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NOTES

WHO NEEDS CONTRACT LAW?—A CRITICAL LOOK AT CONTRACTUAL INDEMNIFICATION (OR LACK THEREOF) IN FHAA AND ADA “DESIGN AND CONSTRUCT” CASES

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INTRODUCTION

The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation.

A rule of law which would sanction the renunciation of a bargain purchased in freedom from illegal purpose, deception, duress, or even from misapprehension or unequal advantage leads inexorably to individual irresponsibility, social instability and multifarious litigation.¹

For generations in the United States there has been a debate surrounding the importance of freedom of contract.² Many scholars link freedom of contract with notions of individualism, democracy, and free will.³ Others note that enforcement of obligations freely bargained for is essential for a capitalist economy, and linking freedom of contract to treasured American values preserves the hierarchical structure of a capitalist system.⁴ Within this debate, governmental

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1. *Blount v. Smith*, 231 N.E.2d 301, 305-06 (Ohio 1967) (citation omitted).

2. See Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 365-67 (1921) (discussing the changing perception of freedom of contract over time).

3. See *id.* at 366.

4. See generally KARL MARX, *THE GERMAN IDEOLOGY* (1932), reprinted in KARL MARX:

intervention is the key variable that splits opinions.⁵ Milton Friedman and John Kenneth Galbraith, two highly influential economists,⁶ nicely represent the diametric views of free market versus governmental intervention.⁷ Friedman advocated freedom for market participants to allocate resources and responsibilities with little governmental intervention in order to promote the most efficient economic system.⁸ Galbraith advocated more governmental intervention in the market to help decide through regulation what is most efficient and productive.⁹ Both sides of the debate recognize to some degree that the ability of parties, particularly business entities, to freely negotiate a deal with the expectation that the deal's terms will be upheld by courts is essential for carrying on business.¹⁰ Parties often come to the negotiating table with a similar profit-making goal but different plans of how best to achieve that goal.¹¹

The construction industry depends heavily on contractual obligations of

SELECTED WRITINGS 175-87 (David McLellan ed., Oxford Univ. Press 2004) (1977) (arguing that mode of production creates ideology and then top-down ideology holds society's current mode of production in check).

5. See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 264-66 (1999) ("The idea of contract itself has become more objectified; it is less often an obligation voluntarily assumed by the contracting parties, and more often an obligation imposed by courts to protect the reasonable expectations of others.").

6. Friedman won the Nobel Memorial Prize in Economic Science in 1976, taught at the University of Chicago from 1948 to 1977, contributed to the rise of the Chicago School of Economics, and was "one of the 20th century's leading economic scholars, on a par with giants like John Maynard Keynes and Paul Samuelson." Holcomb B. Noble, *Milton Friedman, the Champion of Free Markets, Is Dead at 94*, N.Y. TIMES, Nov. 17, 2006, at A1.

Galbraith was "one of the most widely read authors in the history of economics." Holcomb B. Noble & Douglas Martin, *John Kenneth Galbraith, 97, Dies; Economist Held a Mirror to Society*, N.Y. TIMES, Apr. 30, 2006, at A1. Though he never won the Nobel Memorial Prize, he published thirty-three books, wrote speeches for President Franklin D. Roosevelt, and advised Presidents John F. Kennedy and Lyndon B. Johnson. *Id.*

7. See Noble, *supra* note 6 ("In forums . . . [Friedman] would spar over the role of government with his more liberal adversaries, including John Kenneth Galbraith . . .").

8. See MILTON FRIEDMAN, AN ECONOMIST'S PROTEST: COLUMNS IN POLITICAL ECONOMY 203 (1972) (arguing that "collectivism is the road to tyranny, inequality, and misery; and that a free market is the only feasible road to freedom and plenty").

9. See JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 32-33 (3d ed. 1978) ("The fully planned economy, so far from being unpopular with avowed friends of free enterprise, is warmly regarded by those who know it best.").

10. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-30 (1943) (arguing that courts must allow business entities to contract freely because it is impossible to predict the limitless number of potential arrangements business entities will need).

11. See CONSTRUCTION LAW 17-32 (William Allensworth et al. eds., 2009) (describing the many relationships formed in a construction project to accomplish the project goals).

parties.¹² Building construction can be a complicated endeavor whether the project is a small apartment complex or a large sports stadium.¹³ One of the many considerations construction project participants must account for is compliance with accessibility guidelines targeting discrimination against persons with disabilities.¹⁴ Regardless of a project's location, most commercial structures must comply with one of two, or possibly both, federal statutes: the Federal Fair Housing Amendments Act of 1988¹⁵ (FHAA) and the Americans with Disabilities Act of 1990¹⁶ (ADA) (collectively, "the Acts"). In general, both Acts provide that certain accessibility requirements must be included in new construction projects or modifications to existing structures.¹⁷ Both Acts make failure to comply with accessibility requirements in the "design and construction" of such facilities unlawful discrimination and therefore subject to various remedial actions.¹⁸

Despite a lack of specific language in the FHAA and ADA prohibiting indemnification between parties involved in the design and construction of buildings, a few recent federal district court cases have interpreted the Acts to deny implied and express claims for indemnification.¹⁹ Such an interpretation severely limits contractual risk allocation and is not the proper interpretation of the FHAA and ADA. To date, no United States circuit court has weighed in on the issue.

This Note traces and critiques the development of the recent trend toward interpreting the FHAA and ADA to prohibit contractual indemnification. Part I provides background material about the structure of the construction industry,

12. Eric A. Berg & Bill Hecker, *Accessibility Laws—An Ounce of Prevention Is Worth a Pound of Cure*, 28 CONSTR. LAW. 5, 7 (2008) ("In many relationships directly or tangentially related to the construction industry, parties regularly assign risks to the parties in the best position to guard against them. For example, architects are contractually given responsibility for designing plans and specifications and code compliance . . .").

13. See CONSTRUCTION LAW, *supra* note 11, at 17 ("The financial, technical, business, and regulatory challenges involved in even a small commercial project demand the participation of many diverse participants.").

14. Berg & Hecker, *supra* note 12, at 5.

15. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified in scattered sections of 42 U.S.C.).

16. 42 U.S.C. §§ 12101-12213 (2006 & Supp. 2009).

17. See *id.* §§ 3604(f)(3)(C), 12183(a)(1).

18. See *id.*

19. See *United States v. Murphy Dev., LLC*, No. 3:08-0960, 2009 U.S. Dist. LEXIS 100149, at *7-9 (M.D. Tenn. Oct. 27, 2009); *Sentell v. RPM Mgmt. Co.*, No. 4:08CV00629, 2009 U.S. Dist. LEXIS 75126, at *12-13 (E.D. Ark. Aug. 24, 2009); *Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411, 421-23 (E.D.N.Y. 2009); *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 821-22 (D. Md. 2009); *United States v. Shanrie Co.*, 610 F. Supp. 2d 958, 960-61 (S.D. Ill. 2009); *United States v. Gambone Bros. Dev. Co.*, No. 06-1386, 2008 U.S. Dist. LEXIS 73503, at *16-23 (E.D. Penn. Sept. 25, 2008); *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo.*, No. 04-CV-7497, 2007 U.S. Dist. LEXIS 13560, at *19-21 (S.D.N.Y. Feb. 26, 2007); *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 778-79 (E.D.N.C. 2003).

indemnification, the FHAA, and the ADA. Part II analyzes and critiques recent cases leading to the potential ban on indemnification clauses for violation of the ADA and FHAA. Part III critiques the recent statutory interpretation prohibiting contractual indemnification and argues that traditional principles of contract law provide a more efficient and effective allocation of responsibility among parties to a construction project, which ultimately benefits not only persons with disabilities, but also society as a whole.

I. BACKGROUND MATERIAL

A. *The Construction Industry: A Contractual Nexus of Parties*

Construction projects are complex endeavors.²⁰ A thorough analysis of possible combinations of parties and governing relationships is well beyond the scope of this Note. For purposes of examining the impact of contractual indemnification prohibition, familiarity with the basic structure of construction agreements is necessary.

1. *Parties.*—In general, there are three major players involved in designing and constructing covered multifamily dwellings²¹ and commercial facilities: owner, designer, and builder.²² Owners decide a facility is in demand, obtain financing and property, and have an ownership interest in the project.²³ Owners may be public or private entities.²⁴ Designers are licensed architects and engineers who draw plans for projects based on needs and desires of owners, industry standards, and legal requirements.²⁵ Designers also oversee much of the construction project to ensure plans are correctly implemented.²⁶ Builders are usually general contractors and subcontractors.²⁷ Builders coordinate physical construction of the facility by implementing and often adjusting the designer's plans.²⁸

2. *Organization.*—The relationship of owners, designers, and builders may be organized in a number of ways, but most follow the traditional “design-bid-

20. CONSTRUCTION LAW, *supra* note 11, at 17.

21. Not all multifamily buildings are subject to the FHAA. The statute refers to “covered multifamily dwellings,” which are: “(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and (B) ground floor units in other buildings consisting of 4 or more units.” 42 U.S.C. § 3604(f)(7).

22. CONSTRUCTION LAW, *supra* note 11, at 18-24.

23. *Id.* at 18-20.

24. *Id.* at 18.

25. *Id.* at 20-21.

26. See FUNDAMENTALS OF CONSTRUCTION LAW 10-17 (Carina Y. Enhada et al. eds., 2001). The authors note that the role of designer as project overseer is often overlooked considering its importance in the success of the project. *Id.* “[O]wners often view the architect as their representatives and protectors through the construction process.” *Id.* at 8.

27. CONSTRUCTION LAW, *supra* note 11, at 22-25.

28. *Id.*

build” relationship or the “design-build” relationship.²⁹ In design-bid-build relationships, owner, designer, and builder are separate entities.³⁰ Owners enter into contracts with designers to create plans and oversee the construction project.³¹ Once plans are complete, owners hire general contractors to manage the facility’s construction.³² Often, general contractors perform part of the required work and hire subcontractors to perform other requirements of the building project.³³ By contrast, in the design-build context, owners contract with one other party who simultaneously acts as both designer and builder.³⁴ In the design-build scenario, design firms and builder firms may form a joint venture or one firm may offer both services.³⁵

The prevalence of a multi-entity structure where owners, designers, and builders perform distinct functions indicates that it is generally more cost-efficient for the owner to pay designers and builders outside of the owner’s firm rather than bringing them in-house.³⁶ Because architects have special expertise and familiarity with local and national building guidelines,³⁷ it would be very expensive for owners to bring architects in-house if projects are being constructed in many different areas or the owner is developing few projects.³⁸ Just as it is more cost-efficient for most owners to hire outside designers, owners are also likely to hire a builder from outside the firm to make the design a reality because builders possess specialized expertise and equipment most owners lack.³⁹

3. *Relevance of Structure.*—Hypothetically, if an owner employs designers and builders in-house, all liability for failure to design and construct buildings to FHAA and ADA specifications must rest with the owner because it is the only entity involved in design and construction.⁴⁰ But the design and construction of

29. A.H. Gaede, Jr., *Risk Management in Design-Build*, in *HANDLING CONSTRUCTION RISKS: ALLOCATE NOW OR LITIGATE LATER* 341, 341-46 (2002).

30. *FUNDAMENTALS OF CONSTRUCTION LAW*, *supra* note 26, at 83.

31. *Id.* at 8-9.

32. *Id.* at 83-84.

33. *Id.* at 83.

34. Gaede, *supra* note 29, at 343.

35. *Id.*

36. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 395 (1937) (“[A] firm will tend to expand until the costs of organising [sic] an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising [sic] in another firm.”); see also WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 19-21 (10th ed. 2007) (comparing organization within firms to organization across markets).

37. See *CONSTRUCTION LAW*, *supra* note 11, at 132-40.

38. See *FUNDAMENTALS OF CONSTRUCTION LAW*, *supra* note 26, at 8 (“Many owners are engaged in a onetime or sometime event that is far removed from their primary areas of focus. They do not have the resources to have design or construction expertise in-house.”).

39. *Id.*

40. See JAY M. FEINMAN, *PROFESSIONAL LIABILITY TO THIRD PARTIES* 3-6 (2d ed. 2007) (noting that in order to have third party professional liability, there must be a contractual

buildings is complex and almost always a multi-entity affair.⁴¹ Because the owner owns the building, it is the most likely target for grievances associated with defects in the building.⁴² Yet the owner hired the designer and builder from outside its firm in part because it did not possess the expertise needed to design and construct the building.⁴³ In response to the risk of lawsuit, owners often pay premiums for express indemnification clauses covering aspects of the project in which the owner has limited expertise and control.⁴⁴ The accompanying shift in liability gives the other parties an incentive to minimize the probability of payout by performing in a risk-minimizing fashion.⁴⁵

B. Indemnification

Indemnification is a risk-allocating tool that is widely used in business negotiations and commonplace in the construction industry.⁴⁶ Indemnification can be defined as a “complete shifting of liability for loss from one party to another. In essence, one person either agrees or is compelled by law to hold another person harmless for loss or damage which the second person has or is anticipated to sustain because of some liability to a third person.”⁴⁷ Indemnification is also derivative in nature.⁴⁸ One party must be found liable to a third party before the liable party may seek indemnification.⁴⁹ Indemnification may be express or implied by law.⁵⁰

Implied indemnification is court-compelled liability shifting for public policy reasons or because the nature of the relationship between parties indicates an implied agreement to indemnify.⁵¹ The employer-employee relationship is one

relationship between at least two parties).

41. CONSTRUCTION LAW, *supra* note 11, at 17 (“The design and construction of a project is a collaborative process requiring talent, execution, and coordination of many different people and organizations. As the size, cost, complexity, or unusual features of a project increase, the number of participants . . . likely will increase as well.”).

42. *See* FUNDAMENTALS OF CONSTRUCTION LAW, *supra* note 26, at 10-17.

43. *See supra* note 38 and accompanying text.

44. *See* Kenneth M. Cushman & Joyce K. Hackenbrach, *Construction Project Risk Allocation: The Owner’s Perspective*, in HANDLING CONSTRUCTION RISKS: ALLOCATE NOW OR LITIGATE LATER, *supra* note 29, at 9, 10-12.

45. *See id.* at 9-14.

46. THE CONSTRUCTION CONTRACTS BOOK: HOW TO FIND COMMON GROUND IN NEGOTIATING THE 2007 INDUSTRY FORM CONTRACT DOCUMENTS 29 (Daniel S. Brennan et al. eds., 2d ed. 2008).

47. Bruce H. Schoumacher, *Risk Management and Indemnity* § 4-13, in CONSTRUCTION LAW 13.17 (Steven G.M. Stein ed., 2010).

48. *Id.* at § 1.

49. *Id.*

50. *Id.*

51. *Id.*

common type of arrangement that indicates an implied agreement to indemnify.⁵² Public policy may demand indemnification if a plaintiff succeeds against one defendant while a more culpable defendant escapes liability.⁵³ Implied indemnification is essentially an extension of vicarious liability principles in tort law.⁵⁴

More important for purposes of this Note, express indemnification is based on contract rather than tort law.⁵⁵ As a creature of contract, an express indemnification agreement evidences the parties' intent to shift risks *ex ante*.⁵⁶ Predictability is one of the great advantages of contract law generally, and express indemnification specifically provides predictability.⁵⁷ Presumably, bargaining parties pay and receive premiums reflected in the contract price according to their exposure to liability for damages on the occurrence of some event.⁵⁸ As the potential for payout and forecasted damages increases, the premium paid for protection against risk likewise increases.⁵⁹

Express indemnification is a widely accepted vehicle for shifting risk in business negotiations, but there are a few instances in which courts and legislatures deny enforceability of indemnification provisions.⁶⁰ Parties generally cannot seek indemnification against their own willful harm-causing conduct.⁶¹ Additionally, parties generally cannot seek indemnification against conduct they know to be illegal or immoral at the time of contracting.⁶² For instance, parties may not agree to indemnify others for damages resulting from fraud.⁶³ Negligent behavior, as opposed to willful behavior, is more questionable.⁶⁴ Generally, parties are able to contractually indemnify against their own negligence, but several states have enacted anti-indemnification statutes that limit the ability of parties to seek indemnification for their own negligence.⁶⁵ Anti-indemnification statutes may limit or prohibit indemnification in situations where legislatures are concerned that shifting liability may lead to immoral, inefficient, or negligent

52. *Id.* at § 1(a).

53. *Id.*

54. *Id.*

55. *Id.* at § 1(b).

56. THE CONSTRUCTION CONTRACTS BOOK, *supra* note 46, at 29.

57. See ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 4 (1979) ("An important function of contract law is to enforce the parties' agreed-upon allocation of risk.").

58. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 107 (4th ed. 1992) (discussing contract modification and noting that "[i]f . . . [the risk] was allocated to the crew they were presumably compensated for assuming it").

59. *See id.*

60. Schoumacher, *supra* note 47, at § 1(b)(ii).

61. *Id.*

62. *Id.*

63. *Id.* at § 1(b)(iii).

64. *Id.* at § 1(b)(ii).

65. *Id.* at § 2.

behavior.⁶⁶

In the construction industry, bargaining is essential to the process of allocating risk and responsibility to parties in the best position to minimize such risks.⁶⁷ As evidence of the wide acceptance of indemnification in the construction industry, a recent article explored indemnification among architects, contractors, and developers under the ADA and FHAA.⁶⁸ The authors noted that because the Acts are a hybrid of building code and civil rights legislation, courts have been reluctant to allow complete abdication of liability by contractors, architects, or developers when a structure fails to comply with ADA and FHAA accessibility guidelines.⁶⁹ Yet the authors point out that indemnification may still be accomplished through the private contractual relationship of the parties.⁷⁰ The authors provide an example of a contractual provision between an owner and contractor:

Owner acknowledges that Contractor has no design responsibility hereunder. To the extent permitted by law, if Contractor is ever named as a defendant in a lawsuit brought pursuant to, or held liable for violation of, any federal, state, or local disabled-access statute, including [but] not limited to the Americans with Disabilities Act, the Owner agrees to indemnify, defend, and hold harmless the Contractor for any and all liability thereunder, including but not limited to fines, judgments, costs, attorney fees, and expert witness fees.⁷¹

The authors note that “contractual provisions such as these will likely not lead to an architect or contractor being dismissed from an ADA lawsuit as a matter of law. However, they will shift the ultimate responsibility for paying to remediate noncompliant structures (and the attendant legal costs).”⁷² This conclusion was sensible in 2008 when the article was published, but recent district court interpretations of the FHAA and ADA indicate a movement toward unenforceability of these indemnification provisions.⁷³

66. *Id.* at § 1(b)(ii); *see, e.g.*, ARIZ. REV. STAT. ANN. § 34-226 (2010) (construction contracts indemnifying against promisee’s own negligence void); CONN. GEN. STAT. ANN. § 52-572k (West, Westlaw through 2010 legislation) (similar); GA. CODE ANN. § 13-8-2 (2010) (similar); MONT. CODE ANN. § 28-11-302 (2009) (“An agreement to indemnify a person against an act thereafter to be done is void if the act be known by such person, at the time of doing it, to be unlawful.”); TENN. CODE ANN. § 62-6-123 (West, Westlaw through 2010 legislation) (similar to Arizona).

67. *See* Cushman & Hackenbrach, *supra* note 44, at 9-14.

68. Berg & Hecker, *supra* note 12, at 5.

69. *Id.* at 5, 7.

70. *Id.* at 7.

71. *Id.* at 8.

72. *Id.*

73. *See supra* text accompanying note 19.

C. *The FHAA*

In order to better evaluate the movement toward indemnification prohibition, some background about each Act is useful for perspective. In 1988, Congress passed the FHAA to amend the Fair Housing Act of 1968 (FHA).⁷⁴ The original FHA aimed to curb discrimination in housing but failed to address housing practices that disadvantaged persons with disabilities.⁷⁵ As part of the 1988 amendments, Congress added provisions targeting discrimination against persons with disabilities in the housing market.⁷⁶ Congress realized that disability-based discrimination was different from race, gender, nationality, or religious-based discrimination.⁷⁷ In the latter examples, the physical attributes of dwellings are not relevant for determining whether an individual or entity has discriminated in rental or sale.⁷⁸ Disabilities pose a unique problem because it is possible to discriminate strictly on the basis of designing and constructing dwellings with features that make them unusable by persons with disabilities.⁷⁹

In order to address these unique physical design problems, the FHAA sets out seven requirements for those who “design and construct” post-enactment “covered multifamily dwellings.”⁸⁰ The requirements are that

- (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
- (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
- (iii) all premises within such dwellings contain the following features of adaptive design:
 - (I) an accessible route into and through the dwelling;
 - (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
 - (III) reinforcements in bathroom walls to allow later installation of grab bars; and
 - (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.⁸¹

Construction project participants have engaged in litigation to determine whether the FHAA’s “design and construct” language applies to owners, designers, and builders in their distinct roles or if the language only targets

74. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)).

75. H.R. REP. NO. 100-711, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174.

76. *Id.*

77. *See* H.R. REP. NO. 100-711, at 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

78. *Id.*

79. *Id.*

80. 42 U.S.C. § 3604(f)(3)(C) (2006).

81. *Id.*

participants playing dual roles as both designer and builder.⁸² Courts have interpreted the FHAA to make all parties involved in a project potentially liable for failure to comply with FHAA provisions.⁸³ One court has noted that “[d]esign and construct’ is a broad sweep of liability . . . [encompassing] architects, builders, and planners.”⁸⁴ Another important decision took an even broader view by finding that “[w]hen a group of entities enters into the design and construction of a covered dwelling, all participants *in the process as a whole* are bound to follow the FHAA.”⁸⁵

D. The ADA

In 1990, Congress passed the ADA⁸⁶ essentially as an extension of the Civil Rights Acts of 1964⁸⁷ and 1968.⁸⁸ Similar to the FHAA, Congress recognized a need to extend existing protections against discriminatory practices to benefit persons with disabilities.⁸⁹ The ADA is comprehensive legislation covering several discriminatory practices persons with disabilities may face in areas such as employment and transportation services.⁹⁰

Title III of the ADA includes anti-discrimination provisions targeting accessibility in public accommodations.⁹¹ The ADA makes the “failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities” unlawful discrimination.⁹² Unlike the FHAA, the ADA does not list specific

82. See, e.g., *Mont. Fair Hous. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1062, 1068-69 (D. Mont. 1999) (in which defendant builder argued that it only built and did not design the apartment complexes in FHAA case).

83. See, e.g., *Balt. Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664 (D. Md. 1998) (“Defendant’s narrow interpretation of the ‘design and construct’ provision would defeat the purpose of the FHAA by allowing architects and builders who are involved in either the design or construction, but not both, to escape liability . . .”).

84. *United States v. Days Inn of Am., Inc.*, 997 F. Supp. 1080, 1083 (C.D. Ill. 1998), *aff’d*, 151 F.3d 822 (8th Cir. 1998).

85. *Balt. Neighborhoods*, 3 F. Supp. 2d at 665 (emphasis in original).

86. 42 U.S.C. §§ 12101-12213.

87. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000(a)-2000(h)(6)).

88. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619, 3631); see H.R. REP. NO. 101-485(III), at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449.

89. See H.R. REP. NO. 101-485(III), at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446.

90. See 42 U.S.C. §§ 12101-12189 (2006 & Supp. 2009).

91. See *id.* § 12182. Places of public accommodation generally include: (1) places of lodging; (2) places that serve food and drink; (3) places of exhibition and entertainment; (4) places of public gathering; (5) sales or rental establishments; (6) service establishments; (7) certain public transportation; (8) places holding a public display or collection; (9) places of recreation; (10) places of education; (11) social service centers; and (12) places of exercise or athletic recreation. *Id.*

92. *Id.* § 12183(a)(1).

design requirements that must be followed in order for places of public accommodation to be ADA-compliant.⁹³ Instead, design requirements are listed in the ADA Accessibility Guidelines.⁹⁴

As with the FHAA, parties have litigated whether the ADA's "design and construct" language makes owners, designers, and builders liable or only parties responsible for both designing and constructing facilities.⁹⁵ Interestingly, the argument that designers or builders are not liable for noncompliance is stronger under the ADA because while the "design and construct" section does not clearly list proper potential defendants⁹⁶ (the same as the FHAA), the immediately preceding section only targets "any person who owns, leases (or leases to), or operates a place of public accommodations."⁹⁷ While some courts have accepted this argument,⁹⁸ most have followed the FHAA interpretation by holding all parties involved in a project potentially liable for failure to comply with the provisions of the ADA.⁹⁹

II. THE ROAD TO FHAA AND ADA CONTRACTUAL INDEMNIFICATION PROHIBITION

Even though Congress enacted the FHAA and ADA in 1988 and 1990, respectively,¹⁰⁰ and both Acts are ambiguous regarding whether indemnification is prohibited,¹⁰¹ no court interpreted either Act regarding indemnification until 2003.¹⁰² After 2003, there was a five-year dearth of interpretive cases, but since 2008, six federal district courts have interpreted the Acts to prohibit contractual indemnification in design and construct cases.¹⁰³ This section first analyzes the 2003 opinion and then considers one of the more recent cases.

A. *United States v. Quality Built Construction, Inc.*¹⁰⁴

In 2003, *Quality Built* was the first district court case to deny indemnification for failure to design and construct buildings according to FHAA or ADA

93. Compare 42 U.S.C. § 3604(f)(3)(C) (FHAA), with 42 U.S.C. § 12183 (ADA).

94. See 28 C.F.R. § 36 (2009).

95. See, e.g., *United States v. Days Inn of Am., Inc.*, 151 F.3d 822, 824-27 (8th Cir. 1998).

96. See 42 U.S.C. § 12183(a)(1).

97. *Id.* § 12182(a); see also Mita Chatterjee, Case Note, *Access Denied and Not Designed: The Ninth Circuit Drafts a Narrow Escape for Architect Liability Under the Americans with Disabilities Act in Lonberg v. Sanborn Theaters, Inc.*, 9 VILL. SPORTS & ENT. L.J. 293, 303-05 (2002).

98. See, e.g., *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1033-36 (9th Cir. 2001).

99. See, e.g., *Days Inn of Am., Inc.*, 151 F.3d at 824-27.

100. See *supra* Parts I.C-D.

101. See *infra* Part III.A.

102. See *supra* note 19 (listing all cases interpreting either or both Acts).

103. See *supra* note 19 (listing decisions handed down since 2008).

104. 309 F. Supp. 2d 767 (E.D.N.C. 2003).

requirements.¹⁰⁵ Quality Built Construction (“Quality Built”), a North Carolina development company, hired Hite/MSM, P.C. (“Hite”), an architectural firm, to design apartment complexes.¹⁰⁶ The United States brought an action against Quality Built and Hite for violation of numerous design and construction provisions of the FHAA.¹⁰⁷ Quality Built claimed that it had relied upon Hite to adequately design the complexes in accordance with “all applicable codes and building guidelines.”¹⁰⁸ Quality Built filed a cross-claim against Hite seeking indemnification and contribution¹⁰⁹ under the FHAA.¹¹⁰ Hite argued that Quality Built could not seek indemnification because the FHAA does not expressly or impliedly provide for indemnification between co-defendants.¹¹¹

The *Quality Built* court recognized that indemnification under the FHAA was an issue of first impression.¹¹² Rather than interpreting the FHAA to allow indemnification, the court followed reasoning laid down in *Northwest Airlines v. Transport Workers Union of America*,¹¹³ a federal employment discrimination case. Borrowing from *Northwest Airlines*, the *Quality Built* court determined that the FHAA does not provide a right to sue for indemnification because: (1) Congress did not expressly provide such a remedy; (2) Congress did not imply, either through statutory language or legislative history, that such a remedy should be available between co-defendants; and (3) Congress did not provide courts with the ability to fashion federal common law in this area.¹¹⁴

Although Quality Built also brought state law cross-claims for breach of contract and breach of the standard of care against Hite, the court did not squarely address the nature of the claims or give a thorough analysis of potential

105. Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in “Design and Construction” Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 811 (2006).

106. *Quality Built*, 309 F. Supp. 2d at 771.

107. *Id.*

108. *Id.* at 778.

109. As opposed to indemnification, contribution shifts only a portion of the costs of liability rather than all of the costs from one party to another. See *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1103 (4th Cir. 1989). Potential contribution prohibition under the Acts is beyond the scope of this Note. Because this Note focuses primarily on express indemnification, further explanation of *Quality Built*’s treatment of contribution has been omitted.

As to the nature of Quality Built’s indemnification claim, the court’s opinion lacks clarity. Certainly Quality Built was arguing that it should be permitted to seek indemnification on implied grounds through a cross-claim. See *Quality Built*, 309 F. Supp. 2d at 778. Quality Built also brought state law breach of contract actions that were challenged by Hite as de facto claims for indemnification. *Id.* This may indicate that Quality Built and Hite had an express indemnification agreement in their contract documents. Unfortunately, the court does not address whether there were such contractual provisions, and party briefs are unavailable.

110. *Quality Built*, 309 F. Supp. 2d at 778.

111. *Id.*

112. See *id.*

113. 451 U.S. 77 (1981). For further discussion of *Northwest Airlines*, see *infra* Part II.B.1.

114. *Quality Built*, 309 F. Supp. 2d at 778-79.

contractual indemnification.¹¹⁵ With respect to the state law claims, the court held that “[t]o the extent that Defendants seek indemnification on the basis of these state actions, the claims are not allowed.”¹¹⁶ The court did not address the nature of the parties’ contract documents.¹¹⁷

B. Choosing Precedent for Interpreting the FHAA and ADA

The *Quality Built* court was the first court to interpret the FHAA or ADA to preclude indemnification between construction project parties.¹¹⁸ As courts often do, the *Quality Built* court structured its reasoning by claiming to slavishly follow precedent without laying out potential alternatives. Despite the persuasive tone of the *Quality Built* opinion, *Northwest Airlines* was not mandatory authority because it was not directly on point¹¹⁹ and the court had other available options.¹²⁰

1. *Problems with Following Northwest Airlines.*—The *Quality Built* court’s chosen precedent was problematic because it was an employment discrimination case.¹²¹ In *Northwest Airlines*, a union discriminated against potential job candidates in its placement program with an employer.¹²² The plaintiff sued the employer, who was held liable for discriminatory hiring practices under federal Title VII¹²³ anti-employment discrimination provisions and the Equal Pay Act.¹²⁴ The employer filed a claim against the union for contribution.¹²⁵ While courts interpreting the FHAA often look to federal employment discrimination cases for guidance,¹²⁶ the *Quality Built* court failed to address important differences between employment discrimination and design and construct cases.

Like the FHAA and ADA, Title VII neither expressly prohibits nor expressly allows contribution or indemnification.¹²⁷ The *Northwest Airlines* Court interpreted Title VII to prohibit contribution.¹²⁸ Prohibiting contribution in Title

115. *See id.*

116. *Id.* at 779.

117. *Id.*

118. For a list of cases with dates of decisions, see *supra* note 19.

119. *See Quality Built*, 309 F. Supp. 2d at 778 (“The [*Quality Built*] [c]ourt has not found any cases directly on point.”).

120. *See Schwemm*, *supra* note 105, at 807-13. This point is elaborated further in Part II.B.2.

121. *See Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 79-82 (1981).

122. *Id.*

123. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based on “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006).

124. The Equal Pay Act of 1963 generally prohibits employers from discriminatorily paying employees of the opposite sex disparate wages for tasks that require “equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d).

125. *Nw. Airlines*, 451 U.S. at 79-82.

126. *Schwemm*, *supra* note 105, at 776-77.

127. *Nw. Airlines*, 451 U.S. at 91.

128. *Id.* at 98.

VII cases makes sense, but employment discrimination is significantly different from failure to design and construct compliant buildings under the FHAA and ADA.

To begin with, the context of making hiring and firing decisions is different from making accessibility design decisions. As opposed to construction projects, employers making hiring decisions rarely rely on indemnification to shift risk because employers do not heavily rely on the expertise of outside parties to make employment decisions.¹²⁹ Most cases of employment discrimination are comparable to owners having designers and builders in-house—that is, only one party is potentially liable for discrimination.¹³⁰ Not only do employers have the necessary expertise to choose job candidates, but they are presumably more familiar with their own needs than an outside party such as a union.¹³¹ By contrast, indemnification is prevalent in the construction industry precisely because outside parties have more expertise and familiarity than the party seeking indemnification.¹³²

Second, the statutory elements needed to make a claim in employment discrimination cases are different from accessibility design and construction cases. Employment discrimination claims under Title VII generally focus on discriminatory intent.¹³³ Noncompliant facilities under the FHAA and ADA give rise to liability regardless of whether a plaintiff can show discriminatory intent.¹³⁴ As discussed above, parties generally cannot indemnify against intentionally unlawful behavior.¹³⁵ Logically, it makes no sense for Congress to allow indemnification in employment discrimination because that would allow parties to shift liability for intentional wrongdoing. By contrast, when parties contractually shift liability for FHAA and ADA accessibility design compliance, they are aligning responsibility with expertise rather than indemnifying against intentionally wrongful behavior.¹³⁶ Even if an owner intentionally disregards the

129. See Elaine W. Shoben, *Employee Recruitment by Design or Default: Uncertainty Under Title VII*, 47 OHIO ST. L.J. 891, 904-07 (1986) (describing the use of outside parties in employment hiring decisions as “restricted recruitment” and acknowledging that employers remain the parties with most knowledge and responsibility for recruitment needs).

130. See *supra* Part I.A.

131. See Shoben, *supra* note 131, at 904-07.

132. See *supra* Part I.B.

133. Under Title VII, disparate impact claims provide a type of strict liability without intent, but disparate impact cases only provide a presumption of intent that can be rebutted by the employer. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 96-97 (1973). Design and construct cases are all essentially disparate impact claims, but the disparate treatment yields liability rather than a rebuttable presumption. See, e.g., *United States v. Pac. Nw. Elec., Inc.*, No. CV-01-019-S-BLW, 2003 U.S. Dist. LEXIS 7990 at *47-48 (D. Idaho 2003) (FHAA); *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 707 (D. Or. 1997) (ADA).

134. See, e.g., *Pac. Nw. Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990 at *47-48 (FHAA); *Or. Arena Corp.*, 982 F. Supp. at 707 (ADA).

135. See *supra* Part I.B.

136. See *supra* Part I.B. & *infra* Part III.B.2.b.

mandates of the FHAA and ADA, an indemnification clause is traditionally unenforceable.¹³⁷

Third, in design and construct cases the motives for noncompliance are different from the motives of employers that violate Title VII. As Congress recognized, failure to comply with FHAA and ADA requirements in design and construct cases is probably the result of ignorance rather than animosity.¹³⁸ By contrast, social stereotypes drive discrimination in employment decisionmaking rather than ignorance.¹³⁹ Moreover, because employers are generally the only hiring and firing decisionmakers, knowledge of discrimination guidelines is within their field of expertise.¹⁴⁰ There is therefore no reason for employers to seek indemnification as a means of combating ignorance. In the construction industry, indemnification is a useful tool for combating ignorance because it creates an added incentive for the party in the best position to avoid the cost of liability to ensure that facilities are compliant.¹⁴¹

2. *An Alternative Path.*—Professor Robert Schwemm¹⁴² recognized an alternative path that *Quality Built* could have followed instead of adopting the *Northwest Airlines* approach. Rather than foreclosing traditional principles of tort law that would impose joint and several liability, *Quality Built* could have followed the reasoning of two Supreme Court decisions: *Meyer v. Holley*¹⁴³ and *Norfolk & Western Railway Co. v. Ayers*.¹⁴⁴ In *Meyer*, the Court reaffirmed that

137. See *supra* Part I.B. (indemnification for intentional wrongdoing generally prohibited).

138. See H.R. REP. NO. 100-711, at 25, reprinted in 1988 U.S.C.C.A.N. 2173, 2186 (approvingly quoting the Supreme Court as observing that discrimination on the basis of disability is “most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect” (quoting *Alexander v. Choate*, 469 U.S. 287, 297 (1985))). A desire to cut costs is another potential motive, but according to Congress, additional costs should be negligible. See H.R. REP. NO. 100-711, at 80.

139. See D. Wendy Greene, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1376-84 (2008) (analyzing and applying the “cultural meaning” test and unconscious racism in the specific context of employer decisionmaking) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) and R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004)).

140. See GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 31-36 (2d ed. 2007).

141. See *supra* Part I.B. & *infra* Part III.B.2.b.

142. Professor Schwemm is the Ashland Professor of Law at the University of Kentucky College of Law and has authored several articles addressing housing discrimination. *E.g.*, Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private “Clients” Under the Fair Housing Act*, 65 GEO. WASH. INT’L L. REV. 329 (1997); Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187 (2001); Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121 (2004).

143. 537 U.S. 280 (2003).

144. 538 U.S. 135 (2003); see Schwemm, *supra* note 105, at 807-13 (recognizing *Norfolk* as

because the FHAA essentially creates tort liability, traditional tort principles should apply unless Congress explicitly foreclosed them.¹⁴⁵ In *Norfolk*, a Federal Employers' Liability Act¹⁴⁶ (FELA) case, the Court interpreted the FELA using the same method of construction as in *Meyer* and held that the Act did not foreclose contribution¹⁴⁷ because "joint and several liability is the traditional rule."¹⁴⁸ Had the *Quality Built* court followed this approach, it would likely have allowed contribution claims, but it might still have foreclosed implied indemnification claims on grounds that implied indemnification is not necessarily a favored traditional tort principle.¹⁴⁹ Even so, prohibition of implied indemnification is radically different from prohibition of express contractual indemnification.¹⁵⁰

As opposed to claims for implied indemnification, express contractual indemnification is a traditionally accepted vehicle for shifting liability in many tort situations.¹⁵¹ Express contractual indemnification is treated differently because it represents an important recognition between the parties *ex ante* that a particular party should bear all responsibility for a task.¹⁵² In this way, contractual indemnification functions as an efficiency mechanism.¹⁵³ By contrast, claims for contribution and implied indemnification consider fault and responsibility *ex post*.¹⁵⁴ The *Quality Built* court failed to distinguish contribution and implied indemnification from express indemnification. As a result, the court also failed to consider whether Congress intended to eliminate such a traditionally useful construction industry tool for allocating responsibility *ex ante* and properly

a potential alternative precedent).

145. *Meyer*, 537 U.S. at 828-29 (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974) and *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.")).

146. 45 U.S.C. §§ 51-60 (2006).

147. As opposed to indemnification, contribution shifts only a portion of the costs of liability rather than all of the costs from one party to another. See *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 778-80 (E.D.N.C. 2003).

148. *Norfolk*, 538 U.S. at 159-66 (quoted language at 163).

149. "[Implied] [i]ndemnity was and is permitted in only a few situations [in the joint and several liability system]." Schwemm, *supra* note 105, at 811 (citing DAN D. DOBBS, *THE LAW OF TORTS* 1079 (2002)).

150. Again, it is unclear whether *Quality Built* stands for the proposition that express contractual indemnification should be prohibited. The court failed to squarely address the issue. See *supra* note 111 and second paragraph of accompanying text.

151. While strict liability in tort and intentional torts involve acts that parties generally cannot indemnify against, liability arising from the most common tort claim—negligence—can generally be shifted through express contractual indemnification. See *supra* Part I.B.

152. See POSNER, *supra* note 58, at 119 ("[A]n important function of contracts is to assign risk to superior risk bearers," and "[i]f the risk materializes, the party to whom it was assigned must pay.>").

153. *Id.*

154. Schoumacher, *supra* note 47.

incentivizing parties.

3. *Unresolved Issues.*—*Quality Built* focused on the FHAA rather than the ADA,¹⁵⁵ leaving unresolved whether the ADA should be treated differently.¹⁵⁶ Additionally, *Quality Built* failed to squarely address express contractual indemnification,¹⁵⁷ resulting in another unresolved issue. Further, *Quality Built* did not analyze *Meyer* and *Norfolk*—an avenue left open to future district courts.¹⁵⁸

After a lapse of five years, several other federal courts addressed indemnification in FHAA and ADA design and construct suits.¹⁵⁹ None of these courts challenged the reasoning of *Quality Built* or addressed differences between employment discrimination and design and construct cases. Perhaps the district courts have construed Congress's inactivity since the *Quality Built* decision as congressional affirmation of indemnification prohibition. On the other hand, Congress does not always respond to court decisions—especially in the case of a single district court. Also, congressional inactivity after *Quality Built* only indicates that Congress may agree that the FHAA does not allow co-defendants to file cross-claims for implied indemnification. Because the *Quality Built* court failed to squarely address express contractual indemnification, Congress's silence does not necessarily indicate approval of express indemnification prohibition. As discussed further below, district courts that have addressed contractual indemnification have apparently followed *Quality Built* because they are convinced that by depriving parties of the ability to shift risk and costs, all project participants have increased incentive to ensure compliance with the Acts.¹⁶⁰

155. See *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 778-80 (E.D.N.C. 2003).

156. As indicated in Part II.C., recent court decisions have extended express indemnification prohibition to ADA cases without addressing differences in the Acts. Space limitations foreclose a thorough analysis of this topic, but a terse discussion is warranted. Plausibly, express indemnification prohibition stands on more solid footing in FHAA cases than ADA cases. Congress allowed for punitive damages in the FHAA design and construct context, but not in the ADA. Compare 42 U.S.C. § 3613 (2006) (FHAA remedies), with 42 U.S.C. § 12188 (ADA remedies). Congress's imposition of punishment could be taken as an indication that parties should not be able to escape punishment by shifting costs. On the other hand, wise drafters of indemnification clauses can make exceptions for punitive damages. Also, punishment is presumably only warranted in cases of intentional wrongdoing, and in such cases indemnification clauses are void anyway. See *supra* Part II.B.

157. See *Quality Built*, 309 F. Supp. 2d at 778-80.

158. Schwemm, *supra* note 105, at 809.

159. See *supra* text accompanying note 19.

160. See *infra* Part III.D.

C. Equal Rights Center v. Archstone Smith Trust.¹⁶¹ *A Showcase of the Trend in Design and Construct Suits*

Although there have been a number of recent district court decisions following *Quality Built's* lead,¹⁶² *Equal Rights Center v. Archstone Smith Trust*¹⁶³ succinctly evidences the trend toward prohibiting express contractual indemnification under both the FHAA and the ADA with more thorough analysis than other cases.¹⁶⁴

1. *Background.*—On December 20, 2004, the Equal Rights Center, the American Association of People with Disabilities, and the United Spinal Association filed an action against several entities involved in the design, construction, maintenance, and operation of apartment complexes throughout the United States.¹⁶⁵ Among those entities were Archstone Smith Trust and Archstone Operating Trust (collectively “Archstone”), a real estate investment trust specializing in apartment development,¹⁶⁶ and Niles Bolton,¹⁶⁷ a provider of architectural services for fifteen of the properties in question.¹⁶⁸ The plaintiffs alleged violations of both the FHAA and ADA, including failure to design and construct the apartment complexes in compliance in seventeen states and the District of Columbia.¹⁶⁹ By March of 2009, all defendants had reached settlement agreements, but one important issue remained before the court: Archstone’s state law cross-claim against Niles Bolton for indemnification.¹⁷⁰

2. *The Issue.*—Archstone conceded that its apartment complexes were in violation of the FHAA and ADA.¹⁷¹ As a result, it agreed to pay 1.4 million dollars in damages, attorneys’ fees, costs, and other expenses.¹⁷² It also agreed

161. 603 F. Supp. 2d 814 (D. Md. 2009).

162. See *supra* text accompanying note 19.

163. 603 F. Supp. 2d 814.

164. *Id.*

165. *Id.* at 815-16.

166. Archstone is one of the largest real estate investment trusts in the United States. It is a publicly traded corporation and has a long history of mergers and acquisitions. See *About Us*, ARCHSTONE APARTMENTS, http://www.archstoneapartments.com/Top/About_Us.htm (last visited Apr. 4, 2011); *Archstone-Smith Trust*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/ArchstoneSmith-Trust-Company-History.html> (last visited Apr. 4, 2011).

167. Niles Bolton is an architectural firm headquartered in Atlanta, Georgia. It has 190 employees and does business throughout the United States as well as internationally. See NILES BOLTON ASSOCS., <http://www.nilesbolton.com/> (last visited Apr. 4, 2011).

168. *Archstone*, 603 F. Supp. 2d at 815-16.

169. The states in question were Arizona, California, Colorado, Florida, Georgia, Illinois, Maryland, Massachusetts, New Mexico, North Carolina, New Jersey, New York, Oregon, Tennessee, Texas, Virginia, and Washington. *Id.* at 816.

170. Archstone originally only brought a claim for indemnification against Niles Bolton and sought to add a claim for contribution during the 2008 appeal. *Id.* at 817.

171. *Id.* at 815-16.

172. *Id.*

to pay to retrofit noncompliant apartment complexes to bring them in line with FHAA and ADA mandates.¹⁷³ Archstone argued that Niles Bolton was obligated to repay Archstone for the portion of damages Niles Bolton caused Archstone to incur specifically because of designs that failed to comply with the FHAA and ADA.¹⁷⁴ Archstone “[sought] damages only for those violations . . . that occurred because . . . [Niles Bolton] specified an incorrect dimension or other detail in its construction documents, or otherwise failed to provide sufficient information for the builder to construct the project in accordance with the applicable accessibility requirements.”¹⁷⁵

Archstone asserted its indemnification claim both on an implied indemnification ground and on the basis of express contractual indemnification.¹⁷⁶ According to contracts between Niles Bolton and Archstone,¹⁷⁷ Niles Bolton was responsible for designing the structures in compliance with all federal laws, including the FHAA and ADA.¹⁷⁸ Additionally, Niles Bolton promised to indemnify Archstone for any costs Archstone incurred as a result of Niles Bolton’s failure to properly design the buildings.¹⁷⁹

3. *Holding and Rationale.*—The *Archstone* court held that Archstone’s implied tort law and express contract law indemnification claims failed, and Niles Bolton did not have to compensate Archstone (though Niles Bolton had to pay whatever its agreed settlement amount was with the original plaintiffs).¹⁸⁰ The court interpreted the FHAA and ADA to prohibit indemnification by following the reasoning of *Northwest Airlines* as adopted in *Quality Built*.¹⁸¹

Most importantly, the *Archstone* court expressly denounced state breach of contract claims that Archstone asserted as a result of Niles Bolton’s failure to uphold its bargain and indemnify Archstone.¹⁸² The court reasoned that federal law preempts state law express contractual indemnification claims because such claims conflict with the FHAA and ADA.¹⁸³ More specifically, the court held that “Archstone’s express indemnity claim, based on its contract with Niles Bolton, is barred by federal law, every bit as much as its implied indemnity claim is barred.”¹⁸⁴ The court further reasoned that

173. *Id.*

174. *Id.*

175. *Id.* at 817.

176. *Id.*

177. Archstone’s predecessor actually contracted with Niles Bolton. Archstone acquired ownership in the apartment complexes through a buyout. *Id.*

178. *Id.*

179. See *Archstone-Smith Trust and Archstone-Smith Operating Trust’s Cross-Claim Against Niles Bolton Associates, Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814 (2009) (No. 04 Civ. 3975).

180. *Archstone*, 603 F. Supp. 2d at 824-26.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 825.

[a]s a matter of law, Archstone's state law claims for breach of contract and professional negligence are wholly derivative of Archstone's primary liability and are therefore what federal law regards as *de facto* claims for indemnification. Accordingly, those state law claims are barred because *any* recovery by Archstone would frustrate the achievement of Congress'[s] purposes in the FHA and the ADA.¹⁸⁵

Although none of the courts addressing indemnification in the FHAA and ADA context have clearly expressed policy rationales for disallowing indemnification, lurking in the background is the idea that imposing a non-delegable duty of compliance will result in more buildings meeting FHAA and ADA mandates.¹⁸⁶ Theoretically, all parties involved in constructing a building will then have an incentive to be familiar with the FHAA and ADA requirements and will ensure that all standards are met.¹⁸⁷ As discussed below, there are a number of problems with this theory as it relates to express indemnification.

III. THE FHAA AND ADA SHOULD BE INTERPRETED TO ALLOW EXPRESS INDEMNIFICATION

Several factors affect statutory interpretation, but in general, courts consider Congress's intent as evidenced through statutory language and legislative history, the purpose of the legislation, general policy considerations, and prudential concerns.¹⁸⁸ The *Quality Built* court and the courts following its lead have looked to these factors in interpreting the FHAA and ADA to prohibit indemnification,¹⁸⁹ but the result can be scrutinized through analysis of the same factors.

A. Congress's Intent

1. *Statutory Language.*—Both the FHAA and the ADA lack specific language providing for or prohibiting indemnification.¹⁹⁰ Lack of specific language creates an ambiguity, leaving open the possibility that Congress did not

185. *Id.* at 824 (emphasis added).

186. *See* Berg & Hecker, *supra* note 12, at 7 (citing *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1, 2 (D.D.C. 1996) (supporting potential liability for all major players in design and construction)).

187. *See id.*

188. *See* DEBORAH B. MCGREGOR & CYNTHIA M. ADAMS, *THE INTERNATIONAL LAWYER'S GUIDE TO LEGAL ANALYSIS AND COMMUNICATION IN THE UNITED STATES* 193-206 (2008).

189. *See, e.g.*, *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 778-80 (E.D.N.C. 2003) (considering statutory language and structure, congressional intent, and legislative history); *Archstone*, 603 F. Supp. 2d at 822 (focusing on Congress's intent, which may be inferred from "the language of the statute itself, the statute's legislative history, the purpose and structure of the statute, and the likelihood that Congress intended to supersede or to supplement existing state remedies").

190. *Archstone*, 603 F. Supp. 2d at 822 (finding that "no such expressed right exists under [the FHAA and ADA]").

intend to interfere with contractual indemnification.¹⁹¹ As discussed above, many states have enacted anti-indemnification statutes that limit the ability of parties to expressly indemnify against certain losses.¹⁹² Because express indemnification is generally an acceptable means of shifting risk, anti-indemnification statutes threaten to drastically change established contractual relationships.¹⁹³ Recognizing the potential threat to existing risk allocation, many state anti-indemnification statutes provide that contractual indemnification provisions existing at the time of the statute's enactment remain enforceable.¹⁹⁴ This allowance assures parties the benefit of their bargains and gives them necessary notice to adjust mechanisms for allocating risk in the future.¹⁹⁵

Like states, Congress knows how to enact anti-indemnification legislation.¹⁹⁶ But Congress failed to even mention the concept in the Acts, let alone give parties notice of such a drastic change in traditionally accepted risk shifting. Theoretically, negotiating parties pay some premium for indemnification according to the amount of potential damages the agreement shifts.¹⁹⁷ Because the ADA and FHAA are silent with respect to contractual indemnification, prior to the recent decisions discussed above,¹⁹⁸ construction project participants had no notice or reason to think that premiums paid to shift risk would be held unenforceable. By construing the ADA and FHAA to deny contractual indemnification, courts are depriving premium-paying parties of the benefit of their bargains.¹⁹⁹ Premium-receiving parties gain windfalls to the disadvantage of premium-paying parties. If Congress intended to prohibit contractual indemnification under the ADA and FHAA, it should have put parties on notice by including specific language indicating prohibition. The lack of specific anti-

191. See MCGREGOR & ADAMS, *supra* note 190, at 194-95 (quoting Justice Stevens's analysis of how to interpret statutes in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 129 (2005)).

192. See *supra* Part I.B.

193. Steven G.M. Stein & Shorge K. Sato, *Advanced Analysis of Contract Risk-Shifting Provisions: Is Indemnity Still Relevant?*, 27 CONSTR. LAW. 5, 5 (2007).

194. See Schoumacher, *supra* note 47, at § 1(a).

195. See *id.*

196. Congress has mentioned indemnification in a number of statutes and specifically limited or denied indemnification in several instances. See, e.g., Small Business Access to Surety Bonding Survey Act of 1992, 15 U.S.C. § 694b (2006) (limiting indemnification in the form of surety bond guarantees in certain instances); Oil Pollution Act of 1990, 33 U.S.C. § 2710 (respecting oil pollution, "[n]o indemnification . . . shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person"); Mercury Export Ban Act of 2008, 42 U.S.C. § 6939f(e)(B) (denying and limiting indemnification in some instances for persons delivering elemental mercury).

197. See POSNER, *supra* note 58, at 107.

198. See *supra* Part II and text accompanying note 19.

199. Of course, parties doing business in jurisdictions that have interpreted the Acts to prohibit indemnification should be on notice going forward, but this will not aid parties that made bargains long before the current trend and are now finding themselves subject to suit. Parties in undecided jurisdictions face an unpredictable bargaining climate.

indemnification language indicates that Congress did not intend to change existing contractual relationships.

2. *Legislative History*.—In considering whether Congress intended the FHAA and ADA to prohibit indemnification, courts have briefly mentioned legislative history of the Acts as a potentially indicative source of Congress's intent.²⁰⁰ The *Quality Built* court determined that there was nothing in the legislative history indicating that Congress intended to allow indemnification as a remedy.²⁰¹ On the other hand, one court in the Eastern District of Pennsylvania quoted language from House Reports on the FHAA as support for the proposition that Congress actually intended to prohibit contractual indemnification.²⁰² The House Report details a need for additional federal enforcement power.²⁰³ The court concluded that "Congress, in discussing the need for enhancing remedies to combat discrimination in housing, determined that enforcement should be bolstered by giving HUD new powers, not by permitting co-defendants to sue each other for contribution [and indemnification]."²⁰⁴ However, looking to the language from the House Report, Congress failed to even mention indemnification.²⁰⁵ Certainly Congress was concerned about the existing enforcement power of HUD, but the concern focused more on getting the potentially responsible parties to court rather than which specific party should foot the bill.²⁰⁶ Furthermore, the House Report indicates that Congress intended to strengthen private enforcement rights rather than supplant them with increased

200. See, e.g., *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 779 (E.D.N.C. 2003) ("There is nothing in the legislative history of the FHAA which states or implies a right to contribution [or indemnification] on behalf of Defendants.").

201. *Id.*

202. *United States v. Gambone Bros. Dev. Co.*, No. 06-1386, 2008 WL 4410093, at *8 (E.D. Pa. Sept. 25, 2008). See *infra* text accompanying note 205 for the quoted language.

203. See H.R. REP. NO. 100-711, at 16-17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2177-78. Congress found that

[e]xisting law has been ineffective because it lacks an effective enforcement mechanism

Under existing law, although HUD investigates housing discrimination complaints, it can use only "informal methods of conference, conciliation, and persuasion" in an attempt to resolve them. HUD can do no more than this and lacks the power even to bring the parties to the conciliation table. HUD cannot sue violators to enforce the law, as in other civil rights laws.

. . . Since its passage, however, a consensus has developed that the Fair Housing Act has delivered short of its promise because of a gap in its enforcement mechanism.

The gap in enforcement is the lack of a forceful back-up mechanism which provides an incentive to bring the parties to the conciliation table with serious intent to resolve the dispute then and there.

Id.

204. *Gambone Bros.*, 2008 WL 4410093, at *8 (citing H.R. REP. No. 100-711, at 16).

205. See *supra* text accompanying note 205 for what Congress specifically mentioned.

206. See *supra* text accompanying note 205.

governmental enforcement.²⁰⁷ The *Gambone* court, and others following its lead, misread Congress's statements. Reading the grant of increased enforcement power as a prohibition of contractual indemnification is a far stretch of the imagination.

Altogether, just as with the express language of the Acts, Congress simply did not mention indemnification in the legislative history. As argued above, the failure to specifically exclude contractual indemnification strengthens rather than weakens the argument that contractual indemnification clauses should be enforced.²⁰⁸ Indemnification clauses are widely used in the construction industry.²⁰⁹ Contracting parties need to be on notice that traditionally negotiated deal terms will not be enforced.²¹⁰ The *Archstone* court mentioned that one of the factors in determining Congress's intent is "the likelihood that Congress intended to supersede or supplement existing state remedies."²¹¹ Disregarding an indemnification clause leads to breach of contract, a cause of action for which state law provides a remedy.²¹² But the *Archstone* court did not give this factor serious consideration.²¹³ Instead, the court assumed that Congress intended to prohibit indemnification and searched for positive evidence to the contrary.²¹⁴ Such an approach is the reverse of the *Archstone* court's own standard. Rather than presuming that Congress intended to prohibit indemnification, the standard business practices and remedies of the construction industry should be presumed valid, and courts should require plaintiffs to present evidence to the contrary. The legislative history does not provide evidence that Congress intended to prohibit indemnification.

B. Purposes of the Acts

Because the statutory language and legislative history of the Acts are ambiguous regarding indemnification, courts have relied on the purposes of the Acts in support of prohibition.²¹⁵

207. See H.R. REP. NO. 100-711 ("Section 813 continues the private right of action under existing law, but eliminates certain restrictions on the exercise of that right. . . . [It does so in part by extending] the statute of limitations from 180 days to . . . [two] years."); see also *Garcia v. Brockway*, 526 F.3d 456, 475 (9th Cir. 2008) (Fisher, J., dissenting). For the importance of private causes of action, see *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

208. See *supra* Part III.A.1.

209. See *supra* Part I.B.

210. See *supra* Part III.A.

211. *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 822 (D. Md. 2009).

212. See *supra* Part I.B.

213. The *Archstone* court mentioned supplementing state law remedies as a factor but then focused on the *Quality Built* and *Northwest Airlines* analysis. See *Archstone*, 603 F. Supp. 2d at 822.

214. *Id.*

215. See, e.g., *id.* ("The same imperative of Congressional purpose applies to attempts to 'contract around' the 'non-delegable' duties imposed by the FHA.")

1. *Distilling the Purposes.*—Respecting accessibility discrimination, Congress enacted the FHAA and ADA to serve similar purposes. FHAA language provides that “[it] is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”²¹⁶ Professor Schwemm noted that “[t]he FHAA’s ban on handicap discrimination was intended to be ‘a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream’” and that “Congress believed that ‘[t]he right to be free from housing discrimination . . . [was] essential to the goal of independent living.’”²¹⁷

As for the ADA, Congress found that

the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.²¹⁸

Further, “the [n]ation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”²¹⁹

One of the key purposes of the FHAA and the overriding goal of the ADA is therefore to curb discrimination against persons with disabilities. This Note is primarily concerned with curbing discrimination in the design and construction of buildings covered by the FHAA and ADA. All district courts that have considered whether indemnification should be foreclosed have implicitly or explicitly determined that discrimination in design and construction is best eliminated by making all parties to the project potentially liable regardless of fault or prior agreement.²²⁰ The *Archstone* court recited several of the ADA’s purposes as outlined above and stated that “[t]hese goals would be undermined if parties could simply ‘contract around’ their responsibilities under the statute.”²²¹ Similarly, the Southern District of Florida held that “[this] Court cannot approve an arrangement where a developer of a hotel can essentially contract around ADA compliance.”²²² The *Quality Built* court held that “[t]o allow Defendants to seek indemnity . . . would run counter to the purpose of the FHAA and undermine the regulatory goal by allowing the builder to escape any liability for violating the

216. 42 U.S.C. § 3601 (2006).

217. Schwemm, *supra* note 105, at 756 (citation omitted) (quoting H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179).

218. 42 U.S.C. § 12101(a)(8).

219. *Id.* § 12101(a)(7). For additional clarity on the purposes of the ADA, its explicit purposes are set out in 42 U.S.C. § 12101(b).

220. *See supra* text accompanying note 19.

221. *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 825 (D. Md. 2009).

222. *Access 4 All, Inc. v. Atl. Hotel Condos. Ass’n, Inc.*, No. 04-61740-Civ., 2005 WL 5643878, at *13 (S.D. Fla. Nov. 23, 2005).

Act.”²²³

2. *Two Issues Related to Achieving the Purposes.*—There are really two separate concerns related to curbing accessibility discrimination: (1) paying to bring noncompliant buildings that were subject to FHAA and ADA provisions during construction into compliance; and (2) preemptively ensuring that new construction projects are built according to FHAA and ADA mandates the first time around.²²⁴ Unfortunately, the courts do not explain why imposing liability on all parties to a project and prohibiting contractual indemnification would better serve the purposes of the Acts than imposing liability on all parties and allowing indemnification. The courts do not indicate which concern is best addressed by indemnification prohibition.

a. *Achieving compliance for current noncompliant structures.*—As for paying to bring noncompliant structures into compliance, the notion that parties can “contract around” the purposes of the Acts through indemnification is absurd. The mandates of the FHAA and ADA concern overall accessibility for persons with disabilities rather than who foots the bill for bringing structures into compliance.²²⁵ Ultimately, at least one party must be responsible for meeting FHAA and ADA mandates regardless of any contractual indemnification agreements.²²⁶ In order to “contract around” the FHAA and ADA, parties would have to contract with all potential future plaintiffs—including the federal government.

Regardless of the existence of an indemnification provision, all parties may still be sued and have judgments rendered against them.²²⁷ Those parties will have to satisfy the judgment to bring buildings into compliance regardless of whether they are ever successful in obtaining reimbursement through indemnification.²²⁸ The purpose of bringing structures into compliance is therefore fulfilled. Indemnified parties are simply reimbursed for their portion of the judgment because they paid a premium *ex ante* to provide an incentive for the other party to ensure compliance with the FHAA and ADA.²²⁹

b. *Preemptive compliance.*—Because prohibiting contractual indemnification fails to help bring noncompliant structures into compliance, contractual indemnification prohibition must be primarily targeting preemptive compliance. Apparently courts reason that by making all parties potentially liable for noncompliant structures without an option for reimbursement, all parties will be

223. *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 779 (E.D.N.C. 2003).

224. *See, e.g., United States v. Pac. Nw. Elec., Inc.*, No. 01-019, 2003 U.S. Dist. LEXIS 7990, at *46 (D. Idaho Mar. 19, 2003) (“The relief sought by Plaintiff is aimed not only at preventing future violations of the FHA by Defendants, but also at removing the lingering effects of any past violations by requiring retrofitting necessary to bring the complexes into compliance.”).

225. *See supra* notes 218-22 and accompanying text.

226. Because indemnification is derivative, at least one party must be primarily liable. *See supra* Part I.B.

227. *See supra* Part I.B.

228. *See id.*

229. *See id.*

properly incentivized to ensure compliance with the Acts.²³⁰ But prohibiting indemnification is a radical change in the traditional construction industry structure that can produce the opposite consequence.²³¹ In less complex industries, providing such an all-encompassing incentive may prove most effective.²³² However, because of the heavily contract-based, diversified nature of the construction industry, incentives are potentially skewed to the detriment of the purposes of the Acts.

By creating a non-delegable duty for all parties involved in a project to comply with the Acts, designers have less incentive to ensure that building designs follow all regulations.²³³ If a designer has indemnified an owner against potential noncompliance because of faulty design or poor supervision of the construction process, there is no question that the designer has the utmost incentive to ensure compliant design and construction.²³⁴ Without risk shifting through indemnification, designers have less incentive to ensure compliance in design and through supervision because they may ultimately split the cost of any problematic design with all other parties.²³⁵ The same reasoning applies to builders who agree to indemnify owners.²³⁶ Without indemnification provisions, builders have less incentive to ensure compliance because of cost splitting.²³⁷

Owners are the most likely target of an anti-indemnification interpretation because, as they have limited expertise and resources for design and construction, they are the parties most likely to seek out indemnification from designers and builders.²³⁸ But prohibiting indemnification does not change the elemental nature of the construction industry.²³⁹ Most owners simply do not have the expertise to

230. See Berg & Hecker, *supra* note 12, at 5.

231. See Stein & Sato, *supra* note 195, at 5.

232. For an example of a less complex industry, see the discussion of discriminatory employment practices in Part II.B.

233. See FEINMAN, *supra* note 40, at 278 (explaining that when courts tamper with contractual obligations of construction project participants, “parties cannot accurately predict to whom and for what they will be liable, [and therefore] it is impossible for them to plan appropriately for performance and risk in the course of construction”). Of course, designers will continue to have some incentive to comply because their reputation depends on quality service, and failure to design compliant structures may lead to negligence suits. See FUNDAMENTALS OF CONSTRUCTION LAW, *supra* note 26, at 49-50, 54-55.

234. See FEINMAN, *supra* note 40, at 277-78.

235. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 978 (1984).

236. See *id.*

237. See *id.*

238. See CONSTRUCTION LAW, *supra* note 11, at 131-33.

239. It is possible that increasing costs to owners by prohibiting risk shifting could lead to more prominent developers bringing designers and builders in-house. They may do so if the costs of exercising enough control over the project to ensure compliance (if this is possible) exceed the costs of bringing designers and builders in-house. See *supra* note 36.

design and construct compliant buildings.²⁴⁰ They pay for entities with expertise to design, monitor, and construct compliant buildings.²⁴¹ They rely on added contractual incentives through indemnification to ensure performance.²⁴² Of course, if an owner blatantly instructs a designer or builder to disregard the mandates of the Acts, the owner should not be reimbursed for liability. In cases of such willful behavior, indemnification provisions will be void anyway.²⁴³ At best, prohibiting contractual indemnification results in owners paying more for monitoring—with no guarantee that the results will change—and passing off the excess costs to ultimate users of facilities.

By prohibiting indemnification, courts have diffused costs among all participants and created uncertainty rather than allowing parties to concentrate responsibility with those best able to avoid the cost. In particular, the parties that are in the best position to avoid costs are primarily the designers and, to a lesser extent, the builders.²⁴⁴ As in *Archstone*, parties considering the problem *ex ante* are likely to allocate the risk of noncompliance to the designer.²⁴⁵ Since the designer is in the best position to avoid liability under the FHAA and ADA in the first place, such an allocation of responsibility is most efficient.²⁴⁶ This arrangement will ultimately save all involved—including society as a whole—costs associated with bringing existing structures into compliance or building the structure from the outset being passed on to future users of the facilities.²⁴⁷

The most effective path to curbing discrimination in accessibility design and construction is to provide a proper incentive structure through increased enforcement of the Acts coupled with contractual indemnification. Relaxed enforcement policies give no parties an incentive to ensure compliance with the Acts.²⁴⁸ Stringent enforcement incentivizes the party with the most financial

240. See *supra* Part I.A.

241. See *id.*

242. See *supra* Part I.B.

243. See *id.*

244. See James P. Colgate, *If You Build It, Can They Sue? Architects' Liability Under Title III of the ADA*, 68 *FORDHAM L. REV.* 137, 160-63 (1999).

245. See *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 817 (D. Md. 2009). Parties in the best position to avoid the risk of noncompliance should be eager to accept a premium because they have the ability to easily avoid payout. See *infra* text accompanying note 249.

246. For a discussion of how efficiency is best achieved by allocating responsibility to parties in the best position to avoid costs, see R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 42-44 (1960). See also POSNER, *supra* note 58, at 106 (determining that a hypothetical contractor is in a better position to prevent fire in the construction of a building than the owner because “he is in a better position . . . to estimate the likelihood and consequences of fire at various stages in the construction” and “he controls the premises and is knowledgeable about the fire hazards of buildings under construction”).

247. See Colgate, *supra* note 244, at 160-63.

248. See Calfee & Craswell, *supra* note 235, at 976-82.

resources at stake if liability is imposed.²⁴⁹ Allowing contractual indemnification creates an incentive within the construction relationship for parties with the greatest expertise and control to ensure compliance.²⁵⁰ Stringent external enforcement of FHAA and ADA mandates accentuates the incentive on the parties that agreed to accept responsibility through contractual indemnification.

A simple hypothetical illustrates the proper incentive structure. A store owner leaves the cashier (*C*), the salesman (*S*), and the janitor (*J*) in charge of the store for several days at a time. In the event that money is missing from the cash register, the owner requires all workers to repay the deficit. *C*, *S*, and *J* agree that because *C* is in the best position to watch the cash register, if any money is missing, all three will contribute funds to restore the deficit, but *C* must repay *S* and *J*. If the owner never makes any worker pay even when money is missing, *C*, *S*, and *J* really do not care who bears ultimate responsibility. If the owner always makes all workers contribute but fails to make *C* reimburse *S* and *J*, *C* is more likely to be watchful but can afford to shirk because *S* and *J* are shouldering a portion of his financial burden. If the owner always makes all workers contribute and enforces the private agreement, *C* would be a fool to shirk.

In a typically complicated construction project with diversified responsibility and expertise, placing incentives on parties with little knowledge and practical control over accessibility design does not help accomplish the purposes of the Acts. On the whole, parties to the construction project are not "contracting around" the FHAA and ADA specifications because at least one of the parties must remain liable for properly following the guidelines.²⁵¹ This represents a shift of responsibility from one party to another, making the process more efficient and more likely to be adequately performed.²⁵² It does not allow parties to disregard the mandates of the FHAA and ADA.

C. Public Policy and Other Considerations

1. *Public Policy.*—A number of articles have criticized any potential escape from liability by designers for FHAA and ADA structures as bad public policy.²⁵³ The underlying rationale is that designers are the most influential and knowledgeable parties to design and supervise the construction of FHAA- and ADA-compliant facilities.²⁵⁴ Designers are plainly in the best position to avoid

249. *See id.*

250. *See supra* Part I.B.

251. *See id.*

252. *See* POSNER, *supra* note 58, at 106.

253. *See, e.g.,* Colgate, *supra* note 244, at 160-63.

254. *Id.* at 161.

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."

the cost of noncompliance.²⁵⁵ If the design is noncompliant at the planning stage, it costs comparatively little to fix as opposed to, for instance, near construction completion when the builder notices a noncompliant aspect of the design.²⁵⁶ Designers also play a supervisory role in the construction process to ensure that plans are properly implemented.²⁵⁷ Thus, not only do designers make the initial planning decisions, but they are also in a position to monitor the builder and catch negligent errors.²⁵⁸

Noncompliant structures waste time and resources that could be better used to serve society's needs.²⁵⁹ Of course, one of the overriding purposes of the Acts, curbing discrimination against persons with disabilities, is itself a strong public policy.²⁶⁰ Contractual indemnification adds to the argument in favor of greater responsibility for designers by properly incentivizing designers to ensure complete compliance.²⁶¹ Prohibiting indemnification under the ADA and FHAA cracks a door for designers to partially escape liability. As a result, structures are more likely to be noncompliant, costing society valuable time and resources.

2. *Role of Insurance.*—The construction industry relies heavily on insurance for all aspects of operations.²⁶² Because construction insurance is a complicated field,²⁶³ this Note is not meant to provide a thorough analysis of insurance coverage options. It is enough to simply highlight the impact insurance has on the problem of liability for noncompliant structures under the FHAA and ADA.

Neither the FHAA nor the ADA explicitly restricts construction project participants from obtaining an insurance policy to cover potential liability for

Id. (quoting William David Flatt, Note, *The Expanding Liability of Design Professionals*, 20 MEM. ST. U. L. REV. 611, 615 (1990)).

255. See LEGAL HANDBOOK FOR ARCHITECTS, ENGINEERS AND CONTRACTORS: ISSUES IN CONSTRUCTION AND TECHNOLOGY 2002/2003, at 213-18 (Albert H. Dib ed., 2003).

256. The technology and industrial engineering fields analyze such decisions using cost of change curves. These curves describe an exponentially increasing cost as the development process continues. See James E. Folkestad & Russell L. Johnson, *Resolving the Conflict Between Design and Manufacturing: Integrated Rapid Prototyping and Rapid Tooling (IRPRT)*, 17 J. INDUS. TECH. 1, 3-4 (2001). Though the curve for building designers may be steeper or flatter, there should be a reasonably similar relationship.

257. See FUNDAMENTALS OF CONSTRUCTION LAW, *supra* note 26, at 8 (“A less well-known, but related and critical expectation of the owner is that the architect will participate in the administration of the construction contract to assure that the design objectives of the owner are fulfilled.”).

258. See *id.*

259. Colgate, *supra* note 244, at 162.

260. See *supra* Part III.B.1.

261. See *supra* Part III.B.2.b.

262. See CONSTRUCTION LAW, *supra* note 11, at 531-42.

263. SMITH, CURRIE & HANCOCK'S COMMON SENSE CONSTRUCTION LAW: A PRACTICAL GUIDE FOR THE CONSTRUCTION PROFESSIONAL 440 (Thomas J. Kelleher, Jr. ed., 3d ed. 2005) (“Insurance planning for construction projects is extremely complex and specialized . . .”).

noncompliance.²⁶⁴ The FHAA is silent regarding insurance coverage.²⁶⁵ The ADA specifically states:

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law²⁶⁶

Accordingly, construction project parties are free to bargain for insurance provisions that cover losses associated with ADA and FHAA noncompliance.

*Washington Sports and Entertainment v. United Coastal Insurance Co.*²⁶⁷ illustrates potential shifting of liability through insurance policies.²⁶⁸ United Coastal Insurance (UCI) issued a design professional insurance policy to the designer of a sports complex.²⁶⁹ The sports complex owner paid for the policy and was named as an additional insured.²⁷⁰ Originally, the policy excluded “any and all claims both from victims and governmental agencies arising out of or relating to . . . violation of the Americans with Disabilities Act or violation of any other civil rights.”²⁷¹ But the designer and owner paid a substantial premium²⁷² to amend the policy so that the exclusion did not “apply to a design error that could result in a violation of the Americans with Disabilities Act.”²⁷³ After project completion, the Paralyzed Veterans of America successfully brought suit alleging noncompliant design.²⁷⁴ Despite its contractual promise, UCI failed to defend the suit or indemnify the owner for costs to bring the facility into compliance.²⁷⁵ The owner sued UCI, and the court held that the owner “paid a substantial premium to shift risks to . . . [UCI, and UCI] willingly agreed to accept those risks. Without showing that [the owner’s and designer’s] motives stepped beyond a general risk aversion, [UCI] . . . cannot evade its duty to honor the [p]olicy and to defend plaintiffs”²⁷⁶

264. For the lack of specific language in the FHAA concerning insurance coverage for failures to design and construct compliant buildings, see 42 U.S.C. §§ 3601-3619 (2006). For the ADA’s stance on insurance coverage, see 42 U.S.C. § 12201(c)(1) and *infra* note 266.

265. 42 U.S.C. §§ 3601-3619.

266. *Id.* § 12201(c)(1).

267. 7 F. Supp. 2d 1 (D.D.C. 1998).

268. *See id.* at 11.

269. *Id.* at 3-4.

270. *Id.* at 3.

271. *Id.* at 5.

272. The owner paid over \$500,000 up front for the policy. *Id.* at 4.

273. *Id.* at 5.

274. *Id.* at 3.

275. *Id.*

276. *Id.* at 11.

Because insurance policies and contractual indemnification clauses are both forms of contractual indemnification that shift risk,²⁷⁷ prohibiting one while enforcing the other is absurd. On the surface, there is a difference between insurance policies and contractual indemnification clauses—the source of ultimate payment for noncompliant structures.²⁷⁸ If an insurance company honors a claim, the cost is spread to all other premium-paying clients of the company.²⁷⁹ If the insurance company is large, the bill may be paid by a large segment of society.²⁸⁰ If the parties contractually shift risk through indemnification clauses, the party assuming the risk pays the ultimate bill.²⁸¹ But in reality, a wise risk-assuming party would require a premium to be paid in the contract and in turn take that premium and buy an insurance policy to cover its potential liability. Depending on the availability and cost of insurance coverage, parties can achieve similar results as those arrived at through contractual indemnification.

United Coastal was decided in 1998,²⁸² five years before the *Quality Built* decision was handed down and ten years before the recent flurry of cases following *Quality Built*'s lead.²⁸³ Courts may soon face the same issue as found in *United Coastal* but with an argument that express indemnification is prohibited under the Acts. The argument follows that in order to be consistent, courts prohibiting contractual indemnification under the Acts would likewise have to prohibit parties from obtaining insurance coverage. But neither the FHAA nor the ADA explicitly prohibits parties from obtaining insurance coverage in such situations.²⁸⁴ It would be illogical for Congress to have allowed insurance companies to indemnify against FHAA and ADA liability while simultaneously disallowing contractual indemnification between construction project parties. Congress did not intend to create an inconsistent system. By prohibiting contractual indemnification, courts have fashioned the inconsistency.

3. *Contractual Indemnification Prohibition Is at Odds with Policy of Some States.*—Accessibility law is by no means exclusively a federal affair.²⁸⁵ Most states have some form of accessibility standards, many of which are more rigorous than the FHAA and ADA mandates.²⁸⁶ The FHAA provides that

277. See *id.* (discussing insurance as a tool for shifting risk).

278. See ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 13-14 (4th ed. 2007).

279. See *id.*

280. See *id.*

281. See *supra* Part I.B.

282. Wash. Sports & Ent'mt v. United Coastal Ins. Co., 7 F. Supp. 2d, 1 (D.D.C. 1998).

283. *Quality Built* was decided in 2003. United States v. Quality Built Constr., Inc., 309 F. Supp. 2d 767, 778-79 (E.D.N.C. 2003). For the dates of decisions handed down since *Quality Built*, see *supra* text accompanying note 19.

284. See *supra* text accompanying note 264 and accompanying text.

285. See Schwemm, *supra* note 105, at 762.

286. See *id.* at 809; see generally A STATE-BY-STATE GUIDE TO CONSTRUCTION & DESIGN LAW: CURRENT STATUTES AND PRACTICES (Carl J. Circo & Christopher H. Little eds., 1998) (comparing accessibility laws, among others, across the United States).

“[n]othing in this subchapter shall be construed to invalidate or limit any law of a State . . . that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.”²⁸⁷

The ADA contains a very similar provision.²⁸⁸ Accordingly, Congress showed some deference to states with requirements equal to or more stringent than the federal mandates.²⁸⁹ Yet some states that have mirror-image or more aggressive accessibility guidelines do not prohibit contractual indemnification between construction project parties.²⁹⁰ A glimpse at Indiana law illustrates the point.

To date, Indiana has not weighed in on whether the FHAA or ADA prohibits contractual indemnification between construction project parties.²⁹¹ At the state level, Indiana’s legislature essentially adopted a mirror image of the FHAA as a state version of anti-housing discrimination legislation.²⁹² Indiana also incorporated the ADA guidelines for building standards.²⁹³ In addition, Indiana requires that designers certify design compliance with all building codes in order for owners to obtain state-issued design releases prior to beginning a construction project.²⁹⁴ Requiring design releases places an increased burden on designers of construction projects, rather than builders and owners, to comply with applicable standards by requiring submission of plans and promise of compliance.²⁹⁵ By inference, Indiana therefore recognizes that building designers have more specialized skills and control over the project’s accessibility features than builders and owners.

Despite mirror-image standards of the FHAA and ADA and increased architect responsibility, Indiana does not prohibit contractual indemnification for

287. 42 U.S.C. § 3604(f)(8) (2006); *see also id.* § 3615, providing:

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

288. *Id.* § 12201(b). This section provides:

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

289. *See id.*

290. *See, e.g.,* IND. CODE §§ 22-9.5-1-1 to 22-9.5-11-3 (2010); *id.* § 26-2-5-1.

291. The author is unaware of any Indiana cases interpreting the FHAA or ADA regarding indemnification.

292. *See* IND. CODE §§ 22-9.5-1-1 to 22-9.5-11-3. In particular, Section 22-9.5-1-1(3) provides that one purpose of Indiana’s version of fair housing legislation is “[t]o provide rights and remedies substantially equivalent to those granted under federal law.”

293. *See id.* § 22-13-4-1.5.

294. *See id.* § 22-15-3-1-2.

295. *See id.* § 22-15-3-2.

noncompliant design and construction. Unlike the FHAA and ADA, Indiana statutes specifically address the enforceability of indemnification agreements between owners, builders, and designers and do not prohibit all indemnification agreements for failure to comply with Indiana's version of the FHAA and ADA.²⁹⁶ Instead, Indiana clearly signaled which agreements are and are not enforceable by prohibiting indemnification resulting "from the sole negligence or willful misconduct of the promisee or promisee's agents, servants or independent contractors."²⁹⁷ Accordingly, owners, builders, and designers may allocate responsibility for accessibility compliance between the parties to the project as long as noncompliance does not result from the sole negligence or willful misconduct of the party seeking indemnification.²⁹⁸

As an illustration of the potential conflict between state and federal express indemnification rules, litigation based on the same noncompliant feature in an Indiana building could result in disparate treatment depending on whether the claim was brought under the federal Acts or state law equivalents. In order for Indiana to maintain consistent treatment of contractual relationships, Indiana federal courts would have to interpret the FHAA and ADA to allow contractual indemnification. Otherwise, if Indiana federal courts follow *Archstone's* lead, the state law claims are preempted by federal law even though the parties may have been relying on state law mandates.²⁹⁹ Even if the parties bring a state law breach of contract action rather than an indemnification action, to the extent that the contract action is based on liability under the FHAA and ADA, the contract is unenforceable.³⁰⁰ Congress gave no express consideration of such a direct conflict.³⁰¹

D. Prudential Considerations

One court that interpreted the Acts to prohibit indemnification³⁰² cited the Seventh Circuit Court of Appeals for the proposition that absent Congress expressly giving a right of contribution or indemnification, none should be afforded by the court.³⁰³ The Seventh Circuit's reasoning for this approach was based on prudential considerations.³⁰⁴ The court recognized that cases involving cross-claims for contribution and indemnification create more work for the court and complicate the proceeding.³⁰⁵

296. *See id.* § 26-2-5-1.

297. *Id.*

298. *See id.*

299. *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 825 (D. Md. 2009).

300. *Id.*

301. *See* 42 U.S.C. §§ 3601-3619 (2006) (FHAA language); *id.* § 12101-12213 (ADA language).

302. *United States v. Shanrie Co.*, 610 F. Supp. 2d 958, 960 (S.D. Ill. 2009).

303. *Anderson v. Griffin*, 397 F.3d 515, 523 (7th Cir. 2005).

304. *Id.*

305. *Id.*

While the Seventh Circuit's prediction of increased courtroom complication is likely correct in the case of allowing implied indemnification and contribution claims,³⁰⁶ express indemnification is more likely to lead to the opposite result.³⁰⁷ Perhaps the greatest virtue of contractual indemnification is predictability.³⁰⁸ Uncertainty in the distribution of damages gives parties an incentive to fight things out in court because they may have something to gain at the expense of other parties.³⁰⁹ When parties come to an enforceable agreement respecting damage allocation *ex ante*, uncertainty is greatly reduced—and likewise, so is the probability of payoff through lawsuits.³¹⁰ Parties facing relative certainty in damage allocation are more likely to settle their dispute outside of court or in the early stages of litigation.³¹¹ Needless litigation is therefore avoided, and society's scarce resources can be put to better use.

CONCLUSION

There is a disconnect between attempting to curb accessibility discrimination and interpreting the FHAA and ADA to prohibit contractual indemnification. The increasing number of cases and commentary on the subject indicates an elevated concern for enforcement of accessibility legislation in the design and construction of applicable facilities.³¹² Improving accessibility so that persons with disabilities can enjoy a richer life is of utmost importance. Heightened awareness of the problem and enforcement of the Acts is long overdue.

Improved accessibility is best achieved by providing the proper incentive structure. The proper incentive structure combines increased overall enforcement of design and construct mandates with internal risk allocation through contractual indemnification. With increased overall enforcement, the party that bears ultimate financial responsibility for the cost of noncompliance is more likely to ensure proper performance.³¹³ Through contractual indemnification, construction project participants can place ultimate financial responsibility on parties in the best position to avoid costs.³¹⁴ Increasing enforcement but prohibiting indemnification does more harm than good because even though all parties are

306. Courtroom complexity increases with implied indemnification and contribution claims because they are essentially imposing another trial within a trial. The court must make determinations *ex post* about the relative fault of the parties and how much damage, if any, should be shifted. *See id.*

307. *See* Robert Cooter, Stephen Marks, & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 237-39 (1982).

308. *See supra* Part I.B.

309. *See generally* Cooter et al., *supra* note 307.

310. *See id.*

311. *See id.*

312. Schwemm, *supra* note 105, at 754-56.

313. *See* Calfee & Craswell, *supra* note 235, at 976-82.

314. *See supra* Parts I.A. & I.B.

more fearful of liability, they know that costs may be split.³¹⁵ Congress did intend to curb accessibility discrimination, but it did not intend to skew the internal incentive structure of the construction industry.³¹⁶ By allowing parties to contractually allocate risk and responsibility through indemnification and simultaneously ratcheting up enforcement, persons with disabilities will benefit, society will benefit, and the purposes of the FHAA and ADA will be better served.

315. See Calfee & Craswell, *supra* note 235, at 976-82.

316. See *supra* Parts III.A. & III.B.

