Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders

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Therefore the Norris-LaGuardia Act provisions must be accommodated with those of the RLA so that the duty imposed by § 2 (First) would be enforcable through the issuance of an injunction. However, it may be asked whether the Court in effect thwarted self-help through injunctive relief proscribed by the Norris-LaGuardia Act? Are the federal district courts to return to the injunction business? If the RLA has become ineffective, is it not for Congress and not the Court to redress the deficiencies? But perhaps, the federal district courts are capable of making inquiries into a good faith situation presented in the RLA as readily as they have inquired into § 8 Norris-LaGuardia Act situations.

In retrospect, these questions cannot be answered today. Rather, they await the decisions to be rendered by federal district courts. Hopefully those decisions will not be substantive labor policy determinations but will rather yield to the administrative expertise established by Congress.

John W. Oakley

RECENT STATUTORY DEVELOPMENTS CONCERNING THE LIMITATIONS OF ACTIONS AGAINST ARCHITECTS, ENGINEERS, AND BUILDERS

The imposition of liability on those who design or construct buildings and other structures on real property is in need of re-examination in light of recent legislation in a majority of states which tends to severely limit the duration of civil liability of architects,

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63 It has been recognized by at least one student of labor relations that: [C]ongress has not hesitated to provide a remedy when the purposes of the [RLA] could not be achieved through voluntary action. When "free" collective bargaining would not work, Congress made it compulsory; when carriers would not stop interfering with unions, penalties were added; when quarrels over the identity of the bargaining agent and the scope of the bargaining unit blocked negotiations, Congress provided for independent determination of such issues; and, when the parties were unable to settle grievances, Congress provided for the mandatory resort to adjustment boards. ... Wisehart, 66 Mich. L. Rev., supra note 11, at 1710.

64 29 U.S.C. § 108 (1964) provides in pertinent part as follows: No restraining order or injunctive relief shall be granted to any complaint who has failed to comply with any obligation ... or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.
The constitutionality of this type of legislation generally, and Kentucky Revised Statutes [hereinafter referred to as KRS] § 413.135 more specifically is a question which must be dealt with by the judiciary. Reconciling such statutes with generally accepted theories of limitation of actions on the one hand, and notions of constitutional due process on the other, would be a necessary prerequisite to judicial approval. But can this be done?

A brief historical analysis reveals that in common law England, architects and builders were immune from civil liability to third persons who were injured as a result of their negligence in design or construction. This rule was based on the concept of privity of contract and without this relationship, one could not sue. This, in effect, made the architect, engineer, or builder liable to only one party—his employer. This same view was entertained by early American courts. Privity of contract was the only basis for suits against an architect or builder. As a federal court of appeals noted in a typical case:

After completion and acceptance of a building, the liability of a builder for accidents caused by defective construction ceases, and the liability attaches to the owner, whether the damage is attributable to his own negligence [in maintaining the structure] or to that of the builder.

The rationale most often relied upon by such courts was the fear of a never-ending stream of suits in these matters.

In 1916, with the New York Supreme Court’s decision in McPherson v. Buick Motor Co., the assault was launched upon the privity of contract requirement. This “assault,” however, was unable to pierce the immunity of architects and builders until 1957 in the case of Inman.
v. Binghampton Housing Authority,\textsuperscript{7} where the absolute defense of privity of contract was finally destroyed by the New York court, and in its place was established the "latent defect" standard. Thus, applying this new doctrine, an injured third party could sue an architect or engineer even after the structure was accepted by the owner, if the injury were the result of a hidden danger. In the ten years following the Inman decision, the immunity from civil liability enjoyed by architects, engineers, and builders was gradually eroded to the point where they became subject to general liability for their own negligence in actions by injured third parties.\textsuperscript{8} This is not to say that architects or builders became guarantors of their work, any more than a doctor guarantees a cure, or a lawyer guarantees to win a case. It simply meant that architects, engineers, and builders would now be held to the exercise of ordinary skill and care commensurate with standards of their profession.\textsuperscript{9} These swift judicial developments in the late '50's and early '60's had a disconcerting effect upon members of these three professions. And quite understandably so; for not only had the range of liability been widened to include injured third parties, but the duration of such liability had been lengthened substantially. Since statutes of limitation did not begin to run until actual injury occurred, an architect could conceivably be subject to liability throughout his entire life. No actionable claim would arise until after injury, and that might be ten, twenty, or even thirty years or longer after completion of the architect's services.

In the mid 1960's, faced with what they considered to be an intolerable situation, architects, engineers, and builders, through their respective professional organizations, began a drive to alleviate the undesirable consequences of this wide-spread judicial legislation. The American Institute of Architects [hereinafter AIA], along with the National Society of Professional Engineers and the Associated General Contractors, began to push for model legislation which would substantially curtail the limitless duration of liability imposed upon its members. In the span of approximately two years, 1965-67, thirty jurisdictions enacted or amended statutes of limitations specifically for architects, engineers, and builders.\textsuperscript{10} Though these statutes are not identical in every respect, there is one characteristic common to all. Each of them sets a definite period of years beginning at the

\textsuperscript{7} 143 N.E.2d 895 (N.Y. 1957).
\textsuperscript{8} Chapel v. Clark, 76 N.W. 62 (Mich. 1898); see also Palmer v. Brown, 273 P.2d 206 (Cal. 1954).
\textsuperscript{9} W. Prosser, Law of Torts 164 (3d ed. 1964).
\textsuperscript{10} Supra note 1.
time of completion or acceptance of the work, after which no civil actions against the architect, engineer, or builder may be brought. The present Kentucky statute, KRS § 413.135, is typical:

Action for damages arising out of injury resulting from construction of improvements to real estate.

(1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of and deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five years following the substantial completion of such improvement.

(2) Notwithstanding the provisions of subsection (1) of this section, in the case of such an injury to property or the person or wrongful death resulting from such injury, which injury occurred during the fifth year following substantial completion of such improvement, an action to recover damages for such injury or wrongful death may only be brought within one year from the date upon which such injury occurred (irrespective of the date of death), but in no event may such an action be brought more than six years after the substantial completion of construction of such improvement.¹¹

The important factor to note about this statute is that in no instance may an action be brought against an architect, engineer, or builder after a period of six years (actually five years with a one-year grace period) measured from the date of “substantial completion” of the project. This is a radical departure from the general theory of limitations of actions:

[T]he basic principle most generally relied on by the authorities is that statutes of limitation are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidences are lost or all the facts have become obscure from the lapse of time, or the defective memory or death, or removal of witnesses.¹²

The general effect is that “a statutory limitation reduces to a fixed interval the time between the accrual of the right and the commencement of the action.”¹³

¹¹ KRS § 413.135 (1968).
¹² 53 C.J.S. Limitations of Actions § 1 (1948).
Therefore, the basic premise underlying any theory of limitations is that the cause of action must accrue before the time period begins to run. The cause of action is said to accrue at different times for different actions, but statutes uniformly hold that the time limitation does not begin to run until after a plaintiff has suffered injury and has thus acquired the right to sue. KRS § 413.135 and the corresponding statutes and amendments in the other jurisdictions with similar laws are in direct conflict with this basic theory of limitations of actions. These statutes make no mention of the accrual of the cause of action but speak rather in terms of "substantial completion" of the construction.

The effect of this inadequacy is immediately clear. A statute of limitation is apparently intended to affect only the time allowed for exercising an existing right, cutting off the remedy only after a reasonable time for action has elapsed. However, KRS § 413.135 and other statutes similar to it serve to abolish the right of action before it even comes into existence. It is well settled in this jurisdiction and others that to satisfy state and federal requirements of due process, new statutes of limitation made to apply to existing causes of action must allow "a reasonable time after their passage for parties to bring an action." If, then, the allowance of too short a period of time to bring an action is unconstitutional, wouldn't the barring of a cause of action before it even arises be equally unconstitutional, if not more so?

In addition to these due process considerations, certain other constitutional implications are apparent from a review of this type of limitation. Sections three and fifty-nine of the Kentucky Constitution specifically prohibit any form of legislation which would arbitrarily or without reasonable justification discriminate against one class of persons while favoring another.

§ 3. All men, when they form a social compact, are equal and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration, or amendment.

14 For example in malpractice actions, the cause of action is said to accrue at the date of the wrongful act; but in negligence causing personal injury, the cause of action does not accrue until injury is actually sustained.

15 For example, KRS 413.120 begins: "The following actions shall be commenced within five years after the cause of action accrued..." (emphasis added). See also Hernandez v. Daniel, 471 S.W.2d 95 (Ky. 1971).

16 See Sammons v. Turner Elkhorn Mining Co., 430 S.W.2d 340 (Ky. 1968), and Heath v. Hazelip, 167 S.W. 905 (Ky. 1914).
§ 59. Limitations upon. The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

... .

(5) Limitation. To regulate the limitation of civil or criminal causes.

The "special acts" or "special laws" were defined by the Court of Appeals in the case of City of Louisville v. Klusmeyer:

[T]he term "special law" is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others... Both are prohibited not only by § 59 of our constitution but by the guarantees of equal protection of the Fourteenth Amendment of the Federal Constitution and § 3 of the Kentucky Constitution.17

Does KRS § 413.135 qualify as special legislation under the Court's definition? Consider this hypothetical situation: five years and one day after "substantial completion" of an improvement to real property, part of the structure collapses, injuring a passer-by. Obviously, under the existing statute, the injured party's action against any architect, engineer, or contractor would be forever barred. But does this same statute also bar a possible action against a materialman, surveyor, or even the owner himself? If the wall collapsed because of defective materials used in its construction, is civil action against the manufacturer or supplier of those materials also prohibited? A careful reading of the statute itself would suggest that it is not.18 Clearly the statute would not apply as against the owner of such a building, and yet it would seemingly cut off any right to indemnity he might have against the architect, engineer, or contractor (but not against a materialman, surveyor, etc.). Negligence on the part of any of these parties, either jointly or severally, could conceivably lead to the collapse of a building; but KRS § 413.135 would bar civil action against only the architect, engineer, or contractor. Arbitrary? Unreasonable? Quite probably so.19 The Court very early ruled upon an analogous statute of limitations in City of Louisville v. Kuntz:

When the constitution prohibits the legislature from passing special laws upon any given subject, it means that all laws upon that subject shall operate alike upon all, whether individual, or corporate, public or private. It is a safeguard provided by the constitution for the protection of the weak as well as the strong.

17 City of Louisville v. Klusmeyer, 324 S.W.2d 831, 834 (Ky. 1959).
18 The Illinois Court reached this same conclusion in the case of Skinner v. Anderson, 231 N.E.2d 588 (Ill. 1967) at 591.
19 Id.
The legislature has power to make laws fixing the time when an action must be brought, but they must be general in their character, as the constitution prohibits the legislature from discriminating in favor of or against individuals or classes, when it declares that there shall be no special legislation on the subjects enumerated in § 59. . . .

In conclusion, it is apparent that statutes of limitation such as KRS § 413.135 are in direct opposition to general concepts of limitations of actions and very probably violate state and federal notions of due process as well as specific state prohibitions against "special laws." It is not surprising, then, that one of the two courts to consider such a statute thus far has ruled it unconstitutional. The Kentucky Court of Appeals will most assuredly be passing on this question shortly, as the five- to six-year limitation begins to run on projects completed in 1966 (year of passage of KRS § 413.135). When that time comes, the Court will be hearing the same arguments advanced by the AIA and others to promote the original passage of the statute, videlicet:

(1) The threat of continual liability hanging over the head of the professional architect, engineer, or builder throughout his lifetime.

(2) A lengthy passage of time prejudices the defendant in his defense, in that witnesses are gone, evidence is missing, and records are lost.

(3) Over the years, the question of improper maintenance by the owner replaces the factor of negligent design or construction as the primary cause of structural failure.

Persuasive as these arguments may be in theory, they can and should be countered, when the question arises, by more pragmatic considerations:

(1) Professional liability insurance is a reality to which doctors and lawyers can attest. This insurance is available to architects, engineers, and builders and, as in other similar situations, its cost is passed on to the consuming public.

(2) A lengthy passage of time hinders the plaintiff just as much as it does the defendant, if not more so. It is the plaintiff who bears the burden of proof, and proving negligence on the part of an architect after a number of years will not be an easy task.

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20 City of Louisville v. Kuntz, 47 S.W. 592 (Ky. 1898).
(3) Because the burden of proving actionable negligence is on the shoulders of the plaintiff, it is up to him to show that a defect in design or construction, and not improper maintenance, was the cause of injury. Unless he does so, his claim should fail. But if design or construction negligence is the cause of injury, and is so proven, the plaintiff's claim should not be barred before it even comes into existence.

Architects, engineers, and builders should be subject to liability for negligence only if they fail to act in a reasonable manner, under and in accordance with the standards of their respective professions. But when an innocent third party is injured as a result of such negligence, his cause of action should be barred by statute of limitations only if there were an inordinate delay in pressing the claim; it should not be possible that the injured party's right to redress in the courts could be barred even before it comes into existence.

George Anthony Smith