Court.

While not liable under the ADA, California contractors may be liable under the State's Unruh Act. Although no California contractor has yet been held liable under this law, the Unruh Act is more general than the ADA, and does not contain any language limiting potentially liable parties to owners and operators. Thus, there is a risk that state courts could follow the lead of federal decisions outside of the Ninth Circuit and hold construction contractors liable. If this does occur, the consequences to California construction contractors would be significant. Contractors could be required to correct inaccessible facilities, even if they would not be entitled to compensation for that work. Contractors could also be subject to monetary damages and civil penalties for Unruh Act violations.

Even if California contractors are not directly liable under either the ADA or Unruh Act, they need to be aware of disabled access requirements because they still may be indirectly liable through indemnity obligations they have to owners or lessees of inaccessible facilities. There is nothing in the ADA or Unruh Act, or any cases interpreting them, that prevents an owner or lessee held liable for violations from seeking indemnity from its contractor for costs of correcting violations and of paying damages and penalties. In other contexts (*e.g.*, landlord-tenant responsibilities), regulations implementing the ADA expressly recognize that entities may allocate responsibility for ADA compliance among themselves by contract.

Accordingly, to determine whether a construction contractor will be liable to an owner or lessee for ADA and Unruh Act violations, first consideration should be given to the wording of any contract provisions regarding

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either responsibility for compliance with those laws or indemnification. If there are no such terms in the parties' contract, or if the contractor does not have an agreement directly with the owner or lessee, California law regarding extra-contractual (or "equitable") indemnity will determine whether an owner or lessee will be entitled to indemnification from its contractor for ADA and Unruh Act violations.

California contractors need to be aware of federal and

state disabled access requirements. At the present time, contractors will not be found liable for violating the ADA if a facility is found to be inaccessible, but they may be liable under state law. And, unless the contractor carefully reviews and negotiates the terms of its contractual agreement, including the indemnification provision, it may find itself liable on a contractual basis to the owner or lessee of the facility found in violation of federal or state disabled access law.

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