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Construction Cites

A periodic bulletin citing and analyzing legal and other developments affecting the construction industry

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If you have questions regarding this bulletin, please contact Karen P. Layng (312/609-7891) or any other Vedder Price attorney with whom you have worked.

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RECENT DECISIONS ON ARCHITECT AND CONTRACTOR LIABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

Architects and contractors, beware. The Department of Justice ("DOJ"), the government body responsible for enforcement of The Americans with Disabilities Act ("ADA"),[1] has, in recent years, become increasingly aggressive in its enforcement of the ADA.

In one of its more aggressive enforcement campaigns, the DOJ instituted five separate actions against the Days Inn

of America hotel chain for violations of Title III of the ADA,[2] which relate to accessibility standards for existing and newly constructed facilities. The suits were the result of "an 18-month Justice Department investigation of 28 newly built Days Inn hotels in 17 states… [which] revealed that all 28 [hotels] failed to comply with the ADA."[3]

These five cases were significant not only because they were "the first to be filed by the Justice Department under the ADA challenging the construction and design of a building built after the law went into effect,"[4] but also because of their scope. Not only did the DOJ seek claims against owners, operators and lessors,[5] but they also went after those who design and/or construct the facilities (*i.e.*, the architects and contractors).

In each of the five Days Inn cases, the DOJ alleged that the defendants (which included the architects and contractors of each of the five hotels) violated the ADA. According to the DOJ, the ADA requires that parties that "design and construct"[6] new buildings comply with specific architectural standards.[7] This view was echoed by Attorney General Janet Reno in her keynote address at the American Institute of Architects 1997 Universal Accessibility Conference:

> My view and the Department of Justice's view should be clear:
> …Everyone involved in the design and construction process has an obligation to comply with these requirements, and everyone involved in that process may be liable if a building doesn't comply. This is a position we feel strongly about. We have defended it in court, and it is one that we will continue to defend whenever necessary. The ADA …[is] binding on architects as well as developers.

Although the DOJ's position is obviously clear, there has been a recent split in the courts on this subject. In another line of prominent cases, the DOJ filed several suits against the architectural firm of Ellerbe Becket & Associates. In a 1996 case filed in the District of Columbia, *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Engineers, P.C.*,[8] the court agreed with Ellerbe's position that architects are not subject to liability under the ADA because they: (1) do not own, lease or operate facilities as

provided in § 302 of the ADA;[9] and (2) do not both design and construct facilities subjecting them to liability under § 303.[10]

This overly technical reading of the statute was rejected by the District Court of Minnesota in *United States v. Ellerbe Becket*.[11] In its decision, the Minnesota court refused to follow the District of Columbia's ruling and held that architects are not, as a matter of law, excluded from liability under the ADA. The Minnesota court noted that § 303 "does not specify the type of entities liable for violations," but rejected the D.C. court's rationale that § 302's limitation to persons who own, lease or operate should be transferred to § 303 and thereby limit that section's scope.

Although the Minnesota court refused to answer the question of whether the conjunctive use of "design and construct" in § 303 requires that a party actually both design and construct a facility to be liable under the ADA, the court did not accept the D.C. court's contention that as a matter of law architects never both design and construct facilities. Rather, the court suggested that this is a question of fact to be determined on a case-by-case basis.

Recently, in a March 1998 decision involving one of the *Days Inn* litigations, an Illinois District Court took a stronger position holding that the term "design and construct" is a "broad sweep of liability [and] includes architects, builders, planners…."[12] The court reasoned that "design and construct" may be read conjunctively without being read narrowly. "Design and construct enforce each other in that those who design or construct also construct and design."[13]

In another decision that moved closer to the DOJ's public position on architect liability, the United States Court of Appeals for the 8th Circuit held that § 303's anti-discrimination requirements "are not limited to owners, operators, lessors and lessees of newly constructed facilities."[14] The court noted that such a narrow interpretation "would improperly create a gap in coverage that Congress did not intend."[15]

Additionally, the 8th Circuit court applied the "design and construct" language of § 303 conjunctively. However, in determining liability under the "design and construct"

standard the court concluded that "to bear responsibility for an inaccessible facility under Section 303, a party must possess a significant degree of control over the final design and construction of a facility."[16] Under this ruling, liability becomes a question of fact that must be determined on a case-by-case basis.

Although the DOJ reached settlements with the architects and contractors in four of the *Days Inn* cases prior to any court ruling as to their culpability,[17] and other court rulings as to architect liability have been conflicting, a clear message has been sent by the DOJ. The most notable of which is that architects and contractors are not going to be immune from prosecution by the DOJ for design or construction violations of the ADA. As such, architects and contractors would be wise to make certain that future projects meet all ADA standards, as well as local building codes.

If you have any questions regarding this topic, please contact Karen P. Layng at (312) 609-7891 or any other attorney with whom you have worked.

[1]42 U.S.C. §§ 12101-12213.

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[2]Title III of the ADA prohibits discrimination on the basis of disability by providers of public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and, when required, altered in compliance with the accessibility standards established by the ADA.

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[3]*Justice Department Sues Days Inn Chain for Building Inaccessible Hotels,* DOJ press release, February 8, 1996 <http://www.usdoj.gov/crt/foia/dius1.txt>

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[4]*Id*.

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[5]Section 302 of Title III specifically applies to **owners, occupants** and **operators** with respect to the operation of a place of public accommodation.

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[6]*See* 42 U.S.C. § 12183.

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[7]*See Court Approves Agreement Between Justice Department and South Dakota Days Inn Hotel,* DOJ press release, June 26, 1997 <http://www.usdoj.gov/crt/foia/disd2.txt>

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[8]945 F. Supp. 1 (D.D.C. 1996) aff'd, 117 F.2d 579 (D.C. Cir. 1997).

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[9]42 U.S.C. § 12182.

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[10]42 U.S.C. § 12183.

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[11]976 F. Supp. 1262 (D. Minn. 1997).

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[12]*United States v. Days Inn of America, Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998).

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[13]*Id*.

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[14]*United States v. Days Inn of America, Inc.*, 151 F.3d 822 (8th Cir. 1998).

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[15]*Id*.

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[16]*Id*. at 826.

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[17]*Id.* Litigation as to the fifth suit is still going on in the Indiana case. (DOJ website, http://www.usdoj/gov, last viewed January 22, 1999).

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Y2K EFFECTS ON THE CONSTRUCTION INDUSTRY

Introduction

While we are all aware of the "Year 2000 Dilemma", "Y2K," "The Millennium Bug," or "Century Date Change" problem, few may recognize the full extent to which this phenomenon may affect the construction industry. This article addresses the characteristics, potential liability, and various Y2K pitfalls to limit the adverse effects of any such future computer malfunctions.

The Y2K phenomenon is characterized by the inability of certain computer systems after December 31, 1999, to properly recognize and process date related information based on a two-digit year such as '99'. For example, when a computer sorts dates by year, "00" (for the year 2000) could be identified as an earlier date than "99" (for the year 1999).[1] Numerous unexpected consequences may arise if these systems are allowed to "go back in time." For example, systems that interpret such data to mean that required inspections have not yet occurred or that persons have not yet paid their bills may produce erroneous results, malfunction, or simply shut down.[2] The Y2K problem may thus have various implications for those working in the construction industry and related fields.

Potential Liability Arising out of Y2K Issues

One key area of concern is the issue of embedded chips. The Institution of Electrical Engineers warns that, "if you are just starting an investigation of the Year 2000 compliance of your plant, machinery and equipment ("embedded systems"), there may not be enough time for you to find and fix all the potential problems."[3] They recommend that companies immediately set forth priorities to ensure: 1) that the safety of staff, customers or the general public will not be affected, 2) that effective

and efficient operations will continue, 3) that the businesses will be able to meet the requirements of industry regulators, and 4) that business reputation will be maintained.[3] However, even if these steps are taken, issues of liability may still arise out of Y2K related problems.

In this area, building systems operation presents potential Y2K liability concerns. While the need to check computer mainframes for Y2K compliance is very real, of equal importance is the embedded chip issue. A brief list of construction "products" including such chips, among others, are building and elevator access via key cards, fire detection and suppression systems, emergency exits, HVAC services, security systems, energy management systems, telecommunications networks, utilities, power generators, boilers and chillers, thermostats, and building vendors.[4]

The question arises, what should businesses in the construction industry do to protect themselves against "embedded chip" malfunction and potential liability arising therefrom? A prudent business should develop and implement a facilities test plan comprised of 1) an inventory of all possibly affected systems, 2) a comprehensive review of warranties by manufacturers and 3) testing and analysis of building systems. While this process constitutes a reasonable precaution, issues of cost allocation will still inevitably arise.

Issues in this regard could range from the costs of elevator shutdowns, cleaning premises from sprinkler or fire protection floods to preventing access to buildings and thus causing business interruption. The examples and potential scenarios are countless. The issue of who bears the costs of advance testing of said systems, be they in the context of punch list items and representations and warranties provided by a general contractor when it demands substantial completion of a building, or in the landlord/tenant context, can be predetermined and negotiated by engaging in written contractual language, for example, in a general contract or lease.

Further, consideration of external operations must also be part of a prudent Y2K plan. Owners must consider obtaining warranties and representations from various manufacturers as a means to protect their businesses from Y2K related liability. This may prove difficult, however, if manufacturers are unwilling to provide such warranties.

Attempts should, nonetheless, be made to secure such guarantees prior to the millennium change.

Another avenue of protection is the "Good Samaritan Act" (The Act) which was signed into law in October 1998. The purpose of the Act is to encourage the disclosure and exchange of information by business organizations related to their Year 2000 readiness. To achieve this, the Act provides liability protection for certain information conveyed by means of 'Year 2000 Statements' and 'Year 2000 Readiness Disclosures.'

Year 2000 Statements are defined broadly under The Act to include virtually any communication directly or indirectly relating to Year 2000 processing capabilities. Year 2000 Readiness Disclosures on the other hand are more specific but also provide additional protection under The Act. A prudent business would make good-faith attempts to seek protection under The Act as an additional source of protection from Y2K liability and should discuss these issues with their legal counsel.

Y2K Construction Contract and Insurance Issues

Potential liability issues also arise out of the American Institute of Architect's form documents including 1) contract warranties and obligations; 2) indemnification and defense provisions; and 3) negligence theories, among others, as they may be applied in the future to Y2K deficiencies. For example, if a contractor guarantees that it will provide only the highest standard products and equipment, and it has not purchased Y2K compliant systems nor demanded installation of the same from its subcontractors, then if a malfunction occurs, the owner may claim breach of contract and seek indemnification from the general contractor.

In this regard, as of February 1999, over forty cases have been filed involving Millennium Bug issues. Of particular importance to the construction industry are cases involving breach of contract, negligence, strict products liability, fraud and misrepresentation and breach of representations and warranties. Construction representatives should monitor these decisions to govern their future practices. A summary of each of these types of cases follows.

A final area of concern is insurance issues related to Y2K

claims. Because the insurance industry views the Year 2000 as a 'non-fortuitous event,' at least three major insurance providers have said they do not intend to make payments to customers for Year 2000-related losses under standard business interruption insurance policies.[5] Further, insurance companies are not obligated to inform their customers of their intent not to cover Y2K related losses. Finally, whether other builders' or all risk insurance policies could cover such losses is not yet certain. Accordingly, companies concerned about potential liability should contact their insurance provider(s) to obtain written clarification of whether Y2K related occurrences are covered by their current policies.[5]

Conclusion

While the Year 2000 Problem should be taken seriously, it is not without remedy. A prudent construction business should prepare its systems as diligently as possible between now and the millennium. Further, with the help of an experienced and knowledgeable attorney, potential liabilities can be successfully addressed.

[1]Jinnett, Jeff. "Legal Issues Concerning The 'Millennium Bug'" *Computer Lawyer* December, 1996. ©1996 by the Aspen Law & Business, A Division of Aspen Publishers, Inc.

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[2]Goodman, Peter G. Kurzman, Karelsen & Frank, LLP. "Y2K Issues for the Real Estate Attorney" by Matthew Bender & Co., Inc.

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[3]From the Institution of Electrical Engineers Web site regarding The Millennium Problem in Embedded Systems. Web address: http://www.iee.org.uk/2000risk/w-342.htm.

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[4]From the Web site "Y2K and Buildings – How does Y2K impact Corporate Real Estate?" by The Millennium Strategies Group, LLC. Web address: http://www.y2krealestate.com/y2kbuildings.htm.

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[5]"Y2K and Insurance – Property and Business Interruption" http://www.y2krealestate.com/y2k-insurance.htm. March 26, 1999.

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Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with approximately 180 attorneys in Chicago, New York City and Livingston, New Jersey.

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NEW OSHA TRAINING STANDARD FOR FORKLIFT OPERATORS AIMS TO REDUCE INJURIES AND LOSS OF LIFE

This month the Occupational Safety and Health Administration (OSHA) released a new training standard for operators of forklifts and other powered industrial trucks, published at 29 CFR § 1910.178. OSHA anticipates that this new standard will prevent 11 deaths and 9,500 injuries annually and will lead to $135 million annually in employer cost savings. The savings can be broken down as follows: $83 million in direct reduced costs (for example, savings in medical costs, administration of workers' compensation, and value of lost output), and $52 million in reduced accident-related property damage. OSHA estimates that the total cost of compliance for America's employers will be $16.9 million annually.

The new standard, which takes effect on March 1, 1999, applies to all operators of powered industrial trucks in general industry. Additionally, at the same time, comparable standards were promulgated for the construction, *e.g.*, 29 C.F.R. § 1926.602(c)(1)(vi) and maritime industries. The three standards require employers to ensure their employees' competence in operating powered industrial trucks, through a training program and evaluation.

The initial training program consists of three components: formal instruction, including lectures, discussions, computerized training programs, and video and written materials; practical training, including demonstrations and exercises; and evaluation of employees' workplace performance. The content of the training program, as set forth at 29 CFR § 1910.178(3), is to include each of the following topics, unless an employer can demonstrate that a particular topic is not applicable to safe operation of powered industrial trucks in its workplace:

Truck-Related Topics:

aspects of construction law matters. The firm's construction practice covers the entire spectrum of financial and commercial, industrial and residential construction work. Vedder Price has assisted owners, developers of commercial, industrial, and residential real estate, and investors, lenders, architects, engineers, contractors, subcontractors, landlords, tenants, syndicators, brokers, consultants, municipal agencies, public and private corporations, and condominium and cooperative associations.

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A Partnership including Vedder, Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100
Facsimile: 973/597-9607

- Operating instructions, warnings and precautions for the types of truck the operator will be authorized to operate;
- Differences between the truck and automobiles;
- Truck controls and instrumentation, including location, function and operation of instruments;
- Engine or motor operation;
- Steering and maneuvering;
- Visibility (including restrictions due to loading);
- Fork and attachment adaptation, operation, and use limitations;
- Vehicle capacity and stability;
- Any vehicle inspection and maintenance that the operator will be required to perform;
- Refueling and/or charging and recharging of batteries;
- Operating limitations; and
- Any other operating instructions, warnings, or precautions listed in the operator's manual for the type(s) of vehicle that the employee is being trained to operate.

Workplace-Related Topics:

- Surface conditions where the vehicle is to be operated;
- Composition of loads to be carried and load stability;
- Load manipulation, stacking and unstacking;
- Pedestrian traffic in areas where the vehicle will be operated;
- Narrow aisles and other restricted places where the

vehicle will be operated;

- Hazardous locations where the vehicle will be operated;
- Ramps and other sloped surfaces that could affect the vehicle's stability;
- Closed environments and other areas where insufficient ventilation or poor vehicle maintenance could cause a buildup of carbon monoxide or diesel exhaust; and
- Other unique or potentially hazardous environmental conditions in the workplace that could affect safe operation.

The initial training is to be followed by periodic re-evaluation, to be conducted at least every three years, and by refresher training, to be conducted in any of the following circumstances:

- Whenever an operator is involved in an accident or a "near-miss" incident;
- Whenever an operator is seen operating a vehicle in an unsafe manner;
- Whenever an operator is determined to need additional training by an evaluation or re-evaluation;
- Whenever there are changes in the workplace that could affect safe operation of a vehicle; or
- Whenever an operator is assigned to a different type of vehicle.

OSHA requires every employer employing operators of powered industrial trucks (a) to conduct initial training and evaluations; (b) to conduct re-evaluations and refresher training as described above; and (c) to certify that it has complied with these requirements. Initial training and evaluation of employees hired prior to December 1, 1999, is to be completed by December 1, 1999; and initial training and evaluation of employees hired after December 1, 1999, is to be completed before the employee begins operating a powered industrial truck.

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OSHA ANNOUNCES DRAFT PLAN FOR DEALING WITH MULTI-EMPLOYER WORKSITES

Last month the Occupational Safety and Health Administration (OSHA) announced draft revisions to its citation policy with respect to multi-employer worksites. Historically, in a multi-employer setting, the general contractor has borne the brunt of liability for any OSHA violation at the site, but under the new draft proposal, before assessing liability or fines, OSHA will inquire into whether the general contractor has overall responsibility for enforcing safety and health requirements.

This inquiry will take the form of a two-step process, which would be completed before liability and fines are assessed. First, OSHA compliance officers will examine whether the general contractor has responsibility to enforce safety and health requirements at the worksite. This will be done either by examining the general contractor's contracts with the subcontractors, or by visiting the site to observe the nature of the general contractor's control over the subcontractors' work. If it is determined that the general contractor controls the site, then the general contractor is deemed responsible for enforcing safety and health requirements.

But the inquiry does not stop there. The draft proposal's second step involves examining whether the general contractor, given the amount of control and knowledge it had, exercised reasonable care in attempting to discover and correct any safety violations. The idea is to hold the general contractor and the subcontractor to different levels of liability, based on their different levels of knowledge and control. In an example provided by Noah Connell, OSHA's Director of Construction Standards and Compliance, an electrical subcontractor would be expected to have a great deal of expertise on electrical safety issues, while the general contractor who oversees the work would not be expected to have the same depth of knowledge. On the other hand, the general contractor is expected to use its general oversight to ensure that the electrical subcontractor employs good safety and health practices at the site. Each party would be held liable only to the extent it failed to

exercise reasonable care consistent with its level of knowledge and control.

OSHA's Advisory Committee on Construction Safety and Health is currently reviewing the draft proposal. If and when it is approved, another *Construction Cites* article will discuss the final version. In the interim, if you have questions regarding this proposal or other OSHA topics, please contact Nina G. Stillman at (312) 609-7560, James E. Bayles, Jr. at (312) 609-7785, or any other Vedder Price attorney with whom you have worked.

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