HOUSE BILL NO. 108

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES RAMRAS, Gatto

Introduced: 2/2/09
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to real property foreclosures, to the sale of property on execution, and to deeds of trust."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.35.140 is amended to read:

Sec. 09.35.140. Notice of sale on execution. Before the sale of property on execution, notice of the sale shall be given as follows:

(1) notice of the sale of personal property is given by posting a written or printed notice of the time and place of sale in three public places within five miles of the place where the sale is to be held, not less than 10 days before the day of sale; [ONE OF THE NOTICES SHALL BE POSTED AT THE POST OFFICE NEAREST TO THE PLACE WHERE THE SALE IS TO TAKE PLACE;]

(2) notice of the sale of real property is given by posting a similar notice particularly describing the property, including the property's street address if there is a street address for the property, not less than 30 days before the day of sale in

three public places, as provided in (1) of this section, and publishing a copy of the notice four times, once a week for four successive weeks in a newspaper of general circulation published nearest to the place of sale; an inaccuracy in the street address may not be used to set aside a sale if the legal description is correct; in this paragraph, "newspaper of general circulation" means a publication that

(A) is published in newspaper format;

(B) is distributed at least once a week for at least 50 weeks each year within the judicial district, excluding a period when publication is interrupted by a labor dispute or by a natural disaster or other casualty that the publisher cannot control; and has a total paid circulation or paid distribution of at least 500 copies, or 10 percent of the total population of the judicial district, whichever is less; in this subparagraph, "judicial district" means the judicial district where the place of sale is located;

(C) holds a second class mailing permit from the United States Postal Service;

(D) is not published primarily to distribute advertising; and

(E) is not intended primarily for a particular professional or occupational group.

*** Sec. 2.** AS 09.35.140 is amended by adding new subsections to read:

(b) In addition to the notice required by (a) of this section, notice of the sale of real property on execution shall be given by publishing a notice of the sale on an Internet website beginning at least 45 days before the date of the sale. The notice must be published for at least 30 days, including at least 10 of the last 15 days before the actual date of the sale. Giving notice under this subsection is not required unless there is an Internet website that qualifies under (c) of this section.

(c) To qualify as an Internet website on which notices of sale may be published under (b) of this section, an Internet website must

(1) be available to any person;

(2) be completely free to the public for viewing and not require a subscription;

(3) be used primarily to advertise real property under foreclosure;

(4) have been in continuous operation for more than one year;

(5) have a viewership of at least 5,000 different visitors each month that is verified by an independent audit; and

(6) have an office in the state and the office has staff that includes a senior management person.

* **Sec. 3.** AS 09.35.142 is amended to read:

Sec. 09.35.142. Action to establish newspaper <u>or Internet website</u> status. A person who owns a publication may bring an action under AS 22.10.020(g) to establish that the publication is a newspaper of general circulation under **<u>AS 09.35.140(a)(2). A person who owns an Internet website may bring an action under AS 22.10.020(g) to establish that the Internet website qualifies as an Internet website on which notices of sale may be published under AS 09.35.140(b)</u>** [AS 09.35.140(2)].

* **Sec. 4.** AS 34.20.070(b) is amended to read:

(b) Not less than 30 days after the default and not less than **<u>90 days</u>** [THREE MONTHS] before the sale, the trustee shall record in the office of the recorder of the recording district in which the trust property is located a notice of default setting out (1) the name of the trustor, (2) the book and page where the trust deed is recorded or the serial number assigned to the trust deed by the recorder, (3) a description of the trust property, including the property's street address if there is a street address for the property, (4) a statement that a breach of the obligation for which the deed of trust is security has occurred, (5) the nature of the breach, (6) the sum owing on the obligation, (7) the election by the trustee to sell the property to satisfy the obligation, and (8) the date, time, and place of the sale. An inaccuracy in the street address may not be used to set aside a sale if the legal description is correct. At any time **<u>up to two days</u>** before the sale, if the default has arisen by failure to make payments required by the trust deed, the default may be cured by payment of the sum in default other than the principal that would not then be due if no default had occurred, plus attorney fees or court costs actually incurred by the trustee due to the default. If, under the same trust deed, notice of default under this subsection has been recorded two or more times previously and the default has been cured under this subsection, the trustee may elect

to refuse payment and continue the sale.

*** Sec. 5.** AS 34.20.070(c) is amended to read:

(c) Within 10 days after recording the notice of default, the trustee shall mail a copy of the notice by certified mail to the last known address of each of the following persons or their legal representatives: (1) the **trustor** [GRANTOR] in the trust deed; (2) the successor in interest to the **trustor** [GRANTOR] whose interest appears of record or of whose interest the trustee or the beneficiary has actual notice, or who is in **actual physical** possession of the property; (3) any other person **actually** in **physical** possession of [OR OCCUPYING] the property; (4) any person having a lien or interest subsequent to the interest of the trustee in the trust deed, where the lien or interest appears of record or where the trustee or the beneficiary has actual notice of the lien or interest**, except as provided in (e) of this section**. The notice may be delivered personally instead of by mail.

*** Sec. 6.** AS 34.20.070 is amended by adding new subsections to read:

(e) In (c)(4) of this section, if the existence of a lien or nonpossessory interest can only be inferred from an inspection of the real property, the person holding the lien or nonpossessory interest is not entitled to notice under (c) of this section unless the lien or nonpossessory interest appears of record or a written notice of the lien or nonpossessory interest has been given to the beneficiary or trustee before the recording of the notice of default.

(f) If the trustee delivers notice personally under (c) of this section to the property or to an occupant of the property, the trustee may, notwithstanding (c) of this section, deliver the notice up to 20 days after the notice of default is recorded. If there is not a structure on the property and a person is not present on the property at the time of delivery, the trustee may place the notice on the property, or as close as practicable to the property if

(1) there is not a practical road access to the property; or

(2) access to the property is restricted by gates or other barriers.

(g) If the trustee or other person who delivered notice under (f) of this section signs an affidavit for the delivery, the affidavit is prima facie evidence that the trustee complied with (f) of this section. After one year from the delivery, as evidenced by the

affidavit, the trustee is conclusively presumed to have complied with (f) of this section unless, within one year from the delivery, an action has been filed in court to contest the foreclosure based on failing to comply with (f) of this section.

(h) If a person who is entitled to receive notice by mail under (c) of this section is known by the beneficiary or trustee to be deceased, the trustee may satisfy the notice requirements of (c) of this section by mailing the notice to the last known address of the deceased person and to the personal representative of the deceased person if the beneficiary or trustee knows that a personal representative has been appointed for the deceased person.

(i) If a person who is entitled to receive notice by mail under (c) of this section is known by the beneficiary or trustee to be deceased but the trustee and the beneficiary do not know that a personal representative has been appointed for the deceased person, the trustee may satisfy the notice requirements of (c) of this section by

(1) mailing the notice to the heirs and devisees of the deceased person

(A) whose names and addresses are known to the beneficiary or trustee; or

(B) who have recorded a notice of their interest in the property; and

(2) publishing and posting the notice of the foreclosure as provided by law for the sale of real property on execution, except that the notice must be titled "To the Heirs or Devisees of (insert the name of the deceased person)" and include in the body of the notice a list of the names of the persons who are known by the beneficiary or trustee to be the heirs and devisees of the deceased person.

(j) If notice is given as required by (h) and (i) of this section, an heir or devisee of the deceased person may not challenge the foreclosure on the ground that the heir or devisee did not receive notice of the sale, unless the heir or devisee challenges the foreclosure on this ground within 90 days after the sale.

(k) A person may bring an action in court to enjoin a foreclosure on real property only if the person is

(1) the trustor of the deed of trust under which the real property was

foreclosed;

(2) a guarantor of the obligation that the real property is securing;

(3) a person who has an interest in the real property that has been recorded;

(4) a person who has a recorded lien against the real property;

(5) an heir to the real property;

(6) a devisee of the real property; or

(7) the attorney general acting under other legal authority.

(*l*) If a person brings an action under (k) of this section to stop a sale of real property, and if the sale is being brought because of a default in the performance of a nonmonetary obligation required by the deed of trust that the real property is securing, the court may impose on the person the conditions that the court determines are appropriate to protect the beneficiary.

(m) In this section, "devisee," "heir," and "personal representative" have the meanings given in AS 13.06.050.

*** Sec. 7.** AS 34.20.080(a) is amended to read:

(a) The sale authorized in AS 34.20.070 shall be made under the terms and conditions and in the manner set out in the deed of trust. **The proceeds from a sale shall be placed in escrow until they are disbursed.** However, the sale shall be made

(1) at public auction held at the front door of a courthouse of the superior court in the judicial district where the property is located, unless the deed of trust specifically provides that the sale shall be held in a different place**, except that a trustee may also accept bids by telephone, the Internet, and electronic mail if the trustee has taken reasonable steps to ensure that the bidding methods using the telephone, the Internet, or electronic mail are fair, accessible, and designed to result in money that is immediately available for disbursement**; and

(2) after public notice of the time and place of the sale has been given in the manner provided by law for the sale of real property on execution.

*** Sec. 8.** AS 34.20.080(b) is amended to read:

(b) The attorney for the trustee **or another agent of the trustee** may conduct the sale and act in the sale as the auctioneer for the trustee. **The trustee may set**

reasonable rules and conditions for the conduct of the sale. Sale shall be made to the highest and best bidder. The beneficiary under the trust deed may bid at the trustee's sale. **Except as provided by (g) of this section, the** [THE] trustee shall execute and deliver to the purchaser a deed to the property sold.

*** Sec. 9.** AS 34.20.080(e) is amended to read:

(e) The trustee may postpone sale of all or any portion of the property by delivering to the person conducting the sale a written and signed request for the postponement to a stated date and hour. The person conducting the sale shall publicly announce the postponement to the stated date and hour at the time and place originally fixed for the sale. This procedure shall be followed in any succeeding postponement, **but the foreclosure may not be postponed for more than 12 months unless a new notice of the sale is given under (a)(2) of this section. A sale may be postponed for up to 12 months from the sale date stated in the notice of default under AS 34.20.070(b) without providing a basis for challenging the validity of the foreclosure process because of the length of time the foreclosure has been pending**.

*** Sec. 10.** AS 34.20.080 is amended by adding new subsections to read:

(f) After delivery of a deed under (b) of this section, the trustee shall distribute any cash proceeds of the sale in the following order to

(1) the beneficiary of the deed of trust being foreclosed until the beneficiary is paid the full amount that is owed under the deed of trust to the beneficiary;

(2) the persons who held, at the time of the sale, recorded interests, except easements, in the property, that were subordinate to the foreclosed deed of trust; the distribution under this paragraph shall be made according to the priority of the recorded interest, and a recorded interest with a higher priority shall be satisfied before distribution is made to the recorded interest that is next lower in priority; however, if a person holds a recorded interest that is an assessment, the person is entitled only to the amount of the assessment that was due at the time of the sale; in this paragraph, "recorded interest" means an interest, including a lease, recorded under AS 40.17;

(3) the trustor in the trust deed if the trustor is still the owner of the property at the time of the foreclosure sale, but, if the trustor is not still the owner of the property at the time of the foreclosure sale, then to the trustor's successor in interest whose interest appears of record at the time of the foreclosure sale.

(g) The trustee may withhold delivery of the deed under (b) of this section for up to five days after the sale. If, during the five days, the trustee determines that the sale should not have proceeded, the trustee may not issue the deed but shall

(1) inform the beneficiary, the otherwise successful bidder, and the trustor of the trust deed or the trustor's successor in interest that the sale is rescinded; and

(2) return to the otherwise successful bidder money received from the otherwise successful bidder as a bid on the property; return of this money is the otherwise successful bidder's only remedy if the trustee withholds delivery of the deed under (b) of this section.

(h) If a trustee rescinds a sale under (g) of this section and the obligation secured by the deed of trust remains in default, the trustee may, at the request of the beneficiary, reschedule the sale for a date that is not less than 45 days after the date of the rescinded sale. Not less than 30 days before the rescheduled sale date, the trustee shall

(1) mail notice of the rescheduled sale date by certified mail to the last known address of each of the persons identified by AS 34.20.070(c); and

(2) publish and post the notice of the rescheduled sale date as provided by law for the sale of real property on execution.

(i) Unless a sale is rescinded under (g) of this section, the sale completely terminates the rights of the trustor of the trust deed in the property.

* **Sec. 11.** AS 34.20.120(a) is amended to read:

(a) The trustee under a trust deed upon real property given to secure an obligation to pay money and conferring no duties upon the trustee other than the duties that are incidental to the exercise of the power of sale conferred in the deed may be substituted by recording in the mortgage records of the recording district in which the property is located a substitution executed and acknowledged by

(1) all the beneficiaries under the trust deed, or their successors in interest; **or**

(2) the attorneys for all of the beneficiaries or the attorneys for all of the beneficiaries' successors in interest.

* **Sec. 12.** AS 34.20.120(b) is amended to read:

(b) The substitution must contain

(1) the date of execution of the trust deed;

(2) the names of the trustee, trustor, and beneficiary**, and, if the substitution is executed by the attorney for the beneficiary or successor in interest to the beneficiary, the name, address, and Alaska Bar Association identification number of the attorney**;

(3) the book and page where the trust deed is recorded or the serial number assigned to the trust deed by the recorder;

(4) the name of the new trustee; and

(5) an acknowledgment signed and acknowledged by the trustee named in the trust deed of a receipt of a copy of the substitution, or an affidavit of service of a copy of it.

* **Sec. 13.** AS 34.20 is amended by adding a new section to read:

Sec. 34.20.125. Trustee bond required. (a) Before performing the duties of a trustee under AS 34.20.070 and 34.20.080, a person shall obtain a surety bond in the amount of $250,000 to protect the trustors and beneficiaries of trust deeds against fraud or defalcation by the trustee in the performance of the duties.

(b) The bond required by (a) of this section must be a bond that is terminable at any time by the surety by sending written notice by first class United States mail to the obligee and the principal at the address for each that is last known by the surety, and to the department. The bond terminates when 45 days have expired after the date the notice is mailed. The surety is not liable for an act or omission of the principal that occurs after the termination. The surety is not liable after the termination for more than the face amount of the bond, regardless of the number of claims made against the bond or the number of years the bond remains in force. A revision of the amount of the bond is not cumulative.

(c) If a bond terminates under (b) of this section, the person who obtained the bond under (a) of this section shall give notice of the bond's termination to the department and may not act as a trustee until the person obtains another bond under (a) of this section.

(d) Each year, a trustee shall file evidence of the bond with the department. The department shall verify that the evidence is satisfactory to indicate the existence of the bond, keep an updated list of trustees who are bonded, and make the evidence and the list available to the public for inspection. The department may charge the trustee a reasonable fee for verifying the existence of the bond and maintaining the records required by this subsection.

(e) The bonding requirements of this section do not apply to

(1) a title insurance company authorized under AS 21.66 to transact a title insurance business in this state; or

(2) a title insurance limited producer who is licensed as required by AS 21.66.270.

(f) In this section, "department" means the Department of Commerce, Community, and Economic Development.