

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

March 25, 2008

1:34 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Bill Wielechowski

MEMBERS ABSENT

Senator Lesil McGuire
Senator Gene Therriault

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 34

Urging the United States Congress to reauthorize the Debbie Smith DNA backlog grant program.

MOVED HRJ 34 OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 163(JUD)

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

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HJR 34

SHORT TITLE: FEDERAL FUNDING FOR DNA TESTING

SPONSOR(S): REPRESENTATIVE(S) ROSES

02/13/08	(H)	READ THE FIRST TIME - REFERRALS
02/13/08	(H)	JUD
02/22/08	(H)	JUD AT 1:00 PM CAPITOL 120
02/22/08	(H)	Moved Out of Committee
02/22/08	(H)	MINUTE(JUD)
02/25/08	(H)	JUD RPT 5DP
02/25/08	(H)	DP: LYNN, COGHILL, SAMUELS, HOLMES, RAMRAS
03/10/08	(H)	TRANSMITTED TO (S)
03/10/08	(H)	VERSION: HJR 34
03/12/08	(S)	READ THE FIRST TIME - REFERRALS
03/12/08	(S)	JUD
03/21/08	(S)	JUD AT 1:30 PM BELTZ 211

03/21/08 (S) -- MEETING CANCELED --
03/25/08 (S) JUD AT 1:30 PM FAHRENKAMP 203

BILL: HB 163

SHORT TITLE: PROPERTY FORECLOSURES AND EXECUTIONS

SPONSOR(S): REPRESENTATIVE(S) RAMRAS

02/28/07 (H) READ THE FIRST TIME - REFERRALS
02/28/07 (H) L&C, JUD
03/30/07 (H) L&C AT 3:00 PM CAPITOL 17
03/30/07 (H) -- MEETING CANCELED --
04/20/07 (H) L&C AT 3:00 PM CAPITOL 17
04/20/07 (H) Moved CSHB 163(L&C) Out of Committee
04/20/07 (H) MINUTE(L&C)
04/23/07 (H) L&C RPT 1DP 4NR
04/23/07 (H) DP: RAMRAS
04/23/07 (H) NR: BUCH, LEDOUX, NEUMAN, OLSON
04/27/07 (H) JUD AT 1:00 PM CAPITOL 120
04/27/07 (H) Heard & Held
04/27/07 (H) MINUTE(JUD)
04/30/07 (H) CORRECTED L&C RPT CS(L&C) NT 1DP 4NR
04/30/07 (H) DP: RAMRAS
04/30/07 (H) NR: BUCH, NEUMAN, LEDOUX, OLSON
04/30/07 (H) JUD AT 1:00 PM CAPITOL 120
04/30/07 (H) Moved CSHB 163(JUD) Out of Committee
04/30/07 (H) MINUTE(JUD)
05/01/07 (H) JUD RPT CS(JUD) NT 3DP 4NR
05/01/07 (H) DP: GRUENBERG, LYNN, RAMRAS
05/01/07 (H) NR: COGHILL, DAHLSTROM, SAMUELS, HOLMES
05/05/07 (H) TRANSMITTED TO (S)
05/05/07 (H) VERSION: CSHB 163(JUD)
05/07/07 (S) READ THE FIRST TIME - REFERRALS
05/07/07 (S) JUD, FIN
03/05/08 (S) JUD AT 1:30 PM BELTZ 211
03/05/08 (S) Heard & Held
03/05/08 (S) MINUTE(JUD)
03/21/08 (S) JUD AT 1:30 PM BELTZ 211
03/21/08 (S) -- MEETING CANCELED --
03/25/08 (S) JUD AT 1:30 PM FAHRENKAMP 203

WITNESS REGISTER

CRYSTAL KOENEMAN, Staff
to Representative Bob Roses
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Introduced HJR 34 on behalf of the sponsor.

JANE PIERSON, Staff
to Representative Jay Ramras
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Answered questions about HB 163.

STEPHEN ROUTH, Attorney at Law
Routh Crabtree, APC
Anchorage, AK

POSITION STATEMENT: Provided prospective on HB 163.

DENNIS FENERTY, Attorney at Law
Anchorage

POSITION STATEMENT: Offered suggestions on HB 163.

MIKE PRICE, Owner
Mat-Su Title Insurance Agency & Fidelity Title Insurance Agency

POSITION STATEMENT:

REPRESENTATIVE JAY RAMRAS
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Sponsor of HB 163,

ACTION NARRATIVE

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at [1:34:50 PM](#). Present at the call to order were Senators French, Huggins, and Wielechowski.

HJR 34-FEDERAL FUNDING FOR DNA TESTING

CHAIR FRENCH announced the consideration of HJR 34.

[1:35:14 PM](#)

CRYSTAL KOENEMAN, Staff to Representative Bob Roses, sponsor of HJR 34, said that this resolution asks Congress to reenact the Debbie Smith DNA Backlog Grant Program. The program, which was originally passed in 2004 and is due to expire in fiscal year 2009, ensures that DNA evidence can be used to convict the guilty and free the innocent. Alaska has about 400 backlog DNA cases and reauthorizing the program will ensure continuation of the grants so the backlog can be addressed.

She noted that the packets contain information on the federal grants that Alaska has obtained and what has been done with that money.

CHAIR FRENCH said he assumes that this would cost the state nothing, and Ms. Koeneman agreed. He asked if the resolution has a connection to the Innocence Project.

MS. KOENEMAN replied there really is no connection. She added that according to the Innocence Project website, Alaska has not had any post-conviction DNA exonerations.

[1:37:32 PM](#)

CHAIR FRENCH said he believes that's accurate, and noted that Mr. Bill Oberly has been hired to head the Alaska Innocence Project. He asked how much Alaska might get if Congress elects to reauthorize the program.

MS. KOENEMAN estimated that the state has, on average, received about \$160,000 a year.

CHAIR FRENCH noted that the grants total \$151 million, and commented that he'd like Alaska to get a little more of that money.

Hearing and seeing no one else who wished to testify, he closed public testimony. Finding no discussion, he asked for a motion.

[1:39:02 PM](#)

SENATOR HUGGINS motioned to report HJR 34 from committee with individual recommendations and attached fiscal note(s).

CHAIR FRENCH announced that without objection, HJR 34 is moved from the Senate Judiciary Committee.

HB 163-PROPERTY FORECLOSURES AND EXECUTIONS

CHAIR FRENCH announced the consideration of HB 163.

[1:39:39 PM](#)

JANE PIERSON, Staff to Representative Jay Ramras, said that HB 163, "An act relating to real property foreclosures, to the sale of property on execution, and to deeds of trust.", has been changed since it was last heard in this committee. She highlighted the following changes between Version \0, 25-LS0630\0, and Version \N, 25-LS0630\N:

Page 2, line 31 - AS09.35.140(c)(3) was amended to include newspapers that have a circulation of over 50,000 copies of each issue as qualified Internet websites to which non-foreclosure notices may be published.

Page 6, line 31, through page 7, line 3, AS34.20.080(a)(1) was amended so that the trustee must bring an action under AS22.10.020(g) to establish procedures for accepting bids on the Internet.

Page 10, lines 4-19, adds a new section 34.20.125. Trustee bond required. All references to the Department of Commerce, Community, and Economic Development (DCCED) were removed, pursuant to discussions with DCCED and Department of Law (DOL). This is a matter of private contract and the bonding requirements will be overseen by the title insurance companies that will not issue title insurance without the bond in place.

CHAIR FRENCH questioned how many newspaper websites would qualify under the definition that requires a distribution of 50,000 copies for each issue.

MS PIERSON said she believes that the Anchorage Daily News (ADN) and the Alaska Journal of Commerce (AJOC) would qualify. She suggested that Stephen Routh could elaborate.

1:42:45 PM

STEPHEN ROUTH, Attorney at Law, Routh Crabtree, APC, said he only looked at the ADN on the theory that it was the largest. That newspaper would qualify because it has a daily print circulation of about 80,000; web visits are over 130,000 per month. He didn't look at circulations of the AJOC or others, but he would do so if the committee wanted more information.

CHAIR FRENCH said if the idea is to get the word out to as many people as possible to return the most money to the lien holder, he wonders whether it wouldn't be a better idea to make certain that local papers carry the notices.

MR. ROUTH said he agrees with respect to local printed publications, but the problem is that the statewide Internet publication isn't restricted to a particular borough. If any print publication can qualify to publish on the Internet, a very small out-of-the-way publication could carry the Internet

advertisements for a large urban area. Those might not be noticed as much. For that reason, having some circulation threshold makes sense, he said.

1:45:25 PM

CHAIR FRENCH asked if his concern is that the Juneau paper or The Tundra Drums, for example, might carry Anchorage foreclosures.

MR. ROUTH said yes.

CHAIR FRENCH agreed that's to be avoided, but a Juneau resident would probably never think to look on the ADN website to see if there was a foreclosure in his or her neighborhood.

MR. ROUTH pointed out that a Juneau resident would still be able to look in the local paper to find foreclosures in the area. Because of the website visit requirements, search engines will pick up foreclosure information for any particular area. But it wouldn't ratchet the other way, which is why it's a good idea to have some threshold, to make sure that the goal of reaching a wide audience is met.

CHAIR FRENCH said it's a good point that the Internet publication augments rather than supplants newspaper format notification.

1:47:03 PM

CHAIR FRENCH turned to the second change on page 6, relating to accepting bids by telephone and asked Ms. Pierson or Mr. Routh to further explain what's entailed in establishing procedures ahead of time.

MR. ROUTH explained that this change came about as a result of the concern articulated about the new process for taking bids on the Internet. The trustee will establish procedures for accepting bids on the Internet that are fair, accessible, and designed to result in money being immediately available for disbursement, and a superior court judge will review the process. In response to a question, he said that AS22.10.020(g), on page 6, line 31, is the statutory reference to a procedure set by a superior court judge.

CHAIR FRENCH asked if bids are currently allowed by telephone or email.

MR. ROUTH replied they're not expressly allowed or disallowed, but it's common practice to use both in foreclosures. This provides statutory blessing, he said.

[1:49:34 PM](#)

CHAIR FRENCH questioned why only Internet bid procedures are to be reviewed by the superior court; telephone and email are left out.

MR. ROUTH said he believes it's because telephone and email aren't new methods and wouldn't be viewed as suspect. He understood the committee was concerned about mandating protection of the superior court only on the Internet because it's a new method.

[1:51:14 PM](#)

CHAIR FRENCH asked him to explain the changes made on page 10.

MR. ROUTH said that the Department of Law and the sponsor decided that this is a private bond matter and there isn't any need for DCEED to track and keep the information. He concurred. Thus all reference to the Department of Commerce, Community and Economic Development was dropped. The intent and the result are the same; through bonding, Alaskans are provided some measure of protection from unscrupulous trustees who might abscond with funds.

CHAIR FRENCH summarized that the new Section 14 requires a trustee to first obtain a surety bond that must be terminable at any time by the surety. In the event that it's terminated, the person who obtained the bond may not act as a trustee until the person obtains another bond. He noted that title insurance companies and title insurance limited producers are exempted from the bonding requirement and asked what the latter is.

MR. ROUTH explained that one is the underwriter and the other is the agent; in Alaska there's a mix. For example, First American Title is the underwriter that actually provides the insurance. It has licensed agents, some of which aren't owned by First American, but those agents can bind the underwriter. This provision provides protection for both the underwriter and the agent.

CHAIR FRENCH asked if his analysis indicated that there's no reason for oversight from DCCED with respect to keeping a list of who is bonded and who is not.

MR. ROUTH replied that is correct.

[1:53:57 PM](#)

SENATOR WIELECHOWSKI asked what it costs to get a \$250,000 bond.

MR. ROUTH estimated it's about \$5,000.

SENATOR WIELECHOWSKI asked what percentage of trustees are not title insurance companies or title insurance limited producers.

MR. ROUTH said that the majority of people who act as trustees in Alaska are non title insurance related. He surmised that close to a majority are entities from California.

SENATOR WIELECHOWSKI said he supports the concept of providing protection, but he questions the \$5,000. He'd be curious to hear DCCED's perspective.

[1:55:20 PM](#)

CHAIR FRENCH asked Ms. Pierson if this provision was in the bill when it passed the House.

MS. PIERSON said it was; yesterday DCCED, DOL, and the division of insurance made the decision to take DCCED out of the equation.

SENATOR WIELECHOWSKI said he doesn't want inadvertent consequences for individuals who act as trustees.

[1:56:10 PM](#)

MR. ROUTH said he understands the concern about what happens to someone who wants to do this one or two times, but the reality is that it's fairly uncommon because it's become a professional business. His concern is that without bonding requirements or other indication of financial stability, borrowers in foreclosure aren't adequately protected from unscrupulous trustees. Now if a borrower wants to pay off a loan to cure a foreclosure, the standard practice is to hand the money to the trustee. If the trustee decides to run down the road with the money, there's nobody to stop that. That's the evil this tries to avoid, he said.

SENATOR WIELECHOWSKI asked if there's been a problem with trustees committing fraud.

MR. ROUTH replied it hasn't happened in Alaska yet, but it has happened in five or six Western states that he's aware of.

1:58:41 PM

DENNIS FENERTY, Attorney at Law, Anchorage said he's represented lenders for more than 20 years and has done many foreclosures. He noted that he commented on the bill during the work session, and he believes the legislation is valuable and brings Alaska into the modern age. However, Section 2, which amends AS09.35.140 by adding new subsections, doesn't fix the problem that he and others testified to earlier. His concern relates to the qualifications for the hosts of the Internet publication. The publisher of The Alaska Journal of Commerce indicated that he has a paid subscription of 5,000 a week, which means that the AJOC wouldn't qualify. The ADN would qualify under subsection (c)(3), which requires a newspaper circulation of 50,000 copies per issue, but it might not meet the test under subsection (c)(5), which requires at least 5,000 website visits each month.

MR. FENERTY suggested the legislature incorporate the concept that already applies to newspaper advertizing. That is to authorize any newspaper to host Internet publications if they are a newspaper of general circulation under AS09.35.140. That statute establishes the standard for a newspaper that hosts foreclosure sales in a judicial district where the sale will occur. He suggested that subsection (c)(3) read as follows: "be used primarily to advertise real property under foreclosure or be operated by a newspaper of general circulation under AS09.35.140." Under subsection (c)(5) he encouraged the committee to reduce the number of websites visits to 1,000 because requiring 5,000 visits per month may exclude the ADN. He believes that those two changes would open the host sites to competition from the AJOC and others, while still protecting the concept the committee was concerned about. In other respects, this bill accomplishes good things, he said.

2:04:16 PM

MR. FENERTY, addressing Senator Wielechowski's concerns about trustees, explained that under deed of trust the trustee owes duty to the beneficiary and the borrower. It isn't a business that the legislature should want people to get into easily so posting a bond is prudent. A barrier to entry of a \$5,000 premium for a \$250,000 bond shouldn't concern the legislature, he said.

He offered to answer questions and in conclusion said, "I would certainly hope that we carefully not create a monopoly to host the...website advertizing."

CHAIR FRENCH asked him to forward his written suggestions on Section 2 to his office.

2:05:35 PM

MIKE PRICE, Owner, Mat-Su Title Insurance Agency in Wasilla and Fidelity Title Insurance Agency in Anchorage, said he's been a real estate attorney since 1975 and he's conducted many foreclosures in his years of practice. He, too, opposes the Internet provisions in Section 2 of the current draft. The foreclosures he does on behalf of the title companies are advertized in papers of general circulation as defined by a circulation of either 500 papers or 10 percent of the judicial district in which the paper is located. If the legislature is going to encourage Internet advertizing, he would suggest accepting the same language as is used for written publications. With respect to the 5,000 visits per month requirement under subsection (c)(5), he would suggest the committee not establish an arbitrary number. If the newspaper is one of general circulation, then subsection (c)(5) on page 3, could be eliminated altogether.

MR. PRICE referred to page 4, lines 5-6, and noted that the new phrase means that the lender only has to accept a cure of default up to two days before the sale, which is inconsistent with at least 100,000 existing deeds of trust in the state. Those contracts between the borrower and the beneficiary basically say that the borrower can cure any time up to the moment of sale. He encouraged the committee to look at the ex post facto implications of changing up to 100,000 deeds of trusts. And, he said, if it is the legislature's intent to do this, he would encourage establishing legislative history to guide the court in the inevitably court challenge. Most of the bill is good, but those two provisions are unconscionable and they should be removed, he said.

2:12:29 PM

CHAIR FRENCH thanked Mr. Price and said that in these specialized areas of law, it's particularly helpful to hear from people who do this for a living.

SENATOR WIELECHOWSKI said that Mr. Price made good points, and he wouldn't object to removing the two days before the sale provision. The other issue is an interesting debate, he said. Limiting advertisement to one or two Internet sites might not be the best answer, but if a large number of Internet websites are allowed, the sales could be buried and be very difficult to find. There's a balance there somewhere, he said.

[2:14:04 PM](#)

CHAIR FRENCH agreed that the Internet section of the bill needs further work. He noted that the two days before sale provision was in the bill when it passed the House; he circled it at the last hearing but there was no discussion. The testimony today indicates that it may be contrary to a large number of deeds of trust. He'll discuss with legislative legal the idea of adding some qualifying language to keep the provision as long as it doesn't conflict with the contract the borrower signed to purchase the property.

SENATOR WIELECHOWSKI offered the perspective that if someone is potentially losing their house, they should be able to cure right up right up to the time of the sale. That seems fair to me, he said.

[2:15:38 PM](#)

SENATOR HUGGINS said he agrees but he'd like to hear what the debate was in the other body.

MS. PIERSON explained that the original draft said five days prior to the sale. The House Judiciary Committee changed it to two days in the belief that it struck a balance between the cost that would be incurred and litigation that may arise if left up to the day of the sale. After listening to Mr. Price's testimony, she acknowledged that an amendment may be in order.

CHAIR FRENCH said it's clear that if some period of time to cure remains in the bill, some modification will be necessary to make sure that it's subsidiary to any language in existing deeds of trust. He recognized that the sponsor had joined the meeting.

[2:17:26 PM](#)

REPRESENTATIVE JAY RAMRAS, Sponsor of HB 163, said he's amenable to the suggested changes. He is concerned about potential foreclosures in Fairbanks driven by an inability to service a mortgage and the roster of skyrocketing utilities. Although he uses banks, he's mindful that lenders are more interested in their being made whole when a homeowner is distressed and has to surrender their home. He is pleased that this committee is interested in protecting a homeowner's remaining equity. "We appreciate the improvements and the amendments that are going to be offered by Senate judiciary at the appropriate time," he said.

[2:19:04 PM](#)

SENATOR WIELECHOWSKI recapped his musing about the proper tension between advertizing in one publication that reaches a large number of people versus smaller local advertizing. He asked the sponsor to provide the committee with information on how other states deal with that problem.

REPRESENTATIVE RAMRAS said he supports the notion of having two buyers rather than one.

MS. PIERSON added that there are provisions requiring local posting one of which is to advertize the sale in the local newspaper. The Internet provision is really an expansion to get more bidders; it doesn't do away with the local provisions.

[2:21:24 PM](#)

MR. ROUTH relayed that the ADN in a previous month had 123,716 visits so it would qualify, and the Alaska Journal of Commerce would probably qualify as well. He urged the committee not to say that if a publication is qualified for print it's also qualified for the Internet because there wouldn't necessarily be wide publicity to attract bidders. It'd be a mistake to advertize property that's for sale in Juneau primarily in the Tundra Times. That would be a disservice to everyone involved in the process. The bottom line is exposure; that's why real estate companies buy full page ads in large newspapers, he said.

CHAIR FRENCH said everyone shares the same goal; it's a matter of finding the best way to do that. He held HB 163 in committee.

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at [2:23:02 PM](#).