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515

# STATE OF ALASKA THE LEGISLATURE

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May, 1988

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Mary Van Nimwegen

H. JUD. 5-8-88 1:30 p.m.

# HOUSE COMMITTEE REPORT

(7)

Date referred: 5/3/88

FURTHER REFERRALS:

DATE: May 8, 1988

The Judiciary Committee has considered SSSB 515 (JUD)

"An Act relating to foreclosure of a deed of trust or a suit on a deed of trust note; and providing for an effective date."

**RECOMMENDS:**

- replace with HCS SSSB 515 (JUD)  the same title
- attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

**ADOPTS:**  \_\_\_\_\_ letter of intent

**ATTACHES NEW FISCAL NOTE(s):**

- fiscal impact  same as previous fiscal note published \_\_\_\_\_
- zero fiscal note  same as previous zero fiscal note published 4/30/88
- zero with analysis

**SIGNING DO PASS:**

[Signature]

John L. Taylor

[Signature]

[Signature]

\_\_\_\_\_

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**SIGNING OTHER RECOMMENDATIONS:**

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\_\_\_\_\_

[Signature]

Chairman's signature

To: Representative John Sund, Chairman  
House Judiciary Committee

From: Gordon Schadt, Esq.  
Bruce Chertkow, Commercial Banker

Date: May 5, 1988

Subj: Senate Bill 515  
Amending AS 34.20.070(a)

Senate bill 515 addresses lenders options under the non-judicial (summary) foreclosure section of the Alaska Statutes. It appears the author's intent may be to prevent lenders from circumventing the judicial foreclosure process. The bill as presented, however, precludes both the borrowers' and lenders' ability to negotiate out of litigation.

The draft SB 515 reviewed states (in part):

"If the deed of trust is foreclosed judicially or the note secured by the deed of trust is sued on and, if a judgment is obtained by the beneficiary, the beneficiary may not exercise the remedies under this section".

In effect, this type of wording forces the lender to commence a judicial action following suit on the note even if both the borrower and lender are in agreement to foreclose the property by a non-judicial action.

**Scenario:**

The borrower has a mortgage balance of \$150,000.00 secured by property worth \$100,000.00. The lender's analysis discloses the borrower has either the ability to pay or assets sufficient to recover funds without taking title to the property, and decides to sue on the note rather than to initiate judicial foreclosure. When judgment is obtained, the judgment is recorded against other assets owned by the borrower.

The borrower now realizes that he cannot liquidate or encumber his remaining assets to insure liquidity for any purpose whether it be emergency, medical or to keep his business alive. The borrower approaches the lender with the following: Borrower offers to pay the lender \$50,000 providing the lender takes title to the property worth \$100,000 by summary foreclosure. This action will take approximately 90 to 120 days. The lender recovers its funds and the borrower is released from the obligation.

Under SB 515, the above is not possible. The lender has been precluded from summary foreclosure. To effect the settlement, the lender must foreclose judicially which is more costly than a summary action. Additionally, rather than 90 to 120 days, both parties must now face in excess of 6 months to conclude the matter. Holding costs and a 1 year redemption period have decreased the value of the property and increased the borrower's debt.

To preclude the lenders from "having their cake and eating it too," the statute should include wording to the effect:

"If suit is brought on a note secured by real property and, if judgment is obtained, this section may be exercised. Upon issuance of a deed by the trustee, however, the note securing the obligation must be unconditionally canceled and the judgment marked satisfied."

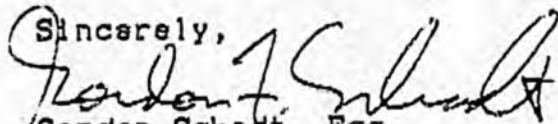
The above wording does not hinder either party's ability to settle. It entitles both parties to settle litigation at a minimum of cost and allows the lender to liquidate the security without a redemption period.

Should a lender desire to foreclose the property after judgment is obtained on the note while at the same time protect a deficiency balance, the lender should look towards the judicial foreclosure action as set forth in A.S. 9.45.170.

Prior to enacting new legislation, it may be helpful to allow public hearings regarding both legal and economic issues related to a change of this nature.

Your consideration of this letter is appreciated. Should you have any questions, or desire to discuss the contents, please feel free to contact the undersigned.

Sincerely,



Gordon Schadt, Esq.  
Bledsoe and Schadt, P.C.  
2525 Blueberry, Suite 206  
Anchorage, AK 99503  
(907) 276-8003



Bruce Chertkow  
7033 Henderson Loop  
Anchorage, AK 99507  
(907) 274-1651

copy: Rep. Robin Taylor  
file

March 7, 1988

Representative Kay Brown  
3111 "C" Street  
Anchorage, Alaska 99503

Dear Ms. Brown:

This letter is addressed to you as co-chairperson of the Housing and Banking subcommittee of the Legislature Joint Economic Recovery Committee and, in response to the front page article in the March 5, 1988 Daily News entitled "Court Boosts Loan Risk in Real Estate."

I have no doubt that the Legislature will be reviewing existing laws pertaining to foreclosure and litigation due to the recent Supreme Court decisions affirming lenders ability to sue directly on the promissory note rather than first looking towards the real estate securing the obligation. In reviewing such proposals and if new legislation is drafted, please, at all times, keep in mind the word "commercial."

There is a vast difference between Mom and Dad buying a home and the investor financing commercial real estate for speculation or as an investment. If new legislation is drafted, the two should be addressed separately, i.e., commercial versus residential or primary residence. Fair? Laws already allow the lenders to pursue a money judgment against consumer debt rather than repossession. The fact is, in many cases lenders repossess first then obtain a judgment on the deficiency balance. Another differentiation in contracts is the "in home sale" or "second deed of trust... ~~on a primary residence~~" both of which, except for commercial usage, provide a three-day rescission period.

Speaking of Mom, Dad and being fair, what happens to Mom and Dad when they sell their property to an investor, taking back a second deed of trust for their retirement income? The investor has taken the tax depreciation benefit, allowed the property deteriorate to the point that it is not worth what is owed to the bank, has made the decision not to "feed" the property and now defaults the loan. If Mom and Dad's only recourse is to judicially foreclose (1 year plus time frame) and the bank does a summary foreclosure first (4 to 6 month time frame), Mom and Dad lose their ability to collect even though the investor can well afford to pay them.

When a banker makes a decision to lend many factors are taken into consideration. First is the ability to pay. That includes a review of the balance sheet and an analysis of the borrower's net worth. Second is the collateral. If institutions desired to own real estate they would purchase it--not make a loan and then foreclose.

Judicial versus Non-judicial foreclosure. True, laws allow for deficiency balances; the judicial foreclosure. After spending thousands of dollars and several months in court (at times, in excess of one year), the lender has a deficiency judgment. The lender also has real estate to liquidate but now with a one-year redemption period and increased holding costs. Within that time period the borrower has been able to convert or liquidate assets, forcing the only recovery to be the real estate.

Are not the people requesting tightened legislation the same who want to know how we can keep real estate in the hands of the people? With ability to pursue the note rather than the property, the people retain the real estate and control the market.

William McNall is quoted in part by saying "Prices are set in the marketplace by supply and demand." I would like to add one more condition to "price setting." That is, the lender's willingness to lend. We are already experiencing larger down payment requirements and stricter lending guidelines. By limiting the lenders ability to recapture funds, losses are higher causing interest rates to climb and increasing loan restrictions.

One of the questions we must ask is who is the investor? All the bank desires is to recover funds loaned out. The lender invests in people. People invest in real estate. Why should the bank take a loss if their investment has the ability to pay?

The Daily News reports that lawyer Ralph Cushman has concerns over increased bankruptcies. "You start garnishing their wages and picking up their toys--the airplanes and the boats--and money and things, and they're going to look for a way to beat you." What is failed to be realized here is that the borrower has assets which could be used to pay his debts. The boats, airplanes and other pleasures of life were taken into consideration at the time of loan approval. The "toys" could be converted to cash and the cash used to repay the lender.

I do not envision lenders abusing the power of litigation. Costs versus recovery is analyzed prior to litigation: (1)

It is unprofitable to litigate principal and (2) it does not benefit the bank to throw good money after bad. If there is no ability to pay or no assets to pursue, the lender would look towards the real estate first.

Banks have always had the opportunity to litigate their contract Notes. Borrowers rights and opportunity to be heard in court remain the same. The reaffirmation of law only makes the format clear. The boats, airplanes and other assets never were exempt from due process and this clarity of law does not change that.

All financial institutions are requesting is the ability to pursue recovery at the least expense possible. To enable recovery enhances the ability to lend.

Ms. Brown, if I sound like a banker it's because I am. I have been in the business of credit and collections in excess of sixteen years. I am also a husband and family man. We bankers are no different than anyone else on the street. If we lose our jobs, we too face financial hardships and the same laws as the non-banker.

If you desire to discuss the contents of this letter, please feel free to contact me.

Sincerely,



Bruce Chertkow  
7033 Henderson Loop  
Anchorage, AK 99507

copy: Virginia Collins  
Red Boucher  
Ramona Barnes  
Jan Falks  
Walt Furnace  
Max Gruenberg  
Rick Halford

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SB515

Dear Members of the House Judicial Committee:

For the good of Alaska, please take time to read this, give it honest consideration and vote to save the people who believed in Alaska enough to invest their life and economic well being in our beautiful state.

Under existing law, if you owe money on a piece of real estate and get into trouble to the point of becoming delinquent, the lender does not have to foreclose. Lender sues for face value of the note. When he wins the judgement he doesn't have to take the subject property. He can take anything you've got.

Example: You, a borrower has a four plex or six plex. Said building has a note against it for \$250,000.00. Payments are \$2,541.00 pr. mo., Income \$4,500.00 pr. mo., Costs are \$1,750.00 pr. mo.. Because of declining market, borrower suddenly finds himself making only \$2,250.00 pr. mo. gross income. Costs are still \$1,750.00, P & I is still \$2,541.00 equaling \$4,291.00. Forty two ninety one less income of twenty two fifty equals two thousand forty one in cash call. You, the borrower, struggles along making cash calls for eighteen months to two years and finally become delinquent.

Lender doesn't foreclose - he sues on note. He wins. He takes you, the borrower's house and realizes \$75,000.00 on that after paying the first. He takes you, the borrower's vacation house and realizes \$40,000.00 after expenses. You the borrower has some land that you aren't able to sell or you wouldn't have gotten delinquent yet. The lender takes it for \$30,000.00. Now the lender has gotten \$165,000.00 against the \$250,000.00. All you, the borrower have lost is your home, your cabin, some bare land and the \$48,984.00 (that's the 2,041.00 cash call you made for two years trying to live up to your obligation)

Now the Lender forecloses. Straight foreclosure - he goes to the court house steps and bids \$90,000.00. He's just picked up a \$250,000.00 multi-unit for \$90,000.00 that is only a paper transaction. Rental income is still \$2,250.00 and going to go up eventually, building expenses are still \$1,750.00. Lender is making \$500.00 a month and all he had to do was destroy you, the borrower. Oh yeah, by now you've lost your business and, in all probability, your health and your marriage and ten to twenty people you used to employ are out of a job.

If the lender must foreclose against the multi-unit first, it is stated collateral after all, he might have gotten \$150,000.00 for it. Then the cabin for \$40,000.00 and the land for \$50,000.00 and borrower has to come up with \$10,000.00 to save his house. The lender has gotten full value. The borrower has taken a beating but not anywhere near as traumatic as the first scenario. He may even survive with his health, his marriage and his business.

Two other quick examples: your son or daughter has just graduated

from college. As a graduation present you help with the purchase of a small condo. You helped with the down payment and co-signed the note. All of a sudden condos are unsellable. Your offspring is seriously injured in an auto accident. You are faced with horrendous medical bills. The condo loan becomes delinquent. Is the lender going to take the condo back? Hell no! Your house is going to do him a lot more good. Hope you can be happy in the condo.

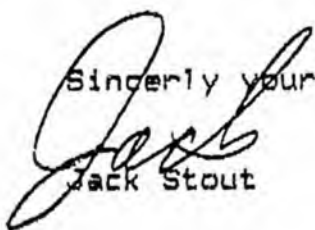
You and some of your friends form a partnership and put up an office building. The building is half full. Finally it's delinquent. Lender sues each partner one at a time. By the time Lender has destroyed each of you, the deficiency on the original note is 10 to 15% of the original face value. Lender goes to court house steps. Nobody is left to bid against him and he's gotten away with destroying some damned fine people and stealing a building for 10 - 15% of its value.

You ask, why would a lender sue on a note when it is going to do so much damage to the community. Well, note buyers are supposed to get the largest, fastest return on the dollar invested. That is their responsibility to the stock holders. As a reasonably prudent employee of a large brokerage house or bank in New York or Tokyo he had better sue on that note. And as FDIC is getting ready to sell \$300,000,000.00 worth of notes in June of 88 in New York City in blocks of \$50,000,000.00 guess who is going to buy them.

Anybody who thinks the existing law is fair or good for Alaska hasn't thought it through. Lenders can't survive without borrowers. Where are lenders going to find borrowers willing to face a 200% at risk in even a healthy economy. Pass S-515 or sit back and watch Alaska become the "Appalachia of the North".

S-515 merely says that lending institutions will live by the rules that they've always lived with in the past.

Sincerely yours,



Jack Stout

Excerpt from another letter by  
Jack Stout

The face value of our note is \$2,377,000.00. It is worth about \$600,000.00 on the open market. It will probably sell outside for 250,000.00. An outside bank will finance 225,000.00. Local banks will get to finance zilch. FDIC has already scheduled to auction 300,000,000.00 in notes. Historically, they sell primarily to organizations from outside the community involved for 10 to 20 cents on the dollar. This is bad for a number of reasons: it leads to further depression of a local economy through lowered tax base, absentee ownership and, indirectly, loss of employment positions.

Examples of the above are as follows: A piece of property is developed with an anticipated value of Two and a half million dollars based upon a rental rate of Two dollars pr. sq. ft.. Actual income is Ninety Cents pr. because of economic downturn. After all the expenses of running the building, there's 8500 pr. mo. for debt service. Using a bankers rule of 115%, there's 7400 pr. mo. for payments which will cover a little less than 800,000.00 at today's interest rate. After taking out fees and points, the best an owner can offer is 725,000.00 against a 2,500,000.00 note. That's 0.25 on the dollar. That's also 800,000.00 borrowed locally that will help feed the local economy. Assuming the owner is a local businessman this will also save the jobs of however many people he employs.

FDIC will not allow the above possibility to happen. Their policy is to sell the note to someone else, most probably from another state for \$250-\$300,000.00. First however FDIC will sucker the owner, with promises of consideration, into giving them all his personal information to pump the price from some one else up as much as possible.

Okay, so now FDIC has lost 400-500,000.00 by selling out of state. The local banks have lost the chance to loan out 800,000.00 on a good risk loan. There's another piece of property owned by someone from outside and some number of jobs will surely disappear. The outside buyer will come in and sue on the note for face value and the guy whose lost it all will have to file bankruptcy to protect himself from the raider. Oh well, at least the attornies will make money.

Based upon the above scenario, our case alone is going to wipe out at least 8 families economically, including our retirements. It will also wipe out at least 22 jobs in the local economy. Measure our little problem against the \$300,000,000.00 that FDIC is about to auction and the scope of what is about to happen to the cash flow in Alaska is on a par with a hand grenade going off in a closed room - a small room.

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

Recvd 4:30pm

POUCH Y STATE CAPITOL  
BUREAU ALASKA 99811  
907 465 3800

MEMORANDUM

May 2, 1988

SUBJECT: Interpretation of CSSB 515 (Judiciary)

TO: Senator Jay Kerttula  
Chair, Senate Judiciary Committee

FROM: Theresa L. Bannister JB  
Legislative Counsel

I wish to bring to your attention an interpretative question in CSSB 515 (Judiciary) that you may wish to address while the bill is in the House. Until now I have interpreted sec. 1 of the bill to prevent only the use of nonjudicial foreclosure after a judgment has been obtained in certain circumstances. However, after studying the bill further, I have determined that it is very possible that the section would be interpreted to prevent the use of both nonjudicial and judicial foreclosure in those circumstances. This conclusion is based on the use of the words "remedies under this section" on line 23, page 1 of the bill. AS 34.20.-070(a) discusses both the remedy of ordinary "foreclosure and sale" and nonjudicial foreclosure. The use of "remedies" rather than "remedy" in the bill suggests that the judicial foreclosure remedy is prohibited as well as the nonjudicial foreclosure remedy.

To limit the bill's prohibition to nonjudicial foreclosure, the language on page 1, line 23 should read something like "remedy of nonjudicial foreclosure authorized under this section". To prohibit both types of foreclosure, the bill should be amended to read something like "remedy of judicial foreclosure or the remedy of nonjudicial foreclosure". I suggest that one or the other of the two changes be made in order to make the bill's application clear.

Please contact me if you wish to have any amendments drafted to address the issues mentioned in this memo.

If I may be of further assistance, please advise.

TLB:bb  
b5/085

MAY 2, 1988

CSSB-515 (JUDICIARY)

TO: SENATOR KERTTULA

FROM: BETH

MOVE THE JUDICIARY CS

SB-515 DEALS WITH THE JUDICIAL FORECLOSURE OF PROPERTY AND SLIGHTLY CHANGES THE LAW IN THIS AREA.

IN VERY SIMPLISTIC TERMS, SB-515 WILL AID DEBTORS SO THAT IF A CREDITOR CHOOSES TO UTILIZE JUDICIAL FORECLOSURE AGAINST THEM AND THE CREDITOR OBTAINS A JUDGMENT, THEN THE CREDITOR WILL BE PRECLUDED FROM USING NON-JUDICIAL FORECLOSURE TO RECOVER THE SECURITY ON THE DEBT.

THIS WILL AID IN ADDING MORE CERTAINTY TO THE PROCEEDINGS AND WILL RE-STATE WHAT MANY BELIEVED THE LAW TO BE BEFORE A RECENT SUPREME COURT CASE, MOENING V. ALASKA MUTUAL BANK, DECIDED IN FEBRUARY OF THIS YEAR.

MOENING HELD THAT EVEN THOUGH THE ALASKAN ANTI-DEFICIENCY PAYMENT STATUTE PROHIBITS A DEFICIENCY JUDGMENT FOLLOWING EXERCISE OF A POWER OF SALE IT DOES NOT PRECLUDE THE EXERCISE OF A POWER OF SALE FOLLOWING A JUDGMENT ON THE NOTE. UNDER COMMON LAW, A PRIOR SUIT ON THE NOTE DOES NOT PRECLUDE

SUBSEQUENT JUDICIAL OR NONJUDICIAL FORECLOSURE OF THE SECURITY. SB-515 CLARIFIES THAT IF A JUDGMENT IS OBTAINED THEN AS A PRACTICAL MATTER THE DEED OF TRUST, OR THE NOTE SECURED BY THE DEED OF TRUST, WILL BE EXTINGUISHED AND THE CREDITOR WILL BE BARRED FROM TAKING IT IF THE CREDITOR HAS ELECTED TO PURSUE THE REMEDY OF JUDICIAL FORECLOSURE AND HAS HIS JUDGMENT. THE CREDITOR WILL, HOWEVER, RETAIN HIS RIGHTS IN A BANKRUPTCY PROCEEDINGS.

*Law  
will  
get*

SENATE JUDICIARY HELD MANY HEARINGS ON SB-515 AND A SIMILAR BILL, SB-305. THE ENTIRE COMMITTEE WANTED TO TRY TO GIVE SOME RELIEF TO THOSE DEBTORS WHO ARE CAUGHT IN OUR CURRENT ECONOMIC CRUNCH. IN DOING SO WE TACKLED ONE OF THE THORNIEST AREAS OF LAW IMAGINABLE. SB-515 IS THE RESULT OF SENATE JUDICIARY'S EFFORT TO MAKE AT LEAST ONE SMALL CHANGE IN HOPES OF SOME CERTAINTY ON BEHALF OF DEBTORS WHO ARE BEING FORECLOSED UPON AND WHO STAND TO LOSE EVERYTHING.

April 20, 1988

SENATE JOURNAL

p. 3115

SB 515

SENATE BILL NO. 515 by the Judiciary Committee, entitled:

"An Act relating to foreclosure of a deed of trust or a suit on a deed of trust note; and providing for an effective date."

was read the first time and referred to the Judiciary Committee.

April 21, 1988

SENATE JOURNAL

p. 3148

SB 515

Senator Kerttula, Chairman, moved and asked unanimous consent that the five-day notice and publication requirements be waived on SENATE BILL NO. 515 "An Act relating to foreclosure of a deed of trust or a suit on a deed of trust note; and providing for an effective date" for the Judiciary Committee meeting on April 22. Without objection, it was so ordered.

April 30, 1988

SENATE JOURNAL

p. 3317

SB 515

The Judiciary Committee considered SENATE BILL NO. 515 "An Act relating to foreclosure of a deed of trust or a suit on a deed of trust note; and providing for an effective date" and recommended it be replaced with

CS FOR SENATE BILL NO. 515(Judiciary)

and do pass. The report was signed by Senator Kerttula, Chairman and concurred in by Senators Josephson, Rodey, Sturgulewski and Faiks.

Zero fiscal note published today from Senate Judiciary Committee.

SENATE BILL NO. 515 was referred to the Rules Committee.

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

MARSHALL LEE CONRAD and )  
COLLEEN M. CONRAD, )  
 )  
Appellants/Respondents, )  
 )  
v. )  
 )  
COUNSELLORS INVESTMENT CO., )  
a partnership; BRIAN J. )  
BRUNDIN; BILL LAWRENCE; )  
MARCUS R. CLAPP; JERRY E. )  
MELCHER; and JAMES M. POWELL, )  
 )  
Appellees/Petitioners. )  
\_\_\_\_\_ )

File No. S-1996/2102

O P I N I O N

[No. 3275 - February 26, 1988]

Appeal in File No. S-1996 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, Judge. Petition for Review in File No. S-2102 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Barry Donnellan, Fairbanks, for Appellants/Respondents. Timothy R. Byrnes, James M. Gorski, Hughes, Thorsness, Gantz, Powell, and Brundin, Anchorage, for Appellees/Petitioners.

Before: Matthews, Chief Justice, Rabinowitz, Compton, and Moore, Justices. [Burke, Justice, not participating.]

COMPTON, Justice.

This appeal presents two questions. The first question is whether secured creditors agreed to limit their remedy to nonjudicial foreclosure of their security. The second is whether the creditors' subsequent claim for judicial foreclosure of that security is precluded by the judgment in a prior suit on the note.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

Counsellors Investment Co. (Counsellors)<sup>1</sup> purchased commercial property in Fairbanks from Marshall Lee Conrad and Colleen M. Conrad. In partial payment for the property, Counsellors gave the Conrads a note secured by a second deed of trust.

Counsellors eventually stopped making payments on the note and offered to reconvey the property to the Conrads in satisfaction of the debt. The Conrads declined the offer and sued Counsellors and its partners for a personal judgment on the note (Conrad I).

The superior court entered summary judgment for Counsellors on the ground that the Conrads' "remedy under their note and deed of trust is that provided in Paragraph B6 of the deed of trust and in AS 34.20.070-.135, and that [the Conrads] may not

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1. Counsellors is a general partnership. The partners are Brian Brundin, Bill Lawrence, Marcus Clapp, Jerry Melcher and James Powell.

maintain a suit on the promissory note alone;" in other words, the Conrads' remedy was limited to nonjudicial foreclosure of the security. Since the judgment form submitted by Counsellors was not consistent with some of the court's oral conclusions, the Conrads moved to amend the judgment to clarify whether they had the right to foreclose judicially. The court denied the motion and entered an order prohibiting the Conrads from exercising "any remedy inconsistent with the deed of trust." However, the court struck language in the proposed order which expressly precluded an action for judicial foreclosure.

The Conrads appealed the judgment in Conrad I and filed a complaint for judicial foreclosure and a deficiency judgment (Conrad II). Counsellors moved to dismiss the complaint, arguing that the Conrads' claim for judicial foreclosure was barred by the judgment in Conrad I. The superior court denied the motion to dismiss because "the question of judicial foreclosure was not before the court in the [prior] action" and "the right of the Conrads to maintain this action for judicial foreclosure of a deed of trust is granted by AS 09.45.170." Counsellors petitioned for review. We granted review and consolidated the cases for appeal.

II. CONRAD I: DID THE CREDITORS AGREE TO LIMIT THEIR REMEDY TO NONJUDICIAL FORECLOSURE OF THE SECURITY?

The Conrads argue that they have the right initially to ignore their security and sue on the note, or to file a complaint

for judicial foreclosure. Counsellors does not dispute that a secured creditor generally has that option; however, it contends that the deed of trust expressly limits the Conrads' remedy to nonjudicial foreclosure.

In Moening v. Alaska Mutual Bank, \_\_ P.2d \_\_, Op. No. 3274 at 6 (Alaska, February 26, 1988), we held that absent an agreement to the contrary, a secured creditor has the option whether to sue on the note or foreclose the security. If the creditor sues on the note and obtains a personal judgment which is returned unsatisfied, the creditor may then foreclose the security. Id.; AS 09.45.200.<sup>2</sup> In determining whether the parties agreed to limit the creditor's remedies, the note and trust deed are construed together and interpreted to carry out the reasonable expectations of the parties. \_\_ P.2d at \_\_, Op. No. 3274 at 7.

The deed of trust note here in issue states that Counsellors "promise(s) to pay" the Conrads the loan amount. In the event of default, the Conrads may at once declare the entire debt due and payable. The note does not indicate that

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2. AS 09.45.200 provides:

During or after the pendency of an action for the recovery of a debt secured by a lien mentioned in AS 09.45.170, an action cannot be maintained for the foreclosure of the lien unless judgment is given in that action that the plaintiff recover the debt or a part of it, and an execution issued in the action against the property of the defendant is returned unsatisfied in whole or in part.

Counsellors is not liable for payment; therefore, the Conrads are entitled to sue on the note or foreclose judicially unless the deed of trust provides otherwise.

Counsellors argue that Paragraph B6 of the deed of trust limits the Conrads' remedy to nonjudicial foreclosure:

Upon default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligation hereof, and shall cause such notice to be recorded in the office of the recorder of each recording precinct wherein said real property of [sic] some part thereof is situated.

(Emphasis added). Counsellors reasons that the language "Beneficiary shall execute" must be construed as a limitation on the Conrads' right to do anything else.<sup>3</sup> However, we believe that the only logical interpretation of this language requires the Conrads to execute the notice only after they have "elected" the remedy of nonjudicial foreclosure. The Conrads are entitled to exercise any other remedies permitted by law.

We conclude that the deed of trust does not limit the Conrads to the remedy of nonjudicial foreclosure. The trust deed

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3. See *Fowler v. City of Anchorage*, 583 P.2d 817, 820 (Alaska 1978) ("Unless the context otherwise indicates, the use of the word 'shall' denotes a mandatory intent.")

does not expressly preclude a suit on the note. The fact that a creditor may foreclose nonjudicially does not imply that it may not foreclose judicially.<sup>4</sup> Because the Conrads' remedies were not expressly waived in the note or deed of trust, they had the right to sue on the note or foreclose the security. Therefore, the superior court erred as a matter of law when it entered summary judgment against the Conrads on their right to sue on the note.<sup>5</sup>

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4. AS 34.20.070 (a) provides in part:

If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken, the trustee, in addition to the right of foreclosure and sale, may execute the trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court,

(Emphasis added).

5. The superior court appeared concerned that the Conrads filed suit on the note without providing Counsellors any notice of default. Paragraph B6 of the deed of trust requires the Conrads to record a notice of default as one of the steps leading to nonjudicial foreclosure. However, no notice is required if the Conrads pursue one of the other remedies available to them as secured creditors. See Smith v. Certified Realty, 585 P.2d 293, 294 (Colo. App. 1978), aff'd, 575 P.2d 1043 (Colo. 1979) (debtor has no equitable right to cure default in an action brought solely on a promissory note).

III. CONRAD II: IS THE CREDITORS' CLAIM FOR JUDICIAL FORECLOSURE PRECLUDED BY THE PRIOR SUIT ON THE NOTE?

Counsellors argues that the Conrads' claim for judicial foreclosure is precluded by the judgment on the note. The Conrads contend that judicial foreclosure was not addressed in Conrad I.

We described the claim preclusive effect of a prior judgment in State v. Smith, 720 P.2d 40, 41 (Alaska 1986), as follows:

Under the doctrine of res judicata (claim preclusion), a judgment on the merits of a controversy bars subsequent suits between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit. Pankratz v. State, Department of Highways, 652 P.2d 68, 74 (Alaska 1982); Calhoun v. Greening, 636 P.2d 69, 71-72 (Alaska 1981). The Restatement (Second) of Judgments § 24(a) (1982) states that the claim extinguished by the first judgment:

includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

A mere change in the legal theory asserted will not avoid the preclusive effect of the first judgment. Pankratz, 652 P.2d at 74.

Arguably, Conrad II is barred under this reasoning. Conrad I involved the same parties and resulted in a judgment on the merits. The Conrads could have joined a claim for judicial

foreclosure with their claim for judgment on the note. Thus, it is irrelevant whether the Conrad I court ruled on this issue.<sup>6</sup>

On the other hand, the common law permits a creditor to judicially foreclose a security following an action on the note. E.g., Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg., 393 P.2d 749, 751 (Colo. 1964); Berg v. Liberty Fed. Sav. & Loan Ass'n, 428 A.2d 347, 348-49 (Del. 1981); Klondike, Inc. v. Blair, 211 So. 2d 41, 42-43 (Fla. App. 1968). Moreover, AS 09.45.200 permits an action for judicial foreclosure "after the pendency of an action for the recovery of a [secured] debt," provided that the creditor prevails in the prior action and its judgment remains unsatisfied in whole or in part.<sup>7</sup>

We believe that this situation is best viewed as an express statutory exception to general principles of res judicata. A creditor need not join its claim for judicial foreclosure in the suit for recovery on the note at the risk of losing its security. In one sense, the subsequent foreclosure may be considered a special form of execution on the prior

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6. To the extent that Counsellors argues that this issue is precluded by Conrad I, it is relevant whether the first court ruled on the judicial foreclosure question. We agree with the Conrads that the superior court did not rule that the Conrads are limited to nonjudicial foreclosure; despite Counsellors' best efforts to obtain a decision on this question, the court left it unresolved.

7. See AS 09.45.200, supra note 2.

judgment for the creditor. Under AS 09.45.200, the creditor may bring these claims consecutively.<sup>8</sup>

The decision of the superior court in File No. S-1996 is REVERSED; the decision in File No. S-2102 is AFFIRMED. The cases are REMANDED to the superior court for further proceedings. The Conrads may elect whether to proceed with the suit on the note or the foreclosure.

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8. However, when the creditor resorts first to judicial foreclosure, failure to join its claim for a deficiency judgment may result in claim preclusion. See AS 09.45.170; see also Darnell v. Denton, 669 P.2d 981, 983 (Ariz. App. 1983); but see Perpetual Bldg. & Loan Ass'n v. Braun, 242 S.E.2d 407 (S.C. 1978).

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD J. MOENING and )  
COLLEEN M. MOENING, )

Appellants, )

v. )

ALASKA MUTUAL BANK, )

Appellee. )

File No. S-1980

O P I N I O N

[No. 3274 - February 26, 1988]

Appeal from the Superior Court of the State  
of Alaska, Third Judicial District, Anchorage,  
Milton M. Souter, Judge.

Appearances: Francis J. Nosek, Jr. and Kelly  
Fisher, Anchorage, for Appellants. Gordon F.  
Schadt and Milford H. Knutson, Anchorage, for  
Appellee.

Before: Matthews, Chief Justice, Rabinowitz,  
Compton, and Moore, Justices. [Burke,  
Justice, not participating.]

COMPTON, Justice.

This appeal presents three questions. The first question is whether a secured creditor initially may ignore the security and sue for a personal judgment on the underlying debt, absent an agreement to the contrary. The second is whether the creditor agreed to limit its remedy to foreclosure of the security. The third is whether the suit on the debt extinguishes the security as a matter of law..

#### I. FACTUAL AND PROCEDURAL BACKGROUND

Harold Moening and Ronald Rivard became business associates in 1983. Prior to their association, Rivard was the sole shareholder of Quest Enterprises, Inc. (Quest). Moening agreed to guarantee Quest's debts to Alaska Mutual Bank (AMB) in exchange for a 40% interest in the business.<sup>1</sup>

To effectuate the guarantee, Moening executed a \$700,000 deed of trust note in favor of AMB.<sup>2</sup> The note was secured by a deed of trust on Moening's home, and on the property which originally secured the Quest obligations extinguished by the consolidation. Moening defaulted. Later Moening executed a secured promissory note for \$33,000 to guarantee the debt for

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1. Colleen Moening is a named defendant because she co-signed many of the obligations with her husband Harold Moening.

2. The principal was payable on demand in a single installment. Absent a demand, the note was due on May 7, 1985.

property purchased by Quest in Peters Creek.<sup>3</sup> Moening defaulted on this note as well.

AMB filed a complaint against Moening seeking a personal judgment on the notes. It did not foreclose the deeds of trust nor attempt to exercise the power of sale. The superior court entered summary judgment for AMB, concluding that AMB had the right initially to ignore its security and sue on the note. The court entered a money judgment for \$733,000 in principal due on the notes, plus accrued interest, costs, and attorney's fees. In addition, the court ordered that the notes should be filed with the court, marked "Conditionally Cancelled" and, "if subsequent execution on the judgment does not satisfy it, the amount by which it is not satisfied may form the basis of judicial or non-judicial foreclosure of the collateral securing the promissory notes."

Moening appeals on the grounds that (1) as a matter of law, AMB must exhaust the security first; (2) AMB agreed to exhaust the security first; and (3) AMB waived its security by suing on the notes.<sup>4</sup> For the reasons hereinafter set forth, we affirm the judgment of the superior court.

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3. The note was secured by a deed of trust identical to that securing the \$700,000 note. The trust deed is not part of the record.

4. Moening also argues that AMB failed to join indispensable parties (Rivard and Quest). Alaska R. Civ. P. 19(b). This is an action to collect a debt. Neither Rivard nor

(Footnote Continued)

## II. THE RIGHTS OF A SECURED CREDITOR

Moening argues that a secured creditor may not ignore the security and sue on the underlying obligation; it must first exhaust the security. AMB contends that a secured creditor has the option to foreclose or sue on the note, and that it may pursue these remedies concurrently or consecutively.

Statutes provide a secured creditor with a variety of remedies when the debtor defaults. For example, the creditor may bring an action for judicial foreclosure. AS 09.45.170.<sup>5</sup> The creditor is then entitled to a deficiency judgment against the debtor. Id.; Smith v. Shortall, 732 P.2d 548, 549 (Alaska 1987); Suber v. Alaska State Bond Comm., 414 P.2d 546, 555-56 (Alaska

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(Footnote Continued)

Quest was a party to the note and neither has an interest in this lawsuit. Civil Rule 19(a)(2). Moreover, their absence does not preclude granting complete relief between Moening and AMB. Civil Rule 19(a)(1). The fact that Moening may have claims against Rivard arising from other agreements, or that Rivard and Quest may have interests of record in the security, does not render them indispensable to AMB's suit on the note.

5. AS 09.45.170 provides:

A person having a lien upon real property, other than that of a judgment, whether created by mortgage or otherwise, to secure a debt or other obligation may bring an action to foreclose the lien. In the action, the court may direct the sale of the encumbered property or a portion of it and the application of the proceeds of the sale to the payment of costs, expenses of sale, and the amount due the plaintiff. The judgment shall also determine the personal liability of a defendant for the payment of the debt secured by the lien and be entered accordingly.

*Similar to  
deficiency*

1966). The debtor has a statutory right of redemption for twelve months after the sale is confirmed. AS 09.45.190, 09.35.250.

The creditor may elect to conduct a nonjudicial foreclosure sale if the deed of trust provides for this remedy. Suber, 414 P.2d at 555-56; AS 34.20.070(a).<sup>6</sup> The creditor is not entitled to a deficiency judgment following a nonjudicial foreclosure. Smith, 732 P.2d at 549; AS 34.20.100.<sup>7</sup> The debtor is not entitled to redeem the property, unless the deed of trust provides otherwise. AS 34.20.090(a).

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6. AS 34.20.070(a) provides in part:

If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken, the trustee, in addition to the right of foreclosure and sale, may execute the trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court

(Emphasis added).

7. AS 34.20.100 provides:

When a sale is made by a trustee under a deed of trust, as authorized by AS 34.20.070 -- 34.20.130, no other or further action or proceeding may be taken nor judgment entered against the maker or the surety or guarantor of the maker, on the obligation secured by the deed of trust for a deficiency.

Statutes also refer to an action on the underlying obligation. Alaska Statute 09.45.200 provides:

During or after the pendency of an action for the recovery of a debt secured by a lien mentioned in AS 09.45.170, an action cannot be maintained for the foreclosure of the lien unless judgment is given in that action that the plaintiff recover the debt or a part of it, and an execution issued in the action against the property of the defendant is returned unsatisfied in whole or in part.

The clear implication of this section is that the creditor may sue directly on the note without first foreclosing the property. Moreover, if the creditor prevails in the legal action and cannot satisfy the judgment against the debtor's personal property, it may then maintain an action for judicial foreclosure of the security.

The superior court order also permits AMB to foreclose nonjudicially if the judgment on the note is returned unsatisfied. Moening argues that, even if AMB initially may ignore the security, it may not foreclose nonjudicially after obtaining a judgment on the note.

The anti-deficiency statute prohibits a deficiency judgment following exercise of a power of sale; however, it does not preclude the exercise of a power of sale following a judgment on the note. AS 34.20.100, supra note 7. Under the common law, a prior suit on the note does not preclude subsequent judicial or nonjudicial foreclosure of the security. Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg., 393 P.2d 749, 751 (Colo. 1964); Berg

*Common law.*

v. Liberty Fed. Savings & Loan, 428 A.2d 347, 348-49 (Del. 1981); Klondike, Inc. v. Blair, 211 So. 2d 41, 42-43 (Fla. App. 1968). The doctrine of election of remedies does not apply, because foreclosure and a suit on the note are not inconsistent remedies. Klondike, 211 So. 2d at 42; Norwood Realty v. First Fed. Savings & Loan, 109 S.E. 2d 844 (Ga. App. 1954); Skach v. Lydon, 306 N.E. 2d 482, 485 (Ill. App. 1973). See also 55 Am. Jur. 2d Mortgages § 543, at 523 (1971).

We conclude that the statutes permit a secured creditor initially to ignore the security and sue on the note. Once the creditor obtains a personal judgment which is returned unsatisfied in whole or in part, the creditor may judicially or nonjudicially foreclose the security.<sup>8</sup>

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8. In Smith v. Shortall, 732 P.2d at 549, we held that a spouse who nonjudicially foreclosed a deed of trust securing her former husband's property division obligation was not entitled to a deficiency judgment under AS 34.20.100. In dicta we stated:

The obligation was evidenced by a promissory note and secured by a deed of trust. When [Debtor] defaulted on the obligation, [Creditor] had several options. She could have waived the security of the deed of trust and sued on the note. Or, she could have brought an action to judicially foreclose the deed of trust, retaining the right to recover a deficiency judgment. AS 09.45.170; Suber v. Alaska State Bond Committee, 414 P.2d 546, 555 (Alaska 1966). Instead, [Creditor] elected the remedy of non-judicial foreclosure. By electing this remedy, [Creditor] lost her right to recover a deficiency judgment against [Debtor].

(Footnote Continued)

### III. THE PARTIES' AGREEMENT

When a note is executed and secured by a deed of trust, the documents are read and construed together as one contract to ascertain the parties' intent. In re Sutton Inv., 266 S.E.2d 686, 689 (N.C. App. 1980), rev. denied, 301 N.C. 90 (1980); Herrington v. Murphy, 446 P.2d 595, 597 (Okla. 1968). The contract is interpreted to give effect to the reasonable expectations of the parties, looking to the language of the contract, the circumstances surrounding its adoption, and case law interpreting similar agreements. Craig Taylor Equip. v. Pettibone Corp., 659 P.2d 594, 597 (Alaska 1983). Ambiguities are construed in favor of the debtor. Patton v. First Fed. Sav. & Loan Ass'n, 578 P.2d 152, 156 (Ariz. 1978).

Any agreement between the parties that the creditor will not seek a deficiency judgment and will look only to the security is enforceable. Stern v. Itkin Bros., 385 N.Y.S.2d 753, 754 (N.Y. Sup. 1975).<sup>9</sup> Such an agreement is enforced even when the security is destroyed by foreclosure of a superior lien. The

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(Footnote Continued)

Id. We disapprove of this dicta insofar as it suggests that a suit on the note constitutes a legal waiver of the security.

9. A rider to the Stern mortgage provided in part:

On default hereunder, no deficiency judgment shall be sought, rendered or entered against the mortgagor and mortgagees will look only to the mortgaged premises.

385 N.Y.S.2d at 754.

formerly secured inferior creditor is not entitled to sue on the note. Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 39 (Mo. App. 1980).<sup>10</sup>

The \$700,000 obligation was evidenced by a "deed of trust note." By its terms, Moening expressly promised to pay principal and interest. The note also stated:

[E]very party signing . . . this note hereby . . . binds himself thereon as a principal, . . . and promises, if this note is not timely paid and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees.

(Emphasis added). The note constitutes a personal obligation of Moening. It does not preclude AMB from suing directly on the note.

The \$33,000 debt is evidenced by a "single payment promissory note" in which Moening expressly promised to pay principal and interest. In case of default, Moening agreed to pay AMB's collection costs and attorney's fees. It does not limit AMB's ability to sue Moening.

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10. The Kaiser note contained the following provision:

No personal liability shall be asserted or be enforceable against the maker, it being intended that the sole remedy of the holder hereof be by the foreclosure of the Deed of Trust and Security Agreement . . . .

596 S.W.2d at 39 n.1.

The deeds of trust securing the loans contain a power of sale provision permitting nonjudicial foreclosure. The trust deeds also expressly allow judicial foreclosure.<sup>11</sup> They do not limit the creditor's right to ignore the security and sue on the note.

#### IV. CANCELLING THE NOTES AND TRUST DEEDS

When AMB submitted a proposed judgment on the notes, Moening objected because the judgment did not include an order cancelling the notes and deeds of trust under Civil Rule 78(d).<sup>12</sup> AMB submitted the original notes to the court, but did not submit the trust deeds. AMB requested that the notes not be cancelled in case the personal judgment was returned unsatisfied. The superior court ordered that the notes be marked "Conditionally

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11. The trust deed states in part:

In the event that this Deed of Trust is foreclosed as a mortgage and said property sold as a foreclosure sale [the purchasers may make necessary repairs or alterations] .

. . .

12. Alaska R. Civ. P. 78(d) provides:

In all cases in which a judgment upon a written instrument is entered, such instrument shall be filed with the court, and unless the court otherwise orders, it shall be cancelled by marks and writing upon its face. The clerk shall retain the same in the files unless otherwise directed by the court.

Cancelled." Moening argues that the superior court erred by failing to unconditionally cancel the notes and trust deeds, entering the order without adequate briefing, and entering the order after the notice of appeal was filed.

When judgment is entered on a written instrument, the instrument shall be filed with the court and cancelled on its face, unless the court orders otherwise. Civil Rule 78(d). We perceive no reason why a secured note should not be subject to this general rule. The note merges with the judgment, and any further proceedings will be to enforce the judgment rather than the note.

In contrast, the deeds of trust should neither be filed with the court nor cancelled:

[A] judgment recovered upon a debt secured by a mortgage does not merge the mortgage nor operate as a discharge, abandonment, or release of the mortgage security.

. . . The mortgage continues to secure such debt and is not released, discharged, or satisfied by a judgment on the debt, note, or bond. Such judgment stands subordinate to the mortgage lien.

Silver v. Williams, 175 A.2d 673, 676 (N.J. Super. Ct. Ch. Div. 1961) (emphasis in original), rev'd on other grounds, 178 A.2d 649 (N.J. Super. Ct. App. Div. 1962). In essence, the creditor ends up with a secured judgment.

Although the superior court could have simply cancelled the notes, it had discretion under the rule to order otherwise.

The conditional cancellation order does not constitute an abuse of that discretion.<sup>13</sup>

AFFIRMED.

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13. The record does not support Moening's assertion that the conditional cancellation order was entered after Moening filed a notice of appeal. The order was entered on January 7. The notice of appeal contains an initial filing stamp of December 19; however, that stamp was cancelled and the notice shows a second stamped filing date of January 7.

ALASKA STATE SENATE

JOE P. JOSEPHSON  
DISTRICT H ANCHORAGE  
3111 C STREET, SUITE 350  
ANCHORAGE, ALASKA 99503  
(907)561-7611

WHILE IN JUNEAU  
P.O. BOX V  
JUNEAU, ALASKA 998  
(907) 465-4525



SB 515

April 8, 1988

*Plans Belt  
Plans introduce*

APR 3 1988

The Honorable Jalmar Kerttula  
Chair  
Senate Judiciary Committee  
Alaska State Senate  
P.O. Box V  
Juneau, Alaska 99801

Dear Senator Kerttula:

I am enclosing for your consideration a draft bill entitled "an Act relating to judicial and nonjudicial foreclosures".

The Senate Committee on Economic Recovery adopted the concepts contained in the draft and has recommended that the bill be referred to your Judiciary Committee for introduction, and, in addition, that a Judiciary Committee bill, if introduced, should incorporate the concepts contained in HB 549, entitled "an Act relating to notice requirements on the use of a deed of trust".

The enclosure is an effort to reverse recent decisions of the Supreme Court of Alaska regarding creditor's rights in foreclosure situations. As a member of the Judiciary Committee and as a member of the Committee on Economic Recovery, I would recommend that legislation be sponsored through the Judiciary Committee for consideration of the Senate..

Please let me know if you desire additional information or background.

With best wishes, I am

Sincerely,

*Joe Josephson*

Joe P. Josephson  
State Senator

JPJ:rak  
Enclosure

cc: Senator Arliss Sturgulewski  
Senator Lloyd Jones

3/28  
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HB  
549  
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5-2103A ✓  
Bradley  
3/28/88

1 IN THE SENATE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to judicial and nonjudicial foreclo-  
7 sures."

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

9 \* Section 1. AS 09.45.170 is amended to read:

10 Sec. 09.45.170. JUDGMENT ON FORECLOSURE OF LIEN. A person  
11 having a lien upon real property, other than that of a judgment or  
12 deed of trust, whether created by mortgage or otherwise, to secure  
13 debt or other obligation may bring an action to foreclose the lien.  
14 In the action, the court may direct the sale of the encumbered prop-  
15 erty or a portion of it and the application of the proceeds of the  
16 sale to the payment of costs, expenses of sale, and the amount due the  
17 plaintiff. The judgment shall also determine the personal liability  
18 of a defendant for the payment of the debt secured by the lien and be  
19 entered accordingly.

20 \* Sec. 2. AS 09.45.170 is amended by adding a new subsection to read:

21 (b) A deed of trust may be foreclosed only under AS 34.20.070 .  
22 34.20.135.

23 \* Sec. 3. AS 34.20 070(a) is amended to read:

24 (a) If a deed of trust is executed conveying real property  
25 located in the state to a trustee as security for the payment of an  
26 indebtedness and the deed provides that in case of default or noncom-  
27 pliance with the terms of the trust, the trustee may sell the property  
28 for condition broken, the trustee, in addition to the right of fore-  
29 closure and sale, may execute the trust by sale of the property, upon

1 the conditions and in the manner set forth in the deed of trust,  
2 without first securing a decree of foreclosure and order of sale from  
3 the court, if the trustee has complied with the notice requirements of  
4 (b) of this section. If the trust is executed by a suit on the note  
5 and foreclosure and sale by the court, the foreclosure and sale extin-  
6 guishes the deed of trust.

7 \* Sec. 4. AS 34.20.100 is amended to read:

8       Sec. 34.20.100. DEFICIENCY JUDGMENT PROHIBITED. When a sale  
9 authorized under AS 34.20.070 - 34.20.135 is made by a trustee under a  
10 deed of trust, [AS AUTHORIZED BY AS 34.20.070 - 34.20.130,] no other  
11 or further action or proceeding may be taken nor judgment entered  
12 against the maker or the surety or guarantor of the maker [,] on the  
13 obligation secured by the deed of trust for a deficiency.

14 \* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).  
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