
Nevada Supreme Court's Decision Bars Owner's Tort and Contract Claim Against Design Professionals Under the ADA and FHA

By: Jean A. Weil, Esq.

The Nevada Supreme Court recently handed down a favorable decision, *Rolf Jensen v. District Court*, 282 P.3d 743, 128 Nev. Adv. Op. 42 (2012), that may have far reaching implications for the design professional community.

By way of background, in 2005/2006, the Department of Justice ("DOJ") investigated Mandalay Corporation and its related entities (collectively "Mandalay") for alleged violations of the Americans with Disabilities Act ("ADA"). The investigation focused on certain properties including the Mandalay Bay Hotel and Casino ("original project") and THEhotel ("expansion project") both located in Las Vegas, Nevada. In this same timeframe, MGM Mirage ("MGM") acquired Mandalay's assets and liabilities.

In 2007, MGM, on behalf of its newly acquired subsidiary, entered into a settlement agreement with the DOJ that involved paying a modest fine and agreeing to retrofit certain aspects of both projects that the DOJ deemed to be non-compliant. Shortly thereafter, Mandalay sued multiple design professionals and the general contractor seeking indemnity for payment of the fine and future payments for the retrofits. In 2008, Mandalay amended its lawsuit to name Rolf Jensen & Associates, Inc. ("RJA").

Back in 1996, during the design of the original project, the architect retained RJA to provide fire protection consulting services. During construction, a question arose regarding the width of toilet room doors in *non-accessible* guest rooms. Do they need to be extra wide? Although RJA was *not* serving in the capacity of a retained ADA consultant, it was asked to review the general contractor's request for information about the matter. In essence, RJA commented that while the issue was not clear [under the then-current guidelines], if the owner wanted to avoid a civil lawsuit, it should take the most conservative approach possible and *maximize* accessibility.

However, Mandalay did not stop work to change out the toilet room doors. In doing so, it avoided a significant time and cost impact to the project. In 2009, the project opened on time and within budget. In 2002, Mandalay hired RJA directly as an ADA consultant for the expansion project.

While Mandalay's 2007 settlement with the DOJ encompassed multiple retrofits to the expansion project, most if not all, of the allegedly non-compliant areas involved owner-driven changes or were otherwise outside of RJA's scope of retention. Thus, the primary focus of Mandalay's lawsuit against RJA involved the toilet room door issue from the original project.

In 2009, Weil & Drage, on behalf of RJA, filed a motion for partial summary judgment seeking to dismiss all tort claims as being barred under the economic loss doctrine pursuant to the Nevada Supreme Court's then-recent decision *Terracon v. Mandalay*, 206 P.3d 81 (Nev. 2009). That motion was granted, leaving intact only Mandalay's contract claims. However, Mandalay later amended its complaint to add a new tort claim, negligent misrepresentation, as an arguable exception to Nevada's economic loss doctrine. In doing so, Mandalay simply relabeled its previously dismissed negligence claim to circumvent RJA's summary judgment.

In 2010, the 4th Circuit Federal Court in Maryland published the seminal decision *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010) ("*Niles Bolton*"). In that decision, the Federal Appellate Court held that under the ADA, all state law claims seeking indemnity for ADA and FHA violations are preempted by federal law and thus barred under the doctrine of obstacle preemption. In other words, the Federal Court found that permitting a party to seek indemnity for its own ADA and FHA violations would serve as an obstacle to Congress's intent and purpose in enacting those statutes. Although the *Niles Bolton* decision is not binding authority on a Nevada state court, it could be cited as persuasive authority, particularly because the Federal Court went to great lengths to explain its analysis of the ADA and its reasoning behind its ruling.

Accordingly, Weil & Drage filed a second motion for summary judgment seeking dismissal of *all* of Mandalay's remaining state based claims against RJA (express indemnity, breach of contract, breach of warranty, negligent misrepresentation) as being barred under the doctrine of obstacle preemption. RJA argued that the claim for negligent misrepresentation was also barred by the economic loss doctrine because, under these facts, it was merely a recycled tort claim that had already been dismissed.

Unfortunately, the trial court denied RJA's motion for summary judgment on both grounds. The trial judge stated that she did not agree with the Federal Court's reasoning in *Niles Bolton* and further that the Nevada Supreme Court's decision in *Terracon* left open the door as to whether negligent misrepresentation was an intended exception to the economic loss doctrine.

Shortly thereafter, Weil & Drage filed a Petition for Writ of Mandamus ("Petition") to the Nevada Supreme Court seeking review of the trial court's denial of RJA's motion for summary judgment. RJA sought review of two issues:

- 1) whether Mandalay's remaining state based claims were barred under the federal doctrine of obstacle preemption; and
- 2) whether the Supreme Court intended to create a negligent misrepresentation exception to the economic loss rule (when such an exception would swallow the rule).

The Supreme Court granted review on both issues. After extensive briefing, on November 1, 2011, the full Court heard oral argument.

On August 9, 2012, the Nevada Supreme Court issued its opinion. The Court, in a seventeen (17) page decision with no dissent, granted RJA's Petition ordering the District Court to reverse its denial of RJA's motion for summary judgment. The Court's ruling was based on its conclusion that *all* of Mandalay's state based claims were obstacles to the objectives of the ADA and therefore preempted by federal law.

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In its decision, the Court held that ADA was enacted to remedy discrimination against disabled individuals and to prevent discrimination. Thus, the owner of a place of public accommodation that constructs a facility not readily accessible to individuals with disabilities, regardless of intent, would be liable for unlawful discrimination. The Court further held (excluding landlord-tenant relationships) that the ADA contained *no* provisions permitting indemnity or allocation of liability between the various entities subject to the ADA.

In applying the law to the facts, the Court found that allowing Mandalay to maintain its indemnity claim against RJA for ADA violations weakened the incentives of the owners to prevent violations and conflicted with the ADA's purpose and intentions, as owners could contractually maneuver themselves to ignore their non-delegable responsibilities under the ADA. Allowance of such claims, would serve to frustrate Congress's goal of preventing discrimination and intrude on the remedial scheme set forth in the ADA, which does not expressly (or impliedly) permit rights of indemnity. Thus, the Court found, relying heavily on *Niles Bolton*, that the ADA preempts indemnity claims brought by owners for their own violations.

Concerning Mandalay's other remaining state claims for breach of contract, breach of express warranty and negligent misrepresentation, the Court held that these claims were also preempted by the ADA, "because, in substance, these claims are merely a reiteration of Mandalay's claim for indemnification." Relying again on *Niles Bolton*, if an owner attempts to plead an indemnity claim in the garb of breach of contract and negligence theories, so long as the relief the owner is seeking is recovery for all losses arising from violations of the ADA, such claims are *de facto* indemnity claims and thus, preempted.

While the Nevada Supreme Court did not address the negligent misrepresentation question left open by *Terracon*, the Court accepted review of this question in another case which has been set for oral argument also before the full Court. Thus, the Court will have the opportunity to hopefully close this loophole left open by its otherwise sound decision.

As to the Court's rulings regarding the ADA, this case may have far reaching implications. Owners and developers across the nation routinely sue design professionals during or after settlements with the DOJ and/or other groups representing the disabled. Owners and developers uniformly have decision making authority on compliance with the ADA and may exert pressure on all members of the design team to minimize the scope and cost of compliance, or worse, override their recommendations. This conduct is particularly concerning where owners and developers can contractually insulate themselves from the consequences of their decisions. Even if the design professionals have strong defenses, historically they have been dragged into these costly and protracted cases. This decision will likely be cited in multiple jurisdictions across the country and may provide a measure of relief to design professionals whose services touch upon ADA compliance.

ABOUT THE AUTHOR:

Jean Weil is a founding partner at Weil & Drage, APC, a law firm with offices in California, Arizona and Nevada. She has been representing design firms since 1987. The above decision Rolf Jensen v. District Court, 282 P.3d 743, 128 Nev. Adv. Op. 42 (2012) is the third published decision that Jean secured from the Nevada Supreme Court favoring design professionals. Terracon v. Mandalay, 206 P.3d 81 (Nev. 2009) involved Nevada's extension of the economic loss doctrine to design professionals. Otak Nevada, LLC v. District Court, 260 P.3d 408 (2012) involved Nevada's strict enforcement of the certificate of merit statute as applied to design professionals. Jean can be reached at: jweil@weildrage.com

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