IADC Newsletter

May, 2002
No. 1

Construction Law and Litigation Committee

In This Issue

Mr. Sido is an active construction law attorney. He is a frequent author and lecturer; he was a panelist at the February 2002 IADC meeting on Effective Use of Experts in Catastrophic Building Failures.

The IADC

Whistler is Waiting!! Mark your calendar for July 6-12, 2002

Don't miss your committee's business meeting at the annual meeting scheduled for Tuesday, July 9.

The International Association of Defense Counsel is the oldest and most prestigious international organization of attorneys representing corporations and insurers.

Court Interprets FHAA "Design and Construction" to Mean "Design *or* Construction"

By Kevin R. Sido

In *Doering v. Pontarelli Builders, Inc.*, 2001 WL 1464897 (N.D. Ill. Nov. 16, 2001) a district court denied defendant/architect's motion to dismiss; the architect contended that the Fair Housing statute did not apply. The court construed the statute to recognize possible liability.

The statute, 42 U.S.C. § 3604, prohibited discrimination in the sale or rental of housing; §3604(f) prohibits discrimination involving the "design and construction of covered multi-family dwellings." Elsewhere, the statute refers to a "failure to design and construct those dwellings" to be accessible in a number of certain respects. The architect contended that it did not both design *and* construct, but only did design work. The memorandum opinion and order discusses two cases which appeared to support the architect's position, but also six decisions which reached the opposite result. In a well-reasoned opinion, the court noted that the reason the statute used conjunctive language was because a design that is not constructed could hardly give rise to discrimination. Further, "the section at issue, significantly, is not a description of *who* is liable, rather it is a description of what actions constitute discrimination." [Emphasis in original.]

Recent Interpretations Concerning Illinois Statute of Limitations for Construction

Illinois adopted many years ago a statutory scheme imposing

a limitations period, as well as a corresponding repose period, for various construction activities. As time has gone on, courts have taken various stances on precisely what is covered.

The statute of limitations provision in Section 13-214(a) provides:

> Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning supervision, observation or management of construction, or construction of an improvemer to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omissior 735 ILCS 5/13-214(a).

The statute of repose provides slightly different language in Section 13-214(b):

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 hears from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section. Notwithstanding any other provision of law, contract actions against a surety on a payment or performance bond shall be commenced, if at all, within the same time limitation applicable to the bond principal. 735 ILCS 5/13-214(b).

Other subsections in Section 13-214 provide for a tolling for minors and exceptions for express warranties or fraudulent concealment.

The words "design, planning, supervision, observation or management of construction, or construction of an improvement to real property" have been construed in several recent decisions. For example, in *Litchfield Community Unit School District No.12 v. Specialty Waste Services,* 325 Ill.App.3d 164, 757 N.E.2d 641, 644 (5th Dist. 2001) the complete removal of asbestos was held to be "mere maintenance" which did not invoke section 13-214(a). Thus, the ordinary ten-year breach of written contract statute applied). Similarly, in *Bailey v. Allstate Development Corporation*, 316.App.3d 949, 738 N.E.2d 189 (1st Dist. 2000), the performance of window washing services on an office building did not qualify as a "construction of an improvement to real property" within section 13-214(a). Thus, the 4-year limitations period did not apply but instead the typical 2-year limitations period applicable to personal injury actions. The definition of "construct" from *Black's Law Dictionary* at p. 312 (6th Ed. 1990) figured prominently in the court's analysis.

On the other hand, in *Blinderman Construction Co., Inc. v. Metropolitan Water Reclamation District of Greater Chicago,* 325 Ill. App. 3d 362, 757 N.E.2d 931 (1st Dist. 2001) a contractor asserted that its breach of written contract agreement was timely filed against a sanitary district owner under the ten-year statute of limitations of written contracts. The owner contended, on the other hand, that the four-year statute of limitations of §13-214(a) applied because it supervised or managed construction and prepared drawings and specifications and its engineer had authority to impose liquidated damages for delay and to order extra work and direct the time in which it was to be performed. Thus, given those facts, the action was dismissed as untimely. A key determination is whether or not the owner participated in construction activities; simply because the dispute arises out of

a construction project does not mean that one who did not actually participate in construction activities is nevertheless swept into §13-214(a). *Id.* at 757 N.E.2d 937 citing *Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 114 Ill. 2d 252, 500 N.E.2d 34, 39. A bonding company which issued a performance bond was not engaged in the "design, planning, supervision, observation or management of construction" and thus not within §13-214(a); a key point is the person's activity, not their status. In any event, whether or not §13-214(a) applies can be a substantial question of fact, ultimately to be determined by the finder of fact. *St. Louis v. Rockwell Graphic Systems*, 153 Ill. 2d 1, 605 N.E.2d 555 (1992) (reversing summary judgment).

Various cases have determined what is to be considered "an improvement to real property". Road work is within the statute. *Billman v. Crown-Trygg Corp.*, 205 Ill.App.3d 916, 563 N.E.2d 903 (1st Dist. 1990) Excavation is an improvement to realty. *American Nat'l Bk. v. Booth/Hansen Assoc., Ltd.* 186 Ill.App.3d 865, 542 N.E.2d 925 (1st Dist. 1989). The improvement need not be to realty owned by the plaintiff, but simply any real property involved in the work. *Continental Ins. Co. v. Walsh Const. Co.*, 171 Ill.App.3d 135, 524 N.E.2d 1131 (1st Dist. 1988).

Kevin R. Sido, Partner
Hinshaw & Culbertson
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601
312-704-3000 (Voice)
312-704-3001 (Fax)