# Because Of Federal Preemption, Project Owner Cannot Seek Indemnity from Architect for Failure of Design to Meet Fair Housing Act and Americans with Disability Act Accessibility Requirements

Thomas R. Folk

The United States Court of Appeals for the Fourth Circuit recently held that federal preemption precluded a project owner from seeking indemnity from its architect based upon the failure of the architect's design to meet the accessibility requirements for the disabled imposed by the Fair Housing Act[1] ("FHA") and the Americans with Disabilities Act[2] ("ADA"). This case has immediate impact on project owners who rely upon their design professionals to provide designs that comply with the FHA and/or ADA. No longer can project owners look to the designer for indemnity for errors and omissions in design that create FHA or ADA violations.

## The Case

The case, *Equal Rights Center & Archstone Multifamily Series I Trust v. Niles Bolton Associates*, No. 09-1453 (4th Cir. Apr. 19, 2010) involved a suit filed by several disability advocacy groups in U.S. District Court in Baltimore against a number of defendants, including Archstone, the developer and owner of 71 apartment communities, and Niles Bolton, Archstone's architect for 15 of the apartment communities. The disability groups alleged that the defendants failed to design and construct 71 apartment buildings so they would be accessible to persons with disabilities as required by the FHA and ADA.

Archstone settled with the plaintiff disability advocacy groups, agreeing in a consent decree to retrofit the 71 properties to make them compliant with the FHA and ADA, and to pay plaintiffs $1.4 million. Niles Bolton entered into a separate consent decree with the plaintiffs. Archstone claimed the cost to retrofit the sites designed by its architect, Niles Bolton, exceeded $2.5 million, and, in order to recover these damages, filed a cross-claim against Niles Bolton asserting the following four state-law causes of action: (1) express indemnity, (2) implied indemnity, (3) breach of contract, and (4) professional negligence. Thereafter, the parties conducted discovery for three years. After discovery closed, Archstone requested leave to amend its complaint to add a claim for contribution. However, the district court denied leave because amendment at such a late date would prejudice Niles Bolton, and also because amendment would be futile since, in the court's view, a state-law claim for contribution would be preempted under federal law. The district court also granted Niles Bolton summary judgment on the four state-law claims that Archstone asserted against it as architect. The court reasoned that (1) Archstone's claims all were either express or de facto indemnity claims for violations of the FHA and ADA, (2) no right of indemnification existed under these laws, and (3) allowing indemnification under state-law claims would be antithetical to the purposes of the FHA and ADA, and thus preempted under federal law under the doctrine of conflict or obstacle preemption.

Archstone appealed, and the Fourth Circuit affirmed. The court found its prior case law on "obstacle preemption," particularly its decision that the Securities Exchange Act of 1933 preempted a state-law claim for indemnity for a violation of that act, directly applicable to state-law claims for indemnification based upon violations of the FHA and ADA. The court noted that both laws were "regulatory rather than compensatory," and that compliance with them is "non-delegable." Thus, the court reasoned, "it is clear that . . . the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity."

The Fourth Circuit agreed with the district court that Archstone's breach-of-contract claim and professional negligence claim were *de facto* claims for indemnification since they sought recovery from Niles Bolton of 100 percent of Archstone's losses at the 15 sites where Niles Bolton was architect. The Fourth Circuit did not reach the issue of whether Archstone's contribution claim against Niles Bolton was also preempted because denial of the late amendment to add that claim was sustainable on the alternative ground that its untimliness was prejudicial to Niles Bolton.

## Implications

The most immediate implication of the Fourth Circuit's opinion in *Niles Bolton* is that project owners within the area of the Fourth Circuit[3] may not seek indemnification in federal court from designers whose errors or omissions cause violations of the FHA or ADA resulting in a suit against the owner. State courts within the Fourth Circuit's geographic area also may likely find the Fourth Circuit's reasoning in *Niles Bolton* persuasive, even though the case would not be binding precedent for them. Courts in other circuits and other state courts may also find *Niles Bolton* persuasive and follow it.

*Niles Bolton* would not appear to extend to claims by a project owner against an architect whose errors or omissions result in FHA and ADA violations, but are not the subject of a lawsuit by the United States or a disabled person, but rather are discovered by the project owner or its consultants. Also, *Niles Bolton* may not preclude a claim for contribution, rather than indemnity, although the district court did hold a contribution claim also to be preempted. Further, *Niles Bolton* does not expressly hold that a duty to defend under a hold-harmless agreement is preempted. Finally, Niles Barton does not necessarily preclude a breach-of-contract claim against an architect that does not seek the equivalent of indemnity.

What is a project owner to do? Certainly, after *Niles Bolton*, project owners will want to redouble their efforts to ensure compliance with the FHA and ADA. Use of an FHA/ADA consultant to review the design and construction carefully for accessibility and FHA/ADA compliance may be even more prudent now that indemnification from the designer for errors and omissions resulting in FHA/ADA violations may be unavailable. Also, project owners may want to consider changing future contracts with architects to address the issue of FHA/ADA violations differently. For example, if the owner includes in the contract with its architect that a specified portion of the architect's fee is for FHA/ADA compliance, and that it is returnable if there is a material FHA/ADA violation caused by the design, the owner may have some redress despite *Niles Bolton*. Finally, obtaining insurance coverage to protect against this potential liability may also be worth exploring.

## Conclusion

The Fourth Circuit's recent decision in Niles Bolton may preclude project owners from seeking indemnification from their designers for errors or omissions in the design that cause violations of the FHA or ADA. Accordingly, project owners must use increased diligence to ensure that their projects comply with FHA and ADA requirements. Also, project owners may wish to consider changing future contracts with architects to ensure some redress if errors or omissions in design cause FHA or ADA violations. Finally, project owners may wish to explore insurance coverage to protect themselves against this potential liability.

**1.** 42 U.S.C. §§ 3601, et seq.

**2.** 42 U.S.C. § 12101, et seq.

**3.** The U.S. Court of Appeals for the Fourth Circuit hears appeals from federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

---

Thomas R. Folk is a partner with Reed Smith and can be reached at 703.641.4294 or at tfolk@reedsmith.com. Reed Smith is a global relationship law firm with nearly 1,600 lawyers in 22 offices throughout the United States, Europe, Asia and the Middle East. Founded in 1877, the firm represents leading international businesses, from Fortune 100 corporations to mid-market and emerging enterprises. Its lawyers provide litigation and other dispute resolution services in multi-jurisdictional and other high-stakes matters; deliver regulatory counsel; and execute the full range of strategic domestic and cross-border transactions. Reed Smith is a preeminent advisor to industries including financial services, life sciences, health care, advertising, technology and media, shipping, energy trade and commodities, real estate, manufacturing, and education. For more information, visit reedsmith.com.

---



**Previous *Guest Essays***

# GUEST ESSAYS

- Liability of Construction Managers/Design Professionals to Injured Employees of Contractors: Pennsylvania Supreme Court Takes another Look (June 07)
- Mergers and Acquisitions and Successor's Liabilities (June 07)
- How to Get a Design Professional to Work For Free! (May 07)
- Director's & Officer's Liability Generic Explanation of – "Side A Coverage" (March 07)
- Understanding the Implications of "Defending" Your Client (December 06)
- Building Information Modeling - BIM: Contractual Risks Are Changing With Technology (September 06)
- A Mid-Year Snapshot Of an Ever Changing Professional Liability Marketplace (August 06)
- Mixed-Use Condominium Projects: Cautionary Tales (June 06)
- Retention Deficit and Disorder: The Riddle In Document Retention Policies (March 06)
- A Greener Landscape on the Horizon (October 05)
- How To Maximize Your Insurance Broker Relationship (August 05)
- Your Public Client May Be Immune From Suit – Are You? (June 05)
- Fiduciary Liability Revisited - Fine Tuning the "Blurred Line" between D&O & Fiduciary Liability Coverages (May 05)
- "Indemnity – Will You Pay For My Problems?" (February 05)
- Architects and Engineers Professional Liablity Insurance State of the Market (January 05)
- EXPUNGE BOB, BROWN PANTS: Defending Claims Without Your Star Witness (January 05)
- The Paralysis of Analysis ...When a Strength Becomes a Weakness (December 04)
- Certification - Bane of the Design Professional (October 04)
- Working Without Formal Agreements (July 04)
- The Proposal Preparation Myth - What's Missing (July 04)
- Statute of Limitations for Negligence Instead of for Breach of Contract Requires Dismissal of Action Against Architect (June 04)
- Client Supplied Contract Forms (April 04)
- Engineer Had No Duty to Warn General Contractor's Employee of Danger (March 04)
- Client Satisfaction (March 04)
- Six What? (December 03)
- Taking a Second Look at Director' & Officer's Liability Insurance (November 03)
- QC/QA.... Turning a Potential Problem into an Opportunity (July 03)
- Arkansas Court Finds Architect's Indemnity Protection Limited to General Contractor's Negligence, but not Limited by Plaintiff's Mere Claims Against Architect (April 03)
- Design/Build... A Good Marriage? (March 03)
- Contractor's Professional Liability Coverage (February 03)
- Look before You Leap when Changing Insurance Companies (December 02)
- Privity of Headache: Contracting Among The Design Team (January 03)
- Edifice Flex: A/E Liability For Cost Estimating (November 02)
- Insuring Design-Build Risks (September 02)
- Negotiating With a Client's Representative Requires Different Tactics (August 02)
- Fungus Shui - The Balance of Design, Construction and Maintenance (July 02)
- State Of The Insurance Marketplace (April 02)
- Does Your Dog Bite? The Risks of Adopting a Project from the Pound (January 02)
- You Can Survive the Hard Market - Here's How (November 01)
- Pray, Liens And Scream: A/E's Must Use Mechanics Lien Rights Wisely (October 01)
- Internet & Websites: Redefining Physical Property Damage, A Precedent Setting Case (September 01)
- Joint Venture Liability Coverage: A Business Issue to Carefully Consider (July 01)
- Pollution Exclusion Means All Types of Consultant/Contractor are Open to Liability (June 01)

# Guest Essays

- Mergers and Acquisitions and Successor's Liabilities (April 01)
- Shopping for Liability (April 01)
- The Flukes of Hazard: OSHA Sets Its Sights On Design Professionals (February 01)
- Project Insurance Protects Design/Environmental Consultants, Owners (January 01)
- Copyright and the Design Professional: An Overview (October 00)
- For Better Or For Worse: Betterment Limits Your Responsibility For Damages (October 00)
- I'm Not Responsible for Site Safety, Right? (August 00)
- A Pollution Liability and Legislation Primer (July 00)
- Clients from HELL: The Virtues of Client Selection (June 00)
- Your Firm on the Internet - Effectively (May 00)
- Employment Practices Liability Insurance, Is It Right For Your Firm? (April 00)
- What the Design Professional Needs to Know about Jury Consultants (March 00)
- Between a Rock and a Hard Place: Notifying Sureties of a Contractor's Default (March 00)
- Effective risk management involves reviewing even the most "standard" of contracts.... (January 00)
- Playing with Fire: Incurring Liability as an Expert Witness (November 99)
- Waiving Goodbye To Subrogation Claims (August 99)
- FYI 4 Y2K - Preparing for the new millennium (February 99)
- Sitting Ducks - A/E Liability Arising From Payment Certifications During Construction (March 99)
- Outside In: The Risks Inherent in Moonlighting (March 99)