SB

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Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establisher a limitation period governing the foreclosure of either legal or equitable mortgages. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (this section), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Slipping on ice as breach of implied contractual duty.— Where, in a suit for injuries suffered by plaintiff when she slipped and fell on ice which had accumulated near the entrance to a lodge where she had been a paying guest, plaintiff contended that she was injured by reason of defendants' breach of their implied contractual duty as innkeepers to keep their premises in reasonably safe condition for their guests and therefore, that the six-year statute of limitations should control it was held that the controlling statute of limitations was the two-year statute governing tort actions and not the six-year statute relating to actions on contract Stinson v. Fowler, Sup. Ct. Op. No. 194 (File No. 341), 389 P.2d 3 ( ).

Cited in Oaks v. Rojcewicz, Sup. Ct. Op. No. 318 (File No. 580), 409 P.2d 839 (1966); Palfy v. Hepp, Sup. Ct. Op. No. 518 (File No. 942), 443 P.2d 310 (1968).

Sec. 09.10.055. Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or con-

trol as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company. (§ 2 ch 61 SLA 1967)

Legislative committee report.—For report on ch. 61, SLA 1967 (HB 160), see 1967 House Journal, pp. 365-366.

Sec. 09.10.060. Actions to be brought in three years. (a) No person may bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in his official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within three years. This section does not apply to an action for an escape.

(b) No person may bring an action upon a statute for penalty or forfeiture where the action is given to the party aggrieved or to that party and the state unless brought within three years, except where the statute imposing it prescribes a different limitation. (§ 1.06 ch 101 SLA 1962)

Sec. 09.10.070. Actions to be brought in two years. No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years. (§ 1.07 ch 101 SLA 1962)

Cross reference.—As to limitation on action against subdivider in contested transactions, see AS 34.55.030(f).

The policy of the law is to allow a reasonable but definitely limited time for the bringing of an action after which the matter is put to rest. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

The purpose of statutes of limitation is to bar actions and not to suppress or deny matters of defense; and it is a general rule that such statutes are not applicable to defenses, but apply only where affirmative relief is sought. It should be noted, however that the rule under consideration applies only in the case of strict defense, and, in the absence of statute, does not apply to cases of set-off or counterclaim. McDonnell v. Hoadley, 7 Alas. L.J. No. 3, p. 433 (Sept. 20, 1968).

The goal of the statute of limitations and the substituted service procedure is to provide speedy adjudication of claims. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

The purpose of statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from the prosecution of stale claims. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Section applies to action for unlawful imprisonment. — Allegation that defendant in his capacity as United States Attorney caused plaintiff to be arrested on criminal complaints sworn out by codefendants "without probable cause or investigation" purports to state a claim in tort against defendant subject to a two-year period of limitation under this section. Williams v. Coughlan, 17

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA AT PALMER

THIRD JUDICIAL DISTRICT

'79 APR 27 P[illegible]

PAUL WILSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, et al.,

Defendants.

YOUNG, BELL AND GAGNON, INC. ANCHORAGE, ALASKA

Case No. 77-5753

Filed in the Trial Courts STATE OF ALASKA THIRD DISTRICT

APR 21 1979

Clerk of the Trial Courts

By _____ Deputy

JULIE COOPER, Personal Representative of the Estate of LEROY COOPER, Deceased,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, et al.,

Defendants.

Case No. 77-5754

PAUL WILSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, et al.,

Defendants.

Case No. 78-2380

JULIE COOPER, Personal Representative of the Estate of LEROY COOPER, Deceased,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, et al.,

Defendants.

Case No. 78-2382
Consolidated

DECISION AND ORDER

ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant EARL [illegible]IGHT, INC., has moved for partial summary judgment dismissing it from these consolidated actions arguing that A.S. 09.10.055 precludes any claim. Plaintiff opposes, arguing that A.S. 09.10.055 is unconstitutional because

it denies equal protection of the law[1] and, as well, constitutes a grant of a special immunity.[2] This court concludes that the statute is unconstitutional under equal protection standards[3] and that the motion for partial summary judgment should be denied.

A.S. 09.10.055 creates a special immunity from contract or tort liability for a certain class of persons by limiting the time for bringing such an action after "substantial completion of construction of an improvement" to real property, after which time the action is barred. The particular class of persons protected are those in charge of the "design, planning, supervision or observation of construction or construction of an improvement to real property." A.S. 09.10.055. Unless the statute is invalid, the parties agree that EARL & WRIGHT, INC. is a member of the protected class, and thus, plaintiffs' claim is untimely.

As a result of State v. Erickson 574 P.2d 1, 12 (Alaska 1978), equal protection claims must be evaluated by a single test; that is, the classification must bear a fair and substantial relation to a legitimate governmental objective. This test requires analysis of the purpose of the legislation, whether the purpose is within the legitimate police power of the State,

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1. Alaska Const. Art I, §1.

2. Alaska Const. Art I, §15.

3. This court does not reach the special immunity issue, although it appears that the standard of analysis approximates that of the equal protection model.

whether the means substantially further the purpose, and finally, whether the means chosen outweigh the infringement of the right.[5]

The constitutionality of statutes similar to A.S. 09.10.055 has been adjudicated in many jurisdictions[6] utilizing many differing standards of equal protection analysis. Some statutes have been declared constitutional under less demanding standards (Regents etc. v. Hartford Acc. & Indem. Co. 581 P.2d 197 (Cal. 1978); Rosenberg v. Town of North Bergen 293 A.2d 662 (N.J. 1972), and under standards which appear similar to that employed by the Alaska Supreme Court. Howell v. Burke 568 P.2d 214 (N.M. App. 1977), N.M. cert. denied 569 P.2d 413. However, other statutes have been deemed violative of equal protection standards which seem equivalent to that of Alaska (Fujioka v. Kam 514 P.2d 568 (Ha. 1973) or less rigorous than that applied in this jurisdiction. Kallas Millwork Corp. v. Square D. Co. 225 N.W. 2d 454 (Wis. 1975).

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4. This standard is flexible, depending on nature of the right involved. Thus, a heavier burden satisfying the strictest standard of scrutiny is placed on a party seeking to justify a classification affecting nonfederal fundamental rights or nonfederal suspect categories under the Alaska Constitution. See Lowell Thomas et al. v. Edgar Bailey (Op. No. 1835, April 10, 1979) concurring opinion of Rabinowitz at 46. Here, however, no fundamental rights or suspect categories are involved and the least exacting standard is appropriate. This lesser standard requires that

> the means used must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Wylie v. State 516 P.2d 142, 145 (Alaska 1973), quoted in Isakson v. Richey 550 P.2d 359, 362 (Alaska 1976).

Isakson v. Richey, supra, at 362, also declares that the judiciary of this state will no longer hypothosize facts in order to sustain legislation.

5. Considerations similar to those noted in footnote 4 appear applicable to the balancing analysis.

6. See Reply memorandum of EARL & WRIGHT, INC., dated January 31, 1979, Appendix A.

The court has reviewed the prior state court decisions on this issue and, based on that examination, concludes that the better view requires invalidation of the statute. Skinner v. Anderson 231 N.E. 2d 588 (Ill. 1967); Fujioka v. Kam, supra; Kallas Millwork Corp. v. Square D. Co., supra. That is, the granting of the special immunity to the protected class, but denial to others similarly situated (e.g., materialmen, owners), does not rest on a ground of difference having a fair and substantial relation to the object of the legislation.[7] Since the Alaska Statute does not withstand equal protection scrutiny, the defendant EARL & WRIGHT, INC.'S motion for partial summary judgment is denied. This order is not a final judgment within the meaning of Civil Rule 54(b).

DATED at Anchorage, Alaska this 24TH day of April, 1979.

MARK C. ROWLAND
Superior Court Judge

I certify that on 4-25-79
a copy of this document was sent to:
☑ Attorney(s) of Record, or
☐ Other:
at address of record.
D.O.E.
Deputy Clerk

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7. The parties have not been able to provide any legislative history which indicates that the purposes underlying the Alaska Statute differ markedly from the purposes discussed in several of the state court adjudications reviewed by this court.

IN THE SUPREME COURT OF THE STATE OF ALASKA

EARL & WRIGHT, INC.,	)
Petitioner,	)
vs.	)
PAUL WILSON and JULIE COOPER, personal representative of the Estate of LEROY COOPER, Deceased,	)
Respondents.	)

File No. 4664

ANSWER TO PETITION FOR REVIEW

RICE, HOPPNER, HEDLAND
FLEISCHER & INGRAHAM
1016 W 6th, #400
Anchorage, Alaska 99501

Attorneys for Respondents

Filed this ____ day of May, 1979, in the Supreme Court of the State of Alaska

ROBERT BACON
CLERK OF THE SUPREME COURT

BY: _____
DEPUTY CLERK

SUBJECT INDEX

ALASKA CONSTITUTION, ARTICLE I, §1 AND §15

ARTICLE I: Declaration of Rights

Section 1: Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Section 15: Prohibited State Action. No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall be passed. No conviction shall work corruption of blood or forfeiture of estate.

STATUTE

A.S. 09.10.055

Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficienty in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, acting out of a deficienty; or (3) for injury to the person or for wrongful death arising out of such deficienty, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death. which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial, completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Is interlocutory review appropriate at this stage in the litigation?

(2) Does A.S. 09.10.055 grant a special immunity to architects in violation of the Alaska Constitution, Article I, Section 15?

(3) Does the architects' immunity from suit, under A.S. 09.10.055, six years after substantial completion, deny respondents the equal protection of the law, in violation of the Alaska Constitution, Article I, Section 1?

REVIEW SHOULD BE DENIED AT THIS POINT IN THE LITIGATION

As discussed herein, A.S. 09.10.055, the Alaskan immunity for architects and contractors (referred to together herein as "architects") is clearly unconstitutional under the standards enunciated in Isaacson v. Rickey, 550 P.2d 359 (Alaska 1977). An interlocutory appeal at this point in the litigation will simply delay trial of the matter in superior court.

Further, despite the plaintiffs' best efforts, petitioner Earl & Wright may prevail at the trial of this matter, not because of the immunity statute, but because plaintiffs may not adequately prove the liability of Earl & Wright. Were this event to occur, obviously Earl & Wright would have no need to secure review of the decision of the superior court. Cf. Johnson v. State, 577 P.2d 706 (Alaska 1978).

STATEMENT OF THE CASE

For purposes of the Petition for Review by Earl & Wright and respondents' Answer thereto, respondents Cooper and Wilson adopt the petitioner's statement of the case, at page 2 of its Petition, with the following clarifications. First, Earl & Wright has previously admitted in this matter that it did design all or part of the King Salmon Platform, and not just the structural drawings necessary for construction of the Fuller Compressor Room. Secondly, Cooper and Wilson do not have adequate knowledge from which to determine that the entire King Salmon Platform was completed and operational in 1969, but will assume it was so completed for purposes of this Answer.

I. A.S. 09.10.055 IS AN UNCONSTITUTIONAL GRANT OF A SPECIAL IMMUNITY IN VIOLATION OF THE ALASKA CONSTITUTION, ARTICLE I, SECTION 15

Art. I, §15 of the Alaska Constitution states in part, ". . . [N]o law making any irrevocable grant of special privileges

or immunities shall be passed. . . ."

Statutes of limitation usually encourage plaintiffs to enforce their rights in a timely fashion. Statutes of limitation penalize plaintiffs who sit on their rights. See Byrne v. Ogle, 488 P.2d 716, 718 (Alaska 1971). The architect's statute, A.S. 09.10.055, however, extinguishes certain plaintiffs' rights even before those rights come into existence, without regard to whether the plaintiffs were, or would have been, diligent in pressing their claims in a timely fashion. Such a statute is in fact a grant of immunity. Fujioka v. Kam, 514 P.2d 568, 570, 571 (Haw. 1973); Pacific Indem. Co. v. Thompson-Yeager, Inc., 260 N.W. 2d 548, 555 (Minn. 1977). The Alaska Statute is similar to the former Illinois statute which provided:

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or for wrongful death, arising out of the defective and unsafe condition of an improvement to real estate, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision or construction or construction of such improvement to real property, unless such cause of action shall have accrued within four years after the performance or furnishing of such services and construction. This limitation shall not be available to any owner, tenant or person in actual possession and control of the improvement at the time such cause of action accrues.

Ill. Rev. Stat. 1965, Ch. 83, para 24(f). The Illinois Supreme Court noted that, "the effect of [the section] of the Limitations Act is to grant to architects and contractors a special or exclusive immunity." Skinner v. Anderson, 231 N.E.2d 588, 590 (Ill. 1967). The Illinois constitutional prohibition forbade the "granting to any corporation, association or individual any

special or exclusive privilege, immunity or franchise whatever." Id at 590. (emphasis supplied.) The Illinois constitutional language is remarkably similar to Alaska's prohibition against any "grant of special privileges or immunities." See also Pacific Indem. Company v. Thompson-Yeager, Inc., 260 N.W. 2d 548, 555 (Minn. 1977).

A.S. 09.10.055 is an unconstitutional irrevocable grant of a special immunity to architects and contractors in violation of Article I, Section 15 of the State Constitution. Thus, defendant Earl & Wright's motion for summary judgment based on the statute was properly denied.

II. A.S. 09.10.055 IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION UNDER THE ALASKA CONSTITUTION

The denial by A.S. 09.10.055 of equal access to the courts might be tested under either the "compelling state interest test" or the "rational basis" test. See Bush v. Reid, 516 P.2d 1215, 1220-21 (Alaska 1973).

Assuming simply for the sake of argument that the appropriate constitutional test is not the compelling state interest test, the right of redress for tortious conduct and the right of access to a judicial forum for the adjudication of liability and damages arising from tortious conduct are important rights invoking the "fair and substantial relationship" test. Concurring opinion of Justice Rabinowitz and Chief Justice Boochever, DeHussor v. City of Anchorage, 583 P.2d 791, 793-98 (Alaska 1978). The test of the statute is more particularly described in Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) as follows:

> Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification 'must be reasonable, not arbitrary, and must rest upon some difference having a fair and

> substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'
>
> It is this more flexible and more demanding standard which will be applied in future cases if the compelling state interest test is found inappropriate. (Citation omitted) (Emphasis supplied)

As a part of this standard, the Supreme Court "will no longer hypothesize facts which would sustain otherwise questionable legislation. . ." Id. at 362.

The DeHusson concurring opinion involved different procedural requirements for claims asserted against governmental and non-governmental defendants. The concurring opinion notes that the fortuity or ill luck of being injured by a non-governmental or, instead, a governmental tortfeasor makes no difference to the injured party; the injury and the need for recompense are the same. Access to a judicial forum for litigation of liability and damages is important to the injured party regardless of the governmental or non-governmental status of the tortfeasor. It follows that an injured party has an equal interest in access to a judicial forum regardless of whether his harm was caused by one type of non-governmental tortfeasor or another type of non-governmental tortfeasor, whether architect or non-architect.

The Alaska immunity statute for contractors and architects, A.S. 09.10.055, totally prohibits suits against persons performing or furnishing the design, planning, supervision or observation of construction, or construction of improvements to real property if the injury occurs or cause of action accrues more than six years after substantial completion of the improvement, unless injury occurs in the sixth year itself, even though the building itself is designed and constructed to last and be used for a longer period. Significantly, the immunity does not extend to owners or tenants occupying the property, or to persons supplying materials used in the construction of the improvement,

or to individuals who design, plan, supervise, observe or construct various personal property items such as motor vehicles, airplanes and construction equipment.

From the victim's point of view, the arbitrary quality of this classification is well noted in this example:

> If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that one event is more likely than the other to occur within four years after construction is completed.

Skinner v. Anderson, 231 N.E.2d 588, 591 (Ill. 1967).

A. Designers of Chattels, for Purposes of the Statute, are not Distinguishable from Architects.

There is no rational reason for discrimination between architects, on the one hand, and designers and manufacturers of chattels on the other hand. Whatever justification architects might advance to support A.S. 09.10.055, the same justifications would extend equally to the designers and builders of chattels. Some, including Earl & Wright, have argued that modern developments in tort law have so expanded the potential liability of architects that some counterbalance in protection such as the Alaska immunity statute is required. If this rationale is used to justify the immunity, the focus of inquiry should be on the liability of architects in Alaska, in particular, and not on trends and developments elsewhere in the country. To the extent which, for example, Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972) or Regents of Univ. of California v. Hartford Accident & Indem. Co., 131 Cal. Rptr. 112 (Cal. App. 1976) seem

persuasive, they should be viewed in the context of the imposition by New Jersey and California courts of strict liability on some builders in some situations. See Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1964) and Kriegler v. Eichler Homes Inc., 74 Cal. Rptr. 225 (Cal. App. 1969).[1/] Respondents Cooper and Wilson have found no Alaska cases imposing strict liability on architects, either within or after six years of substantial completion. One would assume then that Alaska requires only that architects exercise the reasonable care generally expected of those in this skilled business. See 5 Am. Jur. 2d, Architects §23; 19 Am. Jur. Trials, Architectual Malpractice §10; 25 ALR 2d 1085, Defective Plans, §3 and §5. Some legislatures may have found a need to change or shift liability from architects because of other rules, such as strict liability, imposed in their states. Alaska's choice not to enforce strict liability on architects or contractors suggests less need for A.S. 09.10.055 than that of other states.

Though it has imposed strict liability on manufacturers of chattels, Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969), Alaska has not limited the liability of chattel manufacturers to the six-year period beginning on the date of completion of the chattel. If either class of defendants needed an absolute six-year limit on liability, chattel manufacturers would need it more than architects because of the strict liability imposed on chattel manufacturers. The benefit of A.S. 09.10.055, however, is given by the legislature to the less deserving class.

Most courts considering similar statutes have focused

1/ Further the California statute upheld in Regents, supra, did not apply to personal injury or wrongful death.

on the arbitrary distinction between architects on the one hand and materialmen and occupiers of land on the other. In striking a similar Minnesota statute, the Minnesota Supreme Court saw,

> "no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers."

Pacific Indem. Co. v. Thompson-Yeager, Inc., 260 N.W. 2d 548, 555 (Minn. 1977). See also Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454 (Wisc. 1975) wherein the Wisconsin Supreme Court found its state's statute unconstitutional even though the test which it used in measuring constitutionality appears to be only that of whether there is any rational justification for the statute. This Wisconsin test indeed looks less demanding of the statute than that suggested by Isakson v. Rickey, 550 P.2d 359 (Alaska 1977).

Petitioner Earl & Wright has attempted to distinguish architects from materialmen and designers and manufacturers of chattels. Earl & Wright suggests that the mass production engaged in by those who design and produce chattels somehow sets them apart from architects. This distinction is certainly not as clear as Earl & Wright suggests. A drive through many housing developments in Anchorage will reveal many identically designed residences. It is obviously not uncommon for an architect to sell the same blueprints to many home builders, or to a developer who will repeat the design over and over. See e.g., Schipper v. Levitt & Sons, Inc., supra. Similarly, a contractor can mass-produce prefabricated housing modules for later transportation to homeowners' lots. Yet, despite the ability of the architects and contractors who engage in these practices to insure the quality control which Earl & Wright claims it cannot insure, A.S. 09.10.055 limits their liability to the six year period after substantial completion.

Petitioner Earl & Wright acknowledges that materialmen--a class of designers and manufacturers of chattels--are excluded from the benefit of A.S. 09.10.055. See Petition at 10. Petitioner notes, "The same manufactured item may be both a component of a structure and a chattel." Respondents agree. The chattel may be attached to the realty as a fixture, though the designer of the chattel will not necessarily know how its product will ultimately be used. The designer and its insurance actuary will not know how to plan for future liability. Will they get some advantage under the six-year limit because the product became a fixture, or will liability continue for two years from the date of injury, whenever that may be, because the product is a chattel? This possibility undermines Earl & Wright's arguments that A.S. 09.10.055 is a rational allocation of insurance risks.

B. Owners and Occupiers of Land, for Purposes of the Statute, are not Distinguishable From Architects.

Earl & Wright argues that the owner's acceptance and exercise of control over the realty improvements should, at some arbitrary point in time, absolve the architect of further liability. If this shifting of the liability occurs, the statute performs the shift not only for patent defects known to the owner, but also for latent defects never suspected by the owner. Since the owner's duty to third parties is only that of reasonable care, Webb v. City and Borough of Sitka, 561 P.2d 731 (Alaska 1977), the owner is probably not liable for unknown defects. Thus six years after substantial completion, plaintiffs injured by latent design defects have no remedy whatsoever. Webb absolves the owner, and A.S. 09.10.055 immunizes the architect. To that extent, architects and owners are treated equally, while the rest of the public suffers.

If the rationale for a distinction between designers, planners, and others, on the one hand and owners and occupiers on the other hand, is based on some supposed meaningful difference between the status of owners and occupiers and those who designed and built the structure, this rationale fails to support the statute. If the rationale is at all valid and if owners and occupiers should be treated differently, then they should be treated differently as soon as the structure is completed and accepted, as well as six years after substantial completion. If the owner or the occupier stands in some relation to the property such that he alone should be responsible, then his exclusive liability should begin as soon as he accepts the project from the designers and builders. As Earl & Wright says in its Petition for Review at 8, ". . .[A]cceptance of the premises by the owner implies an acceptance of responsibility for conditions thereon." There is no reason for a delay of six years in imposition of sole liability upon the owner. In other words, there is no rational reason for the existence of the statute.

If the purpose of the statute is to protect architects and contractors from stale claims, the statute is unnecessary. If a building collapses, the evidence of its original design and construction is just as old and hard to find for the plaintiff as it is for the defendant. Since the plaintiff will not even have any mental recollection of how the building was designed, and since the plaintiff will certainly have no written records, the plaintiff suffers at the outset a disadvantage compared to a defendant, the employees of which may have mental recollections as well as written records of the design of the building. Further, since the plaintiff bears the burden of proof and the evidence is equally old for both parties, plaintiff bears more of

a disad ntage than architectual or contractual defendants, since they do not bear any burden of proof. The statute thus is overly solicitous of the supposed needs of architect and contractor.

The concurring opinion of Justice Rabinowitz and Chief Justice Boochever in DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978) considered and rejected various proposed justifications for discrimination between governmental and non-governmental tortfeasors. The concurring opinion noted at 797:

> All tort-feasors have a similar interest in the prompt investigation of claims; all victims have a similar interest in obtaining redress for their injuries.
>
> . . .there is no greater need to know of hazards in order to repair and avoid further injuries solely because the entity responsible is a governmental unit.

These considerations apply also to all classes of nongovernmental tortfeasors. Further, with reference to the need to budget and plan for potential liability years in the future, owners of real property, suppliers of materials used in the improvement of real property, and designers and manufacturers of chattels have similar needs to budget or insure for future possible liability.

C. The Statute Does not Perform its Alleged Function, and Therefore, Its Classification of Tortfeasors is Irrational.

If the rationale supporting the Alaska statute is one of giving to the architect and its insurer a finite period of time within which to plan for liability, the statute fails of its purpose. The statute provides that no cause of action may be brought against one who designs, plans, supervises, observes, or constructs improvements to real property more than six years after substantial completion of the improvement. Most parties who are given the benefit of this immunity, however, have no control

over when the project is substantially completed. The architect, for example, cannot insure that the owner secures adequate financing to finish the project, or that the contractor performs on schedule, or that suppliers deliver materials when requested. If the architect's only involvement was in drafting plans and specifications and not in providing on-site supervision, the architect is powerless to predict, much less control, the period of his malpractice exposure under A.S. 09.10.055. He cannot control the date of "substantial completion." If the owner, for example, is forced to cease construction temporarily because of financial difficulties, the six-year immunity does not even begin to run during the cessation of construction. A temporary halt to construction could last for six years, all of which would be added to time spent in construction and the six years' period of the statute. The statute thus does not necessarily provide that limited period of exposure which Petitioner Earl & Wright claims is required by architects and their insurance actuaries. See Petition for Review at 9. Contrary to Petitioner's assertion, at 5 of its Petition, the statute does not provide an absolute limitation of six years.

Constitutional questions aside, the legislature could have provided the definitive immunity sought by Earl & Wright simply by changing the language of the statute. The legislature could have drafted the statute so the six years began to run from the time when each architect completed its particular performance or portion of the project. This would have provided the insurance actuaries a time-certain six year period. Indeed, the legislatures of New Jersey, North Carolina, Virginia and other states have done so. See Appendix A to Petition for Review. The Alaska legislature chose not to begin the six year period on

each individual's finishing of his own performance. This choice by the Alaska legislature implies that the purpose of the statute is not to provide a definite, absolute immunity of a fixed term of years.

Since the statute does not provide a fixed, definite six year limitation, and since the legislature ignored statutory language of other states which, constitutional questions aside, might have provided such a fixed limit, it cannot be said that the statute is reasonable in its classification of architects for special immunity. Since the statute does not do what it and Earl & Wright claims it must do, the statute can hardly be considered rational. Its only and obvious purpose is to grant irrevocable special privileges and immunities to some architects and contractors, but not to other architects, contractors, owners, tenants or designers and manufacturers of chattels. The statute thus violates the Alaska Constitution, Article I, §1 and §15.

If the insurance actuarial problem of architects is real and not hypothetical, Earl & Wright could have documented the justification for the statute with statistics. Earl & Wright might have attempted to show that a large number of architectual malpractice claims are filed more than six years after substantial completion. If we assume instead that, for example, 98% of all claims are made within six years, then the uncertainty generated by a small number of claims after six years will not likely be a significant factor in the computation of insurance premiums. To the extent that Earl & Wright relies upon insurance actuarial problems as a rationale for A.S. 09.10.055, Earl & Wright is requesting the Court to hypothesize facts which the legislature may have had in mind, contrary to Isackson's forbearance of such guesswork.

CONCLUSION

The immunity provided to architects and contractors by A.S. 09.10.055 excludes many similarly situated persons from its protection. Further, as an inept attempt to create benefits for a class of individuals, the statute's failure to provide the alleged benefits in a clear, predictable manner shows the absence of a fair and substantial relationship between the class differentiated and the supposed object of the legislation.

Review should be denied, or, if granted, the judgment of the Superior Court should be summarily affirmed.

RESPECTFULLY SUBMITTED this 21st day of May, 1979.

RICE, HOPPNER, HEDLAND,
FLEISCHER & INGRAHAM
Counsel for Respondents
Cooper and Wilson

By: _____
EDWARD P. NOLDE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

THE CITY OF YAKUTAT, a municipal corporation; and YAKUTAT FISHERMEN'S COOPERATIVE, INC., an Alaska corporation, Plaintiffs, vs. WITCO CHEMICAL CORPORATION, a Delaware corporation, et al., Defendants.	)

Filed In the Trial Courts
STATE OF ALASKA THIRD DISTRICT
NOV 21 1979
Clerk of the Trial Courts
By _____ Deputy

Case No. 3AN-79-1134 Civil

ORDER

The Court, having heard argument and reviewed the briefing by the parties of plaintiff City of Yakutat's Motion to Strike the Affirmative Defense of the Statute of Limitations, and of motions by defendants KPFF, Inc., KPFF-Alaska, Inc., and Chris Berg, Inc. for summary judgment based on AS 09.10.055, grants plaintiff's Motion to Strike, and denies defendants' Motion for Summary Judgment, on the ground that AS 09.10.055 is violative of the equal protection clauses of the Alaska and United States Constitutions. The reasoning of the court in this regard has been extensively set forth on the record.

Further, the respective motions of KPFF, Inc., KPFF-Alaska, Inc., and Chris Berg, Inc. for summary judgment based on estoppel, quasi estoppel, and waiver, are denied.

DATED at Anchorage, Alaska this 21st day of November, 1979.

Milton Souter

MILTON SOUTER
Judge of the Superior Court

I certify that on 11-23-79

NOV 21 1979

LAW OFFICES OF LAWRENCE J. KULI

IN THE SUPREME COURT OF THE STATE OF ALASKA

KPFF, INC., a Washington corporation, and KPFF-Alaska, Inc., an Alaska corporation, Petitioners, vs. THE CITY OF YAKUTAT, a municipal corporation, and YAKUTAT FISHERMEN'S COOPERATIVE, INC., an Alaska corporation, Respondents.	Supreme Court No. 5031 Superior Court No. 3AN-79-1134
CHRIS BERG, INC., a Washington corporation, Petitioner, vs. THE CITY OF YAKUTAT, a municipal corporation, and YAKUTAT FISHERMEN'S COOPERATIVE, INC., an Alaska corporation, Respondents.	Supreme Court No. _____ Superior Court No. 3AN-79-1134

OPPOSITION TO PETITION FOR REVIEW

KULIK & SUDDOCK
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By: John Suddock
John Suddock

FILED in the Supreme Court
of the State of Alaska this
17th day of December, 1979.

ROBERT D. BACON, Clerk

By: _____
Deputy Clerk

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AS 09.10.055 provides:

Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company.

STATEMENT OF FACTS

In the latter 1960's the City of Yakutat undertook to construct a fish processing and cold storage facility. The City delegated the project to an architectural and engineering consortium, petitioners KPFF, Inc. and KPFF-Alaska, Inc. (hereinafter KPFF). KPFF ignored laws of physics and failed to specify any insulation for the roof of the prefabricated metal structure. By December of 1970 the general contractor, petitioner Chris Berg, Inc. (hereinafter CBI) notified KPFF that, due to condensation on the inside of the roof, rain inside the building made finish work impractical. (Kelly Depo., pp. 17-18.)

KPFF thus faced a dilemma of its own making, and sought to extricate itself as quickly and economically as possible. It precipitously seized upon a relatively new product, sprayed-in-place polyurethane foam, as a solution. Albert Kelly, president of KPFF and design supervisor for the project, was not knowledgeable about the product and did not research its flammability, because he was solely concerned with rectifying an omission, minimizing expense to a client of very limited means, and timely completing the project for the spring fishing season. (Id. at 24-25.)

A change order was issued by KPFF to CBI; CBI then subcontracted with defendant Vertecs, Inc., a foam insulation applicator. In January and February of 1971, Vertecs personnel sprayed foam products purchased from defendants Reichhold Chemicals, Inc. and Witco Chemical Corp. onto the metal ceiling. The building was substantially completed by the spring of 1971 and formally accepted by the City on April 23, 1971. Six years and two weeks later, a boiler explosion ignited the exposed urethane foam, which thereupon

burned with such speed and intensity that firemen were helpless.

Based on small scale tests inapplicable to real life, foam manufacturers long touted their product as nonburning or self-extinguishing. (Loper Depo., pp. 30-31.) In fact, the product typically burns almost as rapidly and explosively as napalm and emits toxic fumes and heavy smoke as well. By 1973, Reichhold alerted Vertecs that urethane foam should never be applied without an overlaid thermal barrier. (Id. at 62.) By 1974, Vertecs had so informed CBI, (Id. at 55, 57-60) and Mr. Kelly of KPFF had independently learned of the hazard. (Kelly Depo., pp. 14-16, 26.) Witco had signed an FTC consent order which obligated it to warn prior consumers. The City of Yakutat alleges neither Reichhold, Witco, KPFF, CBI, or Vertecs ever gave warning of the potential for disaster before the catastrophic fire.

STATEMENT OF THE CASE

The City of Yakutat and its lessee, the Yakutat Fishermen's Cooperative, Inc., filed their amended complaint for damages in May of 1979. The KPFF defendants asserted a special statute of limitations, AS 09.10.055, as an affirmative defense. The City of Yakutat moved to strike the defense pursuant to Civil Rule 12(f), and alternatively for partial summary judgment under Rule 56, on the ground that the statute was unconstitutional. KPFF then itself moved for complete summary judgment, and was eventually joined by CBI. The City of Yakutat in its opposition noted that complete summary judgment was inappropriate, because even if AS 09.10.055 were upheld, a cause of action had been pleaded for the failure of KPFF and CBI to warn the City when,

some years after completion of the structure, they received notice of the peril; therefore, this cause of action would not be time barred by AS 09.10.055. This latter contention was not reached by the superior court, which simply ruled that AS 09.10.055 was violative of equal protection under the United States and Alaska constitutions.

ARGUMENT

I. THE ORDER HOLDING AS 09.10.055 UNCONSTITUTIONAL SHOULD NOT BE REVIEWED AT THIS TIME.

The constitutionality of AS 09.10.055 has now been passed upon by two superior court judges, Judge Souter in the instant case, and Judge Rowland in Earl & Wright, Inc. v. Wilson, Super.Ct. No. 78-2382, review denied, Sup.Ct. No. 4464 (August 16, 1979). No superior court has ruled to the contrary, so no conflict between lower courts is presented. Judge Souter's ruling is reasonable on its face, and is supported by substantial and well reasoned authority from at least ten other jurisdictions. His decision is consistent with the tenor of previous equal protection decisions by this court.

To prevail on its motion for complete summary judgment, KPFF must overcome two substantial impediments. First, it must convince this Court that AS 09.10.055, which favors architects, engineers and contractors over the world at large, withstands equal protection scrutiny. Second, it must sustain the argument that, as a matter of statutory construction, AS 09.10.055 attenuates and eventually abrogates the duty to warn, Restatement (Second) of Torts, §321; under this construction, KPFF would no longer have a duty to warn under any circumstances, no matter how egregious, after six years, irrespective of the peril to life and property.

If review is denied, the risk that KPFF will be subjected to unjustified expense at trial is slight. Defense against either the design negligence or failure to warn theory involves the same basic core of evidence regarding polyurethane foam. If KPFF is right on constitutionality but wrong on warnings, its burden and presentation of proof at trial would not be materially affected. Review is correspondingly less urgent.

Ultimate resolution of both issues will be materially advanced by the existence of a complete factual record. As this court noted in Johnson v. State, 577 P.2d 706 at 709 (Alaska 1978), the general rule of finality

> is designed to insure that the questions presented on appeal have a full factual and legal setting in which the practical effect of the parties' contentions may be weighed. Piecemeal adjudication of some, but not all points of law governing a case carries the risk that important considerations may be overlooked which would have been perceived had the entire case been presented.

This argument applies with particular force to the effect of AS 09.10.055 on the duty to warn. This case is young, and discovery is incomplete. Only the barest outline of the negligence of KPFF in failing to warn, a single admission by its president, was presented to the trial court. Upon trial of this case, the record will be augmented, not only with respect to KPFF but as to parties similarly situated but not before the Court, such as Vertecs, Inc., the foam applicator. Among the factors expected to be illumined are the degree of potential hazard to life and property, the clarity of all defendants' notice of the hazard, their degree of culpability in terms of negligence, recklessness or intent,

the effect of continued contacts between plaintiff and some defendants, and the ease of discharge of duty by warning. KPFF's statutory construction argument (KPFF Petit., pp. 5-6) is based on an arid exegesis of the statute. Its conclusion is far from obvious, and is unsupported by a coherent policy rationale. The City of Yakutat contends that the statute is silent on the subject and leaves the common law undisturbed. Questions of public policy loom large, and they should not be resolved on so scant a record.

Because of the probable integrity of Judge Souter's ruling, the low exposure of KPFF to undue hardship, and the particular applicability to this case of the general policy mandating finality of judgment, review should be denied.

II. AS 09.10.055 IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE ALASKA CONSTITUTION.

A. The City of Yakutat Has Standing to Challenge the Statute.

KPFF makes the specious argument that a litigant disadvantaged by disparate treatment lacks standing because if all were treated equally unfairly, no advantage would be gained thereby. (KPFF Petit., 6-7.) Under this rationale, the appellant in DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978) lacked equal protection standing because the state could theoretically have treated her as shabbily as the city, eliminating "unfairness." Clearly the City of Yakutat, which will suffer economic injury if its claim is time barred, possesses "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for elimination of difficult . . . questions." Baker v. Carr, 369 U.S. 186, 204, 7 L.Ed.2d 663,

B. The Equal Protection Standards Announced in Isakson and Erickson Apply to This Case.

Defendant KPFF argues that the equal protection test announced in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) should not apply to statutes enacted before that date. (KPFF Petit., 9-10.) While rules of law may be restricted to prospective application in future cases, respondent is aware of no court which has announced a new controlling constitutional standard and a simultaneous unwillingness to apply that standard to any statute currently in force. Such an approach has been overruled sub silentio in the equal protection decisions of this Court since Isakson.

C. The Statute Violates Equal Protection.

Rules of law which arbitrarily deny access to courts for redress of injury to aggrieved victims regularly lead to harsh and distasteful results. Perhaps the quintessential example is the doctrine of sovereign immunity where the fortuity of injury by a governmental tortfeasor forecloses liability for negligence. In the past few decades, an overwhelming judicial trend has abrogated that doctrine because of its invidious distinctions. See, Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 Univ.Colo.L.Rev. 1 (1972).

In contrast, one segment of the building trades industry has been able to secure passage of special protective legislation which arbitrarily forecloses access to courts. The operative effect of AS 09.10.055 is to create artifical classifications among victims injured by negligent conduct, and among tortfeasors who are in essence similarly

situated. Under the statute, an arbitrary six year limit controls the viability of a victim's cause of action, even as to personal injury or wrongful death. In the instant case, the fire which destroyed the Yakutat Cold Storage Facility occurred two weeks after the statutory six years.

It has been argued that an innocent third-party victim, unrelated to either the architect or owner, is not injured by the statute because such a victim retains an action against the owner in possession. (CBI Petit., p. 10.) Setting aside issues of financial ability to respond to a judgment, this argument ignores the fact that the liability for damages of an architect and of an owner are not co-extensive. The architect must meet the standard of care of his profession, with its superior knowledge. Put simply, the owner is merely liable for defects which he ought reasonably to have discovered and warned against. For example, a bystander injured in the Yakutat fire would probably have no viable action against the City of Yakutat, which itself had no way of knowing that polyurethane foam was a hazardous substance. If on particular facts the owner were found liable, he would be denied under the statute any action for indemnity against the responsible architect or contractor.

Petitioners present no substantial justification for granting absolution to architects, engineers and contractors after six years. The factor which most saliently distinguishes this special interest group from other sections of industry or human endeavor is their perspicacity in drafting a model act and lobbying for its passage. Under the act they receive protections afforded to no other class

of tortfeasor. Persons who supply material to construction sites but who do not themselves participate in construction are not protected. Manufacturers of chattels, which, like a supertanker, may be highly complex, individualized, and long-lived, receive no corresponding protection. Doctors and other professionals with potential liabilities of long duration are not protected. In defense of this state of affairs, proponents of the challenged legislation attempt to hypothesize strained bases to differentiate the building trades.

The controversy has generated a split of authority among the states. The authority upholding similar statutes has been adequately argued by petitioners. In contrast, a substantial line of authority finds the special protection afforded architects and contractors, but not suppliers of building materials, to be irrational. The leading case is Skinner v. Anderson, 231 N.E.2d 588, 591 (Ill. 1967):

> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of the building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that the one event is more likely than the other to occur within four years after construction is completed.

Using similar analysis, the Supreme Court of Wisconsin termed the distinction between the liability of architects and contractors on one hand, and the suppliers of building material on the other hand, a "ludicrous" construct:

> [T]here appears no reason why only a very restricted class of those thus occupied is protected by the statute. Kallas Millwork Corp. v. Square D Company, 225 N.W.2d 454 at 459 (Wisc. 1975).

The Hawaii court found the distinction between the special interest class, and those excluded such as material suppliers, to be an arbitrary and capricious discrimination violative of equal protecton. Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973). Accord, Pacific Indemnity Company v. Thompson-Yaeger, Inc. 260 N.W.2d 548 (Minn. 1977); Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978); Muzar v. Metro Townhouses, Inc., 266 N.W.2d 850 (Mich.App. 1978).

In addition, courts have noted the basic unfairness of a statute which leaves the liability of an owner or occupier intact but forecloses recovery against the actively negligent architect or contractor:

> However, the plaintiff may recover damages from the owners, and the owners will have no right to have the engineer and the contractor reimburse or contribute to them the amount of damages they are required to pay the plaintiff. We are unable to see any rational basis for treating the engineer and the contractor differently from the owners under the same circumstances. Fujioka v. Kam, 514 P.2d 568 at 571 (Hawaii 1973).

Accord, Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) ("[I]f one class of defendants, owners and tenants, is excluded from this protection, the Fourteenth Amendment of the United States Constitution is violated and

the legislation is not valid."); Kallas Millwork Company v. Square D Company, supra; Pacific Indemnity Company v. Thompson-Yaeger, Inc., supra; Skinner v. Anderson, supra.

A very recent decision of the Florida Supreme Court addresses the oft made argument that the passage of time uniquely disfavors architects and contractors. While the decision of the Florida court was made pursuant to a constitutional provision guaranteeing equal access to courts, the court's analysis clearly applies to equal protection of the laws:

> We recognize the problems which inhere in exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expen of an injured party's right to sue, and in violation of our constitutional guaranty of access to courts. Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 at 574 (Fla. 1979), (emphasis added).

Other courts, while evincing judicial displeasure with such statutes, have struck them down on grounds not directly implicated in this Petition for Review. Plant v. R. L.

Reid, Inc., 313 So.2d 518, (Ala. 1975) (void for vagueness); Bagby Elevator & Electric Company, Inc. v. McBride, 291 So.2d 306 (Ala. 1974) (purpose of act not clearly expressed in title); Saylor v. Hall, 497 S.W.2d 218 (Ky.App. 1973) (state constitution prohibits legislative abolition of common law rights of action).

Judge Souter's ruling in the instant case placed particular emphasis on the similarity of position of designers and fabricators of real property, and manufacturers of complex chattels such as aircraft and ships. Petitioner KPFF argues that the serial repetitive nature of the manufacturing process affords greater opportunity for deficiencies to manifest themselves early. (KPFF's Petition, p. 14.) While it is arguable that a repetitious manufacturing process may lend itself in particular circumstances to sophisticated quality control, that fact alone does not lead ineluctably to the conclusion that quality control is significantly more difficult within the building trades. The vast majority of structures built are, as a practical matter, repetitions ad infinitum of other structures. The Yakutat Cold Storage building was a prefabricated metal structure which had doubtless been erected hundreds of thousands of times throughout the country. The average tract home is such a product of repetition that its design and construction in some jurisdictions have been subjected to strict liability in tort. Cf., Kriegler v. Eichler Homes, Inc., 74 Cal.Rptr. 225 (Cal.App. 1969). The low volume nature of building projects makes them particularly conducive to individual inspection and attention. Undoubtedly, both in manufacturing and in construction,

instances occur where the design, use or intended environment of a product, place it on the cutting edge of innovative technology, but such instances must be recognized as rare. Architects and contractors should not be relieved from liability, where materialmen, manufacturers of chattels, or tortfeasors at large are not, merely because of some imagined romanticism of the building trades. While such hypothetical thought processes have been used to sustain legislation in other jurisdictions, such analysis has been abandoned in Alaska. In Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) this Court stated that it would:

> [N]o longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard. Thus, under the new test 'judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of over-inclusive and under-inclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed. Id. at 362 (footnote omitted).

Application of Alaska's equal protection standard requires that the nature and importance of the interest impinged upon be scrutinized:

> Based on the nature of the right, a greater or lesser burden will be placed on the State to show that the classification has a fair and substantial relation to legitimate governmental objective. State v. Erickson, 574 P.2d 1 (Alaska 1978).

The challenged statute drastically attenuates one of the most basic rights of a society governed by law: access to the courts for redress of injuries. The Washington Supreme Court in the case of Hunter v. North Mason High School, 539

P.2d 845 (Wash. 1975) noted that:

> The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well being and ability to continue to live a decent life.

In his concurring opinion in DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978) Justice Rabinowitz, joined by Justice Boochever, examined the legitimacy of foreshortening tort redress by means of a municipal notice of claims provision. Justice Rabinowitz found a provision barring access to the court a burdensome encroachment supportable only by highly significant state interest:

> I deem it sufficient to note that important rights of redress of persons harmed by governmental conduct are involved, as well as equally significant concomitant rights of access to judicial forums for the adjudication of liability and damage issues flowing from such governmental conduct. Given that these rights are important, I have concluded appellant has demonstrated that the distinctions drawn by the charter's notice of claim provision between governmental and private tortfeasors are arbitrary and that the resultant categories are suspect. Consequently, the City of Anchorage must meet a significant burden . . . . Id. at 796.

The state interest in the challenged statute of limitations can only be characterized as meager. The statute confers a minor benefit, much less valuable than a tax incentive, to a minor portion of industry and enterprise. The benefit is conferred, not by spreading the cost broadly over the entire population, as with a tax incentive, but by imposing the cost on a narrow group of injured victims who are least able to bear the cost. Thus, on one side of the balance is a niggardly benefit to a limited section of the

economy capriciously exacted from the victims of the beneficiary's negligence. On the other side of the balance is the violence done to the concept of equal treatment under law when a limited class is singled out and penalized to benefit a special interest group which is in the final analysis indistinguishable in a meaningful sense from other interest groups.

CONCLUSION

Given the likelihood that the courts below were correct in declaring AS 09.10.055 unconstitutional, and the desirability of a full record prior to ultimate adjudication by this Court, the petition for review should be denied. If this Court should elect to review the constitutionality of AS 09.10.055, respondent should be allowed to further develop the facts surrounding the failure to warn claim through discovery, and to present these facts for a decision in the first instance by the superior court, which has never reached the issue.