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Casenotes

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.*

I. INTRODUCTION

The Super Bowl, the new Brad Pitt flick, Madonna in concert - all of these are available in the comfort of one's home thanks to TV, pay-per-view or DVD.¹ Yet, how can this TV experience compare to cheering your favorite team to victory from the stands, watching your favorite star on the big screen or feeling the rhythm of a live performance? Fortunately, Title III of the Americans with Disabilities Act ("ADA") mandates that theaters, arenas and stadiums be equally accessible to all attendees, including those with disabilities.²

The ADA was adopted to eliminate discrimination against the millions of Americans with disabilities.³ It consists of five titles that address discrimination in the areas of employment, public services, private enterprises and telecommunications.⁴ This Note focuses on Title III, "Public Accommodations and Services Operated by Private

1. See generally *iNDemand™ Pay-Per-View*, at <http://www.ppv.com> (last visited Feb. 22, 2002) (setting forth weblink access to movies, sports and entertainment events on television and pay-per-view basis); *DIRECTV®*, at <http://www.directv.com/DTVAPP/index.jsp> (last visited Feb. 22, 2002) (providing digital satellite programming for sports and entertainment).

2. See 42 U.S.C. §§ 12181-89 (1994).

3. See *The Americans With Disabilities Act*, The Center for an Accessible Society, at <http://www.accessiblesociety.org/topics/ada/index.htm> (last visited Feb. 22, 2002) (remarking on impact of ADA on fifty-four million Americans currently with disabilities).

4. See 42 U.S.C. §§ 12101-13 (1994) (listing and describing titles of ADA). Title I, "Employment," relates to equal opportunity employment issues and prohibits employers from discriminating, based on disability, against qualified individuals in hiring, compensation, discharge and job assignment. See 42 U.S.C. §§ 12111-17 (1994). Title II, "Public Services," prohibits public entities from discriminating when providing access to services, programs, benefits and activities. See 42 U.S.C. §§ 12131-65 (1994). Further, Title II covers almost every state or local government program, regardless if it receives federal funding, in areas including transportation, access to public buildings, public benefits and public employment. See *id.* Title III, "Public Accommodations and Services Operated by Private Entities," provides accessibility requirements for privately owned businesses and other establishments. See 42 U.S.C. §§ 12181-89. Title IV, "Telecommunications," requires certain telecommunications systems to provide access for individuals who have impaired hearing or speech. See 47 U.S.C. §§ 225, 611 (1994). Title V, "Miscellaneous Provi-

Entities,” which directs public access to businesses and other establishments in the private sector.⁵ Title III is the segment of the ADA that is most often applicable in sports and entertainment facility cases.⁶

Since the passage of the ADA in 1990, courts have split on the issue of whether an architect who designs a public accommodation or commercial facility is liable under Title III of the ADA for violations of accessibility requirements.⁷ Some courts assign liability only to owners, lessees, lessors or operators of public accommodations and commercial facilities, while other courts extend this liability to architects, contractors and franchisors.⁸ Architects of sports or entertainment facilities often face a unique problem of determining their potential liability with respect to the ADA.⁹ In *Lonberg v. Sanborn Theaters, Inc.*,¹⁰ the United States Court of Appeals for the Ninth Circuit addressed the dispute surrounding architect liabil-

sions,” delineates procedural safeguards, plaintiffs’ remedies, retaliation, regulations and alternate dispute resolution. See 42 U.S.C. §§ 12201-13 (1994).

5. See 42 U.S.C. §§ 12181-89.

6. See Katherine C. Carlson, *Down in Front: Entertainment Facilities and Disabled Access Under the Americans With Disabilities Act*, 20 HASTINGS COMM. & ENT. L.J. 897, 904-11 (1998) (explaining Title III application in sports and entertainment related cases). Title III prohibits discrimination in motion picture houses, theaters, concert halls, stadiums and other places of exhibition or entertainment in order to ensure that people with disabilities enjoy the same forms of entertainment as the general population. See *id.* at 900.

7. Compare *United States v. Days Inns of Am., Inc.* (“8th Circuit DIA”), 151 F.3d 822, 826 (8th Cir. 1998) (holding party who possesses significant degree of control over design and construction of facility liable under Title III of ADA), with *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001), amended by 271 F.3d 953 (9th Cir. 2001) (holding architects are not liable under Title III of ADA).

8. Compare *8th Circuit DIA*, 151 F.3d at 826 (stating franchisor with extensive authority over design and construction may be liable), and *United States v. Days Inns of Am., Inc.* (“Illinois DIA”), 997 F. Supp. 1080, 1085 (C.D. Ill. 1998) (holding licensing corporation and its parent liable for ADA violations), and *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1176 (S.D. Fla. 1997) (denying defendant architect’s motion to dismiss), and *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1268 (D. Minn. 1997) (concluding that architects are not excluded from ADA liability as matter of law), with *Lonberg*, 259 F.3d at 1036 (finding liability not extended to architects under Title III of ADA), and *United States v. Days Inns of Am., Inc.* (“Kentucky DIA”), 22 F. Supp. 2d 612, 617 (E.D. Ky. 1998) (refusing to extend liability under Title III to franchisors), and *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng’rs, P.C.*, (“PVA I”), 945 F. Supp. 1 (D.D.C. 1996) (stating Title III does not provide grounds for liability of architects).

9. See Dennis J. Powers & Eric A. Berg, *Accessibility: Not Just the Owner’s Responsibility*, 21 CONSTRUCTION LAW., Spring 2001, at 13-15 (discussing different judicial decisions and potential consequences for architects, engineers, contractors and subcontractors).

10. 259 F.3d 1029 (9th Cir. 2001), amended by 271 F.3d 953 (9th Cir. 2001).

ity.¹¹ The Ninth Circuit held that the architects of a movie theater were not subject to liability under Title III of the ADA as a result of noncompliance with accessibility standards.¹² Consequently, the plaintiffs were barred from bringing suit against the architects for inaccessible design under the ADA.¹³

This Note examines the Ninth Circuit's holding in *Lonberg* in light of other courts' decisions regarding the liability of parties other than owners, lessees, lessors and operators.¹⁴ Part II of this Note provides the factual setting for the lawsuit against the architects of Sanborn Theaters.¹⁵ Part III describes the complex legal background of architect liability under Title III of the ADA.¹⁶ Part IV describes the Ninth Circuit's reasoning in *Lonberg*.¹⁷ Part V analyzes the reasoning and examines the conclusions of the Ninth Circuit.¹⁸ Finally, a discussion of the implications of the Ninth Circuit's decision in *Lonberg* is elaborated in Part VI.¹⁹

II. FACTS

On September 4, 1997, John Lonberg and Ruthie Goldkorn brought an action against the owners, operators and architects of the Market Place Cinema ("Market Place"), located in Riverside, California.²⁰ Market Place is a multiplex theater containing four auditorium-style and two stadium-style movie theaters.²¹ Lonberg

11. *See id.* at 1030. "We must decide whether an architect can be held liable for designing a movie theater which is not in compliance with the Americans with Disabilities Act." *Id.*

12. *See id.* at 1036 (holding only owner, lessee, lessor or operator of noncompliant public accommodation liable under Title III for discrimination as described in § 12183(a)).

13. *See id.* at n.9. (contemplating various scenarios and concluding "there is still no need to sue the architect").

14. *See, e.g., 8th Circuit DIA*, 151 F.3d 822, 826 (8th Cir. 1998) (stating if party possesses significant degree of control over final design and construction of facility, then party will be liable under Title III of ADA).

15. For a further discussion of the facts surrounding the Ninth Circuit's holding in *Lonberg*, see *infra* notes 20-29 and accompanying text.

16. For a further discussion of the statutory, legislative and judicial framework of Title III of the ADA, see *infra* notes 30-106 and accompanying text.

17. For a further discussion of the *Lonberg* court's approach in analyzing the liability of architects under Title III of the ADA, see *infra* notes 107-37 and accompanying text.

18. For a further discussion of criticisms of the *Lonberg* court's analysis, see *infra* notes 138-71 and accompanying text.

19. For a further discussion on the potential impact resulting from the *Lonberg* court's decision, see *infra* notes 172-84 and accompanying text.

20. *See Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1030 (9th Cir. 2001), *amended by* 271 F.3d 953 (9th Cir. 2001).

21. *See id.* (describing layout and location of movie theater).

and Goldkorn, both physically disabled and requiring the use of wheelchairs, claimed Market Place denied sufficient access to people using wheelchairs.²²

Lonberg and Goldkorn alleged a number of ADA violations involving the wheelchair seating area including insufficient space to accommodate a wheelchair, inadequate lines of sight, lack of companion seats and absence of transfer seats.²³ Allegations of ADA violations outside the movie screening area included inadequate restroom stalls to accommodate wheelchairs, emergency exits not large enough to accommodate wheelchairs and emergency exit ramps too steep to be used safely by persons in wheelchairs.²⁴

The plaintiffs not only argued that the owners and operators of Market Place were liable for ADA noncompliance, but additionally, the architectural firm of Salts, Troutman & Kanshiro, Inc. ("STK") was liable.²⁵ The plaintiffs claimed that STK failed to design and construct Market Place in a manner that was "readily accessible to and usable by individuals with disabilities."²⁶ STK contended that liability was limited to only (1) owners, lessees, lessors and operators, and none of these titles describes STK; and (2) persons who both design and construct a building, and STK did not construct Market Place.²⁷

The question before the Ninth Circuit was whether STK was liable for "design and construct" discrimination even though STK

22. *See id.* at n.1. (describing plaintiff's allegations concerning inadequacies of theater).

23. *See id.* (noting wheelchair seating area inadequate to service needs of wheelchair-bound individuals, isolated from general public and inferior to seating area of general public).

24. *See id.* (listing violations outside screening area affecting safety of wheelchair-bound individuals).

25. *See Lonberg*, 259 F.3d at 1030 (alleging architects liable for failure to design theater in accordance with ADA accessibility requirements).

The Ninth Circuit addressed STK's motion for partial summary judgment, which asserted that no violation of the ADA occurred because STK did not design and construct Market Place. *See id.* The district court stayed the claims against the owners and operators of Market Place pending the outcome of substantially similar litigation elsewhere in the Central District of California. *See id.* at n.2.

26. *Id.* at 1030 (quoting 42 U.S.C. § 12183(a)). The plaintiffs' only claim against STK was for injunctive relief, the remedy provided under Title III of ADA. *See id.*

27. *See id.* The district court rejected STK's first theory, but granted STK partial summary judgment based on the latter. *See id.* Conversely, the Ninth Circuit was persuaded by STK's first theory and rejected the latter. *See id.* at 1036 (holding that "only an owner, lessee, lessor, or operator of a noncompliant public accommodation can be liable under Title III of the ADA for 'design and construct' discrimination described in § 12183(a)").

was not an owner, lessee, lessor or operator of Market Place.²⁸ Although based on a rationale diverging from the district court, the Ninth Circuit affirmed the district court in finding that the architects were not subject to liability under Title III of the ADA.²⁹

III. BACKGROUND

A. Before the ADA

Although the Civil Rights Acts of 1964 and 1968 did not cover people with disabilities, its impact was profound – policy makers would not tolerate exclusion in American society.³⁰ Gradual increases in federal legislation relating to people with disabilities soon followed, including the Architectural Barriers Act, the Urban Mass Transportation Act, the Rehabilitation Act, the Air Carrier Access Act and the Fair Housing Amendments Act.³¹ Each of these Acts

28. *See id.* at 1030 (establishing issue of whether architect is liable for designing theater not compliant with ADA).

The *Lonberg* court also addressed a jurisdictional argument raised by STK. *See id.* at 1031. STK argued that the plaintiffs' had filed their notice of appeal fifty days after the district court judgment had been entered. *See id.* A party normally has only thirty days to file notice of appeal under FED. R. APP. P. 4(a)(1)(A); however, there is an exception under 4(a)(1)(B) when the United States is a party, in which case, all parties have sixty days. *See id.* The United States filed a complaint against Sanborn, the owner of Market Place, without joining STK. *See id.* at 1030-31. However, the United States intervened in support of the plaintiffs by filing an *amicus curiae* brief in this appeal and participating in oral argument. *See id.* at 1031 n.3. The court noted that a majority of courts have rejected the argument that the United States must have an actual interest in the appeal. *See id.* at 1031-32 n.4. Rather, the court held that the sixty-day deadline is applicable if the United States is a party to the action at any stage of the litigation. *See id.* The court noted contrary language in one of their cases, but distinguished the case because it was brought in the context of bankruptcy proceedings. *See id.*

29. *See id.* at 1036 (holding architects are not liable but using different rationale than district court).

30. *See* Bonnie P. Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 340-41 (2001) (discussing Congress' motivation to premise ADA on civil rights paradigm).

31. *See Historical Context of the Americans With Disabilities Act*, at <http://www.adata.org/whatsada-history.html> (last visited Feb. 22, 2002) (describing Civil Rights legislation as establishing statutory foundation on which ADA later constructed). In 1968, President Johnson signed The Architectural Barriers Act, requiring federal buildings and facilities to be accessible to people with physical disabilities. *See The Architectural Barriers Act (ABA) of 1968*, available at <http://www.access-board.gov/about/ABA.htm> (last visited March 27, 2002); *see also* 42 U.S.C. §§ 4151-57 (1968). President Nixon later signed the Urban Mass Transportation Act in 1970, which required that public transportation, to qualify for federal funding, be accessible for the disabled. *See Travel Model Improvement Program: Urban Transportation Planning in the United States – An Historical Overview* available at <http://tmip.fhwa.dot.gov/clearinghouse/docs/utp/ch7.stm#7.1> (last visited Feb. 22, 2002); *see also* Urban Mass Transportation Act, Pub. L. 91-453, 84 Stat. 962 (1970). President Nixon passed The Rehabilitation Act of 1973, proscribing discrimination on the basis of disability by recipients of federal funding. *See Historical Context of the*

eliminated societal barriers faced by people with disabilities, as well as contributed to the passage of the ADA.³² Additionally, these federal mandates shifted the focus from a medical model of disability, which emphasized rehabilitating only the individual with the disability, to a social model that sought to rehabilitate all of society.³³

The underlying civil rights paradigm of the ADA signified a rejection of the medical model of disability and considered disabilities to be a social problem that society as a whole should be responsible for rectifying.³⁴ Redefining and reorganizing society by creating accessibility to people with disabilities, however, generates substantial costs that certain segments of society must incur.³⁵

American With Disabilities Act: Origins of Disability Rights Laws, at <http://www.adata.org/whatsada-history.html> (last visited Feb. 22, 2002); 29 U.S.C. § 794(a) (1973). In 1986, President Reagan signed the Air Carrier Access Act, prohibiting airlines from refusing service to people with disabilities and charging them higher fares. See *Air Carrier Access Act*, at <http://www.access-board.gov/enforcement/Air%20Carrier%20Access%20Act.htm> (last visited Feb. 22, 2002). The Fair Housing Amendment Acts of 1988, also signed by President Reagan, protected people with disabilities from discrimination in housing. See *Historical Context of the American With Disabilities Act: Fair Housing Amendment Acts of 1988 (FHAA)*, at <http://www.adata.org/whatsada-history.html> (last visited Feb. 22, 2002).

For additional chronology of legislation impacting the disabled see Bill Day, *Businesses Find Disabilities Act Has Been a Plus*, SAN ANTONIO EXPRESS-NEWS, July 23, 2000, at 1A; *Landmarks in the March to Equality For Those With Disabilities Series: Americans With Disabilities Act*, ST. LOUIS POST-DISPATCH, Sept. 3, 2000, at A19 [hereinafter *Landmarks in the March*].

32. See *Landmarks in the March*, *supra* note 31, at A19 (providing chronology of significant social, legislative and judicial achievements involving or affecting people with disabilities). See generally *Historical Context of the American With Disabilities Act: Fair Housing Amendment Acts of 1988 (FHAA)*, at <http://www.adata.org/whatsada-history.html> (last visited Feb. 22, 2002) (stating that organized movements of disabled individuals inspired by civil rights struggle and critical to development of disability policy leading up to and including ADA).

33. See Tucker, *supra* note 30, at 336 (describing personal experience with shift from medical to social model of disability). For a further discussion of the models of disability, see generally Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213 (2000).

Enactment of the ADA contributed to enhancing the role of the legal system within the social model of disability. Congress included in their findings that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4) (1994).

34. See Tucker, *supra* note 30, at 336-37 (suggesting law required in which society takes up necessary expenses to secure accessibility to all).

35. See *id.* at 352 (noting controversial area during drafting states of ADA was cost and burden imposed on employers, owners and operators of public accommodations, telecommunication service providers and state and local governments). Tucker states:

To make the ADA palatable to the business sector, the states, and ultimately our representatives in Congress who are responsive to the concerns of their constituents, the ADA had to be framed in such a manner

B. Legislative History of the ADA and Title III

An overwhelming majority in the House of Representatives and the Senate voted for the ADA legislation.³⁶ The ADA passed with the purpose of providing a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁷ Hailed as the “emancipation proclamation” for the disabled, the ADA was described as “the most sweeping piece of civil rights legislation possible in the history of our country”³⁸ On July 26, 1990, President George H. W. Bush signed the ADA into law during an elaborate and emotional White House ceremony declaring the “act powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees . . . independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream Let the shameful wall of exclusion finally come tumbling down.”³⁹ Ten years later, President Clinton commemorated the anniversary of the ADA in front of the FDR memorial, declaring

that it did not seem overly disruptive or intrusive. It is highly unlikely that Congress could have been persuaded to enact a law that outspokenly required the business sector and state and local governments to provide special entitlements to people with disabilities. The ultimate objective of the ADA, however, is just that.

Id. This theory may explain judicial decisions that narrow the scope of the ADA. *See id.* at 353. Courts may view special accommodations and entitlements as a step beyond a traditional nondiscrimination policy of civil rights laws in which the ADA was modeled. *See id.*

36. *See* 135 CONG. REC. 17,251, 17,280 (1990). The vote in the House of Representatives was 355-58. *See id.*, *see also* 136 CONG. REC. 17,364, 17,376 (1990) (indicating vote in Senate was 91-6).

37. 42 U.S.C. § 12101(b)(1). The stated purpose of the ADA includes:
- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
 - (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
 - (3) to insure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
 - (4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

38. James P. Colgate, Note, *If You Build It, Can They Sue? Architect's Liability Under Title III of the ADA*, 68 FORDHAM L. REV. 137, 140 (1999) (quoting 135 CONG. REC. 19,833, 19,847 (1989) (statement of Sen. Hatch)).

39. President George H. W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990, *available at* <http://bushlibrary.tamu.edu/papers/1990/90072600.html> (July 26, 1990).

that “[w]e are all a freer, better country because of the ADA.”⁴⁰ Despite the landmark legislation, progress in applying the ADA has been slower than many people had hoped.⁴¹

Congressional findings revealed that the greater part of the disabled population lead isolated lives and “do not go to movies, do not go to the theatre, do not go to see musical performances, and do not go to sporting events.”⁴² They found that individuals with disabilities continually encounter the discriminatory effects of architectural barriers that prohibit them from enjoying these activities.⁴³ Congress determined that to grant disabled individuals civil rights and equal opportunities, a provision of reasonable accommodations would be necessary to integrate people with disabilities into mainstream society.⁴⁴

Congress hoped to legislate clear and enforceable standards to facilitate such integration.⁴⁵ Pursuant to this goal, the ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities, having a record of such impairment or being regarded as having such impairment.⁴⁶ Additionally, recognition of “the deleterious effects of discrimination against people with disabilities” in their everyday lives instigated the adoption of Title III of the ADA.⁴⁷ In passing Title III, Congress sought to provide people with disabilities access to movies, theaters and sporting events by ensuring that public facilities would accommo-

40. President and Mrs. Clinton’s Remarks at the 10th Anniversary of the ADA, available at <http://usinfo.state.gov/usa/able/07260004.htm> (July 26, 2000).

41. See Tucker, *supra* note 30, at 335, 341-43 (2001) (discussing the education of courts and public-at-large concerning meaning of civil rights as it pertains to people with disabilities); see also Day, *supra* note 31, at 1A (remarking on study demonstrating public’s confusion regarding disabled in workplace).

42. H.R. REP. NO. 101-485, pt. II, at 34 (1990) (citing National Council on Disability).

43. See 42 U.S.C. § 12101(a)(5). Congress found that: individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

Id.

44. See generally Wayne L. Anderson & Mary Lizbeth Roth, *Deciphering the Americans With Disabilities Act*, 51 J. MO. B. 142 (May/June 1995).

45. See 42 U.S.C. § 12101(b)(2). For the text of this section of the ADA, see *supra* note 37.

46. See *id.* at § 12102(2) (defining disability as used in ADA to determine plaintiff standing).

47. Carlson, *supra* note 6, at 900.

date them.⁴⁸ With reasonable or readily achievable accommodations, therefore, people with disabilities could experience entertainment in the same manner as the general population.⁴⁹ Soon after the passage of the ADA, commentators noted that Title III “created more conflicts in implementation than any other aspect of the ADA.”⁵⁰

Implementation of Title III necessitates certain sectors of society to bear the cost of reasonable accommodations as part of an overall business expenditure, thus allowing people with disabilities

48. See 42 U.S.C. § 12181(7)(c) (1994). A detailed list of public accommodations covered under this section of the ADA includes:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire. . . ;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7); see also 42 U.S.C. § 12181(2) (stating “[t]he term ‘commercial facilities’ means facilities —(A) that are intended for nonresidential use; and (B) whose operations will affect commerce”).

49. See Carlson, *supra* note 6, at 901 (stating Title III sought to remedy statistics showing “large majority of people with disabilities do not go to the movies, do not go to the theater, do not go to musical performances and do not go to sporting events”).

50. Paul M. Anderson, *Spoiling a Good Walk: Does the ADA Change the Rules of Sport?*, 1 VA. J. SPORTS & L. 44, 50 (1999) (quoting John W. Parry, *Public Accommodation Under the Americans With Disabilities Act: Nondiscrimination on the Basis of Disability*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 92 (1992)); see also *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1892 (2001) (finding Title III of ADA applies to professional sports); Tucker, *supra* note 30, at 360 (noting courts limit Title III to “physical premises of public accommodations, not programs or activities of such public accommodations”). Additionally, Tucker notes finding architects not liable under Title III as another example of judicially imposed limits of the ADA. See Tucker, *supra* note 30, at 360.

to take part in mainstream society.⁵¹ Congress has given the Attorney General full authority to enforce ADA legislation and provided a private right of action to individuals seeking injunctive relief.⁵²

In assessing the standard of noncompliance of accessibility requirements, Congress acknowledged a distinct variation between the compliance of existing public accommodations within section 302(a) and that of newly constructed public accommodations and commercial facilities within section 303(a) of the ADA.⁵³ Congress presumed that accessibility for existing places of public accommodation would be difficult and therefore mandated modifications “readily achievable” by their owners, lessees, lessors or operators.⁵⁴

51. See Tucker, *supra* note 30, at 352. The ADA had to be framed in such a manner to not seem overly intrusive. See *id.*

52. See 42 U.S.C. § 12188(a)-(b) (1994) (allowing injunctive relief and delineating Attorney General’s enforcement powers). In addition to the statute, the Attorney General has issued regulations for implementation in the Code of Federal Regulations. See 42 U.S.C. § 12134 (1994). *But see* Carlson, *supra* note 6, at 898 (demonstrating newness of case law addressing ADA enforcement may be insufficient to rely on).

53. See Colgate, *supra* note 38, at 145 (citing H. REP. NO. 101-485, pt. III, at 63 (1990) because existing places of accommodation must be accessible to disabled to extent that modifications are readily achievable and newly constructed commercial facilities must be accessible).

54. See 42 U.S.C. § 12181(9) (2002). The statutory term of “readily achievable” is defined as “easily accomplishable and able to be carried out without much difficulty or expense.” *Id.*; see also 28 C.F.R. § 36.304(a) (2001). The ADA regulations provide examples of readily achievable steps such as:

- (1) Installing ramps;
- (2) Making curb cuts in sidewalks and entrances;
- (3) Repositioning shelves;
- (4) Rearranging tables, chairs, vending machines, and other furniture;
- (5) Repositioning telephones;
- (6) Adding raised markings on elevator control buttons;
- (7) Installing flashing alarm lights;
- (8) Widening doors;
- (9) Installing offset hinges to widen doorway;
- (10) Eliminating a turnstile or providing an alternative accessible path;
- (11) Installing accessible door hardware;
- (12) Installing grab bars and toilet stalls;
- (13) Rearranging toilet partitions to increase maneuvering space;
- (14) Insulating lavatory pipes under sinks to prevent burns;
- (15) Installing a raised toilet seat;
- (16) Installing a full-length bathroom mirror;
- (17) Repositioning the paper towel dispenser in the bathroom;
- (18) Creating designated accessible parking spaces;
- (19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
- (20) Removing high pile, low-density carpet;
- (21) Installing vehicle hand controls.

Id.; see also Powers & Berg, *supra* note 9, at 16 (stating that “full compliance is not required where an entity can demonstrate that it is structurally impracticable to meet requirements of the ADA”).

However, all new construction of commercial facilities, including new places of public accommodation, would be designed and constructed consistent with accessibility requirements for persons with disabilities.⁵⁵

C. Title III as Applied to the Liability of Parties

1. ADA sections 302(a) and 303(a)

Sections 302(a) and 303(a) of the ADA, codified as 42 U.S.C. § 12182(a) and § 12183(a), have produced differing judicial interpretations of who is liable for ADA noncompliance.⁵⁶ Section 302(a) states that “any person who owns, leases (or leases to), or operates a place of public accommodation” cannot discriminate on the basis of disability.⁵⁷ Additionally, section 302(a) necessitates owners, lessees, lessors and operators of public accommodations to act affirmatively in the removal of “readily achievable” architectural barriers.⁵⁸

In contrast, section 303(a) requires a stringent standard of “readily accessible . . . and usable” for any newly constructed or altered facility, including both new places of public accommodation and new commercial facilities.⁵⁹ Whereas section 302(a) explicitly states “any person who owns, leases (or leases to), or operates a

55. See Carlson, *supra* note 6, at 901. “In existing facilities . . . where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.” Commercial Facilities, 56 Fed. Reg. 35, 568 (1991). “Because it costs far less to incorporate accessible design into the planning and construction of new buildings and of alterations, a higher standard of ‘readily accessible and useable by’ persons with disabilities has been adopted in the ADA for new construction and alterations.” H.R. REP. NO. 101-485, pt. III, at 60 (1990).

56. See Colgate, *supra* note 38, at 138-39 (contrasting broad purpose of ADA with narrow court interpretations). The strict interpretations of the ADA have created “the growing trend of a judicial backlash against the ADA and civil rights laws in general.” *Id.* at 139. The judicial trend toward plain-meaning construction “often goes so far as to contradict Congress’ plainly-stated intent.” *Id.* at 143.

57. See 42 U.S.C. § 12182(a) (1994) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodations.”).

58. See 42 U.S.C. § 12182(b)(2)(A) (stating if readily achievable barrier is not removed, finding discrimination on basis of disability exists).

59. 42 U.S.C. § 12183(a) (1994). Congress has imposed a higher standard of accessibility on design and construction of public accommodations and commercial facilities after the enactment of the ADA. See *id.* Section 303(a), codified as § 12183(a), states:

As applied to public accommodations and all other new commercial facilities, discrimination for the purposes of 302(a) includes-

place of public accommodations” is liable under its provisions, liability under section 303(a), however, is not as clear.⁶⁰ Section 303(a) defines discrimination as a failure to design and construct public accommodations and commercial facilities in a manner that is accessible and usable; however, it does not distinctly name liable parties in the same manner as section 302(a).⁶¹ The dispute concerning architect liability centers on this discrepancy.⁶²

Architects, contractors and franchisors argue against liability under (1) the plain language of section 303 because they do not both design and construct the facilities, and (2) the parallel interpretation of liability for section 303 because they do not own, lease or operate the facilities.⁶³ Nonetheless, the Department of Justice (“DOJ”) has established, through its Technical Assistance Manual (“TAM”), that “any party with a significant degree of control over the design and construction of a facility – including architects, contractors, and in some instances, franchisors – can be held liable for failing to comply with the ADA’s standards.”⁶⁴

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- (1) a 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 . . . and
 - (2) . . . a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities. . . .

Id.

60. Compare 42 U.S.C. § 12182(a), with 42 U.S.C. § 12183(a).

61. See Powers & Berg, *supra* note 9, at 14 (tracing court decisions addressing interplay of sections 302(a) and 303(a) in determining contractor, architect and franchisor liability).

62. See William L. Killion & Gregory R. Mertz, *Franchisor Liability for Failure by Franchisees to Comply With the Americans With Disabilities Act: Uncertain State of Law*, 19 FRANCHISE L.J. 141, 149 (2000) (discussing court split in determining franchisor liability); Powers & Berg, *supra* note 9, at 13 (discussing various holdings in architect, franchisor and contractor liability); Colgate, *supra* note 38, at 145 (discussing court split in statutory interpretation regarding architect liability).

63. See *United States v. Days Inns of Am., Inc.* (“*California DIA*”), 8 Am. Disabilities Cas. (BNA) 491, 493 (E.D. Cal., Jan. 12, 1998) (stating party must design and construct public accommodation to be liable for ADA noncompliance under [section] 303(a)); *Kentucky DIA*, 22 F. Supp. 2d 612, 615-16 (E.D. Ky. 1998) (stating franchisors do not have sufficient control over design and construction to be classified as “operator” and thus liable under ADA).

64. *8th Circuit DIA*, 151 F.3d at 826 (stating party that possesses significant degree of control over facility design and construction faces liability under Title III of ADA); see United States Department of Justice, THE AMERICANS WITH DISABILITIES ACT TECHNICAL ASSISTANCE MANUAL § III-5.1000 (1993), available at <http://www.usdoj.gov/crt/ada/taman3.html>; see also Adam A. Milani, “Oh, Say, Can I See – And Who Do I Sue If I Can’t?": Wheelchair Users, Sightlines Over Standing Spectators, and Architect Liability Under the Americans With Disabilities Act, 52 FLA. L. REV. 523, 574 (2000) (noting some courts find architects and contractors not liable under ADA, but DOJ states otherwise in TAM).

Courts addressing architect liability have two different approaches: a parallel interpretation approach based on the statute or a significant degree of control approach based on the DOJ interpretation.⁶⁵ Under the parallel interpretation approach, courts reject liability of architects pursuant to a narrow textual interpretation of the relevant sections of the ADA.⁶⁶ Courts that adopt a significant degree of control approach extend liability to architects by using a broad textual viewpoint relied on by the DOJ.⁶⁷ Both sides justify their approaches by analyzing statutory construction, legislative history and public policy concerns.⁶⁸

2. Courts' Approaches Before *Lonberg v. Sanborn Theaters, Inc.*

a. Cases Holding ADA's "Design and Construct" Language Does Not Cover Architects

Although recognizing architect involvement in design and construction, many courts have chosen to limit liability for the "failure to design and construct" ADA-compliant buildings (i.e., section 303(a) violators) only to those parties specified in section 302(a).⁶⁹ These courts have interpreted both sections as a whole and ascribed no liability to architects.⁷⁰ These courts, therefore, have held that only owners, lessees, lessors and operators of either public accommodations or commercial facilities are liable under Title III for "design and construct" discrimination.⁷¹

65. See *Colgate*, *supra* note 38, at 146-47 (discussing contradictory theories of architect liability under ADA).

66. See *Kentucky DIA*, 22 F. Supp. 2d at 617 (refusing to find franchisors liable under Title III because involvement with franchise not equivalent to that of operator); *PVA I*, 945 F. Supp. 1, 2 (D.D.C. 1996) (refusing to find architects liable under Title III because not an owner, operator, lessor or lessee).

67. See, e.g., *8th Circuit DIA*, 151 F.3d at 826 (adhering to plain language and deferring to DOJ interpretation of statute to conclude party found liable if possess significant degree of control over final design of facility); *Illinois DIA*, 997 F. Supp. 1080, 1085 (C.D. Ill. 1998) (finding conjunctive reading of "design and construct" does not restrict liability of licensing corporation and its parent); *Johanson v. Hui-zenga Holdings, Inc.*, 963 F. Supp. 1175, 1176 (S.D. Fla. 1997) (denying architect defendant's motion to dismiss).

68. See, e.g., *PVA I*, 945 F. Supp. at 2 (noting court's interpretation does not frustrate intent of statutory scheme).

69. *Id.* at 1 (holding limitation of liable parties listed in section 302 applies to 303); see also *Kentucky DIA*, 22 F. Supp. 2d at 617 (finding that reference in section 303 to section 302 indicates intention to continue same scope of liability).

70. See *PVA I*, 945 F. Supp. at 2 (discussing architect exclusion from liability).

71. See *PVA I*, 945 F. Supp. at 2 (discussing plain language of both sections limits liable parties to owners, lessors, lessees, and operators); *Kentucky DIA*, 22 F. Supp. 2d at 617 (discussing that finding franchisors liable under section 303 contrary to congressional intent because statute limited to owners, operators, lessors, and lessees of public accommodations and commercial facilities). For further dis-

In *Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers, P.C.* (“PVA I”),⁷² for example, the district court held that an architect may not be liable under section 303(a) under a dual analysis: (1) architects are not proper defendants in a Title III action because such actions are limited to include only those persons who both “design *and* construct” a facility, and (2) liability is limited to owners, lessees, lessors or operators.⁷³ The court reasoned that its holding did not frustrate the ADA’s intent because “[i]f entities who are responsible for both design and construction can be held liable for violations of the ADA, those entities will ensure that the firms or individuals with whom they contract – experts in design or construction – will hew to the dictates of the statute and regulations.”⁷⁴

Following PVA I’s design and construct analysis, the Eastern District of California, in *United States v. Days Inns of America*,⁷⁵ narrowly interpreted the plain language of section 303(a) to insulate from liability anyone who does not both “design and construct.”⁷⁶ The *California DIA* and PVA I decisions do not address a limitation based on a parallel interpretation of liability; rather, they are narrowly constructing the conjunctive use of “and” in determining that parties are liable only if they both “design *and* construct” a noncompliant entity.⁷⁷

Aligning with PVA I’s parallel interpretation analysis, the Eastern District of Kentucky, in *United States v. Days Inns of America*,⁷⁸ construed the specified liable parties of section 302 (i.e. owners,

cussion of gap in coverage argument, see *infra* notes 144-46 and accompanying text.

72. 945 F. Supp. 1, 2 (D.D.C. 1996). Plaintiffs’ allegations involve the design and construction of the MCI Center, a sports and multi-purpose arena in Washington D.C. See *id.*

73. See *id.* The court stated that “the phrase ‘design and construct’ is distinctly conjunctive [and] refers only to parties responsible for both functions, such as general contractors or facilities owners who hire the necessary design and construction experts for each project.” *Id.* The court generalized that most architects, including the defendants, were involved in the design aspect, not construction, and thus were not liable under section 303(a). See *id.* The court rejected the DOJ’s argument of interpreting section 303 based on the *Chevron* analysis. See *id.* For a discussion of the *Chevron* analysis, see *infra* 158-62 and accompanying text.

74. PVA I, 945 F. Supp. at 2.

75. 8 Am. Disabilities Cas. (BNA) 491 (E.D. Cal., Jan. 12, 1998).

76. See *id.* at 493 (holding one must design and construct to be liable). The broader view holds that design and construct should be read functionally as “design *or* construct,” so that either the designer or constructor may be liable. See *id.*

77. See PVA I, 945 F. Supp. at 2 (emphasis added) (stating that phrase “design and construct” is conjunctive, thus refers only to parties responsible for both functions).

78. 22 F. Supp. 2d 612 (E.D. Ky. 1998).

lessors, lessees and operators of public accommodations) as those liable under section 303.⁷⁹ The district court reasoned that “[f]ailing to use section 302 as a guidepost for liability would result in the consequence of an illogical limit to the reach of [section] 303.”⁸⁰ The district court also noted that using language such as “design and construct” may extend liability to subcontractors, materials suppliers and similar entities, which goes against Congressional intent.⁸¹ Finally, the district court noted that sections 302 and 303 were initially drafted as one section and subsequently separated to create a broader group of new buildings subject to ADA compliance.⁸²

b. Cases Holding ADA’s “Design and Construct” Language Can Cover Architects

In *United States v. Ellerbe Becket, Inc.*,⁸³ the District Court for the District of Minnesota held that architects can be liable under the ADA.⁸⁴ The district court used the legislative history, which indicated that Congress specifically designed the term “commercial facilities” in section 303(a) to cover those structures not defined under “public accommodation” in section 302(a), and maintained that the two sections should be read separately.⁸⁵ Additionally, the district court relied on the canon that “[s]tatutory language should be construed in a manner that gives effect to all terms so as to avoid rendering terms useless.”⁸⁶ Because section 302(a) liability is

79. *See id.* at 617. “Based on the similarities in the purpose and in the drafting of [sections] 302 and 303, it is apparent to this Court that Congress intended to limit liability under [section] 303 to owners, operators, lessors, lessees.” *Id.* at 615. *But see* Colgate, *supra* note 38, at 158-59 (explaining Congress may have intentionally created broader class of buildings subject to compliance under section 303 and thus broadened scope of liable parties). Colgate especially points to those parties in significant control of new design and construction of public accommodations and commercial facilities. *See id.*

80. *Kentucky DIA*, 22 F. Supp. 2d at 615.

81. *See id.* *But see 8th Circuit DIA*, 151 F.3d 822, 826 (8th Cir. 1998) (limiting liability to those parties with significant control, not just tangentially connected).

82. *See Kentucky DIA*, 22 F. Supp. 2d at 615. The court followed the Sixth Circuit holding that “when two or more statutes deal with the same subject, they are to be read *in pari materia* and harmonized if possible.” *Id.* at 615-16 (quoting *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 262 (6th Cir. 1984)). The court noted: “Had Congress intended to extend liability further in [section] 303, it could have easily done so. Instead [section] 303 is devoid of any additional entry that is subject to compliance with ADA standards.” *Id.* at 616.

83. 976 F. Supp. 1262 (D. Minn. 1997).

84. *See id.* at 1268 (following DOJ’s interpretation of statute).

85. *See id.* at 1267 (discussing Congress’ intent to expand section 303(a) liability).

86. *Id.* (citing *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)).

ascribed to owners, operators, lessors and lessees of *public accommodations*, defendant Ellerbe's interpretation would result in a gap of liability for commercial facilities.⁸⁷ The significance of including the term "commercial facilities" in section 303(a), therefore, is rendered useless.⁸⁸

In *United States v. Days Inns of America*,⁸⁹ the circuit court rejected such an interpretation, explaining that "by rendering meaningless section 303's inclusion of commercial facilities, DIA's interpretation of section 303 would result in an inexplicable gap in coverage of buildings that Congress clearly intended to include."⁹⁰ Instead, the Eighth Circuit advanced the significant degree of control approach to determine if a party was liable for "design and construct" discrimination.⁹¹ The Eighth Circuit was careful to give effect to the plain language of the statute and to defer to the DOJ's interpretation of the statute.⁹² The Eighth Circuit, however, did import limitations because the party must be in significant control, not just remotely or tangentially connected.⁹³

Credible arguments persuade broad interpretations of "design and construct."⁹⁴ In *Johanson v. Huizenga Holdings, Inc.*,⁹⁵ for example, the Southern District of Florida rejected *PVA I's* conjunctive approach of "design and construct" in its analysis for denying the defendants' motion to dismiss.⁹⁶ Requiring both design and construction is inconsistent with Title III because it "gives standing

87. *See id.* (noting Ellerbe's interpretation would undercut their "plain language" logic).

88. *See Ellerbe Becket*, 976 F. Supp. at 1267 (explaining Congress clearly intended to include different standards of liability in section 303(a)).

89. 151 F.3d 822 (8th Cir. 1998).

90. *Id.* at 825.

91. *See id.* at 826 (holding liable party must possess significant degree of control over final design and construction of facility to bear responsibility under ADA).

92. *See id.*

93. *See id.* ("Clearly, not any party tangentially or remotely connected with the design and construction of a facility sustains liability if the facility is ultimately constructed in violation of the ADA.").

94. *See Colgate, supra* note 38, at 149 (examining textual interpretation of ADA); *see also* United States' Memorandum in Opposition to Defendant's Motion to Dismiss at 13, *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997) (No. 4-96-995), available at <http://www.usdoj.gov/crt/foia/minn1.txt> (arguing Congress' deliberate use of "design" shows intent to include designers as a liable party).

95. 963 F. Supp. 1175 (S.D. Fla. 1997). Plaintiffs brought suit against Broward Arena, which had been designed but not yet constructed. *Id.* at 1176.

96. *See id.* at 1177-78 (noting plaintiffs brought suit before construction had begun, believing they had reasonable grounds because architectural firm Ellerbe Becket had designed several other arenas violating ADA).

both to parties already injured and to those who have ‘reasonable grounds for believing that [they are] about to be subjected to discrimination in violation of [the new construction provision of Title III of the ADA].’⁹⁷

In *United States v. Days Inns of America* (“*Illinois DIA*”),⁹⁸ the Central District of Illinois also rejected the holding of *PVA I* and found a narrow construction “inappropriate to carry out the intent of the ADA.”⁹⁹ Although the court agreed that the phrase “design and construct” is distinctly conjunctive, it could still be read conjunctively without being read quite so narrowly.¹⁰⁰ The court also stated that the franchisors “cannot shirk responsibility for following federal law in its ongoing involvement in the design and construction of hotels.”¹⁰¹

c. Congressional Intent and Deference to DOJ Interpretation

In *PVA I*, the DOJ submitted an amicus brief arguing that its interpretation of section 303 should be awarded the deference described by the United States Supreme Court in *Chevron v. Natural Resources Defense Council*.¹⁰² The *PVA I* court rejected this argument, finding “such deference only arises when the statute is ambiguous.”¹⁰³ The court also found that if Congress’ intent is unambiguous, the *Chevron* analysis does not apply.¹⁰⁴ The *PVA I* court found no ambiguity in the plain language of the statute or in congressional intent and held that architects were not covered by section

97. *Id.* at 1177 (quoting 42 U.S.C. § 12188(a)(1)(1994)); *see also* Colgate, *supra* note 38, at 150. Colgate elaborates on the DOJ’s contention that if *PVA I*’s approach is adopted, an owner or constructor can freely depart from an accessible design originally in compliance, because the violation had only occurred in the construction phase. *See id.*

98. 997 F. Supp. 1080 (C.D. Ill. 1998).

99. *See id.* at 1083 (finding narrow reading of liability not necessary just because phrase “design and construct” is conjunctive).

100. *See id.* at 1082. “‘Design and construct’ enforce each other in that those who design or construct also construct and design.” *Id.*

101. *Id.* at 1083. “‘Design and construct’ is a broad sweep of liability, it includes architects, builders, planners and most definitely national hotel licensing corporations which exist for the sole purpose of ensuring that new hotels are designed and constructed in accordance with acceptable standards.” *Id.*

102. *See PVA I*, 945 F. Supp. 1, 2 (D.D.C. 1996) (citing *Chevron*, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 767 U.S. 837, 842-43 (1984)). In *Chevron*, the Court found that judicial interpretation of an ambiguous statute cannot be substituted if a delegated agency’s interpretation is reasonable. *See Chevron*, 767 U.S. at 841.

103. *PVA I*, 945 F. Supp. at 2.

104. *See id.* (noting when statute is unclear or ambiguous, agency interpretation is given deference).

303 of the ADA.¹⁰⁵ The Eighth Circuit, however, found the statute to be ambiguous and justified the *Chevron* analysis because a plain language interpretation would render terms useless.¹⁰⁶

IV. NARRATIVE ANALYSIS

In *Lonberg*, the Ninth Circuit considered whether an architect could be held liable under Title III of the ADA for the “design and construct” discrimination described in section 303(a).¹⁰⁷ First, the Ninth Circuit interpreted section 302(a) as a “general rule” of the ADA.¹⁰⁸ Then, the court examined the unique and complex legislative history of the ADA.¹⁰⁹ As a result, the court determined the real issue was whether architects can be liable for “design and construct” discrimination even though they are not one of the entities – owners, lessees, lessors or operators – to whom liability is extended by the “general rule” under section 302(a).¹¹⁰ The circuit court continued by discussing the primary approaches used by other courts in determining liable parties.¹¹¹ Ultimately, the court concluded that only the “owner, lessee, lessor or operator of a noncompliant public accommodation” or commercial facility could be liable for the “design and construct” discrimination described in section 303.¹¹² As a result, the Ninth Circuit held that architects are not subject to liability under Title III of the ADA.¹¹³

105. *See id.* (discussing no need to apply *Chevron* analysis because Congress made itself clear through plain language of statute).

106. *See 8th Circuit DIA*, 151 F.3d 822, 825 (8th Cir. 1998) (noting judicial responsibility to defer to reasonable statutory interpretation of agency charged with its enforcement). The Eighth Circuit stated that Congress clearly intended new commercial facilities be held to ADA accessibility standards. *See id.* at 826. Deference to the DOJ interpretation that any party significantly involved in design and construction is liable embraces Congress’ intent without rendering useless terms. *Id.*

107. *See Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1030 (9th Cir. 2001), *amended by* 271 F.3d 953 (9th Cir. 2001) (examining issue of architect liability).

108. For a discussion of the *Lonberg* court’s general rule analysis, see *infra* notes 114-18 and accompanying text.

109. For a discussion of the *Lonberg* court’s review of the legislative history, see *infra* notes 119-23 and accompanying text.

110. *See Lonberg*, 259 F.3d at 1032 (discussing court’s identification of issue centers around statutory interpretation concerning liability of architects).

111. For a discussion of the *Lonberg* court’s assessment of other approaches, see *infra* notes 124-34 and accompanying text.

112. *Lonberg*, 259 F.3d at 1036 (discussing holding that architects are exempt from liability).

113. *See id.*

A. General Rule Analysis

The Ninth Circuit construed section 302(a) as the general rule to be applied to the subsequent sections of Title III.¹¹⁴ The court discussed the plaintiffs' argument that section 303(a) violations extend to anyone who designs and constructs a noncompliant building, rather than only to the parties listed in section 302(a).¹¹⁵ The Ninth Circuit rejected the argument that if liability is strictly limited to those identified in section 302(a), a gap would exist in coverage to commercial facilities.¹¹⁶ Rather than acceding that a gap in commercial facility compliance would result, the Ninth Circuit reasoned that the general rule, as applied to public accommodations, would also apply to commercial facilities.¹¹⁷ The court noted that two approaches have developed to reconcile the ascription of liability to architects and opted for the parallel interpretation.¹¹⁸

B. Legislative History Analysis

The Ninth Circuit also discussed the complex legislative history of the ADA, concluding that Congress gave no indication that the parties liable under section 302(a) are any different than the parties liable under section 303(a).¹¹⁹ According to the Ninth Circuit, the two sections had been separated, and a "clarification" was added to section 302(a) in the final bill.¹²⁰ The clarification constituted the addition of language specifying that "any person who

114. *See id.* at 1032-33 (establishing "general rule" structure of ADA). The court's analysis of Titles I, II and III of the ADA suggests that the text of each title follows the same basic structure. *See id.* at 1032. One provision sets forth a rule of liable parties, and subsequent provisions set forth what actions are discriminatory, and thus, prohibited. *See id.* Following this structure, the court reasoned that section 302 is the general rule under which parties are liable, and all other sections simply describe actions that are prohibited. *See id.* at 1032-33.

115. *See id.* at 1033-34 (arguing against court's adoption of section 302(a) as general rule because resulting gap in coverage for commercial facilities). The plaintiffs contend that liable parties under section 302 are owners, lessors, lessees and operators of public accommodations. *See id.* No party, therefore, is liable for noncompliant commercial facilities specified in section 302. *See id.*

116. *See id.* at 1035 (concluding that Congress wanted section 302(a) to be applied to section 303(a)).

117. *See Lomborg*, 259 F.3d at 1035 (noting although evidence fails to perfectly align in its favor, parallel approach allows general rule formulation to stand).

118. *See id.* at 1034-36. For a thorough discussion of these approaches, see *supra* notes 69-101 and accompanying text.

119. *See id.* at 1035 n.7 (describing bill originally contained only one section and did not specify who could be liable for discrimination under Title III). The final bill was separated to make a distinction between the level of compliance for public accommodations and commercial facilities. *See id.*

120. *See id.* (noting Congress did not distinguish liability between two sections).

owns, leases (or leases to), or operates a place of public accommodation.”¹²¹ The court acknowledged arguments that this separation demonstrated that Congress only wanted section 302(a) to be limited by the subsequent clarification.¹²² The court was persuaded, however, that inserting a provision as a “clarification,” rather than declaring a substantive amendment, meant Congress wanted this provision to apply to both sections.¹²³

C. Significant Degree of Control vs. Parallel Interpretation

The Ninth Circuit discussed the two different approaches used by other courts.¹²⁴ The Ninth Circuit rejected the significant degree of control approach because that application “created a category of liability found nowhere in the text or legislative history of the ADA”¹²⁵ The court analyzed the parallel interpretation approach and concluded that “[a]lthough the evidence does not perfectly align in its favor, the ‘parallel’ interpretation is more consistent with the text and structure of the statute.”¹²⁶

Moreover, the Ninth Circuit supported parallel interpretation because this view conformed to the general rule structure of the other titles of the ADA.¹²⁷ According to the court, a general rule of liability sets forth who may be liable for discrimination, and subsequent provisions describe what constitutes discrimination.¹²⁸ Although it acknowledged the Eighth Circuit’s reasoning for following the DOJ interpretation and applying the significant degree of control approach, the Ninth Circuit rejected this approach because it “divine[d] liability wholly divorced from the text of the statute.”¹²⁹

121. 42 U.S.C. § 12182(a) (1994).

122. See *Lonberg*, 259 F.3d at 1035 n.7 (citing *Colgate*, *supra* note 38, at 158-59).

123. See *id.* (noting other commentators agree that Congress wanted provision to apply to both sections).

124. See *id.* at 1034-36 (comparing parallel interpretation and significant degree of control approaches).

125. *Id.* at 1034 (citing *8th Circuit DIA*, 151 F.3d 822, 826 (8th Cir. 1998); accord *Illinois DIA*, 997 F. Supp. 1080, 1084-85 (C.D. Ill. 1998); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. at 1262, 1267-68 (D. Minn. 1997); *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1177-78 (S.D. Fla. 1997)).

126. *Lonberg*, 259 F.3d at 1034-35 (citing *Kentucky DIA*, 22 F. Supp. 2d 612, 615-16 (E.D. Ky. 1998); *California DIA*, 8 Am. Disabilities Cas. (BNA) 491, 493 (E.D. Cal., Jan. 12, 1998); *PVA I*, 945 F. Supp. 1, 2 (D.D.C. 1996)).

127. See *Lonberg*, 259 F.3d at 1035; see also *supra* notes 114-18 and accompanying text for a discussion of Ninth Circuit’s general rule analysis.

128. See *Lonberg*, 259 F.3d at 1032-33 (discussing general structure of titles in ADA conform to one another).

129. *Id.* at 1034 (stating Eighth Circuit’s decision goes beyond general rule).

Furthermore, the court noted that private actions under Title III are limited to injunctive relief.¹³⁰ The court stated that this limitation is significant because injunctive relief only offers a remedy against the party in current control of the building.¹³¹ Because architects, builders and construction subcontractors are out of the picture by the time a plaintiff brings suit, the court found that the statute provides no meaningful remedy against these parties.¹³² Although the Ninth Circuit contemplated cases of pre-construction, in which architects and contractors may still be involved, the court found a building could be enjoined effectively by suing its owner, lessee, lessor or operator.¹³³ Consequently, the Ninth Circuit granted partial summary judgment to STK.¹³⁴

D. Deference to DOJ Interpretation

Lastly, the court considered the plaintiffs' argument that deference should be given to the DOJ's interpretation of its regulations, suggesting architects who do not own, lease or operate a building can be held liable.¹³⁵ The plaintiffs argued that the relevant sections are ambiguous, and a *Chevron* analysis should be used.¹³⁶ The court concluded, however, that the statute was unambiguous; thus, *Chevron* deference was not warranted.¹³⁷

V. CRITICAL ANALYSIS

A. General Rule Analysis

In support of its position that 42 U.S.C. § 12183 (section 303) pertains only to those parties listed in 42 U.S.C. § 12182 (section

130. *See id.* at 1036 (noting aside from suits brought by Attorney General, private actions under Title III are limited to injunctive relief).

131. *See id.*

132. *See id.*

133. *See Lonberg*, 259 F.3d at 1036 (discussing irrelevance of suing architect because all meaningful violations can be remedied by owner, lessee, lessor and operator).

134. *See id.* (granting partial summary judgment because STK cannot be held liable for failure to design and construct). However, the court suggested that its holding did not preclude STK's liability to Sanborn Theaters, Inc. under tort or contract law for designing a theater not compliant with ADA. *See id.* at n.10.

135. *See Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001), *amended by* 271 F.3d 953, 954 (9th Cir. 2001) (considering TAM guidelines that state any entity involved in design and construction including architect or construction contractor may be held liable).

136. *See Lonberg*, 271 F.3d at 954 (discussing application of *Chevron* analysis to statute). For a further discussion of courts considering the application of a *Chevron* analysis, see *supra* notes 102-06 and accompanying text.

137. *See id.*

302), the Ninth Circuit in *Lonberg* contended that section 302 sets forth the “general rule” of Title III of the ADA, and thus, defines the coverage of all other provisions of Title III.¹³⁸ The United States, in its reply brief to the district court, supported the plaintiffs’ position and claimed that the statute had been misread and misinterpreted by STK.¹³⁹ The United States demonstrated that section 302 provides the “general rule” for section 302 only, not for the other Title III provisions.¹⁴⁰ Indeed, section 302(a) “fleshes out the general rule of section 302 by providing its own examples of the discrimination” otherwise prohibited under this section.¹⁴¹

Although it is proper to read section 302 as defining the covered entities within it, construing section 302 as a general rule for all of Title III is inappropriate because other provisions of Title III are titled “general rule.”¹⁴² In particular, Congress used the title “general rule” freely, rather than for the purpose of establishing a single general rule for all provisions of Title III.¹⁴³

Moreover, the Ninth Circuit countered the plaintiffs’ argument that the general rule analysis results in a gap in coverage by extending liability to those who own, lease and operate commercial facilities and public accommodations.¹⁴⁴ Judicial transference of

138. See *Lonberg*, 259 F.3d at 1033 (citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-78, 682 (2001)). The Ninth Circuit is flawed in its application of the *Martin* case, because *Martin* involves only section 302 of Title III. See *Martin*, 534 U.S. at 674-78, 682. The Supreme Court applied the general rule of section 302 and the comprehensive definition of “public accommodation” in section 302 to hold that the petitioners’ golf tours and their qualifying rounds fit within the coverage of Title III, entitling *Martin* to Title III protection under section 302. See *id.* at 676. The events occurred on “golf courses,” a public accommodation specifically identified within the ADA. See *id.* at 677 (citing 42 U.S.C. § 12181(7)(L) (2001)).

139. Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 4, *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), amended by 271 F.3d 953 (9th Cir. 2001), available at <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

140. See *id.* (discussing defendant’s argument based simply on use of “General Rule” as title to provision).

141. *Id.*; see also 42 U.S.C. § 12182(a) (2001).

142. See, e.g., 42 U.S.C. § 12184(a) (2001) (stating general rule for discrimination in certain transportation services); 42 U.S.C. § 12186(a)(1) (2001) (noting general rule for regulations related to transportation issues).

143. Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 5, *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), amended by 271 F.3d 953 (9th Cir. 2001), available at <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

144. See *Lonberg*, 259 F.3d at 1035 (demonstrating court can make logical transference of liable parties). Even though section 302(a) only covers owners, lessees, lessors and operators of public accommodations, the Court assumed that commercial facilities are covered. See *id.*; see also Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 5, *Lonberg v.*

terms is inherently inconsistent with the court's general rule analysis that the only liable parties are those named in the plain language of section 302.¹⁴⁵ The court's insistence on conforming its holding to a flawed general rule analysis, however, results in limited liability that is not supported by its textual reasoning.¹⁴⁶

B. Legislative History Analysis

In the legislation introduced to Congress in 1989, section 303(a) was not a separate provision governing new construction, but rather a subsection of the general prohibition against discrimination on the basis of disability.¹⁴⁷ At that time, the general prohibition stated that "[n]o individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability."¹⁴⁸ The proposed legislation contained no language that limited liability to owners, operators, lessors or lessees.¹⁴⁹

The Senate introduced an amendment to the proposed legislation that would create a separate section of the bill to address new construction requirements.¹⁵⁰ Section 303 was designated as the new construction provision, whereas section 302 became the general proscription against ADA noncompliance for public accommodations.¹⁵¹ The two categories of facilities covered by sections 302 and 303 are distinct – existing places of public accommodation versus newly constructed commercial facilities, each with its own stan-

Sanborn Theaters, Inc., 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), *amended by* 271 F.3d 953 (9th Cir. 2001) *available at* <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

145. *See 8th Circuit DIA*, 151 F.3d 822 (8th Cir. 1998) (holding such interpretation violates maxim of statutory interpretation that courts should give effect to statute's plain language).

146. *See Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 8*, Lonberg v. Sanborn Theaters, Inc., 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), *amended by* 271 F.3d 953 (9th Cir. 2001), *available at* <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

147. *See id.* (citing S. 933, 101st Cong. § 402(a), (b)(6) (1989); and H.R. 2273, 101st Cong. § 402(a), (b)(6) (1989)).

148. *Id.*

149. *See Colgate*, *supra* note 38, at 156 (stating version of bill had no listing of defendants).

150. *See Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 6*, Lonberg v. Sanborn Theaters, Inc., 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), *amended by* 271 F.3d 953 (9th Cir. 2001), *available at* <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

151. *See id.* (citing S. 933, 101st Cong. §§ 302, 303 (1989)).

dards for accessibility requirements.¹⁵² This distinction highlights the appropriateness of differentiating between categories of defendants.¹⁵³

The legislative history, including floor debates, committee reports and hearings, further substantiates Congress' intent against limiting section 303 liability to the parties listed in section 302.¹⁵⁴ An analysis of this history shows that Congress recognized that section 303 covers architects and contractors, parties who design and construct rather than own, operate or lease these facilities.¹⁵⁵

Congress recognized that compliance at the early stages is necessary and advantageous to decrease costs of litigation and retrofiting.¹⁵⁶ Courts applying a narrow interpretation based on congressional intent analyses to exclude architects from section 303(a) liability, in essence, rely on "reasoning that could just as easily be used to arrive at opposite and more persuasive interpretations."¹⁵⁷

C. Courts' Approaches and Plaintiffs' Arguments

1. *Significant Degree of Control Superior to Parallel Interpretation*

The Ninth Circuit did not enthusiastically embrace the parallel interpretation approach, but rather demonstrated a preference for this approach because of the general rule analysis scheme.¹⁵⁸ Because the parallel interpretation is not entirely consistent with the court's reasoning, the court transferred terms to avoid a gap in coverage of commercial facilities.¹⁵⁹ However, the Ninth Circuit did not concede that the statute was ambiguous, as that would allow the

152. See *Colgate*, *supra* note 38, at 156 (discussing design and construction of new facilities subject to rigid requirements).

153. See *id.*

154. See Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 6, *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), amended by 271 F.3d 953 (9th Cir. 2001) available at <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

155. See *id.*

156. See *Colgate*, *supra* note 38, at 162 (arguing that holding architects liable serves as deterrent for noncompliance of ADA). Architect liability may result in careful incorporation of ADA standards into the design of buildings, a greater number of compliant facilities and fewer lawsuits. See *id.*

157. *Id.* at 156-57 (discussing courts' reliance on same arguments to reach opposite conclusions in determining architect liability).

158. *Lonberg*, 259 F.3d at 1034-35. Despite the court noting that "the evidence does not perfectly align in its favor, this 'parallel interpretation'" is superior because it conforms to the general rule structure of the other titles of the ADA. *Id.* at 1034.

159. See Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 5, *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d

plaintiffs' *Chevron* analysis argument, which defers to DOJ interpretation.¹⁶⁰ The significant degree of control approach is preferred because it centers around the problem of inaccessible design, rather than on hypertextual scrutiny.¹⁶¹ In addition, because of the adjective "significant," many of the other courts' fears of extending liability to subcontractors, suppliers, and so on are thwarted.¹⁶²

2. *Deference to DOJ Interpretation*

The Ninth Circuit chose not to defer to the DOJ regulations, finding Congress' clear intent to limit section 303(a) to owners, lessees, lessors and operators enumerated in section 302(a).¹⁶³ Ironically, the courts in *Illinois DIA* and *Ellerbe Becket* relied on the same argument – the intent of the statute is clear, and thus, deference to DOJ interpretation is unwarranted – to reach the exact opposite conclusion of Congress' clear intent for section 303(a) to not be limited to the enumerated parties of section 302(a).¹⁶⁴ Arguably, because several courts have used the same intent argument to arrive at opposite results, the statute may not be wholly unambiguous.¹⁶⁵ As such, agreement with the DOJ's interpretation, holding an architect liable for noncompliant design under section 303(a), would be appropriate.¹⁶⁶

1029 (9th Cir. 2001) (No. 99-56221), *amended by* 271 F.3d 953 (9th Cir. 2001), available at <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

160. See *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001), *amended by* 271 F.3d 953, 954 (9th Cir. 2001) (declining to address *Chevron* argument because text and legislative history of ADA support conclusion that statute is unambiguous).

161. See *Lonberg*, 271 F.3d at 954.

162. See *id.*

163. See *id.*

164. See *id.* For an example of a Title III ADA case in which the Ninth Circuit did defer to the DOJ's TAM, see generally *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000).

165. See generally *Colgate*, *supra* note 38, at 145-46 (discussing congressional intent arguments in determining architect liability and noting either position supported with intent); William L. Killion & Gregory R. Mertz, *Franchisor Liability for Failure by Franchisees to Comply With the Americans With Disabilities Act: Uncertain State of Law*, 19 *FRANCHISE L.J.* 141 (2000) (discussing intent argument in franchisor liability); Powers & Berg, *supra* note 9, at 13 (examining opposing arguments addressing contractor, architect, and franchisor liability).

166. See Reply Brief For the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 6, *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001) (No. 99-56221), *amended by* 271 F.3d 953 (9th Cir. 2001), available at <http://www.usdoj.gov/crt/briefs/lonbergrep.htm>.

3. *Increased Litigation and Appropriate Injunctive Remedies*

Responsibility of the architect can be addressed through breach of contract litigation, indemnification clauses or other common law or statutory provisions.¹⁶⁷

A separate legal action against the architect by the building owner being sued for noncompliance is an extra and burdensome step in litigation, inconsistent with Congress' intent in passing the ADA.¹⁶⁸ The drafters understood that retrofitting a building can be very expensive; therefore, they required that new facilities be designed and constructed to be accessible from the onset.¹⁶⁹

The Ninth Circuit stated that injunctive relief is significant because architects are out of the picture.¹⁷⁰ Available injunctive relief under the ADA includes a temporary, preliminary or permanent order to make such facilities accessible.¹⁷¹

VI. IMPACT

The Ninth Circuit's decision in *Lonberg* created a split with the Eighth Circuit, the only other circuit court to address the issue of liable parties, other than an owner, lessee, lessor and operator, for noncompliance with the ADA.¹⁷² The district courts are left to grapple with the diametrically opposed approaches of these circuit courts' opinions, resulting in overwhelming inconsistency in the interpretation of the ADA.¹⁷³

Lack of judicial uniformity trivializes the importance of accessibility for people with disabilities, as well as underestimates the mag-

167. See *Colgate*, *supra* note 38, at 145 (discussing alternative remedies available to those bringing claims).

168. See *id.* at 162 (discussing efficient allocation of resources by avoiding litigation costs).

169. See *id.* Society saves the "dead-weight costs associated with rebuilding facilities constructed in non-compliance, ensuing litigation costs, and not having the use of the structures during the reconstruction necessary to retrofit them with accessibility features." *Id.*

170. See *Lonberg*, 259 F.3d at 1036.

171. See generally 42 U.S.C. §§ 12181-89 (noting strong deterrent effect against noncompliance).

172. Compare *United States v. Days Inns of Am., Inc.* ("8th Circuit *DIA*"), 151 F.3d 822, 823 (8th Cir. 1998) (holding party who possesses significant degree of control over design and construction of facility liable under Title III of ADA), with *Lonberg*, 259 F.3d at 1036 (holding architects are not liable under Title III of ADA). See generally Howard Fisher, *Disabled May Sue Architects Case Involves Wheelchairs*, ARIZ. BUS. GAZETTE, Aug. 9, 2001, at 5.

173. Compare *Kentucky DIA*, 22 F. Supp. 2d 612, 617 (E.D. Ky. 1998), with *California DIA*, 8 Am. Disabilities Cas. (BNA) 491, 493 (E.D. Cal., Jan. 12, 1998).

nitude of the civil rights principles supporting the ADA.¹⁷⁴ Building a society accessible to people with disabilities is a key benefit of the ADA.¹⁷⁵ Congress hoped that the ADA would serve as a starting point to foster change in societal attitudes towards people with disabilities.¹⁷⁶ Unfortunately, many courts are not receptive to the civil rights paradigm of the ADA and have not helped foster its promotion.¹⁷⁷

Under section 303, architects are proper defendants in a suit alleging discrimination resulting from a noncompliant building design.¹⁷⁸ Meeting the ADA guidelines at the design stage saves cost and time, while satisfying the Congressional purpose.¹⁷⁹ The Ninth Circuit's reasoning actually permits the design of new facilities that are not accessible to people with disabilities, directly contravening Title III's purpose.¹⁸⁰

States have begun to address the issue of architect liability on their own initiative.¹⁸¹ For example, the Illinois Environmental Barriers Act was amended to clarify for architects, builders, engineers and building owners exactly what type of accessibility is required under the law.¹⁸² Additionally, national recognition of the critical obligations of architects and designers was apparent at the Universal Accessibility Conference.¹⁸³ At the conference, over 400 architects, designers, advocates and other professionals interested

174. See Tucker, *supra* note 30, at 382.

175. See *id.* at 383.

176. See *California DIA*, 8 Am. Disabilities Cas. (BNA) at 493.

177. See Tucker, *supra* note 30, at 382 (discussing judicial backlash by examining decisions inconsistent with policy of ideals on which ADA is based).

178. See *8th Circuit DIA*, 151 F.3d at 822 (holding party who possesses significant degree of control over design and construction of facility liable under Title III of ADA).

179. See *Colgate*, *supra* note 38, at 162. Huge costs in litigation and retrofitting would be spared with compliant design. See *id.*

180. See H.R. REP. NO. 101-485, pt. II, at 34 (1990).

181. See, e.g., National Association of Attorneys General: Civil Rights Update, *Disability Rights Development*, NAAG CIV. RTS. UPDATE 14 (Spring 1997).

182. See *id.* An advocacy council consisting of people with disabilities, code officials, architects and attorneys helped craft the bill. See *id.* The bill, Illinois-SB 1594, authored by Attorney General Jim Ryan, "aimed at bringing Illinois access law into conformance with the American with Disabilities Act." *Id.* Ironically, depending on what circuit decision is followed, this particular aim may or may not be an issue. Compare *8th Circuit DIA*, 151 F.3d at 822, with *Lonberg*, 259 F.3d 1029, 1036 (9th Cir. 2001); see also *Illinois DIA*, 997 F. Supp. 1080, 1085 (C.D. Ill. 1998) (describing Illinois district court decision to hold franchisor and parent company liable for ADA violations).

183. See *Universal Accessibility Conference Hailed a Success*, 3 No.4 ACCESS CURRENTS 1 (1997), available at <http://www.usc.edu/dept/gero/hmap/library/universal.html>.

in accessible design participated in various sessions that included ADA risk management and liability, new construction requirements in ADA Accessibility Guidelines and access to historic facilities.¹⁸⁴

Society, therefore, has begun to recognize the significance of an accessible design. The result is not just a theater, stadium, arena or hotel, but a far-reaching civil rights implication of an accessible society. It is due time that judicial decisions reflect the messages that have founded the very ideals of our nation. We have praised our leaders and our legislators who have taken us two steps forward to an accessible society. It would be unfortunate if our judiciary takes us two steps back. The formalistic approach of the Ninth Circuit should not be used in a civil rights context, instead, the Eighth Circuit's functional approach in interpreting the ADA should be embraced.

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184. *See id.* Sponsored by the Access Board and the American Institute of Architects, Attorney General Janet Reno provided the keynote address. *See id.* In her remarks, she stressed that to vigorously enforce the ADA "you have an obligation to produce designs that provide full and equal access to all If we have to, and I don't want to, but I am prepared to, we will litigate, and litigate vigorously." *Id.*