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Bannister

3/26/09

**CS FOR HOUSE BILL NO. 108(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): REPRESENTATIVES RAMRAS, Gatto

**A BILL****FOR AN ACT ENTITLED**

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

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

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

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

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

12 (2) notice of the sale of real property is given by posting a similar  
13 notice particularly describing the property, including the property's street address if  
14 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) if operated by a newspaper of general circulation, be completely free to the public for viewing and not require a subscription; or

(2) if operated by a newspaper that is not covered by (1) of this subsection, or by another person,

(A) be available to any person;

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

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

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

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

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

(d) In this section, "newspaper of general circulation" means a publication that

(1) is published in newspaper format;

(2) 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 paragraph, "judicial district" means the judicial district where the place of sale is located;

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

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

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

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

**Sec. 09.35.142. Action to establish newspaper or Internet website status. A**

1 person who owns a publication may bring an action under AS 22.10.020(g) to  
2 establish that the publication is a newspaper of general circulation under  
3 **AS 09.35.140. A person who owns an Internet website may bring an action under**  
4 **AS 22.10.020(g) to establish that the Internet website qualifies as an Internet**  
5 **website on which notices of sale may be published under AS 09.35.140(b)**  
6 **[AS 09.35.140(2)].**

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

8 (b) Not less than 30 days after the default and not less than **90 days** [THREE  
9 MONTHS] before the sale, the trustee shall record in the office of the recorder of the  
10 recording district in which the trust property is located a notice of default setting out  
11 (1) the name of the trustor, (2) the book and page where the trust deed is recorded or  
12 the serial number assigned to the trust deed by the recorder, (3) a description of the  
13 trust property, including the property's street address if there is a street address for the  
14 property, (4) a statement that a breach of the obligation for which the deed of trust is  
15 security has occurred, (5) the nature of the breach, (6) the sum owing on the  
16 obligation, (7) the election by the trustee to sell the property to satisfy the obligation,  
17 [AND] (8) the date, time, and place of the sale, **and (9) the statement described in**  
18 **(e) of this section describing conditions for curing the default.** An inaccuracy in the  
19 street address may not be used to set aside a sale if the legal description is correct. At  
20 any time **up to two days** before the sale **date stated in the notice of default or to**  
21 **which the sale is postponed under AS 34.20.080(e),** if the default has arisen by  
22 failure to make payments required by the trust deed, the default may be cured **and sale**  
23 **under this section terminated** by payment of the sum **then** in default, other than the  
24 principal that would not then be due if no default had occurred, **and foreclosure**  
25 **[PLUS ATTORNEY] fees and [OR COURT] costs** actually incurred by the  
26 **beneficiary and** trustee due to the default. If, under the same trust deed, notice of  
27 default under this subsection has been recorded two or more times previously and the  
28 default has been cured under this subsection, the trustee may elect to refuse payment  
29 and continue the sale.

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

31 (c) Within 10 days after recording the notice of default, the trustee shall mail a

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

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

12 (e) The statement required by (b)(9) of this section must state that, if the  
13 default has arisen by failure to make payments required by the trust deed, the default  
14 may be cured and the sale under this section terminated if

15 (1) payment of the following amounts is made at any time up to two  
16 days before the sale date stated in the notice of default, or two days before a date to  
17 which the sale is postponed:

18 (A) the sum then in default, other than the principal that would  
19 not then be due if no default had occurred; and

20 (B) foreclosure fees and costs actually incurred by the  
21 beneficiary and trustee due to the default; and

22 (2) when notice of default under (b) of this section has been recorded  
23 two or more times previously under the same trust deed and the default has been cured  
24 under (b) of this section, the trustee does not elect to refuse payment and continue the  
25 sale.

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

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

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

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

9 (h) If the trustee or other person who delivered notice under (g) of this section  
10 signs an affidavit for the delivery, the affidavit is prima facie evidence that the trustee  
11 complied with (g) of this section. After one year from the delivery, as evidenced by  
12 the affidavit, the trustee is conclusively presumed to have complied with (g) of this  
13 section unless, within one year from the delivery, an action has been filed in court to  
14 contest the foreclosure based on failing to comply with (g) of this section.

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

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

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

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

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

31 (2) publishing and posting the notice of the foreclosure as provided by

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

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

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

11 (1) the trustor of the deed of trust under which the real property was  
12 foreclosed;

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

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

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

17 (5) an heir to the real property;

18 (6) a devisee of the real property; or

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

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

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

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

28 (a) The sale authorized in AS 34.20.070 shall be made under the terms and  
29 conditions and in the manner set out in the deed of trust. **The proceeds from a sale**  
30 **shall be placed in escrow until they are disbursed.** However, the sale shall be made  
31

(1) at public auction held at the front door of a courthouse of the

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

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

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

10 (b) The attorney for the trustee or another agent of the trustee may conduct  
11 the sale and act in the sale as the auctioneer for the trustee. The trustee may set  
12 reasonable rules and conditions for the conduct of the sale. Sale shall be made to  
13 the highest and best bidder. The beneficiary under the trust deed may bid at the  
14 trustee's sale. Except as provided by (g) of this section, the [THE] trustee shall  
15 execute and deliver to the purchaser a deed to the property sold.

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

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

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

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

31 (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

1 known address of each of the persons identified by AS 34.20.070(c); and

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

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

6 (j) If a sale is rescinded under (g) of this section, the deed of trust foreclosed  
7 in the rescinded sale is restored to the validity and priority it would have had as though  
8 the sale had not occurred.

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

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

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

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

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

20 (b) The substitution must contain

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

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

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

28 (4) the name of the new trustee; and

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

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

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

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

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

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

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

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

28                     (2) a title insurance limited producer who is licensed as required by  
29 AS 21.66.270; or

30                     (3) a state agency, including the Alaska Housing Finance Corporation  
31 and the Alaska Industrial Development and Export Authority.

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