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### Summary of Rolf Jensen & Assoc., Inc. v. Eighth Judicial Dist. Ct., 128 Nev. Adv. Op. 42

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*Nevada Law Journal*

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## CONTRACTS – PREEMPTION OF INDEMNIFICATION

### **Summary**

On petition for writ of mandamus challenging a denial of summary judgment, the Court considered whether the Americans with Disabilities Act (ADA) preempts state law claims for indemnification brought by an admitted violator of the ADA.

### **Disposition/Outcome**

The ADA preempts indemnification claims brought by owners for their violations thereof because such claims would pose an obstacle to the ADA.

### **Facts and Procedural History**

In 2002, Mandalay Corporation entered into a contract with petitioner Rolf Jensen & Associates for consulting services regarding construction of an expansion to the Mandalay Bay Resort and Casino (the Resort) in compliance with the ADA. The parties' contract contained a provision that Rolf Jensen would indemnify Mandalay for any damages arising from an act, omission, or willful misconduct by Rolf Jensen in performance of its obligations.

After the Resort expansion was constructed, the Department of Justice (DOJ) began an investigation of numerous violations of the ADA arising from a lack of handicap accessibility at the Resort. Thereafter, Mandalay entered into a comprehensive settlement agreement with the DOJ that required Mandalay to bring the Resort into compliance with the ADA. The retrofits were estimated to cost Mandalay more than \$20 million.

Mandalay sued Rolf Jensen in district court seeking to recover the costs of the retrofit. Following preliminary motion practice, claims remained for (1) express indemnification, (2) breach of contract, (3) breach of express warranty, and (4) negligent misrepresentation. Rolf Jensen filed for summary judgment asserting that each claim was preempted by the ADA. The district court denied Rolf Jensen's motion for summary judgment. Rolf Jensen petitioned the Supreme Court of Nevada for a writ of mandamus directing the district court to grant its motion.

### **Discussion**

Justice Saitta wrote the opinion for the unanimous Court.<sup>2</sup> In entertaining the petition, the Court noted that the issue of preemption under the ADA was an issue of nationwide magnitude in need of clarification in the courts of Nevada.

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<sup>1</sup> By Amanda Ireland

<sup>2</sup> Justice Pickering voluntarily recused herself from participation in this decision.

### A. Preemption

The Court reviewed the question of preemption de novo, noting that under the Supremacy Clause of the United States Constitution state law must yield when it frustrates or conflicts with federal law.<sup>3</sup> This petition involved conflict preemption, concerning whether, in view of the ADA's purpose and intended effects, Mandalay's state law claims posed an obstacle to the accomplishment of Congress's objectives in enacting the ADA.

As a threshold matter, the Court noted the "two cornerstones" of preemption: first, that "the purpose of Congress is the ultimate touchstone in every pre-emption case."<sup>4</sup> Second, a presumption against preemption arose out of respect for state sovereignty when Congress legislates in fields traditionally occupied by the states. This petition concerned Congress's legislation in the area of disability discrimination, a legislative landscape not traditionally occupied by the states, so the Court found the presumption against preemption did not apply with particular force in this matter.

### B. The ADA

Reviewing the purposed and intended effects of the ADA, the Court found the goal of the ADA to be twofold: to not only remedy discrimination against disabled individuals but to prevent it. The ADA had a comprehensive scope covering discriminatory practices disabled people faced including access to public accommodations.<sup>5</sup> Congress also designed the ADA to prevent discrimination stemming from neglect and indifference as well as intentional discrimination. So when, as in this case, a facility was not constructed to be readily accessible to individuals with disabilities, the owner was liable for unlawful discrimination regardless of intent.<sup>6</sup> The Court noted that there were no provisions permitting indemnification or allocations of liability between various entities subject to the ADA, except for in landlord-tenant relationships.<sup>7</sup>

### C. Mandalay's Indemnification Claim

Rolf Jensen argued that indemnification claims such as Mandalay's were preempted because they diminished owners' incentive to comply with the ADA thereby frustrating Congress's goal of preventing disability discrimination. Mandalay argued that its indemnification claim actually advanced the purpose of the ADA because with indemnification, owners would be more likely to use consultants such as Rolf Jensen which would promote ADA compliance. Mandalay also argued it was unfair to bear the cost of the retrofit when Rolf Jensen was a direct factor causing the expenses and that indemnification did not deprive disabled persons the right to seek relief for violations of the ADA.

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<sup>3</sup> Nanopierce Tech. V. Depository Trust, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007).

<sup>4</sup> Wyeth v. Levine, 555 U.S. 555, 565 (2009)(*quoting* Medtronic, Inc. v. Lohr, 521 U.S. 470, 485 (1996)).

<sup>5</sup> PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001).

<sup>6</sup> 42 U.S.C. §§ 12182(a); 12183(a)(1) (2006).

<sup>7</sup> 28 C.F.R. § 36.201(b) (2010).

The Court agreed with other courts that “flatly rejected” the type of indemnification claim brought by Mandalay. In the leading case, the Fourth Circuit reasoned that permitting an owner to, in essence, circumvent responsibility for its violations of the ADA and Fair Housing Act through an indemnification claim would lessen the owner’s incentive to ensure compliance, so such claims were preempted.<sup>8</sup> Likewise, federal district courts had uniformly concluded that owners’ indemnification claims for their own ADA violations undermine the goals of the ADA. The Court concluded that such claims would allow owners to contractually maneuver themselves into a position where, in essence, they could ignore their nondelegable responsibilities under the ADA. Thus, the Court held that the ADA preempts indemnification claims brought by owners for their violations because such claims would pose an obstacle to the ADA.

The Court disagreed with Mandalay’s assertion that permitting indemnification claims would promote ADA compliance. Owners sought advice to aid in their duty to comply with the ADA: an indemnification mindset would have a debilitating effect on ADA compliance, as illustrated by the numerous ADA violations in this case. The surest way to ensure compliance would be to hold owners’ risks of noncompliance firmly in place.

The Court also disagreed with Mandalay’s contention that preemption was unfair, noting that a highly sophisticated entity with ultimate authority over all construction decisions, such as Mandalay, was in the best position to prevent violations. Rolf Jensen was not immunized from liability for any role in the Mandalay violations, because its liability would run to disabled individuals rather than to Mandalay. Further, the Court found that although indemnification did not directly interfere with the rights of disabled individuals to obtain relief under the ADA, the goal of the ADA was preventative as well as remedial, and Mandalay’s indemnification claim would thwart the prophylactic aspects of the ADA.

Finally, the Court found unavailing the authorities that Mandalay “patched together” to seek allocation of responsibility for complying with the ADA, such as the landlord tenant exception, and the suggestion that the ADA created tort liability, which traditionally allowed indemnification.

Mandalay’s remaining claims for breach of contract, breach of express warranty, and negligent misrepresentation were also preempted by the ADA, because these claims were in substance merely a reiteration of Mandalay’s claim for indemnification.

## **Conclusion**

The Court granted Rolf Jensen’s petition for extraordinary relief and issued a writ of mandamus to direct the district court to grant Rolf Jensen’s motion for summary judgment. The Court concluded that Mandalay’s state law claims for indemnification posed an obstacle to the objectives of the ADA and therefore were preempted.

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<sup>8</sup> Equal Rights Ctr. v. Niles Bolton Assoc.’s, 602 F.3d 597 (4th Cir. 2010).