HB
211

#3

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE SUITE 200 ANCHORAGE, ALASKA 99501 PHONE: (907) 276-3550*

☐ *1st NATIONAL CENTER 100 CUSHMAN ST. SUITE 400 FAIRBANKS, ALASKA 99701 PHONE: (907) 452-1568*

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March 8, 1984

The Honorable Dick Eliason, Chair
Senate Labor & Commerce Committee
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: United States v. Alaska Board of Registration for Architects, Engineers and Land Surveyors (A-82-423 Civ.)

Dear Senator Eliason:

Your staff has asked for a brief summary of the progress in this case since the end of last session. This case involves a suit filed by the U.S. Department of Justice (DOJ) against the Board of Registration for Architects, Engineers, and Land Surveyors, challenging the validity of one of its regulations governing the professional conduct of those it registers. The regulation, 12 AAC 36.230(b), specifically prohibited solicitation or submission of proposals for professional services on the basis of competitive bidding.

HB 211, concerning state and local government procurement of these professional services, does not affect the validity or existence of this prohibition in any way. Therefore, that bill is not directly relevant to the litigation.

Here is a chronology of the case:

October 12, 1982	--	DOJ complaint filed in U.S. District Court at Anchorage.
November 22, 1982	--	Board answer filed in court
December 13, 1982	--	DOJ initiates formal discovery
January 28, 1983	--	Board Motion to Stay Proceedings until May 31, so Board

03-C5LH

Re: Law Suite

		could seek legislation to specifically authorize the 12 AAC 36.230(b) prohibition of competitive bidding. (HB 211 does not accomplish this).
February 14, 1983	--	DOJ opposition to Board's Motion to Stay and DOJ Motions to compel discovery and for a status conference.
February 24, 1983	--	Board's Motion for Stay granted. DOJ motions denied.
May 31, 1983	--	Stay expired without legislative solution.
June 10, 1983	--	Settlement negotiations begin
October 17, 1983	--	Stipulation and Proposed Judgment signed for the Board by the Attorney General's office.
November 18, 1983	--	Stipulation and Proposed Judgment filed in court (copy attached).
December 3, 1983	--	First publication of notice of stipulation in Anchorage Daily News.
January, 1984	--	12 AAC 36.230(b) is deleted from the Alaska Administrative Code according to stipulation and in anticipation of judgment.
February 1, 1984	--	End of 60 day public comment period - 3 adverse comments submitted from Alaska architects and engineers.
April 1, 1984	--	DOJ expects to have reply comments filed. The court may act on Stipulation and Proposed Judgment anytime after that filing.

I hope this is helpful to you. Please let me know if I can provide any further information.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Peter B. Froehlich
Assistant Attorney General

NCG: PBF:eja

Enclosure:

cc w/o enc.: Harry Traeger, Director
Division of Occupational Licensing

Arthur H. Peterson
Legislation Attorney
Department of Law

Wayne Jensen, Chair
Board of Registration for Architects,
Engineers and Land Surveyors

FILED

OCT. 12 1982

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By..........

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	)	Civil No. Filed: 15 U.S.C. §1 (Antitrust Violation Alleged) 15 U.S.C. §4 (Equitable Relief Sought)

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendant and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act, as amended (15 U.S.C. §4), in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. §1).

2. The defendant, Alaska Board of Registration for Architects, Engineers, and Land Surveyors (hereinafter referred to as the "Board"), maintains its principal office, transacts business and is found within the District of Alaska.

II

DEFENDANT

3. The Board is made the defendant herein. The Board is comprised of practicing architects, professional engineers, and land surveyors and is organized and exists under Section 3 of

Chapter 179 of the 1972 Session Laws of Alaska, as amended (Alaska Statutes § 08.48.011 et seq.). The Board maintains its principal office in Juneau, Alaska.

III

CO-CONSPIRATORS

4. Various other persons not made defendants herein have participated as co-conspirators with the defendant in the violation hereinafter alleged, and have performed acts and have made statements in furtherance thereof.

IV

TRADE AND COMMERCE

5. There are approximately 2100 architects, professional engineers and land surveyors, more than one-half of whom are residents of states other than Alaska, licensed to practice in Alaska. These persons provide architectural, professional engineering or land surveying services to individuals, private businesses and governmental entities in Alaska. These services include the design, study and supervision of the construction of buildings, roads, bridges, dams, industrial plants and other structures. Over $17 million dollars are spent annually by Alaska residents and governmental entities for such services.

6. The Board is the sole licensing authority for the practice of architecture, professional engineering and land surveying in the State of Alaska. The Board administers written examinations and otherwise supervises the qualification, certification and registration for practice within the State of Alaska of resident and nonresident architects, professional engineers, land surveyors and corporations offering architectural, professional engineering or land surveying services. Upon payment of a fee, the

Board annually issues certificates of registration to all properly certified or registered architects, professional engineers, and land surveyors.

7. It is unlawful in Alaska for individuals to practice or offer to practice the profession of architecture, professional engineering or land surveying, or to represent that they are architects, professional engineers or land surveyors unless they have been properly certified or registered by the Board and hold a current Board certificate of registration to practice architecture, professional engineering or land surveying in Alaska.

8. The Board consists of nine members appointed to six-year terms by the Governor of Alaska. Three of the Board members must be architects, one must be a land surveyor, two must be civil engineers, one must be a mining engineer, and two must be engineers from other branches of the engineering profession. Board members must have been residents of Alaska for at least three consecutive years before their appointments. Board members must hold Board certificates of registration and have a minimum of five years of professional practice in their respective fields. While serving their membership terms, Board members may, and do, continue to engage in the practice of architecture, professional engineering or land surveying in Alaska. Board members are compensated on a per diem basis when attending to the work of the Board. In addition, Board members are entitled to receive travel expenses incurred in carrying out their duties.

9. Pursuant to the terms of Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, the Board may promulgate and amend a code of ethics or professional conduct for architects, professional engineers, and land surveyors.

Under Alaska law, the Board, except in emergencies, must hold a public hearing or proceeding before promulgating or amending its code of ethics or professional conduct. The laws of Alaska are silent as to the form or content of any such code of ethics or professional conduct and neither direct, require, nor mandate restrictions upon, or the regulation of, price competition in the offering of architectural, professional engineering, or land surveying services. Nor has any policy of restricting or regulating price competition in the offering of architectural, professional engineering or land surveying services been established or dictated by the State of Alaska.

10. In 1974, the Board adopted "Rules of Professional Conduct" intended to regulate the practice of architecture, professional engineering and land surveying in Alaska. Among the Board's rules is Rule 36.230(b), which provides that an architect, professional engineer or land surveyor may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding. This rule is still in effect. In December, 1980, the Board rejected a proposal to repeal Rule 36.230(b). In May, 1982, the Board refused to repeal Rule 36.230(b) on an emergency basis. In September, 1982, the Board voted to retain Rule 36.230(b).

11. Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, provides that the Rules of Professional Conduct of the Board shall be made known in writing to every registrant and applicant for registration and shall be published with the roster of registrants, which the Board must annually publish, mail to registrants and state, borough, and city officials and distribute or sell to the public. Board Rule 36.240(b) provides that an architect, professional engineer or land surveyor having knowledge or reason to believe that another person or corporation may be in violation of any

of the Rules of Professional Conduct shall present that information to the Board in writing and shall cooperate with the Board in furnishing such further information or assistance as may be required.

12. The Board is authorized by Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, to take disciplinary action against any Board certificate of registration holder who violates any of the Rules of Professional Conduct. Such disciplinary action may include the reprimand of a registrant or corporation or the suspension, refusal to renew, or revocation of the offender's certificate of registration.

13. The architectural, professional engineering and land surveying services provided by the Board certificate of registration holders involve and affect individuals, corporations and other business entities throughout the United States. These services facilitate, direct and shape the conduct of interstate business and contribute directly to the flow of persons, money, goods and services into and out of the State of Alaska.

14. In the course of rendering architectural, professional engineering and land surveying services, Board certificate of registration holders located in Alaska often travel to states other than Alaska and make substantial use of interstate mail and wire services in the transport of funds, documents, plans, reports, plats, drawings and other communications throughout the United States. In addition, many certificate of registration holders located outside Alaska perform architectural, professional engineering and land surveying services within Alaska.

15. The activities of the Board and its certificate of registration holders, as described herein, are within the flow

of interstate commerce and have a substantial effect upon interstate commerce.

V

VIOLATION ALLEGED

16. Beginning at least as early as 1974, and continuing up to and including the date of the filing of this complaint, the defendant and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act. Said violation is continuing and will continue unless the relief hereinafter prayed for is granted.

17. The substantial terms of said agreement, understanding and concert of action have been and are that the defendant promulgate, adopt, publish and distribute a provision in its Rules of Professional Conduct, Rule 36.230(b), prohibiting certificate of registration holders and other architects, professional engineers and land surveyors practicing in Alaska from knowingly soliciting or submitting proposals for professional services on the basis of competitive bidding.

18. For the purpose of effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators have done those things which, as hereinbefore alleged, they agreed and conspired to do.

VI

EFFECTS

19. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Competition in the sale of architectural, professional engineering and land surveying services has been suppressed and eliminated;

(b) Consumers of architectural, professional engineering, and land surveying services have been deprived of the benefits of free and open competition in the sale of such services; and

(c) Architects, professional engineers, and land surveyors have been restrained in their ability to make their services readily and fully available to customers requiring such services.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act.

2. That the defendant, its members and all other persons acting or claiming to act on its behalf be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination and conspiracy or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying or following any practice, plan, program or device having similar purposes or effects.

3. That the defendant, its members and all persons acting or claiming to act on its behalf be enjoined and restrained from promulgating, publishing, distributing or otherwise

suggesting, and from adhering or agreeing to adhere to, any rule prohibiting competitive bidding by Board certificate of registration holders.

4. That the defendant be required to cancel Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

5. That the defendant be required to notify all Board certificate of registration holders, the general public, and all Alaska city, borough, and state officials that it has cancelled and rescinded Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

6. That the plaintiff have such other and further relief as the Court may deem just and proper.

7. That the plaintiff recover the costs of this suit.

WILLIAM F. BAXTER
Assistant Attorney General

EDWARD D. ELIASBERG, JR.

JOSEPH H. WIDMAR

CAROLYN L. DAVIS

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Telephone: (202) 633-2582

UNITED STATES ATTORNEY
District of Alaska

Dated: October 7, 1982

U.S. Department of Justice

Washington, D.C. 20530

JPMcG:JWP:EDE
60-423-164

03 APR 1984

Ms. Jo Ann Myres
Clerk
United States District Court
for the District of Alaska
Federal Building & United States Courthouse
701 C Street, Box 4
Anchorage, Alaska 99513

Re: United States v. Alaska Board of Registration for Architects, Engineers, and Land Surveyors, Civil Action No. A 82-423 CIV (D. Alaska)

Dear Ms. Myres:

Enclosed for filing is Plaintiff's Response To Comments Regarding The Proposed Final Judgment. Copies of the three comments we received are attached to the Response. We have sent copies of the Response to the two engineers who prepared individual comments, counsel for the group of six engineers, architects, and land surveyors who submitted a joint comment, and counsel for the Board.

15 U.S.C. § 16(d) requires that the comments and response be published in the Federal Register before entry of the decree. This is the only requirement of the Antitrust Procedures and Penalties Act that remains outstanding. Once it is satisfied, we will be filing the Certificate of Compliance with the Act, after which time the Court can enter the proposed Judgment. We expect publication to take place in about five to seven working days.

Also enclosed for filing is a Motion For Enlargement Of Time. We had informed Chief Judge von der Heydt by letter dated March 12, 1984 that we would be filing such a Motion so that the Government could give proper consideration to the comments that had been received. We would appreciate it if you would present the Motion to the Chief Judge for his approval.

Should there by any questions about these procedures, please feel free to call me at (202) 633-2582 or 2425. As always, we appreciate your consideration.

Sincerely yours,

Edward D. Eliasberg, Jr.
Attorney
Antitrust Division

Enclosures

cc: Hon. James A. von der Heydt
Peter B. Froehlich, Esquire
Richard W. Garnett, III, Esquire
Mr. Donald R. Dent, Jr.
Mr. Vernon Akin

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A 82-423-CIV
	PLAINTIFF'S RESPONSE TO COMMENTS REGARDING THE PROPOSED FINAL JUDGMENT

Plaintiff submits this Response pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(d), which provides that for a 60-day period prior to the entry of a proposed Final Judgment in a civil antitrust suit the United States shall receive and consider any written comments relating to that proposed Final Judgment. The APPA provides that at the close of that period the United States shall file with the District Court and cause to be published a response to such comments.

Three comments, copies of which are attached, were submitted to plaintiff regarding the proposed Final Judgment

during the 60-day period which ended on February 1, 1984. They, along with this response, will promptly be published in the Federal Register as required by 15 U.S.C. § 16(d). After reviewing these comments, plaintiff continues to believe that the proposed Final Judgment should be entered without modification.

A. Response to Comment of the Charles Tryck Group

In a pleading dated January 27, 1984, Charles Tryck, Walter Steige, Kenneth Walsh, Robert Hesseltine, Gustav Johnson, and Sam Best (hereinafter the "Tryck Group"), raise certain objections to the theory underlying the government's suit and to the entry of the proposed Final Judgment. First, they contend that the consent decree is based on a "misunderstanding" of the Board's rules in that those rules do not, they say, disallow competition. Second, they argue that competitive bidding for professional services is harmful to the public interest and will promote "mediocrity." Third, they contend that the Board's ban on such bidding is immune from antitrust challenge under the state action doctrine. 1/ Finally, the Tryck Group contends that the proposed Final Judgment "would unduly interfere with legislative options" in

1/ The Tryck Group Comment suggests that the procedures leading to the proposed decree were "irregular" and "inadequate for a full review of the important legal and policy issues in this case." The Comment also suggests that the Alaska Assistant Attorney General acted contrary to the wishes of the Board in agreeing to the consent decree.

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that it would bar the Board from adopting future restrictions on competition even if authorized by a "broad" authorization from the state legislature. The relief the Group seeks is that "entry of the decree be delayed for at least six (6) months until the Legislature has had full opportunity to review the decree and its own policy options." It further urges that "if the Court determines to approve the proposed decree . . . the decree should be modified to state specifically that its entry will have no effect upon the power of the Legislature to determine appropriate public policy for procurement of professional services, and the manner of implementing that policy."

A principal contention of the Tryck Group amounts to an argument that the underlying cause of action of this case is without merit. These arguments are not germane to the public interest determination which the Court must make in evaluating a proposed antitrust consent decree under the APPA. 15 U.S.C. § 16(e). That Act provides, in relevant part,

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider --
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

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> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

In discussing the appropriate standard for evaluating proposed consent decrees, the Ninth Circuit has held that the Court's determination is not to be an evaluation of the merits or the propriety of plaintiff's case; the Court is not to try and decide the case which the parties have agreed to settle. Instead the test under the APPA is simply whether the proposed judgment is adequate to remedy the violations alleged in the complaint. United States v. Bechtel Corp., 648 F.2d 660, 665-66 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981). See United States v. AT&T, 552 F. Supp. 131, 149-51 (D.D.C. 1982); United States v. Agri-Mark, Inc., 512 F. Supp. 737, 739 (D.Vt. 1981); United States v. Nat'l Broadcasting Co., 449 F. Supp. 1127, 1143-45 (C.D. Calif. 1978), cert. denied, 444 U.S. 991 (1981); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975). Furthermore, the Court's review is not meant to be "an unrestricted evaluation of what relief would best serve the public," but rather, whether the relief requested in the proposed Final Judgment is consistent with the theory of the case. Bechtel, supra at 665-66; AT&T, supra; Agri-Mark, supra at 739-40; NBC, supra at 1144-45; Gillette, supra. The latitude which the reviewing Court should afford to decrees negotiated by the parties is founded on the sound

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policy of the APPA encouraging entry of consent decrees and leaving the balancing of competing interests affected by the consent decrees to the discretion of the Attorney General. Bechtel, supra at 666; AT&T, supra at 150-51; Agri-Mark, supra at 739; NBC, supra at 1141-43; Gillette, supra at 716.

In sum, questions raised as to the wisdom of the litigation, the validity of the theory of the case or sufficiency of evidence to support that theory are beyond the scope of the inquiry mandated under the APPA. The Comment of the Tryck Group, questioning whether competition is lessened by the Board's rules and whether competitive bidding is harmful to the public interest or whether the state action doctrine should shield the Board's activities obviously go to the merits of the underlying claim in this case. The Court should refuse to consider such contentions under the APPA. Bechtel, supra at 666. The Court's task is to assess whether the relief proposed under the decree is adequate to remedy the alleged violation of the antitrust laws. Id. The relief proposed, removal of the rules challenged in the complaint, is, we submit, obviously consistent with that standard as set forth in Bechtel.

Moreover, the arguments of the Tryck Group relating to the substantive issues in this case would be without merit even if they were now timely. Bans on competitive bidding such as that challenged in this litigation have been held to be per se illegal. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978),

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1 aff'd., 592 F.2d 919 (5th Cir. 1979), cert. denied, 444 U.S.
2 925 (1979). See Catalano, Inc. v. Target Sales, Inc., 446 U.S.
3 643, 647 (1980). It is well established that bidding bans are
4 "naked restraints" on competition which will be struck down
5 without regard to the purported public interest arguments that
6 competition is harmful which the Tryck Group makes. National
7 Society of Professional Engineers, supra at 695; Texas State
8 Board of Public Accountancy, supra at 402-3. Furthermore, the
9 Tryck Group's comments imply, erroneously, that the decree
10 mandates or compels competitive bidding. It does not. It
11 simply permits engineers, architects, surveyors, and their
12 customers to engage in the competitive bidding process if they
13 think it is in their interest to do so.

14 The comment of the Tryck Group also implies that the Court
15 should give special scrutiny to this proposed decree because,
16 it asserts, the defendant "is without legal representation,"
17 i.e., it is represented by the Attorney General of Alaska who
18 has consented to provisions that purportedly are not agreeable
19 to at least some members of the Board. Although the Court may
20 properly consider whether consent was lacking by a party
21 entering into a decree, Bechtel, supra at 663, in this case the
22 Attorney General of Alaska possessed the power to negotiate and
23 enter the proposed Final Judgment for the defendant. Under
24 Alaska law, the Attorney General has the sole authority to
25 represent all state agencies in judicial proceedings.
26 AS 44.23.020; AS 08.48.141. That authority includes the power
27 to control and dispose of litigation, including consenting to
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the entry of a final judgment. State v. First Nat'l Bank of Anchorage, 660 P.2d 406, 420-21 (Alask. S. Ct. 1982); Public Defender Agency v. Superior Court, 534 P.2d 947, 949-51 (Alask. S. Ct. 1975). An individual state agency may not overrule the Attorney General of Alaska in the exercise of that discretion. Public Defender Agency, supra; see Opinion of Alaska Attorney General Wilson L. Condon to the Department of Internal Revenue (October 7, 1981). The comments do not suggest any procedural irregularity by the Attorney General. Thus, the Attorney General of Alaska had the authority to, and did, consent to the entry of the proposed Final Judgment.

Although this matter has already been stayed by the Court for four months in order to permit the Alaska Legislature to consider legislation regarding competitive bidding (see, Minute Order from Chambers, February 24, 1983), the Tryck Group requests yet another stay of six months so that the Legislature can again consider possible legislation and, also "review" this proposed decree. In the alternative, the Group requests that the decree be modified to state that its entry "will have no effect upon the power of the legislature to determine appropriate public policy for procurement of professional services, and the manner of implementing that policy." Such a request is unjustified and unnecessary.

The proposed decree does not prevent the Legislature of the State of Alaska from enacting legislation to prevent or regulate competitive bidding in the rendering of services. For example, the Legislature is clearly free to enact legislation

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1 making all or certain kinds of competitive bidding for
2 engineering, architectural or surveying services unlawful or
3 requiring that state agencies not engage in competitive
4 bidding. The only possible conflict with the provisions of
5 this decree would occur if the Legislature enacted new
6 legislation which required, or appeared to require, the Board
7 to restrict competitive bidding -- legislation which it has
8 previously declined to enact. If such a case arose there would
9 be various questions to resolve including what kind of
10 restraint on competitive bidding was intended by the
11 Legislature and whether such a restraint had been so clearly
12 articulated as state policy as to confer a so-called "state
13 action" defense exemption under the antitrust laws. Community
14 Communications Co. v. City of Boulder, 455 U.S. 40 (1982);
15 California Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. 97
16 (1980); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S.
17 96 (1978). 2/ We submit that it is clearly premature to deal
18 with such a hypothetical situation now.
19 Given the Legislature's past refusals to enact any legis-
20 lation restricting competitive bidding, the Tryck Group's
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2/ As the Tryck Group points out, questions regarding this defense are now before the United States Supreme Court in Ronwin v. State Bar of Arizona, 686 F.2d 692 (9th Cir. 1982), cert. granted sub nom. Hoover v. Ronwin, 103 S.Ct. 2084 (1983). The issues in that case, however, are inapplicable to the facts of this case. The question in Ronwin is under what circumstances a specific statutory grant provides state action

Footnote Continued

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objection that the Legislature may someday enact legislation that would require Board promulgation of a ban on competitive bidding is necessarily speculative. In any event, under Section XII of the proposed Final Judgment, the defendant retains the right to request that the Court consider the propriety of amending the Judgment if such legislation were ever enacted. A potential conflict between the requirements of a decree and legislation is not grounds to justify rejection of the decree. If substantive changes are required, the modification provisions of the decree are available to defendant. Cf. Bechtel, supra at 666.

In the event such legislation were enacted, the Board would be required under the decree to request that the Court amend the judgment to permit it to act in accordance with the legislation. This procedure is entirely appropriate and in the public interest in that the Court would have the opportunity to determine whether the statute constituted state action and hence would otherwise immunize the Board's conduct from challenge under the antitrust laws.

Finally, the Tryck Group's request for a six months stay prior to entry of the decree should be rejected as unwarranted and improper at this stage of the proceeding. The Court's sole

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2/ Footnote Continued

protection. In contrast, the present case involves only a general enabling statute. See generally, City of Boulder, supra.

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function under the APPA is to either approve the settlement or to state what amendments it will require to the proposed Final Judgment before approving the decree. AT&T, supra at 153; NBC, supra at 1142-43. It would be inappropriate and inconsistent with the APPA to grant third parties extensions of time to seek what they perceive as curative legislation where as here the parties have stipulated to a decree resolving the controversy. AT&T, supra at 153; NBC, supra at 1142-43; Cf., Landis v. North American Co., 299 U.S. 248 (1936). Indeed, such a stay would be particularly inappropriate in this case since the Court previously has granted the defendant a four month stay in which it unsuccessfully sought legislation. (See, Minute Order From Chambers, February 24, 1983).

B. Response to Comment of Donald R. Dent

By letter dated January 27, 1984, Donald R. Dent, a professional engineer and land surveyor in Anchorage, Alaska, made general objections to the bringing and settling of this suit. He noted that he agreed with the comments of the Tryck Group, except he believed that the Final Judgment should be dismissed immediately "as being without basis in fact or law" rather than delayed six months for legislative action as the Tryck Group had requested. He also stated in his letter that he did not believe that the actions taken by the United States or the Alaska Attorney General "have been open and above reproach" in this case and that "the cases cited by the [United States] Department of Justice . . . as a basis of attack are applicable to this situation, or this State Agency." He

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further stated that "many statements made in the Competitive Impact Statement . . . are speculative and without basis in fact" and that "this Final Judgment would allow the Department to avoid proving its allegations." All of Mr. Dent's objections except one are basically among those raised by the Tryck Group discussed above. Our response to their comments are equally applicable to his.

Mr. Dent raises one additional comment concerning Sections IV and V of the proposed Final Judgment. He asserts that these Articles are in conflict with one another in that "the Board . . . would not be able to exercise its rights in 'advocating or seeking legislation concerning competitive bidding', allowed by Article V, without violating Article IV." This is not correct. Article V clearly provides that "nothing in this Final Judgment shall prohibit defendant from advocating or seeking legislation concerning competitive bidding or quoting prices, provided that such advocacy or discussion makes clear that defendant is not thereby suppressing, restraining or discouraging Board certificate of registration holders from submitting competitive bids or price quotations."

C. Response to Comment of Vernon Akin

By a one page letter dated February 1, 1984, Vernon Akin, a consulting engineer with offices in Juneau, Alaska, also made a general objection to the entry of the proposed decree. He indicated that he had read and endorsed the position Charles Tryck and his colleagues had taken in their comment. Mr. Akin also stated that, as was the case with the Tryck Group, his

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basic position is that the ban does not unreasonably restrain competition, that competitive bidding is harmful to the public interest, and that the present Alaska Attorney General has "'sold down the river'" the defendant and the profession. He asked that the Court delay entry of the decree until members of the profession have had an opportunity "to prove" that "their stand is valid."

Mr. Akin's objections are among those raised by the Tryck Group. Our response to their comments are equally applicable to his.

CONCLUSION

After reviewing these comments, the United States still submits that prompt entry of the proposed judgment is in the public interest.

Respectfully submitted,

EDWARD D. ELIASBERG, JR.

CAROLYN L. DAVIS

Attorneys, Department of
Justice, Antitrust Division
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-2582

Dated: April 3, 1984

Form OBD-183
12-8-76 DOJ

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 18, 1983

AT
202-633-2016

The Department of Justice today filed a proposed consent decree that would terminate its civil antitrust suit against the Alaska Board of Registration for Architects, Engineers, and Land Surveyors.

Attorney General William French Smith said the proposed decree, which was filed in U.S. District Court in Anchorage, will become final upon approval by the court.

William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, said the suit, filed on October 12, 1982, alleged that the Board violated Section 1 of the Sherman Act by adopting a code of ethics provision which prohibits architects, professional engineers, and land surveyors licensed to practice in Alaska from engaging in competitive bidding.

The proposed decree will enjoin the Board from adopting, continuing, advocating, or furthering any agreement, plan, or course of action which has the purpose or effect of suppressing or discouraging Alaska architects, professional engineers, and land surveyors from submitting competitive bids or price quotations.

The Board is also required to delete the competitive bidding ban from its code of ethics and to notify licensed practitioners, purchasers of architectural, professional engineering, and land surveying services, and the general public in Alaska of the rule change.

(MORE)

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

BILL SHEFFIELD
GOVERNOR

NEWS RELEASE

FOR INFORMATION CONTACT:
Pete Spivey
Press Secretary

John Greely
Deputy Press Secretary
Office of the Governor
Pouch A, Juneau, AK 99811

Bus. Phone: (907) 465-3500

SETTLEMENT WITH DEPARTMENT OF JUSTICE
October 27, 1983
#83-

FOR IMMEDIATE RELEASE

JUNEAU - Attorney General Norman Gorsuch announced today that the State of Alaska has signed a stipulation (see attachment) with the U. S. Department of Justice to settle an antitrust case filed against the Alaska Board of Registration for Architects, Engineers, and Land Surveyors. At issue in United States v. Alaska Board of Registration for Architects, Engineers, and Land Surveyors was the Board's regulation forbidding every registered architect, engineer or land surveyor to "knowingly solicit or submit proposals for professional services on the basis of competitive bidding."

Under the terms of the proposed final judgment, which will be filed in federal district court in Anchorage in early November, the prohibition against competitive bidding will be deleted. If the final judgment is approved by the court following a 60 day public comment period required by federal law, architects, engineers and surveyors will be able to solicit work

- MORE -

or submit proposals on the basis of competitive bidding and will be able to offer price quotations, hourly rates, or price estimates to all potential customers.

Since 1978, the Attorney General's office has repeatedly advised the Board that its ban on competitive bidding was probably illegal under state and federal antitrust laws. The Board has consistently refused to follow the advice to repeal the regulation. The Department of Justice filed the lawsuit in October, 1982 to invalidate the regulation, after warning the Board in May that its failure to repeal the ban would require litigation.

Attorney General Gorsuch said it was simply not in the best interest of the public to spend the time and money to defend the bidding ban in light of its doubtful legality.

The Attorney General expressed hope that Alaska's surveyors, architects and engineers would welcome the return to competitive bidding which will benefit the Alaska consumer. The Attorney General noted that the free market system works best where healthy competition is encouraged--including competition among individuals who provide professional services, whether they are doctors, lawyers or architects.

Persons interested in commenting on th proposed judgment and stipulation should contact the Clerk of the District court by calling 271-5568, or writing Clerk of the Court, 701 C St., Anchorage, AK 99501.

Michael R. Spaan
U.S. Attorney
Federal Building and United States Courthouse
Room C-252, Mail Box 9
701 C Street
Anchorage, Alaska 99513

Edward D. Ellasberg, Jr.
Carolyn L. Davis
United States Department of Justice
10th & Pennsylvania Ave., N. W.
Washington, D. C. 20530
Telephone: (202) 633-2582
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	)	Civil Action No. A82-423 CIV Filed: <u>STIPULATION</u>

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendant and by filing that notice with the Court.

2. In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

Dated:

FOR THE PLAINTIFF:

WILLIAM F. BAXTER
Assistant Attorney General

JOSEPH H. WIDMAR

JOHN W. POOLE, JR.

THOMAS L. GREANEY
Attorneys, Antitrust Division
U. S. Department of Justice

EDWARD D. ELIASBERG, JR.

CAROLYN L. DAVIS
Attorneys, Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530
Telephone: (202) 633-2582

MARK R. DAVIS
Assistant United States Attorney
District of Alaska

FOR THE DEFENDANT:

NORMAN GORSUCH
Attorney General

(10/17/83)

BY: PETER B. FROEHLICH
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Department of Law
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	)	Civil Action No. A82-423 CIV Filed: FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint herein on October 12, 1982, and plaintiff and defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED, AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against defendant under Section 1 of the Sherman Act (15 U.S.C. § 1).

II.

As used in this Final Judgment: "Board certificate of registration holder" means any person holding a current certificate of registration as a professional architect, engineer or land surveyor issued by defendant, or any corporation holding a current certificate of authorization to practice architecture, engineering or land surveying issued by defendant.

III.

This Final Judgment applies to the defendant and to defendant's officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with it who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

Defendant is hereby enjoined and restrained from directly or indirectly:

(A) Continuing, maintaining, adopting, entering into, carrying out, advocating or furthering any agreement, plan, program, or course of action which has the purpose or effect of

suppressing, restraining, or discouraging Board certificate of registration holders from submitting competitive bids or price quotations.

(B) Promulgating, maintaining, adopting, disseminating, publishing, enforcing or seeking adherence to any rule, by-law, guideline, standard, code of ethics, statement of principle, policy, or collective statement which has the purpose or effect of suppressing, restraining, or discouraging Board certificate of registration holders from submitting competitive bids or price quotations, or which states or implies that competitive bidding or quoting prices is prohibited, unethical, unprofessional, or contrary to any policy of defendant.

(C) Refusing to issue a certificate to any applicant, or rescinding, suspending or refusing to renew a certificate of any holder, because of use or submission of competitive bids or price quotations, or solicitation of proposals for professional services on the basis of competitive bidding.

V.

Nothing in this Final Judgment shall prohibit defendant from advocating or seeking legislation concerning competitive bidding or quoting prices, provided that such advocacy or discussion makes clear that defendant is not thereby suppressing, restraining or discouraging Board certificate of registration holders from submitting competitive bids or price quotations.

VI.

Subsection 230(b) of the defendant's Rules of Professional Conduct [12 AAC 36.230(b)] which states that:

> Each architect, engineer or land surveyor shall seek professional employment on the basis of qualifications for the proper accomplishment of the work. He may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding.

is hereby declared null and void because the subsection is in violation of Section 1 of the Sherman Act [15 U.S.C. § 1 (1977)]. Subsection 230(b) must be deleted from the Alaska Administrative Code within 60 days from the entry of this Final Judgment. Defendant is also ordered and directed to delete any other provision in its Rules of Professional Conduct, by-laws, resolutions, and policy statements, whether formal or informal, which prohibits, limits, or otherwise discourages the use or submission of competitive bids or price quotations, or solicitation of proposals for professional services on the basis of competitive bidding, by Board certificate of registration holders and applicants, or which implies that the use, submission, or solicitation of competitive bids or price quotations is prohibited, unethical, unprofessional, or contrary to any policy of the defendant.

VII.

Within 60 days from entry of this Final Judgment:

A. The defendant is ordered to insert in the place of the text of subsection 230(b) [12 AAC 36.230(b)] and any other provision deleted pursuant to Section VI, above, a statement that

subsection 230(b) [12 AAC 36.230(b)] or other such provision has been deleted and the date of the deletion.

B. The defendant is further ordered to insert in the Alaska Administrative Code on the page where subsection 230(b) [12 AAC 36.230(b)] previously appeared the following Editor's Footnote:

> Editor's Note: As of Register 88, Jan. 1984, 12 AAC 36.230(b) was deleted by the regulations attorney in accordance with a Final Judgment entered, with the consent of the Board and the United States Department of Justice, by the United States District Court for the District of Alaska in <u>United States</u> v. <u>Alaska Bd. of Registration for Architects, Engineers and Land Surveyors</u>, Civil Action No. A82-423 CIV. This Judgment was entered because 12 AAC 36.230(b) was in violation of Section 1 of the Sherman Antitrust Act [15 U.S.C. § 1 (1977)]. The Final Judgment also prohibits further enforcement of any ban or Board policy against competitive bidding.

VIII.

Within 60 days from entry of this Final Judgment, notice of this Final Judgment consisting of a letter on the letterhead of the Division of Occupational Licensing of the Alaska Department of Commerce and Economic Development with a text identical to that of Appendix A of this Final Judgment, shall be sent: (1) to each current Board certificate of registration holder; (2) to each state, city and borough entity in Alaska which may purchase architecture, engineering, or land surveying services and to which the Board's roster is mailed under AS 08.48.081; and (3) to each trade association for contractors in the State of Alaska. In addition within 60 days from entry of this Final Judgment, such notice shall be published in the <u>Alaska Construction and Oil</u>

magazine, and in the _Anchorage Times_, _Juneau Empire_, _Fairbanks News-Miner_, _Sitka Sentinel_, _Peninsula Clarion_, _Nome Nugget_, _Tundra Times_, _Ketchikan Daily News_, and _Kodiak Mirror_ newspapers in their general readership sections.

Furthermore, for a period of ten (10) years following the date of entry of this Final Judgment, such notice shall be sent to each new Board certificate of registration holder and to all others who receive the Board's roster under AS 08.48.081. The letter will also be published in every printing of the Board's pamphlet of statutes and regulations for a period of ten (10) years after the date of entry of this Final Judgment.

IX.

The defendant is ordered and directed to file with the Court and serve upon plaintiff, within one-hundred-twenty (120) days after entry of this Final Judgment, an affidavit as to the fact and manner of its compliance with Sections VI, VII and the first paragraph of Section VIII.

X.

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant

made to the Division of Occupational Licensing at its principal office, be permitted:

(1) Access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant, who may have counsel present, regarding any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees, and agents of such defendant, who may have counsel present, regarding any such matters.

(B) Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to the Division of Occupational Licensing at its principal office, defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested. The Antitrust Division of the United States Department of Justice will be considered a person who has filed a request for notice of proposed regulation actions by the defendant under AS 44.62.190 (a)(2) and will therefore be sent notice of those actions.

XI.

This Final Judgment shall remain in effect until ten (10) years from the date of entry.

XII.

Jurisdiction is retained by the Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of its provisions, for its enforcement or compliance, and for the punishment of any violation of its provisions.

XIII.

Entry of this Final Judgment is in the public interest.

Entered:

____
United States District Court Judge

APPENDIX A

Re: United States v. Alaska Board of Registration for Architects, Engineers, and Land Surveyors, (Civil No. A82-423 CIV. D. AK.)

Dear Alaskan or Other Interested Party:

The Alaska Board of Registration for Architects, Engineers, and Land Surveyors has recently entered into a stipulation with the United States Department of Justice to settle an antitrust case filed against the Board. That case, United States v. Alaska Board of Registration for Architects, Engineers, and Land Surveyors (Civil No. A82-423 CIV.) concerned the Board's regulation 12 AAC 36.230(b) which does not allow an architect, engineer or land surveyor to "knowingly solicit or submit proposals for professional services on the basis of competitive bidding." Under the terms of the Final Judgment entered by the Court according to the stipulation, 12 ACC 36.230(b) has been deleted entirely. All Board Certficate of Registration holders will now be able to solicit work or submit proposals on the basis of competitive bidding and will be able to offer price quotations, hourly rates, or price estimates to all potential customers whether or not that customer requested a price quotation or competitive bid.

In addition, the Final Judgment, which was entered by Federal District Court Chief Judge von der Heydt, prevents the Board from adopting in the future any new regulation, rule, or policy statement which would prevent, discourage or label as unprofessional the use, submission or solicitation of price quotations and competitive bids. The Final Judgment, which is enforceable in federal court, prohibits the Board from discouraging or disparaging competition which is, in part, based on price, cost, or hourly charges.

A copy of the entire Final Judgment is available upon request from any office of the Division of Occupational Licensing or the Alaska Attorney General.

Sincerely yours,

Harry D. Traeger
Director
Division of Occupational Licensing
Department of Commerce and Economic Development
State of Alaska

Michael R. Spaan
U.S. Attorney
Federal Building and United States Courthouse
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Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS,

Defendant.

Civil No. A 82-423-CIV

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On October 12, 1982, the United States filed a civil antitrust complaint alleging that, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendant Alaska Board of Registration for Architects, Engineers and Land Surveyors

("Board") and co-conspirators have been engaged in a combination and conspiracy to restrain competition in the sale of architectural, professional engineering, and land surveying services in Alaska.

The Complaint alleged that the substantial terms of this agreement, understanding, and concert of action have been and are that the Board promulgate, adopt, publish and distribute a provision in its Rules of Professional Conduct, 12 Alaska Administrative Code 36.230(b) ("Rule 36.230(b)" or "Rule"), prohibiting Board certificate of registration holders and other architects, professional engineers and land surveyors practicing in Alaska from knowingly soliciting or submitting proposals for professional services on the basis of competitive bidding. The Complaint further alleged that the effect of the conspiracy has been to suppress and eliminate competition in the sale of architectural, professional engineering, and land surveying services in Alaska.

The relief sought in the Complaint was that the Board be required to cancel its ban on competitive bidding and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders. The Complaint also asked that the Board be enjoined from adopting or suggesting any rule prohibiting competitive bidding or any practice, plan, program or device having a similar purpose or effect. The Complaint further asked that the Board be required to notify all holders of Board certificates of registration,

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Alaska city, borough, and state officials, and the general public of the rule change.

Entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for further proceedings which may be required to interpret, enforce or modify the Judgment, or to punish violations of any of its provisions.

II.

DESCRIPTION OF PRACTICES INVOLVED IN THE ALLEGED VIOLATION

Defendant is a state licensing board consisting entirely of architects, engineers, and land surveyors who are also private practitioners. Under Alaska law, individuals may not practice or offer to practice the profession of architecture, professional engineering, or land surveying unless they hold a current certificate of registration from the Board to practice architecture, professional engineering, or land surveying.

In 1974, the Board adopted "Rules of Professional Conduct" intended to regulate the practice of architecture, professional engineering, and land surveying in Alaska. The Board can suspend, refuse to renew, or revoke the certificate of registration of any certificate of registration holder who violates any of the Board's Rules of Professional Conduct.

Among the Rules which the Board adopted in 1974 is Rule 36.230(b), which provides that an architect, professional engineer, or land surveyor may not knowingly solicit or submit proposals for professional services on the basis of competitive

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bidding. This Rule is still in effect. In December, 1980, the Board voted to retain Rule 36.230(b) despite the recommendation of the Alaska Attorney General that it be repealed. In May 1982, the Board refused to repeal the Rule on an emergency basis. In September 1982, the Board voted to retain the Rule.

Had this case gone to trial, the United States would have offered evidence to show that the Rule has had an adverse impact on consumers of architectural, engineering and land surveying services in Alaska by restricting practitioners' ability to compete and thereby raising prices. As a result of the Board's ban on competitive bidding, certificate of registration holders have refused to submit competitive bids although purchasers have requested such bids, and architectural, professional engineering, and land surveying associations have made reference to the ban in an attempt to discourage purchasers in Alaska from requesting or insisting upon competitive bids. Had this case gone to trial, the Government would also have adduced evidence that the Board informed potential purchasers that competitive bidding was in violation of its Rules and took other steps to ensure compliance with its Rules.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the Board have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that its

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entry does not constitute any evidence against or admission by either party with respect to any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section XIII of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that the Board completely eliminates all formal or informal rules, policy statements, or ethical codes proscribing or discouraging competitive bidding. It is also intended to ensure that Board certificate of registration holders and purchasers of architectural, professional engineering and land surveying services in Alaska are made aware that competitive bidding is now permissible.

A. Prohibited Conduct

Section IV of the proposed Final Judgment prohibits three categories of conduct. First, it enjoins the Board from directly or indirectly entering into, continuing, adopting, advocating, or furthering any plan, agreement, program, or course of action which has the purpose or effect of suppressing, restraining, or discouraging Board certificate of registration holders from submitting competitive bids. Second, Section IV enjoins the Board from promulgating, adopting, maintaining, or seeking adherence to any rule, guideline, statement of principle, policy, or collective statement which has the purpose or effect of suppressing, restraining, or

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discouraging Board certificate of registration holders from submitting competitive bids or price quotations, or which states or implies that competitive bidding or quoting prices is prohibited, unethical, unprofessional, or contrary to any policy of the Board. Finally, the Board is also enjoined from refusing to issue a certificate to any applicant, or rescinding, suspending or refusing to renew a certificate of any holder, because of use or submission of competitive bids or price quotations, or solicitation of proposals for professional services on the basis of competitive bidding.

Section V provides that nothing in the proposed Final Judgment shall prohibit the Board from advocating or seeking legislation concerning competitive bidding, provided that such advocacy or discussion makes clear that the Board is not thereby suppressing, restraining, or discouraging board certificate of registration holders from submitting competitive bids or price quotations.

B. Affirmative Obligations

The affirmative obligations of the proposed Final Judgment are found in Sections VI-VIII.

Section VI declares Rule 36.230(b) null and void and requires its deletion from the Alaska Administrative Code within 60 days from entry of the proposed Final Judgment. Section VI also requires the Board to delete any other provision in its Rules of Professional Conduct, by-laws, resolutions, and policy statements, whether formal or informal, that prohibits, limits, or otherwise discourages the use or

1 submission of competitive bidding or price quotations or which
2 implies that the use, submission, or solicitation of
3 competitive bids or price quotations is prohibited, unethical,
4 unprofessional, or contrary to any policy of the Board.
5 Section VII of the proposed Final Judgment requires the
6 Board within 60 days from entry of the proposed Final Judgment
7 to insert in the place of the text of Rule 36.230(b) and any
8 other provision deleted pursuant to Section VI a statement that
9 Rule 36.230(b) or other such provision has been deleted and the
10 date of the deletion. The Board is also required within 60
11 days from entry of the proposed Final Judgment to insert in the
12 Alaska Administrative Code on the page where Rule 36.230(b)
13 previously appeared a statement that the Rule was deleted in
14 accordance with the proposed Final Judgment and that the
15 proposed Final Judgment also prohibits further enforcement of
16 any ban or Board policy against competitive bidding.
17 Section VIII contains various requirements for
18 dissemination of the proposed Final Judgment. First, Section
19 VIII provides that within 60 days from entry of the proposed
20 Final Judgment notice of the proposed Final Judgment consisting
21 of a letter on the letterhead of the Division of Occupational
22 Licensing of the Alaska Department of Commerce and Economic
23 Development with a text identical to that of Appendix A of the
24 proposed Final Judgment shall be sent to (1) each current Board
25 certificate of registration holder, (2) each state, city, and
26 borough entity in Alaska which may purchase architectural,
27 engineering, or land surveying services and to which the
28

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1 Board's roster is mailed under Alaska Statute 08.48.081, and
2 (3) each trade association for contractors in the State of
3 Alaska. Second, Section VIII further provides that within 60
4 d[illegible] entry of the proposed Final Judgment this notice will
5 a[illegible]blished in the general readership sections of various
6 pub[illegible]ions and newspapers in Alaska. Third, this Section
7 also requires that this notice be sent to each new Board
8 certificate of registration holder and to all other persons who
9 normally receive the Board's roster each year for the next ten
10 years. Finally, the Section also provides that the letter will
11 also be published in every printing of the Board's pamphlet of
12 statutes and regulations for the next 10 years.

13 C. Scope of Final Judgment

14 Section XI provides that the proposed Final Judgment will
15 remain in effect for 10 years. Section III provides that the
16 proposed Final Judgment applies to the Board and to the Board's
17 officers, directors, agents, employees, successors, and
18 assigns, and to all other persons in active concert or
19 participation with the Board who shall have received actual
20 notice of the proposed Final Judgment by personal service or
21 otherwise.
22
23 IV.

24 COMPETITIVE EFFECT OF THE PROPOSED FINAL JUDGMENT

25 The relief in the proposed Final Judgment is designed to
26 permit competitive bidding with regard to architectural,
27 professional engineering, and land surveying services in Alaska.
28

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Three methods for determining compliance with the terms of the Final Judgment are provided. First, Section IX requires that the Board file within 120 days after entry of the Final Judgment an affidavit as to the fact and manner of its compliance with Sections VI, VII and the first paragraph of Section VIII of the Final Judgment. Second, Section X provides that, upon reasonable notice, the Department of Justice shall be given access to any of the Board's records relating to matters contained in the Final Judgment and permitted to interview any officers, directors, employees, or agents of the Board. Third, Section X also provides that, upon written request, the Department of Justice may require the Board to submit written reports about any matters relating to the Final Judgment. Finally, Section X provides that, pursuant to Alaska Statute 44.62.190(a)(2), the Department of Justice will be sent notice of proposed regulation actions by the Board.

The Department of Justice believes that this proposed Final Judgment contains adequate provisions to prevent further violations of the type upon which the Complaint is based and to eradicate the effects of the alleged conspiracy.

V.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as

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costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Board.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to John W. Poole, Jr., Chief, Special Litigation Section, Antitrust Division, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20530, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. Section XII of the proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

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VII.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Department of Justice was a full trial of the issues on the merits and on relief. The Department considers the proposed Final Judgment to be of sufficient scope and effectiveness to make a trial unnecessary, since it provides appropriate relief against the violation alleged in the Complaint and is the identical relief that would have been sought at trial.

VIII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment.

Dated:

Respectfully submitted,

EDWARD D. ELIASBERG, JR.

CAROLYN L. DAVIS

Attorneys, United States
Department of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Telephone - (202) 633-2582

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CERTIFICATE OF SERVICE

I, Mark R. Davis, attorney for Plaintiff United States of America, hereby certify that on November 18, 1983, I caused a copy of the attached Stipulation, Competitive Impact Statement and Proposed Final Judgment to be served by express mail on Peter B. Froehlich, attorney for Defendant, State of Alaska, Department of Law, Pouch K-State Capitol, Juneau, Alaska 99811.

Mark R. Davis
Assistant United States
Attorney
District of Alaska
United States Attorney's Office
C-252 Federal Building, Box 9
701 C Street
Anchorage, Alaska 99513

Anch Daily News
Thurs. 29, Dec. 83

Kids glued to games as robber gets cash

A man armed with a small revolver robbed the Qwik Stop grocery at 324 Boniface Parkway on Tuesday night while two teen-agers, oblivious to the theft, played on the store's video games near the front counter.

According to an Anchorage police report, the man walked up to the store clerk just before 10 p.m. and opened his coat to display the weapon tucked in his belt. He asked her to stay quiet and hand over cash.

The thief then ran from the store and sped off in a light-colored station wagon.

The entire robbery went undetected by two 14-year-olds who were busy with a video game. Only when the clerk said what had happened did the boys look up to catch a glimpse of the getaway car.

The suspect is described as a black man in his 20s, and 5 feet, 7 inches tall. He wore sunglasses, a maroon hat, blue jacket and jeans. The belt holding his weapon also sported a large, silver buckle.

Judge finds unconstitutional architect immunity statute

The Associated Press

A state statute designed to protect architects and contractors from construction liability six years after a project is completed has been ruled unconstitutional by a superior court judge.

The law unfairly grants immunity to designers, planners, supervisors and builders from lawsuits after the six-year period, and it leaves property owners or tenants liable for personal injury or wrongful death lawsuits from the design or construction of a structure, said Judge James Hanson of Anchorage.

Hanson said the statute violates the equal protection provision of the state constitution because it grants special immunity to certain people.

"This special statute of 'limitations' is actually a grant of immunity, a bar to causes of action arising out of design or construction deficiencies that cannot be discovered until injuries occur (often after the end of the magic 6-year period)," Hanson wrote in his decision.

The ruling came Friday in a $3 million lawsuit filed by David M. Stiles in 1982. Stiles says he was hit on the head by a piece of steel while working on an oil drilling platform in Cook Inlet.

Named in the lawsuit are Arco, part owner of the platform; Mine Safety Appliances Co., designers of the hard hat Stiles was wearing; and J. Ray McDermott and Co. Inc. and Earl and Wright Consulting Engineers.

McDermott and Earl and Wright claimed they were immune from the lawsuit because six years had passed since the platform was completed.

Assembly redu

By GREG GADBERRY
Daily News reporter

When he or she begins work early next year, the new Anchorage ombudsman will find an office with less than half the staff and money it was allowed in 1983.

The reduction in funding — mandated by the city's post-Proposition 24 budget — will probably result in a reduction in customer service, according to the acting city ombudsman.

"The question is, who is going to suffer because of this (funding cut)?" said acting ombudsman Greg Jefferies. "Well, it's the public."

Earlier this year, former Ombudsman Wayne Mabry led a four-person staff funded with $197,000.

Prior to leaving in November, Mabry requested about $242,000 to run the office in 1984. That money would have paid for four staff members and a new office outside the Municipal-Hill Building.

Instead, the assembly allocated the office $108,860, which will pay for one full-time ombudsman and a secretary.

"The minumum to do this job is three people," Jefferies said this week. "We need the power to monitor situations all over the municipality."

Anchorage has had three ombudsmen since the city and borough were unified in 1975. The office has responded to an increasing number of citizen complaints about government.

In 1982, the ombudsman's office had 2,520 "contacts" with the public, records show. Most of those contacts were handled with a few minutes on the telephone, Jefferies said. Only 113 contacts prompted formal investigations.

Records for 1983 are not completed. Bu[t] probably show 3,400 people call[ed] Jefferies said.

He estimated t[he num]ber of public con[tacts] will be more tha[n] ing the office's manpower that severe.

Since Mabry's in November, th[e office has] been led by Jeff[eries] sistant ombudsm[an] chorage Assembl[y] appoint a new early next year.

Jefferies, who two years in the he isn't sure he w[ill] job.

He said limited leave the new ci[ty ombuds]man with little ch[oice] phase out much of investigative work two people to han[dle] workload next y[ear] may be little or r[oom for] in-depth probes, he

Answering the alone could bec[ome over]whelming, he said.

The municipalit[y] gives the ombuds[man consi]derable scope — b[road] power. An ombu[dsman can] examine files in t[he munici]pality and issue a[dministra]tive subpoenas t[hat are] backed up with th[e] a superior court.

People who "wil[l] der" the ombudsm[an] charged with a mi[sdemeanor] and fined up to $500

But there are li[mits] ombudsman's powe[r] investigate acts of mayor or the assem[bly] appoints him. His

Peninsula mayor seeks re-election

Our Peninsula bureau

SOLDOTNA — Kenai Peninsula Borough Mayor Stan Thompson, who has served seven years as mayor, said

CARPET SALE
Mister Nubbs
Carpet Remnant Shoppe

CHRI[S]
F

First Nat'l Bank, Sup. Ct. Op. No. ... (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. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Applied in State v. Reefer King Co., Sup. Ct. Op. No. 1344 (File Nos. 2605, 2606, 2607), 559 P.2d 56 (1976), modified on rehearing on other grounds, 562 P.2d 702 (1977); Clary v. Stack Steel & Supply Co., Sup. Ct. Op. No. 2093 (File No. 4194), 611 P.2d 80 (1980); Municipality of Anchorage v. Sisters of Providence in Wash., Inc., Sup. Ct. Op. No. 2343 (File Nos. 5017, 5018, 5329), 628 P.2d 22 (1981); Roberts v. Brooks, Sup. Ct. Op. No. 2544 (File No. 5616), 649 P.2d 710 (1982).

Quoted in King v. First Nat'l Bank, Sup. Ct. Op. No. 2525 (File No. 5380), ... P.2d ... (1982).

Stated in Walker v. White, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 567 (1980).

Cited in Oaks v. Rojcewicz, Sup. Ct. Op. No. 318 (File No. 580), 409 P.2d ... (1966); Palty v. Hepp, Sup. Ct. Op. No. 51... (File No. 942), 448 P.2d 310 (1968); Alaska Airlines v. Lockheed Aircraft Corp., 430 F. Supp. 134 (D. Alaska 1977); Straight v. ...ll, Sup. Ct. Op. No. 2256 (File No. 4610), ...2 P.2d 425 (1981); Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., Sup. Ct. Op. No. 2286 (File No. 4698), 623 P.2d 324 (1981); State, N.S.E. Regional Aquaculture Ass'n v. Alex, Sup. Ct. Op. No. 2488 (File Nos. 5065, 5086, 5142), 646 P.2d 203 (1982).

...imely suit to enforce policy as ...errupting limitations against claim... ...s amended pleading to reform it, or ... versa, 92 ALR2d 168.

...hat statute of limitations governs ...on by contractee for defective or improper performance of work by private building contractor, 1 ALR3d 914.

Validity of contractual time period shorter than statute of limitations, for bringing action, 6 ALR3d 1197.

When does cause of action accrue, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another, 12 ALR3d 1265.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass, 15 ALR3d 1228.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 ALR3d 1438.

Time limitations as to claims based on uninsured motorist clause, 28 ALR3d 580.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations, 41 ALR3d 1111.

What statute of limitations covers action for indemnity, 57 ALR3d 833.

What statute of limitations governs action for interference with contract or other economic relations, 58 ALR3d 1027.

What statute of limitation applies to action for surplus of proceeds from sale of collateral, 59 ALR3d 1205.

Choice of law as to applicable statute of limitations in contract actions, 78 ALR3d 639.

When statute of limitations begins to run against action to recover money paid by mistake, 79 ALR3d 754.

Limitation of action against insurer for breach of contract to defend, 96 ALR3d 1193.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 ALR4th 677.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 ALR4th 1214.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 ALR4th 1385.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 ALR4th 456.

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 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.

Bill Freeing Doctors, Other Professionals From FTC Regulation Is Passed by House

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—The House approved a measure granting doctors, dentists and other state-licensed professionals blanket exemption from Federal Trade Commission scrutiny or prosecution.

The exemption provision, which Rep. James Florio (D., N.J.) warned would "fan the flames of health-care cost inflation," was adopted on a 245-155 vote. The American Medical Association and the American Dental Association lobbied vigorously for the measure, and their political action committees contributed handsomely to the 1982 campaign coffers of a majority of representatives.

The proposal was one part of reauthorizing legislation for the FTC. The House dealt the agency a further setback by cutting its budget from the current $68 million level to $60 million for fiscal 1983, $55 million for fiscal 1984 and $54.6 million for fiscal 1985. In addition, the House voted to maintain its prerogative to veto any FTC rule, despite a recommendation from the House Rules Committee that it relinquish that authority. Congress gave itself legislative veto power over the FTC in 1980, and the question of whether Congress has the constitutional authority to veto agency regulations now is before the Supreme Court.

The vote on the exemption measure came after advocates of the exemption narrowly defeated a compromise measure that would have permitted the FTC to continue policing the business practices of professionals while restricting licensing and standard-setting to the purview of state authorities. The compromise, offered by Rep. James Broyhill (R., N.C.), and supported by the White House, was defeated on a 208-195 vote.

The FTC's defenders, including Reps. Broyhill and Florio, had hoped to delay consideration of the issue until the new Congress, with its larger Democratic majority, convened in January. The ultimate outcome of the battle over the professionals' exemption remains unclear, but yesterday's House vote was clearly a blow to the FTC's backers. A similar measure is awaiting action in the Senate, where it won Commerce Committee approval by a two-to-one margin in May.

Rep. Florio said yesterday he also thought the FTC's backers would have done better if the vote had been taken before the November election. "Before an election, there might have been more sensitivity as to how their vote would be read by the people at home," he said. After extensive publicity about the AMA's hefty campaign contributions, a substantial number of Democratic and Republican members successfully urged the leadership this fall to delay consideration of this issue until after the election. The AMA's political action committee gave more to the 1982 congressional campaigns than any group other than the nation's Realtors.

The FTC's supporters said late yesterday they will try to block full congressional action on the FTC's reauthorization—[illegible] professionals' exemption—during the current post-election session. If they are successful, the legislative process on all these FTC-related issues will have to start from scratch in January.

The chief sponsor of the exemption proposal, Rep. Thomas Luken (D., Ohio), said his measure would prevent the agency from "encroaching" on state officials' authority to regulate state-licensed professions. And, he maintained, there isn't any way to do what Rep. Broyhill's proposal sought to do—to draw a line between those activities of doctors and other professionals that affect the quality of care and those activities that amount to business or commercial practices.

Among the actions the FTC has taken in the health-care area are orders forbidding the AMA and the dentists' group from interfering with its members' desire to advertise or work for prepaid health-care plans. The FTC also issued a rule striking down many state and private restrictions on how and where eyeglasses can be sold; the rule is credited with having reduced the cost of eyeglasses and contact lenses nationwide.

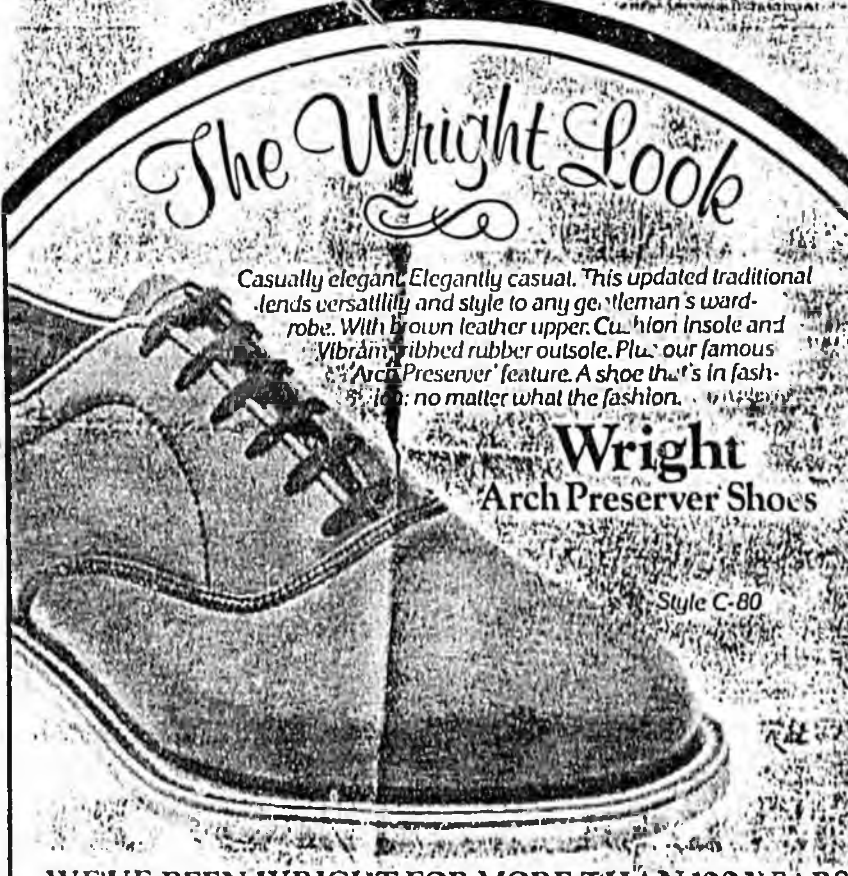
The exemption provision doesn't invalidate such previous FTC actions, as the doctors had wanted, but it does preclude the agency from following up on its earlier orders with actions against smaller professional groups. Recently, the agency has challenged local doctors' and dentists' groups for imposing on themselves and their colleagues certain "ethical" restrictions and agreements that chill competition.

House of Fabrics Inc.

SHERMAN OAKS, Calif.—House of Fabrics Inc. said it expects to report that net income for the fiscal third quarter, ended Oct. 31, rose 39% to $3.7 million, or 70 cents a share, from $2.6 million, or 53 cents a share, a year earlier.

Third-quarter revenue grew about 31% to some $62.6 million from $47.7 million a year earlier, Chairman David I. Sofro said in an interview.

Net for the nine months climbed about 54% to $7.3 million, or $1.41 a share, from



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

DAVID M. STILES,)
)
Plaintiff,)
)
vs.)
)
ATLANTIC RICHFIELD CO.;)
MINE SAFETY APPLIANCES)
COMPANY; J. RAY)
McDERMOTT & COMPANY, INC;)
EARL & WRIGHT CONSULTING)
ENGINEERS,)
)
Defendants.)
)

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT

DEC 22 1983

Clerk of the Trial Courts
By BM Deputy

No. 3AN-82-6892 CIV.

ORDER RULING A.S. 09.10.055 UNCONSTITUTIONAL

Plaintiff's motion in this case has directly challenged the constitutionality of a statute, A.S. 09.10.055, which immunizes certain classes of defendants from any liability six years after substantial completion of any improvement to real property (eight years in the event of wrongful death occurring during the sixth year). This statute, entitled "Certain actions relating to construction in six years"[1],

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1. 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 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

enacted by the legislature in 1967, grants absolute immunity from legal actions ("whether in contract...tort or otherwise") to designers, planners, supervisors, and builders of improvements to real property. Such special "limitation" is denied to owners and tenants of such property, who may still be sued within the usual period that does not begin to run until a personal injury action accrues (until a design or construction "deficiency" results in an injury). The Alaska statute does not distinguish between patent and latent deficiencies; it averts the "discovery" doctrine, under which defective construction would become actionable at the time it was discovered or should have been discovered (usually the time of injury).[2] Unlike the more rational classification of limitations statutes--i.e., classification based on the type of liability asserted (contract, negligence, defamation, etc.)--the statute challenged here turns upon the type of defendant being sued. Thus the statute is contrary to the basic precept that the same law should apply to all who are similarly situated and

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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 196)

2. Such statutes in some other jurisdictions at least distinguish between patent and latent defects; e.g., Martinez v. Traubner, 653 P.2d 1046 (Calif. 1982). The Tennessee courts evidently distinguished between "hidden" dangerous conditions and those openly "visible," Wallace v. Knoxville, 568 S.W.2d 107 (1978). Other states have also sought to ameliorate the harsh effect of such statutes of limitation/immunization by refusing to apply them to personal injury and wrongful death actions. Martinez, supra. Some state legislatures have modified such statutes with this significant clause: "Unless the parties to the contract agree otherwise," as in Wyoming's Code of Civil Procedure §1-? 111 (Wyoming Statutes Annotated [1983 Cumulative Supplement]), which has not yet been tested in court; the original statute was struck down as unconstitutional by the Supreme Court of Wyoming in 1980. Some state legislatures have also refused to extend such limitation/immunization to designers or builders guilty of fraud or concealment of such a cause of action. E.g., §15-3-670 of the South Carolina Code of Civil Remedies and Procedures. Later, the Supreme Court of South Carolina struck down as unconstitutional that state's corollary to our statute in Broome v. Truluck, 241 S.E.2d 739 (1978). In sum, it seems that Alaska's statute is unmitigated in its harshness especially in comparison with the statutes of various other jurisdictions.

no one should be granted special immunity in the courts. Moreover, and what may be more objectionable, this statute has the obvious effect of cutting off an existing right of action--in many instances the common law right of action for negligence--inasmuch as the statute shortens the period of limitation to a time that has already run out.[4] Therefore, this court finds that the challenged statute violates both the equal protection and due process provisions of the Alaska Constitution (Article I, §1 and Article I, §7, respectively).[5] In ruling A.S. 09.10.055 unconstitutional, this court rules that those hitherto protected--designers, planners, supervisors, and builders of improvements to real property--are subject to the same scope of liability to which other professionals, and ordinary citizens in general, are subject to in Alaska. In particular, A.S. 09.10.050 and A.S. 09.10.070, which set forth the respective periods of limitations for contract and

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3. See McClanahan v. American Gilsonite Co., 494 F.Supp. 1334 (USDC, D.Colo. 1980).

4. See Saylor v. Hall, 497 S.W.2d 218, 225 (Court of App.s, Kentucky, 1973): "The right of action for negligence proximately causing injury or death, which is constitutionally protected in this state, requires more than mere conduct before recovery can be attempted. Recovery is not possible until a cause of action exists. A cause of action does not exist until the conduct causes injury that produces loss or damage. The action for negligence evolved chiefly out of the old common-law form of action on the case, and it has always retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. See Prosser, Handbook of the Law of Torts, section 30, page 143 (4th Edition 1971)."

   . . .

   "It is not within the power of the legislature, under the guise of a limitation provision, to cut off an existing remedy entirely, since this would amount to a denial of justice, and, manifestly, an existing right of action cannot be taken away by legislation which shortens the period of limitation to a time that has already run." 51 Am.Jur.2d, Limitations of Actions, section 28, page 613. Surely then, the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action.

5. This court need not address the plaintiff's assertion that the statute is also a "local or special act" in violation of Article II, §19 of our Constitution.

tort actions, now apply to actions arising out of defective construction of improvements to real property, including actions for indemnity or contribution brought by owners or occupiers of such improvements. Finally, this court reiterates the well-established rule that such statutes of limitations begin to run at the time the cause of action accrues,[6] even in cases concerning deficient design or construction.

Given the impact of this order and the likelihood of an appeal to the Supreme Court of Alaska, this court takes this opportunity to explain this ruling further. Although this issue arose in the context of motions for summary judgment in this case, it is hoped that this decision to strike down the statute will not be viewed as summary. Both the plaintiff's and the defendants' attorneys adequately addressed the basic issues in their respective briefs and in oral argument. As a result, this court has reviewed varying commentaries on the subject and examined comparable statutes from virtually every jurisdiction in this country (statutes that have been held constitutional, statutes held unconstitutional, statutes "reenacted" with substantial court-inspired changes, statutes not yet tested), along with the considerable case law on the subject.[7] Notably, just as the parties to this case disagree on the exact breakdown of statutes upheld and statutes struck down, commentators come up with varying counts and, perhaps predictably, different judges dwell upon different authorities. This court does not peg its decision upon a simple tally of "pro" and

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6. Silverton v. Marler, 389 P.2d 3 (Alaska 1964); Howarth v. First Nat'l Bank, 540 P.2d 486 (Alaska 1975), aff'd on reh., 551 P.2d 934 (1976).

7. E.g.: Knapp & Lee, "Application of Special Statutes of Limitations Concerning Design and Construction," 23 St. Louis Univ. L. J. 351; Acret, Architects and Engineers: Their Professional Responsibility, 255-266 (1977); Note, "Actions Arising Out of Improvements to Real Property: Special Statutes of Limitations," 1981 N.Dakota L.Rev. 43; Note, "Limitation of Actions--Statute of Limitations for Architects and Builders as Special Legislation," 16 Land & Water L.Rev. 313 (1981); Sisson & Kelley, "Statutes of Limitations for the Design and Building Professions--Will They Survive Constitutional Attack?" April 1982 Ins. Counsel J. 243; Witherspoon, "Architects' and Engineers' Tort Liability," 16 Def. L.J. 409 (1967).

"con" jurisdictions.[8]

The brief factual background of this case is as follows. The plaintiff is said to have sustained severe and permanent head injuries allegedly as a result of an accident that occurred while he was working on the King Salmon Drilling Platform, a structure designed and constructed by defendants Earl & Wright Consulting Engineers and defendants J. Ray McDermott & Company. That platform is owned by a consortium of oil corporations, including the defendant ARCO. Plaintiff alleges that he was injured as a result of a defect in the design or construction of part of the platform, which caused a large metal hole cover to fall from a work floor above him, and that the defendants should be liable for such a defect. The defendants, Earl & Wright and McDermott, entered respective motions for summary judgment and pleaded the protection of the statute applicable to "certain actions relating to construction within six years" inasmuch as more than six years had elapsed since the "substantial completion" of the King Salmon Platform. Plaintiff submitted a motion for an order declaring that statute unconstitutional, in violation of Article I, §1(equal protection), Article I, §7 (due process) and Article II, §19 (proscription of "local or special" acts).[9]

If the statute were upheld and applied literally, designers and builders could not be liable for a defect (or

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8. The fate of this sort of statute seems to have been about evenly split in recent cases, and the modern trend seems to be toward findings of unconstitutionality, for various violations. Rulings often depend upon the particular provisions of the statutes at issue and the differences among constitutions of different states. See, e.g.: Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972); Overland v. Sirmons, 369 So.2d 572 (Fla. 1979); Martinez v. Trauber, 653 P.2d 1046 (Calif. 1982); Bagby v. McBride, 291 So.2d 306 (Ala. 1974); Skinner v. Anderson, 231 N.E.2d 588 (Ill. 1967).

9. Defendant ARCO, an owner of the allegedly defective structure, has neither joined in nor opposed the plaintiff's motion to have the statute ruled unconstitutional.

breach of implied warranty) due to negligent design or construction, once six years had elapsed since the substantial completion of the improvement to the real property--whether or not the defect were in some part of a structure that should reasonably be expected to last only a short while or in some part that should reasonably be expected to last a very long time.

In recent years many appellate courts have had to examine statutes more or less similar to the one at issue here, almost always in the context of a constitutional challenge. The statutes vary in scope (some apply only to contract actions, but do not immunize the protected class of defendants from personal injury or wrongful death suits); and they vary in the length of limitations periods (from four to twelve to twenty years). Nevertheless, the cases cited herein concern statutes sufficiently similar to Alaska's so as to have some useful bearing upon the case before this court.

The plaintiff dwells primarily upon Article I, §1, emphasizing a violation of equal protection. To address a threshold question, this court acknowledges the defendants' contention that the plaintiff lacks standing to challenge the statute on equal protection grounds. However, the Supreme Court of Alaska has often liberally construed the judicial limitation of standing and has "favored increased accessibility to the courts." State v. Lewis, 559 P.2d 630 (Alaska 1977); Moore v. State, 553 P.2d 8 (Alaska 1976); Wagstaff v. Superior Court, 535 P.2d 1220 (Alaska 1975). Moreover, various courts in other jurisdictions have allowed challenges to such statutes based on equal protection arguments even when advanced by parties not within the class discriminated against by the statute (i.e., not an owner or occupant or materialsman/supplier, typically excluded from the protection of such statutes). E.g., Skinner v. Anderson,

231 N.E.2d 588 (Ill. 1967); Kallas v. Square, 225 N.W.2d 454 (Wisc. 1975); Broome v. Truluck, 241 S.E.2d 739 (S. Carolina 1978). Although the foregoing cases did not delve into the standing issue, a United States District Court did do so in finding such a special statute of limitations in violation of the equal protection clauses of both the United States Constitution and the Constitution of the State of Colorado. McClanahan v. American Gilsonite, 494 F.Supp. 1334 (USDC, D. Colo 1980). In McClanahan the court discussed the United States Supreme Court's opinion in Singleton v. Wulff[10], which discussed the reasons for the general rule that one may not claim standing to vindicate the constitutional rights of a third party:

> "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them."
> 428 U.S. at 113-14, 96 S.Ct. at 2874.

In view of the facts of this case and the reasoning of the United States Supreme Court in Singleton, this court concludes that the plaintiff in this case is an adequate party to assert an equal protection challenge against the statute at issue. I believe that the plaintiff's interest in challenging the statute for violation of equal protection is great enough to assure adequate advocacy. Although those in the specifically discriminated-against class--owners, suppliers and occupiers--could assert their own rights and mount such a challenge to this statute, the underlying objective is to assure that the party in court is the best available advocate of that challenge. Moreover, as the U.S. Supreme Court noted, the rule that one party may not

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10. 428 U.S. 106, 112 (1976).

assert the rights of some other person "has not been imposed uniformly as a firm constitutional restriction on federal court jurisdiction." Flast v. Cohen, 392 U.S. 83, 99, n.20 (1968). Such a rule should not be uniformly imposed to over-restrict this court either. I therefore find that the plaintiff is a proper advocate to advance an equal protection argument against A.S. 09.10.055.

Article I, §1 of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Whereas the scrutiny a statute receives under federal equal protection depends on the characterization of affected right as fundamental or non-fundamental, under the Alaska Constitution's equal protection provisions a stricter "rational basis" equal protection test applies to statutes that do not affect fundamental rights, as in the statute at issue before this court, a "more demanding standard which will be applied in future cases if the compelling state interest test is found inappropriate." Hilbers v. Municipality of Anchorage, 611 P.2d 31, 39 (Alaska 1980). As the Alaska Supreme Court explained in Hilbers:

> As a result, we will no 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 overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.
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> Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (footnotes omitted).

The defendants, among others, have argued that the legislature's purpose in enacting this statute was to protect certain classes of persons in the construction industry

from the increased exposure to liability due to, among other factors, the demise of the rule that construction contractors were not liable to third parties injured after a building had been completed and accepted by an owner. A primary purpose advanced has been to avoid the evidentiary problems that come with the passage of time. However, if this is really the statute's purpose, it is surely promoted in a discriminatory manner. On this point it is worthwhile to note the Illinois Supreme Court's views expressed in Skinner v. Anderson, supra, considered a leading decision on the subject of such special statutes of limitations:

> "[O]f all those whose negligence in connection with the construction of an improvement to real estate might result in damage to property or injury to persons more than four years after construction is completed, the statute singles out the architect and contractor and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. Not only is the owner or person in control given no immunity; the statute takes away his action for indemnity against the architect or contractor.
>
> "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 a 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 used is granted no immunity. And so it is with all others who furnish materials used on 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." Skinner v. Anderson, supra, 231 N.E.2d at 591.

The Illinois Supreme Court's reasoning applies in the case before this court as well.[11] As the Wyoming Supreme Court

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11. Other jurisdictions have followed the Skinner Court in striking down such statutes as violations of equal protection. E.g.: Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973); Kallas, supra, (Wisconsin 1975); Loyal Order of Moose v. Cavaness, 563 P.2d 143 (Okla. 1977).

stated in its thorough opinion in Phillips v. ABC Builders: "We cannot agree that the architects' and contractors' lots in the business world are so onerous as to entitle them to an immunity denied to all others."[12]

I add in passing that within the Ninth Circuit several states have upheld their respective statutes, however distinguishable from Alaska's (to varying degrees): Washington, Oregon, and Utah. I agree with the Wyoming Supreme Court's remark on those decisions: "Those cases are extremely conclusory in their holdings and they do not add appreciably to the difficult and technical discussion warranted by these troublesome statutes."[13]

In the case before this court the plaintiff has also argued that the statute at issue violates Article I, §7 of the Alaska Constitution, which provides for the due process of law. I find that this statute does violate due process in that it effectively operates to destroy a common law right of action that existed at the time the statute was enacted--a right of action for negligence that proximately causes personal injuries. This special statute of "limitations" is actually a grant of immunity, a bar to causes of action arising out of design or construction deficiencies that cannot be discovered until injuries occur (often after the end of the magic 6-year period). On this issue I concur with the view expressed by the Florida Supreme Court in Overland Construction v. Sirmons, 369 S.2d 572 (1974)[14]:

> 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

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12. Phillips v. ABC Builders, 611 P.2d 82, 830 (Wyoming 1980).

13. Id. at 830.

14. The Florida court actually focuses on its state constitutional "right of access to the courts," but that concept is related to due process considerations.

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 expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts.

Furthermore, as indicated earlier in this opinion, I also find support in the decision of the Kentucky Court of Appeals in Saylor v. Hall, which found that a comparable statute of limitations pertaining to injuries caused by construction deficiencies would improperly destroy a common law right of action.[15]

Finally, although the plaintiff has not argued that this statute may even violate Article II, §13 of the Alaska Constitution ("one subject...expressed in the title"), A.S. 09.10.055 invites the same criticism expressed by the Alabama Supreme Court in declaring a comparable statute unconstitutional. That court held that the statute's title did not clearly express the subject matter, because its title stated that it was a statute to regulate the time during which construction-defect actions must be commenced, whereas the statute actually contained both a period of limitations and a provision abolishing certain rights of action against architects and builders after seven years.[16] However, having already ruled the statute to be in violation of due process and equal protection, this court need not decide whether A.S. 09.10.055 violates Article II, §13 or,

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15. The Kentucky court dealt with its state constitutional provision pertaining to pre-existing rights of action. Such a provision also involves due process considerations.

16. Bagby v. McBride, 291 So.2d 306 (Alabama 1974).

as plaintiff argued, Article II, §19 ("no local or special act").[17]

THEREFORE, IT IS ORDERED that A.S. 09.10.055, entitled "Certain actions relating to construction within six years," is an unconstitutional violation of equal protection and due process. IT IS FURTHER ORDERED that A.S. 09.10.050 and 09.10.070, which set forth the respective periods of limitations for contract and tort actions, now apply to actions arising out of defective design or construction of improvements to real property, including actions for indemnity or contribution.

DATED: December 22, 1983.

James A. Hanson
SUPERIOR COURT JUDGE

[illegible] 12-23-83
[illegible] was mailed to each [illegible] at their addresses of [illegible]: See below
Ellen L. Mueller
Secretary to Judge Hanson

M. Flanigan
C. Hagans
D. Thomson
H. Huestenfeld
J. Conway

17. As the Alaska Supreme Court stated in Suber v. Alaska State Bond Committee, 414 P.2d 546 (1966), among the purposes of Article II, §13 is "to guard against inadvertence, stealth and fraud in legislation."