SB 73

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,

Thmco W. Botefuhr

VOS/THP/zmc

Victor O. Schinnerer & Company Inc

March 16, 1983

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

Years Brought Within	# of Claims	% of Claims	Cummulative Percentage
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
	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 Professional Design Council

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

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.

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

NFIB Alaska

National Federation of
Independent Business

February 9, 1993

The Honorable Tim Kelly
Labor and Commerce Committee
Alaska State Senate
Pouch V
Juneau, Alaska 99811

RE: SB 73 relating to the time for filing certain civil actions.

Dear Senator Kelly:

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 SB 73.

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 SB 73 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.

State Office
9159 Skywood Lane
Juneau, AK 99801
(907) 789-4278

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%

SUPPORT FROM
NFIB ALASKA

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,

Resa Jerrel

Resa Jerrel
NFIB/Alaska
State Director

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 73

Revision Date: February 4, 1993
Title: "An Act relating to the time for filing certain civil actions..."
Sponsor: Senator Kelly
Requestor: Senator Kelly

Department Affected: Department of 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 SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						
FUNDING:						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
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 the attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: February 4, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 4, 1993

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

FISCAL NOTES

Rev 11/92

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 73

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 on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. SB 73

Revision Date:
Title: An Act relating to the time for filing certain civil actions
Sponsor: Kelly
Requestor: Senate Labor & Commerce

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
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						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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
Division: Alaska Court System
Phone: 264-8228
Date: 02/08/93

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/08/93

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

Rev 1/93

Alaska State Legislature

SENATOR TIM KELLY

Official Business

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: Senator Robin Taylor, Chair
Senate Judiciary Committee

FROM: Senator Tim Kelly TDK

DATE: February 10, 1993

RE: SB 73 - Liability of Design/Construction Professionals

I respectfully request that you schedule SB 73 for a hearing before the Senate Judiciary Committee at the Committee's earliest opportunity.

Attached you will find my position paper, a fiscal note, letters of support from the National Federation of Independent Business of Alaska and the Alaska Professional Design Council, legal opinions from the Department of Law and LAA's Division of Legal Services, and other pertinent back-up.

Please note that this legislation did pass the Senate last year before dying in the House Labor & Commerce Committee.

Your timely consideration is appreciated.

SPONSOR STATEMENT

Alaska State Legislature

SENATOR TIM KELLY

Official Business

State Capitol
Juneau, AK 99801-1182

SPONSOR STATEMENT FOR SB 73:

LIABILITY OF DESIGN/CONSTRUCTION PROFESSIONALS

In 1967, the Alaska Legislature enacted a six year statute of repose for suits against design professionals. The rationale was that it seemed reasonable to assume that after a facility had been utilized safely for six years, the facility itself should be deemed safe. A balance needed to be struck 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 amount of time. Without such a statute, design professionals and others in the building trade are subject to an almost indefinite period of liability, even though a facilities' "safeness" becomes increasingly affected by operation and maintenance activities, as well as improvements, over the life of the facility.

In 1988, the Alaska Supreme Court, in Turner Const. Co. v. Scales, ruled the statute (AS 09.10.055) unconstitutional, as it violated Article 1 of the Alaska Constitution, the provision guaranteeing equal protection under the law. (See attached opinions from LAA's Division of Legal Services and the Department of Law).

SB 73 would repeal the six year statute of repose and re-enact a 10 year statute of repose in its place. While the same constitutional concerns exist, it may now survive the court's scrutiny. Under current law, there is no longer joint and several liability, so liability would not be shifted to another party.

In addition, immunity would not kick in until 10 years from the date of substantial completion, rather than six. (An attached study from a major insurer of design professionals indicates 98% of all claims against design professionals are brought forward within 10 years of substantial completion.) It does not grant immunity if the injury or property damage resulted from "gross negligence."

While this legislation is admittedly in a "constitutional grey area", it is necessary to provide reasonable protection for design professionals.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☐ *1031 WEST 4TH AVENUE, SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☒ *P.O. BOX 110300 - STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465- 2398
FAX: (907) 465-2417

February 5, 1993

The Honorable Tim Kelly
Chair
Senate Labor and Commerce Committee
P. O. Box V
Juneau, AK 99811

Re: Senate Bill No. 73

Dear Senator Kelly:

You have requested our office to comment on Senate Bill No. 73. Last legislative session our office provided comments to Senator Halford on CSSB 109(2d Jud.); Senate Bill No. 73 is nearly identical to last year's CSSB 109(2d Jud.). Our concerns with this type of legislation remain the same. Therefore, we enclose a copy of our comments on CSSB 109(2d Jud.); these comments apply with equal force to current Senate Bill No. 73. We have discussed this matter with your staff member, Josh Fink. Please contact me if I can be of further assistance to you on this matter.

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Sarah J. Felix
Sarah J. Felix
Assistant Attorney General

SJF:prm

Attachment

cc: Kris Lethin, Legislative Liaison
Governor's Office

Charlie Cole
Attorney General

03-C5LH

ATTORNEY GENERAL'S LEGAL OPINION

Bruce Botelho
Deputy Attorney General

Deborah Behr, Assistant Attorney General
and Regulations Attorney

Susan Cox,
Assistant Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☐ 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ 1st NATIONAL CENTER
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☑ P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 24, 1992

The Honorable Richard W. Halford, Senator
Chairman, Senate Judiciary Committee
Capitol Bldg., Room 103
P.O. Box V
Juneau, Alaska 99811

Re: Senate Bill No. 109
File No. 663-92-0389

Dear Senator Halford:

You have requested the administration's position on the February 5, 1992, work draft of CSSB 109(2d Jud.). Because our office cannot speak for the administration we are, by copy of this memorandum, forwarding your request to the governor's office. We will address legal issues presented by this draft of the bill.

As we understand it, the work draft seeks to minimize potential constitutional problems associated with prior versions of the bill. Although the work draft improves upon prior versions, we do not believe this draft eliminates potential equal protection problems.

The work draft contains findings to justify the bill and would create a new 10-year statute of repose in AS 09.10.055. Previous versions of the bill did not include findings and specified a seven-year statute of repose.

However, the bill as revised continues to present a grey area in light of the concerns raised by the Alaska Supreme Court in Turner Construction Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988). As you are aware, the court in Turner struck down a six-year statute of repose then existing in AS 09.10.055, finding that the statute violated the state constitution's equal protection clause.

We agree with Mike Ford's February 3, 1992, memorandum to you that the legislation may not dispose of the constitutional concerns raised by the court in Turner. The Turner court found that the purpose of AS 09.10.055 was to "encourage construction and avoid stale claims by shielding certain defendants from potential future liability." Id. at 471 (citation omitted). Although these

1-CSLH

were found to be legitimate government purposes, the court determined that they were not substantially related to the means used in the statute, which was to exempt design professionals from liability. Id. at 471-72.

The findings that would be added to the bill by the February 5 work draft arguably present a new justification for the bill. However, the court in Turner apparently was not persuaded by the type of justification set out in these findings. Id. 1/ Furthermore, it is not clear that extending the statute of repose from six to 10 years would cause the court to find the legislation's means substantially related to its purpose. Thus, it is arguable that the significant constitutional problem identified by the court in Turner remains.

We acknowledge that the post-Turner elimination of joint and several liability and contribution in Alaska may well impact a court's analysis of any new legislation creating a statute of repose. The Turner case was decided in the context of joint and several liability, meaning that "each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury." Id. at 471. Under the Uniform Contribution Among Tortfeasors Act, AS 09.16.010 -- 09.16.060, a party found to be at fault, who paid damages to a plaintiff, could seek to recover contribution on a pro rata basis from another liable tortfeasor who had not previously paid the plaintiff. The Turner court acknowledged that the statute of repose essentially eliminated this statutory right of contribution in some circumstances; for example, "whenever an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the unprotected owner would be 100% liable for all damages, without a remedy for contribution." Turner, 752 P.2d at 471. Thus, in such a situation the statute of repose served to shift the liability among joint tortfeasors. Id. at 472.

The passage of Initiative Proposal No. 2 in 1987 resulted in the repeal of statutory contribution and elimination of the common law doctrine of joint and several liability. See 1987 Initiative Proposal No. 2, secs. 1 and 2; AS 09.17.080. By statute, in all actions involving fault of more than one party, the court is to enter judgment on the basis of several liability in accordance with each party's percentage of fault. AS 09.17.080. This means that, ideally, no tortfeasor should be held accountable

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1/ It is noteworthy that the court in Turner expressly referenced cases from other jurisdictions that had considered these types of justifications, yet the Turner court failed to uphold the statute of repose as some other courts have on these grounds. Turner, 752 P.2d at 471.

for anything but its own share of the damages it caused. If this were the case, it could eliminate the Turner court's concern about shifting liability for defective design and construction from designers, architects, engineers, and construction contractors to owners and material suppliers. Turner, 752 P.2d at 472.

Whether the tort reform initiative actually prevents shifting of liability among tortfeasors remains to be seen. While that is the theme of the 1987 initiative, there are several questions about practical application of the principle that are not addressed by the initiative. For example, AS 09.17.080(a) directs the trier of fact to allocate the percentage of fault attributable to each party to an action; yet, it is unclear whether and by what means the universe of parties is to be defined. Specifically, may a defendant add other tortfeasors as parties to the case, now that statutory contribution has been repealed? If the plaintiff is allowed to limit the defendants to an action, will those defendants who are named be permitted to argue that fault should be allocated to entities who are not participants in the litigation? How these issues are resolved by the courts will determine whether Alaska has purely several liability, or whether only the parties selected by a plaintiff to be defendants will carry the burden of liability. If the latter situation is the case, a statute of repose that insulates certain professionals from suit may still have the effect of shifting liability, albeit indirectly, to others who are not so protected. 2/

The [illegible] court found "no substantial relationship between exempting [illegible]n professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction." Turner, 752 P.2d at 472. As pointed out above, it is questionable whether tort reform has eliminated the possible shifting of liability among potential defendants that is posed by the work draft of CSSB 109 (2d Jud.). Moreover, it is unclear whether the court would find the means of this legislation to be substantially related to the end of encouraging construction in Alaska.

2/ We note that, even if pure several liability is the rule in Alaska, it can cause a shifting of liability from the defendants to the plaintiff. If a percentage of fault is allocated to a defendant who is judgment-proof, the plaintiff will not be able to recover that percentage of the judgment from any other defendant and the plaintiff will therefore bear the burden of that defendant's fault. This feature of tort reform would not, however, necessarily impact the court's examination of SB 109's differential treatment of certain types of potential defendants.

For the foregoing reasons, we believe that the February 5 work draft of CSSB 109 is in a constitutional grey area. We have no suggestions at this time on ways to improve the legislation's chances of passing constitutional muster. We hope this responds to your request. 3/

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

Sarah J. Felix

By: Sarah J. Felix
Assistant Attorney General

Susan D. Cox

By: Susan D. Cox
Assistant Attorney General

SJF/SDC:jp/jal

cc: Bruce Geraghty
Governor's Office

Deborah Behr,
Legislation and Regulations

3/ We also agree with the observation in Mike Ford's February 7, 1992, letter that proposed AS 09.10.055(c)(1) is ambiguous and should be revised to specify that the statute of repose does not apply to an action against a person who was in actual possession and lawful control of the improvement at the time the defect caused the personal injury, death, or property damage.

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 January 22, 1993

SUBJECT: Limiting liability of certain construction professionals - (Work Order No. 8-LS0446\A)

TO: Senator Tim Kelly

FROM: Michael F. Ford
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 ~~seven~~ 10 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

DIVISION OF LEGAL SERVICES'
LEGAL OPINION

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 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
93-054.glc

that the former record owner would have received the notice, would have prevented foreclosure by paying off the State's lien, and then would have allowed Emerson to continue his adverse possession. The causal connection between the allegedly defective notice and Schnabel's present predicament is too attenuated to confer standing upon him.

The causation aspect of standing has never been well developed by this court. However, federal courts have addressed the issue at length. To have standing in federal court, a litigant must show that *but for* the challenged action, his injury would not have occurred. *See Warth v. Seldin*, 422 U.S. 490, 504–08, 95 S.Ct. 2197, 2207–2210, 45 L.Ed.2d 343, 358–59 (1975) (in a challenge of restrictive zoning practices, litigants lacked standing because they failed to allege facts showing that, "absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield"). In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40–45, 96 S.Ct. 1917, 1225–1227, 48 L.Ed.2d 450, 462–64 (1976), the Court held that the causation requirement of standing is not merely prudential, but is mandated by Article III.[3]

In Alaska state courts, standing restrictions are prudential, rather than constitutionally mandated. In this case, the party entitled to notice was the 1957 record owner. That person, whomever he may be, does not claim that the notice was defective. Under these circumstances, it is imprudent to entertain such a claim by one who was not injured by the alleged violation. To do so would be a misallocation of judicial resources.

Schnabel's alternative basis for standing is that he seeks to protect not his own rights but the rights of a third party—namely, the former record owner. A litigant can have standing to protect the constitutional rights of a third party when a special relationship exists between the two, and when the third party's rights would otherwise go unasserted. This court allowed standing on this basis in *Wagstaff v. Superior Court, Family Court Division*, 535 P.2d 1220, 1226 (Alaska 1975). However, in Schnabel's case, this basis for standing is totally inapposite: Schnabel seeks to vindicate the rights of the former record owner not to *protect* that person, but instead to possess adversely *against* him. In other words, Schnabel is not an appropriate representative.

For these reasons, I would affirm the superior court's holding that Schnabel lacks standing. As for the defense of laches, I agree that it would otherwise bar Schnabel's claim. However, a person who lacks standing to raise a claim cannot unreasonably delay in asserting it.

TURNER CONSTRUCTION COMPANY, INC., Petitioner,

v.

Robert SCALES and Kip Clapper, Respondents.

Phillip IVERSON d/b/a Iverson Construction Company, Petitioner,

v.

DeWayne B. CARSON and Robert J. Kottre d/b/a K & W Doors, Respondents.

Nos. S–1429, S–1600.

Supreme Court of Alaska.

April 1, 1988.

Action was brought against construction company and others for loss as result of fire in apartment complex. The Superi-

3. The *Warth* and *Simon* opinions have been criticized, primarily because the Supreme Court required such a high degree of certainty in the causal connection. *See* L. Tribe, *American Constitutional Law* 129–34 (2d ed. 1988).

or Court, Third Judicial District, Anchorage, Douglas J. Serdahely and Joan M. Katz, JJ., ruled six-year statute of repose unconstitutional and petitions for review were filed. The Supreme Court, Burke, J., held that six-year statute of repose on suits against design professionals violated equal protection clause of State Constitution.

Affirmed.

1. Limitation of Actions ⇐165

Statute of repose differs from statute of limitations in that former may bar cause of action before it accrues, because statute begins to run from specific date unrelated to date of injury so that cause of action thus precluded is damnum absque injuria, loss without remedy, while in contrast, statute of limitations begins to run when plaintiff's cause of action accrues or is discovered and thus operates to prevent plaintiff from sleeping on his or her rights.

2. Constitutional Law ⇐42.2(2)

Injured party's interest in invalidating six-year statute of repose on suits against design professionals was as great as that of materialmen or defendant in possession, so that injured party had standing to assert claim that statute violated equal protection clause of State and Federal Constitutions because it did not protect all defendants similarly situated and two-year savings period unfairly discriminated against parties injured in seventh and eighth year after construction. AS 09.10.055; Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐213.1(1)

When plaintiff challenges statute on state and federal equal protection grounds, first question Supreme Court must consider is whether constitutional claimant asserts fundamental constitutional right or statute uses a suspect classification and if answer to either question is yes, then statute is unconstitutional under federal standard absent compelling state interest. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 1.

4. Constitutional Law ⇐249(3)
Limitation of Actions ⇐4(2)

Six-year statute of repose on suits against design professionals classified defendants based on their occupation or nature of work they performed and classified plaintiffs based on time of their injury, so that neither was suspect class, and right asserted was interest in suing particular party, which was not fundamental constitutional right, but as interest in redressing wrongs through judicial process was significant one, compelling state interest standard did not apply and Supreme Court would analyze significant constitutional claims asserted under fair and substantial relationship test of State Constitution. Const. Art. 1, §§ 1, 7.

5. Constitutional Law ⇐249(3)
Limitation of Actions ⇐4(2)

There was no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and goals of encouraging construction, and thus six-year statute of repose on suits against design professionals violated equal protection clause of state constitution. AS 09.10.055; Const. Art. 1, §§ 1, 7.

Paula Williams and Dan Cadra, Law Offices of Roy W. Matthews III, Anchorage, for petitioner Turner Const. Co.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for petitioner Philip Iverson.

Joseph A. Kalamarides, Kalamarides & MacMillan, Anchorage, for respondent Robert Scales.

Jeffrey M. Feldman and Stuart A. Ollanik, Gilmore & Feldman, Anchorage, and Jeffrey D. Jefferson, Nordstrom, Steele & Jefferson, Kenai, for respondent DeWayne B. Carson.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

The question in these consolidated cases is whether AS 09.10.055, the six-year statute of repose on suits against design professionals, violates the Alaska Constitution. The superior court ruled the statute unconstitutional. We affirm.

I. FACTS AND PROCEEDINGS

Turner Construction v. Scales, File No. S–1429. Robert Scales suffered property damage when a fire occurred in the Winterbrook Apartments in 1984.[1] Turner Construction Company built the apartments in 1978. Scales sued Turner Construction and others for his loss, alleging in part that the fire was caused by Turner Construction's negligent construction and installation of a fireplace.

[1] Turner Construction asserted that Scales' cause of action was barred by AS 09.10.055, the six-year statute of repose[2] governing actions against design professionals such as architects, engineers and contractors, and moved for judgment on the pleadings. Scales moved to strike the defense on the ground that the statute is unconstitutional. Superior Court Judge Douglas J. Serdahely granted Scales' motion, concluding that AS 09.10.055 violates the due process[3] and equal protection[4] clauses of the Alaska Constitution.

Iverson v. Carson, File No. S–1600. DeWayne B. Carson was injured in 1985, while attempting to install an automatic garage door opener in his home. Phillip Iverson built the home in 1978; the garage door was originally installed by a subcontractor.

Seven months after his injury, Carson sued Iverson and the subcontractor. Iverson moved for summary judgment, based on the six-year statute of repose, because Carson was injured six-and-a-half years after substantial completion of the improvement. Superior Court Judge Joan M. Katz denied Iverson's motion, concluding that AS 09.10.055 violates the equal protection clause[5] of the Alaska Constitution.

II. THE STATUTE

The statute in question was enacted in 1967. It provides in part:

> (a) No action, whether in contract ..., 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.

1. Given the procedural posture of these cases, we must assume the allegations in the plaintiffs' complaints are true. *Freezer Storage v. Armstrong Cork*, 476 Pa. 270, 382 A.2d 715, 717 (1978).

2. A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is *damnum absque injuria*, a loss without a remedy.

In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

3. Alaska Const. art. I, § 7.

4. Alaska Const. art. I, § 1.

5. *Id.*

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of the 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.

AS 09.10.055 (Emphasis added).

The House Judiciary Report notes that this section "places a ... statute of limitation on lawsuits against architects, designers and builders." 1967 House Journal 261. It is clear, however, that the House intended to enact a statute of repose. An explanatory report by the Judiciary Committee stated in part:

> [T]he time begins running upon 'substantial completion' of the improvement; consequently this bill limits not only the bringing of the cause of action, but in effect prevents the cause of action from arising when an injury occurs after the time limitation has expired. An action based on a defect not discovered until after the time limitation has expired would likewise be precluded.

Id. at 365.[6]

III. EQUAL PROTECTION

[2] Scales and Carson argue that AS 09.10.055 violates the equal protection clauses of the state and federal constitutions because (1) it does not protect all defendants similarly situated and (2) the two-year savings period in subsection (b) unfairly discriminates against plaintiffs injured in the seventh and eighth years after construction. The design professionals contend that the injured plaintiffs lack standing to challenge the statute on the first of these grounds, because the plaintiffs are not members of the class of unprotected defendants. The design professionals further contend that the statute is constitutional.

Standing. The injured plaintiffs' first constitutional claim is based on the rights of third parties—potential defendants, such as owners and tenants, who are not protected by the statute.[7] Every court which has addressed the issue has concluded that persons such as the plaintiffs are proper parties to assert this claim, because they are precluded from asserting their own rights against defendants who might otherwise be liable; the statute narrows the group against which recovery is available. *McClanahan v. American Gilsonite*, 494 F.Supp. 1334, 1342–44 (D.Colo.1980); *Shibuya v. Architects Hawaii*, 65 Hawaii 26, 647 P.2d 276, 282 (1982). The injured plaintiffs' interest in invalidating the statute is as great as that of the materialman or the defendant in possession. *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514, 523 (1982). We find this reasoning persuasive, therefore, we conclude that the injured plaintiffs have standing to assert the equal protection challenge.

[3] *Equal protection.* When a plaintiff challenges a statute on state and federal equal protection grounds, the first question we must consider is whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). If the answer to either question is "yes," then the statute is unconstitutional under the federal standard absent a compelling state interest. *Id.*

[4] This statute classifies defendants based on their occupation or the nature of the work they perform; it classifies plaintiffs based on the time of their injury.

6. AS 09.10.055 is one of many state statutes enacted as a result of a concerted national lobbying effort by design professionals sparked by an increase in their potential liability for design and construction defects. *See, e.g.*, Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 Fed'n of Ins.Couns.Q. 41, 44–45 (1978).

7. The statute expressly excludes from its protection owners, tenants and others in possession. AS 09.10.055(d). Most courts construe the statute to exclude materialmen and manufacturers of component parts as well.

Neither is a suspect class. The right asserted is the interest in suing a particular party, which is not a fundamental constitutional right; nonetheless, the interest in redressing wrongs through the judicial process is a significant one. *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). We, therefore, conclude that the compelling state interest standard does not apply and we may analyze the significant constitutional claims asserted under the fair and substantial relationship test of the state constitution. *Erickson*, 574 P.2d at 12.

[5] We next examine the statutory purpose to determine whether it is a legitimate exercise of the state's police power. *Id.* The purpose of the statute is to encourage construction and avoid stale claims by shielding certain defendants from potential future liability. *See Yarbro v. Hilton Hotels*, 655 P.2d 822, 825–27 (Colo.1982). We believe that these are legitimate government purposes.

The final step is to examine the means to determine whether they substantially further the statutory purpose. *Erickson*, 574 P.2d at 12. In doing so, we do not hypothesize facts which would sustain otherwise questionable legislation. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

Scales argues that AS 09.10.055 is unconstitutional because it fails to protect owners, tenants, and materialmen, while protecting others who are similarly situated, such as architects, planners, engineers, and construction contractors. Turner Construction contends that there are substantial differences between these groups justifying the statutory distinction.

Many courts have suggested distinctions to justify the challenged classification. The exclusion of owners, tenants, and others in possession is most often rationalized by the fact that such persons have continuing control over access to and maintenance of the property. *Klein*, 437 N.E.2d at 522–25; *Freezer Storage*, 382 A.2d at 718. Some courts also point to the different treatment of owners and tenants at common law, such as the larger class of potential plaintiffs which may sue design professionals, the legal theories available to those plaintiffs, and the common law defenses available only to landlords and tenants. *Freezer Storage*, 382 A.2d at 718–20. Others cite the possibility of defective maintenance and alterations. *Yarbro*, 655 P.2d at 827–28.

Various justifications are also found to support the distinction between materialmen and design professionals.[8] One argument is that, because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. *Klein*, 437 N.E.2d at 524; *Freezer Storage*, 382 A.2d at 719. In other words, buildings are more complex than their component parts. *Freezer Storage*, 382 A.2d at 719. Furthermore, design professionals have special expertise; they should be encouraged to experiment and their creativity should not be stifled. *Klein*, 437 N.E.2d at 524; *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336, 342 (1980).

We are not persuaded by any of these diverse rationales. One effect of the statute of repose is to eliminate the statutory right of contribution among tortfeasors. In *Arctic Structures v. Wedmore*, 605 P.2d 426, 435 (Alaska 1979), we ruled that the Uniform Contribution Among Tortfeasors Act, AS 09.16.010–.060, did not abolish the common law rule of joint and several liability; therefore, each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. It follows that whenever an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the unprotected owner would be 100% liable for all damages, without a remedy for contribution. The statute of repose, therefore, does not entirely abrogate liability for defective de-

8. For purposes of argument, we assume without deciding that AS 09.10.055 does not protect materialmen or manufacturers.

sign work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered.

In our view, there is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. The shift of liability to unprotected parties decreases their incentive to build in corresponding measure to the increased incentives of protected parties. If anything, the disincentive on the part of owners may be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control. Moreover, design defects may be catastrophic, and experimental designs shift correspondingly greater unknown risks to owners, giving them even more reason not to finance construction. Thus, we believe that the statutory means are not substantially or rationally related to the ends. We conclude that AS 09.10.055 violates the equal protection clause of the Alaska Constitution.

The decisions of the superior court in File Nos. S-1429 and S-1600 are AFFIRMED.

Robert MERRY, Appellant,

v.

STATE of Alaska, Appellee.

No. A-1635.

Court of Appeals of Alaska.

March 25, 1988.

Rehearing Denied April 12, 1988.

While defendant was on probation for misconduct involving controlled substance in third degree, defendant pled no contest to another felony. The State then moved to revoke defendant's probation based on the second felony conviction. The Superior Court, Third Judicial District, Anchorage, S.J. Buckalew, Jr., J., revoked defendant's probation and imposed sentence of three and one-half years, and defendant appealed. The Court of Appeals, Coats, J., held that: (1) court's later imposition of consecutive sentence after mistakenly imposing concurrent sentence did not constitute double jeopardy; (2) court's pronouncement of sentence outside presence of defendant and his counsel constituted harmless error; and (3) imposition of sentence for probation violation after violation was considered as aggravating factor at another sentencing proceeding did not violate double jeopardy.

Affirmed.

1. Criminal Law ⇐189

Once sentence is legally imposed and not subject to change under criminal rules, double jeopardy bars court from increasing sentence. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐189

Court's later imposition of consecutive sentence after mistakenly imposing concurrent sentence did not violate constitutional provisions prohibiting double jeopardy; it was clear from sentencing record that court made mistake and that court intended to impose consecutive sentence. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐987

Not every correction in judgment requires presence of defendant; however, sentencing is critical stage of criminal proceeding, at which defendant should be present.

4. Criminal Law ⇐1177

Court's pronouncement of sentence outside presence of defendant and his counsel constituted harmless error, where defendant was given notice of fact that court had made change in sentence on record and defendant never asked court to repronounce sentence in his presence.

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

FEB 15 RECD

February 11, 1993

Senator Robin Taylor
Chair, Senate Judiciary
Alaska State Capitol
Juneau, Alaska 99801-1182

re: SB 73, Liability of Design/Construction Professionals

Dear Senator Taylor,

The Alaska trial lawyers oppose SB 73 which is currently in Senate Judiciary.

This bill attempts to overturn a recent Alaska Supreme Court decision and to establish a ten 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 SB 73 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.

I have enclosed two position papers on the bill. Both were written by Russ Winner. If you wish additional input on this issue from the Alaska trial lawyers, please do not hesitate to call.

Thank you.

Debra C. Gravo

Debra C. Gravo
Executive Director
dch/encl.

ALASKA ACTION TRUST POSITION

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

S.B. 73: 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, SB 73 has been introduced before the Alaska Senate by Senators Kelly, Leman, Halford, Pearce and Frank. 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 ten 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 statue 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
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501
(907) 258-4040 • FAX (907) 276-7185

TO: Senator Taylor, Chair of Senate Judiciary
Senator Halford, Vice-Chair of Senate Judiciary
Senator Jacko
Senator Donley
Senator Little

FROM: Russell Winner

DATE: February 11, 1993

RE: SB 73, Liability of Design/Construction Professionals

****

On behalf of the Academy of Trial Lawyers, I have been asked to express our strong opposition to SB 73. This bill attempts to overturn a recent Alaska Supreme Court decision and to establish a ten 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 SB 73 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, SB 73 attempts to reenact AS 09.10.055, with some modifications, and to overturn Turner. It replaces the six year limitation with a ten 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.[1] Further, SB 73 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, SB 73 makes it clear that it is an absolute statute of repose, expressly overriding the discovery rule of AS 09.10.140.

SB 73 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 roof of an elementary school collapsed eleven years after completion of construction due to an engineering firm's negligent calculation of the roof's ability to carry a snow load. Under SB

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[1] 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.

73, 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, SB 73 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, SB 73 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 SB 73 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 ten year statute of repose of SB 73.

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 SB 73 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 SB 73 the unprotected participants would still have a disincentive to engage in the construction process. Accordingly, the Supreme Court may well strike SB 73 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 SB 73, 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, SB 73 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 SB 73 would have on the liability insurance rates of design professionals.

Finally, SB 73 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.

APDC

Alaska Designs

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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.

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Number of States	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 ength of time for legal action to take lace does not appear to be a prima- y reason for ruling the statute nconstitutional. In fact, Victor)'Shinner, a major insurer of archi- ects and engineers, has indicated hat 89.3% of all cases are brought orward in the first six years after ubstantial completion. This increas- s only slightly to 96.8% after the nth year.

The Constitutionality Issue

Why are the statutes of repose uled unconstitutional? The primary rgument is based on preserving the qual protection clause of the consti- ution. This was the argument used efore Alaska's supreme court in 988 in the consolidated cases of 'urner Construction vs. Robert cales and Iverson Construction vs.)eWayne Carson.

In the first case, Robert Scales uffered property damage when a re occurred in the Winterbrook .partments. Turner Construction, ie prime contractor, was sued due o their alleged negligent construc- ion and installation of a fireplace.

In the second case, DeWayne arson was injured while attempt- ng to install on automatic garage oor opener. Mr. Carson sued the uilder, Iverson Construction, and s subcontractor for faulty construc- on. 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 then 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.

This personal liability is not just limited to private sector design

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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 accelograph 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 ...bott, both with the Municipality of ...chorage, 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.

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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 ...ividual leaves his employer, whether private or public? Insurance 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.

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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.