# ARTICLE:
# ALLOCATION OF ADA LIABILITY BETWEEN LANDLORD AND TENANT WITH RESPECT TO THIRD PARTIES

*by Tori Phillips Gyulassy*[*]

## 1. *Introduction.*

Landlords and tenants may (and often do) contract between themselves to allocate responsibility for compliance with, among other laws, Title III of the Americans with Disabilities Act ("Title III" or "ADA"), a federal antidiscrimination statute. But can such an allocation affect who is responsible to third parties (i.e., parties other than the contracting tenant and landlord) for violations of the ADA? This article lays out the current extent of tenant and landlord liability for compliance with the ADA, despite contractual allocations, with respect to third parties, and poses some related questions.

## 2. *Title III of the Americans With Disabilities Act.*

Title III prohibits discrimination on the basis of disability by places of public accommodation.[1] Specifically, Title III provides that "[n]o 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."[2] Under the statute, "places of public accommodation" include privately owned spaces open to the public such as hotels, restaurants, theaters, retail stores, hospitals, public transportation stations, libraries, and gyms.[3]

Among the forms of discrimination prohibited by the statute is the failure "to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable."[4] To be liable under Title III for ADA violations for failure to remove

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architectural barriers, a plaintiff must show that the removal of some architectural barrier was "readily achievable," the showing of which can take into account the cost of such removal and the financial resources of the owner of the public accommodation.[5] Title III further provides that such liability may not be delegated by way of a contractual arrangement: "[it is] discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through *contractual, licensing, or other arrangements*, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity."[6]

### 3. *Contractual Allocation of ADA Liability between Landlord and Tenant.*

As a result of negotiations between a commercial landlord and tenant for a lease of commercial space, the resulting lease will often allocate various types of risks and responsibilities between the two parties. For example, the lease may identify which party is responsible for the maintenance and repair of specified areas of the leased property, which party has control or approval rights over changes made within such real property, or for compliance with certain laws, including the ADA. In addition to this, the parties may each agree to indemnify the other for certain claims or losses suffered by one party, which could cover actions brought against such party for claims of ADA violations.

So, assuming that a landlord and tenant have allocated responsibility for ADA compliance in their lease, what happens when a customer visits, or attempts to visit, a public accommodation and is confronted by an architectural barrier in violation of the ADA? Who may be held liable, as between the tenant and the landlord, for such a violation with respect to such a third-party customer, who was not a party to the lease that allocated responsibility for ADA compliance?

 

4. *Extent of a Landlord's ADA Liability*.

(i) *Botosan Factual Background*.

The Ninth Circuit Court of Appeals considered this question in *Botosan v. McNally Realty* ("*Botosan*").[7] In *Botosan*, Kornel Botosan (the "Plaintiff"), a paraplegic man bound to a wheelchair, brought ADA-violation claims after he tried to visit a realty company but was allegedly unable to do so because of a lack of adequate handicapped parking. The Plaintiff sued both Paul McNally Realty ("McNally Realty"), the realty company he was unable to access, and Chuck and Judith Rutson ("Rutsons"), who, as trustees of the owners of the building in which the realty company operated, were McNally Realty's landlord. The Plaintiff alleged violations of both the ADA and a California anti-discrimination statute, the California Unruh Civil Rights Act,[8] for the lack of handicapped parking.

The Rutsons, as the landlord, had leased the space to McNally Realty, as tenant, which lease purportedly allocated all maintenance obligations and responsibility for compliance with laws, including compliance with the ADA, to the tenant.[9] Among other arguments, the landlord-defendant contended that it could not be liable for a lack of ADA compliance, given that the tenant was responsible under the lease for such compliance. The U.S. District Court for the Southern District of California hearing the case disagreed and, extending the reasoning of similar prior district court decisions, entered summary judgment for the Plaintiff.[10] On appeal by defendants, the appellate court considered the issue of "whether a lease may allocate all responsibility for compliance with the ADA from the landlord to the tenant."[11]

(ii) *Botosan Court's Review of ADA Statute, Legislative History, and the DOJ's Interpretations*.

The Court of Appeals reviewed the ADA statute's plain language, the legislative history of Title III, the DOJ's related regulations, and the interpretation of those regulations, and considered public policy implications of its ruling on the matter.[12]

In looking at the plain language of the statute (which language

 

is set forth in Section 2, above), the Court concluded that the owner of a public accommodation clearly has obligations under the ADA, and that the legislative history supported this. The Court found compelling the illustrative examples included in the legislative history:

> For example, if an office building contains a doctor's office, both the owner of the building and the doctor's office are required to make readily achievable alterations. It simply makes no practical sense to require the individual public accommodation, a doctor's office for example, to make readily achievable changes to the public accommodation without requiring the owner to make readily achievable changes to the primary entrance to the building. Similarly, a doorman or guard to an office building containing public accommodations would be required, if requested, to show a person who is blind to the elevator or to write a note to a person who is deaf regarding the floor number of a particular office. The amendment also clarifies that entities which lease public accommodations are covered by the requirements of this title.[13]

The legislative history also showed, the court continued, that landlords could not avoid ADA-compliance obligations by contractually agreeing that the tenant would be solely responsible for them. The Court found that the "reference to contractual arrangements [in the ADA statute] is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act. . .. [O]f course, a covered entity may not use a contractual provision to reduce any of its obligations under this Act."[14] Thus, liability to third parties cannot be contractually delegated from the property owner-landlord to another party. Further, the Court ruled that a landlord's ADA obligations "are not extended or changed in any manner by virtue of its lease with the other entity."[15]

The Department of Justice's ("DOJ") promulgated regulations were also reviewed by the Court, which the Court explained further clarified the idea that the parties *could* allocate such responsibilities through contract between themselves, *but not* with respect to third parties. "Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public

 

accommodations subject to the requirements of this part. *As between the parties*, allocation of responsibility for complying with the obligations of this party may be determined by lease or other contract."[16] Clearly, parties may contract, *between themselves*, to allocate responsibility for ADA compliance. However, such allocation may not change liability for ADA compliance with respect to third parties who were not a party to the contract. The DOJ's Technical Assistance Manual interpreting this regulation made it clear that the parties each had certain liability for compliance with the ADA that could not be limited or shifted contractually.[17] The court also reviewed an example set forth in this manual:

> ILLUSTRATION: ABC Company leases space in a shopping center it owns to XYZ Boutique. In their lease, the parties have allocated to XYZ Boutique the responsibility for complying with the barrier removal requirements of Title III within that store. In this situation, if XYZ Boutique fails to remove barriers, both ABC Company (the landlord) and XYZ Boutique (the tenant), would be liable for violating the ADA and could be sued by an XYZ customer. Of course, in the lease, ABC could require XYZ to indemnify it against all losses caused by XYZ's failure to comply with its obligations under the lease, but again, such matters would be between the parties and would not affect their liability under the ADA.[18]

(iii) *Court's Public Policy Considerations*.

The Court opined on the potential incentives that might be created if landlords or owners of public accommodations were permitted to contract away ADA liability: "A landlord would be able to allocate all responsibility for ADA compliance to the tenant in the lease, and if the compliance measures were not 'readily achievable' for the tenant, the plaintiff would have recourse against no one."[19] Remember from Section 1, above, that in determining whether compliance is "readily achievable," a court may take into account a party's financial state. The Court further concluded:

> Under the DOJ's interpretation of the regulation, however, the landlord is a necessary party in an ADA action, regardless of what the lease provides. The landlord can in turn seek indemnification from the tenant pursuant to their lease agreement. Not only does this construction of the regulation hamper efforts of a landlord and

 

> a tenant to evade ADA requirements, but it also aids in the enforcement of the Act. A landlord who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property.[20]

Essentially, the Court reasoned that if a landlord remains liable for ADA violations it will be incentivized to monitor such compliance, and since the landlord can seek indemnification from the tenant (assuming the lease provides for it), there is no harm (and potentially much benefit) in holding the landlord jointly and severally liable with tenant for ADA violations.

(iv) *Botosan Holding and Cases Following Botosan.*

As between a landlord and tenant, the two parties may allocate responsibility for ADA compliance, maintenance, control, and other such matters. However, the *Botosan* court held that, with respect to third parties, a landlord is always liable for ADA violations on its property, these obligations for compliance with ADA may not be delegated to another party through contract, and "[t]he existence of a lease that delegates control of parts of that property to a tenant has no effect on the landlord's preexisting obligation, because under the ADA, a party is prevented from doing anything 'through contractual, licensing, or other arrangements' that it is prevented from doing 'directly.' "[21] With respect to nontenant, nonlandlord, third parties, a private landlord entity is liable for its property's compliance with Title III, and a landlord may not shift that liability through any contractual arrangement.[22]

Courts since *Botosan* have followed the court's holding that, despite the allocation of liability for compliance with the ADA to the tenant under a lease, a landlord is still independently liable for ADA violations with respect to third parties,[23] including that landlord and tenant would be jointly and severally liable for ADA violations within the tenant's leased premises.[24]

(v) *Limits to Botosan's Application With Respect to Landlord Liability.*

As a rule, a landlord will be liable for ADA violations occurring

 

on any of the property it owns. But just how far does a landlord's liability extend? Although plaintiffs have tried to extend the *Botosan* court's reasoning to make a landlord liable for *policies* (as opposed to architectural barriers) in violation of the ADA that are implemented by a tenant (such as a shop owner's refusal to serve customers who enter a public accommodation with a service animal), courts have refused to do so.[25] One court stated in dicta that certain "path of travel"[26] obligations on a landlord would not be triggered if those areas were not otherwise being altered: "[A]lterations by the tenant in areas that only the tenant occupies do not trigger a path of travel obligation upon the landlord with respect to areas of the facility under the landlord's authority, if those areas are not otherwise being altered."[27] It is yet to be seen to what extent courts will continue limiting *Botosan*'s reach.

5. *Extent of Tenant Liability.*

Does the logic of *Botosan*, then, extend to the case of determining when a tenant has liability for ADA compliance? After *Botosan*, many courts did extend *Botosan*'s reasoning, stating, essentially, that a tenant was liable for ADA compliance outside of tenant's leased premises, even if a tenant had no control over changes to the property.[28] Courts also used reasoning parallel to that made by the *Botosan* court, that a tenant cannot shift its responsibility for ADA compliance through a contract with a landlord.[29]

However, *Kohler v. Bed, Bath, and Beyond*, a case following *Botosan*, addressed this issue, and made it clear that *Botosan* would not be so extended.[30] In *Kohler*, a disabled paraplegic had visited a Bed Bath and Beyond store ("BB&B") where he was allegedly confronted with architectural barriers in both the store, as well as the parking area outside the store (the piece relevant to our consideration here). The United States District Court for the Central District of California hearing the case granted summary judgment for BB&B, finding, among other things, that BB&B, as a tenant in the shopping center, did not "own, lease, or operate" the parking area, and thus did not have liability for ADA violations within such area.[31] Plaintiff appealed from the district

 

court's summary judgment grant, and on appeal, the Ninth Circuit Court of Appeals considered the issue of whether a tenant could be liable for ADA violations that occurred outside of a leased premises, in an area controlled entirely by a landlord.[32]

The lease between the landlord and tenant in Kohler had allocated to the landlord the obligation to operate, maintain, repair and replace, and to comply with Legal Requirements within the common areas of the shopping center, including a parking lot used by BB&B's customers. Arguing an extension of the reasoning in the *Botosan* case, plaintiff argued that such an allocation under the lease was the tenant's "attempt to contract away its ADA liability in violation of [*Botosan*]."[33] But the Court of Appeals disagreed, stating that, while a landlord is clearly liable for ADA violations that occur on the land that a landlord owns, the *Botosan* court's "decision did not create liability for tenants, or landlords, where the ADA did not already impose it."

In the Court's opinion, based on the district court's factual findings, BB&B's leased premises did not include the parking lot, which was solely under the landlord's control, so BB&B had no pre-existing liability over the parking lot that it could contractually agree to allocate to the landlord.[34] The Court considered the logical implications of plaintiff's arguments, stating that "Kohler's reading of [the *Botosan*] decision would impose upon a single tenant—e.g., the cell phone kiosk operating in a shopping center's lobby—liability for ADA violations occurring at the far end of the shopping center's parking lot; such an outcome serves no purpose other than to magnify the potential targets for an ADA lawsuit . . . ."[35]

For additional authority on the matter, the Court reviewed legislative history, which indicated that the limitation prohibiting contractual agreements that reallocate ADA liability "creates no substantive requirements in and of itself."[36] The legislative history even included an illustrative example:

> [A] store located in an inaccessible mall or other building, which is operated by another entity, is not liable for the failure of that other entity to comply with this Act by virtue of having a lease or other

 

> contract with that entity. This is because, as noted, the store's legal obligations extends [sic] only to individuals in their status as its own clients or customers, not in their status as the clients or customers of other public accommodations.[37]

The court held that "neither the ADA, nor [its] decision in *Botosan*, imposes upon tenants liability for ADA violations that occur in those areas exclusively under the control of the landlord."[38] The Court stated that its decision was further supported by the DOJ's path of travel regulations, which, as mentioned above, provide that a landlord is not required to make path of travel upgrades to comply with the ADA as a result of a tenant's alterations inside its premises, even if such alterations would trigger such obligations: "Alterations by a tenant do not trigger a path of travel obligation for the landlord. Nor is the tenant required to make changes in areas not under his control."[39]

(i) *Question of Fact Regarding Control.*

Yet to be conclusively seen is how a court will determine what is outside of a tenant's control. It is likely that the extent of control will be a question of fact, as some cases prior to *Kohler* predicted.[40] In one unpublished case that came after *Kohler*, the defendant tenant argued that *Kohler* was dispositive in showing that tenant had no liability over common areas.[41] However, the court distinguished the facts of *Kohler* because there the district court had found sufficient evidence that BB&B had no control over the common area in question. Thus, the amount of control a tenant may have over common areas is a question of fact for which the parties may need to show sufficient evidence before a court can reach a decision.[42]

6. *Conclusion and Implications.*

From a landlord's perspective, no matter what the parties agree to between themselves, such contractual agreements govern only the rights and obligations among the contracting parties, and have no effect with respect to third parties. Thus, since a landlord has liability for ADA violations within any portion of its property, it might make sense to retain the right to perform ADA compliance improvements even within a tenant's premises, in order to

 

potentially avoid or preempt litigation claiming ADA violations in such areas. As a tenant, knowing that ADA liability is tied to the factual question of its control over the area in question might guide the tenant's allocation of control or maintenance responsibility and the definition of what area it is truly leasing. For example, a tenant might want to expressly limit its control over common areas to avoid the extension of its ADA compliance liability to such areas.

As mentioned by many of the court decisions considered in this article, the parties may always negotiate indemnification provisions in their leases, so that whoever does bear the financial burden in court may ultimately seek indemnification from the party who has responsibility for such obligations under the lease. The above comments demonstrate, however, that, as in any negotiation, allocation of risks and responsibilities will depend on who the parties are, the relative bargaining power, and that other factors may also be important to consider. The credit-worthiness of a party, for instance, may be particularly central here, given that lease allocation of liability, alone, may not actually shift the financial burden of an ADA violation. As already mentioned, a landlord, knowing that it will always be liable for ADA violations, will want to make sure it can seek indemnification under its lease from the tenant for those items over which the tenant has contractual liability. However, this is only effective if the indemnifying party is not judgment proof. If, for instance, a tenant has a low or negative net worth, or tenant's liability is limited to a single purpose entity with few assets, a landlord may not actually be able to recover anything from such a tenant, no matter how the lease allocates ADA compliance obligations.

Left unaddressed both by the existing case law and by the ADA and its legislative history is the question of whether the *Botosan* rationale applies to all leases, particularly to ground leases where the landlord typically and traditionally has no control over the ground tenant's construction or use of the property and may in fact have no present ownership interest in the improvements constructed by the tenant. Also unaddressed is whether any distinction will be drawn between a landlord who has leased the

 

property with improvements versus one who has only leased land or a shell building where the tenant constructs the improvements. Under the language of *Botosan*, there will be no distinction and the landlord will *always* be responsible to third parties for ADA noncompliance. The law includes no explicit safe harbor for landlords who relinquish such controls, even in the ground lease situation. As a result, a ground lessor or other landlord should be particularly concerned about any limitation or recourse or rights of the tenant to assign the lease and be relieved of liability, because without an enforceable indemnity from a creditworthy tenant, the landlord should expect to cover such liability in all such circumstances.

Understanding how a court will allocate a landlord or tenant's liability for ADA violations with respect to third parties is an important concept to keep in mind in lease negotiations, and may ultimately influence the deals struck by contracting parties. It will also be interesting to watch legislative developments. Much ADA litigation has been driven by a small number of serial plaintiffs, suing over relatively small noncompliant issues where the defendant tenants or landlords often end up settling to avoid a more costly litigation.[43] A new bill, which was recently passed by the House Judiciary Committee, aims to lessen the incentive to bring frivolous suits by proposing a 120-day notice and cure period for the responsible party to remedy the alleged violation.[44] However, unless this bill or some other legislative modifications to the ADA actually become law, no such notice and cure period is required.

**ENDNOTES:**

[1]42 U.S.C.A. § 12182.
[2]Id.
[3]Id. at (7)(B).
[4]Id. at (b)(2)(A)(iv).
[5]Id. at (9).
[6]Id. at (b)(1)(A)(i) [emphasis added].
[7]*Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000).

 

[8]Civ. Code, § 51.

[9]*Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000).

[10]Id. at 829.

[11]Id. at 830; See, e.g., *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D. Or. 1997), opinion supplemented, 1 F. Supp. 2d 1159 (D. Or. 1998) (holding that a landlord who leases space to a tenant is a proper defendant in an action alleging ADA violations in such space).

[12]*Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000).

[13]Id. at 832 (citing H.R. Rep. No. 101-485(III), at 55-56 (1990)).

[14]Id. (citing H.R. Rep. No. 101-485(II), at 104).

[15]Id.

[16]Id. (citing *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 982 (D. Or. 1997), opinion supplemented, 1 F. Supp. 2d 1159 (D. Or. 1998) [emphasis added].

[17]Id. at 833 (citing Department of Justice, Technical Assistance Manual on the American With Disabilities Act § III-1.2000 (1994)).

[18]Id.

[19]Id. at 834.

[20]Id.

[21]*Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260, 1264 (9th Cir. 2015) (citing 42 U.S.C.A. § 12182(b)(1)(A)(i)).

[22]Note that public entities are not subject to Title III.

[23]See, e.g., *Hoewischer v. Terry*, 44 Nat'l Disability Law Rep. P 75, 2011 WL 5510274 (M.D. Fla. 2011); *Connors v. Orlando Regional Healthcare System, Inc.*, 39 Nat'l Disability Law Rep. P 148, 2009 WL 2524568 (M.D. Fla. 2009); *Access 4 All, Inc. v. Atlantic Hotel Condominium Ass'n, Inc.*, 2005 WL 5643878 (S.D. Fla. 2005); *Frotton v. Barkan*, 219 F.R.D. 31 (D. Mass. 2003); *Paulick v. Starwood Hotels & Resorts Worldwide, Inc.*, 2012 WL 2990760 (N.D. Cal. 2012) (landlord is an indispensable party in action alleging violations in tenant's restaurant, even though full control over the tenant's restaurant was allocated to tenant).

[24]*Kosloff v. Washington Square Associates, LLC*, 2007 WL 2023497 (N.D. Cal. 2007).

[25]*Supancic v. Turner*, 2016 WL 3262616 (Cal. App. 2d Dist. 2016), as modified on denial of reh'g, (July 7, 2016) and review filed, (July 19, 2016) and unpublished/noncitable (Court of Ap-

 

peal, Second District, Division 5, California) (landlord not liable for discriminatory policy of tenant) (citing *Haynes v. Wilder Corp. of Delaware*, 721 F. Supp. 2d 1218, 1228 (M.D. Fla. 2010) (finding landlord not liable for alleged discrimination by tenants against handicapped personals, absent a discriminatory policy, practice, or procedure)).

[26]*Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260, 1265 (9th Cir. 2015) (citing 28 C.F.R. § 36.403(e)(2))("A 'path of travel' is a continuous, accessible pathway from a particular altered area to 'an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.' . . . In the context of a shopping center, such a path of travel would include many features considered to be within the 'Common Area' under BB & B's lease, such as 'walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.' '').

[27]Id. at 1265 (citing 28 C.F.R. § 36.403).

[28]See, e.g., Davis v. Jacobs S. Ciborowski Family Trust, 2012 WL 3779612, at 3 (D.N.H. August 30, 2012) (stating that a tenant could be liable under the ADA despite the fact that the lease did not allow a tenant to make structural changes).

[29]Id.

[30]*Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260, 1262 (9th Cir. 2015).

[31]Id.

[32]Id.

[33]Id.

[34]Id. at 1264.

[35]Id.

[36]Id. (citing H.R. Rep No. 101-485, pt. III at 55-56 (1990)).

[37]Id. at 1265 (citing H.R.Rep. No. 101-485(II) at 104.).

[38]Id. at 1265.

[39]Id. at 1266.

[40]*Delgado v. Orchard Supply Hardware Corp.*, 826 F. Supp. 2d 1208 (E.D. Cal. 2011) ("a party's obligation under Title III is determined with respect to the nature and circumstances of its relationship with the property, among other considerations").

[41]*Rodgers v. Claim Jumper Restaurant*, 2015 WL 188708 (2015).

[42]*Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260 (9th Cir. 2015).

 

[43]House Committee approves ADA reform, July 7, 2016, http://www.icsc.org/sct/newsletters/article/the-ada-education-and-reform-act-of-2015-passes-in-house/.

[44]Id.