

HB

494

HB 494
SUMMARY

The revisions to the lien law will provide subcontractors with a more efficient means to recover payment when owners or general contractors fail to make payment for work or equipment provided by the subcontractor.

It is important to note that the revisions will not affect lenders or general contractors who follow good business practices.

A general contractor is able to make draws from the construction lender for payment to a subcontractor, however, there is no provision to make certain that this is where the money goes. A subcontractor who does not receive payment can issue a stop payment notice but this has not proven to be effective.

The bill will change the stop payment notice to a direct payment notice (DPN). When a claimant has a problem with payment the claimant may file a DPN with the lender and owner. The owner has ten days to object to the notice. If the owner does not object the lender is to pay the claimant directly. If a notice of objection is received within ten days the lender is to issue payment jointly to the owner and claimant and leave it to them to work out their dispute by settlement or in the courts.

It also gives construction lien claimants equal priority with construction lenders. Right now lenders tend to continue to make disbursements to owners who are in trouble because they have their prior deeds of trust to fall back on. This will discourage lenders from continuing to make disbursements on problem loans since the lender's equity would be proportionally reduced in the event of a foreclosure.

Under the bill, after receipt of a DPN, a lender may not withhold or disburse loan proceeds (interest) in satisfaction of the owner's obligations to the lender until all payments specified in the DPN have been made to the claimant.

Another problem is that subcontractors have had only fifteen days after a notice of completion is filed to file a claim of lien or notice of right to lien. Often this is not enough time for a subcontractor to tell if they have a payment problem. The time allowed is changed to 30 days.

Also, an owner must now give a claimant 15 days notice, instead of five, that they intend to file a notice of completion. This will give the claimant an opportunity to be sure completion has actually occurred. The owner is liable for actual damages caused by a prematurely filed notice of completion.

COMPARISON
HB 494

<u>Section</u>	<u>HB 494</u>	<u>Existing Law</u>
34.35.060(a)(e)	Gives lender and claimants equal priority in the event of a foreclosure.	Gives first priority to lender.
34.35.062(a)	Adds language requiring the owner to certify which parcel of property each portion of each loan draw is allocated to if more than one parcel is involved in the construction financing. Direct payment notice may be filed by claimant to the lender and owner if payment is not received. If owner does not object within ten days the lender issues the check directly to the claimant. If owner objects, a check is written to both owner and claimant.	Requires the general contractor to certify job progress to the lender. Stop payment notice may be filed if payment is not made by certain times. Lender is required to withhold enough from the next draws to cover the amount. If not paid in 30 days a law suit may be filed. Claimant must furnish bond in amount of claim.
34.35.062(b)	Lender is liable for damages suffered by claimant <u>or</u> owner if it fails to comply with its obligations.	Lender is liable for damages suffered by the claimant if it fails to comply with its obligations.
34.35.062(d)	New section. Lender may not disburse funds to itself from a construction loan once a DPN has been filed.	
34.35.063	New section. A claimant may file an intent to furnish materials, labor, etc. If notice is given the owner has burden of proof to show that they did not know of or consent to the work or materials.	
34.35.068(b)	Gives claimants 30 days after a notice of completion is filed to file a claim of lien or notice of right to lien.	Gives claimants 15 days.

34.35.071(a)	Requires an owner of real property to give claimants 15 days and owners and lenders 20 days notice that they intend to file a notice of completion.	Requires notice of five days for claimants and ten for owners and lenders.
34.35.114(e)	Penalizes lenders and owners for failure to provide claimants with required information.	Penalizes owners only.
34.35.118	A claimant is liable for injuries caused by filing a DPN too soon and an owner is liable for injuries caused by filing a premature Notice of Completion.	Only a claimant is liable.

1986 - PROPOSED AMENDMENTS TO THE LAW

- Abolishment of Acknowledgement of Right to Lien
- Adoption of a Direct-Payment Notice which requires the owner's construction lender to make a direct payment to the claimant from the next construction draw, unless the owner timely objects to the Notice, in which case the lender is required to make a joint payment to the claimant and owner and leave it up to them to work out their disputes.
- Claimants other than individual laborers are given equal priority with a prior-recorded deed of trust for construction financing in cases of original construction. Individual laborers (excluding individual sub-contractors) and trustees of employment benefit trusts for such laborers continue to have priority over prior-recorded deeds of trust.
- The deadline is extended for recording a Notice of Right to Lien or Claim of Lien after a Notice of Completion is recorded to give the latter job trades more time to prepare their statements and determine if they have a payment problem.

ALASKANS

FOR

LIEN LAW REFORM

LIEN LAW HISTORY

In 1979 certain amendments were made to the Alaska Lien Laws which have caused large monetary losses to material suppliers and sub-contractors. The intent of these amendments was to expedite loan closings on the sale of real property and also to assure that no liens could be attached after the property was sold. In a joint meeting held between suppliers, sub-contractors, title companies, and lending institutions it was agreed that this new bill would allow the lending institutions to be secured by a first deed of trust on their interim construction financing which gave them priority over all liens or encumbrances which may be recorded by a material supplier or sub-contractor.

In exchange for giving up a historical priority position, suppliers and sub-contractors were to be provided a vehicle by which they could put the lending institution on notice that they were a supplier of record, and in so doing, protect the suppliers interest. The methods provided to material suppliers and sub-contractors under the new law were:

1. Notice of Right to Lien and
2. Stop Payment Notice

The intent of the "Notice of Right to Lien" was to inform the lending institution, and the property owner, that a supplier or sub-contractor had provided materials or services to a specific project and they may have a claim on the interim construction financing. The further intent of this notice was to guarantee that the lending institution would monitor the disbursing of interim construction funds to assure that persons who had given them a "Notice of Right to Lien" would be paid from each draw.

The "Stop Payment Notice" amendment was added as an additional method for securing a payment, when past due from interim construction financing. The intent of this amendment was to cause the lending institution to withhold the amount claimed by the material supplier or sub-contractor from the next draw and to disburse the funds directly to the claimant.

Since there is no liability on the part of the lending institution for failing to disregard the intent of these amendments, they have been circumvented to a large degree. Interim construction draws are being disbursed directly to the contractor with no assurance that the material supplier or sub-contractor will be paid. In many instances the contractor will use these funds for purposes other than paying his suppliers or sub-contractors.

A "Stop Payment Notice" rarely accomplishes the purpose for which it was intended. The lending institutions in many instances interpret this notice as indication that the contractor is in financial trouble and they will call the loan; thereby stopping all draw requests until the liens are removed or the loan is satisfied. Or they may just hold the notice for a period of 30 days at which time the current law mandates that a law suit be instigated to collect the debt. In addition, the current law mandates that a claimant must provide a bond equal to the amount of the claim. With the current cost of bonding, legal fees and the length of time it takes to get a court date a claimant will rarely recover the amount owed to him. Interestingly enough the lending institutions continue making draws to satisfy their interest charges.

A "Claim of Lien" in many instances has no value. The lending institution has priority over all other encumbrances through their First Deed of Trust position. In the event of foreclosure the lending institutions First Deed of Trust must be paid in its entirety before any other claims can be satisfied, in spite of the fact that the lending institution may have disbursed construction funds directly to the contractor with no regard to a supplier, or sub-contractors "Notice of Right to Lien".

POSITION

The suppliers and sub-contractors position is really quite simple:

We should have the right to reasonably expect to be compensated for the materials supplied and work performed that adds value to someone else's property, and in the event this does not occur we have equal opportunity for recovery under the law.

The trade off or "trust me legislation" of 1979 is simply not working.

Lending institutions are in the best position to review and determine a contractor's financial capability. They have or can have complete access to a contractor's financial information because they control the purse strings. However, loan officers have little or no incentive under existing law to control disbursements so as to assure that suppliers and sub-contractors are paid. At a minimum all they need do is assure that the materials are incorporated into the real estate before they disburse to the contractor. Whether the contractor pays the suppliers or the sub-contractors is really of little concern, because they (the lending institution) are always in first position. This enables them to foreclose and extinguish the liens of suppliers and sub-contractors in the event the contractor ultimately fails to perform. When an institution fails to exercise good control of funds, it is difficult to understand why their investment should be given priority at the expense of suppliers and sub-contractors.

There is no viable vehicle for a supplier or sub-contractor to compel a lending institution to disburse loan draws for materials purchased or work performed.

When the supplier or sub-contractor attempts to utilize a stop payment, or otherwise involve the loan officers, typically the lending institutions' first reaction is to draw down available proceeds to cover interest and other charges or even to call the loan.

Conclusion. The make up of the lending institutions as well as the environment under which the legislation was drafted in 1979, differs from that of today and perhaps is one of the prime reasons requiring a change in this legislation.

It is evident that the current law is not working. The unusual large numbers of business failures, bankruptcy's, and foreclosures bear this out. If some form of protection for sub-contractors and material suppliers is not legislated, there will continue to be many bankruptcy's and foreclosures. In addition, the cost of construction will increase dramatically due to the increase in cost of materials and services to cover the losses sustained through the inequities in the existing law.

**CASE HISTORY
EXAMPLE**

PROJECT Residential Units - Fairbanks
LENDER Bank
ACCOUNT PROFILE Customer for several years
Slow payment record

HISTORY. Because of previous problems with this customer and before supplier would enter into an agreement to sell the project, the lending institution agreed to monitor the loan and disburse funds direct to the supplier. After the project was in process the account went 30 days past due and was closed. The supplier contacted the bank was told they (the bank) were working on the draws and payment would be sent in about 10 days. Additionally, the bank requested that the account be left open.

When the account was (45) days past due and no payment received, the supplier again called the bank and was told the loan officer was on vacation. Again the bank requested that the account remain open and that if the materials were allowed to go they would cover the purchases. The supplier was also told there were more than enough funds to cover the balance due. A check would be cut as soon as the loan officer returned.

When the account was (60) days past due the supplier closed the account. The bank was contacted. The loan officer met with supplier, who was again advised that they were working on draws that would bring the account current. The loan officer requested that the account still be left open. Supplier recorded claim of liens.

When the account was (70) days past due the bank filed foreclosure with no advance notice to supplier.

ACTION TAKEN. Timely recorded Notice of Right to Lien and notified lender. Filed Claim of Liens totaling \$214,000.

RESULTS. Without notice bank filed foreclosure notices. Bank offered supplier \$85,000 in settlement. Customer filed bankruptcy. Loan officer resigned from his position at the bank.

SUMMARY. Under the existing law supplier filed all proper documents, and additionally had the assurance of the lending institution that they would disburse directly to them. The supplier had no other recourse except to sue the lending institution or settle because of the first position given the bank under the present lien law.

HB 494
LIEN LAW REVISIONS
SECTIONAL ANALYSIS

Sections 1 and 2: Gives construction lien claimants (subcontractors) equal priority with construction lenders. This will discourage lenders from continuing to make disbursements on problem loans since the lenders's equity would be proportionally reduced in the event of a foreclosure.

Section 3: Adds - the lender and the owner are required to certify which parcel of property each portion of each loan draw is allocated to if the construction financing involves more than one parcel of property. This will prevent contractors from directing loan proceeds to other projects or uses. Present law requires certification of job progress to the lender by the general contractor.

The Stop Payment Notice (SPN) is changed to an optional Direct Payment Notice (DPN) because SPN's have proven to be ineffective. When a claimant has a problem with payment the claimant may file a DPN with the lender and owner. The owner has ten days to object to the notice. If the owner does not object the lender is to pay the claimant directly. If a notice of objection is received the lender is to issue a check jointly to the owner and claimant and leave it to them to work out their dispute by settlement or in the courts.

Section 4: The lender is liable for actual damages suffered by the claimant or owner as a result of its failure to comply with these obligations. If the lender complies, it will not be liable to anyone for doing so.

Section 5: A lender that has received a DPN is not allowed to withhold or disburse to itself any further construction loan proceeds to satisfy the owner's obligations to it until all payments specified in the DPN have been made to the claimant.

Section 6: A claimant may file an intent to furnish labor, materials, services, or equipment to the lender. If notice is given the owner than has the burden of proof to show that they did not know of or consent to the work or materials. If an intent is not filed the claimant must prove the owner knew of and consented to the work or materials.

Section 7: Gives claimants 30 days after a notice of completion is filed to file a claim of lien or notice of right to lien rather than 15 days. Fifteen days does not give a subcontractor enough time to see if there is a payment problem.

Section 8: Technical change.

Section 9: Requires an owner to give claimants 15 days notice that they intend to file a notice of completion and owners and lenders a 20 day notice. This is changed from five and ten respectively. This gives subcontractors time make sure the project is really completed.

Section 10: Penalizes lenders as well as owners for failure to provide claimants with required information by requiring them to pay actual damages or \$200 (whichever is greater) to the claimant.

Section 11: Technical change.

Section 12: A claimant is liable for injuries caused by filing a DPN too soon and an owner is liable for injuries caused for filing a premature Notice of Completion.

Section 13: Definitions.

HOUSE
COMMITTEE REPORT

(7)
Date referred: 1/24/86

JUDICIARY

FURTHER REFERRALS: FINANCE

DATE: Feb. 13, 1986

The LABOR & COMMERCE Committee has considered HB 503

"An Act relating to ice classics."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with CS HB 503 same title
- new title

and recommends Ab Pass

further referral to the _____ Committee

- and attaches:
- letter of intent
 - first fiscal note
 - new fiscal note
 - zero fiscal note

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Mike Deane

Mike Savana

George Hanley

Paul Allen

Bob L. Bunker

W. Lee Rouse

Mike Savana
Chairman

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 2/6/86

REQUEST

Bill/Resolution No: CSHB 503
Title: An Act Relating to Ice Classics

Sponsor: Navarre/Marrou
Requestor: House Finance
Date of Request: January 26, 1986

FISCAL DETAIL

Agency Affected: Revenue
BRU: Public Services

Components: Public Services Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES	-	-	-	-	-	-
TRAVEL	-	-	-	-	-	-
CONTRACTUAL	-	-	-	-	-	-
SUPPLIES	-	-	-	-	-	-
EQUIPMENT	-	-	-	-	-	-
LAND & STRUCTURES	-	-	-	-	-	-
GRANTS/CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	-	-	-

CAPITAL	-	-	-	-	-	-
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REVENUE	-	-	-	-	-	-
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	-	-	-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	-	-	-	-	-

POSITIONS:

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

ANALYSIS: Attach a separate page if necessary

Prepared by: *Sally Smith*
Division: Public Services

Phone: 465-2392
Date: February 6, 1986

Approved by: *Henry J. Stedje*
Commissioner: _____
Agency: Revenue

Date: 2/10/86

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 494(L&C)

By the Labor and

Commerce Committee

Page 7, line 16, after "SUITS." insert "(a)"

Page 7, after line 25, insert a new subsection to read:

"(b) A claimant with a claim of lien recorded under AS 34.35.075 who fails to promptly remove the claim from the record upon receiving payment on the claim or discovering that the claim is in error is liable for actual damages caused by the improperly recorded claim plus costs, including reasonable actual attorney's fees."

TESTIMONY ON LIEN REFORM

MY NAME IS KENT LEE WOODMAN. I AM AN ALASKAN SINCE 1953. I AM ONE OF THE OWNERS, AND THE LICENSEE FOR COMMONWEALTH, LTD., PARENT CORPORATION FOR YELLOW ELECTRIC, LTD, AMBER ELECTRIC, LTD. AND NORTHERN ELECTRONICS..... ALL STATE-WIDE ELECTRICAL AND ELECTRONIC CONTRACTORS. YELLOW HAS BEEN IN OPERATION FOR OVER 12 YEARS. I ALSO REPRESENT THE ALASKA INDEPENDENT ELECTRICAL CONTRACTORS ASSOCIATION, AIECA, WHICH ITSELF REPRESENTS OVER HALF THE ELECTRICAL CONTRACTORS IN ALASKA.

I WISH TO CONVEY THE CONDITIONS OF A REAL EMERGENCY TO THE LEGISLATURE. I WILL GIVE YOU SOME SPECIFICS IN A MOMENT, SO YOU WILL NOT THINK ME A BLATHERING PANIC MONGER. BEFORE THAT, HOWEVER, PLEASE LET ME OFFER THIS THINKING:

ABOUT 7 YEARS AGO THE LIEN LAW HEAVILY FAVORED THE CONTRACTOR AND SUPPLIER TO THE GREAT DISTRESS OF THE BANKER. AFTER A NUMBER OF LOSSES, THE BANKERS GOT TOGETHER AND WORKED UP THE BASICS FOR THE PRESENT LIEN LAW, HINTING STRONGLY THAT IF THEY DID NOT GET SUCH REFORMS PUT IN PLACE, THEY WOULD BE FORCED TO STOP LOANING MONEY AND OUR CONSTRUCTION AND DEVELOPMENT ECONOMY WOULD GRIND TO A HALT.

FROM THAT DATE TO THIS, THE LIEN LAW HAS BEEN HEAVILY WEIGHTED IN FAVOR OF THE BANKS, AND AGAINST THE CONTRACTOR AND SUPPLIER. THIS APPEARS A CLASSIC CASE OF THE PENDULUM SWING FROM EXTREME TO EXTREME...EXCEPT THAT I PERCEIVE THAT THE PENDULUM, WHICH IS SUPPOSED TO MOVE IN EVER DECREASING ARCS UNTIL IT REACHES THE PROPER MIDDLE, HAS INADVERTANTLY CRASHED THROUGH THE SIDE OF THE CASE!

THERE ARE 3 THINGS THAT WILL CURRENTLY DRIVE A CONTRACTOR OR SUPPLIER OUT OF BUSINESS.....OTHER THAN THE STAGNANT ECONOMY:

1. INSURANCE COSTS: AS YOU ARE NO DOUBT AWARE, INSURANCE COSTS HAVE GONE THROUGH THE ROOF. THIS PROBLEM IS BEING WORKED ON CURRENTLY IN ANOTHER ARENA.
2. COLLECTIONS: THERE IS A BILL WHICH HAS CLEARED BOTH HOUSES AND IS EN ROUTE TO THE GOVERNOR, WHICH WILL RAISE THE SMALL CLAIMS LIMITS FROM \$2000 TO \$5000. THIS WILL BE A BOON TO SMALL CONTRACTORS, AND WE WILL PUT THE NEW TOOL TO GOOD USE IMMEDIATELY.
3. LIEN LAW INEQUITIES: NO MATTER HOW ONE DOCUMENTS, NO MATTER HOW TIMELY, NO MATTER HOW RECORDED, IF SOMETHING GOES WRONG BETWEEN THE BUILDER AND THE BANKER, WE HAVE NO WARNING; THE BANK FORECLOSES AND ALL THE LIENS ARE WIPED OUT!

HERE ARE 2 SPECIFIC CASES FROM OUR FIRM. THEY ARE TYPICAL; I COULD HAVE BROUGHT OVER A DOZEN "FRESH ONES". I DO NOT MIND REVEALING NAMES AS THEY ARE ALL A MATTER OF PUBLIC RECORD:

THE FIRST IS PARK LANE DEVELOPMENT. OUR COMPANY WORKED FOR PARK LANE FOR SEVERAL YEARS WITH NO GREAT PROBLEMS. THEN THIS YEAR, THE FINAL PAYMENT OF \$5,913.30 WAS SLOW TO COME IN. WE CALLED THE DEVELOPER AND WERE TOLD THAT ANOTHER DRAW WOULD SHORTLY PROVIDE CASH...THEN IT WAS; "WHEN THE NEXT UNIT IS SOLD" THERE WOULD BE FUNDS, ETC, ETC. WE HAD PERFECTED ACKNOWLEDGEMENTS OF RIGHT TO LIEN, AND THEN LIENS. ALL WERE CORRECTLY EXECUTED AND PROPERLY RECORDED WITH THE STATE. ALL WERE AND ARE TIMELY.

ON 16 JANUARY 1986, UNITED BANK ALASKA'S ATTORNEYS SERVED UPON US A NOTICE OF DEFAULT AND SALE FOR A TOTAL OF 6 HOMES THAT WE HAD WIRED AND FOR WHICH WE HAD LIENS. THEY WILL HAVE A SALE ON OR ABOUT THE 8TH OF APRIL, AND WE WILL LOSE EVERYTHING AGAIN.

WE ARE TRYING TO WORK WITH THE BANK AND THE DEVELOPER FOR A PARTIAL PAYMENT ON ONE UNIT WHICH HAS BEEN OCCUPIED WITH EARNEST MONEY ON DEPOSIT SINCE BEFORE THE END OF 1985, BUT THE BANK IS DRAGGING ITS FEET IN ORDER TO RETAIN THE UNIT IN THE FORECLOSURE, AND HAS NO INTEREST OR PREFERENCE TO CLOSE AND REDUCE THE DEBT.

OUR NEXT EXAMPLE IS CROWN TREE HOMES, INC. WE DID BUSINESS FOR THIS FIRM FOR SEVERAL YEARS WITHOUT DIFFICULTY AS WELL, BUT THIS YEAR THEY GOT INTO TROUBLE. WE HAD PERFECTED ACKNOWLEDGEMENTS AND THEN LIENS. WHEN THEY COULD NOT PAY THE LAST \$5,752.57, WE EVEN WENT SO FAR AS TO OBTAIN A PROMISSORY NOTE AND DEEDS OF TRUST ON THE REMAINING 16 UNITS. WHEN THEY DID NOT RESPOND TO CERTIFIED LETTERS REQUESTING STATUS, AND THEY DEFAULTED ON THEIR PROMISSORY NOTE, WE DID SOME TITLE SEARCHING AND LEARNED THAT WE ARE 32ND IN LINE WITH LIENS. THIS PRESAGES DISASTER. THOUGH WE HAVE NOT YET BEEN SERVED WITH FORCLOSURE, IT IS OBVIOUSLY GOING TO HAPPEN.

WITH THAT MANY LIEN HOLDERS, IT IS OBVIOUS THAT WE ARE GOING TO BE ASKED TO SETTLE FOR SOME FRACTION ON THE DOLLAR TO FACILITATE SETTLEMENT, OR LOSE EVERYTHING WHEN THE LIENS ARE WIPED OUT BY THE BANK.

IN THESE CASES, ^{OUR}~~THE~~ MONEY HAS ALREADY BEEN SPENT; SALARIES AND TAXES PAID, MATERIALS PAID, OVERHEAD PAID. WE HAVE NO WAY TO TELL OUR PEOPLE OR SUPPLIERS THAT WE CANNOT PAY THEM BECAUSE WE WERE NOT PAID. WE PAID OUR RENT, OUR INSURANCE, OUR VEHICLE PAYMENTS AND THE LIKE IN ORDER TO STAY IN BUSINESS.

IN OTHER WORDS, WE TOOK THIS MONEY OUT OF OUR POCKET! IF ONE'S PROFIT MARGIN AFTER OVERHEAD AND TAXES IS SAY 3%, THAT MEANS THAT EVERY TIME WE TAKE A BATH FOR \$6000, WE NEED TO GO OUT AND GENERATE AN EXTRA \$200,000 OVER AND ABOVE BUDGET, JUST TO GET THAT MONEY BACK. IF THAT HAPPENS SAY 5 TIMES IN A YEAR, YOU NEED A MILLION!

A COMPANY THAT GROSSES A QUARTER OF A MILLION DOLLARS A YEAR AND HAS EVEN 1 OF THESE BABIES, IS DOOMED!

WHY YOU NEED TO GROSS \$200,000 JUST TO BREAK EVEN!

WE ARE ABSOLUTELY POWERLESS TO DO ANYTHING ABOUT THIS PREDICAMENT. OUR ONLY OTHER OPTION IS TO SUE THE CONTRACTOR. BY THEN, HE IS EITHER IN CHAPTER 11 OR 7, GONE FROM THE STATE, OR HE IS A PRUNE, THAT NO AMOUNT OF SUEING WILL SQUEEZE EVEN A DROP MORE.

THERE IS NO RELIEF FOR THIS PROBLEM UNLESS THE LIEN LAW ITSELF IS ADJUSTED TO MAKE FOR A MORE REASONABLE, MORE FAIR DISTRIBUTION OF THE BURDEN. UNTIL AND UNLESS WE CAN GET THE PENDULUM BACK NEAR CENTER, AND HAVE THE BANKS, THE SUPPLIERS OF MATERIALS AND LABOR SHARE EQUAL RESPONSIBILITY AND EQUAL REMEDY, WE HAVE A TOOL THAT CAN BE WIELDED VERY EFFECTIVELY, EVEN SURGICALLY, TO PUT ONE CONTRACTOR OR SUPPLIER AFTER ANOTHER RIGHT OUT OF BUSINESS.

WE SUPPORT THE BEGINNING ^{PROCESSES} STEPS TAKEN IN HB 494, ESPECIALLY AS ADDRESSED IN THE RECENT COMMITTEE SUBSTITUTE BILL. BANKS MAY NOT LIKE IT, BUT WE SEE IN THE PAPERS DAILY ABOUT INCREASED PROFITS BY ALL THE BANKS. AND YOU READ IN THOSE SAME PAPERS ABOUT THE FAILINGS OF CONTRACTORS AND SUPPLIERS.

UNLESS THIS ESSENTIAL TEAM IS PLACED BACK IN BALANCE, IT IS NOT AVAILABLE TO PRODUCE ACTIVELY IN EXPANDING OUR ECONOMY AND PROVIDING FOR EFFECTIVE CAPITOL PROJECTS AND PRIVATE DEVELOPMENT.

WE DO NOT REQUEST ANY SPECIAL SOCIALISTIC PROTECTION, NOR SPECIAL DISPENSATION. WHAT WE REQUEST IS RELIEF FROM PRECISELY THAT EMBODIED IN ALASKA STATUTES, SECTION 34 NOW. WE REQUEST ONLY THAT THE LEGISLATURE MODIFY THE PRESENT, LOPSIDED RULES, IN ORDER NOT TO PROVIDE TOO MUCH GOVERNMENT PROTECTION TO ANY ONE SEGMENT OF OUR INDUSTRIAL COMPLEX.....WHICH IT CLEARLY DOES NOW.

WE ARE STAUNCH ADVOCATES THAT "IF IT DON'T BE BROKE, DON'T FIX IT", BUT GENTELPERSONS, I ASSURE YOU THAT IT'S BROKE AND IT'S BROKE BIG. PLEASE, PLEASE, THIS SECOND SESSION OF THE 14TH LEGISLATURE, PASS OUT SOMETHING TO REDUCE THIS HUMONGOUS GAP BETWEEN THE HAVE'S AND THE HAVE-NOT'S. YOUR CONTRACTORS AND SUPPLIERS ARE ALREADY BATTLING TO HANG ON BY THERE FINGER NAILS, AND BANKERS KEEP STEPPING ON THEIR KNUCKLES.

I'LL CONCLUDE BY BRIEFLY ADDRESSING SEVERAL POINTS MADE BY JUNEAU VISITORS WHEN THIS BILL WAS FIRST ON TELECONFERENCE:

1. IN RESPONSE TO A BUILDING INDUSTRY SPOKESMAN WHO INDICATED THAT ALL WE NEED TO DO IS TIGHTEN UP THE EXISTING LAW AND MAKE IT A FELONY TO SIGN FOR MORE THAN YOUR BANK LOAN OR THAT YOU CAN HANDLE: WE DO NOT WANT TO LITIGATE. WE DO NOT WANT THE BUILDER TO GO TO JAIL, ALL WE WANT IS TO GET PAID.....WITHIN OUR LIFETIME!

2. THE REPRESENTATIVE FROM ~~ME~~ ^{THE BANK} WHO INDICATED HE IS THE LARGEST CONSTRUCTION LENDER AND ONLY HAD 50 FORECLOSURES IN 10 YEARS: IT'S NOT NECESSARILY THE FORECLOSURES.....WHAT ABOUT ALL THE SETTLEMENTS IN LIEU OF FORECLOSURE THAT ARE ORCHESTRATED AT 20¢ ON THE DOLLAR DAILY BY BANKERS OR ATTORNEYS? THEY ARE 50 OR 75 TO ONE OVER THE RECORDED FORECLOSURES. HIS FIGURES ARE SKEWED; HE MISSES THE POINT OR DELIBERATELY MISLEADS THE COMMITTEE.

INCIDENTALLY, 50 IN 10 YEARS IS 5 A YEAR, AND WE'VE BEEN INVOLVED IN 3 IN THE PAST 18 MONTHS.....IT IS HARD TO BELIEVE THE STATISTICS.

3. THERE WAS A SUGGESTION THAT ABOLISHING THE ACKNOWLEDGEMENT OF RIGHT TO LIEN WOULD SOMEHOW FIX EVERYTHING. THAT WILL NOT FIX ANYTHING. IT'S THE LIENS THAT GET DUMPED ON A FORECLOSURE!

4. THERE WAS A COMMITTEE QUESTION ON PRIORITIES OF EMPLOYEES GETTING PAID, AND I THINK THE ANSWER MAY HAVE BEEN LOST. IF AN EMPLOYEE WORKS FOR A SUB OR A SUPPLIER, HE OR SHE RECEIVES WAGES, AND THEY ARE INDEPENDENT OF THE JOB IN PROGRESS; IT'S SUCCESS OR FAILURE. IF THE JOB BOMBS OUT AND THE SUB DOES NOT PAY HIS EMPLOYEE, THERE WILL BE HELL TO PAY, AND THE EMPLOYEE CAN TAKE A LABOR ACTION....SO CAN BOTH THE IRS AND THE STATE.

WHEN THE EMPLOYEE IS ~~IS~~ A SOLE PROPRIETER, HOWEVER, HE OR SHE IS JUST AS LONELY AT THE END OF THE LINE AS A FULL BLOWN CORPORATION; THEY LOSE IT ALSO, BUT IT'S NOT WAGES THEN....IT'S A CONTRACT GONE AMUCK.

5. THERE WAS SOME DISCUSSION ON WHETHER FOLKS WERE UTILIZING THE PRESENT LAWS FULLY. WHILE THERE MAY BE THOSE WHO DO NOT PULL ALL THE STOPS, IT DOESN'T MATTER; THE FOLKS WHO ARE CONCERNED HERE, ARE THE ONES WHO DO EVERYTHING RIGHT, AND THEN LOSE IT ALL.

ONE CAN GET A PROPERLY EXECUTED ACKNOWLEDGEMENT, SPEND \$130 ON A TITLE SEARCH TO BE CERTAIN THE SIGNATOR IS THE PROPERTY OWNER OF RECORD, TAKE IT DOWN AND HAVE IT RECORDED, MONITOR IT, UPDATE IT AT SIX MONTHS IF REQUIRED, CONVERT IT INTO A FULL LIEN WHEN TROUBLE IS SUSPECTED, AND STILL LOSE EVERYTHING WHEN THE CONTRACTOR OR DEVELOPER OWES YOU SAY 30% AT THE END, HIS BANK LOAN IS DRAWN DOWN, AND THERE IS FORECLOSURE.

6. THE BANK REPRESENTATIVE TOTALLY MISLEAD THE COMMITTEE WHEN HE ANSWERED QUESTIONS ABOUT SALES OF PROPERTIES AND DISPERSED "SURPLUSES". I HAVE NEVER SEEN A FORECLOSURE SALE IN MY ENTIRE LIFE THAT NETTED EVEN ONE PENNEY MORE THAN THE BANK AND THE BANK'S ATTORNEY REQUIRED. SALES ON THE COURT-HOUSE STEPS ARE NOTORIOUSLY GOOD PLACES TO BUY PROPERTIES. OFTEN THE UNIT IS INCOMPLETE AND THE BANK MUST SPEND SOME MORE MONEY TO COMPLETE IT. BY THEN THE TOTAL VALUE OF THE PLACE WHEN COMPLETE IS ABOUT 65% OF THE TOTAL BILLS OUTSTANDING, SO THE BANK TAKES THEIRS, PAYS THE ATTORNEY AND THE REST OF US SUCK WIND.

7. THE BANKER ALSO MISLEAD THE COMMITTEE WHEN CHARACTERIZING THE NATURE OF THE LENDER AND THE SUPPLIERS AND CONTRACTORS. THERE IS A MAJOR DIFFERENCE BESIDES THE ONE POINTED OUT BY SEVERAL CONTRACTORS.....THAT THE BANK IS THE ONLY ONE WHO KNOWS ALL THE PLAYERS. THAT OTHER MAJOR DIFFERENCE IS THAT THE BANK HAS ACCESS TO ADDITIONAL COLLATERAL, UP FRONT, BEFORE THE JOB BEGINS. THEY ALREADY TAKE OUT THEIR LOAN INTEREST FROM THE FRONT OF THE PROCEEDS. THEY HAVE THE OPTION, BACK WHEN THE BUILDER COMPLETES HIS OR HER APPLICATION, TO IDENTIFY OTHER COLLATERAL AND INCLUDE LANGUAGE WHICH WILL ENABLE THE BANK TO ATTACH ADDITIONAL PROPERTIES OR SOURCES OF FUNDING SHOULD THE LOAN FORECLOSE. SUBS AND SUPPLIERS HAVE NO SUCH ACCESS, AND THEY DO NOT CONTROL NOR PRIORITIZE PAYMENTS ONE iota.

8. SEVERAL PEOPLE SAID THAT THE STOP PAY PROVISION WAS NOT BEING UTILIZED BY SUBS AND SUPPLIERS. THAT MAY BE, BUT 99% OF THE TIME, WHEN THERE IS A PROBLEM, IT'S BECAUSE THE LOAN IS DRAWN DOWN TO ITS CREDIT LINE.....THEN HOW MUCH GOOD DOES A STOP PAY DO? MOST SUPPLIERS AND SUBS DO NOT GET INTO TROUBLE WITH THEIR BUILDER ON THE FRONT END OF THE DEAL. THE TROUBLE BEGINS WHEN THE LOAN IS DRAWN DOWN AND THE BUILDER IS CALLED UPON TO CONTRIBUTE HIS OWN FUNDS TO COMPLETE THE JOB.....THAT'S THAT OTHER 20% WE WERE TALKING ABOUT.

WOULD BE INTERESTING TO SEE BANKS REQUIRE THE BUILDER TO PRESENT PAID INVOICES FOR 20% OF THE JOB VALUE AT THE FRONT HALF, PRIOR TO RELEASING THE 80% MONEY THEY LOAN!

9. ANOTHER OBSERVATION OF MINE IS THAT WHEN A FORECLOSURE OF ANY MAGNITUDE TAKES PLACE, OR EVEN A LARGE-ISH SETTLEMENT IN LIEU OF FORECLOSURE, THAT THERE ARE NO ASSETS LEFT FOR THE SUBS AND THE SUPPLIERS TO GO AFTER. EITHER THE CONTRACTOR IS OUT OF BUSINESS, GONE CHAPTER 11 OR 7, OR IS IN MEXICO. AS A PRACTICAL MATTER, THERE IS NO RECOURSE ONCE THE BANK HAS PLAYED ITS TRUMP CARD AND EVEN THREATENED FORECLOSURE.

10. THE BANKER ALSO MISLEAD THE COMMITTEE ABOUT THE AMICABLE ARRANGEMENTS THAT HE CLAIMED WERE MADE WITH SUBS AND SUPPLIERS WHEN THEIR IS A FORECLOSURE. I CAN TELL YOU FOR A FACT, THAT ONCE THAT PLUG IS PULLED, THE BANKERS WILL NOT EVEN CALL YOU BACK. SEVERAL TIMES I HAVE MADE 10 TO 12 CALLS, WRITTEN LETTERS AND EVEN GONE DOWN IN PERSON TO SEE IF THERE WAS ANYTHING I COULD DO TO HELPTHE BANK AND THE BUILDER COMPLETE A UNIT AND GET IT SOLD TO PREVENT FORECLOSURE, OR TO MINIMIZE EVERYONE'S DAMAGES WHEN IT WENT UNDER.....AND THE BANKERS ARE SMUG, UNCOMMUNICATIVE AND IN TOTAL CONTROL. THEY WILL SIT ON DECISIONS, CHANGE LOAN OFFICERS, RENIG ON THEIR COMMITMENTS AND LET THINGS SLIDE INTO SALE THAT COULD BE EASILY SALVAGED.

I MIGHT ADD THAT THE BANK IN QUESTION HAS JUST LOST A MAJOR COURT BATTLE FOR PRECISELY THAT....BUT IT'S THE RARE BUILDER THAT HAS THE RESOURCES TO BRING IT TO LIGHT!

11. THE BANKER INDICATED THAT ALL THE INTEREST IN LIEN LAW REFORM WAS SIMPLY A "RESPONSE TO THE ECONOMIC SLOWDOWN": YES, THAT IS TRUE. WHEN THINGS ARE GOING WELL AND WE ARE ALL BUSY, WE CAN ABSORB SOME OF THIS AND INGORE BAD LEGISLATION. WHEN THINGS GET SLOW AND TOUGH, HOWEVER, THERE IS TIME AND JUSTIFICATION TO FIGHT IT. JUST BECAUSE BAD LEGISLATION WHICH CLEARLY FAVORS ONE SEGMENT OF OUR SOCIETY HURTS US MORE AT ONE TIME THAN IT DOES AT ANOTHER, DOES NOT MEAN THAT IT IS NOT SICK AND DOES NOT REQUIRE DOCTORING.

12. THE BANKER INDICATED THAT FOLKS SHOULD CONSIDER PROPORTIONATE LOSSES IN A FORECLOSURE. HE DID NOT, UNFORTUNATELY, OFFER A FORMULA. LET'S SUPPOSE IT'S A \$300,000 4-PLEX FOR WHICH THE BANK LOANED \$240,000. THE BUILDER WAS SUPPOSED TO COME UP WITH \$60,000 AND LET'S ASSUME THAT HE WENT \$20,000 OVER BUDGET AND THAT HE WAS DRAGGING ALONG A \$45,000 LOSS FROM HIS PREVIOUS JOB. THAT MEANS THAT OF THE \$240,000 FROM THE BANK, ONLY ABOUT \$175,000 IS AVAILABLE FOR SUBS AND SUPPLIERS ON THIS JOB.....LESS THE INTERIM LOAN INTEREST AND COSTS WHICH WILL BE DEDUCTED UP FRONT.

THAT MEANS THAT THE EXCAVATOR MOST LIKELY GOT PAID AND SO DID THE CONCRETE MAN IF THEY WERE ON TOP OF THEIR BILLINGS. THE FRAMER MAY HAVE ALL HIS MONEY, THE PLUMBER PROBABLY HAS THE FIRST HALF, AS HAS THE ELECTRICIAN. THE MILLWORK, CARPET AND APPLIANCE SUPPLIERS MAY BE PAID. THAT MEANS THE PAINTER, THE TILE SETTER, THE MECHANICAL GUY AND THE TRIM BILLINGS FOR PLUMBING AND ELECTRICAL, ARE BEYOND THE CAPABILITY OF THE BUILDER. THE BANK HAS ALREADY LOANED OUT ALL THE CASH, THE LIENS BEGIN TO BUILD. FOLKS STOP GOING BACK TO WORK ON THE UNIT, SO IT IS NOT COMPLETE AND CANNOT SELL, THEN THE BUILDER DEFAULTS ON HIS INTERIM NOTE AND THE BANK FORECLOSES. THE BANK THEN PROCEEDS TO SPEND ANOTHER \$45,000 TO FINISH IT, THEIR ATTORNEY WANTS \$15,000, AND IT GOES ON THE MARKET WITH A TOTAL PRICE TAG OF AT LEAST 60% MORE THAN FAIR MARKET VALUE.

IT WOULD APPEAR THAT THE BANK WOULD HAVE HAD SOME DUTY TO DETERMINE THAT THE BUILDER SPENT THE MONEY ON THIS PROJECT AND THAT THE SUBS AND SUPPLIERS GOT PAID, AND THAT THE BUILDER HAD HIS 20% SHARE READY TO SPEND.

IN LARGER JOBS, THE DRAWS ARE BASED UPON PERCENTAGE OF COMPLETION, AND ARE CERTIFIED BY THE INSPECTOR; THE LENDER KNOWS PRECISELY WHAT THE STATUS OF THE JOB IS AND WHO THE SUPPLIERS ARE.

BACK TO PROPORTIONS, HOWEVER: LET'S TRY THIS FORMULA: BANKS TRADITIONALLY HAVE A LOAN LOSS RATIO OF LESS THAN 1%; LET THEM TAKE THE 1% AND SPLIT THE REST AMONG THE OTHER CREDITORS.

SERIOUSLY THOUGH: A \$15,000 BANK LOSS ON A \$300,000 4-PLEX DOES NOT RELATE IN ANY WAY TO THE 20% OF ANNUAL GROSS SALES FOR THE TILE SETTER OR THE CARPETLAYER. PERHAPS THE BEST FORMULA IS TO ADD ALL THE COSTS OF THE PARTIES TOGETHER AND DIVIDE THIS NUMBER INTO EACH CREDITOR'S LOSS FOR A PERCENTAGE OF THE PROCEEDS ON SALE AT FORECLOSURE. THAT WAY IF SAY THE TOTAL AVAILABLE IS 60%, EACH PARTY TAKES IT'S 40% LOSS AND THE BANK GOES BACK THROUGH THEIR ORIGINAL NOTE COLLATERALIZATION AGREEMENT AND BACKFILLS THEIR LOSS BACK TO 100%. THAT'S REASONABLE!

13. BANKERS LOOK DOWN THEIR NOSES AT SUBS BECAUSE THEY ARE "JOHNNY COME LATELY". WHEN THE WORK ON THAT PHASE IS COMPLETED BETWEEN THE 1ST AND THE 15TH, IT IS BILLED THE 30TH, DISCOUNTED 2% FOR PAYMENT ON THE 10TH OF THE NEXT MONTH, LATE ON THE 25TH, AND A MATTER OF FOLLOWUP ON THE 25TH OF THE 2ND MONTH WHEN IT TRIPS OVER 30 DAYS. WE HAVE NO INKLING THAT THERE IS A PROBLEM UNTIL 65 DAYS AFTER THE WORK WAS DONE...AFTER THE SUBS HAVE PAID THEIR HELP AND SUPLIERS AND OVERHEAD.

THANK YOU VERY MUCH FOR YOUR ATTENTION. I WILL TURN IN A TYPED COPY OF MY PREPARED TEXT, AND I AM AVAILABLE FOR QUESTIONS.

Sam -

You mentioned earlier
that the various interests
were working on a
compromise.

Any progress?

NO -

Home builders
may have lined up
w/ Banks

This



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Cont. Lic. No. AA-5818

March 1, 1986

Rep. Mike Navarre
Alaska State House of Representatives
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Mike,

I would like to thank you for your hospitality while the Home Builders were in Juneau. I would also like to assure you and your staff that I continue to work hard here on the grass-roots level to promote that dearest of issues, close to all of our hearts: the swift passage of H.B. 700!

H.B. 494

I feel that the position expressed in the Teleconference hearing on Feb. 26th by the Homebuilders represents middle ground, and that to do more than these suggested changes is to assure future Legislatures of having to correct the law back closer to what it is now. **Making the misappropriation of funds a criminal offense** should go a long way towards correcting the problems of the present law. Further, if Subs and Suppliers can simply file a **Right to Lien** instead of having to get an Acknowledgement of Right to Lien signed by the Owner of Record, this will make this part of the process much less onerous, and ultimately result in more Subs and Suppliers getting their money. The inclusion of a **criminal penalty for the filing of a false or fraudulent lien** would keep "grudge liens" from being the next problem we would have to deal with.

S.S.H.B. 506

In Chapter 76. JOINT INSURANCE ARRANGEMENTS., Sec. 21.76.010 AUTHORITY TO ESTABLISH JOINT INSURANCE ARRANGEMENTS., sub-section (a) should be amended further to include " and non-profit corporations".

FUNDING FOR MUNICIPAL PROJECTS IN SOLDOTNA FOR FY 1987

We in Soldotna are satisfied with the Governor's Capital Budget figures as they were passed to the House from the Senate. These represent the projects that are at the top of our priorities, and will allow us to move forward with plans to include traffic signalization in our Binkley Street Project next summer. Including Signalization at this time will ultimately cost less than doing it as a separate job later, and as you well know, is badly needed. We also need to expand our water and sewer on the south side of the Kenai River to allow for the Development of the Salamantof property, and the building of a much-needed Water Storage Tank.

Sincerely,

Mitchel L. Robinson

sounds like part of the
solution is need for
bonded + licensed
contractors (not in
this bill, though)

ALASKA MORTGAGE BANKERS ASSOCIATION

P.O. BOX 4-2691/ANCHORAGE, ALASKA 99509

February 20, 1986

Honorable Mike Navarre
Members: Labor and Commerce Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

RE: House Bill 494

Dear Representatives:

The Alaska Mortgage Bankers Association has reviewed HB494 and has the following comments:

AS 34.35.060: This clause would give labor and materialmen liens equal priority with a prior mortgage.

Passage of this clause would, in our opinion, effectively preclude construction lending for a significant number of builders/contractors. In order to protect its loan, the lender would probably select one or more of the following:

- 1) Require significantly higher cash injection
- 2) Require a bond
- 3) Require additional collateral
- 4) Require a percentage holdback until Notice of Completion is filed and time frame had expired.

The net effect of such a clause would be to eliminate the small builder/contractor, and owner-builder from the industry.

AS 34.35.062: This clause would abolish the Stop-Payment Notice; require the lender and the owner to identify which property each portion of the loan draw is allocated to; and preclude any disbursements to lender, including interest payments or reimbursement for advances until a Direct Payment Notice has been paid. (Lenders need not comply with this section if builder/contractor has a 50% payment bond. Very few builder would be able to obtain such a bond, and if they could obtain the bond, the cost would be high.)

Direct Payment Notice (in lieu of Acknowledgement of Right to Lien and Stop Payment Notice); the effect would be that upon performance, a claimant could submit a DPN to the lender who would be obligated to pay unless the owner objected within 10 days. Performance could include delivery to a site; lenders normally advance funds only on a percentage of completion, not on delivery of the materials. Materials could "disappear" after the lender had advanced funds to pay for them.

Alternatively, if owner objects to DPN within timely manner, lender would be obligated to issue payment jointly to owner and claimant. The lender would have no control over its funds; this could lead to under-secured loans, over-disbursement for budgeted items and loss to the lender.

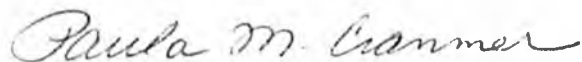
Honorable Mike Navarre
February 20, 1986
Page 2

AS 34.35.068 and .071: These sections would extend the time required for notice of filing the Notice of Completion from 5 days to 15 days and extend the time frame after Notice of Completion from 15 days to 30 days for filing of liens. This extension of time will cause delays in closing of residential loans and increased interest costs to the builder, unless title companies will accept an indemnity from the builder. It is doubtful that title companies will be willing to accept indemnities from any but the strongest builders/contractors. As is the case with section 34.35.060, the net effect will be to eliminate the small builder.

The current law has provisions in place to protect claimants; these provisions are seldom used.

We recommend the law be left intact as it currently exists.

Sincerely,



Paula Cranmer
President

ry

February 26, 1986

POSITION OF ALASKANS FOR
LIEN LAW REFORM

1. There are serious problems with the present Lien Law that are prejudicing Suppliers and Subcontractors.
2. The 1978-79 amendments to Lien Law are not working. Liens no longer a practical remedy for Suppliers and Subcontractors.
3. The 'trust me' attitude by Lenders in 1978-79 led Suppliers and Subcontractors to concede their superior lien priority to the Lenders in the mistaken belief that the new stop payment remedy would offset the loss of their superior lien priority.
4. The stop payment remedy is not working due to (a) the shortness of the 30 day deadline by which a suit must be filed by the lien claimant, (b) the bonding requirement, and (c) the Lenders' right to foreclose construction loans and wipe out the Suppliers', Subcontractors' and Builders' liens after failing to responsibly and diligently monitor their loans; eg. Lenders seldom condition construction loan disbursements on receipt of lien releases from Suppliers and Subcontractors.
5. All that Suppliers and Subcontractors want is PARITY with Lenders, not a return to their former superior lien position.
6. HB 494 would solve the Suppliers' and Subcontractors' problems, but has met with stiff resistance from Builders as well as Lenders.
7. The Suppliers and Subcontractors appreciate the Builders' problems and are willing to amend HB 494 to accommodate them, but believe that the Lenders are not seriously interested in a compromise because they want to 'have their cake and eat it too', ie. no statutorily mandated requirements for carefully monitoring their construction loans while having priority over Builders', Suppliers' and Subcontractors' liens.
8. As a result, in an effort to compromise, the Suppliers and Subcontractors are willing to amend HB 494 to accommodate the Builders by (a) abolishing stop payment provisions, (b) dropping direct payment notices and joint payment proposals, (c) requiring the mandatory recording of Notices of Right to Lien within a short period after supplies are furnished or work is begun as a condition to subsequent lien right, and (d) dropping proposals to extend notice of completion deadlines.

9. The cornerstones of the amendments proposed by the Suppliers and Subcontractors are:
- Abolishing acknowledgements of Rights to Lien and instead requiring the timely mandatory recording of Notices of Right to Lien; this eliminates notice problems that plagued the title companies in 1978-79.
 - Elevating liens of Suppliers, Subcontractors and Builders to a level of equal priority with Lenders, with appropriate accommodations to Lenders to enable them: (a) to still summarily foreclose their deeds of trust out of court; (b) to sell property purchases at such a foreclosure sale free and clear of all liens by bonding or escrowing around them; and (c) to provide joint ownership between the Lender and valid lien claimants if the property cannot be sold at a reasonable price by the Lender. Lenders and lien claimants equitably share losses proportionately.
 - Requiring Builders to apply construction loan proceeds to the authorized project with appropriate civil and criminal penalties if they don't.
 - Subcontractors and Builders will be elevated to equal rank with Suppliers for foreclosure proceeds sharing purposes.

March 5, 1986

Alaska Banker's Association
Proposed substitute for HB 494

*Section 1. AS 34.35.062 is repealed and reenacted to read:**

Section 34.35.062. Construction financing. (a) A claimant to whom payment for the labor, materials, services or equipment furnished is past due may give the lender written notice to stop lending. The claimant shall at the same time give a copy of the notice to the owner and to the prime contractor. A stop-lending notice shall instruct the lender to stop disbursing, advancing or otherwise providing construction financing, shall be verified by the claimant and shall:

(1) state the claimant's name, address and telephone number;

(2) describe the labor, materials, services or equipment furnished by the claimant and state the name of the person to whom the same were furnished;

(3) describe the real property improved by such labor, materials, services or equipment and state the name of the owner of the real property;

** Note: Further amendments, to change "stop-payment" to "stop-lending", are necessary in various other places throughout §050-120. They are, presumably, the same places as those at which the present bill offers amendments to employ the term "direct-payment".

(4) state the amount due and unpaid to the claimant for such labor, materials, services or equipment.

(b) A stop-lending notice is binding upon a lender from the time the lender has received it and had a reasonable opportunity to act upon it until it expires or is revoked. A notice expires on the sixty-first day after it is received by the lender unless, prior to that day, the claimant has commenced an action on its claim and the lender has received written notification of that fact. A notice may be revoked at any time by a writing signed by the claimant. Expiration or revocation of a notice extinguishes any liability of the lender to the claimant under (c) of this section.

(c) A lender who disburses, advances or otherwise provides construction financing that is the subject of a binding stop-lending notice is liable to the claimant in an amount equal to the lowest of:

(1) the amount of construction financing disbursed, advanced or otherwise provided by the lender subsequent to its receipt of the claimant's stop-lending notice; if there are two or more binding stop-lending notices when such disbursement, advance or other provision of construction financing is made, the lender's liability for the amount disbursed, advanced or otherwise provided is to the claimant or claimants entitled to priority under AS 34.35.112(b);

(2) the amount properly owed to the claimant for labor, materials, services or equipment furnished by the claimant, as established by a written agreement signed on or after the date of the stop-lending notice by the claimant, the owner and the prime contractor or by a final judgment in an action to which the owner is a party; and

(3) 150 per centum of the amount stated in the stop-lending notice.

(d) Within ten days after receiving pursuant to (c)(2) of this section the written agreement or a certified copy of the judgment establishing the amount properly owed to a claimant from whom it has a binding stop-lending notice, a lender shall send to the claimant a statement showing, by date and amount, all construction financing provided by the lender. Except as provided at (e) of the section, the lender shall at the same time send the claimant payment in the amount of the lender's liability to the claimant under (c) of this section.

(e) If there are two or more claimants to whom a lender is or may be liable under (c) of this section and the lender is uncertain of the amount of its liability or possible liability among those claimants, the lender may bring an action to require the claimants to interplead their claims.

*Section 2. AS 34.35.064(a)(7) is amended to read:

(7) the following statement in type no smaller than that used in providing the information required by (1) - (6) of this subsection:

WARNING: Unless provision is [HAS BEEN] made for payment of such sums as may be due to the undersigned, your above property may be subject to foreclosure to satisfy such sums even though you may pay a prime contractor or other person for the labor, materials, services or equipment furnished by the undersigned [THIS CLAIM, YOU MAYBE LIABLE FOR PAYMENT DIRECTLY TO THIS CLAIMANT NOTWITHSTANDING THE FACT THAT PAYMENT HAS BEEN MADE TO A PRIME CONTRACTOR OR OTHER PARTY].

*Section 3. AS 34.35.064 is amended by adding a new subsection to read:

(c) A claimant other than an individual performing labor shall not have or claim a lien or submit a stop-lending notice under AS 34.35.050-120 for labor, materials, services or equipment furnished to a person other than the owner prior to the time the owner was given notice by the claimant under this section.

*Section 4. AS 34.35.080(a) is amended to read:

(a) A lien provided for in AS 34.35.050 - AS 34.35.120 does not bind land or a building [, STRUCTURE,] or other improvement for more than six months after the claim of lien is recorded [FILED], unless an action is commenced in a [SUIT IS BROUGHT BEFORE THE] proper court to enforce the lien

(1) within that time, or

(2) within six months after recording of an extension notice in the same recording office within the original six-month period showing the recording date and the book and page or instrument number of the initial claim of lien, and the balance owing.

*Section 5. AS 34.35.080(b) is repealed and reenacted to read:

(b) A lien whose duration is extended by commencement of an action pursuant to (a) of this section is void as against a person who, after the commencement of such action and without knowledge or actual notice of its pendency, acquires an interest in the subject property in good faith and for valuable consideration, unless a notice of the pendency of the action has been duly filed for record prior to the time such person's conveyance is duly filed for record. Notice of the pendency of the action shall conform to the requirements of AS 09.45.790.

*Section 6. AS 34.35.114(c) is repealed and reenacted to read:

(c) A person who receives a stop-payment notice or notice of right to lien that identifies a project with respect to which the person is not a lender, accompanied with a copy of a writing by which the claimant's customer has identified such person as lender, shall, within five days, notify the claimant in writing that such person is not the lender.

*Section 7. AS 34.35.114(d) is repealed and reenacted to read:

(d) At the request of an owner or lender to whom a claimant has given a stop-lending notice or notice of right to lien, a claimant shall, within five days, provide the owner or lender a written statement of the current amount due and unpaid to the claimant.

*Section 8. AS 34.35.114(e) is amended to read:

(e) A person [AN OWNER OR HIS AGENT] who fails to provide information as required by this section, or who furnishes incorrect information, is liable to the person to whom such information should have been, or was, given in the amount of the actual damage caused by such failure or incorrectness [WHICH CAUSES A CLAIMANT TO FAIL TO REALIZE ON A LIEN IS LIABLE TO THE REQUESTING PARTY FOR ACTUAL DAMAGES].

*Sections 9, 10 and 11 - same as sections 7 - 9 in original bill

*Section 12. AS 34.35.120(4) is amended to read:

(4) "construction financing" means money loaned or other credit extended to an owner on the security of real property [THAT PORTION OF MONEY SECURED BY AN ENCUMBRANCE] to finance the costs of a project on that [ORIGINAL CONSTRUCTION OF A BUILDING OR OTHER IMPROVEMENT ON, OR DEVELOPMENT OF,] real property; [, BUT] it does not include money loaned or credit extended to:

(A) finance acquisition of [FUNDS TO ACQUIRE] real property;

(B) finance payment of prior indebtedness secured by real property [FUNDS TO PAY PRINCIPAL AMORTIZATION OF ENCUMBRANCES WITH PRIORITY OVER THE ENCUMBRANCE SECURING THE CONSTRUCTION FINANCING];

(C) finance payment of [FUNDS TO PAY] loan, commitment, title, legal, closing, recording, [OR] appraisal, or

other fees and costs incurred in connection with the making or extension of construction financing [ON THE CONSTRUCTION LOAN;].

*Section 13. AS 34.35.120(12) is amended to read:

(12) "owner" means a person who owns real property, or a possessory interest in real property, [THE BUILDING OR OTHER IMPROVEMENT] and who enters into a contract, express or implied, for the construction, alteration or repair of a building or improvement on or to the real property.

*Section 14. AS 34.35.120 is amended by adding a new subsection to read:

(17) "project" means the construction, alteration or repair of a building or other improvement on or to real property.

*Section 15. AS 34.35.069, AS 34.35.070(f), and AS 34.35.120(6) are repealed.



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Cont. Lic. No. AA-5818

February 8, 1986

Rep. Mike Navarre
Alaska State House of Representatives
Pouch V (MS 3100)
Juneau, Alaska 99811

Subject: H.B. 494

Dear Mike,

As you may already know, House Bill 494 is not loved by all in the Construction Industry. It is seen by many as an attempt by the supplier/sub-contractor portion of the industry to improve their position when a builder or other buyer of materials and/or services gets into financial trouble. That effort has merit, in that, since the Lien Law has been in its present form, it has been very difficult for this portion of the industry (suppliers and sub-contractors) to protect themselves. We feel the proposed legislation will ultimately have a detrimental impact to good, solid, credit-worthy Builders, and goes beyond what's needed to cure the ills of the present Lien Law.

There is a feeling by some in the industry that the suppliers are attempting to use H.B. 494 as a substitute for a good, sound credit policy. Wouldn't it be the best of both worlds if the suppliers could extend credit to both credit-worthy and unworthy builders alike, knowing that, if the unworthy builder gets into financial difficulty, the bank is obligated to pay these claims from subs and suppliers upon their demand? This flies in the face of good credit policy, yet if this legislation is allowed to become law as proposed, the Building Industry would be subject to a "credit policy" that would be considered unacceptable in any other industry. Of course, these poor-risk builders generally are the same ones that are causing builders to suffer from a poor reputation in the public's mind (the so-called "fly-by-night" builders), so we are not serving that public well by making it easier for them to operate.

The banks are also holding up the spectre of builders being forced to have all their bills paid by the banks, so that they can be sure the builder is paying them in a responsible way with the money borrowed. I submit that the bad builder, again, is the one that is creating the problem in the first place, and any legislation that either wittingly or unwittingly makes it easier for him to operate, is ill-advised, and is not in the public's interest.

On a lighter note, I'd like to inform you that the Alaska State Home Builders Association Board of Directors will be in Juneau on Feb. 26th and 27th, and will be holding a Legislative Reception at the Baronof Hotel on the evening of Feb. 26th. I would very much appreciate your accepting my invitation to this event. Since many of the issues facing our industry seem to cross your committee desk, I feel it would be beneficial to both sides of the table to know each other better on a social level.

Sincerely,

Mitchel L. Robinson

Analysis of Alaska Banker's Association's
proposed substitute for HB494

Section 1

(a) Revises §062 to more clearly and accurately state the present "stop-payment" rule.

(b) Eliminates the current requirement that a claimant wait 20 - 30 days after an account becomes delinquent before he can give a stop notice to the lender.

(c) Doubles (to sixty days) the time within which the claimant must bring suit to preserve his rights, and eliminates the present requirement that he give a bond.

(d) Addresses the lender's obligations in cases where two or more stop notices are pending.

Section 2

Revises the required warning in the Notice of Right to Lien to more correctly alert the owner of the significance of the Notice.

Section 3

Provides that a claimant who is not in contract with the owner must give the owner a Notice of Right to Lien as a condition of his acquiring any statutory rights in the owner's property. This accomplishes the apparent purpose of the present §069, which would be repealed (Section 15).

Section 4

Clean-up revisions to §080(a).

Section 5

Under current law, a prospective purchaser who encounters a recorded lien claim must, no matter how old or apparently stale the claim, undertake to find out if the action required by §080(a) to keep the lien alive has been brought. First National Bank v. Dent, 683 P.2d 722 (Alas. 1984). Such a suit could be pending in any court, Superior or District, from Ketchikan to Barrow. Thus, a stale claim can put an onerous burden on properties' transferability.

AS 09.45.790 enables the claimant to record notice that he has brought the suit required, by §080(a), to keep the lien alive. This Section 5 simply provides that, unless he does record a lis pendens notice, the claimant risks losing his lien to a subsequent good faith purchaser for value who doesn't know of the claimant's action. It reverses the rule in FNBA v Dent.

Sections 6 - 8

Impose clearer obligations on lenders and claimants to provide correct information respecting their relationship to a project.

Sections 9 - 11

Extends the time a claimant is given to record a lien claim in the manner proposed by the bill.

Sections 12 and 13

Revises the definitions of "construction financing" and "owner" in interests of accuracy and clarity.

Section 14

Defines "project", a term used in the proposed §114(c) (Sec. 6) and 120(4) (Sec. 12).

Section 15

Repeals the current law's "acknowledgement of right to lien" provision, an unintelligible subsection of §070, and the definition of "draws" -- a term that is not used if §062 is amended as proposed at Section 1.

WORK DRAFT

WORK DRAFT

WORK DRAFT

Cook
3/14/86

Original sponsors: Cotten, Szymanski,
Phillips, et al

1 IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

2 CS FOR HOUSE BILL NO. 494 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to liens for labor or material
7 furnished."

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

9 * Section 1. AS 34.35.062 is repealed and reenacted to read:

10 Sec. 34.35.062. CONSTRUCTION FINANCING. (a) A claimant to whom
11 payment for the labor, material, service, or equipment furnished for a
12 project is past due may give the lender a stop-lending notice. The
13 claimant shall at the same time give a copy of the notice to the owner
14 and to each prime contractor with whom or through whom the claimant or
15 the claimant's debtor has contracted. A stop-lending notice shall

16 (1) instruct the lender to stop disbursing, advancing, or
17 otherwise providing construction financing for the project;

18 (2) be verified by the claimant;

19 (3) state the claimant's name, address, and telephone
20 number;

21 (4) describe the labor, material, service, or equipment
22 furnished by the claimant and state the name of the person to whom
23 furnished;

24 (5) describe the real property improved by the labor,
25 material, service, or equipment and state the name of the person the
26 claimant believes to be the owner of the real property;

27 (6) state the amount due and unpaid to the claimant for the
28 labor, material, service, or equipment.

29 (b) After the lender has received a stop-lending notice and has

1 had a reasonable time to act on it the lender may not disburse a draw
2 until the notice expires or is revoked. A notice expires on the 91st
3 day after it is received by the lender unless the claimant has com-
4 menced an action on the claim that is the subject of the notice before
5 that day and the lender has received written notification of the
6 action. A stop-lending notice may be revoked at any time in writing
7 signed by the claimant. Expiration or revocation of a notice extin-
8 guishes the liability of the lender to the claimant under (c) of this
9 subsection.

10 (c) A lender who provides construction financing for a project
11 after it is the subject of a binding stop-lending notice is liable to
12 the claimant in an amount equal to the lowest of the following
13 amounts:

14 (1) the amount of construction financing provided by the
15 lender after receipt of the claimant's stop-lending notice; if there
16 are two or more binding stop-lending notices when the disbursement
17 occurs, the lender's liability to each claimant is based on the claim-
18 ant's ranking under AS 34.35.112;

19 (2) the amount owed to the claimant for labor, material,
20 service, or equipment furnished for the project by the claimant,
21 including interest, costs, and attorneys fees, as established by a
22 written agreement signed on or after the date of the stop-lending
23 notice by the claimant, the owner and the prime contractor with whom
24 or through whom the claimant or the claimant's debtor has contracted
25 or by a final judgment in an action in which the owner, the claimant
26 and the claimant's debtor are named and, if necessary, served parties;

27 (3) 150 percent of the amount stated as due in the stop-
28 lending notice.

29 (d) Within 10 days after receiving the written agreement or a

1 certified copy of the judgment under (c)(2) of this section estab-
 2 lishing the amount owed to a claimant from whom it has a binding
 3 stop-lending notice, a lender shall send to the claimant a verified
 4 statement showing, by date and amount, all construction financing
 5 provided by the lender for the project. Except as provided in (e) of
 6 this section, the lender shall include with the statement payment in
 7 the amount of the lender's liability to the claimant under (c) of this
 8 section.

9 (e) If there are two or more claimants to whom a lender is or
 10 may be liable under (c) of this section and the lender is uncertain as
 11 to the amount of its liability or possible liability to each, the
 12 lender may bring an action to require the claimants to interplead
 13 their claims.

14 (f) A lender may not provide a draw to the owner or an agent of
 15 the owner until

16 (1) the owner delivers a verified certificate to the lender
 17 that states the

18 (A) progress of the project, including the percentage
 19 of completion of the project;

20 (B) name, address, and telephone number of each prime
 21 contractor who has furnished labor, material, service, or equip-
 22 ment for the project;

23 (C) amount owed by the owner to each listed prime
 24 contractor;

25 (D) portion of the draw that the owner will pay to
 26 each listed prime contractor; and

27 (2) each prime contractor listed in the owner's certificate
 28 delivers a verified certificate to the lender that states the

29 (A) amount owed to the prime contractor by the owner

Is this done anyhow

1 for the project;

2 (B) name, address, and telephone number of each person
3 who has furnished labor, material, service, or equipment for the
4 project under a contract with the prime contractor;

5 (C) description of the labor, material, service, or
6 equipment furnished by each listed person;

7 (D) amount owed by the prime contractor to each listed
8 person for the labor, material, service, and equipment;

9 (E) portion of the draw to be paid by the owner to the
10 prime contractor that the prime contractor will pay to each
11 listed person; and

12 (F) name, address, and telephone number of each person
13 who has not entered into a contract with the prime contractor but
14 has furnished labor, material, service, or equipment to or for
15 the benefit of the project through the prime contractor.

16 (g) The owner and each prime contractor shall use each draw as
17 indicated in the certificates given by them to the lender under (f) of
18 this section. The lender may not be required to verify the informa-
19 tion in a certificate and is not liable for an error in a certificate.

20 (h) An owner or prime contractor who wilfully and intentionally
21 fails to apply construction financing proceeds as indicated by the
22 certificate required under (f) of this section is guilty of a class C
23 felony. If the owner or prime contractor is not a natural person,
24 upon conviction the owner or prime contractor may be fined in an
25 amount not to exceed \$50,000.

26 (i) Within 10 days after being requested, a lender shall provide
27 a person who has given it a notice of right to lien with a copy of

28 (1) each certificate received by the lender under (f) of
29 this section; and

1 (2) a verified certificate stating the amount of construc-
2 tion financing proceeds committed by the lender for the project that
3 have not been disbursed by the lender.

4 (j) The lender may not provide construction financing proceeds
5 for payment of indebtedness of the owner that is not incurred for the
6 project.

7 * Sec. 2. AS 34.35.064(a) is amended to read:

8 (a) Before furnishing labor, material, service, or equipment for
9 a project, a person [AFTER ENTERING INTO A CONTRACT, A CLAIMANT] may
10 give a notice of right to lien to the owner or owner's agent [AND THE
11 LENDER]. If the notice is given in accordance with this section, the
12 owner has the burden of proof to show that the owner did not know of
13 or consent to the furnishing of the labor, material, service, or
14 equipment by the claimant in an action to foreclose the claimant's
15 lien on the property under AS 34.35.050 - 34.35.120. Otherwise the
16 claimant has the burden of proof to show that the owner knew of and
17 consented to the furnishing of the labor, material, service, or equip-
18 ment". The notice of right to lien shall be in writing, state that it
19 is a notice of a right to assert a lien against real property [A
20 BUILDING OR OTHER IMPROVEMENT] for labor, materials, services, or
21 equipment furnished in connection with a project [CONSTRUCTION, ALTER-
22 ATION, OR REPAIR OF THE BUILDING OR OTHER IMPROVEMENT], and contain

23 (1) a legal description sufficient for identification of
24 the real property [UPON WHICH THE BUILDING OR OTHER IMPROVEMENT IS
25 LOCATED];

26 (2) the name of the owner;

27 (3) the name and address of the claimant;

28 (4) the name and address of the person with whom the claim-
29 ant contracted;

1 (5) a general descriptor of the labor, materials, ser-
2 vices, or equipment provided or to be provided;

3 (6) a statement that the claimant may be entitled to record
4 a claim of lien; and

5 (7) the following statement in type no smaller than that
6 used in providing the information required by (1) - (6) of this
7 subsection: WARNING: Unless provision is [HAS BEEN] made for payment
8 of sums due to this claimant, your property described in this notice
9 may be subject to foreclosure regardless of whether [THIS CLAIM, YOU
10 MAY BE LIABLE FOR PAYMENT DIRECTLY TO THIS CLAIMANT, NOTWITHSTANDING
11 THE FACT THAT] payment has been made to a prime contractor or other
12 person for the labor, material, service, or equipment furnished by the
13 claimant [PARTY].

14 * Sec. 3. AS 34.35.067 is amended to read:

15 Sec. 34.35.067. RECORDING NOTICE OF RIGHT TO LIEN. A notice of
16 right to lien may be recorded by a claimant at any time after the
17 claimant enters [ENTERING] into a contract for or first furnishes
18 labor, material, service, or equipment [FURNISHED] in connection with
19 a project [THE CONSTRUCTION, ALTERATION OR REPAIR OF A BUILDING OR
20 OTHER IMPROVEMENT]. The notice shall be recorded in the same manner
21 as specified for the recording of a claim of lien under AS 34.35.070.

22 * Sec. 4. AS 34.35.070(a) is amended to read:

23 (a) A [SUBJECT TO THE PROVISIONS OF AS 34.35.069(a), A] claimant
24 may record a claim of lien after entering into a contract for a proj-
25 ect [THE CONSTRUCTION, ALTERATION, OR REPAIR OF A BUILDING OR IMPROVE-
26 MENT]. A claim of lien may not be recorded later than the time spec-
27 ified under AS 34.35.068.

28 * Sec. 5. AS 34.35.071(a) is amended to read:

29 (a) The owner of real property that may be subject to a lien

1 under AS 34.35.050 - 34.35.120 may announce the date of completion of
2 the project [A BUILDING OR OTHER IMPROVEMENT ON THE PROPERTY] by

3 (1) recording a notice of completion after completion of
4 the project [CONSTRUCTION, ALTERATION OR REPAIR OF THE BUILDING OF
5 OTHER IMPROVEMENT] in the office of the recorder of the district in
6 which the real property [BUILDING OR OTHER IMPROVEMENT] is situated;
7 and

8 (2) giving notice at least five days before the recording
9 of the notice of completion to all claimants who have given a notice
10 of right to lien or a stop-lending [STOP-PAYMENT] notice to the owner
11 and the lender prior to 10 days before recording a notice of comple-
12 tion; the notice must include a copy of the notice of completion and a
13 statement advising claimants that a notice of completion will be
14 recorded not earlier than five days after the date of the notice.

15 * Sec. 6. AS 34.35 is amended by adding a new section to read:

16 Sec. 34.35.074. CIVIL SUITS. A person injured by a violation of
17 AS 34.35.050 - 34.35.120 may bring a civil action

18 (1) for actual damages that are proximately caused by the
19 violation, and if the person prevails and the defendant's conduct is
20 found to be wilful and intentional, the person shall be awarded three
21 times the amount of actual damages plus costs, including reasonable
22 actual attorney's fees;

23 (2) to enjoin the violation, and if the person prevails,
24 the person shall be awarded costs, including reasonable attorney's
25 fees.

26 * Sec. 7. AS 34.35.080(a) is amended to read:

27 (a) A lien provided for in AS 34.35.050 - 34.35.120 does not
28 bind real property [A BUILDING, STRUCTURE, OR OTHER IMPROVEMENT] for
29 more than six months after the claim of lien is recorded [FILED].

1 unless an action is commenced in [SUIT IS BROUGHT BEFORE] the proper
2 court to enforce the lien within

3 (1) [WITHIN] that time; [,] or

4 (2) [WITHIN] six months after recording of an extension
5 notice in the same recording office within the original six-month
6 period showing the recording date and the book and page or instrument
7 number of the initial claim of lien, and the balance owing.

8 * Sec. 8. AS 34.35.080 is amended by adding a new subsection to read:

9 (c) A lien extended by commencement of an action in accordance
10 with (a) of this section does not affect an interest of a person in
11 real property acquired after the commencement of the action without
12 knowledge or actual notice of the action if the person acquired the
13 interest in good faith for valuable consideration. For purposes of
14 this subsection, notice of the pendency of the action conforming to
15 requirements under AS 09.45.790 and recorded before the person ac-
16 quires the interest in property constitutes actual notice of the
17 action.

18 * Sec. 9. AS 34.35.112 is amended to read:

19 Sec. 34.35.112. PAYMENT OF CLAIMANT'S LIENS. (a) If more than
20 one lien created under AS 34.35.050 - 34.35.120 is claimed against
21 property, the court in its judgment shall declare the rank of each
22 lien or class of liens in the following order:

23 (1) all persons other than prime contractors or subcontrac-
24 tors with lien rights under AS 34.35.050(1);

25 (2) the trustees of employment benefit trusts for persons
26 described in (1) of this subsection;

27 (3) all materialmen and subcontractors;

28 (4) [SUBCONTRACTORS, INCLUDING] prime contractors other
29 than the general contractor [AND PERSONS DESCRIBED IN

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AS 34.35.050(5)];

(5) the general contractor.

(b) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of the foreclosure sale of the property are insufficient to pay the lien claims of all persons who have recorded claims [A CLAIM] of lien, the

(1) [THE] liens of all individuals with lien rights under AS 34.35.050(1) shall first be paid in full, or pro rata if the proceeds are insufficient to pay them in full;

(2) [THE] liens of trustees of employment benefit trusts for persons described in (1) of this subsection shall be paid in full or pro rata if the proceeds are insufficient to pay them in full;

(3) [THE] liens of materialmen and subcontractors shall be paid in full or pro rata if the proceeds are insufficient to pay them in full;

(4) liens of persons described in AS 34.35.050(5) and [OUT OF THE REMAINDER THE SUBCONTRACTORS, INCLUDING] prime contractors, other than the general contractor, shall be paid in full [,] or pro rata if the remainder is insufficient to pay them in full; and

(5) lien of the general contractor [THE BALANCE] shall be paid out of [TO THE GENERAL CONTRACTOR; A GENERAL CONTRACTOR IS ENTITLED TO EXECUTION FOR] the balance [DUE AFTER DISTRIBUTION].

* Sec. 10. AS 34.35.112 is amended by adding a new subsection to read:

(c) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of the foreclosure sale of the property are sufficient to pay the lien claims of all persons who have recorded claims of lien, the balance shall be paid to the person who owned the property before the foreclosure sale.

* Sec. 11. AS 34.35.114(c) is repealed and reenacted to read:

(c) A person who receives a stop-lending notice or notice of

1 right to lien identifying a project for which the person is not the
2 lender shall notify the claimant in writing within 10 days after
3 receipt of the notice that the person is not the lender.

4 * Sec. 12. AS 34.35.114(d) is repealed and reenacted to read:

5 (d) A claimant shall, within 10 days after receipt of a request,
6 provide an owner or lender to whom the claimant has given a stop-lend-
7 ing notice or notice of right to lien a written statement of the
8 amount due to the claimant and unpaid.

9 * Sec. 13. AS 34.35.117(a) is amended to read:

10 (a) Except as provided under (b) of this section, a written
11 waiver of lien or stop-lending [STOP-PAYMENT] notice of rights created
12 under AS 34.35.050 - 34.35.120 signed by a claimant requires no con-
13 sideration and is valid and binding. A waiver permitted under this
14 section may not relate to labor, materials, services, or equipment
15 furnished after the date the waiver is signed by the claimant.

16 * Sec. 14. AS 34.35.120(4) is amended to read:

17 (4) "construction financing" means [THAT PORTION OF] money
18 loaned or other credit extended to an owner secured by an encumbrance
19 on real property to finance a project on that [ORIGINAL CONSTRUCTION
20 OF A BUILDING OR OTHER IMPROVEMENT ON, OR DEVELOPMENT OF,] real prop-
21 erty [, BUT DOES NOT INCLUDE

22 (A) FUNDS TO ACQUIRE REAL PROPERTY;

23 (B) FUNDS TO PAY PRINCIPAL AMORTIZATION OF ENCUM-
24 BRANCES WITH PRIORITY OVER THE ENCUMBRANCE SECURING THE CONSTRUC-
25 TION FINANCING;

26 (C) FUNDS TO PAY LOAN, COMMITMENT, TITLE, LEGAL,
27 CLOSING, RECORDING OR APPRAISAL FEES ON THE CONSTRUCTION LOAN];

28 * Sec. 15. AS 34.35.120(9) is amended to read:

29 (9) "give notice" means to mail a notice required under

1 AS 34.35.050 - 34.35.120 by first-class mail and by using a form of
2 mail requiring a signed receipt, or to deliver the notice and obtain a
3 receipt signed by the person to whom it is directed or an agent of
4 that person; a notice is effective when given or delivered to

5 (A) [TO] a lender at the address designated in the
6 encumbrance securing that lender;

7 (B) [TO] an owner at the last known address of the
8 owner;

9 (C) [TO] a prime contractor at the last known address
10 of the prime contractor;

11 (D) [TO] a potential lien claimant at the address
12 specified in a stop-lending [STOP-PAYMENT] notice or notice of
13 right to lien or claim of lien;

14 * Sec. 16. AS 34.35.120(13) is amended to read:

15 (13) "owner" means a person who owns real property or a
16 possessory interest in real property [THE BUILDING OR OTHER IMPROVE-
17 MENT] and who enters into a contract, express or implied, for a proj-
18 ect on that property [THE CONSTRUCTION, ALTERATION OR REPAIR OF A
19 BUILDING OR IMPROVEMENT];

20 * Sec. 17. AS 34.35.120 is amended by adding a new paragraph to read:

21 (17) "project" means construction, alteration, or repair of
22 an improvement on real property or work done to enhance the real
23 property itself.

24 * Sec. 18. AS 34.35.069, 34.35.070(f), 34.35.080(b), 34.35.114(e), and
25 34.35.118 are repealed.

*file
w/ HB 494*

PUBLIC OPINION MESSAGE

TO: REPRESENTATIVE MIKE NAVARRE
FROM: ALAN SHAFER
4101 1/2 TAFT DRIVE
ANCHORAGE ANCHORAGE 99503
248-1242

BILL NO: HB 494

SUBJECT: LIENS FOR LABOR OR MATERIALS FURNISHED

MESSAGE:

I AM IN SUPPORT OF THE BILL INCLUDING THE CRIMINAL PENALTIES
FOR FAILURE TO COMPLY. I AM AGAINST MANDATORY RECORDING
FOR NOTICES OF RIGHT TO LIEN.

DATE: 04/02/86 TIME: 16:14:07 SENT BY: ANCHORAGE LIO

COPIES TO: HOUSE MEMBERS
SENATE MEMBERS

PUBLIC OPINION MESSAGE

TO: REPRESENTATIVE MIKE NAVARRE
FROM: BRUCE NIEMI
12131 RAINBOW AVENUE
ANCHORAGE 99516
345-1657

BILL NO: HB 494

SUBJECT: LIENS FOR LABOR OR MATERIALS FURNISHED

MESSAGE:

I AM REAL DISAPPOINTED THE WAY THE LAW IS SET UP NOW, AND I WOULD LIKE TO SEE THE BILL CHANGED. I WOULD HATE TO SEE MY JOB AND FUTURE JEOPARDIZED IN THIS WAY DUE TO THE FACT WE HAVE LOST SO MUCH MONEY IN A SHORT PERIOD OF TIME. I AM OPPOSED TO THE MANDATORY REPORTING AMENDMENT.

DATE: 04/02/86 TIME: 16:04:01 SENT BY: ANCHORAGE LIO

COPIES TO: HOUSE MEMBERS
SENATE MEMBERS

PUBLIC OPINION MESSAGE

TO: REPRESENTATIVE MIKE NAVARRE
FROM: ROBERT GENTRY
8410 BROOKRIDGE ST
ANCHORAGE 99504
333-7932

BILL NO: HB 494

SUBJECT: LIENS FOR LABOR OR MATERIALS FURNISHED
MESSAGE:

I WOULD ENCOURAGE YOU TO VOTE FOR HB 494 AND ALSO, I AM
AGAINST THE MANDATORY RECORDING BECAUSE LITTLE BUSINESSES
AND INDIVIDUALS WHO OWN AND OPERATE THOSE BUSINESSES CANNOT
COMPLY WITH THIS. TOO MANY BUSINESSES HAVE GONE OUT OF BUSINESS
BECAUSE OF A LACK OF A BILL LIKE THIS.

DATE: 04/02/8 TIME: 14:54:05 SENT BY: ANCHORAGE LIO

COPIES TO: HOUSE MEMBERS
SENATE MEMBERS

**STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE**

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 597
 Title: An Act relating to powers of the Guide Licensing and Control Board and to regulations adopted by the board;
 Sponsor: Reps. Marrou & Davis
 Requester: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Commerce & Econ. Dev.
 BRU: Occupational Licensing

 Components: _____

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		-0-	-0-	-0-	-0-	-0-
TRAVEL		-0-	-0-	-0-	-0-	-0-
CONTRACTUAL		.8	-0-	-0-	-0-	-0-
SUPPLIES		-0-	-0-	-0-	-0-	-0-
EQUIPMENT		-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		.8	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE		**				
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FUNDING: (Thousands of dollars)

GENERAL FUND		.8	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULLTIME		0	0	0	0	0
PARTTIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary.

The bill amends the board's authority under AS 08.54.040(a) to establish a quota for licensed guides and requires that the quota for any area be consistent with game harvest levels in the area. The bill also annuls regulations 12 AAC 38.051 - 12 AAC 38.058 relating to guide areas. (See attached for further explanation of costs.)

**The bill is not expected to generate new revenues.

Prepared by: Jennifer Strickler, Management Analyst Phone: 465-2144

Division: Occupational Licensing Date: 3-28-86

Approved by Commissioner: *Sam S. Armstrong* Date: 4/1/86

Agency: Commerce & Economic Development

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 597

Since the bill annuls regulations 12 AAC 38.051 - 12 AAC 38.058, new regulations regarding guide areas would have to be established. Contractual costs consist of the following:

Printing of public notices in three major newspapers and for distribution to interested parties (approximately 200 individuals) = \$.3

Teleconference of public hearing using the Legislative Teleconference Network System for two hours at \$50 per site, per hour, and connected to the following sites where most of the guides participate from:

Anchorage
Fairbanks
Kodiak
Juneau
Ketchikan

= .5

\$.8

MS
494

from Dan Koch

SID

HERE IS SOME BACKGROUND DATA ON THE MECHANICS + MATERIALMENS LIEN ISSUE. WE HAVE BEEN INTO THIS THING SEVERAL TIMES.

ORDER 77-3

ORDER 77-3 SUPPLEMENT

ORDER 77-3 SUPPLEMENT #2

ORDER 77-3 SUPPLEMENT #3

ORDER 78-4

ORDER 80-1 (TEMPORARY)

ORDER 84-2

ORDER 77-3 IS THE BEST IN TERMS OF DETAILED BACKGROUND.

IN ADDITION, ORDER 78-5 IS GOOD BACKGROUND ON HOW TITLE INSURANCE WORKS. THE REFS WERE TRO'D AND WERE ULTIMATELY WITHDRAWN.

STATE OF ALASKA
DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
POUCH D
JUNEAU, ALASKA 99803

Order 77-3

To: All Title Insurers Admitted to do Business in Alaska
All Licensed Title Insurance Agents in Alaska

RE: Title Insurance - Mechanics' Liens - Continued use of the ALTA
Standard Loan Policy

The Director of Insurance does hereby find, as follows:

Background

1. On December 17, 1976, the Pioneer National Title Insurance Company (Hereinafter Pioneer), an admitted title insurer and reinsurer of one of the major writers of title insurance in Alaska, requested a hearing before the Division of Insurance. In its request, Pioneer expressed its serious concern about the degree of hazard presented to title insurers issuing the American Land Title Association Standard Loan Policy (hereinafter ALTA policy) because of the peculiarities of the Alaska Mechanics Lien Law (AS 34.35.050-120) and a superior court decision in the case against Habitat Ketchikan, Inc. et al (case number 73-270 civil, 73-202 civil, 73-302 civil and 73-318 civil at Ketchikan). A prime concern offered by Pioneer for consideration in our decision to grant a hearing was the potential impact on title insurer solvency. Pioneer petitioned that the Division disallow the ALTA policy form in this State.
2. After reviewing the request by Pioneer, the Division granted the hearing. A notice of hearing was sent to:

All authorized title insurers in Alaska;
All licensed title insurance agents in Alaska; and
All Alaska State Legislators.

The hearing was held as noticed on February 18, 1977 in Juneau. During the hearing it became clear that we should also be receiving input from the lending community. Accordingly, the hearing was recessed and a new notice of hearing was sent to:

All title insurers admitted to do business in Alaska;
All life insurers admitted to do business in Alaska;
All banks in Alaska;
All savings and loan associations in Alaska;
The Federal Housing Administration;
The Federal National Mortgage Association;
The Alaska State Housing Authority;
The Association of General Contractors of America;
The Teamsters Pension Fund;
The Surety Association of America;
All Alaska State Legislators; and
Other interested persons.

The hearing was reconvened on March 16, 1977 in Juneau and additional input was received.

Title Insurance

3. The title insurance policy is a report which the title insurer guarantees is correct and provides indemnification to the degree that the policy is incorrect and loss or damage results. Title insurance is different from all other kinds of insurance in this regard. The premium paid is primarily a service fee that covers the expense of searching, analyzing, sorting, cross checking, and indexing of recorded information so that the history or "chain of title" on a property can be compiled. In addition to the guarantee feature of the title insurance coverage, the title insurer can assume certain known risks. The title insurer may take a calculated risk for business reasons in the belief that the danger of loss is remote or that if an adverse claim is asserted, the insured title can be successfully defended.
4. The title insurer will also assume risk upon the basis of indemnity furnished to the insurer by the seller, mortgagor, developer or contractor. The indemnity is usually in the form of a personal indemnity agreement, accepted on the integrity and financial responsibility of the indemnitor or fortified by a deposit of cash or securities. Though not the usual practice, the indemnity could take the form of a bond executed by a surety company.
5. In underwriting a title policy, the title insurer eliminates the loss by identifying defects and excluding the defects from coverage by listing the defects as exceptions to otherwise clear title in an exception schedule in the title policy. This effort can be contrasted with the property or casualty insurer where the underwriter attempts to measure the risk and magnitude of loss rather than exclude the loss from coverage. In each case, the title insurer or the property-casualty insurer, assuming it may legally offer a coverage, has the right to offer or not to offer a particular coverage, or policy form. Each is expected to exercise underwriting judgment when considering an application for coverage.
6. In 1974 the Alaska Legislature adopted a title insurance law substantially tracking a model law developed by the American Land Title Association (ALTA). Title insurance is defined in this new law under AS 21.66.480(7) as

"... insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances on it or others interested therein against loss or damage suffered by reason of

- (a) Liens, encumbrances upon, defects in or the unmarketability of the title to the property; or
- (b) The invalidity of unenforceability or liens or encumbrances on the property."

The scope of the definition is further confined by a limitation on the powers of a title insurer. The limitation found in AS 21.66.190(b) states:

"No title insurance company may engage in the business of guaranteeing the payment of the principal or the interest of bonds or other obligations."

This limitation is entirely appropriate from two standpoints. First, the guaranteeing of payment of the principal or the interest of bonds or other obligations is surety and is properly covered by a surety company. Secondly, the underwriting necessary to conduct a surety business is alien to the experience, expertise and financial condition of the title insurer.

ALTA Standard Loan Policy

7. The American Land Title Association Standard Loan Policy (ALTA policy) is presently issued to lenders by all title insurers doing business in Alaska subject to the underwriting judgment of each insurer. The ALTA policy offers lenders the broadest title insurance coverage of mortgages available. It was designed to insure mortgages, the proceeds of which have been fully dispersed. Included in the coverages provided is protection against "any statutory lien for labor or materials which now has gained or hereafter may gain priority over the lien of said mortgage or Leed of Trust upon said estate (emphasis added)." This policy contemplates an inspection by the insurer prior to commitment, since coverages are provided for unrecorded matters as well as recorded exceptions. This policy form is used in almost all jurisdictions.

Role of Title Insurance in Marketing Mortgages

8. When a lending institution agrees to finance construction of a building and/or the "permanent" or "take out" loan on the structure, it is justifiably concerned with the condition of the title on the property and the priority or its security. This guarantee is provided through a title insurance policy in which it is named insured.
9. Since few Alaska lending institutions fund long term mortgages with their own capital, they must be concerned with the requirements and expectations of the firms or organizations that purchase those loans. The lending institutions sell the loans to others, referred to as the secondary market, and reuse the replenished capital to finance more loans. Some lending institutions experience this capital turnover on a daily basis.
10. The largest buyer of loans in the secondary market for Alaska is the Federal National Mortgage Association (FNMA). Other buyers of Alaska mortgages include the State of Alaska Pension Fund, the Alaska Housing Finance Corporation, the Mortgage Corporation, life insurance companies, and others. These buyers generally follow the lead of FNMA as to requirements for loans being purchased. FNMA requires an ALTA policy including protection against mechanics' liens. Without the ALTA policy, most mortgages are not marketable in the secondary market.

Mechanics of Policy Issuance

11. As can be inferred from the foregoing, the primary customers of the title insurer is the lending institution. Competition is keen and accommodation is normal. The lending institutions generally transfer as much risk to the title insurer as is possible.

When an order for a construction loan policy is given to the title insurer, the insurer performs its search of the title plant, conducts its inspection of the property if it is deemed appropriate, and issues a preliminary title

report or commitment to issue title insurance. This document may contain exceptions that are negotiated out after obtaining proper support. For example, certain liens may be removed after obtaining indemnity agreements. The order for a permanent or "take out" loan follows much the same procedure.

Solvency of Title Insurers

12. All title insurers doing business in Alaska are regulated by the Division of Insurance under AS 21.66. Foremost among the regulatory concerns of the Division is the continued solvency of all insurers. If an insurer undertakes to provide a coverage or coverages that has a substantial potential for jeopardizing the solvency of that insurer and thus the ability of that insurer to pay its contractual obligations, then the Division must intervene to prevent the use of such coverage.

Alaska Mechanics' Lien Law

13. Under Alaska law AS 34.35.050-120 is the article concerning the rights of mechanics and materialmen to lien property. Section 060 of the article establishes that a lien created by this article in favor of a person actually performing labor upon or furnishing material used in a building or other improvement in its original construction is preferred to a prior lien, mortgage or other encumbrance upon the land on which the building or other improvement is constructed. The lien claimant is further barred from waiving these rights by AS 34.35.495.
14. AS 34.35.070 sets forth the requirements for filing a lien. Unfortunately, the law contains some ambiguities which appear to extend, indefinitely in some cases, the right of the lien claimant to file a lien. The lien claimant has 90 days to file his lien after proper notice of completion is filed by the contractor. Under present law, the contractor must file such notice within 10 days of completion. The 1977 Legislature addressed this issue during the last session and passed SB 252 (Chapter 123 SLA 1977) which will become effective on September 12, 1977. The intent of the legislation is to place a more specific time limitation on the right of the lien claimant to file his lien.
15. The Legislature also considered some major changes in the section dealing with the priorities noted in 13 above. HB 282 would have revised the law to prevent mechanics' or materialmen's liens from gaining priority over a prior recorded mortgage. The effect of the current State of Alaska law is that the mortgagee has no assurance that he has or will continue to have the priority lien on a property even though its mortgage has been properly recorded prior to commencement of any construction.
16. The Division notes that Alaska's law is similar to the law of other states in this regard but that a vast majority of states adopted the view that prior recorded mortgages do not lose their priority to any liens or encumbrances (except governmental tax or assessment liens). It appears that such public policy is consistent with permitting orderly development of real estate projects with adequate protection for both the lender and the materialmen.

The Habitat Ketchikan, Inc., Case

17. On November 2, 1976, a superior court decision was rendered in a case against Habitat Ketchikan, Inc., which has wrought substantial unrest amongst insurers. The decision, in part, negated the effectiveness of the indemnity agreement as a device to limit or eliminate exposure to loss.

Without discussing the complexities of the case, it is sufficient to note that the title insurer took an indemnity agreement from Habitat and the contractor as to liens for materials and labor which the court held was not enforceable and required the title insurer to discharge a contractor's lien which, though construction commenced after recording of the mortgage, had, because of Alaska's law, acquired priority over the insured mortgage.

18. The use of the ALTA policy by the lenders as means of gaining protection against mechanic's lien priority, has the effect of providing the protection through title insurance which the Legislature chose not to give the lenders by a re-ordering of priorities.

Delay of Order

19. At the time the hearings were being held, the Legislature had SB 252 under consideration. Passage of that bill would have rendered this issue moot. In view of that, this order was delayed.

Conclusions

20. Since title insurance by definition insures, guarantees or indemnifies against loss or damage suffered by reason of liens, it is necessary to consider how mechanics' liens coverage fits within the scope of the definition. It is also necessary to consider the limitation of powers on title insurers. As noted in section 3 of this order, the title insurance policy is basically a report. This report relies on the quality of the title plant and of the inspection performed by the insurer. Other incidental coverages are provided but the guaranteed report is the title insurance function.
21. When a title insurer issues an ALTA policy, it is guaranteeing to the lender that it has a mortgage with first priority. The title report and title policy are expected to reflect any existing liens on the property covered. While the mechanics and materialmen may have the right to lien at inception of coverage, the mechanics' lien is not reflected in any record until it is properly recorded, thus the title insurer has no practical way of knowing what lien rights may have accrued. If the lien has not been recorded and the title insurer has guaranteed to the lender that the mortgage has priority, knowing full well that preferred liens may continue to come in, it is in effect, guaranteeing the payment of those obligations, which is an action barred by AS 21.66.190(b). That the exposure is not incidental or negligible can be attested to by a review of the title insurer's liability in the Habitat Ketchikan case, where the loss was in excess of \$1,000,000.
22. There are essentially four basic types of mortgage loans that must be considered since mortgagees generally have been requiring ALTA policy protection on all four types. The four types are:

- (1) Mortgage on unimproved property to secure a loan, the proceeds of which are to be used to purchase the unimproved property or to secure a loan for purposes unrelated to the land. Generally no immediate construction is contemplated. If any construction takes place at any time after the recordation of the mortgage, the mechanics' liens arising out of such construction would have priority over the mortgage.
 - (2) Mortgage on improved property to secure loans to finance the purchase of the property, finance other than the purchase of the property, or to finance additional improvements to the property. Since the original construction is already complete, the mechanics' liens that may attach for work done after the recordation of the mortgage could not, under Alaska law, attain priority over the mortgage. Thus the problem referred to in this order does not affect this category of transaction.
 - (3) Mortgage securing permanent financing of a construction project on what was originally unimproved property. In this situation all mechanics liens would have priority over the mortgage, however, there are statutory provisions for cutting off mechanics lien claimants by the timely recording of a notice of completion of construction in accordance with the newly amended AS 34.35.070.
 - (4) Mortgage securing the construction loan on originally unimproved property. In this situation, all work done on or for the premises entitles the supplier or mechanic to a lien which could acquire priority over the construction loan mortgage, irrespective of the relative dates of recording the mortgage and the date work is commenced.
23. Under the situation noted in 22(1) above, loans on unimproved property where no construction is contemplated, there is a risk, should at any time after recordation the owner elect to commence construction without obtaining a replacement construction loan. It is conceivable that the risk could be substantial, but incidence of persons building on unimproved properties without obtaining a construction loan is regarded as sufficiently infrequent as to not justify a separate rule for this situation.

The Division recognizes that underwriters may elect not to issue a policy in a particular circumstance because of this risk, but to prohibit the use of the ALTA policy seems at this time unnecessary.

24. The situation described in 22(2) above, mortgages on improved property, other than mortgages securing "take out" loans of newly completed improvements, presents no unusual risk to title insurers and the ALTA policy should remain available.
25. Under the situation described in 22(3) above, the "take out" loan, there is a substantial risk that deserves special consideration. The ability to control that risk, however, does exist and if the controls are exercised, prohibition of the ALTA policy is unnecessary.

It is clear that the Legislature intended the notice of completion law, AS 34.35.070, to be an effective method for cutting of mechanics' liens. The reason for changing the language was to clarify the latitude the owner or builder had in recording the notice in order to avoid defeating the effect of the notice

where there was a failure to record within a strict 10 day period following completion. While the statute still leaves open such questions as a definition of completion and is thus not the full measure of protection a title insurer would like, it must be assumed that in most cases the statute has meaning and will be used. The ALTA policy can be issued to cover these loans provided the notice of completion is duly recorded and the period for recording liens has run.

Of course, any mechanics' liens that are recorded, if not discharged will have to be disclosed as exceptions.

26. Finally, the situation described in 22(4) above, where the mortgage secures the construction loan, must be considered. If the ALTA policy is issued then the title insurer assumes a substantial risk with respect to mechanics' liens arising out of construction funded by the proceeds of the loan which the mortgage secures. This is a risk which the title insurer has little ability to control. On the other hand, the lender of the construction funds is in a good position to control the risk through judicious disbursement of the construction funds.

The prudent lender could use joint payee checks to assure that known materialmen, subcontractors and suppliers are paid; employ disbursement control to assure no more funds are advanced than evidenced by the degree of completion of the project; withhold a percentage of each draw to assure a reserve for contingencies including undisclosed potential lien claimants; utilize periodic inspections to assure compliance with plans and specifications; require surety bonds to provide alternative sources of payment in the event of contractor failure; and, use more careful review of credit of the borrower, the contractor and other principals in the project.

Since the risk is high and the ability to control the risk lies more readily with the lender, it is inappropriate for the risk to be shifted to the title insurer. It is further inappropriate, considering the general inability of the title insurer to use the control techniques available to the lender.

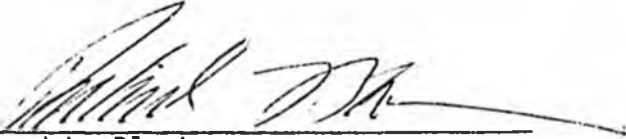
Thus the ALTA policy cannot issue to protect mortgage against mechanics' liens arising out of work done on a project all or a portion of which is funded by the loan secured by the subject mortgage.

The Director Hereby Orders

- A. The petition by Pioneer National Title Insurance Company to disallow the issuance of the ALTA Standard Loan Policy is denied except as herein provided.
- B. The ALTA Standard Loan Policy may not be issued to cover a mortgage or Deed of Trust securing a loan replacing a construction or interim financing loan, the proceeds of which were used in whole or in part to fund the construction until a notice of completion of construction has been duly recorded and the 90 day period for filing mechanics' lien has run.
- C. The ALTA Standard Loan Policy may not be issued to cover a mortgage or Deed of Trust securing a loan, all or any portion of the proceeds of which are used to finance original construction on property which is essentially unimproved at the date of recording unless such policy includes a general exception for mechanics' liens or materialmen's liens which arise out of the construction which is wholly or partially funded by the proceeds of the loan secured by the Deed of Trust or mortgage being insured.

- D. No policy of title insurance may be issued at any time which fails to list as exceptions to title mechanics' liens or materialmen's liens recorded prior to the date of recording the mortgage or trust deed insured or prior to the effective date of title insurance unless the title insurer has evidence of the discharge of that lien.
- E. This order is effective July 15, 1977 at 12:01 a.m., except that it shall not invalidate any title policy or commitment to issue a title policy outstanding at the effective date hereof.

Signed this 5th day of July, 1977.



Richard L. Block
Director of Insurance

STATE OF ALASKA
DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
POUCH D
JUNEAU, ALASKA 99803

Order 77-3 Supplement

After the publication of the Order 77-3 several significant segments of the building industry in Alaska, particularly home builders and mortgage brokers made known the serious concerns with certain provisions of the order. The Division of Insurance believes it in the best interest of the state to defer application of one aspect of the order while its implications on these industries is further considered.

Section A. No changes.

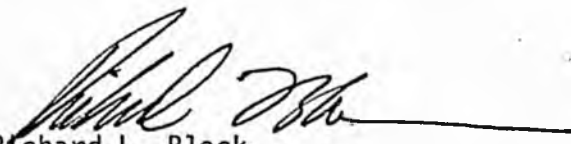
Section B. No changes.

Section C. No changes.

Section D. This section is amended to read:
"No policy of title insurance may be issued at any time which fails to list as exceptions to title, mechanics liens or materialmen's liens recorded prior to the date of recording the mortgage or trust deed insured or prior to the effective date of title insurance unless the title insurer (1) has evidence of the discharge of that lien; (2) has evidence of a bond for disputed amounts recorded pursuant to AS 34.35.072; or, (3) has been named and protected in an indemnity agreement by the owner of the lien property and an escrow account has been established and funded to pay amounts disputed if the lien is determined to be proper."

Section E. This section is amended to read:
"Sections A, C, and D of this Order are effective July 15, 1977 at 12:01 a.m. Section B of this Order is effective October 1, 1977 at 12:01 a.m. This order shall not invalidate any title policy or commitment to issue a title policy outstanding at the effective date hereof. For the purpose of this Order, a commitment to issue a title policy shall be considered outstanding on the date the title insurer places the order for a title policy in its order book, provided a commitment is actually issued within ten days after receipt of order, and the commitment relates to a specific property and lists all specific exceptions.

Signed this 15th day of July, 1977


Richard L. Block
Director

STATE OF ALASKA
DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
POUCH D
JUNEAU, ALASKA 99803

Order 77-3 Supplement #2

Since publication of Order 77-3 and Supplement dated July 1, 1977, the title insurance industry and others affected by presence of the Order have made known several concerns with the operation of same. The Division of Insurance believes these expressions address legitimate concerns and accordingly amends the Order as follows:

Section A. No changes.

Section B. This section is amended to read:

The ALTA Standard Loan Policy may not be issued to cover a mortgage or Deed of Trust securing a loan replacing a construction or interim financing loan, the proceeds of which were used in whole or in part to fund the construction until a notice of completion of construction has been duly recorded and the 90 day period for filing mechanics' lien has run unless the title insurer has been named and protected against all mechanics liens which could become prior liens in an indemnity agreement by a bank, savings and loan association or other title insurance company or a title reinsurance company authorized to transact business within the State of Alaska, or, has been named as an obligee in a surety bond executed by an admitted surety company, covering all mechanics liens and materialmens liens arising from said construction.

Section C. This is amended to read.

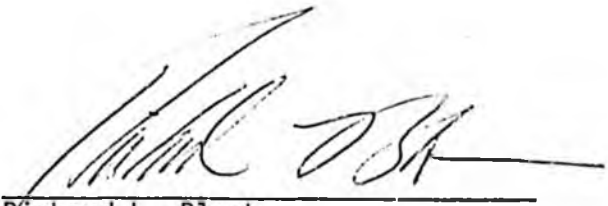
The ALTA Standard Loan Policy may not be issued to cover a mortgage or Deed of Trust securing a loan, all or any portion of the proceeds of which are used to finance original construction on property which is essentially unimproved at the date of recording unless such policy includes a general exception for mechanics liens or materialmens liens which arise out of the construction which is wholly or partially funded by the proceeds of the loan secured by the Deed of Trust or mortgage being insured or unless the title insurer has been named and protected against all mechanics liens which could become prior liens in an indemnity agreement by a bank, savings and loan association or other title insurance company or a title reinsurance company authorized to transact business within the State of Alaska, or has been named as an obligee in a surety bond executed by an admitted surety company, covering all mechanics liens and materialmens liens arising from said construction.

Section D. This section is amended to read:

"No policy of title insurance may be issued at any time which fails to list as exceptions to title, mechanics' liens or materialmen's liens recorded prior to the date of recording the mortgage or trust deed insured or prior to the effective date of title insurance unless the title insurer (1) has evidence of the discharge of that lien; (2) has evidence of a bond for disputed amounts recorded pursuant to AS 34.35.072; (3) has been named and protected in an indemnity agreement and an escrow account has been established and funded to pay amounts disputed if the lien is determined to be proper; or, (4) has been named and protected in an indemnity agreement by a bank, savings and loan association or other title company, or a title reinsurance company authorized to transact business within the State of Alaska. An indemnity agreement given under this subsection (4) need not be secured by a funded escrow account."

Section E. No changes.

Signed this 23rd day of November, 1977.



Richard L. Block
Director

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
POUCH D
JUNEAU, ALASKA 99803

Order 77-3 Supplement No. 3

Additional and legitimate concerns have been presented since the last Supplement to Order 77-3 which we believe warrant revision of the Order to accommodate the expressed concern. The indemnity agreements permitted by the Order were those given only by persons subject to solvency regulation by a State or federal agency. An analysis of this position suggests that this position can be modified, thus granting greater flexibility to title underwriters. We accordingly amend the Order as follows:

Section A. No changes.

Section B. This section is amended to read:
The ALTA Standard Loan Policy may not be issued to cover a mortgage or Deed of Trust securing a loan replacing a construction or interim financing loan, the proceeds of which were used in whole or in part to fund the construction until a notice of completion of construction has been duly recorded and the 90 day period for filing mechanics' lien has run unless the title insurer has been

(1) named as an obligee in a surety bond executed by an admitted surety company, covering all mechanics liens and materialmens liens arising from said construction;

(2) named and protected against all mechanics liens which could become prior liens in an indemnity agreement by another title insurance company or a title reinsurance company authorized to transact business within the State of Alaska;

(3) named and protected against all mechanics liens which could become prior liens in an indemnity agreement by a bank, savings and loan association, or any other person, as defined in AS 01.10.060(7), with an audited financial statement prepared by a certified public accountant and showing a net worth of at least \$1,000,000. Such statement shall bear an effective date of not more than 12 months prior to the effective date of the indemnity agreement. The indemnity amount shall not exceed 10% of the audited net worth.

Section C. This is amended to read:

The ALTA Standard Loan Policy may not be issued to cover a mortgage or Deed of Trust securing a loan, all or any portion of the proceeds of which are used to finance

original construction on property which is essentially unimproved at the date of recording unless such policy includes a general exception for mechanics liens or materialmens liens which arise out of the construction which is wholly or partially funded by the proceeds of the loan secured by the Deed of Trust or mortgage being insured or unless the title insurer has been

(1) named as an obligee in a surety bond executed by an admitted surety company, covering all mechanics liens and materialmens liens arising from said construction;

(2) named and protected against all mechanics liens which could become prior liens in an indemnity agreement by another title insurance company or a title reinsurance company authorized to transact business within the State of Alaska;

(3) named and protected against all mechanics liens which could become prior liens in an indemnity agreement by a bank, savings and loan association, or any other person, as defined in AS 01.10.060(7), with an audited financial statement prepared by a certified public accountant showing a net worth of at least \$1,000,000. Such statement shall bear an effective date of not more than 12 months prior to the effective date of the indemnity agreement. The indemnity amount shall not exceed 10 percent of the audited net worth.

Section D.

This section is amended to read:

"No policy of title insurance may be issued at any time which fails to list as exceptions to title, mechanics' liens or materialmens' liens recorded prior to the date of recording the mortgage or trust deed insured or prior to the effective date of title insurance unless the title insurer

(1) has evidence of the discharge of the lien;

(2) has evidence of a bond for disputed amounts recorded pursuant to AS 34.35.072;

(3) has been named and protected in an indemnity agreement and an escrow account has been established and funded to pay amounts disputed if the lien is determined to be proper; or,

(4) has been named and protected in an indemnity agreement by

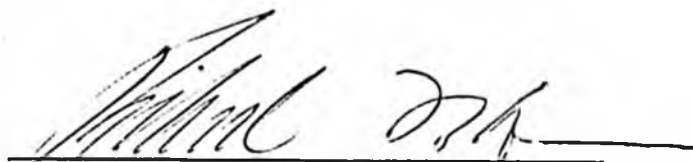
(a) another title insurance company or a title reinsurance company authorized to transact business within the State of Alaska, or,

(b) a bank, savings and loan association, or any other person, as defined in AS 01.10.060(7), with an audited financial statement prepared by a certified public account showing a net worth of at least \$1,000,000. Such statement shall bear an effective date of not more than 12 months prior to the effective date of the indemnity. The indemnity amount shall not exceed 10 percent of the audited net worth.

An indemnity agreement given under this subsection need not be secured by a funded escrow account.

Section E. No Changes.

Signed this 3rd day of May, 1978.

A handwritten signature in dark ink, appearing to read 'Richard L. Block', is written over a horizontal line. To the right of the signature, there are some additional scribbles or initials.

Richard L. Block
Director

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

POUCH D
JUNEAU, ALASKA 99811

Order 78-4

To: All Title Insurers Admitted to do Business in Alaska
All Licensed Title Insurance Agents in Alaska

RE: Title Insurance - Mechanics Liens - Use of the ALTA Standard Loan Policy.

The Director of Insurance does hereby find as follows:

Background

1. On July 5, 1977, this division issued Order 77-3 after hearing and in response to a situation described in that order wrought by the Alaska Mechanics' Lien Law (AS 34.35.050-120). This Order was subsequently modified by supplements issued on July 15, 1977, November 23, 1977 and May 3, 1978.
2. With the passage of HB 739 (ch 175 SLA 1978) by the Alaska Legislature, the Mechanics Lien Law has been substantially restructured in a manner that negates much of the major concerns expressed in Order 77-3, Sections 13-26.
3. The new law has changed the priorities of liens on land. Under previous law (AS 34.36.060), a lien created by law in favor of a person actually performing labor upon or furnishing material used in a building or other improvement in its original construction was preferred to a prior lien, mortgage or other encumbrance upon the land on which the building or other improvement is constructed. Under the new law, preference is based on the date the lien is filed. (See Section 13 of Order 77-3.)
4. A substitute mechanism has been developed to protect the potential mechanic lienholder. A new requirement that a Notice of Right to Lien be given is intended to result in making potential liens more readily identifiable. The time for filing a lien is limited to 10 days after a Notice of Completion is recorded. The potential mechanic lienholder also has the ability to stop or restrict the flow of funds via a stop notice. This assures that sufficient funds are withheld to pay the particular claim. (See Sections 13-16 of Order 77-3.)

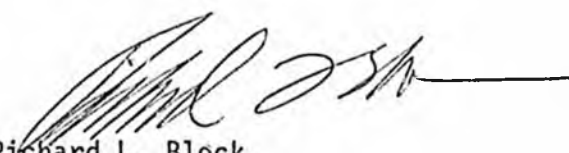
Conclusions

5. When a title insurer issues an ALTA policy, it is guaranteeing to the lender that it has a mortgage with first priority. The title report and title policy are expected to reflect any existing liens on the property covered. With the passage of HB 739, a title insurer cannot issue an ALTA policy with the assurance that the mortgage priority will not be usurped by a later filed mechanics lien. (See Section 21 of Order 77-3.)
6. Chapter 175 SLA 1978 applies only to liens on projects commenced after the effective date of the law, thus, repealing Order 77-3 effective immediately which permits the title insurers to cover some mortgages not protected by the new law. The division has determined that for the short time duration between the effective date of this order and the applicability date of the new law, the risk to the title insurers is outweighed by the need to make the coverage available to expedite the flow of construction during this summer's construction season.

The Director hereby Orders:

- A. Section B of Order 77-3 is repealed.
- B. Section C of Order 77-3 is repealed.
- C. Section D of Order 77-3 as set forth in Supplement #3 remains unchanged.
- D. This order is effective July 18, 1978 at 12:01 a.m.

Signed this 24th day of July, 1978.


Richard L. Block
Director

JAY S. HAMMOND, GOVERNOR

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

DIVISION OF INSURANCE

POUCH D
JUNEAU, ALASKA 99811

ORDER 80-1 (Temporary)

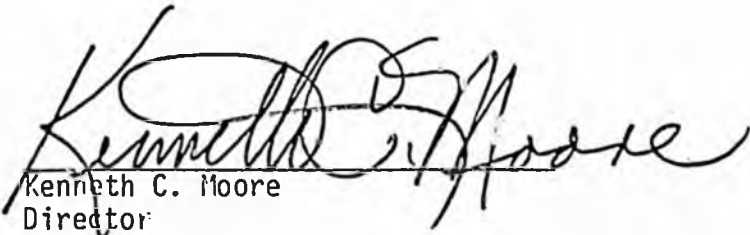
TO: ALL TITLE INSURANCE INSURERS AND AGENTS AUTHORIZED OR LICENSED TO
WRITE TITLE INSURANCE

RE: TITLE INSURANCE - MECHANICS LIENS

Due to the possibility that title insurers appear to be suffering financial losses resulting from possible unfair competitive advantages, and pending a complete analysis and review of the particular title practice; it is hereby ordered that until further notice all title insurers authorized to transact business within the State of Alaska, in instances of original construction, shall not issue owners standard coverage policies until the expiration of 15 days after the recording of a valid notice of completion and after compliance with all other requirements of AS 34.35, unless the owner's policy excludes from coverage all mechanics and materialmens liens, whether recorded to not, under Schedule B of said policy.

This order takes effect immediately.

Dated February 25, 1980.


Kenneth C. Moore
Director

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

POUCH D
JUNEAU, ALASKA 99811
PHONE: 465-2515

DIVISION OF INSURANCE

ORDER 84-2

TO: All Title Insurers Admitted to do Business in Alaska
All Title Insurance Agents Licensed in Alaska
Alaska Land Title Insurance Association

RE: Title Insurance - Acting as a Surety Prohibited

The Director of Insurance does hereby find as follows:

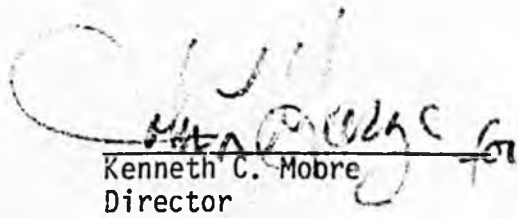
BACKGROUND

1. On April 27, 1984, the Alaska Land Title Association filed an advice that stated in brief, that title insurers and agents in the Anchorage Recording District have been committing to insure title insurance policies based on written closing instructions without the benefit of examining documents up to the time of closing. This appears to be done because of a backlog of indexing documents in the recorder's office.
2. On July 5, 1977, after several hearings, the Director of Insurance issued Order 77-3. In the conclusions portion of that order (sections 20-26), the Director pointed out that title insurers are barred from acting as a surety. This is specifically stated in AS 21.66.190(b).
3. The issues generating Order 77-3 are essentially the same in the situation described in the Alaska Land Title Insurance Association correspondence.

The Director Hereby Orders

- A. No policy of title insurance may be issued at any time which fails to list as exceptions, documents of the public record which have not been reviewed by the title examiner.

Signed this 1st day of June, 1984.


Kenneth C. Mobre
Director

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STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

JAY S. HAMMOND, GOVERNOR

POUCH D

JUNEAU, ALASKA 99811

ORDER 78-5

TO: All Title Insurers Admitted to do Business in Alaska
All Licensed Title Insurance Agents in Alaska

RE: Adoption of Title Insurance Regulations

The Director of Insurance does hereby find as follows:

BACKGROUND

1. On August 14, 1974, a substantial revision of AS 21.66 became effective with impact on the title insurance companies of Alaska. Many of the changes made in this act (CH 120 SLA 1974) track the recommendations of the American Land Title Association's (ALTA) model title insurance legislation. No regulations had been adopted under the previous law which became effective in 1966 or under the current law.
2. Starting on December 17, 1976, a number of issues relating to title insurance confronted the Division, such as Federal Register items, mechanics lien problems and title rate levels. After a study of these issues, it was realized that other title and title related problems and issues exist which should be addressed by the Division, thus a study of the title insurance business in Alaska was scheduled. This study commenced in July 1977 with a "Letter of Call for Information," the results of which were due by September 1, 1977. At the same time several limited subject market conduct examinations were conducted. These investigations tended to focus our attention on the need to promulgate regulations, to clarify existing statute and provide procedures with which to comply with statutory requirements.
3. The Division has already considered and responded to several issues relating to title insurance. Meetings have been held, hearings conducted and orders or bulletins have been issued.

Order 77-3 issued on July 5, 1977 and subsequently revised on July 15, 1977; November 23, 1977 and May 8, 1977 deals with the Alaska Mechanics' Lien Law and its impact on issuance on the ALTA Standard Loan Policy.

Bulletin 77-4 issued on April 12, 1977 deals with Federal Register Matters.

Order 78-4 issued on July 24, 1978 deals with the Alaska Mechanics' Lien Law as amended effective July 18, 1978.

4. The study of title insurance was substantially completed in January 1978 and a first draft regulation was prepared. This draft was further modified and on February 10, 1978 the second draft was sent to all title insurers and title insurance agents for review with a request for comment. On February 28, 1978, an additional letter was mailed extending the period for comment and providing a section by section commentary on the proposal. The input received as a result of this procedure was carefully reviewed and a third draft and fourth draft was prepared.
5. Upon completion of the fourth draft, a hearing was set and a duly prepared notice thereof as required by AS 21.06.090 was mailed to:

- All title insurers doing business in Alaska;
- All title insurance agents licensed in Alaska;
- All Alaska State legislators;
- The Commissioner of Commerce & Economic Development;
- All State Banks in Alaska;
- All National Banks in Alaska;
- All Federal Savings and Loan Associations in Alaska;
- The Federal Housing Administration;
- The Federal National Mortgage Association;
- The U.S. Department of Housing and Urban Development;
- The Federal Veterans' Administration;
- The Alaska State Housing Authority;
- The Anchorage Realty Board;
- The Fairbanks Realty Board;
- The Homebuilders Association;
- The Association of General Contractors;
- The Teamsters Pension Fund; and
- The Anchorage Multiple Listing Service.

A notice of the Rules of Procedure for the Hearing was also mailed simultaneously with the hearing notice to the same persons.

The Notice of Hearing, the Notice of Rules of Procedure for the Hearing, the Affidavit of Mailing Notice, the various affidavits of publication are all exhibits to the permanent record of this proceeding.

7. Hearings were held at the times, on the dates as set forth in the Notice of Hearing and Rules of Procedure. The hearings were conducted in accordance with the Rules of Procedure and in accordance with AS 21.06.210.

COMPETITION IN THE TITLE INSURANCE INDUSTRY

8. Title insurance is seldom purchased as a separate product or service in the same way that automobile insurance or homeowners insurance is purchased. A consumer of automobile or homeowners insurance must annually reevaluate his insurance requirements, compare price and service of several competing alternative sources for this coverage, and make a choice of carrier or agent.

On the other hand, title insurance is generally purchased as an incidental part of another transaction far more significant to the purchaser. For example, a family purchases a new home, a transaction which requires a cash investment of several thousand dollars and a total investment, including borrowing funds, of four or five times the family annual income. This is the largest single investment of most families and may occur only a few times during the family's existence.

The family has been consumed with decisions about the house, the location, the financing, the costs of moving, and the color of carpets. A significant concern of the family is obtaining the loan. As the loan transaction is completed, the family pays numerous incidentals including loan fees, appraisal costs, escrow expenses and other similar matters. Title insurance, which most home buyers do not fully understand, is "loaded in" as one of the several necessary incidentals. The buyer is happy to be "led" to a title company of the broker's or lender's suggestion. It is not until a defect occurs in title that a buyer realizes that his title policy is the most important part of the transaction. It was not until the Division studied the profit results of title insurers that the significance of the buyer being effectively, if not legally, denied the choice of title insurer became apparent to us. It is our conclusion that there is really no price competition among title insurers.

Our findings suggest that we promulgate regulations that tend toward a more informed purchaser of title insurance and a greater degree of price competition.

FORM FILINGS

9. The forms to be filed by an insurer are set forth in AS 21.66.450. This section establishes a filing requirement, a time for review by the Division and which forms are to be filed. Aside from this, no procedural requirements have been discussed in the statute. Interpretations as to the scope of forms intended for inclusion in the statutory filing requirement have been varied. Of particular concern to this Division is that category of terms, conditions, exceptions or provisions which are typed-in but have not previously been approved for inclusion in a form issued for use in this State.

If the typed-in material is a specific defect in title that may be ascertained from an examination of the risk, then the resultant exception along with any affirmative assurance offered with respect to such defect is not subject to the filing requirement. On the other hand, an exception listed which is not determined or ascertained from an examination of the risk amounts to a modification of the filed form and must be reviewed and considered in that light. If an applicant for insurance causes limitations upon examination of the risk or fails to provide the data requisite to a judgement of insurability, resultant exceptions would not be subject to the filing requirement. All other material would be subject to the filing requirement.

10. To require the filing of forms used for the internal operation of the company and which are not issued to applicants for coverage would serve no practical purpose.
11. The Division has in the past received filings which have not included sufficient identifiers on the forms for adequate identification of those forms. Absence of form number, form title, name of insurer issuing the form or revision dates on revised forms have created difficulties in properly reviewing forms for use in Alaska and for determining compliance with filing requirements.

RATE FILINGS

12. In view of the various responses to the "Letter of Call for Information," it is readily apparent that most title insurers doing business in this State have very limited capabilities to produce data needed to support filed rate structures. While the responses did give the Division some working data for its needs, they were generally insufficient in quality to elicit any degree of confidence in the accuracy of data contained therein.
13. Rate standards are established in statute by which the Division is supposed to be making the judgement as to whether to approve or to disapprove a rate. In many respects, these standards are not too different than the standards established for property/casualty lines of insurers. AS 21.66.360 states that "The purpose of Sections 370-400 of this Chapter is to promote the public welfare by regulating title insurance rates so that they are not excessive, inadequate or unfairly discriminatory..." We have found that there is little consistency in the way a title insurer arrives at its rates.
13. The title insurance industry through the American Land Title Association, in an attempt to respond to similar concerns by regulations in other jurisdictions, was prompted to cause development of a data collection system to help its member companies organize their efforts to address the regulatory rate information collection problem. In cooperation with Arthur D. Little, Inc., a Uniform Financial Reporting Plan and a Uniform Statistical System were developed. However, testimony has been received which casts substantial doubt that this data collection system would give us the necessary data with which to approve or disapprove title rates.

It is clear that the system would generate useful information for company management. Aggregate loss and expense data by state provides bench marks with which individual company managers can measure individual performance.

Both industry and the Division could use the data to measure aggregate rate adequacy. But there are serious deficiencies.

First, the costs for any company writing in Alaska includes allocations of central corporate costs which are distributed to the Alaska book of business by formulae which are probably generally equitable but are necessarily arbitrary and may be wholly inequitable when applied to a single company operation. While this may still generate information useful for management, it offers insufficient support for Alaska title insurance rate making to justify the expense to the companies or the burden on the Division.

Second, the trend in rate filings with the Division has been to rate reductions for special classes of business and specialty products or unique markets. There has not been a change by any single title insurer or the industry of the basic rate for years. This trend in filing indicates that the most significant information needed by the Division is loss and expense data by product line and by target market. The proposed systems do not offer data in this regard either directly or by allocation.

These deficiencies lead us to suspend serious consideration to adopt either part of the system.

Nevertheless, the requirement of AS 21.66.360 remains and any rate filed must demonstrate that it is, indeed, not excessive, inadequate or unfairly discriminatory. To this end, it is clear that title insurers will have to develop the capability to produce data to support filed rate structures, both current and future. A methodology and formula used to arrive at given rate levels should be developed by each company which has many of the elements of the system considered and not adopted. It must have the ability to support rate activities by product line and by target market. Allocations of expenses will be required with explanation. Much of what is needed requires an industry approach rather than individual company approach. With this in mind, we point out that AS 21.66.360 authorizes intercompany cooperation in rate making and it is likely that by separate order and cooperative effort, an inter-industry rate data and statistical collection could be sanctioned by the Division.

FILING ACKNOWLEDGEMENT AND RETENTION

14. Alaska law provides that a filing may be used 30 days after it has been filed with the Director unless it has received earlier approval. There has been some difference of interpretation concerning the date of filing. Clearly a document can not be considered filed with the Division until the Division has physical possession of that document. Further, the burden of proving that a filing has in fact been made, rests with the filer. The procedure set forth in regulation offers a method whereby the insurer can assure itself that it is in compliance with the law as concerns the use of its rates and forms.

TITLE INSURANCE AGENTS SERVICES

16. A title insurance agency may engage in the business of handling escrows, settlements or closing in connection with its title insurance business. AS 21.66.280 establishes requirements for an agency so engaged. These requirements include: a separate fiduciary account for all escrow funds which may not be commingled with any other funds; a record keeping requirement; submission of financial statements; and compliance with solvency standards established by the Director.
17. A mismanaged escrow transaction could result in a sizeable loss to one or more parties to such a transaction. For this reason, a solvency standard applicable to the title agent is important as a protection to the users of this service. Ideally, a corporate protection is more desirable than regulatory protection. Corporate protection includes such things as maintenance of a specified capital and surplus, fiduciary accounts, fidelity bond coverage, and the third party guarantees for liabilities incurred. Regulatory protection includes record keeping, examination and reporting requirements. A combination of both can provide a reasonable protection to the users of the service. Good business practices will dictate that the agent will limit his liability or exposure to liability to the degree he can with such things as fidelity bond protection on employees, maintenance of sufficient operating capital and third party guarantees.
18. A title insurance agent in this state maintains a relationship with only one title insurance company. The agent holds himself before the public as representing that company. The company name or logo appears on the forms used by the agent, on materials made available for distribution to the public, and on advertising materials on or within the office of the agent. As a natural result, the public tends to view the agent as a branch of the company. It is normal practice for the title insurance company to guarantee the agents liabilities as to title insurance matters. We view an extension of this guarantee to liabilities arising out of the business of handling escrows, settlements or closing to be a logical and natural extension since these functions are performed in connection with the agents title business. We further view such a guarantee as sufficient and necessary public protection and offer this method as one of two options through which an agent may evidence the financial ability which the Division must find pursuant to AS 21.66.280.
19. From the regulatory viewpoint, the most effective tools for public protection, and the one that has not previously been used in this specific area is the examination process. Clearly, this tool coupled with corporate protections will assure an adequate protection of the Alaska public. The regulations are directed to keeping current the data necessary to conduct such an examination.

OWNER'S, PURCHASER'S, LESSEE'S TITLE INSURANCE POLICY

20. Almost every insurer operating in Alaska experiences, to a greater or lesser degree, some kind of competitive advantage because of influence exerted directly or indirectly in some areas of the market. These advantages exist primarily because the business is ordered or placed by persons other than the owner, purchaser or lessee of insured property. Some states expend a great deal of time, money and manpower to directly regulate or control these influences. We have doubts as to how effective such an approach can be. The cost-benefit ratio of such an approach in Alaska renders such an approach impractical.
21. While some title insurers view the bank, real estate broker, lawyer, etc. requesting coverage on behalf of a client, as their customer, we view the owner, purchaser or lessee protected by the policy as the customer. That person should therefore be in a position to exercise more control in the selection of coverages and selection of insurer than is presently the practice. One way to assure that this control is shifted is to require that certain materials have been delivered to the person owning, purchasing or leasing property subject to the proposed insurance before such insurance has been placed or is effective. This would tend to assure that the choice of selection is in the proper hands. We address this concern primarily to residential property one to four families and raw land on the theory that other transactions will involve persons in a position to adequately influence the placement of insurance and having sufficient commercial awareness of title insurance involvement in a real estate transaction as to not need protection of a governmental agency. With these regulations, we require the title insurance company or title insurance agent provide the proposed owner, purchaser or lessee with a consumer brochure which describes title insurance, its purpose, the extent of coverages available, and the right to select coverage and insurer.
22. One of the purposes of the title insurance report or preliminary commitment of title insurance and one to which the title industry points proudly, is to apprise the prospective owner, purchaser or lessee and lender concerning the condition of title so that he can make an informed decision as to whether he should go forward with the transaction. In many cases, the proposed owner, purchaser or lessee in this State does not see a title report until after the transaction has closed, a practice at odds with statements made by the industry through its trade organization, the American Land Title Association, and one that is unfair to the proposed owner, purchaser or lessee. So important is this function that we require that the report be in the hands of the proposed owner, purchaser, or lessee and that that person have accepted the exceptions listed thereon prior to the closing date of the transaction.

23. The Division has received consumer complaints from persons who had reason to believe that the title insurance charge on their closing statement evidenced coverage under which they would be the beneficiary only to discover that coverage was provided for the lender only. Admittedly, this happenstance has diminished with the advent of the Real Estate Settlement Procedures Act (RESPA), a Federal statute which among other things requires that a fairly comprehensive information booklet be given to the prospective purchaser of residential property. However, RESPA is not all reaching and it is likely that the practice continues. To the degree that it does continue the practice is potentially injurious to the public.

Since title insurance is purchased so infrequently during a person's lifetime, it is not surprising that a person would not know that the title insurance charge on his closing provides him no coverage, unless it was carefully and clearly explained to him. There are so many things to be considered during a real estate transaction that the uninitiated is hard pressed to assign a great deal of importance to any single item. He is relying on his broker, attorney, if he has one, and lender to make those assessments for him. When any of the parties either fail to inform, inadequately inform, or misinform, the stage is set for disaster should the title be clouded. For this reason we require simultaneous issue of coverage for the mortgagor when mortgagee coverage is ordered. This may be rejected by the mortgagor in writing in which case he will be conscious of the fact that he will have no coverage for his interest.

24. We have some concern for a practice which could develop as a response to the position espoused in this Order, in which the lender takes the position that regardless of the selection of title insurance made by the prospective owner, purchaser or lessee, the lender will make the selection of the insurer to provide mortgagee protection. This would result in either a negation of the selection choice made by the prospective owner, purchaser or lessee, or a substantially increased title insurance cost since the rate advantage in a simultaneous issue would not be available. The Division points out that AS 21.36.165 prohibits just such an action. This section, dealing with coercion of debtors is not limited to persons licensed or admitted to do business by the Division and does extend to actions by lenders. The penalties provided in AS 21.36.320 for violations are substantial and are enforceable in court.

STANDARDS OF PERFORMANCE

25. The Division has received a number of complaints concerning delays in processing title orders. We have been advised by the title industry that orders can generally be processed in one to three days. Some complaints received have evidenced delays in excess of several months. A prohibition to accepting orders that cannot be processed within a stated time period would not recognize the occasional surges of orders that can occur and would likely prove to be injurious to the public. By establishing a standard within which service is to be provided, it is recognized that there will be exceptions which will not be subject to penalty. The general book of business must meet the established standard.

UNFAIR TITLE TRADE PRACTICES

26. During the mechanics lien problem of 1977, it became apparent to the Division that the title insurance industry in Alaska was very sensitive to pressures from the lending community to provide coverages or services insisted upon. This was true even where there was a distinct question concerning the legality or propriety of the coverage or service. This possibility is reduced where positive statements are made listing those actions considered to be unfair practices.
27. In Order 77-3, a discussion of title insurance was presented. It was noted that the cost of title insurance is primarily due the expense of search and examination. The title insurer has rates on file that presumably reflect this expense. The title insurer must, therefore, assure itself that it has an order from someone empowered to make such an order and must make a charge reflective of the work done. If a policy is issued then the charge must also be reflective of the coverage provided.

The Division has had occasion to review contracts which when read in their entirety, provide essentially no coverage at all. In effect, the benefits provided are illusory. Such contracts are misleading, are injurious to the person supposedly insured and may not be issued.

Other forms have been found issued and delivered which have not been the subject of a search and examination of the title. This practice is contrary to the requirements of AS 21.66.170(a) and is not permitted.

28. Complaints have been received where the title policy contained exceptions not appearing in the preliminary report. A title insurer or agent handling the recording of documents pertinent to a real property transaction is able to exercise control over matters that generate title insurance policy exceptions. It is in a position to make known to the prospective owner, purchaser or lessee of property, all exceptions to title which will appear on his title. Having accepted the responsibility for recording and thus, being in the position described, there should be no reason, aside from error, for additional exceptions to arise. It is, therefore, reasonable to expect the insurer or agent to be bound by the exceptions presented to the prospective owner, purchaser or lessee in the preliminary title report prior to the closing date.
29. Several title insurers have had endorsements and rates on file which would provide coverage to a mortgagee for its own usurious actions. Usurious actions are illegal. For an insurer to provide protection to an insured for that insureds illegal action is a measure which tends to circumvent the penalties created in law for the illegal action and is, therefore, against public policy. Issuance of coverage for such usurious action is, therefore, prohibited.

30. The responsibility of a title insurance company or title insurance agent issuing a report on title is to report all encumbrances or impairments to title which it has determined can be enforced. As an underwriting matter, the company may decide to provide coverage for the matter excepted. Nevertheless, the prospective insured is entitled to know all exceptions to title regardless of whether the insurer elects to provide coverage for the exception or not.
31. The title insurance company is required to file its schedule of rates under AS 21.66.370. It is separately required to file its escrow, settlement and closing charges. The intent of this separation is to avoid a rebate situation where service, special favor or advantage of value is provided as an inducement to coverage. The charges for each must be separate items.
32. Title insurance companies and title insurance agents, in order to encourage the use of their service by lenders, real estate brokers, attorneys and others, provide forms needed in real estate transactions. Normally, the name of the title insurance company or title insurance agency will be preprinted, prestamped, pretyped or prewritten on the form used or intended for use in connection with a real estate transaction including escrow instructions, earnest money agreements, deposit receipts, or other similar documents in which the title insurer or title agent is to be designated by parties to the transaction to provide title insurance or a title service. This acts as a deterrent to the proposed owner, purchaser or lessee's right to make his own choice of title insurer, and therefore, defeats the intent of this Order and regulation.

REMOVAL OF EXCEPTED LIENS - COLLATERALIZED SECURITY

33. Since a title insurer or title insurance agent must list all encumbrances or impairments to title which it has determined can be enforced, including liens, the Division is concerned with any exercise of underwriting judgement which may tend to generate loss. AS 21.66.190(b) bars a title insurer from engaging in the business of guaranteeing the payment of the principal or the interest of bonds or other obligations. Therefore, a lien exception for which coverage is provided must be supported by some form of collateralized indemnity to prevent a violation of AS 21.66.190(b). The collateral accepted by an insurer can ultimately become an asset of the company, so that logically the collateral should be limited to only those items that can be admitted as an asset under AS 21.21. It should further be protected by insurance where appropriate, as in the case of improvements on real property. An additional consideration is that the collateral be reasonably valued. These matters can have a direct bearing on the solvency of the company. The Division, therefore, makes an entirely appropriate intrusion into the standards established for the valuation of and kinds of collateral used to provide coverage for a lien exception.

34. A situation which has come to the Division's attention on several occasions is that where a title insurance company has provided coverage for an exception or has failed to list an exception. During a subsequent transaction with another insurer, the exception is listed and this fact impairs the transaction. The last title insurer is willing to write coverage for the exception, while the new one is not. This often occurs when the succeeding company is unable to obtain an acceptable indemnity. The property is effectively locked into the last insurer.

Generally, insurers in the position of the last insurer are not giving any indemnities to subsequent insurers, thus, furthering the lock up. The result is that the proposed owner, purchaser or lessee is denied his freedom of choice of the insurer of his choice. This is an unacceptable situation. It is further unacceptable that an insured miss a potential sale of the property while the title insurer attempts to resolve the problem. If the company pays the loss, then the matter is resolved, as to the company, its obligation having been fulfilled. Short of that the only way to avoid a lock up of the property is for the last company to provide an indemnity.

It is reasonable that the obligation of the last title company be limited to the coverage it had provided as to type and limit. The last insurer must provide the indemnity for a current and valid lien not excepted for its policy when request for the indemnity is made by the insured under the existing policy. While the subsequent title company must list the encumbrance, it can provide coverage based on the indemnity.

35. Most title companies have in the past accepted uncollateralized indemnity agreements from persons not always able to respond in the event foreclosure is necessary. While we do not wish to totally prevent the use of uncollateralized indemnity agreements, it is important that persons giving such indemnities be able to support them. A title insurance company or title insurance agency is not staffed with personnel expert in making the kinds of judgements a lender makes when it extends credit. This is basically the kind of expertise needed when reviewing an unsupported indemnity. Generally, it is desirable to allow the use of unsupported indemnity agreements given by persons subject to some regulatory agency for its solvency, such as title insurance companies and banks. It is, however, recognized that some persons besides those subject to solvency regulation are indeed able to meet safely its obligations. This was reflected in Order 77-3, Supplement #3, and has been included in these regulations.

TITLE PLANTS

36. A title insurance company is obligated to maintain a minimum statutory financial position, to have a certain amount of capital and surplus pursuant to AS 21.66.010. It may, by law, (AS 21.66.240) reflect as one of its assets, its title plant. Generally speaking, it is one of its principal assets, since it is capitalized at a rather high cost, thus, representing a substantial portion of its assets. The plant is the core of the business. The destruction of the plant would in many cases place the title insurance company in insolvency. The fact that the loss of a single asset could have such an impact requires that a review be made of that potential.

If a title insurer has elected to discontinue business after the loss of its plant, we have a regulatory responsibility to see that such a choice is indeed a choice and not a position that is forced on the company because it is insolvent.

If the title insurer intends to value the plant as an asset, then the division must take an active interest in contingency plans for its replacement, cost of rebuilding, length of time to rebuild, etc. A title insurer may elect not to value the plant as an asset in which case our view of the plant would necessarily differ, at least from the solvency standpoint.

37. AS 21.66.200 establishes requirements for a title plant but these tend to be vague except as to the requirement that all instruments of record affecting all land within the recording district for a period of at least 25 years immediately before the date a policy of title insurance is issued, be maintained. The statute also speaks to adequate maps and fully indexed records but does not elaborate as to content. The Division has reviewed several plants and has found more variety of content than expected. Our concern is that adequate material be found in the plant to properly conduct a reasonable search. This tends to be, perhaps, more of a problem in Alaska than in many other states due to our vast land size, mining history, size of federal land ownership and other problems. We have accordingly established minimum standards for content of the title plant.
38. On March 15, 1977, an informal meeting was held by the Division to discuss concerns of the title insurance industry regarding coverage of items disclosed in the Federal Register under title policies. This subject was again discussed at length during recent hearings considering the adoption of title insurance regulations. We have considered a requirement that all title plants in this State include matters recorded with the Land Recording Office of the Bureau of Land Management, United State Department of Interior for Alaska. This, it turns out, is not practicable since those records are not posted to specific tracts of land. The descriptions of land in those records is often so vague as to be unpostable.

The expectations of insureds is such that leaving the insured with such a large exposure is not acceptable. It is one thing to allow exclusion of a kind of coverage in toto, for example, encroachments. It is yet another thing to allow exclusion of a portion of a coverage based on who has the records revealing the defect. For example, unexpected easements would be covered if a state record but not if it is a federal record. We have, therefore, determined that the position adopted in Bulletin 77-4 is to be continued. The conclusions reached at that time were:

- (a) No title insurance policy may exclude, through exceptions or by redefinition of the term "public record" or by any other means, the coverage under title insurance policies for items disclosed in the Federal Register;
- (b) unless substantial evidence is provided to the contrary, current rate structures are deemed adequate to provide continuance of this coverage;
- (c) although each title insurer may deem it prudent to maintain the Federal Register in its title plant AS 21.66.200 is deemed not to make it mandatory.

Subsection (c) has been incorporated in the regulations while (a) and (b) are to be considered a statement of policy on this matter.

- 39. The Division is cognizant of the Supreme Court's dicta in Hahn vs. Alaska Title Guaranty Company (1976), 557 P2d (Alaska) 143 in which the court suggested that public land orders be posted in the title plant. The Division, however, must wrestle with the issue of cost; comparing cost for each title insurer to add Federal Register items to their plant with the cost of paying a claim should one develop under the policy. The Division's current view is that claims for failure to disclose a public land order will generate a lesser cost than would the requirement to post to the title plant.
- 40. The Division takes the position that the Court in Hahn concluded that the policy covered public land orders because of an ambiguity in policy language. The Court stated: "Here, as indicated by the trial judge, in the absence of the definition portion of the policy, there would be little difficulty in construing the term 'public record' to include material published in the Federal Register." [emphasis added]

The title insurers may wish to file for approval, a modification to their policy changing the definition of "public record" to exclude public land orders. The Division will not currently favor such a filing but will allow the insurers to show exceptions for specifically identifiable public land orders that may affect the property subject of the policy.

Further, these regulations will make it necessary for insurers to show public land orders of which it has knowledge, and every title insurer has knowledge of public land order #601.

CONCLUSION


41. The various statements made in 8 through 33 of this order comprise the basis or reasoning behind the regulation subject of this order. These are all issues which the Division believes it must address and are appropriate matters for consideration. Every effort has been tendered the industry for input and for self-resolution of the problems addressed by these regulations.

THE DIRECTOR HEREBY ORDERS:

- A. Bulletin 77-4 is repealed because the substantive provisions have been incorporated in the regulation.
- B. Section D of Order 77-3 as set forth in Supplement #3 is repealed because the substantive provisions have been dealt with in the regulation.
- C. The attached 12 pages of regulations dealing with title insurance are hereby adopted and certified to be correct copies of the regulations which the Division of Insurance adopts under authority vested by AS 21.06.090 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This order takes effect on the 30th day after it has been filed by the Lieutenant Governor as provided in AS 44.62.180.

Dated this 25th day of August, 1978.



Richard L. Block
Director of Insurance

I, Lowell Thomas, Jr., Lieutenant Governor for the State of Alaska, certify that on October 24, 1978, at 9:25 a.m., I filed the attached regulations according to the provisions of AS 44.62.040 -- 44.62.120.

Lowell Thomas, Jr.

Lieutenant Governor

EFFECTIVE November 23, 1978
REGISTER 68, January 1979

CHAPTER 27. TITLE INSURANCE
AND LENDER MARKETED PRODUCTS

Article

1. Title Insurance

ARTICLE 1. TITLE INSURANCE

Section

10. Forms required to be filed
20. Form filing requirements
30. Rates required to be filed
40. Rate filing requirements
50. Filing acknowledgements and retention
60. Title insurance agents' services
70. Owner's, purchaser's, lessee's title insurance policy
80. Standards of performance
90. Unfair title insurance trade practices
100. Removal of excepted liens
110. Collateralized security favoring title insurer
120. Title plants
130. Title plant security
300. Definitions

3 AAC 27.010. FORMS REQUIRED TO BE FILED. (a) Each insurer must file with the director for the director's approval each form which is intended or proposed to be issued by the company in the business of title insurance in this state. No form may be used unless filed with and approved by the director. The forms required to be filed must include:

- (1) each policy of title insurance or guaranty;
- (2) each form, rider or endorsement to be attached to a policy of title insurance or guaranty;
- (3) each title report form, preliminary commitment to insure or to issue a policy of title insurance form, preliminary reports of title, and commitment to insure or to issue a policy of title insurance form;
- (4) each binder for insurance;
- (5) all terms and conditions of insurance coverage or guaranty that relate to title to any interest in property; and
- (6) other title related reports whether insured or not.

(b) Any term or condition reflected in the policy that relates to title to any interest in property, or to the insurance coverage provided, and any exception appearing within the policy which has not been ascertained from a search and examination of the records relating to the title

or inspection or survey of subject property to be insured, may be included only after the term, condition, or exception has been filed and approved as if it were a separate form.

(c) Forms of title policies and other contracts of insurance in (a) and (b) of this section specifically exclude

(1) reinsurance contracts or agreements;

(2) all specific defects in title excepted in reports, binders, commitments or policies which have been ascertained from a search and examination of the records relating to the title, together with any affirmative assurances;

(3) policies of excess coinsurance; and

(4) forms used for the internal operation of the company which are not made part of any title policy or other contract of insurance. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66.370(g)
AS 21.66.450
AS 21.66.480(2)

3 AAC 27.020. FORM FILING REQUIREMENTS. (a) A letter of transmittal must accompany each filing of a form or forms required under sec. 10 of this chapter.

(b) Each transmittal letter must be dated.

(c) Each transmittal letter must contain the full name of the filing insurer.

(d) Each transmittal letter must contain the following information concerning the form or forms filed:

(1) the insurer's form number, revision date if applicable, and name for each form filed;

(2) a statement to indicate whether the form is new or a replacement of a previous filing; and

(3) a brief description of provisions, benefits, charges and any other information pertinent to consideration of the filing. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)

3 AAC 27.030. RATES REQUIRED TO BE FILED. (a) Each insurer must file with the director a schedule of rates for each coverage or service which it provides.

(b) Each agent must file with the director a schedule of rates for any service which it provides that has not been filed under (a) of this section.

(c) The requirements of (a) and (b) of this section do not prevent the provision of a coverage or service at no charge if so stated and approved in the rate schedule. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66.360
AS 21.66.370
AS 21.66.380
AS 21.66.390

3 AAC 27.040. RATE FILING REQUIREMENTS. (a) A letter of transmittal must accompany each filing of rates required to be filed.

(b) Each transmittal letter must be dated.

(c) Each transmittal letter must contain the full name of the filing insurer.

(d) A transmittal letter for a rate to be used with a specific form may be combined with the filing transmittal letter for the form.

(e) Each rate filing to be justified under AS 21.66.380(a) must include:

(1) a description of the methods and formula used to arrive at the filed rate with a complete explanation of all judgment used in developing the rates as well as any assumptions used;

(2) expected expenses and losses represented as a percentage of total premium;

(3) past loss and expense history including the method for allocating regional and home office expenses to Alaska business, with identification of the year to which each is attributable;

(4) the statistical bases for any change in rate level or rate relativity; and

(5) if it is for a product line or target market, an allocation of expenses by product line or target market with explanation. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66.360

AS 21.66.370

AS 21.66.380

AS 21.66.390

3 AAC 27.050. FILING ACKNOWLEDGEMENTS AND RETENTION.

(a) The 30 day waiting period for a filing commences as of the date of acknowledgement of receipt by the division.

(b) Failure of a filer to provide a copy of a filing purported to have been filed, together with a copy of the transmittal letter with the division's acknowledgement, is considered failure to have made that filing.

(c) A filer desiring acknowledgement of receipt of a filing by the division may file a duplicate copy of the transmittal letter accompanied by a return envelope with adequate postage affixed to return that copy of the filing to the filer. The received date affixed to the transmittal letter constitutes acknowledgement of receipt.

(d) A copy of a filing made must be retained by the insurer as a permanent record until after the first market conduct examination by the division following replacement or discontinuance of the form. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090

AS 21.66.360

AS 21.66.370

AS 21.66.380

AS 21.66.400

AS 21.66.450

3 AAC 27.060 TITLE INSURANCE AGENTS SERVICES. (a) An agent engaging in the business of handling escrows, settlements or closings in connection with the business of title insurance shall provide annually no later than March 2:

(1) the name of the bank and account number of the account through which all receipts and disbursements for its escrow, settlements and closings business has been handled;

(2) the location at which an audit may be conducted of the books of accounts and records and vouchers pertaining to the business of handling escrows, settlements or closings; and

(3) evidence of solvency which may be either

(A) an agreement with the insurer for which it is the agent in which the insurer guarantees any liabilities, fiduciary or otherwise, incurred by the agent which arise out of the handling of escrows, settlements or closings in connection with the business title insurance, or,

(B) maintenance of a capital and surplus minimum of \$50,000 and a fidelity bond, equal to the maximum amount of cash handled in any one transaction, covering all principals and employees involved in the handling of escrows, settlements or closings in connection with the business of title insurance.

(b) For the purpose of this section, "settlements" or "closings" include:

(1) recording, drafting, executing, transmitting, filing or certifying documents;

(2) acting as trustee; or

(3) exercising powers granted in documents relative or incidental to the sale or transfer of any interest in real or personal property sold or transferred as part of a real property transaction. (Eff.11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66.280(b)

3 AAC 27.070. OWNER'S, PURCHASER'S, LESSEE'S TITLE INSURANCE POLICY. (a) No insurer or agent may issue or deliver an owner's, purchaser's or lessee's title insurance policy or contract of insurance in connection with a transaction involving a single family residence, a multiple dwelling for two to four families, or raw land of five acres or less unless:

(1) it has provided the proposed owner, purchaser, or lessee, at the time of placing the order, with a consumer brochure describing title insurance, the purpose and extent of coverages available, and the right of the proposed owner, purchaser, or lessee to select the insurer with whom the coverage is to be placed as well as the type of coverage to be purchased to provide for his own interests;

(2) a copy of a preliminary report of title and commitment to issue a policy concerning the subject property has been delivered to the proposed owner, purchaser, or lessee and he has acknowledged receipt of the report and acceptance of the exceptions listed prior to the closing date for the transaction.

(b) No insurer or agent may issue or deliver mortgagee's title insurance in connection with a transaction involving a single family residence or a multiple dwelling for two to four families or raw land of five acres or less upon a loan made simultaneously with the purchase of all or part of the real estate securing that loan unless standard form owners coverage for the mortgagor is also provided.

(c) Notwithstanding (b) of this section, the mortgagor has the right to reject coverage protecting his interest. Such rejection must be in writing. The rejection must be retained by the company for a period not less than five years from the date the loan is closed.

(d) A consumer brochure described in (a)(1) of this section must be filed with and approved by the director before its use. The brochure may be filed by or on behalf of one or more insurers.

(e) An insurer or agent has provided the proposed owner, purchaser, or lessee a brochure at the time of placing the order if it can demonstrate that the lender, escrow, real estate broker, attorney, or other party delivered to the proposed owner, purchaser, or lessee the approved brochure at the time documents in which title insurance provisions are included are executed or, where no institutional lender, escrow, real estate broker, or attorney is involved, within one business day after receipt of an order, the insurer agent mails the brochure to the proposed owner, purchaser, or lessee. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
 AS 21.36.01
 AS 21.36.50
 AS 21.36.65
 AS 21.66.450

3 AAC 27.080. STANDARDS OF PERFORMANCE. (a) An insurer or agent failing to meet the standards set forth in this section is subject to disciplinary measures as stated in AS 21.66.430. This is not to be construed as a limitation on the use of other penalty and discipline measures considered appropriate by the director.

(b) An insurer or agent shall, as a general business practice, provide a service or contract ordered within five working days of the date of order on all transactions involving a single family residence, a multiple family dwelling for two to four families or raw land of five acres or less.

(c) As to general business practice, delivery of an owner's, purchaser's or lessee's title insurance policy must be made no more than 10 days after closing of the transaction for which it was required. For the purpose of this section, "delivery" means placing the policy into the possession of the person insured. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
 AS 21.42.250
 AS 21.66.430

3 AAC 27.090. UNFAIR TITLE INSURANCE TRADE PRACTICES.
 (a) No insurer or agent may issue a title insurance binder,

commitment to title insurance, preliminary commitment to issue title insurance, or preliminary report

(1) unless a bona fide order for such a document has been made by or on behalf of the person to be insured and a fee is charged for the document;

(2) if by its terms and exceptions, any policy resulting from acceptance of the document provides illusory benefits;

(3) unless based upon a search and examination of the title; or

(4) for a charge which is other than that currently filed for such a risk with the Division of Insurance.

(b) No insurer or agent may issue an owner's, purchaser's, or lessee's policy on which it has handled the recording of documents pertinent to the transaction that contains exceptions which were not approved in writing by the owner, purchaser, or lessee before the date of closing or which were not listed as exceptions to title in the report on title.

(c) No insurer or agent may issue coverage to a mortgagee for the usurious actions of the mortgagee.

(d) No insurer or agent may fail to list as an exception to title any encumbrance or impairment to title which it has determined can be enforced.

(e) No insurer or agent may include any exception to title for items which have not been ascertained from a search of title unless the exception has first been filed and approved for use under sec. 10(b) of this chapter.

(f) No insurer or agent may include or agree to include closing or escrow services as a part of a title insurance premium charge for issuance of a policy.

(g) No insurer or agent may issue, print or use, or cause to be issued, printed, or used any form used or intended for use in connection with a real estate transaction including escrow instructions, earnest money agreements, deposit receipts or any other similar document in which an insurer or agent is to be designated by the parties to the transaction if the name of any insurer or agent is pre-printed, prestamped, pretyped, or prewritten into the form to designate the insurer or agent selected to issue the title insurance. This does not apply to deeds of trust in which the insurer or agent is named as trustee. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.36.150
AS 21.66.170(a)
AS 21.66.310
AS 21.66.370

3 AAC 27.100. REMOVAL OF EXCEPTED LIENS. (a) Notwithstanding sec. 90(d) of this chapter, coverage may be provided for a lien listed as an exception to title if the insurer

(1) has been named as an obligee in a surety bond executed by an admitted surety company covering the lien;

(2) has, if a mechanics', materialmens', or labor lien under dispute, evidence of a bond for disputed amounts recorded under to AS 34.35.072; or

(3) has been named and protected in an indemnity agreement for the full amount of the lien and the indemnity agreement has been secured by collateral under sec. 10 of this chapter.

(b) If an insured, under an existing title policy, upon a proposed sale or mortgaging of the property, is presented with the fact of a current valid and outstanding encumbrance to the title, outstanding at the time of issuance of the existing coverage, objectionable to the proposed buyer or lender and not excepted from coverage under the existing title policy, the existing insurer must, upon demand by its insured provide indemnity up to the full amount of liability outstanding on its existing title policy to the insurer selected by the buyer or mortgagor for any new policy against all loss arising out of that encumbrance or otherwise cause elimination of the encumbrance.

(c) An indemnity agreement under this section must be collateralized by a security interest in allowable assets to pay amounts disputed if the lien is determined to be proper unless the indemnity is given by

(1) a title insurance company or a title reinsurance company authorized to transact business within the State of Alaska; or

(2) a state or federal bank; or,

(3) a person, as defined in AS 01.10.060(7), with an audited financial statement prepared by a certified public accountant showing a net worth of at least \$1,000,000; such a statement must bear an effective date of not more than 12 months before the effective date of the indemnity agreement; the indemnity agreement must not exceed 10 percent of the audited net worth of the person. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.36.030
AS 21.36.080
AS 21.66.170
AS 21.66.180

3 AAC 27.110. COLLATERALIZED SECURITY FAVORING TITLE INSURER. (a) An indemnity agreement favoring an insurer may be issued in an amount equal to the estimated liability of the lienee if the lien is found to be valid and may be secured only as noted in (b) through (f) of this section.

(b) Collateral must be in cash or in property allowed as an investment by AS 21.21.060-130, 225, 230 and 260.

(c) The value of collateral referred to in

(1) AS 21.21.225 and 230 and cash must be no less than 100 percent of the maximum liability of the indemnity;

(2) AS 21.21.060-130 must be no less than 110 percent of the maximum liability of the indemnity; and

(3) AS 21.21.260 must be no less than 150 percent of the maximum liability of the indemnity.

(d) The aggregate amount of collateral securing all indemnities except cash or property referred to in AS 21.21.260, when combined with like properties held for the insurer, must not exceed the permissible limit established for that property as an investment under AS 21.21.

(e) When property referred to in AS 21.21.060-130, 225, and 230 is used to collateralize an indemnity under this section, it is subject to the following requirements:

(1) the collateral must be otherwise unencumbered;

(2) the security interest must be perfected as required, for each type of collateral, by Uniform Commercial Code - Secured Transaction (AS 45.05.690-794); and

(3) a security interest in any collateral must include a security interest in the rents, issues, profits and proceeds of sale or maturity of the collateral.

(f) When the collateral is property referred to in AS 21.21.260, it is subject to the following requirements:

(1) the value of the real estate mortgaged must be established by an appraisal completed not more than 90 days before the time the indemnity is taken or must be valued at the assessed valuation for property tax purposes; and

(2) any improvements must be insured to replacement value for fire and extended coverage. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.21
AS 21.66.180

3 AAC 27.120. TITLE PLANTS. (a) Title plants in this state are subject to the minimum standards of adequacy for:

(1) tract indices, as set forth in (b)-(e) of this section;

(2) maps, as set forth in (f) of this section;
and

(3) general index, as set forth in (g) of this section.

(b) Tract indices are to be a reference record of all documents and proceedings which affect real property in the recording district, including matters recorded with the district recording office for the recording district covered by the plant. Maintenance in the plant of items contained in the Federal Register is not mandatory.

(c) Tract indices relating to recorded plats are to be kept separately as to each plat and may be referred to either by name or number.

(d) Tract indices may be kept on ledger sheets, separate cards, sheets or film, either bound in books or contained in envelopes or storage files, or the indices may be kept on punch card, computer tape, disc, or similar machine compatible form. The tract index must contain a reference to all deeds, contracts, suits, liens, unsatisfied mortgages and other matters of record which specifically describe the real property.

(e) A currently posted tract index must be one in which the postings are made at regular intervals which do not exceed 30 days from the date recorded material becomes available.

(f) Adequate maps are such maps which enable anyone working the title plant to locate a tract of land which may be the subject of a title search, in accordance with the accepted practices in general use for the description of real property within the locality and with particular reference to the government survey system. Maps should be of such scale as to make them workable. A record must be kept of all recorded plats.

(g) A general index must be a complete compilation of all general matters affecting real property which do not describe or cannot be assigned to a specific parcel of real property. Information in the general index must be in such order, either alphabetically or through a phonetic system, that any record pertaining to any person by name can be ascertained. Such index to be complete must consist of the following items, which may be found by a search of, but is not limited to, the proper records within the recording district:

- (1) unsatisfied judgments and tax liens (both state and federal);
- (2) guardianships and estates of deceased persons;
- (3) divorces (closed or pending); and
- (4) powers of attorney. (Eff. 11/23/78 Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66.200

3 AAC 27.130. TITLE PLANT SECURITY. (a) Each insurer must insure each title plant it maintains or in which it participates in this state with valuable papers insurance, or alternative approved by the director, in an amount equivalent to the replacement cost of the plant but not less than the valuation of the plant as an asset as noted in AS 21.66.240.

(b) Each insurer must file with the director for approval a contingency plan for replacement of each title plant it maintains or in which it participates in this State in the event of partial or total destruction of the plant. The plan must include:

- (1) the method of replacement;
- (2) the estimated current cost of replacement;
- (3) the estimated time to rebuild the plant; and
- (4) the procedure for interim underwriting.

(c) If an insurer does not value the title plant as an admitted asset, the requirements of (a) and (b) of this section are waived. (Eff. 11/23/78 Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66.200
AS 21.66.240

3 AAC 27.300. DEFINITIONS. In secs. 10-300 of this chapter:

(1) "acknowledgement of receipt" means the procedure by which the Division of Insurance, upon receipt of a document, stamps the document with the date it was received and the word "received" and returns a copy of the document so stamped to the person having filed it;

(2) "agent" means title insurance agent;

(3) "commitment" means any offer by the title insurance company or its agent to issue or provide title insurance coverage for a person, directly or indirectly, regardless of the conditions, exclusions, exceptions or limitations of the offer;

(4) "construction has commenced" means the point in time at which materials are first delivered to the property or initial clearing, excavation or preparation works has been started;

(5) "encumbrance" includes liens, judgments, defects, covenants, and easements;

(6) "examination" means the evaluation of documents searched to determine the present state of title;

(7) "insurer" means title insurance company;

(8) "illusory benefits" means of benefits ordinarily provided, but which have been excepted on a title insurance policy; and

(9) "lien" means a charge upon real property for the satisfaction of a debt or duty arising by operation of law or contract; and

(10) "search" means a review of all documents on public record to identify those which may impart constructive notice of matters relating to interests in particular land, whether done from the public records themselves or copies and indexes of them maintained in a title plant. (Eff. 11/23/78, Reg. 68)

Authority: AS 21.06.090(a)
AS 21.66

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March 5, 1986

Honorable Mike Navarre, Chairman
Labor and Commerce Committee
Alaska House of Representatives
P. O. Box V
Juneau, AK 99811

Re: HB499 *HB 494*

Dear Mr. Chairman:

At the committee's February 26 hearing on this bill, Mr. Cotten asked if I would expand in writing upon my testimony that the bill is not integrated with existing law that it would not change and, so, would, if enacted, raise a host of difficulties. I write this letter in response to that request.

Sections 1 and 2 of the bill would amend AS 34.35.060 to give all "original construction" materialmen, subcontractors and prime contractors liens having "equal priority" with any "prior recorded encumbrance". Its passage would create the following problems:

(a) It is most unlikely that the "prior recorded encumbrances" to which mechanic's liens are to become "equal" will have equal ranking among themselves.

AS 34.15.290 -- as a chief example, and as the basic Alaska law respecting the ranking of interests in real property -- gives disparate validity to such "prior recorded encumbrances". It specifies that the mortgage B acquires and records is inferior in right to the prior recorded mortgage of A, superior to the subsequently recorded mortgage of C. Yet HB494 would give mechanic's liens a priority equal with that A, B and C -- which is to say, apparently, that C and B are also elevated to equality with A, in spite of AS 34.15.290 and in spite of the fact that none of them bargained for that treatment.

Imagine the collusion that would invite between C (or B) and a potential lien claimant.

(b) The lien claims that are given "equal priority with a prior recorded encumbrance" are themselves of unequal status. AS 34.35.112 ranks mechanic's liens in order of preference.

(c) The bill will assure that a failed construction project will result in the property's being tied up -- probably in an incompleated and very much "at risk" condition -- while lien claimants, other encumbrancers, and owners litigate their various (and, by the bill, very uncertain) claims against one another and the property. Who of those disputants is going to pay the costs (or bear the risks) of the property's simply standing idle (taxes, insurance, liability for injury to persons or property, risks of casualty loss), let alone the costs of completing the project? Who, in those circumstances, would want to buy the property (from whom could he buy it)?

(d) It has been argued in support of the bill that the litigation required by the current §062 is expensive and burdensome. Perhaps that is true, but that expense and burden pales in comparison to the litigation that this "equal priority" notion would cause. (Prior to the 1978 and 1979 amendments, which HB494 would largely undo, the courts were choked with seemingly unending, multiple party, complex lien litigation, almost all of which abruptly stopped when the amendments took effect.)

(e) The bill would give "parity" to claimants who have no obligation to give their "peers" so much as notice of their existence, let alone prompt notice of the fact and amount of any payment delinquency that might give rise to a lien claim.

(f) The bill gives "equal priority" only to liens "for original construction". What is "original construction", and how does it differ from "construction" (which is defined at §120(2) in such a way that no construction can fail to be "original")?

Section 3. Clarifying and streamlining §062 is a laudable objective. But HB494's amendments promise to make matters worse, not better.

(a) To whom are the lender, owner and general contractor to make the new "certifications" called for by the proposed amendment to (a)(1)? What purpose is served by the requirement that they be "signed and verified" or, for that matter, in writing? If ~~is~~ the purpose of "construction financing" that the

funds be used to pay construction costs, and it is the essence of the contract between borrower and lender that the borrower apply the funds to that purpose.

(b) There is no obligation that the claimant give the stop notice to the owner (borrower) at the same time as he gives it to the lender. By simply delaying notice to the owner, a claimant can assure that the owner will not make objection in time to prevent the "direct payment" called for by the proposed §(a)(5).

(c) The requirement in (a)(5) that the lender "disburse the sums jointly" to two (or more) persons who are, by definition, in dispute as to who is entitled to the "sums" is impossible of accomplishing.

The lender can, it's true, issue a multi-party check. But issuing a check does not pay or disburse anything. "Disbursement" does not occur until the check is presented and paid. Payment of a check can be challenged and invalidated by any payee who has not endorsed the check. None of the payees is apt to endorse the check, and allow another payee to collect it, until the dispute as to who's entitled to the proceeds is resolved. The law now obliges the lender to hold the funds until the dispute is resolved -- either by agreement or litigation. The "joint disbursement" amendment will simply give one of the parties - the one who has the "joint check" -- the temptation to forge the other's endorsements and collect the check.

And to which of the disputants, for the matter, is the lender to give the "joint disbursement" check?

Section 4. How -- under what circumstances -- can a lender be liable to a borrower (owner) for having made loan disbursements directly to the borrower that it was supposed, instead, either not to have made at all or to have set aside for someone else?

Section 5. What ever does this mean? A lender either will or will not have made post-notice disbursements that it did not set aside for the claimant. If it has, it will be liable to the claimant without regard to what other purpose the loan proceeds were put.

How a lender can "satisfy a borrower's (owner's) obligations to a lender" by lending yet more money to the borrower is itself a mystery. But if he can find a way to do such a thing, no amendment is needed to make it clear that he has "violated" §062.

Section 6. This section would add yet another kind of "notice" to the lien statutes' calendar of notices. Much of the confusion

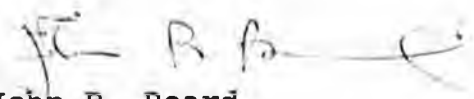
Honorable Mike Navarre, Chairman
March 5, 1986
Page 4

people seem to be experiencing with the lien law appears to derive from the law's plethora of kinds of notice.

It would seem as though the office of this new "notice of intent" could be served, as well, by the "notice of right to lien" that the statute already calls for.

I hope that the committee will find these remarks to be helpful in its consideration of the bill.

Very truly yours,


John R. Beard

JRB:cam

cc: Representative Cotten
Representative Phillips
W. Coyner
R. Enberg



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