

HB

160

Rep. Brian Porter, Chairman

Date: March 26, 1993

Place: Capitol Room 120

Subject of Meeting: HB 160 Liability of Design Professionals; SB 54 Offenses by Juveniles

# House Judiciary Committee

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
Rosemary Matt	A.D.O.T. + P.F.	MS 2500			465-6960	Y <input checked="" type="radio"/> N	HB 192
Donna Schultz	DHSS / DFYS	P.O. Box 110630 / 99811-0630			465-2112	Y <input checked="" type="radio"/> N	will answer questions SB 54
Jim Galea	DHSS / DFYS	PO Box 110630 -			465-3208	Y <input checked="" type="radio"/> N	Will answer questions SB 54
Deborah Wing	DHSS / DFYS	" "			465-3191	Y <input checked="" type="radio"/> N	Available to AS. Direct.
✓ Shira Macklin	AK Prof. Design	315 5th St # 8	99801		586-7518	Y <input checked="" type="radio"/> N	HB 160
✓ Russ Winney	AK Action Trust	900 W 5th Ave Ste 700, Anch.	99501		277-9522	<input checked="" type="radio"/> Y N	HB 160
✓ Charles E. Cole	Attorney General	Box K JUNEAU			3600	<input checked="" type="radio"/> Y N	SB 54
✓ DEAN GUANELI	Dept. of LAW	Box KC JUNEAU				<input checked="" type="radio"/> Y N	SB 54
✓ Britch Ritter	AK Prof. Design <sup>Comm</sup>				586-1371	<input checked="" type="radio"/> Y N	SB HB 160
LIZ DODD	ACLU	100 Parks St.	99801		463-2601	Y <input checked="" type="radio"/> N	SB 54
						Y N	
						Y N	

# HOUSE COMMITTEE REPORT

(7)

Date Referred: March 3, 1993

FURTHER REFERRALS:

Date of Committee Action: 3-26-93

The JUDICIARY Committee considered:

HB 160

HOUSE BILL NO. 160

LIABILITY OF DESIGN/CONSTRUCTION PROS

"An Act relating to the time for filing certain civil actions; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title  
 be replaced with \_\_\_\_\_ [ ] a new title

[ ] have attached amendments(s)

do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

[ ] fiscal impact \_\_\_\_\_

[ ] fiscal note(s) \_\_\_\_\_

[ ] zero fiscal note \_\_\_\_\_

zero fiscal note(s) Law, Court 3/3/93

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Janette James</i>	✓	<i>James</i>	✓		
<i>Pete Foster</i>	✓	<i>Clayton</i>			
<i>Brian Foster</i>	✓				
<i>Gail Phillips</i>	✓				

\_\_\_\_\_  
CHAIRMAN'S SIGNATURE

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE NORDLUND

TO: HB 160

Page 3, line 18:

Delete "gross"

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE NORDLUND

TO: HB 160

Page 3, line 19, after ";;":

Delete "or"

Page 3, line 21, after "contract":

Insert "; or

(4) if the defect is not discovered or could not reasonably be discovered within the period of time set out under (a) of this section"

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE PHILLIPS

TO: HB 160

Page 2, line 19:

Delete "10"

Insert "eight"

Page 3, line 2:

Delete "10"

Insert "EIGHT"

Page 3, line 6:

Delete "10"

Insert "eight"

Page 3, line 9:

Delete "10th"

Insert "eighth"

Alaska State Legislature

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CHAIR, OIL & GAS COMMITTEE

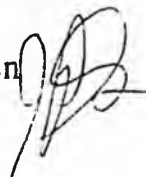


INTERIM ADDRESS:  
3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99503  
(907) 561-7007

DISTRICT 10

Representative Joe Green

TO: Representative Brian Porter, Chair  
House Judiciary Committee

FR: Representative Joe Green 

RE: HB 160

DATE: March 10, 1993

---

I have introduced HB 160, an act relating to the liability of design and construction professionals. The bill was heard, and passed, by the Labor & Commerce Committee.

The next committee of referral is the Judiciary Committee. I would very much appreciate a hearing on this bill at your earliest convenience.

If you or your professional staff have any questions about this legislation, please feel free to speak with me.

REQUEST FOR SCHEDULING

# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 17, 1993

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/02/93

The LABOR AND COMMERCE Committee considered:

HB 160

HOUSE BILL NO. 160

LIABILITY OF DESIGN/CONSTRUCTION PROS

"An Act relating to the time for filing certain civil actions; and providing for an effective date."

- RECOMMENDATIONS:  the same title  
 be replaced with \_\_\_\_\_  a new title  
 have attached amendments(s)  
 do pass  
 do not pass  
 no recommendations  
 individual recommendations  
 additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note Court System, L.A.W

zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Brian S. Porter</i>	✓				
<i>Bill Hudson</i>	✓				
<i>Stitt</i>	✓				
<i>W.R. Ziegler</i>	✓				
<i>Jeffrey</i>	✓				

*Bill Hudson*  
 CHAIRMAN'S SIGNATURE

Alaska State Legislature

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RAILROADS COMMITTEE

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DISTRICT 10

Representative Joe Green

Sponsor Statement for House Bill 160

HB 160 proposes a balance by amending the time period within which someone may bring legal action against design and construction professionals. This time period is known as the "Statute of Repose" (similar to a Statute of Limitations) and it has been established in 45 other states.

The 5th Alaska Legislature first enacted a statute of repose with a six year limitation. In 1988, the Alaska Supreme Court, in Turner Construction Co. v. Scales, found the statute to be in violation of Article 1 of the Alaska Constitution, and ruled it unconstitutional. HB 160 addresses the court's concerns in Turner by expanding the list of those involved in the design and construction process.

The sponsor believes that without a time limit to file legal actions, design professionals and others in the construction trade are subject to an indefinite -- and unfair -- period of liability. After substantial completion of a project the integrity of a structure can be adversely affected by poor maintenance, improper operation or alteration, factors for which the designer or builder should not be held responsible. Within the 10 year period established in HB 160, the integrity of the structure should be well established.

HB 160 **does not** grant immunity -- at any time -- from injury or damage as the result of gross negligence.

A national study conducted in 1988 found that 96.8% of all claims addressed by HB 160 are filed within the 10 year time limit. Within 10 years after a project is completed even the most frivolous claim can still be filed. After the 10 year limit a plaintiff would have to establish gross negligence to have a case. The sponsor feels that cases filed 10 years or more after a project is completed are costing architects, engineers and contractors time, energy, productivity and financial resources beyond what is reasonable.

- SPONSOR STATEMENT -

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 160

Revision Date: February 26, 1993  
Title: "An Act relating to the time for filing certain civil actions..."  
Sponsor: Representative Green  
Requestor: House Labor and Commerce

Department Affected: Law  
BRU: Legal Services  
Component: Operations  
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
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FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see attached analysis.

Prepared by: Richard I. Peques, Director  
Division: Administrative Services Division  
Approved by Commissioner: Charles E. Cole, Attorney General  
Agency: Department of Law

Phone: 465-3672  
Date: February 26, 1993  
Date: February 26, 1993

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 160

ANALYSIS: (continued)

This bill amends the statute of repose for architects and engineers, AS 09.10.055. This bill generally deals with private transactions and, for the most part, the state is not involved, except where it may be a plaintiff with a design claim of its own. The state usually relies on contract law when it has a claim of this nature. It is therefore not anticipated that the bill will have a fiscal impact of the Department of Law.

**FISCAL NOTE**

**STATE OF ALASKA  
1993 LEGISLATIVE SESSION**

Bill No. HB 160

Revision Date: \_\_\_\_\_ Department Affected: Alaska Court System  
 Title: Liability of design/construction BRU: Trial Courts  
           professionals Components: \_\_\_\_\_  
 Sponsor: Green  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 788

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
FUND SOURCE:						

**FUNDING: (Thousands of Dollars)**

1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1008 GF/MHTIA						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

**ANALYSIS:** (Attach a separate page if necessary)  
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel *CS* Phone: 264-8228  
 Division: Alaska Court System Date: 03/01/93

Approved by: Arthur H. Snowden, II, Administrative Director *AS* *CS* Date: 03/01/93  
 Agency: Alaska Court System

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

# NFIB Alaska

National Federation of  
Independent Business

March 2, 1993

The Honorable Bill Hudson  
Labor and Commerce Committee  
Alaska State House  
Pouch V  
Juneau, Alaska 99811

RE: HB 160 Liability of Design/Construction Professionals

Dear Representative Hudson:

The NFIB/Alaska, National Federation of Independent Business of Alaska, membership is comprised of 5000 small and independent business owners. On behalf of our members I want to offer our support to HB 160.

During the year, the field staff of NFIB/Alaska visits literally thousand of small businesses in the state. One recurring theme our staff continues to hear is concern with the cost of insurance.

In response to our 1991 poll of members on liability insurance the members that wrote comments about Liability Insurance, expressed a sense of frustration. Although they had no claims or a few minor claims, their cost had increased. Several members commented they no longer carried liability insurance due to the cost. Anything, you can do to help lower their cost, I am sure would be greatly appreciated. We would urge you to move HB 160 on to the next committee of referral.

On the 1991 NFIB/Alaska ballot we conducted an extensive poll of our members about their Liability Insurance. We sought to determine the current extent of any problems.

9159 Skywood Lane  
Juneau, AK 99801

The following is the result of the 1991 NFIB/Alaska ballot questions regarding liability insurance:

Are you having trouble obtaining liability insurance coverage for your business?

Yes 15.9%

No 80.7

Undecided 3.3%



The Guardian of  
Small Business

LETTERS OF SUPPORT

Page: 2  
MB 160

In recent years, have you experienced a rate increase in your liability insurance for the same amount of coverage?

Yes 72.7%      No 20.8%      Undecided 6.4%

If you answered "Yes" to question 8a how much did it increase?

Increase		Increase	
0 to 10%	25.7%	51 to 75%	3.8%
11 to 25%	41.0%	76 to 100%	3.3%
26 to 50%	19.1%	More than 100%	7.1%

Have you had to reduce your protection through increased deductibles or reduced coverage limits because of rising costs?

Yes 39.1%      No 57.0%      Undecided 3.9%

Have you ever had any claims against your general liability insurance?

Yes 11.3%      No 88.3%      Undecided 0.4%

NFIB/Alaska hopes this information regarding the views of small business owners on liability insurance will be useful to you. If you have any questions regarding this information, please do not hesitate to contact me.

I look forward to working with you on this and other issues of importance to the small business members of NFIB/Alaska.

Sincerely,

*Rosa*

Rosa Jerrel  
NFIB/Alaska  
State Director

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

February 26, 1993

**SUBJECT:** Limiting liability of certain construction professionals - (HB 160)

**TO:** Representative Joseph Green

**FROM:** Michael F. Ford *M. F.*  
Legislative Counsel

I wanted to alert you to a constitutional equal protection issue raised by this work draft. As explained in this memo, the bill draft does appear to violate the constitutional provision guaranteeing everyone the equal protection of the law contained in Article I, section 1, of the Alaska constitution.

Section 2 of the draft repeals and reenacts AS 09.10.055. As repealed and reenacted, the statute would require that an action against a construction professional for personal injury resulting from a defect in construction be brought within ten years of the substantial completion of the construction, with certain exceptions. The existing version of AS 09.10.055 was held to be in violation of the state equal protection clause and struck down by the Alaska Supreme Court in Turner Const. Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988). A careful reading of the court's decision in that case reveals that AS 09.10.055 as repealed and reenacted in the draft still appears to violate the state equal protection clause. The key portion of the court's decision was that the apparent purpose of AS 09.10.055, that of encouraging construction, was not substantially related to the means used to achieve the purpose, exempting design professionals from liability. While AS 09.10.055 as repealed and reenacted in the draft has been improved in a constitutional sense by removing the distinction between types of design professionals that are exempt from liability, the significant constitutional problem identified by the court in Turner Const. Co. Inc. remains.

The right to bring a lawsuit against a particular person is a significant right that to be restricted, must pass the fair and substantial relationship test described in State v. Erickson, 574 P.2d 1 (Alaska 1978). The test generally requires that the state must show that the classification or in this case the exemption, bears a fair and substantial relationship to a legitimate governmental goal. The exemption from liability given to construction professionals in the draft is the means used to achieve the apparent goal of the bill, of encouraging construction. This method was specifically found by

MEMO FROM LEGAL SERVICES

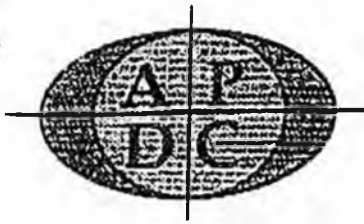
Representative Joseph Green  
February 26, 1993  
Page 2

the court to be a method that was not substantially related to the purpose of encouraging construction. Turner Const. Co. Inc. at 472. Therefore, unless another purpose exists, the draft appears to violate the state equal protection clause in the same manner as the existing language of AS 09.10.055 does.

Two additional points deserve to be mentioned, however. A significant portion of the court's analysis in Turner Const. Co. Inc. focused on the fact that by exempting construction professionals from liability, that liability was being shifted to unprotected parties, such as the property owner. It is unclear if the court's equal protection analysis would change if the court were to consider the changes in the law of civil liability made in 1988 that prevent liability from being shifted to another party. See AS 09.17.080(d). However, given the fact that the property owner is still not exempted from liability under the draft, I don't believe that this would change the court's conclusion that the exemption given to construction professionals is not substantially related to the goal of encouraging construction. It should also be pointed out that the Colorado Supreme Court did reach the opposite conclusion in deciding this issue. In Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982), the court upheld a statute providing an exemption from liability to certain construction professionals against lawsuits filed more than 10 years after substantial completion of the project.

Please contact me if you have further questions.

MFF:gc  
93-170.glc



# Alaska Professional Design Council

P.O. Box 10-3115  
Anchorage, Alaska 99510-3115

**Member Societies**

Alaska Society of  
Professional Engineers

Alaska Society of  
Professional Land Surveyors

American Congress of  
Surveying and Mapping

American Institute of Architects  
Alaska Chapter

American Society of Civil Engineers  
Alaska Section

Architectural/Engineering  
Marketing Association of Alaska

Consulting Engineers Council of Alaska

International Conference of Building Officials  
Alaska Chapter

Professional Engineers in Private Practice  
Alaska Chapter

Structural Engineers Association of Alaska

Senator Tim Kelly  
Chairman, Labor and Commerce Committee  
Capitol Building, Room 107  
Juneau, Alaska 99801

February 3, 1993

RE: Senate Bill No. 73

Dear Senator Kelly:

You have requested the Alaska Professional Design Council's (APDC) position on the current Senate Bill 73, dealing with the Statute of Repose. As a group of 1400 licensed design professionals statewide, APDC represents 10 professional architectural, engineering and surveying societies.

We have been working since the old statute was declared unconstitutional in 1987, to put in force a new statute of repose. Our position is that the new statute will address the following points:

- . Encourage Construction in Alaska
- . Provide Equal Access to the Courts
- . Provide Protection where Protection is Due
- . Aid in Limiting Insurance Rates

### Encourage Construction in Alaska

The statute will encourage design professionals to continue to design projects which are new and innovative without the worry of long term liability. This does not mean that we will have construction projects with any less quality than we do now, it simply will allow the design professional to reasonably limit his risk. Having a statute of repose will decrease operating costs for design professionals in the state.

It is a fact that time spent in defense against any kind of a claim whether it be true or meritless, is borne by the design professional solely. Lack of statute of repose would be unfair to the vast majority of those involved in the design and construction of improvements to real property, many of whom are forced to pay for defense against unfounded charges and are brought into suits solely to increase the potential pool of money for payment to claimants. Nationally it was found by Victor O. Schinnerer Insurance Co., that for every hour spent by a lawyer defending a case, a design professional will spend 3 to 6 hours. This expenditure of time and energy reduces productivity, drains operating resources, and affects the future positive outlook of a firm. This results in a hesitancy towards innovation, a defensive orientation towards clients, higher design fees and an overall increased cost to the public. The design professional wants to provide the best possible service to protect the public utilizing current codes and a professional standard of care.

ALASKA PROFESSIONAL DESIGN  
COUNCIL'S POSITION PAPER

**Provide Equal Access to the Courts**

The statute does not restrict access to the courts. Plaintiffs can still bring action against others including design professionals. In the case of design professionals though, they must prove "gross negligence" in order to have a case. Otherwise the statute will bar action after 10 years. Any type of action can be brought without proof of "gross negligence" prior to 10 years. This is consistent with 45 other states in the United States.

The statute of repose is fair to all parties involved with design projects. A study done by Victor O. Schinnerer states that 96.8 % of all claims against design professional's are brought within 10 years of substantial completion of a project. The statute will protect the public from extensive, meritless cases tying up their court system. It will also protect the public from spending their money on claims which, as proven in national statistics, result in no monetary payment to them 70% of the time. The statute does not protect design professional's who intentionally or as a result of gross negligence, fraud, fraudulent concealment, fraudulent misrepresentation or breach of an express warranty design projects which are a hazard.

**Provide Protection where Protection is Due**


A design project is more of a process than an end product. Due to the complexity of the construction process a project is not like a manufactured product. It continues to evolve and change up to and after the substantial completion date. The design professional brings it to the point of being built, the contractor builds the project with the oversight of the design professional periodically and the owner then takes over control of the project and maintains, improves or neglects it. The project never stays the same during it's life. The initial designer or contractor should not be responsible for everything that happens to the project or around the project site for an unlimited period of time. It is therefore reasonable that after 10 years of changes or neglect the design professionals and contractors are not held responsible for all claims.

**Aid in Limiting Insurance Rates**

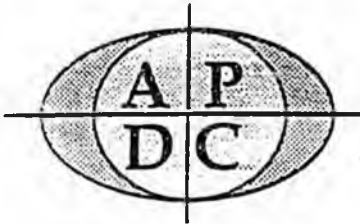
Victor O. Schinnerer, the only liability insurance carrier in the State of Alaska, has stated that having a statute of repose will neither increase or decrease our insurance in the short term. They indicated that insurance rates are not directly tied to this item, hence not affecting them initially. If over time, many suits are brought against design professionals, especially meritless ones, the costs of insurance, design work and construction will go up. A statute of repose would help limit this and thus limit insurance rate increases over time, which will help to keep all insurance rates down.

45 states have passed statute of repose legislation since 1961. Alaska is one of 10 states that has ruled it unconstitutional. Currently Alaska is one of 5 states that are in the process of passing new legislation. Senate Bill 73 with it's new findings section, inclusion of licensed General Contractors and an extended ten year time period will have a broader basis for passing constitutional scrutiny.

Respectfully Submitted,



Doug Green, AIA  
Chairman  
Legislative Liaison Committee  
Alaska Professional Design Council



# Alaska Designs

Volume 14, No. 1, January 1991

The Official Newsletter of the Alaska Professional Design Council

In this Issue

## ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS AND LAND SURVEYORS Special Supplement

### Impacts of Statutes of Limitation and Repose

by Willy Van Hemert, P.E.

Almost thirty years have passed since the 1961 enactment of the first special statute of limitation for lawsuits against architects, engineers and others who design and build construction projects. During this period, much interest has been focused on the legislative programs that led to the enactment of such statutes and their interpretation by the courts once enacted.

It is the purpose of this article to provide basic information regarding statutes of limitation and repose and their impact on the design professional.

#### Statute of Repose vs. Statute of Limitation

The statute of limitation refers to a limited period of time during which a plaintiff must file an action after the cause of action accrues; that is, from the time the injury or damage was first discovered or reasonably should have been discovered. This limited period of time is usually in the two to three year range.

A statute of repose, on the other hand, bars an action for injury or

damage after a stated period of time following substantial completion of the project.

Thus, injury or damage flowing from a constructed facility more than the number of years stated in the law (on the average between seven and eight years) is barred and the question of the alleged negligence of the design professional is not subject to legal procedures.

Why is there a statute of repose dealing with construction activities such as buildings, roadways and so forth? Without such a statute, builders, designers, architects and others in the building trades are subject to an almost indefinite period of liability.

However, we all understand that physical improvements become increasingly affected by operation and maintenance activities, as well as modifications and improvements to the original facilities with the passage of time. It would seem reasonable to assume that once a facility has been used safely for a number of years, the facility itself should be deemed safe.

It is under this general premise that legislators have enacted legislation that strikes a balance between

the interests of potential plaintiffs and the interests of potential defendants who have a right to be free from suit after the passage of a reasonable period of time. The plaintiff is still free to pursue a claim against the owner or tenant in possession of the building or facility; and therefore, the plaintiff is not left without a remedy.

#### Historical Perspective

Since 1961, 47 states, as well as the District of Columbia and Puerto Rico, have passed legislation dealing with the statute of repose. Of the original 49 laws, 44 were taken to court. Thirty three have been ruled constitutional and nine have been ruled unconstitutional. Alaska is included in the latter group.

Currently, 40 states have a statute of repose specifically for design professionals of which 33 have been successfully tested in court.

The time period of the various statutes of repose are tabulated in Figure 1.

See REPOSE, page 7

• REPOSE

*Continued from page 1*

	Length of Liability		
	4-6 years	7-10 years	11-15 years
Constitutional	9	22	2
Unconstitutional	4	5	0
Untested in Court	0	6	1

Figure 1. Status of Current Statutes of Repose

It is interesting to note that the length of time for legal action to take place does not appear to be a primary reason for ruling the statute unconstitutional. In fact, Victor Shinner, a major insurer of architects and engineers, has indicated that 89.3% of all cases are brought forward in the first six years after substantial completion. This increases only slightly to 96.8% after the eighth year.

**The Constitutionality Issue**

Why are the statutes of repose ruled unconstitutional? The primary argument is based on preserving the equal protection clause of the constitution. This was the argument used before Alaska's supreme court in 1988 in the consolidated cases of Turner Construction vs. Robert Scales and Iverson Construction vs. DeWayne Carson.

In the first case, Robert Scales suffered property damage when a fire occurred in the Winterbrook apartments. Turner Construction, the prime contractor, was sued due to their alleged negligent construction and installation of a fireplace.

In the second case, DeWayne Carson was injured while attempting to install an automatic garage door opener. Mr. Carson sued the builder, Iverson Construction, and a subcontractor for faulty construction. Both cases were brought more

than six years after substantial completion of the structures.

The Alaska supreme court was asked to determine if the statute of repose, under which both contractors sought protection, was constitutional. In its evaluation, the court recognized other parties including owners and tenants have continuing control over access to and maintenance of the properties. They recognized that design professionals are open to suit by a larger number of plaintiffs than are owners and tenants whom are given special common law defenses.

The court recognized the distinction between materialmen (suppliers of building components) and design professionals. That is, materialmen provide standard goods manufactured by standard processes. They may, therefore, be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. In other words, buildings are more complex than their component parts.

And lastly, the court recognized that design professionals have special expertise and they should be encouraged to experiment and advance new concepts and ideas rather than be stifled by the threat of unlimited liability.

However, after recognizing all these elements, which form the basis of the statute of repose, the supreme court rejected them as being unpersuasive. The only rational argument brought forward by the court for declaring the statute of repose unconstitutional was the fact that it went against the common law rule of joint and several liability (i.e. anyone whose negligence is in any way part of the cause of an injury is liable for all compensable damages attributable to that injury).

However, in 1988, the people of Alaska voted to repeal several liability to the extent that no one can ever be held financially responsible

for more than twice their contributory negligence. On that fact alone, we believe the supreme court may be forced to reconsider the merits of the same statute, were it enacted by the legislature today.

**Implications for Design Professionals**

What consequences are in store for design professionals if Alaska does not re-enact a statute of repose? This is probably best explained by the case of the Mianus River Bridge collapse in Connecticut in 1988. The design engineer was named as a defendant in legal action although the design was performed over 25 years ago! The engineer had a long legal fight (also having to go to the supreme court) but was eventually relieved of any liability based on the statute of repose. Can you imagine defending a design you performed 25 years ago?

Suits against design professionals are not unusual. In fact, in the past decade, firms averaged over one claim every three years. Yet of the claims brought against design professionals, 80% were successfully defended with no payments to the plaintiff. Unfortunately, in all cases, the design professional was required to defend his actions at considerable cost.

Third party personal liability is not just limited to private sector design

*See REPOSE, page 11*

**Alaska Designs Correspondents**

The deadline for the February issue of *Alaska Designs* is January 25. Mail articles to:

Blythe Campbell, Editor  
Alaska Designs  
P.O. Box 112387  
Anchorage, AK 99511  
(907) 345-1066

## STRUCTURAL ENGINEERS ASSOCIATION OF ALASKA

### November Meeting Report

SEAA joined forces with EERI for a lunch meeting in November. The speaker was Dick Malle of the United States Geological Survey who talked about the location and data collection of strong motion accelerometer instruments in the state.

### January Meeting Announced

The next meeting is scheduled for Tuesday, January 22, 1991. The speakers will be Ron Watts and Will Abbott, both with the Municipality of Anchorage, who will discuss earthquake preparedness and disaster relief plans.

SEAA is trying to coordinate efforts with the Municipality to have response teams ready in the event of a major catastrophe to inspect structures starting with emergency shelters and continuing through public and private buildings.

Anyone wishing to attend should contact Tanya Bratslavsky at 348-5214 or Andy Stember at 561-1733.

#### • REPOSE

*Continued from page 7*

professionals. Public employees are also being named in suits and they are finding that they are not necessarily protected by the governmental agency by whom they are employed if negligence is involved.

And what happens when an individual leaves his employer, whether private or public? Insur-

ance companies are very reluctant to provide prior acts insurance if there is no defined limit to their potential liability. This was evident several years ago when the majority of professional liability insurance carriers pulled out of Alaska. Those firms who had to find new insurance carriers found it cost prohibitive, if not impossible, to obtain prior acts coverage.

The statute of repose impacts all design professionals, as well as the general public, for it is the general public who eventually pays for higher insurance premiums, unnecessary litigation and the eventual loss of America's technical competence.

The statute of repose is not intended to protect design professionals who are negligent. It does, however, protect against unreasonable litigation and sets a distinct limit to potential liability.

We must all work together to insure re-enactment of this important statute.

#### • SURVEY

*Continued from page 9*

*The activities, the products and the opportunities of (surveying and mapping) are not wisely managed on a statewide basis. Consider the following:*

- *There is little, if any, interdepartmental coordination of surveying and mapping activities;*
- *Alaska is one of only a few states not providing annual recommendations to the U.S. Geological Survey regarding Alaska's priorities; hence Alaska is losing millions of dollars annually in benefit;*
- *There is no effort to establish data exchange standards so that multiple use can be achieved of Alaska's tremendous existing computerized survey, mapping*

*and related data;*

- *Alaska has no requirement that valuable surveying and mapping information be preserved, nor even cataloged as to content and location, so that others may benefit from its existence.*

*Since its inception, SMAB has operated without a budget. The voting private sector members have donated their time and personally paid for travel and expenses because they feel very strongly about their mission.*

*The Board, as presently structured, has regional representation plus ex-officio members from DNR, DEC, DCRA and DOT. Since the Board's mission crosses agency boundaries, it needs higher level authority. Creation of the "Alaska Surveying and Mapping Coordinating Council", at the Governor's level, will provide stability and continuity for the Board.*

*Having served as Secretary of the Interior and Alaska's Governor, we know you appreciate the value and importance of surveying and mapping. For the benefit of all Alaskans we urge you to issue an Executive Order creating the "Alaska Surveying and Mapping Coordinating Council".*

The afternoon session dealt with an ongoing proposal to establish survey authority over the unorganized borough. A draft has been prepared for Senator Bettye Fahrenkamp by the Legislative Division of Legal Services using last year's SB 546 and language proposed by the DOT&PF to deal with right-of-way plats.

The Surveying and Mapping Advisory Board analyzed the draft line by line in a work session lasting nearly five hours. For the most part, differences between the private surveying sector, native landholding interests, DOT&PF and DEC were resolved.

It is hoped the resulting draft will become the basis for a new bill early in the upcoming legislative session.

# Schinnerer

Management Services, Inc.

Two Wisconsin Circle, Chevy Chase, Maryland 20815-7003 • 301/961-9800 • Fax 301/951-5444 • Telex 261829

Thomas H. Porterfield, Jr.  
Vice President

Direct Dial: 301/961-9877

January 28, 1992

Mr. Art Jacobs  
7060 Saturn Circle  
Anchorage, Alaska 99504

RE: Alaska Statute of Response

Dear Mr. Jacobs:

Pursuant to our telephone conversation of last Friday, Victor O. Schinnerer and Company has conducted four special claim studies which measure when claims are brought against design professionals in relationship to project date of substantial completion. The studies cover a period of twenty-four years as follows:

- 1964 Study of 570 claim files
- 1983 Study of 159 claim files
- A New York State Specific Study covering claims filed in 1981, 1982 and 1983
- A New Hampshire State Specific Study covering claims filed in 1984 through 1988

As evidenced by all four studies the vast majority of claims filed against Design Professionals are brought within six years of substantial completion usually involving parties to the construction process. Claims filed more than six years after substantial completion almost always involves users of the project. The fact that design professionals may be sued in these instances in no way equates to negligence in their performance of professional services going back 5, 10, 20 and more years.

SCHINNERER CLAIMS' STUDY

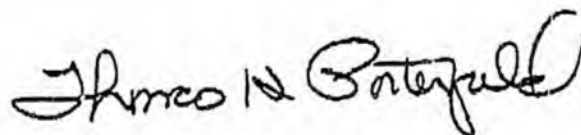
**Schinnerer**  
Management Services, Inc.

The studies also reinforce our belief that there is a legitimate argument to be made for a Statute of Repose. In view of the complexity of the construction process is unrealistic to expect parties involved in the design and construction of any project to defend stale claims brought many years after their involvement with the project has ended; and while normally defensible these claims represent a tremendous financial burden in terms of direct out of pocket cost, time and money.

A special statute does not impose an unfair burden on an injured party because it direct him or her to seek redress from the owner or occupier of the project, the party who is most likely to be responsible for the injury and the one in the best position to have prevented it.

If you have any questions regarding the enclosed material or if we can be of any further assistance, please let me know.

Cordially,



VOS/THP/zmc



March 16, 1983

VICTOR O. SCHINNERER & COMPANY INC.  
SPECIAL CLAIM STUDY  
DISTRIBUTION OF CLAIMS IN RELATIONSHIP TO SUBSTANTIAL COMPLETION

<u>Years Brought Within</u>	<u># of Claims</u>	<u>% of Claims</u>	<u>Cummulative Percentage</u>
One	73*	45.9	45.9
Two	22	13.8	59.7
Three	13	8.2	67.9
Four	13	8.2	76.1
Five	12	7.5	83.6
Six	9	5.7	89.3
Seven	5	3.1	92.4
Eight	5	3.1	95.5
Nine	0	0	95.5
Ten	2	1.3	96.8
More Than Ten	5	3.1	99.9
	<hr/>	<hr/>	<hr/>
	159	99.9	99.9

\*Based on CNA's records, roughly 32.9% of these claims were brought prior to the date of substantial completion.

Study is based upon a review of 250 CNA files set up between December 1979 and October 1980.

The Date of Substantial Completion was established from information secured from CNA claim records.

159 files contained sufficient documentation which could be used for the purpose of this study.

## BACKGROUND

The basis for this study is previous evidence that:

- (1) Most claims against design professionals are initiated within a few years of a project's substantial completion.
- (2) Claims made 10 years after a project's substantial completion are the result of inadequate maintenance by those responsible for a facility, at the time of the claim, not the result of inadequate service by the original design professionals.
- (3) Claims made 10 years, or more, after substantial completion rarely result in damage payments by the design professionals.
- (4) Yet, significant expenses are incurred by the courts, plaintiffs, defendants and insurance companies in processing claims occurring 10 or more years after a project's substantial completion.
- (5) A statute of limitations based on empirical claims data would benefit the public and all involved professionals.



## Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510  
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501  
(907) 258-4040 • FAX (907) 276-7185

March 19, 1993

Representative Brian Porter  
Chair, House Judiciary  
Alaska House of Representatives  
Alaska State Capitol  
Juneau, Alaska 99801-1182

re: HB 160, Liability of Design/Construction Professionals

Dear Representative Porter,

The Alaska trial lawyers oppose HB 160 which is currently in House Labor & Commerce.

HB 160 would impose a statute of repose for suits against architects and engineers for their negligence in the design and construction of buildings in Alaska. The bill is probably unconstitutional. See Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). Further, it is bad public policy: If for example an elementary school roof collapsed more than seven years after construction of the school, killing and injuring students and teachers, the architects, engineers and their insurers would be exempt from liability. This is special interest legislation, pure and simple, at the expense of public safety.

Enclosed is a copy of the Trust's summary position papers on HB 160. Enclosed as well is a more detailed analysis of HB 160 prepared by Russ Winner.

If you have any questions or want additional input from Alaskan trial lawyers on this bill or any other issue, please do not hesitate to call our office.

Sincerely,

Debra C. Gravo  
Executive Director  
dch/encl.

LETTERS OF OPPOSITION



## Alaska Action Trust

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### H.B. 160: LIABILITY OF DESIGN/CONSTRUCTION PROFESSIONALS

In 1967, the Alaska legislature enacted AS 09.10.055. This statute established a six year statute of repose for suits against architects, engineers and contractors concerning their negligence in the design or supervision of construction of a building in Alaska. It was widely criticized as unfair: If a building collapsed during the seventh year after its construction killing its inhabitants, no suit could be filed against the negligent architect, engineer or contractor. Accordingly, a number of superior court decisions in Alaska had ruled that the statute was unconstitutional. Each of these cases settled, however, before they were reviewed by the Alaska Supreme Court.

The matter finally came before the supreme court in Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). There, the court agreed with the superior courts and struck AS 09.10.055 as unconstitutional under the Alaska equal protection clause. Applying the sliding scale of judicial scrutiny, State v. Erickson, 574 P.2d 1, 12 (Alaska 1978), the court found that the right to bring a suit for damages was a significant right, and that legislation restricting that right must bear a "fair and substantial relationship" to a legitimate purpose. The court found that the purpose of the statute was to encourage the design and construction of buildings in Alaska.

The Turner court then found that this statute did not effectively further this purpose: Although it protected architects, engineers and contractors, it did not protect owners, tenants and materialmen. Thus, individuals in this latter group might be sued after the six year period. Under the law regarding joint and several liability in existence at that time, a defendant in that group might then be held liable for up to twice his percentage of fault. In light of this, the court viewed AS 09.10.055 as, in effect, a statutory shifting of liability from design and construction professionals to owners, tenants and materialmen. Since this latter group would continue to have a disincentive to construct buildings, the court reasoned, the purpose of the statute was not served by its provisions. Accordingly, the statute was found to violate the state constitution's equal protection clause.

Since Turner, the Alaska voters approved an initiative abolishing joint and several liability. Now, each defendant is liable only for his percentage of fault. There is no possibility of shifting of liability from architects, engineers and contractors to owners, tenants and materialmen. The narrow basis for the Turner court's rejection of AS 09.10.055 is arguably no longer present.

Seizing on this possibility, HB 160 has been introduced before the Alaska House by Representatives Green, Phillips, Larson, Hudson, Porter, Bunde and Vezey. In essence, it amounts to an effort to reenact AS 09.10.055, with slight modifications, and to overturn Turner. It replaces the six year limitation with a seven year limit. It makes it clear that contractors are protected. (AS 09.10.055 was somewhat unclear on this point, although the supreme court treated it as covering contractors as well as architects and engineers.) It makes it clear that it is an absolute statute of repose, expressly overriding the discovery rule of AS 09.10.140.

As was true earlier, this construction statute of repose is obviously unfair to innocent victims of negligently designed or constructed buildings. Other constitutional challenges to the validity of this bill, if enacted, could be presented. However, it is not a certainty that the Alaska Supreme Court would accept these arguments and again strike the bill, if it becomes enacted. Accordingly, the bill should be stopped now, and should not be enacted by the Alaska legislature.



*Alaska Action Trust*

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**TO:** Representative Porter, Chair of House Judiciary  
Representative James, Vice-Chair of House Judiciary  
Representative Kott  
Representative Phillips  
Representative Green  
Representative Davidson  
Representative Nordlund

**FROM:** Russell Winner

**DATE:** March 19, 1993

**RE:** HB 160, Liability of Design/Construction Professionals

\*\*\*\*\*

On behalf of the Academy of Trial Lawyers, I have been asked to express our strong opposition to HB 160. This bill attempts to overturn a recent Alaska Supreme Court decision and to establish a seven year statute of repose for suits against construction design professionals. First, the bill is manifestly unfair to the innocent victims of negligently designed buildings. Second, it may well be stricken as unconstitutional by the Alaska Supreme Court. Third, enactment of HB 160 is unlikely to have any appreciable effect on the insurance premiums paid by design professionals. Finally, passage of this bill may result in significant additional social service costs to the State of Alaska.

In 1967, the Alaska legislature enacted AS 09 10.055. This statute established a six year statute of repose for suits against architects, planners and engineers concerning their negligence in the design or supervision of construction of a building in Alaska. It was widely criticized as unfair: If a building collapsed during the seventh year after its construction injuring or killing its inhabitants, no suit could be filed against the negligent design professional. Accordingly, a number of superior court decisions in Alaska had ruled that this statute was unconstitutional. Each of these cases settled, however, before they were reviewed by the Alaska Supreme Court.

The matter finally came before the supreme court in Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). There, the court agreed with the superior courts and struck AS 09.10.055 as unconstitutional under the Alaska equal protection clause. Applying a sliding scale of judicial scrutiny, State v. Erickson, 574 P.2d 1, 12 (Alaska 1978), the court found that the right to bring a suit for damages was a "significant right," and that legislation restricting that right must bear a "fair and

substantial relationship" to a legitimate purpose. The court found that the purpose of the statute was to encourage the design and construction of buildings in Alaska, and that this was a legitimate purpose.

The Turner court, however, found that AS 09.10.055 did not effectively further this purpose: Although it protected design professionals, it did not protect owners, tenants and materialmen. Thus, individuals in this latter group, who were also necessary participants in the construction process, might be sued after the six year period. Further, under the law regarding joint and several liability in existence at that time, a defendant in that latter group might then be held liable for up to twice his percentage of fault. In light of this, the court viewed AS 09.10.055 as, in effect, a statutory shifting of liability from design professionals to owners, tenants and materialmen. Since this latter group would continue to have a disincentive to construct buildings, the court reasoned, the purposes of the statute were not served by its provisions. Accordingly, the statute was found to violate the state constitution's equal protection clause.

Since Turner, the Alaska voters approved an initiative abolishing joint and several liability. Now, each defendant is liable only for his percentage of fault. AS 09.17.080. There is no possibility of shifting of liability from design professionals to owners, tenants and materialmen. Arguably, under a narrow reading of Turner, the basis for the court's rejection of AS 09.10.055 is no longer present.

Seizing on this possibility, HB 160 attempts to reenact AS 09.10.055, with some modifications, and to overturn Turner. It replaces the six year limitation with a seven year limit. It appears to protect contractors as design professionals, at least insofar as they are involved in the design phase of a construction project.<sup>1</sup> Further, HB 160 can be read as expanding AS 09.10.055 by protecting contractors in their construction activities (as opposed to their design activities) as well: It applies inter alia to "negligence in the construction ... of an improvement to real property." Finally, HB 160 makes it clear that it is an absolute statute of repose, expressly overriding the discovery rule of AS 09.10.140.

HB 160 should not be passed. First, as was true earlier, this bill is obviously unfair to innocent victims of negligently designed or constructed buildings. By way of example, suppose the

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<sup>1</sup> AS 09.10.055 was somewhat unclear on this point. However, the supreme court in Turner treated it as covering contractors involved in the design process as well as architects and engineers. 752 P.2d at 471.

roof of an elementary school collapsed more than seven years after completion of construction due to an engineering firm's negligent calculation of the roof's ability to carry a snow load. Under HB 160, no recovery could be had against the responsible engineering firm or its insurer for the deaths or injuries of the school's children. Likewise, the school district could not recover from the engineering firm or its insurer for the cost of repairs to the school roof.

Second, HB 160 may well be found unconstitutional by the Alaska Supreme Court for the same reasons as AS 09.10.055. The court would likely apply the same equal protection analysis as it did in Turner. Since innocent victims of negligently designed buildings would be deprived of the "significant right" of access to the courts, HB 160 would survive judicial scrutiny under the Alaska equal protection clause only if it bears a "fair and substantial relationship" to its purpose of encouraging the design and construction of buildings in Alaska.

As was true under the prior statute, the statute of repose of HB 160 would not protect owners, tenants, and materialmen. As the supreme court noted in Turner, these are all essential participants in the construction of improvements on real estate. To exempt some but not all of the necessary participants in the construction process would not have the desired effect of encouraging the design and construction of buildings in Alaska. The unprotected participants could still be found liable, under the discovery rule, even after the seven year statute of repose of HB 160.

It is true that after the recent initiative, these unprotected participants can be found liable for only their percentage of fault, rather than double that amount. Thus HB 160 does not effect a partial shifting of liability from the protected to the unprotected participants, as did AS 09.10.055 before the initiative. Nonetheless, even after enactment of HB 160 the unprotected participants would still have a disincentive to engage in the construction process. Accordingly, the Supreme Court may well strike HB 160 for the same reason it struck AS 09.10.055 in Turner: it fails to bear a substantial relationship to encouraging the design and construction of buildings in Alaska. Owners, tenants, and materialmen would still be liable and might still balk at playing their roles in the construction process.

Construction statutes of repose have been struck as unconstitutional in a number of other states besides Alaska. These decisions rely on a variety of grounds, including equal protection, due process, or the prohibition against special legislation. The Alaska Supreme Court, when called upon to review HB 160, might well strike it under any of these provisions of the Alaska constitution. Accordingly, before considering passage of this bill, an opinion from the Attorney General should be sought regarding its constitutionality.

Third, HB 160 can be justified as encouraging the design and construction of buildings in Alaska only to the extent that it can be shown to reduce the liability insurance premiums for design professionals. However, no evidence has been presented, in Alaska or elsewhere, that enactment of "tort reform" has had much if any effect on insurance rates. Instead, insurance rates appear to be driven principally by insurance companies' investment strategies and their rates of return on investments. The legislature should collect further information, and hold further hearings if necessary, to examine what effect, if any, enactment of HB 160 would have on the liability insurance rates of design professionals.

Finally, HB 160 should be accompanied by a fiscal note. Enactment of this bill might well increase the costs of providing social services in Alaska. If the bill is enacted and withstands judicial scrutiny, it is inevitable that future catastrophically injured victims of the collapse of buildings will go uncompensated. The cost of their medical treatment, care and support will have to be borne by the social service agencies of the State of Alaska.