SB

305

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March 3, 1988

The Honorable Representative Kay Brown
Chairperson
House Judiciary Subcommittee
on Economic Recovery
P.O. Box V
Juneau, Alaska 99811

Re: Amendments to Foreclosure Statutes

Dear Honorable Representative Brown:

Enclosed are the proposed amendments and deletions of the foreclosure statutes. I wish to amplify the need for legislative action. In further discussion with bank counsel I am advised that lenders who now have the power as set forth in Moening and Conrad not only will use their ability to sue on the note as opposed to foreclosing, but probably have a duty to their shareholders to do so. Certainly lenders who are already aggressively persuing collection efforts will add this "new" tool to their arsenal. It is quicker, less expensive, and has much greater impact on the borrower.

Sincerely yours,

LAW OFFICES OF WILLIAM L. McNALL

By: William L. McNall
William L. McNall

WLM:sel

Enclosure - as stated.

SB 305

Article 3. Foreclosure of Liens.

Delete Sec. 09.45.170. Judgment on foreclosure of lien.

Add new to read as follows:

Sec. 09.45.170. Procedure on default of deed of trust or deed of trust notes for foreclosure of lien. (a) Upon default by a borrower, a secured creditor shall pursue a foreclosure either judicially or nonjudicially.

(b) After issuance of the notice of default, the amount of applicable mortgage insurance, if available, will be applied to the note balance thereby reducing the amount of the unpaid balance of the mortgage prior to further foreclosure action being taken.

(c) In a nonjudical foreclosure, the beneficiary must at the foreclosure sale, bid the fair market value of the property as defined in Section 5 up to the mortgage balance, including costs of sale and attorney's fees.

(d) In a judicial foreclosure, the court, prior to sale, must establish the fair market value of the property.

(e) Fair market value of the property is defined as the real value of the property which should approximate the price a person acting without duress would be willing to sell the property for, and which a person willing and financially able to buy the property would reasonably pay therefore, not for purposes of speculation but for that use to which it has been or may be put. The Legislature finds such real valueshuld be equivalent to the replacement costs as adjusted for wear and tear.

(f) Beneficiary may then apply to the court for confirmation of the sale and recovar a deficiency judgment together with costs and reasonable attorney's fees on the remaining balance of the debt.

Add new Sec. to read as follows:

Sec. 09.45.171. Election of remedies. At the time the foreclosure action begins, lender must elect to proceed judicially or nonjudicially. Once the election is made lender cannot re-elect.

Delete Sec. 09.25.180. Sale of encumbered property.

Add new Sec. to read as follows:

Sec. 09.45.180. Inferior deed of trusts and deed of trust note. In the event a beneficiary of a deed of trust loses the security due to a foreclosure of a superior deed of trust, the beneficiary shall have the right to bring an action directly upon the unpaid balance of the promissory note secured by the deed of trust.

Delete Sec. 09.45.200.

Delete Sec. 09.45.210.

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 OPINION [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.

SB 305

property purchased by Quest in Peters Creek.[3] 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.[4] 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)

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).[6] The creditor is not entitled to a deficiency judgment following a nonjudicial foreclosure. Smith, 732 P.2d at 549; AS 34.20.100.[7] 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.

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.[8]

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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)

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).[10]

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.

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 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.

SB 305

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

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.[3] 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.")

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

judgment for the creditor. Under AS 09.45.200, the creditor may bring these claims consecutively.[8]

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).

SB. 305

APR 1 0 1988

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM April 16, 1988

SUBJECT: Changes in current CSSB 305(Judiciary)

TO: Senator Jay Kerttula
Chair, Senate Judiciary Committee

FROM: Theresa L. Bannister TB
Legislative Counsel

This memo accompanies a new version of CSSB 305(Judiciary) containing two changes requested by John Abbott. The first change rewrites AS 34.21.080(d) to clarify that the secured creditor must exhaust the collateral by judicial foreclosure before obtaining a money judgment for the debt against the debtor. The second change repeals AS 09.45.200; the section was repealed in SB 305, but the repeal was incorrectly deleted from the 4-9-88 committee substitute.

If I may be of further assistance, please advise.

Enclosure

TLB:bb
b5/007

5-1200B
Bannister
4/15/88

APR 1 1988

Original sponsor: Rules/Legislative Council

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 305 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to security interests in real property; and providing for an effective date."

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

* Section 1. PURPOSES AND INTENT. (a) A purpose of this Act is to provide relief to ~~home~~ loan debtors from the effects of the state's severe economic depression.

(b) The legislature declares its intention to

(1) retroactively apply AS 34.21.080 relating to the remedies of a secured party, AS 34.21.330 relating to attorney fees, and AS 34.21.210 - 34.21.290 relating to the right of redemption, added by sec. 2 of this Act, to foreclosure proceedings that are in progress when this Act takes effect, unless the collateral has been sold under AS 34.20.070 before the effective date of this Act, or unless a judgment has been entered in a judicial foreclosure action or breach of contract action before the effective date of this Act;

(2) modify the common law relating to real property security interests that was established in Moening v. Alaska Mutual Bank, Op. No. 3274 (Alaska, February 26, 1988), and in Conrad v. Counsellors Investment Co., Op. No. 3275 (Alaska, February 26, 1988).

* Sec. 2. AS 34 is amended by adding a new chapter to read:

CHAPTER 21. SECURITY INTERESTS IN REAL PROPERTY.

Sec. 34.21.010. POLICY AND SCOPE. (a) This chapter applies to a transaction, regardless of its form, that is intended or that appears under all the circumstances to be intended to create a security

interest in real property in the state.

(b) Each provision of this chapter with regard to rights, obligations, and remedies applies whether title to collateral is in the secured party, the debtor, or a third party.

(c) If a lease is intended as security to the lessor, the lessor's interest is a security interest. If a seller's retention of legal title to real property after the buyer enters into possession is intended as security, the seller's interest is a security interest. Whether a transaction is intended as security is to be determined by the facts of each case; however, the inclusion in a lease of an option to purchase at a price reasonable in the circumstances at the time of contracting does not of itself indicate the lease is intended to create a security interest.

Sec. 34.21.020. TRANSACTIONS EXCLUDED. This chapter does not apply to a lien created by statute or rule of law.

Sec. 34.21.030. COLLATERAL NOT OWNED BY DEBTOR. Unless otherwise agreed, if a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under AS 34.21.320(c), is not liable for the debt or for a deficiency after judicial foreclosure, and has the same right as the debtor to

(1) receive and object to a secured party's notice of intent to sell the collateral;

(2) cure a default under AS 34.21.180;

(3) obtain injunctive or other relief under AS 34.21.340;

(4) recover losses under AS 34.21.340;

(5) receive statements under AS 34.21.040; and

(6) redeem the property under AS 34.21.210 - 34.21.290.

Sec. 34.21.040. REQUEST FOR STATEMENT OF ACCOUNT. (a) A debtor

or the holder of a subordinate security interest in the collateral may request a statement of account between the debtor and secured party as of a specified date. If the debtor makes payments to the secured party's agent, the debtor or the holder of the subordinate security interest shall make the request of the agent; if the debtor makes payments directly to the secured party, the debtor shall make the request of the secured party. A person receiving a written request shall comply with it within 15 days after receipt by sending a written statement of account that includes the principal amount due, accrued interest, other sums due, and the interest rate in effect, including the rate per day for the current interest period, and that indicates the status of an escrow account held by the secured party or the secured party's agent for receiving payments in connection with the loan. If the debtor has requested a statement of account from the secured party's agent and does not receive it within 20 days, the debtor may request it from the secured party. The secured party or the secured party's agent for receiving payments who without reasonable excuse fails to comply with a written request within 15 days after receiving it is liable to the person requesting the statement of account for

(1) all damage caused to that person because of failure to comply; and

(2) $250 without proof of actual damages.

(b) If at the time the request for a statement of account is received the person receiving it no longer has an interest in the obligation or collateral either as secured party or as agent for receiving payments, that person shall, within 15 days after receipt of the request, disclose the name and address of a successor in interest known to that person, and that person is liable for a loss caused to

the debtor as a result of failure to disclose.

(c) Subject to (d) of this section, a debtor is entitled to request a statement of account once every six months without charge. The secured party may charge a fee not exceeding $20 for each additional statement furnished.

(d) If a secured party without request provides annually or more frequently a statement of account containing the information specified in (a) of this section, the secured party may charge a fee not exceeding $20 for a statement requested as of a date within 21 days before or after the date of a periodic statement of account.

(e) If a purchaser or other interested party relies in good faith on a statement of account provided under this section, the secured party may not claim a security interest larger than that shown in the statement of account.

Sec. 34.21.050. ALIENABILITY OF DEBTOR'S RIGHTS. A debtor's rights in collateral may be voluntarily or involuntarily transferred by way of sale, creation of a security interest, attachment, levy or other judicial process, notwithstanding a provision in the security agreement prohibiting a transfer or making a transfer a default.

Sec. 34.21.060. NOTIFICATION OF ASSIGNMENT. (a) A debtor is authorized to pay an assignor of the security agreement until the debtor receives notice that the security agreement has been assigned and that payment is to be made to someone other than the assignor. A notice that does not reasonably identify the rights assigned is ineffective.

(b) If requested by the debtor, the assignee shall, within 30 days after the request, furnish reasonable proof that the assignment has been made. Until the assignee does so the debtor may pay the assignor.

Sec. 34.21.070. RELEASE OF SECURITY INTEREST. (a) A document that releases a security interest evidenced by a recorded security agreement must contain the recording information for that security agreement.

(b) When there is no outstanding secured obligation and no commitment to make advances, incur or fulfill obligations, or otherwise give value under a security agreement the secured party or the secured party's agent shall within 15 days after receiving a written demand by the debtor send the debtor a document legally sufficient to release the security interest.

(c) If the secured party or the secured party's agent fails without good cause to send a document to the debtor as required under (b) of this section, the secured party is liable to the debtor or the debtor's successor in interest for the greater of

(1) $500 without proof of actual damages; and

(2) all damage the debtor or the debtor's successor in interest sustains by reason of the failure.

Sec. 34.21.080. REMEDIES OF SECURED PARTY. (a) If a debtor is in default under a security agreement, the secured party may

(1) bring a civil action that seeks to recover judgment on the secured debt and to foreclose on the collateral;

(2) bring a civil action to foreclose on the collateral;

(3) foreclose on the collateral under AS 34.21.090 - 34.-21.190.

(b) If the debtor has filed for bankruptcy, the secured party may, in addition to the remedies listed in (a) of this section, file a claim in the debtor's bankruptcy as a secured or unsecured creditor.

(c) If collateral is sold under AS 34.21.190, the secured party shall withdraw a claim filed under (b) of this section, the court

shall dismiss an action filed under (a)(1) or (2) of this section in accordance with the rules of court, and, if judgment has been entered in an action filed under (a)(1) or (2) of this section, the secured party shall file a satisfaction of judgment.

(d) A secured party may not recover a money judgment against the debtor until the secured party has foreclosed judicially on the collateral and the proceeds of the sale have been applied to reduction of the debt.

(e) After a sale of collateral under AS 34.21.190, another action or proceeding may not be taken or judgment entered against the former debtor, or against the former debtor's surety or guarantor on the obligation secured by the security agreement for a deficiency.

Sec. 34.21.090. REQUIREMENTS FOR SUMMARY FORECLOSURE. Before the foreclosure procedures under AS 34.21.090 - 34.21.500 may be used,

(1) the security agreement must confer a power of sale upon the secured party or another person;

(2) a default must occur under the security agreement, if under the terms of the security agreement the default makes the power of sale operative; and

(3) the security agreement must be recorded in the recording district in which the collateral being foreclosed is located.

Sec. 34.21.100. PROCEDURE BEFORE SALE. The procedures that must be followed before collateral may be sold under a power of sale, and the minimum time periods before the procedures may be taken are established by AS 34.21.110 - 34.21.150. The content of notices required by those sections is set out in AS 34.21.160 - 34.21.170.

Sec. 34.21.110. TRANSMITTING NOTICE OF DEFAULT. Not less than 30 days after a default the secured party or other person having a power of sale shall cause a written notice of default that meets the

requirements of AS 34.21.160 to be transmitted by first class certified mail, return receipt requested, to the debtor, to the successor in interest of the debtor if known to the secured party, and to all persons actually occupying the collateral whose names are known to the secured party. Due diligence shall be exercised to determine the address of the debtor, or of the debtor's successor in interest, that is most likely to give the debtor notice.

Sec. 34.21.120. RECORDING NOTICE OF INTENT TO SELL. Not less than 30 days after transmittal of the notice of default the secured party or other person having the power of sale shall record a notice of intent to sell the collateral that meets the requirements of AS 34.21.170. The collateral may not be sold within 60 days following the recording of the notice of intent to sell.

Sec. 34.21.130. TRANSMITTING, POSTING, AND PUBLISHING NOTICE OF INTENT TO SELL. After recording the notice of intent to sell, and not less than 45 days before the sale, the secured party or other person having the power of sale shall

(1) after exercising due diligence to determine the address that is most likely to give the person notice, transmit a copy of the notice of intent to sell by first class certified mail, return receipt requested, to

(A) each person who has an interest in or lien or claim of lien against the collateral or a part of it, if the interest, lien or claim is of record at the time the notice of intent to sell is recorded;

(B) each person who is the attorney of record in a pending court action to foreclose a lien or other encumbrance on all or a part of the collateral, if a lis pendens showing the existence of the action is of record on the date the notice of

intent to sell is recorded;

(2) if the state has a recorded lien on the collateral, transmit to the attorney general by first class certified mail, return receipt requested, the notice of intent to sell and so much of the following information as is shown of record regarding each of the recorded state liens that is inferior in priority to the interest of the secured party:

(A) the nature of the lien;

(B) the amount shown on the lien document;

(C) the agency of state government that appears to have caused the lien to be filed; and

(D) the recording information for the lien;

(3) post in a conspicuous place on the collateral a copy of the notice of intent to sell; and

(4) publish the first of three publications of the notice of intent to sell, the publications to be made once a week for three successive weeks in a newspaper of general circulation published in the municipality in which the collateral is located, or if none is published there, in a newspaper of general circulation published in the state senate election district where the collateral is located, or if none is published there, in a newspaper of general circulation published in the judicial district where the collateral is located.

Sec. 34.21.140. TRANSMITTING FURTHER INFORMATION ABOUT SALE. Unless the information required by this section has been included in the notice of intent to sell, not less than 10 days before the time of public sale or if there is to be a private sale or other disposition of the collateral, not less than 10 days before entering into a contract of sale or otherwise disposing of the collateral, the secured party or other person having the power of sale shall transmit by first

class certified mail, return receipt requested, a written notice of the time and place of a public sale or of the time after which a private sale or other intended disposition is to be made to a

(1) person who has asked the secured party or other person having the power of sale in writing for the notice and has provided an address to which the notice is to be mailed; and

(2) person to whom a notice of intent to sell was sent under AS 34.21.130.

Sec. 34.21.150. MANNER OF TRANSMITTING NOTICE. Wherever in AS 34.21.110 - 34.21.150 transmittal of a notice by mail is required, the notice may instead be served in the manner provided for service of summons and complaint in a civil action or may be delivered personally.

Sec. 34.21.160. CONTENT OF NOTICE OF DEFAULT. A notice of default must include

(1) a description of the collateral;

(2) the recording information for the security agreement;

(3) a statement that the secured party declares the debtor to be in default and the nature of the default;

(4) if the default is failure to make payments, a statement of the amount in arrears on the date of the notice;

(5) a statement of the fees and costs, in addition to any amount in arrears, that the debtor is obliged to pay to reinstate the security agreement and an estimate of additional fees and costs anticipated before a foreclosure sale;

(6) a statement that failure to cure the default and failure to pay fees and costs within 30 days after the date of transmittal and posting of the notice of default may lead to the recording of a notice of intent to sell, and that the collateral may be sold at a

date not less than 60 days after the recording of the notice of intent to sell;

(7) a statement that the effect of the recording of a notice of intent to sell will be

(A) to increase the fees and costs; and

(B) to advertise the debtor's property for sale;

(8) a statement that the effect of a failure to cure the default within 60 days after the recording of a notice of intent to sell will be to deprive the debtor and those who hold by, through or under the debtor of all their interest in the collateral, except for the right to

(A) stop the sale under AS 34.21.180(d) by curing the default and paying the entire remaining indebtedness and certain expenses;

(B) enjoin or object to sale under AS 34.21.340;

(C) receive surplus proceeds under AS 34.21.320(c); and

(D) redeem the collateral under AS 34.21.210 - 34.21.290 after the sale; and

(9) a statement that the debtor or the debtor's successor in interest has recourse to the courts to contest the default.

Sec. 34.21.170. CONTENT OF NOTICE OF INTENT TO SELL. A notice of intent to sell shall be in substantially the following form:

NOTICE OF INTENT TO SELL

I

Notice is given that the undersigned intends to sell the following property:

(set out legal description of collateral to be sold)

II

(If the time and place of a public sale are known, set them out here. If a private sale or other disposition is intended, set out here the intention and the time after which the private sale or disposition is to be made. If the time and manner of disposition of the property are not fixed at the time of recording of this notice, insert the following.) The date of sale will be not earlier than ....., 19.... The property will be advertised for sale in a way that is commercially reasonable for the specific property, will be sold in one or more parcels by public or private proceedings and may be sold by one or more contracts. At least 10 days written notice of the time and place of a public sale or of the time after which a private sale or other intended disposition of the property is to be made will be provided to any person who asks the undersigned in writing for such a notice and provides a mailing address, and to any person to whom this notice of intent to sell is sent under AS 34.21.130(1).

III

Authority to sell the property in the event of default is contained in a (insert title of security agreement) executed by ....., debtor, to secure an obligation to ....., secured party, dated ....., 19.., and recorded in the records of the ..... Recording District, ... Judicial District, State of Alaska, in book ..... at page .....

IV

(ALTERNATIVE A: If the default is failure to pay money, set out that the default is failure to pay when due the following amounts: (listing the amounts in arrears)).

(ALTERNATIVE B: If default is for other than failure to pay money, set out the particulars).

A written notice of default was transmitted to the debtor or the

debtor's successor in interest at the following address:

.....

.....

.....

on the ..... day of ....., 19.., proof of which is in the possession of the undersigned.

V

The sale will be terminated if at any time before the ..... day of ....., 19.., (insert the date 61 days after the date of recording of the notice of intent to sell) the default as set out above is cured and all fees and costs are paid. The sale will be terminated if at any later time before the sale the entire principal and interest plus all fees and costs are paid.

VI

As of the date of recording of this notice there is owing on the obligation secured by the security agreement $....., together with interest on $..... from the ..... day of ....., 19.., at the rate of ..... percent per ....., and the following accrued fees and costs that the debtor is obliged to pay to cure the default:

(set out fees and costs)

It is estimated that additional fees and costs totaling $..... will accrue before a foreclosure sale. The property described in paragraph I of this notice will be sold to satisfy the above amounts owing plus the expenses of sale and other accrued fees and costs.

VII

Failure to cure the default alleged in this notice before ....., 19.. (insert the date 61 days after the date of recording of the notice of intent to sell) will deprive the debtor and those who hold by, through or under the debtor of all their interest in the

collateral, except the right to stop the sale by curing any default under AS 34.21.180(d) and paying the entire indebtedness and certain expenses, the right to enjoin or object to sale under AS 34.21.340, the right to receive surplus proceeds under AS 34.21.320(c), and the right to redeem the collateral under AS 34.21.210 - 34.21.290 after the sale.

VIII

A person having an objection to the sale on any ground will be afforded an opportunity to be heard as to the objection if the person brings a lawsuit to restrain the sale under AS 34.21.340. Failure to bring a lawsuit may result in a waiver of any ground for invalidating the sale.

IX

The person whose name and address are set out below will provide in writing to anyone requesting it a statement of all fees and costs due at any time before the sale.

X

The effect of the sale will be to deprive the debtor and all those who hold by, through or under the debtor of all their interest in the above-described property, unless the debtor redeems the collateral under AS 34.21.210 - 34.21.290 after the sale.

(signed).....

.....

Address.....

.....

Phone.....

STATE OF ALASKA)

: ss.

_____ JUDICIAL DISTRICT)

The foregoing instrument was acknowledged before me this (DATE) by (NAME OF PERSON WHO ACKNOWLEDGED).

.....

NOTARY PUBLIC in and for the State of Alaska. My commission expires .....

(SEAL)

Sec. 34.21.180. CURING DEFAULT BEFORE SALE; EXTINCTION OF DEBTOR'S RIGHT TO CURE. (a) Subject to (b) of this section, the debtor, the debtor's successor in interest; or a holder of an interest inferior in priority to that being foreclosed may cause a discontinuance of sale proceedings by curing the default, which, if the default is failure to pay, shall be by paying to the secured party or other person having the power of sale

(1) all amounts then due under the terms of the security agreement and the obligation secured by it, other than amounts which would not be due if default had not occurred; and

(2) the expenses actually incurred by the secured party or other person having the power of sale in enforcing the provisions of the security agreement and the obligation secured by it, including the attorney fees allowed under AS 34.21.330 and court costs incurred because of the default.

(b) The cure described in (a) of this section must be made within 60 days following the recording of the notice of intent to sell, or within 45 days following the first publication and completion of posting and transmittal of the notice of intent to sell, whichever is the later time.

(c) Notwithstanding (a) and (b) of this section, if under the same security agreement notice of intent to sell has been recorded two or more times previously because of default by the debtor, the secured

party or other person having the power of sale may refuse the cure of the default under (a) of this section and continue with the sale.

(d) At any time before the secured party or other person having the power of sale has sold or entered into a contract to sell the collateral, the debtor, the debtor's successor in interest or a holder of an interest inferior in priority to that being foreclosed may cause a discontinuance of the sale proceedings by curing the default and paying the entire principal debt and accrued interest, and all other expenses as defined in (a)(2) of this section incurred as of the date of payment.

(e) If the default is cured, the sale proceedings shall be discontinued. If the default is cured under (a) of this section, the security agreement is reinstated and the obligation remains as though acceleration had not taken place. If the default is cured by the holder of an interest inferior in priority to that being foreclosed, the security interest of that holder includes all payments made to cure, including attorney fees allowed under AS 34.21.330 and reasonable costs. If the interest held in the collateral by the person who cured the default is security for an interest-bearing obligation, the cost to cure default bears interest at the rate of that obligation; otherwise the cost to cure default bears interest at the same rate as an unpaid judgment of a state court.

(f) If the default is cured and the obligation and security agreement reinstated under this section, the secured party or other person having the power of sale shall promptly cause to be recorded a notice of discontinuance of the sale. The notice must contain the recording information of the security agreement and the notice of intent to sell, and a statement that the sale has been discontinued.

(g) The passage of time within which a default may be cured

under (a) of this section extinguishes all rights held in the collateral by the debtor, the debtor's successor in interest, all persons who were sent a notice of intent to sell under AS 34.21.130, and all holders of unrecorded junior encumbrances, except the right

(1) to cure the default under (d) of this section;

(2) to seek an injunction under AS 34.21.340;

(3) to receive surplus proceeds under AS 34.21.320(c); and

(4) to redeem the collateral under AS 34.21.210 - 34.21.290

after the sale.

(h) To the extent cure of a default requires payment of money, the secured party may require payment in cash, by cashier's check on a bank in the judicial district where the sale is held, or by postal money order.

Sec. 34.21.190. MANNER OF SALE. (a) If a default has not been cured under AS 34.21.180, the secured party or other person having the power of sale may sell the collateral in its existing condition or following a commercially reasonable preparation.

(b) After the time for cure under AS 34.21.180(a) has expired and until the default is cured under AS 34.21.180(d) or the collateral is sold, the secured party or other person having the power of sale may take possession of the collateral in order to protect it or to prepare it for sale.

(c) After the notice of intent to sell the collateral has been recorded for 30 days, the secured party has a right of access to the collateral to show it to prospective purchasers.

(d) The sale of the collateral may be by public or private proceedings and may be made by way of one or more private contracts. Sale may be as a whole or in parcels and at any time and place and on any terms, but every aspect of the sale, including the method, manner,

time, place and terms, must be commercially reasonable.

(e) The fact that a better price could have been obtained by a sale of the collateral at different times or in a different method from that selected by the secured party or other person having the power of sale is not of itself sufficient to establish that sale was not made in a commercially reasonable manner. If the collateral is sold in the usual manner in a recognized market for it, is sold at the price current in that market at the time of the sale, or is otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, the sale is in a commercially reasonable manner.

(f) A sale of the collateral that has been approved in a judicial proceeding or by a creditor's committee convened under 11 U.S.C. 705 or 11 U.S.C. 1102 (Bankruptcy Code) is conclusively considered commercially reasonable, but this subsection does not imply that judicial approval must be obtained nor does it imply that a sale not approved by a creditor's committee is not commercially reasonable.

Sec. 34.21.200. PURCHASE OF COLLATERAL BY LIENHOLDER. (a) If the sale of collateral is at public auction, the secured party who is foreclosing under this chapter may bid at the sale and set off the amount of that secured party's interest, including attorney fees allowed under AS 34.21.330 and costs, against the bid. The secured party may not be a purchaser at a negotiated sale.

(b) At a sale under AS 34.21.190 the holder of a perfected lien against the collateral who is not foreclosing under this chapter may purchase the collateral and set off against the purchase price the amount of the lien. At the time of purchasing under this subsection or before, the lien holder must pay off or otherwise secure the release of superior liens against the collateral.

Sec. 34.21.210. RIGHT OF REDEMPTION. A sale of collateral by summary procedure under this chapter is subject to redemption. The person conducting the sale shall give to the purchaser a certificate of the sale that contains

(1) a particular description of the collateral sold;

(2) the price bid for each distinct lot or parcel;

(3) the entire price paid; and

(4) a statement that the property is subject to redemption.

Sec. 34.21.220. REDEMPTION. Collateral subject to redemption under AS 34.21.210 may be redeemed by the following persons or their successors in interest:

(1) the debtor; and

(2) a creditor having a lien by judgment or security interest on all or part of the collateral if the lien is subsequent in time to the security interest for which the collateral was sold.

Sec. 34.21.230. REDEMPTION BY LIEN CREDITOR FROM PURCHASER. A lien creditor may redeem the collateral under AS 34.21.210 within 60 days after the sale by paying the amount of the purchase money, interest on the purchase money at the rate of 10.5 percent a year from the date of the sale, and the amount of taxes that the purchaser has paid for the collateral since the sale. If the purchaser is also a creditor having a lien prior to that of the redemptioner, the redemptioner shall also pay the amount of the purchaser's lien with the interest allowed under AS 45.45.010(a).

Sec. 34.21.240. SUBSEQUENT REDEMPTIONS. The collateral may be redeemed from the previous redemptioner within 60 days after the last redemption by paying the sum paid on the last redemption, interest at eight percent a year from the date of the last redemption, the taxes on the collateral that the last redemptioner has paid as part of or

after redeeming, and the amount of the liens held by the last redemptioner that are prior in time to the lien of the last redemptioner. A lien creditor may not redeem the property from the debtor who has redeemed under AS 34.21.250.

Sec. 34.21.250. REDEMPTION BY DEBTOR. The debtor or the debtor's successor in interest may redeem the collateral by paying within 12 months of the sale the amount of the purchase money, interest at the rate of 10.5 percent, and the taxes that the purchaser or last redemptioner paid for the collateral under AS 09.35.230 or 09.35.240.

Sec. 34.21.260. PROCEDURE FOR REDEMPTION. (a) Redemption is made by paying the required sum to the seller. Upon a redemption, the seller shall give the person redeeming a certificate of redemption containing the sum paid on redemption, the name of the person from whom the collateral was redeemed, and the date of the redemption. The seller shall immediately give notice of the redemption to the party from whom the collateral was redeemed.

(b) To redeem collateral, a debtor or redemptioner shall submit to the seller

(1) a copy of the recorded security agreement or judgment lien on which the debtor or redemptioner bases the right to redeem;

(2) a copy of an assignment that is necessary to establish that the person is the successor in interest to the holder of the security agreement or judgment lien provided under (1) of this subsection, verified by the affidavit of the holder or the agent of the holder; and

(3) an affidavit by the holder of the security interest or judgment or by the agent of the holder showing the amount then actually due under the security agreement or the judgment lien.

Sec. 34.21.270. PRIORITY OF REDEMPTION. If more than one person

applies to the seller at the same time to redeem, the debtor may redeem first, if the debtor is among the applicants, and the person having the earliest recorded lien may redeem first, if the debtor is not among the applicants.

Sec. 34.21.280. REFUSAL TO PERMIT REDEMPTION. A person's right to redeem is not prejudiced by the refusal of the seller to allow the redemption.

Sec. 34.21.290. RIGHTS OF PURCHASER AND REDEMPTIONER. The purchaser, from the time of sale until a resale or a redemption, or a redemptioner, from the time of redemption until another redemption, is entitled to the possession of the collateral purchased or redeemed as against the debtor or other person claiming by, through, or under the debtor. Where the collateral is in the possession of a tenant, the purchaser or redemptioner is entitled to receive the rents of the collateral or the value of the use and occupation of the collateral.

Sec. 34.21.300. PROCEDURE AFTER SALE. After a sale of the collateral by summary procedure under this chapter and receipt of the purchase price, the secured party or other person having the power of sale shall deed the collateral to the purchaser subject to the right of redemption provided under this chapter. The deed shall include or have attached to it a sworn statement reciting

(1) the recording information of the security agreement that was foreclosed;

(2) the date and recording information of the recorded notice of intent to sell;

(3) the actual consideration for the conveyance;

(4) the facts indicating the manner in which the notices required under AS 34.21.110 - 34.21.140 were given;

(5) the time and place of publication of the notice of

intent to sell; and

(6) the time, place and manner of sale.

Sec. 34.21.310. EFFECT OF SALE. (a) Subject to the right of redemption under AS 34.21.210 - 34.21.290, a sale of collateral under this chapter transfers all title and interest the debtor had in the collateral at the time the security agreement was executed, together with all title or interest the debtor may have acquired before the sale.

(b) A sworn statement complying with AS 34.21.300 and asserting that all requirements of law have been complied with is prima facie evidence of compliance with those requirements.

Sec. 34.21.320. DISPOSITION OF PROCEEDS OF SALE. (a) The secured party or other person with power of sale shall apply the proceeds of the sale of the collateral in the following order to

(1) the reasonable expenses of retaking, holding, preparing for sale and selling the collateral, the attorney fees allowed under AS 34.21.330, and the reasonable legal expenses incurred by the secured party or other person with power of sale;

(2) the satisfaction of the indebtedness secured;

(3) the satisfaction of indebtedness secured by a recorded subordinate security interest or recorded lien on the collateral.

(b) If requested by the secured party or other person having the power of sale, the holder of a recorded subordinate security interest or recorded lien must furnish to the secured party or other person having the power of sale reasonable proof of interest in the collateral.

(c) The secured party or other person having the power of sale shall account to the debtor who owns or has rights in the collateral for the proceeds of sale and pay the debtor any surplus after applying

the proceeds under (a) of this section.

Sec. 34.21.330. ATTORNEY FEES. (a) The attorney fees that must be paid under AS 34.21.180 by the debtor to cure the default before the sale of the collateral may not exceed the sum of

(1) $250 for the first $100,000 of the amount due under the terms of the security agreement at the time of the cure; plus

(2) .15 percent of the amount that exceeds $100,000 and that is due under the terms of the security agreement at the time of the cure.

(b) The attorney fees that are included in the set-off under AS 34.21.200 may not exceed the sum of (a)(1) and (2) of this section.

(c) The attorney fees that are considered a reasonable expense under AS 34.21.320 of retaking, holding, preparing for sale and selling the collateral may not exceed the sum of (a)(1) and (2) of this section.

(d) In this section, "amount due" does not include attorney fees.

Sec. 34.21.340. SECURED PARTY'S LIABILITY FOR FAILURE TO COMPLY, ENJOINING SALE. If it is established that the secured party or other person having the power of sale is not proceeding under AS 34.21.090 - 34.21.360, a sale of collateral may be ordered or restrained on appropriate terms and conditions. If the sale has occurred, the debtor or a person entitled to a copy of notice of intent to sell under AS 34.-21.130 or a person whose subordinate security interest or lien has been recorded before the distribution of proceeds of sale may recover from the secured party or other person having the power of sale a loss caused by a failure to comply with AS 34.21.090 - 34.21.360.

Sec. 34.21.350. GENERAL VALIDITY OF SECURITY AGREEMENT. Unless it conflicts with a provision of law, a security agreement is

effective between the parties according to its terms. Nothing in this chapter validates a charge or practice that is illegal under a statute or regulation for debtor protection including those statutes and regulations governing usury and small loans. Nothing in this chapter extends the application of the statute or regulation for debtor protection to a transaction not otherwise subject to it.

Sec. 34.21.360. WAIVER OF RIGHTS. To the extent that they give rights to the debtor and impose duties on the secured party or other person having the power of sale, the provisions of this chapter may not be waived or varied.

Sec. 34.21.500. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "collateral" means the real property subject to a security interest;

(2) "debtor" means the person who owes payment or other performance of the obligation secured, whether or not the person owns or has rights in the collateral; if the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of this chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both when the context requires it;

(3) "real property" includes an interest in real property;

(4) "recording information" means the information (book and page, document number, electronic retrieval code, or other specific information) needed to find a document in the public records;

(5) "redemptioner" means a creditor who is allowed to redeem collateral under AS 34.21.220(2) and who redeems collateral sold by summary procedure under this chapter;

(6) "secured party" means a lender, seller, beneficiary or

other person or governmental agency for whose benefit there is a security interest, including a receiver, trustee in bankruptcy, or person to whom a security agreement is sold;

(7) "security agreement" means an agreement that creates or provides for a security interest in real property, and includes a lease if the lease was intended to create a security interest;

(8) "security interest" means a consensual interest in real property that secures payment or performance of an obligation.

* Sec. 3. AS 06.05.175 is amended by adding a new subsection to read:

(d) It is not a violation of this section to provide a statement of account to a debtor or the holder of a subordinate security interest under AS 34.21.040.

* Sec. 4. AS 09.45.170 is amended to read:

Sec. 09.45.170. JUDGMENT ON FORECLOSURE OF LIEN. A person having a lien upon real property, other than that of a judgment, whether created by <u>security agreement</u> [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 <u>court</u> [JUDGMENT] shall also determine the personal liability of a defendant for the payment of the debt secured by the lien and <u>enter the determination in the judgment</u> [BE ENTERED ACCORDINGLY].

* Sec. 5. AS 09.45.170 is amended by adding a new subsection to read:

(b) In this section, "security agreement" means an agreement that creates or provides for a security interest in real property; in this subsection, "security interest" has the meaning given in AS 34.-21.500.

* Sec. 6. AS 09.45.200, AS 34.20.010, 34.20.020, 34.20.030, 34.20.040, 34.20,050, 34.20,060, 34.20,070, 34.20,080, 34.20,090, 34.20.100, 34.20.-110, 34.20.120, 34.20.130, and 34.20.135 are repealed.

* Sec. 7. TRANSITIONAL PROVISIONS. (a) A security agreement as defined in AS 34.21.500, as enacted in sec. 2 of this Act, that is entered into before the effective date of this Act, including rights, duties, and interests under it, continues in effect and may be terminated or enforced under a law amended or repealed by this Act as though the law had not been amended or repealed.

(b) A person foreclosing a deed of trust executed before the effective date of this Act, may elect to foreclose under AS 34.21, added by sec. 2 of this Act, or under the law in effect when the deed of trust was entered into.

(c) Notwithstanding (a) of this section, a person foreclosing a security agreement other than a deed of trust shall foreclose under the law in effect when the security agreement was entered into.

(d) Notwithstanding the other provisions of (a) - (c) of this section to the contrary,

(1) AS 34.21.080, 34.21.210 - 34.21.290, and 34.21.330, added by sec. 2 of this Act, apply to security agreement foreclosure proceedings that are in progress during, or that begin after, the effective date of this Act, unless the collateral has been sold before the effective date of this Act under AS 34.20.070, repealed by sec. 6 of this Act, or unless a judgment has been entered before the effective date of this Act in a judicial foreclosure action or judicial action for breach of contract arising out of the security agreement; and

(2) AS 34.21.080 also applies retroactively to the cases that were the subject of Moening v. Alaska Mutual Bank, Op. No. 3274 (Alaska, February 26, 1988) and Conrad v. Counsellors Investment Co. Op. No. 3275

(Alaska, February 26, 1988) and to the cases subsequently decided in this state under the authority of either of the cases.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

SB 305
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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

FRED ROSENBERG and RITA ROSENBERG, Appellants, v. ALVIN G. SMIDT and JANICE M. SMIDT, Appellees.	)	File No. S-747 O P I N I O N [No. 3134 - November 7, 1986]

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

Appearances: Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for Appellants. R. J. Christie and Lynette I. Hotchkiss, Kay, Christie, Saville & Coffey, Anchorage, for Appellees.

BEFORE: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

COMPTON, Justice.
MOORE, Justice, with whom Rabinowitz, Chief Justice, joins, dissenting, in part.

Fred Rosenberg and Rita Rosenberg appeal from a partial summary judgment entered pursuant to Civil Rule 54(b). The judgment divested them of title to a parcel of

Deals w/ notice requirement

real property and revested it in Alvin Smidt and Janice Smidt. Since the trial court's decision is based on stipulated facts, the appeal presents only legal issues. The parties dispute whether AS 34.20.070(c) requires a trustee to attempt to discover the current address of a record interest holder before proceeding with a trustee's sale of encumbered real property. The parties also dispute whether AS 34.20.090(c) protects the Rosenbergs as bona fide purchasers without notice of possible defects in the foreclosure sale notifications. We affirm.

I. FACTS AND PROCEEDINGS

In December 1973, Rodney Spendlove and William Johnson[1] sold real property to Alvin Smidt and Janice Smidt (Smidts). At the time of the sale, a first deed of trust executed by Spendlove and Johnson encumbered the property.[2] The Smidts executed a second deed of trust on the property in favor of Spendlove and Johnson,[3] securing the balance of

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1. While both are defendants below, neither are parties to this appeal. Apparently, no final judgment has yet been entered against them.

2. The beneficiaries of this first trust deed are not parties to this dispute.

3. In this trust deed, the Smidts requested Alaska Title to send notices of default (on that deed,

(Footnote Continued)

the purchase price, $6,200. Alaska Title Guaranty Company (Alaska Title) was designated trustee on both deeds of trust.

The Smidts made all of the payments due on their note through May 1981. Nevertheless, by early 1980 Spendlove and Johnson had defaulted on the payments due under the note secured by the first deed of trust. At the beneficiaries' request, Alaska Title began nonjudicial foreclosure proceedings in June, 1980.

As required by AS 34.20.070(c),[4] Alaska Title sent copies of the notice of default to the Smidts, Johnson, and

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(Footnote Continued)

presumably) to the address listed on the deed. Upon the default in the first trust deed, as requested, Alaska Title did send the notice to the address listed on the second deed.

4. AS 34.20.070(c) provides:

> Within 10 days after recording the notice of default, the trustee shall mail a copy of the notice by certified mail to the last known address of each of the following persons or their legal representatives (1) the grantor in the trust deed; (2) the successor in interest to the grantor whose interest appears of record or of whose interest the trustee or the beneficiary has actual notice, or who is in possession of the property; (3) any other person in possession of or occupying the property; (4) any person having a lien or interest subsequent to the interest of the trustee in the trust deed, where the

(Footnote Continued)

Spendlove. Alaska Title used the address for the Smidts listed on the 1973 second deed of trust. The Smidts, however, had moved from that address -- a mobile home park -- in 1975. The certified letters sent to the Smidts were returned to Alaska Title marked "unclaimed." Alaska Title published notice of the sale in an Anchorage newspaper. The Smidts, however, did not get actual notice of the sale.

From the summer of 1975 through the summer of 1980, the Smidts resided and received mail at their home on Old Muldoon Road in Anchorage. Alaska Title could have discovered the Smidts' address by contacting either the Anchorage Municipality Real Property Taxation Department, any of several utility companies, or the State's Department of Motor Vehicles. The Anchorage phone directory listed Alvin Smidt's phone number, but not address. Polk's Greater Anchorage Area Directory listed the Smidt's address in 1979, but not in 1980.

In October 1980, Fred Rosenberg and Rita Rosenberg (Rosenbergs) purchased the property at a public foreclosure

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(Footnote Continued)

> lien or interest appears of record or where the trustee or the beneficiary has actual notice of the lien or interest. The notice may be delivered personally instead of by mail.

(Emphasis added).

sale held by Alaska Title. Although the property was then worth more than $20,000, they bid only $5,626.25. The Smidts, meanwhile, continued making payments to Spendlove and Johnson, ignorant of the sale until April 1981.

The Smidts sued the Rosenbergs, Alaska Title, Spendlove, and Johnson to set aside the sale.[5] The Smidts moved for partial summary judgment. The trial court ruled that "principles of equity" require a trustee to "take reasonable steps to ascertain the current address of the trustor or his assignee." The trial court noted that the mobility of Alaska's youthful population compelled such a duty. It further noted that while professional trustees know of the need to be informed of address changes, the deed of trust here imposed no such requirement on the Smidts. Judgement was entered pursuant to Civil Rule 54(b),[6] and the Rosenbergs appealed.

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5. The Rosenbergs answered and moved to dismiss. The trial court denied the motion. The Rosenbergs then filed a petition for review in this court. This court declined to review the issues pending final judgment.

6. Civil Rule 54(b) provides in part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as

(Footnote Continued)

II. DILIGENT INQUIRY UNDER AS 34.20.070(c).

AS 34.20.070(c)[7] required Alaska Title to mail a notice of Spendlove and Johnson's default to the "last known address" of their assignees, the Smidts. At the time Alaska Title mailed its notice, it had actual knowledge only of the address used by the Smidts seven years earlier. The parties dispute whether Alaska Title should have made some effort to locate the Smidts after it received the returned certified letter marked "unclaimed." Imposition of a due diligence requirement would announce a p. on neither required nor precluded by the statute.

No Alaska cases have construed this provision of AS 34.20.070(c). Decisions from other jurisdictions interpreting similar "last known address" clauses provide some insight, but the statutory schemes in which such

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(Footnote Continued)

> to one or more but fewer than all of the claims of the parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Here, the trial court made an express determination and direction.

7. See supra n.4.

clauses occur differ so greatly that no case adequately disposes of this question.[8]

"Last known address" clauses appear most frequently in tax statutes, service of process rules, and trust deed statutes. For instance, Section 6212(b) of the Internal Revenue Code, 26 U.S.C. § 6212(b) (1981), requires the Commissioner of Internal Revenue to mail notice of a tax deficiency to the taxpayer's "last known address." The federal courts require the Commissioner to use reasonable diligence in ascertaining the taxpayer's current address. See Annot., 58 A.L.R. Fed. 548, 554-56 (1982). At the same time, the commissioner may rely on "the address appearing on

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8. The parties do not here dispute the constitutionality of the notice provision. They had disputed below whether due process required better notice than the Smidts received. The trial court originally invalidated the sale on due process grounds. It then reversed its due process ruling and decided instead upon equitable grounds.

The constitutionality of notice of deed of trust sale provisions has been litigated frequently. See G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law §§ 7.23 - 7.30 (1979) (hereinafter cited as Real Estate Finance Law); see also Note, The Constitutionality of Power of Sale Foreclosure in Alaska, 6 UCLA-Alaska L. Rev. 90 (1976). The trend, however, is to find that nonjudicial sales lack sufficient state action to trigger the federal due process protections. See Flagg Bros. v. Brooks, 436 U.S. 149, 56 L.Ed.2d 185 (1978) (warehouseman's private sale of goods under UCC 7-210 involved no state action); Garfinkle v. Superior Court, 578 P.2d 925 (Cal. 1978) (deed of trust foreclosure sale lacked state action).

a taxpayer's return as the last known in the absence of clear and concise notification from the taxpayer directing the Commissioner to use a different address." Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), aff'd mem., 538 F.2d 334 (9th Cir. 1976).

Thus, while the Internal Revenue Service (IRS) must be diligent to send notices properly, the taxpayer must clearly notify the IRS of any changes. Only when the IRS fails to respond after the taxpayer has communicated changed addresses will the IRS have breached its duty of due diligence. See, e.g., Crum v. Commissioner, 635 F.2d 895, 899-900 (D.C. Cir. 1980). Absent communication by the taxpayer, the IRS seems under no duty to mail notices to any address other than the one last used by the taxpayer. The tax statutes, however, contemplate at least yearly communications between government and taxpayer.

Substitute service of process rules occasionally allow a party to mail process to defendant's "last known address." See Shanklin v. Bender, 283 A.2d 651, 653-54 (D.C. 1971) (construing Ill. Rev. Stat. ch. 95½, § 10-301(b) (1967-70)) (service of process on nonresident motor vehicle operator); Feinstein v. Bergner, 422 N.Y.S.2d 356 (N.Y. 1979) (construing N.Y. Civ. Prac. R. 308(4)) (substitute mail service on defendant's "last known residence" and nail service on "dwelling place" and "usual place of abode");

Volmer v. Hoel, 93 N.E.2d 416 (Ohio 1950) (construing Gen. Code § 6308-2, replaced by Ohio Rev. Code Ann. § 2703.20 (1981)) (service on nonresident motor vehicle operator); Waddell v. Mamat, 72 N.W.2d 763, 766 (Wis. 1955) (construing § 85.05(3) stats., now Wis. Stat. Ann. § 345.09(2) (West 1971)) (nonresident motor vehicle operator); see also Ohio Civ. R. 4.4 (1982). Volmer appears to require due diligence. 93 N.E.2d at 420. Shanklin interpreted Illinois law as requiring reasonable diligence. 283 A.2d at 653. Waddell merely paraphrased Wuchter v. Pizzutti, 276 U.S. 13, 72 L.Ed. 446 (1928), and stated that "[t]he last known address is that one most likely to give the party to be served notice." 72 N.W.2d at 766.

We recognize that, like cases construing the tax statute, these holdings involve statutory schemes with concerns somewhat different from the deed of trust sale. When service of process is involved, federal due process requires notice reasonably calculated to apprise the parties of the pendency of an action. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 873 (1950). Moreover, some states require proof of due diligence at attempted personal service before allowing substitute service. See, e.g., N.Y. Civ. Prac. R. 308(4) (West 1972). Thus the federal due process concerns raised by tax and process laws require some showing of due

diligence. These federal due process rights are absent from a deed of trust foreclosure sale. Furthermore, unlike tax and process cases, deed of trust sales involve title to real property. Courts have traditionally favored the free and easy alienability of real property. Deed of trust provisions encourage ready transfer in two ways. By assuring creditors a speedy, inexpensive and uncomplicated remedy in the event of default, deeds of trust allow lenders to loan more cheaply the funds necessary to purchase the property initially. See 10 G. Thompson, Commentaries on the Modern Law of Real Property, § 5175 at 204-05 (1957). Thus, deeds of trust encourage debtors to buy by assuring creditors of easy resale. "[W]here it is in common use, power of sale foreclosure has provided an effective foreclosure remedy with a cost in time and money substantially lower than that of its judicial foreclosure counterpart." Real Estate Finance Law, § 7.19 at 477 (footnote omitted).

The Rosenbergs argue that a requirement of due diligence in a provision of notice of default would increase the costs of financing real property transfers. Beyond the administrative costs of searching for absent interested parties, creditors would bear the increased risk of attendant costs of litigation over the trustee's compliance. See id. Ultimately, creditors will pass on these costs to

future borrowers. Thus, all debtors would be forced to pay the higher costs of protecting those debtors who invest and then move without advising the trustee of their new address. The Rosenbergs, however, do not quantify these increased costs.

Review of the law of other jurisdictions reveals numerous "last known address" statutes governing notice of deed of trust sales.[9] See, e.g., Cal. Civ. Code § 2924b(2)(a)-(c) (West 1974 & Supp. 1985); D.C. Code Ann. § 45-715(b) (1981) (written notice by certified mail with return receipt requested to the last known address); Idaho Code § 45-1506(2) (1977) (notice by registered or certified mail to last known address); Or. Rev. Stat. § 86.740 (1983) (mail notice by both first class and certified mail with return receipt to the last known address); compare Ariz. Rev. Stat. Ann. § 33-809(B)(2) (Supp. 1985) (trustee uses address on recorded document unless address missing); Tex. Prop. Code Ann. § 51.002(b)(3) (Vernon 1984) (notice sent to last known address appearing in the records of the holder of the debt); Wash. Rev. Code Ann. § 61.24.040(b) (Supp. 1985)

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9. Some states require no mailed notice. See, e.g., S.D. Codified Laws § 21-48-6 (1979) (notice by publication alone suffices); Utah Code Ann. § 57-1-25 (Supp. 1983) (notice by publication and posting notice on property to be sold, as well as three other public places in the city where property is to be sold).

(notice sent to address in recorded instrument or otherwise known to trustee). The few reported decisions reveal no holding imposing a due diligence requirement.[10] A recent California decision specifically rejected a due diligence requirement. In I.E. Associates v. Safeco Title Insurance Co., 702 P.2d 596 (Cal. 1985) the California Supreme Court construed Civil Code 2924b. This statute explicitly defines "last known address" as "the last business or residence actually known by the . . . person authorized to record the notice of default." Cal. Civ. Code § 2924b(2)(c). The section also requires the beneficiary to tell the trustee of the last address actually known by the beneficiary. Cal. Civ. Code § 2924b(2)(c). Faced with such strong evidence of a limitation to knowledge "actually" known, the court stated that the section imposed no due diligence requirement upon trustees. 702 P.2d at 598.

The California statute's explicit definition of "last known address" distinguishes it from AS 34.20.070(c).

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10. In Security Pacific Finance Corp. v. Bishop, 704 P.2d 357 (Idaho App. 1985), the trustee sent a notice by certified mail to the debtor. The opinion does not clarify whether the letter was correctly addressed. The notice was returned unclaimed. Id. at 359-60. The Idaho court strictly construed its notice provisions and found inadequate compliance. Id. at 360. It invalidated the sale, but did not explicitly create a due diligence requirement. Id.

Further, unlike California, Alaska imposes no duty on the beneficiary of a trust deed to notify the trustee of an actually known last address of an interested party.[11] We therefore decline to follow the reasoning of I.E. Associates.

A tension exists between free and easy alienability of real property and notice to persons whose interest in real property is to be affected by governmental or private action. Yet it is not so great as to preclude a requirement of due diligence in attempting to get notice to those who will be affected by that action. As this case demonstrates vividly, diligent inquiry by the trustee would readily have provided Smidts' actual address.

On one hand,

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11. The California court noted that the trustor should learn of the sale through posted notice on the property, Id. at 601 n.6, and that only passive investors, uninvolved with daily activity on the property, risk missing notice, Id. at 601 n.7.

Like California, Alaska requires both posting and publication before a nonjudicial sale. See AS 34.20.080(a)(2), AS 09.35.140. However, there is little basis for asserting that the only persons not likely to get notice under Alaska's statutory scheme are "passive investors" of undeveloped property who do not list a permanent agent for service of notices upon their original execution of the recorded instruments. Further, it should not make a difference that the affected interest is that of "passive investors."

> [w]hile noncompliance with the statutory provisions regarding foreclosure by the power under a mortgage or trust deed is not to be favored, the remedy of setting aside the sale will be applied only in cases which reach unjust extremes.

Semlek v. National Bank of Alaska, 458 P.2d 1003, 1006 (Alaska 1969). On the other, "equity abhors a forfeiture and will seize upon slight circumstances to relieve a party therefrom." Jameson v. Wurtz, 396 P.2d 68, 74 (Alaska 1964) (footnote omitted).

We conclude that the last known address is that address most likely to give the affected party notice. The trustee is obligated to exercise due diligence to determine that address. Failure to impose such a requirement would not balance adequately the competing interests involved.

III. DOES AS 34.20.090(c) PROTECT THE ROSENBERGS AS BONA FIDE PURCHASERS?

Under AS 34.20.090(c),[12] recitals in the foreclosure sale deed that the trustee complied with notice

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12. AS 34.20.090(c) provides:

> A recital of compliance with all requirements of law regarding the mailing or personal delivery of copies of notices of default in the deed executed under a power of sale is prima

(Footnote Continued)

provisions become conclusive evidence of compliance in favor of bona fide purchasers (bfp's). The deed the Rosenbergs received stated:

> All other requirements of law regarding the mailing, publication and personal delivery of copies of the Notice of Default and all other notices have been complied with, and said Notice of Sale was publicly posted as required by law and published in the Anchorage Times on August 26 and September 2, 9, and 16, 1980.

The parties dispute whether this section barred the Smidts from overturning the sale on the basis of lack of notice. Although the Rosenbergs directed the trial court to this statute, the judgment makes no mention of it.

The Smidts make three arguments to avoid the statute. First, the Smidts claim that the statute does not apply to void sales. They correctly state the general rule that "[t]he doctrine of good faith purchaser for value without notice does not apply to a purchaser at a void foreclosure sale." Henke v. First Southern Properties, Inc., 586 S.W.2d 617, 620 (Tex. Civ. App. 1979). They

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(Footnote Continued)

> facie evidence of compliance with the requirements. The recital is conclusive evidence of compliance with the requirements in favor of a bona fide purchaser or encumbrancer for value and without notice.

(Emphasis added).

misapply the rule, however, to the sale by Alaska Title. They fail to distinguish "void" from "voidable" sales. See Real Estate Finance Law, § 7.20 at 477-78. Only substantial defects such as the lack of a substantive basis to foreclose in the first place will make a sale void. Id. at 477 & § 7.21 at 489-90. Henke itself illustrates the most common basis for finding a void sale: the absence of default. 586 S.W.2d at 620. Where a defect in a foreclosure sale makes it merely voidable, however, sale to a bfp cuts off the trustor's ability to set aside the sale. See Swindell v. Overton, 314 S.E.2d 512, 517 (N.C. 1984); Real Estate Finance Law, § 7.21 at 489. Here, the alleged defect went not to the trustee's right to proceed with foreclosure but only to "the mechanics of exercising the power." Id. at 490. Thus, if the Rosenbergs were bfp's, the Smidts cannot set aside what is not a void, but a voidable, sale. However, as we hereinafter conclude, the Rosenbergs are not bfp's. The sale is therefore voidable.

Second, the Smidts challenge the Rosenberg's status as "bfp's without notice." No case defines this phrase for purposes of AS 34.20.090(c). Cases generally interpret the phrase to apply to one who lacks actual, constructive (i.e., from the land records) or inquiry notice. See, e.g., Swindell, 314 S.E.2d at 517; see also Sabo v. Horvath, 559 P.2d 1038, 1043 (Alaska 1976). No one

here contends that the Rosenbergs had actual or constructive notice of any defects in the notice sent to the Smidts. To bar their status as bfp's, the Smidts must hold the Rosenbergs to inquiry notice of the alleged defects.

This court explained inquiry notice in Modrok v. Marshall, 523 P.2d 172 (Alaska 1974).

> It is a settled rule of property that circumstances . . . which suggest outstanding equities in third parties, impose a duty upon the purchaser to make a reasonable investigation into the existence of a claim. Given suspicious facts, the status of bona fide purchaser turns upon whether there was a prudent inquiry into their import.

Id. at 174 (footnote omitted). In other words, "the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect." Real Estate Finance Law, at 478.

The facts stipulated below suggest that the Rosenbergs at most were chargeable with knowledge of the Smidts' status as assignees of Spendlove and Johnson. The facts do not reveal whether anyone else bid at the auction. On one hand, the Rosenbergs could reasonably believe that the Smidts were unable to cure Spendlove and Johnson's default or had made other arrangements with the defaulting debtors. On the other, it is unreasonable to believe that the Smidts would do nothing to protect their interest.

Ultimately, to hold that the interested party's absence from a foreclosure sale imposes a duty upon purchasers to investigate the notice given would gut AS 34.20.090(c). No one would ever be a "bona fide purchaser without [inquiry] notice."[13] By requiring would-be purchasers to "investigate or buy a lawsuit," such a holding would further increase the costs and delays accompanying deed of trust sales.

However, even if the Rosenbergs were not put on inquiry notice by the Smidts' absence from the sale, they may be charged with such notice if the deed contains no more than mere recitals that the trustee has complied with statutory notice requirements.

The Smidts argue that AS 34.20.090(c) contemplates recitals of fact, not conclusions of law. They contend that interpreting "recital" to mean a detailed recitation of the steps taken to notify trustors or their successors will

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13. Compare bona fide purchasers under the UCC. Section 9-504(4) (AS 45.09.504(d)(1)) protects purchasers at public foreclosure sales of secured personal property. This section requires a bfp to have no "knowledge" of any defects in the sale. See Coogan, Hogan, Vogts & McDonnell, Secured Transactions under the Uniform Commercial Code, 1A Bender's 1A UCC Serv. (MB), § 8.04[2][c][i] at 8-96 (1985) ("[P]urchaser at the public sale . . . is put under no duty to inquire into the circumstances of the sale." (footnote omitted)). Section 1-201(25) (AS 45.01.201(25)) defines "knowledge" as actual knowledge.

prevent problems such as in this case. A recitation of the "facts" of notice, they argue, would charge the Rosenbergs with inquiry notice of the Smidts' plight and thus prevent the Rosenbergs from becoming bfp's. We agree with each of these points.

Several states have statutory presumptions similar to Alaska's. See, e.g., Cal. Civ. Code § 2924 (West 1974); Or. Rev. Stat. § 86.780 (1983); Utah Code Ann. § 57-1-28 (1) (1985). We have found no cases which hold that such statutes either are or are not satisfied by a bare statement that the law was complied with, as distinguished from a factual recitation of the steps which were taken to comply with the law.[14]

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14. There is dictum in the plurality opinion in Blodgett v. Martsch, 590 P.2d 298, 303 (Utah 1978) suggesting that a mere statement of compliance will suffice. However, the court did not so hold; the purchaser in that case was found not to be a bfp. Further, there is no discussion of the issue of the level of detail necessary to comply with the statute. Pierson v. Fischer, 280 P.2d 491, 497 (Cal. App. 1955) is relied on by the Rosenbergs. That case is based on language of a deed of trust, not a statute similar to AS 34.20.090(c). Further, the deed of trust in Pierson specifically stated that the recital could be "in general terms, or as conclusions of law . . . " a broad grant which is absent in our statute. Similarly, the cases referred to in the dissenting opinion, Triano v. First Am. Title Ins. Co., 643 P.2d 26, 28 (Ariz. App. 1982) and Wolfe v. Lipsey, 209 Cal. Rptr. 801, 805 (Cal. App. 1985) do not speak to the issue of what type of recital is called for. Triano does not set forth what was stated in the trustee's deed; it merely holds that in the absence of a showing that

(Footnote Continued)

According to one commentator on Oregon's statute,[15]

> if the trustee recites in the deed it carried out notice procedures required by the statutes, such recitals provide absolute protection to a bona fide purchaser relying upon them.

Randolph, Jr., Updating the Oregon Installment Land Contract, 15 Willamette L.J. 181 at 200 n.64 (1979). Oregon explicitly lists the required contents of recitals. Or. Rev. State. 86.775 states:

(Footnote Continued)

the law in fact was not complied with the issuance of the deed was conclusive. Wolfe likewise does not state what was set forth in the trustee's deed. The court of appeals in Wolfe affirmed the action of the trial court setting aside the trustee's sale, reasoning that since the trial court did not apply the conclusive presumption of the statute it must have found that the purchaser was not a bfp, although that conclusion was not stated. The court in Wolfe also referred to the California Supreme Court case, Garfinkle v. Superior Court of Contra Costa County, 578 P.2d 925, 932 (Cal. 1978) which in footnote 16 suggests that the validity of the conclusive presumption clause in California's statute is an open question.

15. Or. Rev. State. § 86.780 reads:

> When the trustee's deed is recorded in the deed records of the county or counties where the property described in the deed is situated, the recitals contained in the deed and in the affidavits required under ORS 86.750(3) shall be prima facie evidence in any court of the truth of the matters set forth herein, but the recitals shall be conclusive in favor of a purchaser for value in good faith relying upon them.

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> The trustee's deed to the purchaser at the trustee's sale shall contain, in addition to a description of the property conveyed, a recital of the facts concerning the default, the notice given, the conduct of the sale and the receipt of the purchase money from the purchaser.

(Empnasis added). Alaska law also specifies that the trustee's "deed shall recite . . . the mailing or delivery of the copies of the notice of default . . . ."[16] though it is less clear than the Oregon statute as to whether the recital should be factual or conclusory.

We are persuaded that what is required is a recital of fact specifying what the trustee has done, not a mere conclusory statement that the trustee has complied with the law. There are several reasons which lead us to this conclusion.

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16. As 34.20.080(c) provides:

> The deed shall recite the date and the book and page of the recording of default, and the mailing or delivery of the copies of the notice of default, the true consideration for the conveyance, the time and place of the publication of notice of sale, and the time, place and manner of sale, and refer to the deed of trust by reference to the page, volume and place of record.

The fact that .080(c)[17] explicitly calls for factual details in the deed recital concerning recording, price, publication, and sale suggests that facts are also called for concerning mailing or delivery.[18] Further, requiring a factual recital tends to assure that the requirements of law concerning mailing or delivery are complied with. A conclusory statement can be a matter placed in a form, or a programmed deed, and will not require the trustee to review what was actually done. A factual recital does require review in each case. While a factual recital requirement does not protect against fraud in all cases, it does tend to prevent the more common failings of oversight and neglect. A conclusory recital, on the other hand, accomplishes little or nothing.

The dissenting opinion states that the purpose of 34.20.090(c) is to provide extra protection to purchasers at

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17. See note 16 supra.

18. The principle of statutory construction which is applicable here is that of associated words -- words are known by the company they keep. "A widely applied tenet of statutory interpretation is that if 'the legislative intent or general meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words and phrases.'" State, Real Estate Commission v. Johnston, 682 P.2d 383, 386-87 (Alaska 1984). Thus, since .080(c) calls for facts concerning other subjects used in a series with mailing or delivery, it is logical to conclude that the statute calls for facts concerning mailing or delivery.

foreclosure sales and to enhance the reliability of their titles. While that is one purpose of the act of which 34.20.090(c) is a part, it is by no means its only purpose. The enactment in question, ch. 116, SLA 1957, added the mailing and delivery requirements now set out in .070(c) (previous law had only required publication, ACLA 1949 § 22-5-2), mandated that the deed recite the mailing or delivery of notice, .080(c), and stated the evidentiary effect of such a recital, .090(c). Thus, the purpose of the act was not only to protect the foreclosure sale purchaser, but to require that effective notice of default and sale be given parties in interest, and to provide a self-effecting method of assuring that such notice is given. Construing the recital requirements in .080(c) and .090(c) to call only for formal conclusions does not accomplish the purpose of assuring mailing or delivery; a construction which holds that a recital of facts is required is consistent with all of the purposes of the statute.

Moreover, the use of the word "recital" suggests that facts rather than conclusions are what the statute calls for. The ordinary meaning of "recital" is a formal statement of relevant facts.[19]

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19. Webster's Third New International Dictionary:
(Footnote Continued)

For these reasons we conclude that AS 34.20.080(c) and .090(c) require a recital of facts specifying what the trustee has done regarding mailing or delivery. Since there was no such recital in this case the Rosenbergs were on inquiry notice of a potential voidable defect. They cannot claim bfp status or the protection of .090(c).

AFFIRMED.

(Footnote Continued)

"Recital 1: the formal statement or setting forth of some relevant matter of fact in a deed or legal document (as to explain the reasons for a transaction, to evidence the existence of facts, or to introduce a positive allegation in pleading). 2. a: a particularized account . . . ."; Black's Law Dictionary 1435 (Rev. 4th ed. 1968): "Recital: The formal statement or setting forth of some matter of fact, in any deed or writing, in order to explain the reasons upon which the transaction is founded . . . The formal preliminary statement in a deed or other instrument, of such deeds, agreements, or matters of fact as are necesary to explain the reasons upon which the transaction is founded."

MOORE, Justice, with whom Rabinowitz, Chief Justice, joins, dissenting in part.

I dissent from the majority's conclusion that the Rosenbergs are not Bona Fide Purchasers (BFP). In my view the Rosenbergs' status as BFPs bars the Smidts from overturning the foreclosure sale, and limits their remedy to seeking damages from Spendlove, Johnson and/or the trustee, Alaska Title Guaranty Company. Protecting the Rosenbergs' title to the property is compelled by important public policy considerations as well as by the express language of AS 34.20.090(c).

The majority correctly notes that where, as here, a defect in the foreclosure sale makes it merely voidable, the sale to a BFP will completely bar the debtor's ability to set aside the sale. G. Nelson & D. Whitman, Real Estate Finance Law § 7.20 (2d ed. 1985); Annot., 73 A.L.R. 612, 638 ("It seems well settled that mere defects or irregularities in foreclosure proceedings do not affect the title acquired by a bona fide purchaser at the sale thereunder.") This makes perfect sense, as grave consequences would result if the rule were otherwise. For example, if innocent purchasers at foreclosure sales had to face the risk that debtors could easily set aside the sales, then it takes little imagination to realize that participation at foreclosure sales

would be significantly and unacceptably chilled. As the court stated in In re Alsop, 14 B.R. 982, 987 (Bankr. Alaska 1981), aff'd 22 B.R. 1017 (D. Alaska 1982):

> The specter of this uncertainty of title will severely inhibit participation at the foreclosure sale by anyone other than the original creditor, thus depressing bid prices to the general detriment of debtors. [This] would further reduce the willingness of creditors to lend on the security of a deed of trust, to the general detriment of borrowers.

Id. (Citation omitted.)

Furthermore, the innocent purchaser, having absolutely nothing to do with the legal relationship between the trustee and the debtor, should not be forced to bear any loss caused to the debtor by the trustee's failure to diligently protect the debtor's interests.

> As between the mortgagor and the purchaser, the former rather than the latter should suffer the loss, because by granting to the mortgagee the right to sell, the mortgagor put it in the mortgagee's power to work the injury through the execution of that power.

Dugan v. Manchester Federal Savings & Loan Association, 23 A.2d 873, 876 (N.H. 1942). Here, where the injury was caused by the trustee's failure to discover the debtor's new address, it should be the debtor, not the innocent purchaser, who should lose title to the property. It is the debtor, not the purchaser, who can most easily notify the trustee of the new address. As between two innocent parties, the

loss should fall on the one in the best position to have avoided that loss.

There is no doubt that Alaska follows the universal rule of refusing to set aside a voidable foreclosure sale when title has passed to a BFP. In fact, Alaska goes even further, and even in the absence of a BFP this court will remain very reluctant to set aside a foreclosure sale except in the most unusual circumstances. For example, in McHugh v. Church, a case not involving purchase by a BFP, this court stated:

> While noncompliance with the statutory provisions regarding foreclosure by the power under a mortgage or trust deed is not to be favored, the remedy of setting aside the sale will be applied only in cases which reach unjust extremes.

583 P.2d 210, 216 (Alaska 1978) (footnote omitted, quoting Semlek v. National Bank of Alaska, 458 P.2d 1003, 1006 (Alaska 1969)). See also Harris v. Alaska Title Guaranty Co., 510 P.2d 501, 505 (Alaska 1973). In other words, in Alaska, a voidable foreclosure sale will never be set aside if a BFP has title, and even where no BFP is involved, the sale will be overturned only if necessary to avoid extreme results. See Note, The Constitutionality of Power of Sale Foreclosure in Alaska, 6 U.C.L.A.-Alaska L. Rev. 90, 112-13 (1976). Because the Rosenbergs are undoubtedly BFPs, I must disagree with the majority's decision to forfeit the

Rosenbergs' title to the property by setting aside the foreclosure sale.

In the context of foreclosure sales, there are three requirements for BFP status.

> If the sale purchaser has paid value and is unrelated to the mortgagee, it would seem that he should take free of voidable defects if: (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect.

G. Nelson & D. Whitman, Real Estate Finance Law § 7.20 at 539 (footnote omitted). As the majority opinion illustrates, the Rosenbergs satisfy all of these requirements. They have paid value and are not related to the mortgagee. They had no actual knowledge of the trustee's failure to exercise due diligence in determining the Smidts' new address, and nothing in the recorded instruments put the Rosenbergs on notice of this defect. Finally, the notice defect was not such that attendance at the sale would provide any hint of the defect. As the majority carefully explains, the debtor's absence from the sale does not put the purchaser on inquiry notice nor require him to investigate or buy a lawsuit.

It is therefore clear that the Rosenbergs are BFPs and entitled to possession of the property. How then does the majority justify setting aside the sale? Curiously, the

majority takes AS 34.20.090(c), gives it a bizarre interpretation, and uses it to strip the Rosenbergs of their BFP status. Ironically, this statute, like those found in other states, was specifically designed to enhance the reliability of title purchased by a BFP at a foreclosure sale. G. Nelson & D. Whitman, Real Estate Finance Law, § 7.21 at 552; Note, The Constitutionality of Power of Sale Foreclosure in Alaska, supra at 112, 116.

AS 34.20.090(c) provides:

> A recital of compliance with all requirements of law regarding the mailing or personal delivery of copies of notices of default in the deed executed under a power of sale is prima facie evidence of compliance with the requirements. The recital is conclusive evidence of compliance with the requirements in favor of a bona fide purchaser or encumbrancer for value and without notice.

(Emphasis added.) Since the trustee's deed recited that all notice requirements had been complied with, the statute should have precluded, at the outset, this action by the Smidts against the Rosenbergs. As already discussed, the Rosenbergs are entitled to the property because they are BFPs. For extra protection against unnecessary and costly litigation, and to enhance the reliability of title acquired at a foreclosure sale, our legislature has expressly created a conclusive presumption in favor of the BFP whenever the debtor seeks to overturn the sale on the basis of a notice defect. The Rosenbergs' status as BFPs, as well as the

conclusive presumption created by the statute both point toward the same result: the Rosenbergs are entitled to the property.

The majority, however, reasons that because the recitation in the deed did not contain detailed factual statements, the Rosenbergs cannot rely on the statutory presumption and therefore are not BFPs. This, of course, is absurd. Even assuming arguendo that the Rosenbergs are not entitled to the conclusive presumption, this does not defeat their status as BFPs. As discussed above, the Rosenbergs undoubtedly satisfy all three requirements for BFP status; that they may be without the protection of AS 34.20.090(c) does not change that fact. The statute does not define BFP status, but instead offers extra protection to one already qualified as a BFP. Indeed, even if AS 34.20.090(c) never had been enacted, the Rosenbergs still would prevail under the universally accepted rule that a voidable foreclosure sale will not be set aside once title has passed to a BFP.

I must also disagree with the majority's decision to engraft onto the statute a requirement of detailed factual statements. The statute nowhere contains this requirement, and it is for the legislature, not this court, to add one if it sees fit to do so. While it is true that to create a conclusive presumption in favor of a BFP, some states

require recitals of facts,[1] other states, like Alaska, do not.[2] A third variation does not require recitations at all, but provides that the deed itself creates the conclusive presumption in favor of the BFP.[3] These variations suggest that there is no one way to balance the rights of creditors and BFPs. Our legislature has struck the balance in such a way that the BFP receives protection from the trustee's recitals in the deed. It is not for this court to alter the balance struck by this statutory scheme. The majority is unable to cite any authority that suggests this court can add a detailed factual statement requirement to a statute that obviously lacks one.

In Blodgett v. Martsch, 590 P.2d 299, 301 (Utah 1978), the trustee's deed falsely stated that all statutory requirements for public sale had been satisfied. Utah's statute, like Alaska's, does not expressly require factual statements. Nevertheless, the court held that if the

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1. Mont. Code. Ann. § 71-1-318 (1985); Or. Rev. Stat. §§ 86.775, 86.780 (1985).

2. Cal. Civ. Code § 2924 (West Supp. 1986); Nev. Rev. Stat. § 107.030(8) (1985); Utah Code Ann. § 57-1-28 (Supp. 1985).

3. Ariz. Rev. Stat. Ann. § 33-811 (Supp. 1985).

purchaser had been a BFP, he would have been completely protected by this conclusory recital. Id. at 303.[4]

The majority suggests that a trustee will always recite that the law has been complied with, and thus the Rosenbergs' reliance on that recital is hollow. However, this "hollow reliance" is exactly what the statute authorizes. Moreover, since the trustee may be liable to the debtor in damages if wrong, the trustee has ample incentive to avoid issuing incorrect recitals. The BFP is therefore even further justified in relying on the accuracy of those recitals. Finally, even if the trustee had recited factual details, the majority does not explain what the Rosenbergs should have done to protect themselves. The fact that letters are returned unclaimed does not per se establish a notice defect. To discover the defect the potential purchaser would have to mount a costly and time consuming investigation. Language in the majority opinion illustrates the serious shortcomings of such a requirement:

> Ultimately, to . . . impose[] a duty upon purchasers to investigate the notice given would gut AS 34.20.090(c). No one would ever be a "bona fide

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4. Other courts likewise have enforced similar conclusive presumption statutes without judicially engrafting requirements that were not included by the legislature. See, e.g., Wolfe v. Lipsy, 209 Cal. Rptr. 801, 805 (Cal. App. 1985); Triano v. First Am. Title Ins. Co., 643 P.2d 26, 28 (Ariz. App. 1982).

> purchaser without [inquiry] notice." By requiring would-be purchasers to "investigate or buy a lawsuit," such a holding would further increase the costs and delays accompanying deed of trust sales.

Opinion at 18.

In conclusion, I dissent from the majority's holding that the Rosenbergs are not BFPs. That decision may have far-reaching effects, possibly clouding the titles of numerous BFPs who have acquired property through foreclosure sales, and chilling the bidding at future sales to the detriment of debtors and creditors alike. I would therefore return title in the property to the Rosenbergs and leave the Smidts free to pursue their remedy in damages against Johnson, Spendlove, and/or the trustee.

John Gibbon's
testimony re: SB-305

3-24-88 Hrng comments SB 305
Sec. interests in real property

1) Background - purpose of sec. interests

2) Salient features

a) Contracts of sale, mortgages, DOTs all subject to summ/jud. foreclosure proceedings

b) Tracks Alaska's U.C.C. in terms of definitions, procedures to follow

c) New provisions

lender bound to his acct. ① Accounting statements all interested person

② Form notice of intent to sell

streamlines, saves $$ ③ 120 day steps to foreclosure

④ Penalty for failure to timely release sec. int.

tracks recent S. Ct. decisions ⑤ Increased remedies for sec. party. (RECENT AK S.C. cases)

⑥ Notice of assignment of sec. interest.

excess of sale to go to debtor - ⑦ Spells out in great detail what steps required to avail of law.

d) Closely tracks Rosenberg vs. Smidt.

① Follows Moore position on who bears risk of loss

② Follows Moore position that changes law by

Repealers:

1) 09.45.170 @ changes "mortgage" to security interest

ⓑ adds new § defining "security interests"

2) 09.45.200 amended to allow secured party to use all legal/equitable remedies. 200 days must have unsatisfied execution before can foreclose on judgment lien.

note: brings 09. into compliance with recent Ak. Sup. Ct. case law.

f) Controversial provisions

① Notice requirements - already answered by Rosenberg.

② U.C.C. private sale provision - liab. exposure for bank

Lender bound to his statement figures

③ Accounting / Reconveyance penalties

④

g) Savings clauses -

h) Add'l changes - very controversial

① Atty fees, costs -

- ② Right of redemption for trustor

RECVD 4-22-88

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M April 22, 1988

SUBJECT: Revision of draft CSSB 305(Judiciary)

TO: Senator Jay Kerttula
Chair, Senate Judiciary Committee

FROM: Theresa L. Bannister
Legislative Counsel

The draft CSSB 305(Judiciary)) that accompanies this memo contains the most current changes suggested by John Abbott. The changes correspond to those made for the 4-22-88 draft of CSSB 515(Judiciary), and also substitute the words "real property" for "home" on page 1, line 10.

If I may be of further assistance, please advise.

Attachment

TLB:bb
b5/034

Original sponsor: Rules/Legislative Council

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 305 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to security interests in real property; and providing for an effective date."

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

* Section 1. PURPOSES AND INTENT. (a) A purpose of this Act is to provide relief to real property loan debtors from the effects of the state's severe economic depression.

(b) The legislature declares its intention to

(1) retroactively apply AS 34.21.080 relating to the remedies of a secured party, AS 34.21.330 relating to attorney fees, and AS 34.21.-210 - 34.21.290 relating to the right of redemption, added by sec. 2 of this Act, to foreclosure proceedings that are in progress when this Act takes effect, unless the collateral has been sold under AS 34.20.070 before the effective date of this Act, or unless a judgment has been entered in a judicial foreclosure action or breach of contract action before the effective date of this Act;

(2) modify the common law relating to real property security interests that was established in Moening v. Alaska Mutual Bank, Op. No. 3274 (Alaska, February 26, 1988), and in Conrad v. Counsellors Investment Co., Op. No. 3275 (Alaska, February 26, 1988).

* Sec. 2. AS 34 is amended by adding a new chapter to read:

CHAPTER 21. SECURITY INTERESTS IN REAL PROPERTY.

Sec. 34.21.010. POLICY AND SCOPE. (a) This chapter applies to a transaction, regardless of its form, that is intended or that appears under all the circumstances to be intended to create a security

interest in real property in the state.

(b) Each provision of this chapter with regard to rights, obligations, and remedies applies whether title to collateral is in the secured party, the debtor, or a third party.

(c) If a lease is intended as security to the lessor, the lessor's interest is a security interest. If a seller's retention of legal title to real property after the buyer enters into possession is intended as security, the seller's interest is a security interest. Whether a transaction is intended as security is to be determined by the facts of each case; however, the inclusion in a lease of an option to purchase at a price reasonable in the circumstances at the time of contracting does not of itself indicate the lease is intended to create a security interest.

Sec. 34.21.020. TRANSACTIONS EXCLUDED. This chapter does not apply to a lien created by statute or rule of law.

Sec. 34.21.030. COLLATERAL NOT OWNED BY DEBTOR. Unless otherwise agreed, if a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under AS 34.21.320(c), is not liable for the debt or for a deficiency after judicial foreclosure, and has the same right as the debtor to

(1) receive and object to a secured party's notice of intent to sell the collateral;

(2) cure a default under AS 34.21.180;

(3) obtain injunctive or other relief under AS 34.21.340;

(4) recover losses under AS 34.21.340;

(5) receive statements under AS 34.21.040; and

(6) redeem the property under AS 34.21.210 - 34.21.290.

Sec. 34.21.040. REQUEST FOR STATEMENT OF ACCOUNT. (a) A debtor

or the holder of a subordinate security interest in the collateral may request a statement of account between the debtor and secured party as of a specified date. If the debtor makes payments to the secured party's agent, the debtor or the holder of the subordinate security interest shall make the request of the agent; if the debtor makes payments directly to the secured party, the debtor shall make the request of the secured party. A person receiving a written request shall comply with it within 15 days after receipt by sending a written statement of account that includes the principal amount due, accrued interest, other sums due, and the interest rate in effect, including the rate per day for the current interest period, and that indicates the status of an escrow account held by the secured party or the secured party's agent for receiving payments in connection with the loan. If the debtor has requested a statement of account from the secured party's agent and does not receive it within 20 days, the debtor may request it from the secured party. The secured party or the secured party's agent for receiving payments who without reasonable excuse fails to comply with a written request within 15 days after receiving it is liable to the person requesting the statement of account for

(1) all damage caused to that person because of failure to comply; and

(2) $250 without proof of actual damages.

(b) If at the time the request for a statement of account is received the person receiving it no longer has an interest in the obligation or collateral either as secured party or as agent for receiving payments, that person shall, within 15 days after receipt of the request, disclose the name and address of a successor in interest known to that person, and that person is liable for a loss caused to

Sec. 34.21.070. RELEASE OF SECURITY INTEREST. (a) A document that releases a security interest evidenced by a recorded security agreement must contain the recording information for that security agreement.

(b) When there is no outstanding secured obligation and no commitment to make advances, incur or fulfill obligations, or otherwise give value under a security agreement the secured party or the secured party's agent shall within 15 days after receiving a written demand by the debtor send the debtor a document legally sufficient to release the security interest.

(c) If the secured party or the secured party's agent fails without good cause to send a document to the debtor as required under (b) of this section, the secured party is liable to the debtor or the debtor's successor in interest for the greater of

(1) $500 without proof of actual damages; and

(2) all damage the debtor or the debtor's successor in interest sustains by reason of the failure.

Sec. 34.21.080. REMEDIES OF SECURED PARTY. (a) If a debtor is in default under a security agreement or under a promissory note secured by a security agreement, the secured party may

(1) bring a civil action that seeks to recover judgment on the secured debt and to foreclose on the collateral;

(2) bring a civil action to foreclose on the collateral without seeking to recover a judgment on the secured debt;

(3) foreclose on the collateral under AS 34.21.090 - 34.-21.190.

(b) If the debtor has filed for bankruptcy, the secured party may, in addition to the remedies listed in (a) of this section, file a claim in the debtor's bankruptcy as a secured or unsecured creditor.

(c) If collateral is sold under AS 34.21.190, the secured party shall withdraw a claim filed under (b) of this section, the court shall dismiss an action filed under (a)(1) or (2) of this section in accordance with the rules of court, and, if judgment has been entered in an action filed under (a)(1) or (2) of this section, the secured party shall file a satisfaction of judgment.

(d) A secured party may not recover a money judgment against the debtor under the security agreement or the promissory note until the secured party has foreclosed judicially on the collateral under AS 09.45.170 and the proceeds of the sale have been applied to reduction of the debt.

(e) After a sale of collateral under AS 34.21.190, another action or proceeding may not be taken or judgment entered against the former debtor, or against the former debtor's surety or guarantor on the obligation secured by the security agreement for a deficiency.

Sec. 34.21.090. REQUIREMENTS FOR SUMMARY FORECLOSURE. Before the foreclosure procedures under AS 34.21.090 - 34.21.500 may be used,

(1) the security agreement must confer a power of sale upon the secured party or another person;

(2) a default must occur under the security agreement, if under the terms of the security agreement the default makes the power of sale operative; and

(3) the security agreement must be recorded in the recording district in which the collateral being foreclosed is located.

Sec. 34.21.100. PROCEDURE BEFORE SALE. The procedures that must be followed before collateral may be sold under a power of sale, and the minimum time periods before the procedures may be taken are established by AS 34.21.110 - 34.21.150. The content of notices required by those sections is set out in AS 34.21.160 - 34.21.170.

Sec. 34.21.110. TRANSMITTING NOTICE OF DEFAULT. Not less than 30 days after a default the secured party or other person having a power of sale shall cause a written notice of default that meets the requirements of AS 34.21.160 to be transmitted by first class certified mail, return receipt requested, to the debtor, to the successor in interest of the debtor if known to the secured party, and to all persons actually occupying the collateral whose names are known to the secured party. Due diligence shall be exercised to determine the address of the debtor, or of the debtor's successor in interest, that is most likely to give the debtor notice.

Sec. 34.21.120. RECORDING NOTICE OF INTENT TO SELL. Not less than 30 days after transmittal of the notice of default the secured party or other person having the power of sale shall record a notice of intent to sell the collateral that meets the requirements of AS 34.21.170. The collateral may not be sold within 60 days following the recording of the notice of intent to sell.

Sec. 34.21.130. TRANSMITTING, POSTING, AND PUBLISHING NOTICE OF INTENT TO SELL. After recording the notice of intent to sell, and not less than 45 days before the sale, the secured party or other person having the power of sale shall

(1) after exercising due diligence to determine the address that is most likely to give the person notice, transmit a copy of the notice of intent to sell by first class certified mail, return receipt requested, to

(A) each person who has an interest in or lien or claim of lien against the collateral or a part of it, if the interest, lien or claim is of record at the time the notice of intent to sell is recorded;

(B) each person who is the attorney of record in a

pending court action to foreclose a lien or other encumbrance on all or a part of the collateral, if a lis pendens showing the existence of the action is of record on the date the notice of intent to sell is recorded;

(2) if the state has a recorded lien on the collateral, transmit to the attorney general by first class certified mail, return receipt requested, the notice of intent to sell and so much of the following information as is shown of record regarding each of the recorded state liens that is inferior in priority to the interest of the secured party:

(A) the nature of the lien;

(B) the amount shown on the lien document;

(C) the agency of state government that appears to have caused the lien to be filed; and

(D) the recording information for the lien;

(3) post in a conspicuous place on the collateral a copy of the notice of intent to sell; and

(4) publish the first of three publications of the notice of intent to sell, the publications to be made once a week for three successive weeks in a newspaper of general circulation published in the municipality in which the collateral is located, or if none is published there, in a newspaper of general circulation published in the state senate election district where the collateral is located, or if none is published there, in a newspaper of general circulation published in the judicial district where the collateral is located.

Sec. 34.21.140. TRANSMITTING FURTHER INFORMATION ABOUT SALE. Unless the information required by this section has been included in the notice of intent to sell, not less than 10 days before the time of public sale or if there is to be a private sale or other disposition

of the collateral, not less than 10 days before entering into a contract of sale or otherwise disposing of the collateral, the secured party or other person having the power of sale shall transmit by first class certified mail, return receipt requested, a written notice of the time and place of a public sale or of the time after which a private sale or other intended disposition is to be made to a

(1) person who has asked the secured party or other person having the power of sale in writing for the notice and has provided an address to which the notice is to be mailed; and

(2) person to whom a notice of intent to sell was sent under AS 34.21.130.

Sec. 34.21.150. MANNER OF TRANSMITTING NOTICE. Wherever in AS 34.21.110 - 34.21.150 transmittal of a notice by mail is required, the notice may instead be served in the manner provided for service of summons and complaint in a civil action or may be delivered personally.

Sec. 34.21.160. CONTENT OF NOTICE OF DEFAULT. A notice of default must include

(1) a description of the collateral;

(2) the recording information for the security agreement;

(3) a statement that the secured party declares the debtor to be in default and the nature of the default;

(4) if the default is failure to make payments, a statement of the amount in arrears on the date of the notice;

(5) a statement of the fees and costs, in addition to any amount in arrears, that the debtor is obliged to pay to reinstate the security agreement and an estimate of additional fees and costs anticipated before a foreclosure sale;

(6) a statement that failure to cure the default and

failure to pay fees and costs within 30 days after the date of transmittal and posting of the notice of default may lead to the recording of a notice of intent to sell, and that the collateral may be sold at a date not less than 60 days after the recording of the notice of intent to sell;

(7) a statement that the effect of the recording of a notice of intent to sell will be

(A) to increase the fees and costs; and

(B) to advertise the debtor's property for sale;

(8) a statement that the effect of a failure to cure the default within 60 days after the recording of a notice of intent to sell will be to deprive the debtor and those who hold by, through or under the debtor of all their interest in the collateral, except for the right to

(A) stop the sale under AS 34.21.180(d) by curing the default and paying the entire remaining indebtedness and certain expenses;

(B) enjoin or object to sale under AS 34.21.340;

(C) receive surplus proceeds under AS 34.21.320(c); and

(D) redeem the collateral under AS 34.21.210 - 34.21.-290 after the sale; and

(9) a statement that the debtor or the debtor's successor in interest has recourse to the courts to contest the default.

Sec. 34.21.170. CONTENT OF NOTICE OF INTENT TO SELL. A notice of intent to sell shall be in substantially the following form:

NOTICE OF INTENT TO SELL

I

Notice is given that the undersigned intends to sell the following

property:

(set out legal description of collateral to be sold)

II

(If the time and place of a public sale are known, set them out here. If a private sale or other disposition is intended, set out here the intention and the time after which the private sale or disposition is to be made. If the time and manner of disposition of the property are not fixed at the time of recording of this notice, insert the following.) The date of sale will be not earlier than ....., 19.... The property will be advertised for sale in a way that is commercially reasonable for the specific property, will be sold in one or more parcels by public or private proceedings ... sold by one or more contracts. At least 10 days written notice of the time and place of a public sale or of the time after which a private sale or other intended disposition of the property is to be made will be provided to any person who asks the undersigned in writing for such a notice and provides a mailing address, and to any person to whom this notice of intent to sell is sent under AS 34.21.130(1).

III

Authority to sell the property in the event of default is contained in a (insert title of security agreement) executed by ....., debtor, to secure an obligation to ....., secured party, dated ....., 19.., and recorded in the records of the ..... Recording District, ... Judicial District, State of Alaska, in book ..... at page .....

IV

(ALTERNATIVE A: If the default is failure to pay money, set out that the default is failure to pay when due the following amounts: (listing the amounts in arrears)).

(ALTERNATIVE B: If default is for other than failure to pay money, set out the particulars).

A written notice of default was transmitted to the debtor or the debtor's successor in interest at the following address:

.....

.....

.....

on the ..... day of ....., 19.., proof of which is in the possession of the undersigned.

V

The sale will be terminated if at any time before the ..... day of ....., 19.., (insert the date 61 days after the date of recording of the notice of intent to sell) the default as set out above is cured and all fees and costs are paid. The sale will be terminated if at any later time before the sale the entire principal and interest plus all fees and costs are paid.

VI

As of the date of recording of this notice there is owing on the obligation secured by the security agreement $....., together with interest on $..... from the ..... day of ....., 19.., at the rate of ..... percent per ....., and the following accrued fees and costs that the debtor is obliged to pay to cure the default:

(set out fees and costs)

It is estimated that additional fees and costs totaling $..... will accrue before a foreclosure sale. The property described in paragraph I of this notice will be sold to satisfy the above amounts owing plus the expenses of sale and other accrued fees and costs.

VII

Failure to cure the default alleged in this notice before .....,

19.. (insert the date 61 days after the date of recording of the notice of intent to sell) will deprive the debtor and those who hold by, through or under the debtor of all their interest in the collateral, except the right to stop the sale by curing any default under AS 34.21.180(d) and paying the entire indebtedness and certain expenses, the right to enjoin or object to sale under AS 34.21.340, the right to receive surplus proceeds under AS 34.21.320(c), and the right to redeem the collateral under AS 34.21.210 - 34.21.290 after the sale.

VIII

A person having an objection to the sale on any ground will be afforded an opportunity to be heard as to the objection if the person brings a lawsuit to restrain the sale under AS 34.21.340. Failure to bring a lawsuit may result in a waiver of any ground for invalidating the sale.

IX

The person whose name and address are set out below will provide in writing to anyone requesting it a statement of all fees and costs due at any time before the sale.

X

The effect of the sale will be to deprive the debtor and all those who hold by, through or under the debtor of all their interest in the above-described property, unless the debtor redeems the collateral under AS 34.21.210 - 34.21.290 after the sale.

(signed).....

.....

Address.....

.....

Phone.....

STATE OF ALASKA)
: ss.
_____ JUDICIAL DISTRICT)

The foregoing instrument was acknowledged before me this (DATE) by (NAME OF PERSON WHO ACKNOWLEDGED).

.....
NOTARY PUBLIC in and for the State of Alaska. My commission expires .....

(SEAL)

Sec. 34.21.180. CURING DEFAULT BEFORE SALE; EXTINCTION OF DEBTOR'S RIGHT TO CURE. (a) Subject to (b) of this section, the debtor, the debtor's successor in interest, or a holder of an interest inferior in priority to that being foreclosed may cause a discontinuance of sale proceedings by curing the default, which, if the default is failure to pay, shall be by paying to the secured party or other person having the power of sale

(1) all amounts then due under the terms of the security agreement and the obligation secured by it, other than amounts which would not be due if default had not occurred; and

(2) the expenses actually incurred by the secured party or other person having the power of sale in enforcing the provisions of the security agreement and the obligation secured by it, including the attorney fees allowed under AS 34.21.330 and court costs incurred because of the default.

(b) The cure described in (a) of this section must be made within 60 days following the recording of the notice of intent to sell, or within 45 days following the first publication and completion of posting and transmittal of the notice of intent to sell, whichever is the later time.

(c) Notwithstanding (a) and (b) of this section, if under the same security agreement notice of intent to sell has been recorded two or more times previously because of default by the debtor, the secured party or other person having the power of sale may refuse the cure of the default under (a) of this section and continue with the sale.

(d) At any time before the secured party or other person having the power of sale has sold or entered into a contract to sell the collateral, the debtor, the debtor's successor in interest or a holder of an interest inferior in priority to that being foreclosed may cause a discontinuance of the sale proceedings by curing the default and paying the entire principal debt and accrued interest, and all other expenses as defined in (a)(2) of this section incurred as of the date of payment.

(e) If the default is cured, the sale proceedings shall be discontinued. If the default is cured under (a) of this section, the security agreement is reinstated and the obligation remains as though acceleration had not taken place. If the default is cured by the holder of an interest inferior in priority to that being foreclosed, the security interest of that holder includes all payments made to cure, including attorney fees allowed under AS 34.21.330 and reasonable costs. If the interest held in the collateral by the person who cured the default is security for an interest-bearing obligation, the cost to cure default bears interest at the rate of that obligation; otherwise the cost to cure default bears interest at the same rate as an unpaid judgment of a state court.

(f) If the default is cured and the obligation and security agreement reinstated under this section, the secured party or other person having the power of sale shall promptly cause to be recorded a notice of discontinuance of the sale. The notice must contain the

recording information of the security agreement and the notice of intent to sell, and a statement that the sale has been discontinued.

(g) The passage of time within which a default may be cured under (a) of this section extinguishes all rights held in the collateral by the debtor, the debtor's successor in interest, all persons who were sent a notice of intent to sell under AS 34.21.130, and all holders of unrecorded junior encumbrances, except the right

(1) to cure the default under (d) of this section;

(2) to seek an injunction under AS 34.21.340;

(3) to receive surplus proceeds under AS 34.21.320(c); and

(4) to redeem the collateral under AS 34.21.230 - 34.21.290 after the sale.

(h) To the extent cure of a default requires payment of money, the secured party may require payment in cash, by cashier's check on a bank in the judicial district where the sale is held, or by postal money order.

Sec. 34.21.190. MANNER OF SALE. (a) If a default has not been cured under AS 34.21.180, the secured party or other person having the power of sale may sell the collateral in its existing condition or following a commercially reasonable preparation.

(b) After the time for cure under AS 34.21.180(a) has expired and until the default is cured under AS 34.21.180(d) or the collateral is sold, the secured party or other person having the power of sale may take possession of the collateral in order to protect it or to prepare it for sale.

(c) After the notice of intent to sell the collateral has been recorded for 30 days, the secured party has a right of access to the collateral to show it to prospective purchasers.

(d) The sale of the collateral may be by public or private

proceedings and may be made by way of one or more private contracts. Sale may be as a whole or in parcels and at any time and place and on any terms, but every aspect of the sale, including the method, manner, time, place and terms, must be commercially reasonable.

(e) The fact that a better price could have been obtained by a sale of the collateral at different times or in a different method from that selected by the secured party or other person having the power of sale is not of itself sufficient to establish that sale was not made in a commercially reasonable manner. If the collateral is sold in the usual manner in a recognized market for it, is sold at the price current in that market at the time of the sale, or is otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, the sale is in a commercially reasonable manner.

(f) A sale of the collateral that has been approved in a judicial proceeding or by a creditor's committee convened under 11 U.S.C. 705 or 11 U.S.C. 1102 (Bankruptcy Code) is conclusively considered commercially reasonable, but this subsection does not imply that judicial approval must be obtained nor does it imply that a sale not approved by a creditor's committee is not commercially reasonable.

Sec. 34.21.200. PURCHASE OF COLLATERAL BY LIENHOLDER. (a) If the sale of collateral is at public auction, the secured party who is foreclosing under this chapter may bid at the sale and set off the amount of that secured party's interest, including attorney fees allowed under AS 34.21.330 and costs, against the bid. The secured party may not be a purchaser at a negotiated sale.

(b) At a sale under AS 34.21.190 the holder of a perfected lien against the collateral who is not foreclosing under this chapter may purchase the collateral and set off against the purchase price the

amount of the lien. At the time of purchasing under this subsection or before, the lien holder must pay off or otherwise secure the release of superior liens against the collateral.

Sec. 34.21.210. RIGHT OF REDEMPTION. A sale of collateral by summary procedure under this chapter is subject to redemption. The person conducting the sale shall give to the purchaser a certificate of the sale that contains

(1) a particular description of the collateral sold;

(2) the price bid for each distinct lot or parcel;

(3) the entire price paid; and

(4) a statement that the property is subject to redemption.

Sec. 34.21.220. REDEMPTION. Collateral subject to redemption under AS 34.21.210 may be redeemed by the following persons or their successors in interest:

(1) the debtor; and

(2) a creditor having a lien by judgment or security interest on all or part of the collateral if the lien is subsequent in time to the security interest for which the collateral was sold.

Sec. 34.21.230. REDEMPTION BY LIEN CREDITOR FROM PURCHASER. A lien creditor may redeem the collateral under AS 34.21.210 within 60 days after the sale by paying the amount of the purchase money, interest on the purchase money at the rate of 10.5 percent a year from the date of the sale, and the amount of taxes that the purchaser has paid for the collateral since the sale. If the purchaser is also a creditor having a lien prior to that of the redemptioner, the redemptioner shall also pay the amount of the purchaser's lien with the interest allowed under AS 45.45.010(a).

Sec. 34.21.240. SUBSEQUENT REDEMPTIONS. The collateral may be redeemed from the previous redemptioner within 60 days after the last

redemption by paying the sum paid on the last redemption, interest at eight percent a year from the date of the last redemption, the taxes on the collateral that the last redemptioner has paid as part of or after redeeming, and the amount of the liens held by the last redemptioner that are prior in time to the lien of the last redemptioner. A lien creditor may not redeem the property from the debtor who has redeemed under AS 34.21.250.

Sec. 34.21.250. REDEMPTION BY DEBTOR. The debtor or the debtor's successor in interest may redeem the collateral by paying within 12 months of the sale the amount of the purchase money, interest at the rate of 10.5 percent, and the taxes that the purchaser or last redemptioner paid for the collateral under AS 09.35.230 or 09.35.240.

Sec. 34.21.260. PROCEDURE FOR REDEMPTION. (a) Redemption is made by paying the required sum to the seller. Upon a redemption, the seller shall give the person redeeming a certificate of redemption containing the sum paid on redemption, the name of the person from whom the collateral was redeemed, and the date of the redemption. The seller shall immediately give notice of the redemption to the party from whom the collateral was redeemed.

(b) To redeem collateral, a debtor or redemptioner shall submit to the seller

(1) a copy of the recorded security agreement or judgment lien on which the debtor or redemptioner bases the right to redeem;

(2) a copy of an assignment that is necessary to establish that the person is the successor in interest to the holder of the security agreement or judgment lien provided under (1) of this subsection, verified by the affidavit of the holder or the agent of the holder; and

(3) an affidavit by the holder of the security interest or

judgment or by the agent of the holder showing the amount then actually due under the security agreement or the judgment lien.

Sec. 34.21.270. PRIORITY OF REDEMPTION. If more than one person applies to the seller at the same time to redeem, the debtor may redeem first, if the debtor is among the applicants, and the person having the earliest recorded lien may redeem first, if the debtor is not among the applicants.

Sec. 34.21.280. REFUSAL TO PERMIT REDEMPTION. A person's right to redeem is not prejudiced by the refusal of the seller to allow the redemption.

Sec. 34.21.290. RIGHTS OF PURCHASER AND REDEMPTIONER. The purchaser, from the time of sale until a resale or a redemption, or a redemptioner, from the time of redemption until another redemption, is entitled to the possession of the collateral purchased or redeemed as against the debtor or other person claiming by, through, or under the debtor. Where the collateral is in the possession of a tenant, the purchaser or redemptioner is entitled to receive the rents of the collateral or the value of the use and occupation of the collateral.

Sec. 34.21.300. PROCEDURE AFTER SALE. After a sale of the collateral by summary procedure under this chapter and receipt of the purchase price, the secured party or other person having the power of sale shall deed the collateral to the purchaser subject to the right of redemption provided under this chapter. The deed shall include or have attached to it a sworn statement reciting

(1) the recording information of the security agreement that was foreclosed;

(2) the date and recording information of the recorded notice of intent to sell;

(3) the actual consideration for the conveyance;

(4) the facts indicating the manner in which the notices required under AS 34.21.110 - 34.21.140 were given;

(5) the time and place of publication of the notice of intent to sell; and

(6) the time, place and manner of sale.

Sec. 34.21.310. EFFECT OF SALE. (a) Subject to the right of redemption under AS 34.21.210 - 34.21.290, a sale of collateral under this chapter transfers all title and interest the debtor had in the collateral at the time the security agreement was executed, together with all title or interest the debtor may have acquired before the sale.

(b) A sworn statement complying with AS 34.21.300 and asserting that all requirements of law have been complied with is prima facie evidence of compliance with those requirements.

Sec. 34.21.320. DISPOSITION OF PROCEEDS OF SALE. (a) The secured party or other person with power of sale shall apply the proceeds of the sale of the collateral in the following order to

(1) the reasonable expenses of retaking, holding, preparing for sale and selling the collateral, the attorney fees allowed under AS 34.21.330, and the reasonable legal expenses incurred by the secured party or other person with power of sale;

(2) the satisfaction of the indebtedness secured;

(3) the satisfaction of indebtedness secured by a recorded subordinate security interest or recorded lien on the collateral.

(b) If requested by the secured party or other person having the power of sale, the holder of a recorded subordinate security interest or recorded lien must furnish to the secured party or other person having the power of sale reasonable proof of interest in the collateral.

(c) The secured party or other person having the power of sale shall account to the debtor who owns or has rights in the collateral for the proceeds of sale and pay the debtor any surplus after applying the proceeds under (a) of this section.

Sec. 34.21.330. ATTORNEY FEES. (a) The attorney fees that must be paid under AS 34.21.180 by the debtor to cure the default before the sale of the collateral may not exceed the sum of

(1) $250 for the first $100,000 of the amount due under the terms of the security agreement at the time of the cure; plus

(2) .15 percent of the amount that exceeds $100,000 and that is due under the terms of the security agreement at the time of the cure.

(b) The attorney fees that are included in the set-off under AS 34.21.200 may not exceed the sum of (a)(1) and (2) of this section.

(c) The attorney fees that are considered a reasonable expense under AS 34.21.320 of retaking, holding, preparing for sale and selling the collateral may not exceed the sum of (a)(1) and (2) of this section.

(d) In this section, "amount due" does not include attorney fees.

Sec. 34.21.340. SECURED PARTY'S LIABILITY FOR FAILURE TO COMPLY, ENJOINING SALE. If it is established that the secured party or other person having the power of sale is not proceeding under AS 34.21.090 - 34.21.360, a sale of collateral may be ordered or restrained on appropriate terms and conditions. If the sale has occurred, the debtor or a person entitled to a copy of notice of intent to sell under AS 34.-21.130 or a person whose subordinate security interest or lien has been recorded before the distribution of proceeds of sale may recover from the secured party or other person having the power of sale a loss

caused by a failure to comply with AS 34.21.090 - 34.21.360.

Sec. 34.21.350. GENERAL VALIDITY OF SECURITY AGREEMENT. Unless it conflicts with a provision of law, a security agreement is effective between the parties according to its terms. Nothing in this chapter validates a charge or practice that is illegal under a statute or regulation for debtor protection including those statutes and regulations governing usury and small loans. Nothing in this chapter extends the application of the statute or regulation for debtor protection to a transaction not otherwise subject to it.

Sec. 34.21.360. WAIVER OF RIGHTS. To the extent that they give rights to the debtor and impose duties on the secured party or other person having the power of sale, the provisions of this chapter may not be waived or varied.

Sec. 34.21.500. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "collateral" means the real property subject to a security interest;

(2) "debtor" means the person who owes payment or other performance of the obligation secured, whether or not the person owns or has rights in the collateral; if the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of this chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both when the context requires it;

(3) "real property" includes an interest in real property;

(4) "recording information" means the information (book and page, document number, electronic retrieval code, or other specific information) needed to find a document in the public records;

(5) "redemptioner" means a creditor who is allowed to

redeem collateral under AS 34.21.220(2) and who redeems collateral sold by summary procedure under this chapter;

(6) "secured party" means a lender, seller, beneficiary or other person or governmental agency for whose benefit there is a security interest, including a receiver, trustee in bankruptcy, or person to whom a security agreement is sold;

(7) "security agreement" means an agreement that creates or provides for a security interest in real property, and includes a lease if the lease was intended to create a security interest;

(8) "security interest" means a consensual interest in real property that secures payment or performance of an obligation.

* Sec. 3. AS 06.05.175 is amended by adding a new subsection to read:

(d) It is not a violation of this section to provide a statement of account to a debtor or the holder of a subordinate security interest under AS 34.21.040.

* Sec. 4. AS 09.45.170 is amended to read:

Sec. 09.45.170. JUDGMENT ON FORECLOSURE OF LIEN. A person having a lien upon real property, other than that of a judgment, whether created by security agreement [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. Subject to the provisions of AS 34.21.080, the court [JUDGMENT] shall also determine the personal liability of a defendant for the payment of the debt secured by the lien and enter the determination in the judgment [BE ENTERED ACCORDINGLY].

* Sec. 5. AS 09.45.170 is amended by adding a new subsection to read:

(b) In this section, "security agreement" means an agreement

that creates or provides for a security interest in real property; in this subsection, "security interest" has the meaning given in AS 34.-21.500.

* Sec. 6. AS 09.45.200, AS 34.20.010, 34.20.020, 34.20.030, 34.20.040, 34.20,050, 34.20,060, 34.20,070, 34.20,080, 34.20,090, 34.20.100, 34.20.-110, 34.20.120, 34.20.130, and 34.20.135 are repealed.

* Sec. 7. TRANSITIONAL PROVISIONS. (a) A security agreement as defined in AS 34.21.500, as enacted in sec. 2 of this Act, that is entered into before the effective date of this Act, including rights, duties, and interests under it, continues in effect and may be terminated or enforced under a law amended or repealed by this Act as though the law had not been amended or repealed.

(b) A person foreclosing a deed of trust executed before the effective date of this Act, may elect to foreclose under AS 34.21, added by sec. 2 of this Act, or under the law in effect when the deed of trust was entered into.

(c) Notwithstanding (a) of this section, a person foreclosing a security agreement other than a deed of trust shall foreclose under the law in effect when the security agreement was entered into.

(d) Notwithstanding the other provisions of (a) - (c) of this section to the contrary,

(1) AS 34.21.080, 34.21.210 - 34.21.290, and 34.21.330, added by sec. 2 of this Act, apply to security agreement foreclosure proceedings that are in progress during, or that begin after, the effective date of this Act, unless the collateral has been sold before the effective date of this Act under AS 34.20.070, repealed by sec. 6 of this Act, or unless a judgment has been entered before the effective date of this Act in a judicial foreclosure action or judicial action for breach of contract arising out of the security agreement; and

(2) AS 34.21.080 also applies retroactively to the cases that were the subject of Moening v. Alaska Mutual Bank, Op. No. 3274 (Alaska, February 26, 1988) and Conrad v. Counsellors Investment Co. Op. No. 3275 (Alaska, February 26, 1988) and to the cases subsequently decided in this state under the authority of either of the cases.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

SB305

May 13, 1987

The Honorable Bettye Fahrenkamp
Chair, Alaska Legislative Council
Pouch V, State Capitol
Juneau, AK 99811

RE: Bills on real property security interests
(5-1200 and 5-0481)

Dear Senator Fahrenkamp:

The attached bills (one for the House and one for the Senate) are submitted to the Alaska Legislative Council pursuant to AS 24.20.075 with the request that they be introduced in the Fifteenth Legislature. A sectional analysis accompanies the bills; the analysis is taken from the February 27, 1985 House and Senate Joint Journal Supplement for HB 245 and SB 198.

The bills were introduced in the Thirteenth Legislature as HB 341/SB 244 and in the Fourteenth Legislature as HB 245/SB 198. The bills did not move out of committee. At least part of the reason in the Thirteenth Legislature was that it was erroneously associated in many minds with a controversial "due-on-sale" section of an earlier bill, HB 403 of the Twelfth Legislature. That section is not in the bills now offered. Changes in other state and federal lending laws have made it unnecessary.

The bills cover the relationship, rights, and remedies of debtor and creditor in secured real property transactions. It resulted from the commission's general review of real property law in Title 34.

The main sources drawn upon in preparing the bills are the existing Alaska law on deeds of trust, the Uniform Commercial Code, the Washington law on nonjudicial foreclosure, and the Uniform Land Transfers Act.

Respectfully submitted,

Tamara Brandt Cook

Tamara Brandt Cook
Executive Secretary
Alaska Code Revision Commission

JA:mkr
m11/114

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MAY 1987
ALASKA CODE REVISION COMMISSION
COMMENTARY TO ACCOMPANY
BILL ON SECURITY INTERESTS IN REAL PROPERTY
Work Order No. 5-1200 and 5-0481

General Features of the Bill

The attached bill prepared by the Alaska Code Revision Commission is an effort to bring into secured real property transactions some of the same principles that govern secured personal property transactions under the Uniform Commercial Code. The bill covers the broad area of relationships, rights, and remedies of debtor and secured creditor. The state law on summary foreclosure of deeds of trust would be superseded, but not drastically changed. In cases where foreclosure under a power of sale is required, the bill makes possible a commercially reasonable resale by listing and sale through a real estate agent, in order to avoid the disastrous forced-sale prices often received at public auction.

The bill was introduced in the Twelfth Legislature as HB 403. Action was not taken on it. All attention focused on a relatively minor part of the bill, a section limiting the use of "due-on-sale" clauses in security agreements for the purchase of a home. That controversial section, readily separable from the body of the bill, is not included in the present form of the bill and has largely been preempted by recent federal and state statutes and regulations (12 U.S.C. 1701j-3 (sec. 341, Garn-St. Germain Depository Act of 1982, P.L. 97-320); 12 U.S. 371(g); 12 C.F.R. 548.8-4(f); AS 06.01.020; AS 18.56.098(e); 15 AAC 118.267).

In the Thirteenth Legislature the bill was again introduced, but it was not scheduled for committee hearings. In that legislature the Code Revision Commission was asking that priority be given to several other bills it had drafted. The bill was also introduced in the Fourteenth Legislature. However, the commission believes the time now is right for legislative attention to this bill.

Persons familiar with the present Alaska law on both real and personal property should find the bill a natural

development. The vast majority of real property sales are now financed by deeds of trust. Most departures in the bill from present practices under deeds of trust are not great. The main changes occur where needed to permit additional kinds of sales of collateral in cases of default. The bill makes deed of trust foreclosure procedures applicable to mortgages and contracts of sale. Under present law mortgages are more difficult to foreclose than deeds of trust, for no logical reason, and there are no statutory guidelines for foreclosing contracts of sale, which has resulted in substantial litigation at both the superior court and supreme court level (e.g., Lonas v. Metropolitan Mortgage and Securities Co., 432 P.2d 603 (Alaska 1967); Moran v. Holman, 501 P.2d 769 (Alaska 1972); Curry v. Tucker, 616 P.2d 8 (Alaska 1980); Wickwire v. McFadden, 633 P.2d 278 (Alaska 1981); Strack v. Miller, 645 P.2d 184 (Alaska 1982); additional cases are summarized in Department of Revenue v. Baxter, 486 P.2d 360, 365n.10 (Alaska 1971)).

A bill of this kind must specify procedures to be followed and forms to be used in carrying out the procedures. The procedures to be followed before sale in a summary foreclosure are set out in the bill in AS 34.21.110-34.21.150. These sections are followed by AS 34.21.160-34.21.170 which specify the content of forms that are to be used. Since the forms are designed to advise the defaulting debtor of the debtor's rights and to inform the debtor of the procedures that will be followed, the forms cover some of the same material that is set out in the preceding substantive sections. AS 34.21.100 in the bill explains this relationship between the sections.

A contents page and a comparison of time elements and steps from default to sale under existing law and under the bill are attached here for ready reference. (See next 3 pages)

Sec. 1. PURPOSE OF ACT

Sec. 2. CHAPTER 21. SECURITY INTERESTS IN REAL PROPERTY

Sec. 34.21.010. POLICY AND SCOPE
Sec. 34.21.020. TRANSACTIONS EXCLUDED
Sec. 34.21.030. COLLATERAL NOT OWNED BY DEBTOR
Sec. 34.21.040. REQUEST FOR STATEMENT OF ACCOUNT
Sec. 34.21.050. ALIENABILITY OF DEBTOR'S RIGHTS
Sec. 34.21.060. NOTIFICATION OF ASSIGNMENT
Sec. 34.21.070. RELEASE OF SECURITY INTEREST
Sec. 34.21.080. REMEDIES OF SECURED PARTY
Sec. 34.21.090. REQUIREMENTS FOR SUMMARY FORECLOSURE
Sec. 34.21.100. PROCEDURE BEFORE SALE
Sec. 34.21.110. TRANSMITTING NOTICE OF DEFAULT
Sec. 34.21.120. RECORDING NOTICE OF INTENT TO SELL
Sec. 34.21.130. TRANSMITTING, POSTING, AND PUBLISHING NOTICE OF INTENT TO SELL
Sec. 34.21.140. TRANSMITTING FURTHER INFORMATION ABOUT SALE
Sec. 34.21.150. MANNER OF TRANSMITTING NOTICE
Sec. 34.21.160. CONTENT OF NOTICE OF DEFAULT
Sec. 34.21.170. CONTENT OF NOTICE OF INTENT TO SELL
Sec. 34.21.180. CURING DEFAULT BFFORE SALE; EXTINCTION OF DEBTOR'S RIGHT TO CURE
Sec. 34.21.190. MANNER OF SALE
Sec. 34.21.200. PURCHASE OF COLLATERAL BY LIENHOLDER
Sec. 34.21.210. PROCEDURE AFTER SALE
Sec. 34.21.220. EFFECT OF SALE
Sec. 34.21.230. DISPOSITION OF PROCEEDS OF SALE
Sec. 34.21.240. SECURED PARTY'S LIABILITY FOR FAILURE TO COMPLY, ENJOINING SALE
Sec. 34.21.250. GENERAL VALIDITY OF SECURITY AGREEMENT
Sec. 34.21.260. WAIVER OF RIGHTS
Sec. 34.21.270. DEFINITIONS

Sections 3-5 make amendments to:

Sec. 06.05.175. DEPOSITOR AND CUSTOMER RECORDS CONFIDENTIAL
Sec. 09.45.170. JUDGMENT ON FORECLOSURE OF LIEN

Sec. 6. Repeals AS 09.45.200 and AS 34.20.010--34.20.135

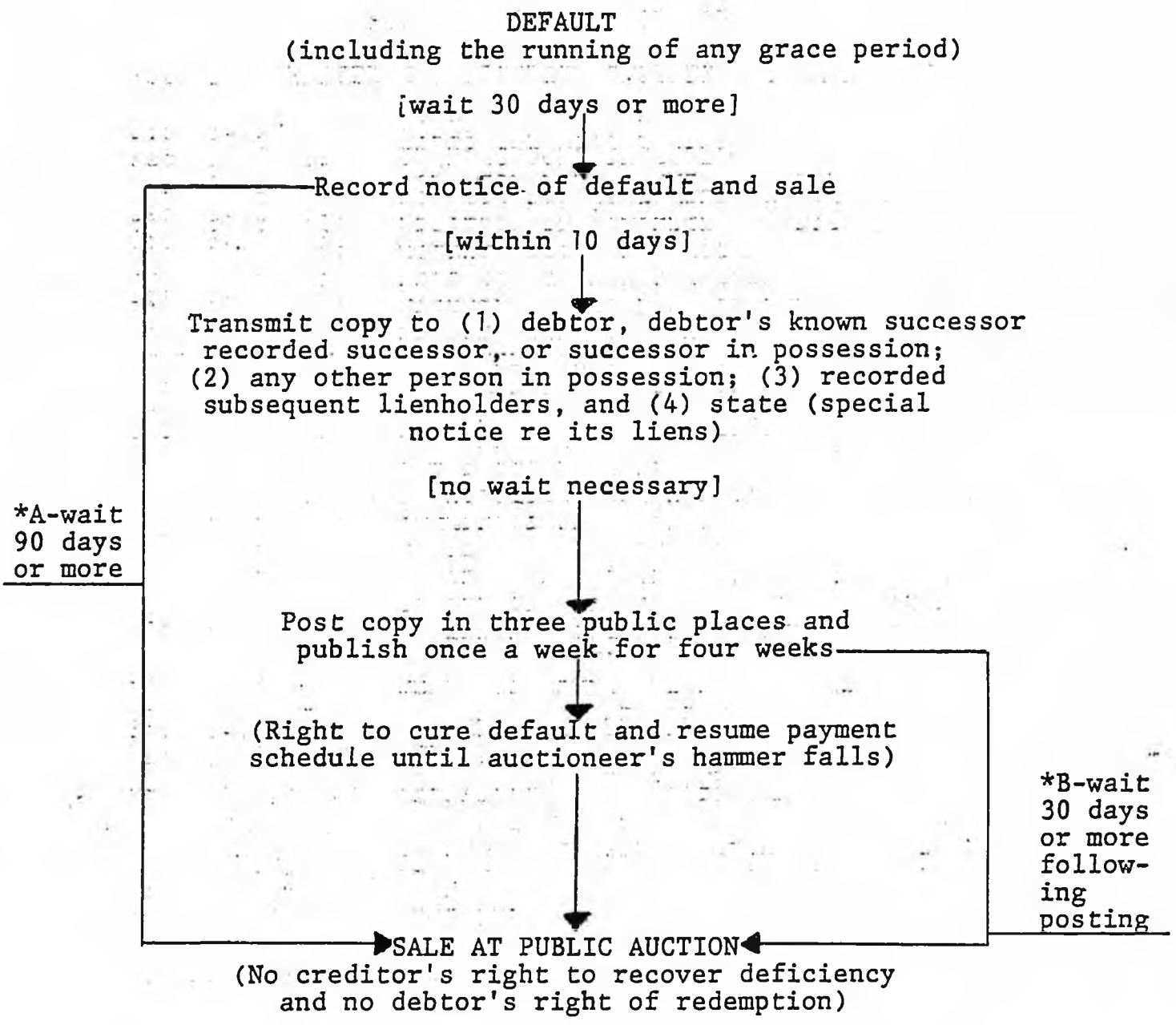
Sec. 7. Transitional provisions

Sec. 8. Effective date

STEPS IN SUMMARY FORECLOSURE

UNDER EXISTING SECTIONS 34.20.070 - 34.20.135

(Deeds of Trust)



Minimum time between the end of a grace period for receipt of payments and the date of sale: 120 days.

* A and B time laspe in used depending upon which brings one to a later sale date.

STEPS IN SUMMARY FORECLOSURE

UNDER PROPOSED SECTIONS 34.21.090 - 34.21.270

(Any security agreement containing a power of sale)

DEFAULT

[wait 30 days or more]

Transmit notice of default
[to (1) debtor or debtor's successor
and (2) occupants]

[wait 30 days or more]

Record notice of intent to sell

[no wait necessary]

Transmit notice of intent to sell [to (1) debtor and any other person with known or recorded interest in the collateral; (2) an attorney shown in a lis pendens, and (3) the Attorney General with special notice re state liens], post it on the collateral and start publication of it once a week for 3 weeks

*A-wait 60 days or more

[no wait necessary]

Notice of time and place of public sale or time after which private sale will be made (this separate notice is not necessary if it was included in notice of intent to sell)

*B-wait 45 days or more following transmittal posting and start of publication

[wait 10 days or more]

SALE

(No creditor's right to recover deficiency and no debtor's right of redemption)

Minimum time between the end of a grace period for receipt of payments and the date of sale: 120 days.

* A and B time laspe is used depending upon which brings one to a later "sale" date.

The date for "sale" shown here is also the last date for curing a default and resuming the regular payment schedule (a "simple" cure). The sale may be held later as a public sale or a "commercially reasonable" private sale, but after the final date for a simple cure, the sale can be stopped only by paying the full principal, interest and costs.

Sectional Analysis

Following are source notes and brief comments on the sections, where appropriate. In the source notes and comments the Uniform Commercial Code, AS 45.01 - 45.09, referred to as the UCC. The Uniform Land Transactions Act is referred to as the ULTA and the Uniform Simplification of Land Transfers Act is referred to as the USLTA. The Revised Code of Washington Annotated is referred to as RCWA.

Section 1

Comment: This sections states the general purposes of the Act.

Section 2

AS 34.21.010

SOURCE: (a) is from AS 45.09.102; (b) is from AS 45.09.202; (c) is part of the ULTA sec. 3-103(7) and USLTA sec. 1-201.

COMMENT: (a) is intended to allow a court to find a transaction subject to this chapter even though there is no documentary evidence of the parties' intent.

The material in (c) was included as part of the definition of "security interest" in the referenced uniform acts. The general subject matter of sec. 34.21.010 is covered in ULTA sec. 3-102.

AS 34.21.020

SOURCE: AS 45.09.104(8).

COMMENT: The exclusion in this section is consistent with the definition of "security interest" as a "consensual" interest.

AS 34.21.030

SOURCE: AS 45.09.112.

COMMENT: This section is designed to protect the real party in interest. Its effect is similar to that of existing law, which requires the trustee to send a notice of sale "where the trustee or beneficiary has actual notice of the lien or interest." AS 34.20.070(c)(3).

AS 34.21.040

SOURCE: This section was taken from ULTA sec. 3-209 which is based upon sec. 9-208 of the UCC (AS 45.09.208). Language is added to allow a debtor to request statements from the bank to which he actually makes his payments.

COMMENTS: Existing law makes no provision for such a statement, although the common practice is for statements to be sent even though not requested.

Liability is imposed on the person failing to comply with the request only if he lacks a "reasonable excuse."

The bill gives the holder of a subordinate security interest like a second deed of trust the right to get from the trustee or beneficiary on a first deed of trust a statement of account on the obligation secured by the first deed of trust. The duty placed on the secured party or the secured party's agent bank to provide information would create an exception to the strict confidentiality of bank records under AS 06.05.175. Section 3 near the end of the bill specifically amends that section.

AS 34.21.050

SOURCE: AS 45.09.311.

COMMENT: This section is verbatim from the UCC. It is to make clear that in all secured real property transactions the debtor has an interest which the debtor can dispose of and which the creditors of the debtor can reach.

The section does not preclude a security agreement provision which makes a transfer a default but merely prevents such a provision from having the effect of prohibiting transfer. The transfer would be subject to the security interest.

AS 34.21.060

SOURCE: AS 45.09.405(c).

COMMENT: Existing law deals with the subject of this section only by providing that recording an assignment of mortgage is not in itself notice to the debtor of the assignment. AS 34.20.010. In contrast, AS 34.20.130 provides that recording an assignment of the beneficial interest in a deed of trust is "constructive notice to all persons." (When the assignor acts as the assignee's agent to receive payments following the assignment, this section could be ignored.)

AS 34.21.070

SOURCE: The section is based upon AS 45.09.404(a), sec. 9-404(1) of the UCC.

COMMENT: The section requires the secured party to pay the debtor both a fixed sum of $500 and the debtor's actual damages if the debtor fails to provide the statement within 15 days after demand. This is the UCC provision, substantially, except the UCC requires the statement within 10 days and the dollar penalty is $100.

AS 34.21.080

SOURCE: AS 45.09.501(a), with major changes.

COMMENT: The commission saw no reason to restrict the secured party from proceeding with judicial and nonjudicial remedies simultaneously. The section follows generally UCC sec. 9-501(1) which provides that remedies shall be cumulative.

The section is subject to the court's authority to consolidate actions and to require marshaling of assets. As the existing law on nonjudicial foreclosure, AS 34.21.220(d) in the bill provides that there is no right to recover a deficiency after sale in a nonjudicial foreclosure.

AS 34.21.090

SOURCE: RCWA 61.24.030.

COMMENT: The last phrase, "or another person," in subparagraph (1) is intended to insure that deeds of trust continue to be summarily foreclosed.

All of the requirements of this section are also in existing law. AS 34.20.070(a) and (b).

AS 34.21.100

SOURCE: Original drafting.

COMMENT: This section is a guide to the balance of the chapter. It is to make clear that secs. 110 through 150 cover the pre-sale procedures and time elements for power-of-sale foreclosure, and that secs. 160 and 170 only establish the content of the principal notices, i.e., the notice of default and the notice of intent to sell.

AS 34.21.110

SOURCE: RCWA 61.24.030.

COMMENT: This section repeats the present rule that proceedings cannot begin until 30 days after the default. As under existing law, notice is sent to the debtor. The requirement of service on an occupant is new to Alaska Statutes, but almost certainly required by common law.

AS 34.21.120

SOURCE: RCWA 61.24.040(1)(a).

COMMENT: Existing law requires a notice of default which includes a notice of time and place of sale. The proposed section requires a simple notice of default followed, if necessary, by a formal notice of intent to sell which is recorded. If a sale becomes necessary, sec. 150 requires that an informal notice giving further information as to the sale be provided to interested parties.

AS 34.21.130

SOURCE: (1)(A) is from RCWA 61.24.040(b); (1)(B) is from RCWA 61.24.040(c); (2) is from AS 34.20.070(d); (c) is from RCWA 61.24.030; and (4) is from AS 09.35.140(2). There are changes from the original forms.

COMMENT: The initial notice of default should be relatively inexpensive for the secured party to send out, unlike the currently used notice of default which requires a record search. The more expensive notice of intent to sell goes out only if the debtor fails to cure within 30 days of the first notice. Since the debtor pays costs and attorneys fees when the debtor cures under both present law and the proposed section, this provision should save the debtor considerable money.

Subparagraph (2) continues the present rule requiring that the state be given particular information as to the liens it has on the collateral.

Posting on the collateral of notice of intent to sell is required.

Subparagraph (d)(3) changes the present publishing requirement which is hidden in AS 09.45.180 and 09.35.140(2) from four to three weeks. But the time between the first publication and the sale must be at least 45 days.

AS 34.21.140

SOURCE: Original drafting.

COMMENT: This section includes provision for giving notice of time and place or manner of sale to all those who received the notice of intent to sell and to all those who have asked to be notified.

AS 34.21.150

SOURCE: Original drafting.

COMMENT: The section clarifies intent.

AS 34.21.160

SOURCE: Paraphrased from RCWA 61.24.030(6).

COMMENT: This section requires that when a secured party declares a debtor in default, the secured party must fully inform the debtor the basis of the default, what the debtor must do to cure the default and the consequences if the debtor fails to cure it. It requires a clear warning to the debtor that the debtor's rights in the collateral will be cut off under sec. 34.21.180(g) if the debtor fails to cure within the required time.

AS 34.21.170

SOURCE: RCWA 61.24.040(f), with many changes.

COMMENT: The notice set out in this section corresponds to the existing notice of sale, except that this notice need not contain the time, place, and manner of the sale. When it does not contain this information, the debtor and interested parties will be advised of specifics as to the sale by a later notice. The later notice will also go out to all other persons who have written to the person designated in the notice expressing an interest and providing a mailing address.

AS 34.21.180

SOURCE: (a) is from RCWA 61.24.090(b)(1); (b) and (c) are paraphrased from AS 34.20.070(b); (d) is original drafting; (e) is from RCWA 61.24.090(b)(2) and (4); (f) is from RCWA 61.24.090(b)(5); (g) and (h) are original drafting.

COMMENT: Subsection (a) essentially restates existing law, except that it explicitly allows cure by persons other than the debtor.

Subsection (b) sets a time limit within which cure must be made. After the expiration of that time period, cure can only be made by tendering the full amount of indebtedness under (d).

Subsection (c) limits to two the number of times the debtor will be permitted to cure after the second step toward foreclosure has been reached. By subsection (c) the debtor is limited in the number of times the debtor can reinstate the security agreement after defaulting and permitting foreclosure to reach the last stage before sale.

Subsection (d) is intended to ameliorate the harshness of (g), which cuts off the debtor's right to cure in order to maximize the purchase price at the foreclosure sale. The debtor may rescue the debtor's home at any time before the sale by paying the entire default, including the accelerated amount.

Subsection (e) applies to cures the rule currently applicable to post-sale redemption, which is that a creditor who rescues the debtor acquires a lien for the amount spent on the rescue.

Subsection (f) is designed to provide a clear record for the title searcher. If the secured party's failure to record the required notice after cure causes a debtor to lose a sale, the debtor may sue for damages under sec. 240.

Subsection (g) is a radical departure from existing law, which allows cure until the auctioneer's hammer falls. The proposed section cuts off the debtor's right to a simple cure so that the collateral can be listed and sold. While the proposed section appears on its face to treat the debtor harshly, it is intended to protect the debtor's equity from the usual sacrifice sale. No other state has been found that has eliminated the requirement of a public auction.

Subsection (h) assures that any payment made which stops default proceedings will not be a bogus payment.

AS 34.21.190

SOURCE: (a) is from AS 45.09.904; (b) is original drafting; (c) is on the subject of AS 45.09.904(c); (d) is from AS 45.09.904(c); (e) is from AS 45.09.507(b); and (f) is from AS 45.09.507(b).

COMMENT: Subsection (a) provides for sale following expiration of the cure period.

Subsections (d) and (e) incorporate the UCC standard of the commercially reasonable sale. To insure a high purchase price, a commercially unreasonable sale transfers good title to the buyer (see sec. 34.21.220). However, an aggrieved debtor may sue the secured party for damages under sec. 34.21.240. The concept of this section is basic to the UCC and basic to this bill.

AS 34.21.200

SOURCE: Original drafting.

COMMENT: Offset bidding at a sale of collateral at public auction is the norm at present, and continues to be provided for in this section.

This bill permits negotiated sales of the collateral as well as sales at public auction. Subsection (a) prohibits the foreclosing secured party from being a purchaser at a sale that he negotiates as seller.

Subsection (b) authorizes a junior lienholder to set off the amount of the junior lienholder's lien if the junior lienholder is a purchaser of the collateral and first pays off or secures the release of superior liens.

AS 34.21.210

SOURCE: AS 34.20.080(c) and (d).

COMMENT: This section requires that there be included in, or attached to, the deed issued by the secured party (1) an affidavit of the manner of giving the required notices and (2) an affidavit of publication of the notice of intent to sell. Existing AS 34.10.080(d) calls for recording of these affidavits by the secured party after the sale.

AS 34.21.220

SOURCE: (a) is from AS 34.20.090(a); (b) is from AS 34.20.090(b); (c) is from AS 34.20.090(c); and (d) is from AS 34.20.100.

COMMENT: This section is little changed from existing law.

Subsection (d) restates the present rule which allows nonjudicial foreclosure only where no deficiency judgment is permitted.

AS 34.21.230

SOURCE: (a) is from AS 45.09.504(a); (b) is original drafting; and (c) is from AS 45.09.504(b).

COMMENT: Subsection (a) is taken from the UCC. The priorities among various types of liens and security interests are left by (a)(3) to case law. Although it is not spelled out in the bill, it is intended that the secured party retains a right to file an interpleader action when priorities are in doubt.

AS 34.21.240

SOURCE: AS 45.09.507.

COMMENT: This section allows for an injunction before sale or damages after sale for failure to comply with this chapter.

AS 34.21.250

SOURCE: AS 45.09.201.

COMMENT: This section is taken from the UCC, and is included principally to contrast with AS 34.21.260.

AS 34.21.260

SOURCE: This section is from AS 45.09.501(c), but is more inclusive.

COMMENT: This section protects debtors from being asked to waive various rights guaranteed by this chapter.

AS 34.21.270

SOURCE: (1) is from AS 45.09.105(3); (2) is from AS 45.09.105(4); (6) is from USLTA sec. 1-201(25) and ULTA sec. 3-103(7).

Section 3

AS 06.05.175

COMMENT: This subsection is added to meet the possible reluctance of a financial institution to provide information to the holder of a subordinate security interest.

Section 4

AS 09.45.170

COMMENT: This section substitutes the broader term "security interest" for the term "mortgage" in the long-standing section on judicial foreclosure in the Code of Civil Procedure. No change is made in the judicial foreclosure procedure, but it is made clear by statute that the procedure is available broadly for foreclosure of all security interest.

Section 5

COMMENT: This section adds a definition of "security agreement" to AS 09.45.170.

Section 6

Repeal of AS 09.45.200 and AS 34.20.010-34.20.135

COMMENT: AS 09.45.200, here repealed, provides that an action for foreclosure cannot be maintained while an action is pending for the debt. Reference AS 34.21.080 in the bill.

The other sections repealed are the existing law on deeds of trust.

Section 7

COMMENT: This transitional section takes the conservative approach that the law in effect when a security agreement is entered into is the law used to enforce the security agreement. However, since this Act follows more closely the existing law on deeds of trust than it does the existing law on other security agreements, an exception is made for deeds of trust. The person foreclosing a deed of trust is given an option to proceed with foreclosure under this Act if the person wants to.

This transitional section will make it necessary for the statutes repealed or amended by this Act to be retained in the Alaska Statutes for several years after this Act goes into effect.

Section 8

The effective date of the Act should allow a period of time following enactment to become familiar with its terms.

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