

# Welcome!

## **Stay Out of Debtor's Prison: How to Handle Legal and Contractual Issues with the ADA and FHA**

Wed, September 30, 2015 1:00 PM - 2:00 PM EDT

Earn 1.0 AIA HSW LUs



# Moderator



**Jane Cameron, AIA, LEED AP**

**Jane Cameron, AIA, LEED AP**, is an Associate Principal in the Chicago office of Perkins + Will. She worked at SOM LLP and SCB architects prior to joining P+W in 2006. With over 25 years of experience, her current role as a Senior Project Architect allows her to focus on the technical aspects of projects and she oversees large project teams to deliver a variety of building types, both domestically and internationally. Originally from Canada, Jane has Bachelor's degrees in Interior Design and Architecture, as well as a Masters in Architecture (focus in Urban Design). She has also practiced in Canada and the UK. She is licensed in the State of Illinois, and has been an AIA member since 1999. She is a retired member of the Ontario Association of Architects. She is an active member in the Chicago Committee on High Rise Buildings, and is also the past Program Director for the Committee. She joined the CCA-KC group in 2013 and is the current chairperson for the 2015 year.



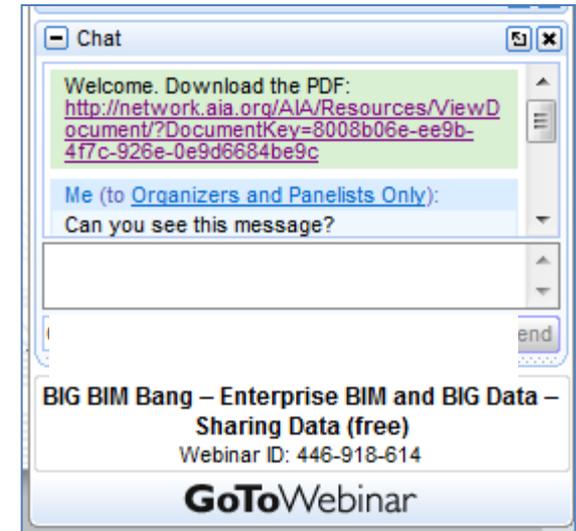
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- **in the Chat box** at the conclusion of the live presentation;
- **in the follow-up email** you will receive one hour after the webinar.



# Speaker



**Michael L. Brown**

**Michael Brown** is a partner in Wallace Saunders Design Professional's Group. He educates himself on the emerging trends and legal developments impacting design professionals. He maintains a close relationship with design professional insurers and brokers and is A/E Panel Counsel for most major insurers. He is the firm's primary contact with AIA Kansas City and AIA CES. He is also active in the ACEC, Builder's Association, Harmonie Group Construction Committee, and KCMBA Construction Committee. Mike has been awarded the "Super Lawyers" designation for Kansas and Missouri by Super Lawyers®.



# Speaker



**Nathanial A. Dulle**

**Nathan Dulle** counsels design professionals and their businesses on risk management issues, including contract review, to help prevent disputes from arising. When disputes occur, Nathan prosecutes and defends claims in state and federal courts and also advocates for his clients before regulatory agencies.



# Course Description

Since 1940, it is seldom that architects are asked to design bath houses. If bath houses were still common, it would be required that they comply with the ADA, FHA and other codes and regulations. Failure of a final design to comply with the ADA and FHA can result in federal or state prosecution, as well as private civil actions. Contractual indemnity, warranty, and standard of care provisions can impact a designer's potential liability.

This presentation will focus on contractual provisions impacting a designer's liability for violations of the ADA and FHA.



# Learning Objectives

1. Recognize potential liability issues concerning the ADA and FHA.
2. Understand the impact of sealing plans and designs that may not comply with the ADA and FHA.
3. Recognize contractual issues during value engineering as related to claims made under the ADA and FHA
4. Decide how best to address ADA and FHA issues with insurers and in contract documents



# And now for our presentation:

## Stay Out of Debtor's Prison: How to Handle Legal and Contractual Issues with the ADA and FHA





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Stay Out of Debtor's Prison  
How to Handle Legal and Contractual Issues with the ADA and FHA

Mike Brown

Nathan Dulle

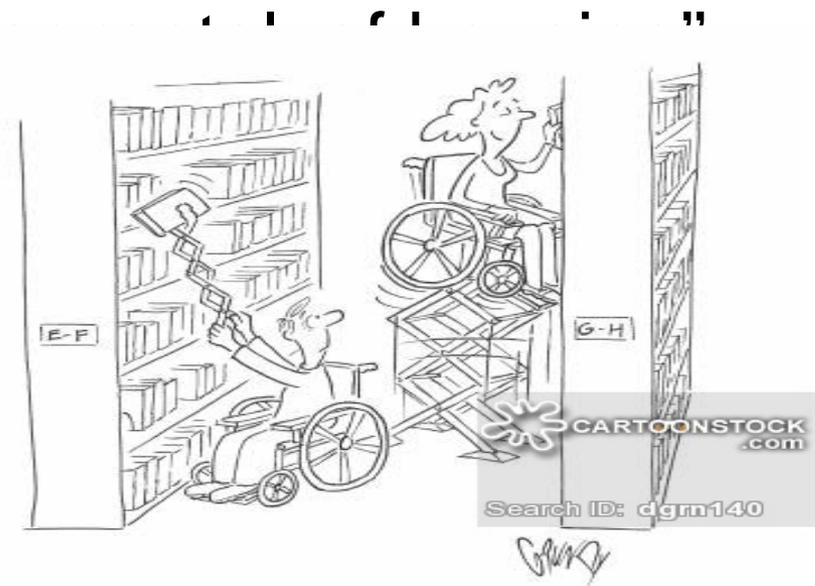
September 30, 2015

# Penalty for ADA and FHA violations

- 1<sup>st</sup> offense - up to \$50,000
- Subsequent offense - up to \$100,000

# The ADA and FHA

- ADA - “any place of public accommodation” - commercial facilities
- FHA - “sa



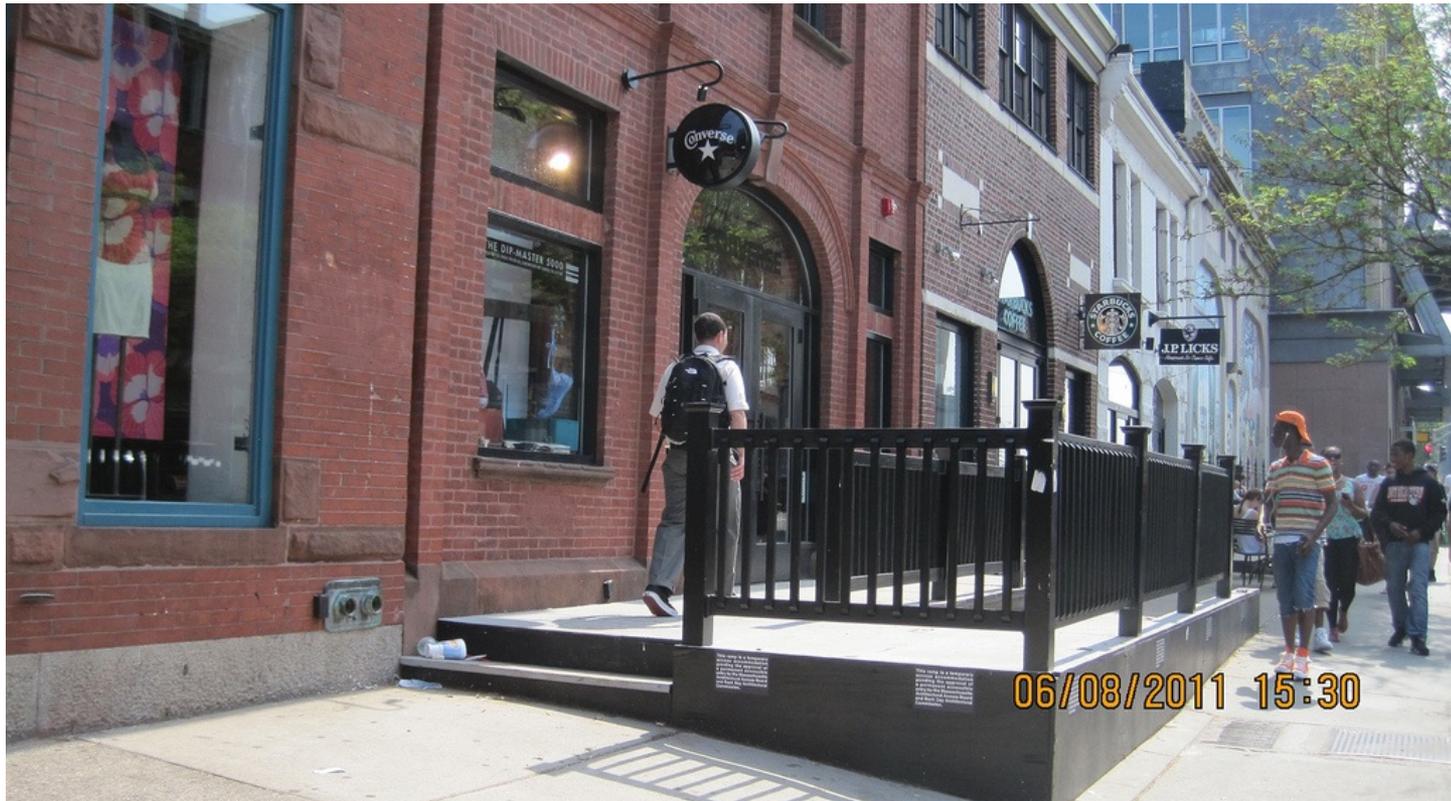
# Americans with Disabilities Act (ADA)

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 accommodation.

42 U.S.C.A. § 12182

# Purpose of the ADA

“[E]limination of discrimination against individuals with disabilities”



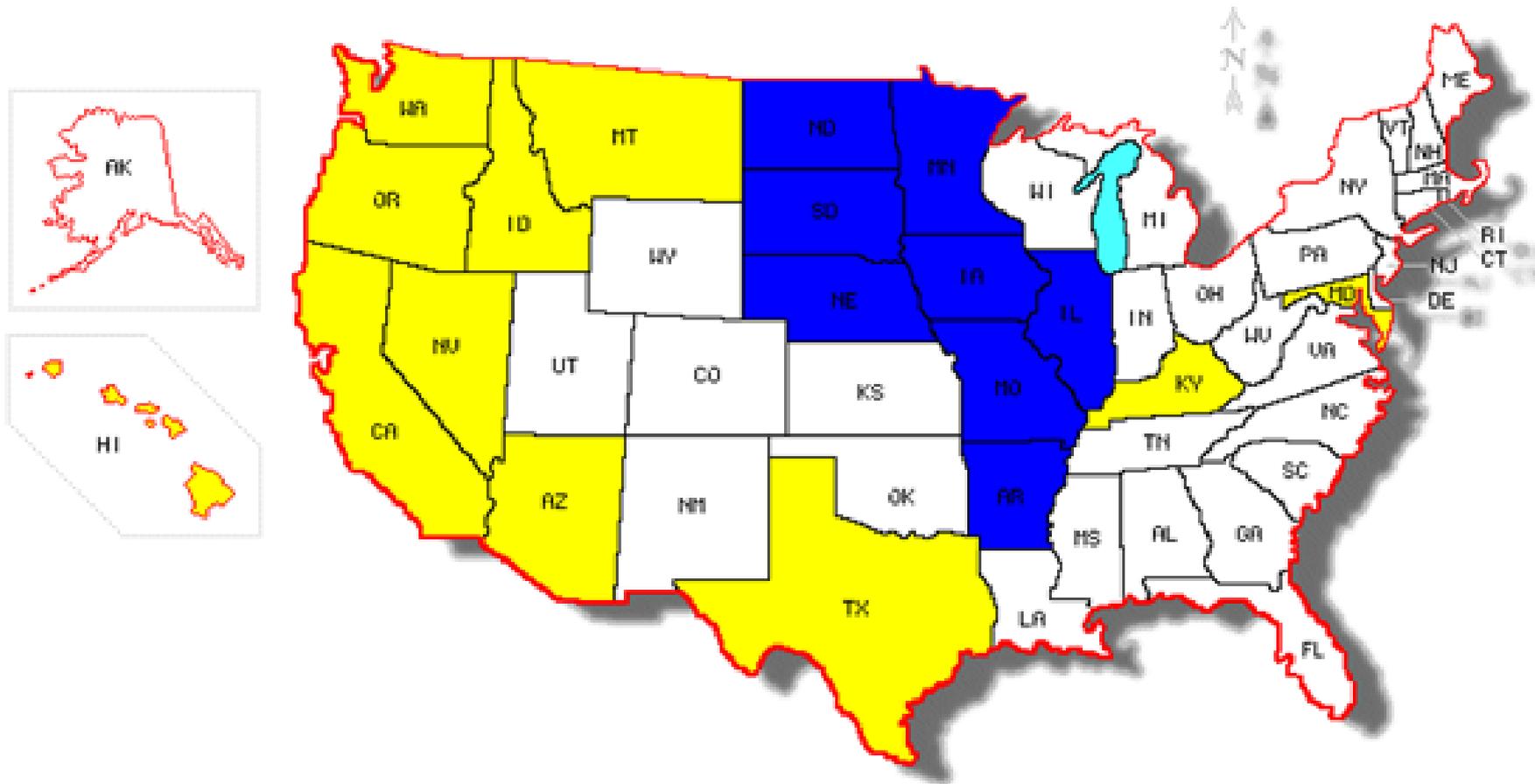
# Violations of the ADA

- ▣ Readily Accessible
  - failure to design and construct, or
  - failure to make alterations

42 U.S.C.A. § 12183



# Designer liability for ADA violations?



# Why the disparity?

## Designers Liable for ADA

- Statute applies to “design and construction”
- Designers can be liable if designer has “significant degree of control”

## Designer’s Not Liable for ADA

- Statute *specifically* applies to “owners, lessees, lessors, and operators”
- “Design ‘and’ construction”
  - ▣ “and” is in the conjunctive

# Fair Housing Act (FHA)



It shall be unlawful “to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.”

42 U.S.C. § 3602

# Violations of the FHA

- a failure to design and construct the public use and common use portions to be readily accessible
- a failure to design and construct all the doors



# Designer liability for FHA violations?

- Yes

- ▣ FHA not limited to “owners, lessees, lessors, and operators”
- ▣ Different statutory wording:

“in connection with design and construction”

v.

“a failure to design and construct”

# Contribution v. Indemnity

## □ Contribution

- The right to demand that another who is jointly responsible for a third party's injury supply part of what is required to compensate the third party.

## □ Indemnity

- A duty to make good any loss, damage, or liability incurred by another
- Reimbursement or compensation for loss, damage, or liability.

# Can an Owner/CM/GC seek contribution?

Maybe

Can't seek the entirety of the retrofit/repairs



# Can an Owner/CM/GC seek indemnity?

“Permitting an owner to, in essence, circumvent responsibility for its violations of the ADA and FHA through an indemnification claim would lessen the owner’s incentive to ensure compliance with the ADA and FHA.”

*Rolf Jensen & Assoc. v. Eighth Judicial District*

# No indemnity for ADA/FHA claims

- Not yet decided by U.S. Supremes
- Other courts have held owner cannot escape liability for ADA violations through contractual indemnity.

# Indemnification for ADA/FHA

- “In today’s commercial construction industry, it is surely an owner such as Mandalay – highly sophisticated entity with ultimate authority over all construction decisions – who is in the best position to prevent violations of the ADA.”
- Contribution – Door is still open for potential contribution claims.

# Choice of Law

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Apply the laws of a jurisdiction that does not allow lawsuits against designers for ADA violations.

# Design Build/Teaming Agreements

- Horizontal Teaming
  - ▣ Joint Venture may be liable for ADA/FHA violations
    - “Design and Construct” provision of ADA
    - Should be specific provision addressing ADA/FHA
  
- Vertical Teaming
  - ▣ Lead/Primary may be liable for ADA/FHA violations

# What Architects Can Do

- Insurance;
- Choice of Law Provision;
- Maximize compliance in every project;
- Resist pressure from the client;
- Document the file in writing;
- Never seal plans not in compliance; and
- Notify the owner and document team members' disregard/misapplication of design intent

# What Owners Can Do

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- Pre-Opening ADA/FHA inspections
  - ▣ Bring suit against designer before Third-Party makes ADA/FHA claim
- Seek Contribution, not indemnity
  - ▣ Include contribution clause in contract for design not in compliance with the ADA/FHA



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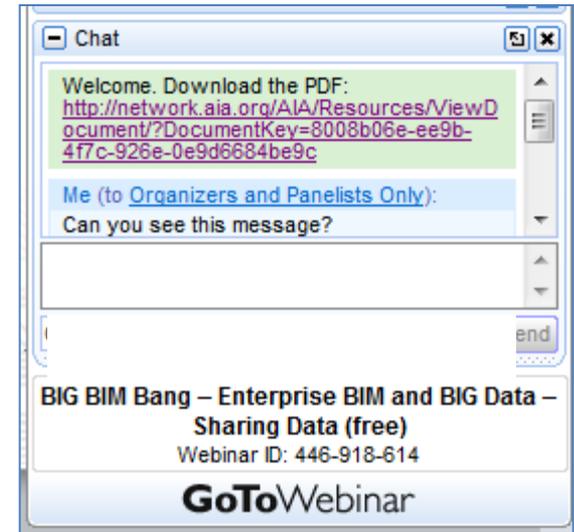
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# Thank you for joining us!

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