ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8072

3316 HJUD HB 245 - HB 246

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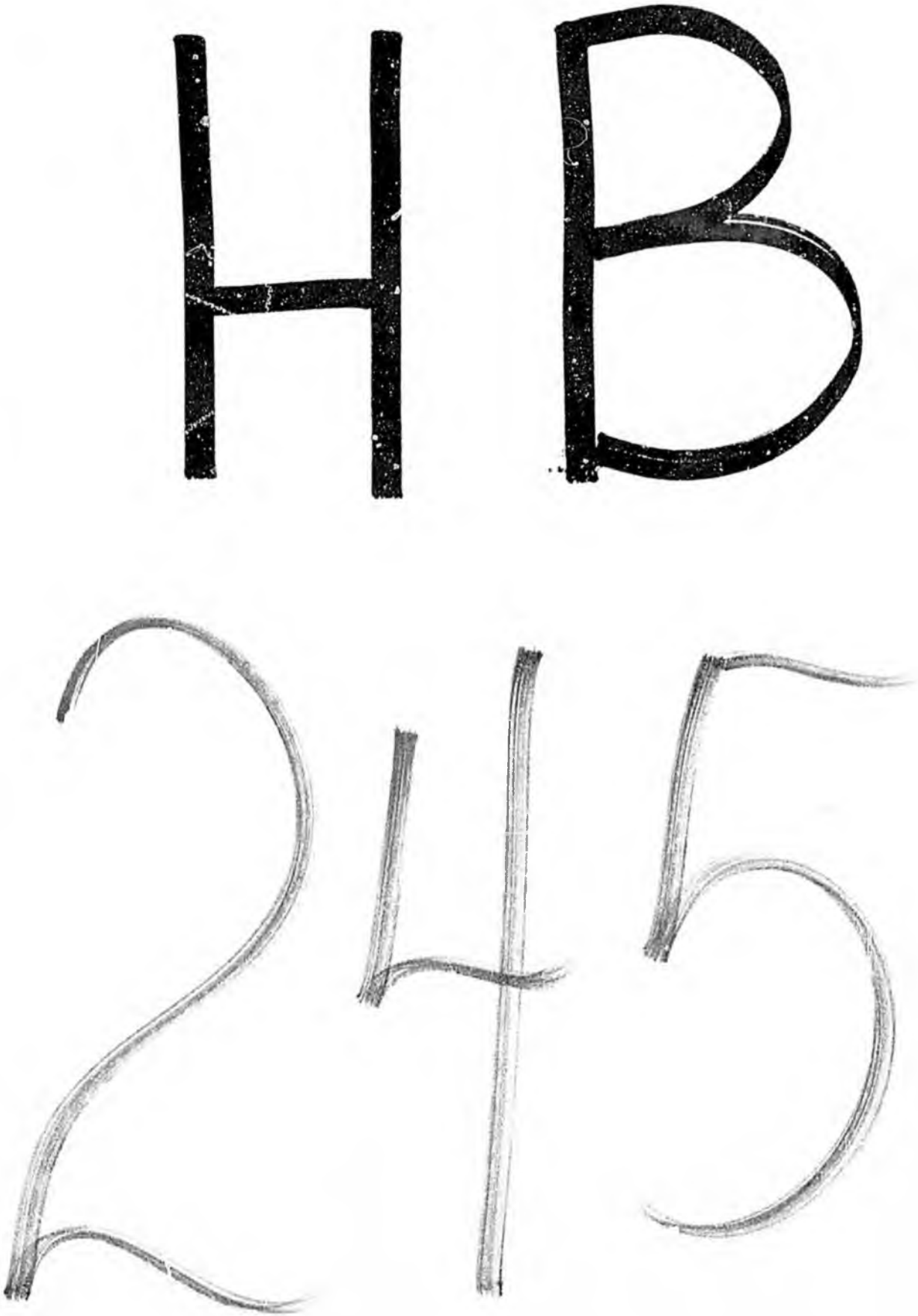
HB
245

STATE OF ALASKA
THE LEGISLATURE

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

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary 1-24-86 1:30 pm

HOUSE JUDICIARY COMMITTEE
HB 245 - Testimony of Jerry Kurtz
September 19, 1985

Chairman Rep. Miller introduced Jerry Kurtz, a member of the Code Revision Commission. Mr. Kurtz gave a general overview and explanation of HB 245.

Mr. Kurtz: HB 245 is another bill that has been in the legislature for a long time. I can not recall when it was first introduced. Probably 1979 or 1980. The bill originally contained clauses concerning what are called due-on-sale clauses; deeds of trust, clauses that say that if the owner of a house sells it, than the owner of the mortgage can declare the entire balance of the mortgage due and payable. This type of clause is the subject of legislation in a number of states and court decisions in others. Banks like that kind of clauses, mortgage payers generally do not. To make a long story short, Congress took action three years or so ago..... (inaudible, pages turning)....greater issue, to boot, because the action they took made it possible to enforce due-on-sale clauses under virtually all mortgages that were purchased by the secondary mortgage market and the result was that we took that section out of this bill because it would not accomplish that much if we left it in, and it was clear that the banks would oppose the whole bill if those sections were not removed.

The bill as it now stands tries to do two things. First of all Alaska law concerning foreclosure of deeds of trust has quite a few holes in it and we tried to fill in those holes. A good example was a situation where a deed of trust was foreclosed by a non-court summary proceedings and ceases to think of the terms of hypothetical where we have a one hundred thousand dollar house that's being foreclosed for a debt of thirty thousand dollars on the first mortgage. There may well be second or third, or even second, third, fourth and fifth mortgages on it. somebody comes to that sale and bids more than what is owed on the first mortgage, bids say, sixty thousand dollars, we have no statute explaining what happens to the surplus over and above what's required for payment of the first mortgage. At the present time some title companies will force a court action. Logically those proceeds should be applied to the liens against the property in the order they were incurred against the property. We have put in a petition to do just that. Some title companies are willing to risk spreading money out in that fashion, others are not. This is a good example of the type of problem we're trying to solve.

There are two major changes from present law. Under present law deeds of trust can be foreclosed 120 days after

going into default through summary procedures that do not involve the court. However, mortgages cannot be foreclosed that way and contracts of sale cannot be foreclosed that way. This legislation would make it possible to foreclose any security in the same way a deed of trust can be foreclosed, and our feeling is that all these things do the same thing. The Supreme Court of Alaska has gone in the direction of treating mortgages and contracts of sale similarly to the way deeds of trust are treated, and we don't see any economic or legal reason to treat them differently. What we're doing is making the procedure practical for all these things.

The second major change is in the way property must be sold. Lets go back to our one hundred thousand dollar house. At the present time if I'm a bank and I hold a mortgage for fifty thousand dollars against a one hundred thousand mortgage or a deed of trust, against that house, I can send out appropriate notices and at the end of 120 days some attorneys (I'm sure Mr. Reitman has done this at times, I know I've done it many times) go over to the court house, stand on the court house steps and announce to whoever is there, usually a gathering of people who are in to deal with traffic tickets, and attorneys that wander by, that we're selling this house and bids are now open, and we then bid fifty thousand dollars, an offset bid, on behalf of whatever institution that holds the deed of trust and we go home. Now this procedure doesn't accomplish anything economically for either the owner of the mortgage or the person who owns the house. It leaves some problems. The Supreme Court of Alaska has indicated that if the bid is totally unfair that they may set the sale aside, but we don't know what is totally unfair. We don't know whether the bank has to bid seventy thousand or ninety thousand or fifty-five thousand. We have no feel for it. What we've done is allow conservative people who want the procedures the way they've always been to go ahead and do so, but we've also given them the same Uniform Commercial Code alternative that now exists under Alaska law and may be law under forty-nine states I believe, regarding personal property, and that is the option for the foreclosing deed of trust holder to simply go about selling that house the way anybody else can sell a house; that is to list it with a broker, advertise it, treat it like a normal house sale. Houses sold in that fashion are likely to bring about what they are worth, which will help the debtors and there would more likely be surplus proceeds. It also will help the foreclosing party, we feel, eliminate the necessity for having this silly sale on the courthouse steps.

Those are the major changes the act makes. I can't emphasize too strongly that the person that holds the deed of trust can foreclose basically in the same fashion as he does today, if he wants to; on the other hand, if he wants

to use the new method instead, he can, and I think that over a period of time those people will. Under Uniform Commercial Code the experience has been that right after adoption of the code people kept selling things like airliners and Caterpillar tractors at public auction, but twenty-five years later you seldom see items like this at public auction. Commonly, goods are sold through normal channels, such as Caterpillar tractors dealers for tractors, and airplane dealers for airplanes, resulting in everybody working out better sales.

That's about the best overview I can give you without going through it section by section. There is a chart on pages four and five of the commentary which if you can understand it in any less than an hour, you're doing better than I am, but it is accurate and its probably the best way to see the difference in the procedures. The important thing is that by the old act or the bill we propose, it still takes 120 days to foreclose, still can't start foreclosure until thirty days to default, and the notice requirements in this new bill, we feel, are more protective; they are designed to make sure that whoever is in that building, or whoever owns that property gets notice of the foreclosure.

The real philosophical question that we have here is why should a one hundred thousand dollar house be treated any differently than a one hundred thousand dollar airplane or a Caterpillar tractor.

I should add, I forgot to say, that the title companies looked at this very long and hard, as did the banks, four or five years ago; we had sent it to these institutions earlier for a report, but there has not been any active involvement of either group since then, and certainly this should be nosed out to the real estate and banking and title company groups before the committee takes action. The bar has never taken a position.

Chairman Miller: Were they aware?

Mr. Kurtz: Well they were, I don't know whether they are now or not.

Chairman Miller: A very minor point? I noticed at the bottom of page 8, the section requires the secured party to pay the debtor five hundred without proof of actual damages. I'm just curious how we arrived at five hundred dollars?

Mr. Kurtz: Mr. Chairman, I'm glad you raised that question. That's one section the banks probably still are not happy with. I should have indicated that. I represent pretty nearly every bank in Alaska, that's what I do with 90% of my time, but I'm also a debtor, so I have a split

personality when talking about this sort of problem. We had a major problem in Alaska in being unable to get payoff quotes on deeds of trust. A lot of the mortgages are serviced by mortgage companies and this state has no control, no regulations, no laws whatsoever dealing with mortgage companies. Anybody that has enough money to set up a corporation can open a mortgage company, and start servicing mortgages. It was felt that one hundred dollars wasn't a high enough figure to get anybody to take it seriously, and the figure is very arbitrary--I think the commission originally had a much higher figure. Most of us on the commission could not understand how, with computer systems that most mortgage holders were using, there should be any problem coming up with a payoff of a mortgage in fifteen days.

In the same connection we, at the request of the bankers, will request provisions so that a person cannot come in and ask for a payoff every two weeks all year. In other words, you have to be reasonable about how often you request these things, otherwise you will get charged for them.

END OF JERRY KURTZ' TESTIMONY

Alaska State Legislature

House of Representatives

House Judiciary Committee

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

House Bill 245 was heard by the House Judiciary Committee during an interim work session on September 19, 1985. See tape B dated September 19.

HOUSE & SENATE JOINT
JOURNAL SUPPLEMENT

February 27, 1985 No.7

THE FOLLOWING COMMENTARY

FROM THE

ALASKA CODE REVISION COMMISSION

COVERS

HOUSE BILL NO. 245)
)
) "An Act relating to
) security interests
) in real property;
) and providing for
) an effective date."
)
SENATE BILL NO. 198)

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH V, STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4678
OFFICE LOCATION
ROOMS 5 AND 6
120 SEWARD ST.
JUNEAU, ALASKA 99801

February 15, 1985

The Honorable Jack Fuller
Chairman, Alaska Legislative Council
Pouch V, State Capitol
Juneau, Alaska 99811

Re: Bill on security interests in real property

Dear Chairman Fuller:

The attached bill is submitted to the Alaska Legislative Council pursuant to AS 24.20.075 with the request that it be introduced in the Fourteenth Legislature.

The bill was in the Thirteenth Legislature as HB 341/SB 244. That bill did not move out of committee. At least part of the reason 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 bill now offered. Changes in other state and federal lending laws have made it unnecessary.

The bill covers 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 bill 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.

A commentary on the bill is attached.

Respectfully submitted,

John W. Abbott

John W. Abbott, Chairman
Alaska Code Revision Commission

JWA:chw
Attachments
cc: Hon. Bill Sheffield
Hon. Edmond W. Burke, Chief Justice
Executive Director, Legislative Affairs Agency

is given an option to proceed with foreclosure under this Act if he should wish to.

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

Section 7

The effective date of the Act should be several months following enactment to allow time for becoming familiar with its terms.

"receiver," and "trustee in bankruptcy" are added in (6) to clarify intent.

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 interests.

Section 5

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 6

COMMENT: This transitional section takes the conservative approach that the law in effect when a security agreement is entered into shall be the law used in enforcing 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 as to deeds of trust. The person foreclosing a deed of trust

FEBRUARY 1985

ALASKA CODE REVISION COMMISSION

COMMENTARY TO ACCOMPANY

DRAFT BILL ON SECURITY INTERESTS IN REAL PROPERTY

BILL NO.

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 disasterous 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 (sec. 341, Garn-St. Germain Depository Act of 1982, P.L. 97-320, 12 U.S.C., sec. 1701 j-3; 12 U.S. sec. 371(g); 12 C.F.R. sec. 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. 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 (1967); Moran v. Holman, 501 P.2d 769 (1972); Curry v. Tucker, 616 P.2d 8 (1980); Wickwire v. McFadden, 633 P.2d (1981); Strack v. Miller, 645 P.2d 184 (1982); additional cases are summarized in Department of Revenue v. Baxter, 486 P.2d 360 365 n.10).

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 his rights and to inform him of the procedures that will be followed, they 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)

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 douht.

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 34.21.290

SOURCE: (1) is from AS 45.09.105(3); (2) is from AS 45.09.105(4); (3) is from USLTA sec. 1-201(19); (4) is from AS 45.09.105(8); (5) is from USLTA sec. 1-201(25) and ULTA sec. 3-103(7); and (6) is from AS 45.09.105(9).

COMMENT: All definitions are paraphrased from the UCC or the USLTA, as noted. The terms "governmental agency,"

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 his lien if he 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.

CHAPTER 21. SECURITY INTERESTS IN REAL PROPERTY

Other Amendments:

Repeal of AS 09.45.200 and AS 34.20.010--34.20.135

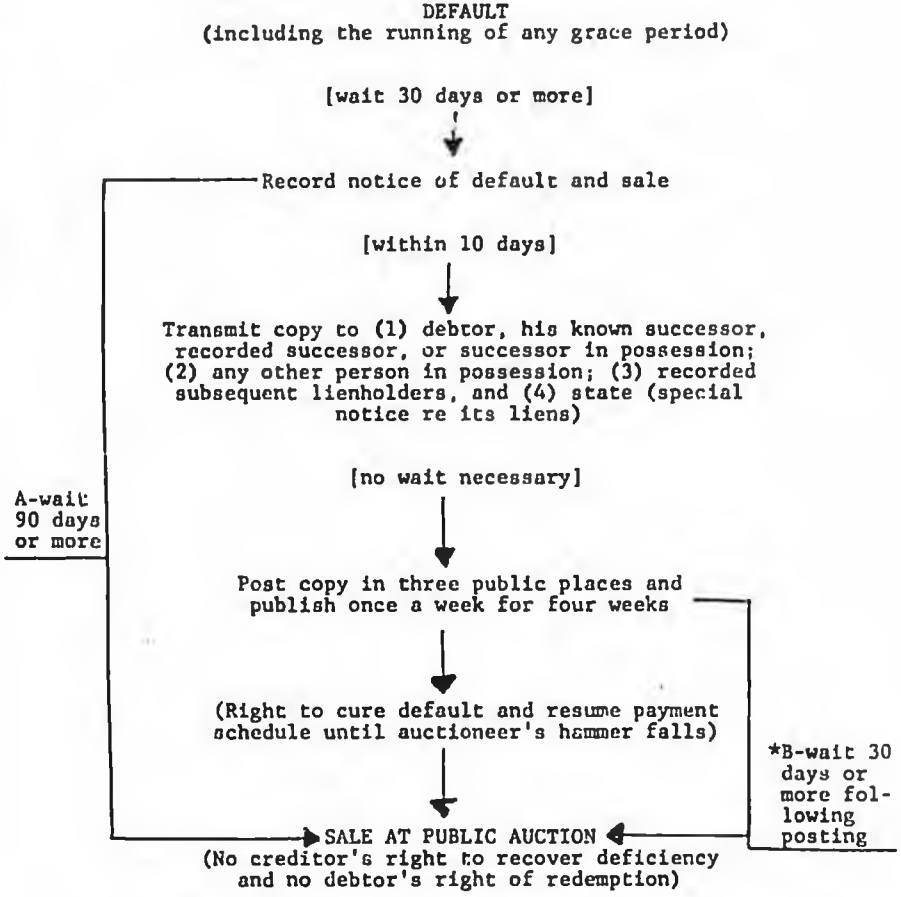
Transitional provisions

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 lapse is used depending upon which brings one to a later sale date.

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 his equity from the usual sacrifice sale. No other state has been found which 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. 220). However, an aggrieved debtor may sue the secured party for damages under sec. 240.

The concept of this section is basic to the UCC and basic to this bill.

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 he 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 his 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.

STEPS IN SUMMARY FORECLOSURE
UNDER PROPOSED SECTIONS 34.21.090 - 34.21.280

(Any security agreement containing a power of sale)

DEFAULT

[wait 30 days or more]

↓

Transmit notice of default
[to (1) debtor or his 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 lapse 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.

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); (3) 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 he 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.

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.

COMMENT: 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 his 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 34.21.05[illegible]

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 a 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 3[illegible].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 his actual damage if he 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 with 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.

LAW OFFICES

LYNCH, FARNEY, CROSBY & MOLENDA

A PROFESSIONAL CORPORATION

ALASKA MUTUAL BANK BLDG.

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ROD SISSON
JAMES B. WRIGHT

March 3, 1986

The Honorable M. Mike Miller, Chairman
House Fiduciary Committee
P. O. Box 1494
Juneau, AK 99802

Re: House Bill 245
Foreclosure of Security Interests in Real Property

Dear Chairman Miller:

Representative Gruenberg was kind enough to send me a copy of House Bill 245. I have had an opportunity to review the bill and believe that the bill is well intentioned, but that it will do far more harm than good. I am sure that members of the lending and title industries will have testified on this bill. It has been my experience that these groups often cluster on certain provisions and that others are not addressed at alll. The legislature can only respond to the testimony presented; therefore, my comments deal first with particular provisions and then an overall evalution.

Sec.34.21.010(c). This subparagraph appears to be a specific application of the more generalized concept expressed in 34.21.101(a). As such, not only is it probably unnecessary, but it could also result in the assertion of frivolous defenses under As 09.45. Since that procedure is not available when a question of title is raised, this provision could be easily used to delay eviction procedures. It would seem to me that the more general expression of policy in 34.21.010(a) and (b) accomplishes your purpose, and may avoid specious litigation.

Sec.34.21.040. Most collection escrows do not classify themselves as the agent of the secured party. Indeed, their value is that the collection escrow is independent and has duties to both the debtor and the secured party. The term "agent" should be defined if it is to be retained.

There should be a provision which permits the collection agent or escrow to determine that the person requesting the report is the debtor or a subordinate secured party.

Subparagraphs a, c and d impose a real burden on collection escrows in that they may be (i) forced to change their programing, files and forms, and (ii) incur other additional expenses in order to comply with the reporting requirements. This will only increase the cost of collection escrow services to the public. The same comments are applicable to mortgage companies. In most instances the people making payment simply wish the assurance that the payment was received yet the recipients of payments will have to prepare to comply with this section of the statute. This appears to be an excessive reaction to what is probably a relatively infrequent problem.

The $250 penalty is excessive and most likely to impact private parties who are not using commercial collection agents or escrows.

Sec.34.21.050. The intent and application of this provision is not clear. It does not void operation of a due on sale clause to make a prohibited transfer a default. The provision does not appear to do anything except to confirm the validity of the transfer. I would oppose any blanket prohibition of due on sale clauses.

Sec.34.21.060. I wholeheartedly support this provision. It is needed.

Sec.34.21.070. The time period of (b) is relatively short and the penalty tied to it in (c) is excessive. It is very common to have a chain of encumbrances which cannot be cleared by the physical delivery of the release documents within the 15-day period. Despite this, title companies and banks go foward with transactions in the knowledge that the appropriate documents will become available.

Sec.34.21.110 and .120. I do not understand why an effective notice of default cannot be given within a shorter period. There are many people and companies who rely upon timely payments. This provision, in combination with .120, creates a 60-day "cure" period. This is too long a period. As drafted, .110 can be interpreted to mean that a debtor can remain between 30 and 60 days in default without the secured party being able to commence a foreclosure. This leaves the creditor with acceleration of the note balance and a lawsuit as the only available remedy. The secured party is entitled to timely payment and the threat of foreclosure is a viable tool to assure this.

Sec.34.21.130. I have two substantial criticisms of this provision:

Subparagraph (3) requires posting in a conspicious place on the collateral. This is ridiculous as soon as you leave a built up, urban area. It is easy to post on a house in central Anchorage, but it will be very difficult to locate an unimproved lot in remote Rabbit Creek, Eagle River, or the Mat-Su Valley. It will be expensive just to do the posting. It will be even more expensive to locate parcels in more remote areas; in many instances, it would require a surveyor to know you are on the property. There will often be a legitimate question as to whether the posting was conspicuous. To take an extreme example, but one in which I have been involved: where a subdivision of 110 lots outside Talkeetna is being foreclosed upon, with 108 lots owned by one man, would 110 notices have to be posted? What would be required if the lots are not labeled, or the corners of the lots easily seen? It would be a nightmare! Foreclosure on a 5-acre parcel on Montana Creek would be just as difficult. The posting requirement simply does not match the realities of Alaska.

Subparagraph (4) also imposes an unnecessary burden. It gives publication priority first to completely local publications, then those published in the senate district and then to ones of general circulation published in the judicial district. I am not aware of any directory of the weekly publications of Alaska. I am sure that there are a number of them. Under this provision the secured party, or trustee (title company), has to know what is published in each "municipality", senate and judicial district and when it is published. This is simply too difficult a requirement. For example, what publication is to be used for foreclosure on land in Tok, Barrow, or Healy? There are two newspapers of universal circulation throughout the State: it makes sense to permit notices to continue to be published in one of these.

Sec.34.21.140. I am intrigued by the implication that the collateral can be disposed of by disposition other than public or private sale. What is contemplated?

Sec.34.21.160 and .170. The degree of detail required here is remarkable. I can understand that the purpose is to explain the gravity of what may occur to the less sophisticated, but it still seems excessive. I should also note that the impact of the cure period running out will not be clear to most people.

Sec.34.21.180. Subparagraph (g) cuts off all rights of the debtor, successor and subordinate parties in the real property when the cure period has run. The debtor retains title of record, and this provision is silent as to the secured party's right to remove the debtor.

Sec.34.21.190. Subparagraph (b) does not cure the problem raised in the preceding paragraph. It does not provide a procedure for removing a debtor. The summary eviction procedures may not be available since the question of title cannot be resolved in a forcible entry and detainer action.

Subparagraph (d) is a major focus of my comments, as might be expected. This brings into the real estate area the concepts of Article 9 of the Uniform Commercial Code. Frankly, I can foresee tremendous opportunities for abuse and confusion here. There will be constant efforts to enjoin sales on the basis that an element thereof is commercially unreasonable - it may be the efforts made to market the collateral, the advertising of a public sale, or the price or payment terms on a private sale. This is a true can of worms. Financial institutions and title companies will be driven crazy as will private parties who are simply trying to obtain the money their purchaser promised to pay.

This provision injects a great deal of uncertainty into an area in which certainty is of very great importance. I think this is true despite subparagraph (e). Subparagraph (d) appears to require that the property be offered for sale for some period of time, at a price which presumably is established by reference to some valuation scheme. This entails both delay and expense. Alaskans are litigous and these provisions will simply encourage litigation under Sec.34.120.240 and uncertainty as to how to proceed in any foreclosure.

Real property has long been considered to be the best form of collateral. An entire system has grown up around this which relies upon the ability to evaluate the risks involved and the certainty of obtaining satisfaction from that collateral on a significant default. The present clear and well defined procedure for a "straight", "strict" or non-judicial foreclosure is made much more expensive and more uncertain of proper conduct by the procedures that are specified and the virtually undefined nature of the sale that can occur.

It is not just financial institutions which are secured parties. Many private parties hold deeds of trust and will continue to take them as collateral when they sell proparty. Non-commercial, occasional sellers will be unaware of the change of law created by this bill. They will fail to anticipate the difficulties they will experience in foreclosing their security device.

It is not clear what public policy or interests are being advanced in this legislation. I have difficulty finding any. I have little difficulty finding substantial problems for secured parties and those holding the power of sale (title companies) and substantial opportunities for debtors to create additional problems in foreclosures. There are many sound elements in this bill, of necessity I have focused on the negative aspects and hope that these comments will be considered and result in appropriate changes.

Very truly yours,

Peter J. Crosby
je

cc: The Honorable Max Gruenberg
The Honorable Don Clocksin
The Honorable John Sund
The Honorable Robin Taylor
The Honorable Fritz Pettyjohn
The Honorable Randy Phillips

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

REAL ESTATE COMMISSION

3601 C Street
Suite 798
Anchorage, Alaska 99503
Phone: (907) 563-2169

November 18, 1985

House Judiciary Committee
Pouch V
State Capitol
Juneau, Alaska 99811

Attn: Hayden Kaden, Committee Counsel

Dear Mr. Kaden:

I have reviewed HB 244 and HB 245 and the sectional analyses that you provided. Clarification and simplification in these areas would materially benefit the public. In our day to day dealings with public inquiries and complaints it is not uncommon for a problem to be traceable to problems with either recording or security instruments or both. In many cases the problems stem from confusion regarding what is proper and legal and what is not. The "unification" of foreclosure procedures, regardless of what they are called would eliminate many problems. In this respect, one of the problem areas and one that is frequently involved when fraud is committed involves unrecorded contracts for deed. The unrecorded contract for deed is frequently used by subdividers to eliminate the time and costs of foreclosure proceedings under deeds of trust. I would suggest that a penalty provision be attached to the non waiverability section of HB 245 making it a fraud to circumvent or deny a person's rights under the law through the use of any instrument or scheme that deceives a person about or conceals from the person their rights under the law. This might be similar to the other provisions that provide for a minimum of unproven damages or actual damages if they are greater.

Often in real estate transactions the problem boils down to the fact that the consumers do not know the law that would protect them. The commission, in common with similar bodies in other states is looking at increased disclosure requirements rather than extensive additional regulation. A requirement that the foreclosure procedures and the owner's rights under them be disclosed in the instrument when an instrument other than a deed of trust is executed might be quite beneficial.

In sec. 7 of HB 245 I would suggest that the word "recorded" be inserted so it reads (a) A recorded security instrument....This would eliminate many of the problems that are waiting to manifest themselves with current unrecorded instruments and would get most legitimate instruments recorded. A "grace" period could be granted from the effective date of the act to enable unrecorded instruments to be recorded. This would mean that instruments that do not get recorded and unrecordable instruments would be covered by the new law rather than any law that was in effect at the time they were allegedly drafted.

Such an amendment to the bill would affect primarily those people who are attempting to victimize the public by the use of what might be called creative foreclosures which avoid the normal delays and protections afforded the consumer. In order to eliminate harmful effects that might occur to people who used other or unrecorded instruments for legitimate reasons and which instruments may not be in recordable form (not notarized etc) there might be , during the grace period, a waiver of most requirements for recordation with the caveat that in the event of a challenge to an instrument so recorded recordation is not effective as full constructive notice unless a court rules it is.

A current practice is to require a borrower to sign an undated quit claim deed or reconveyance to the seller or creditor so that in the event of a default the creditor does not have to go through foreclosure proceedings but simply date and record the instrument. If I read it correctly the non waiverability clause in HB 245, (34.21.260), would render such a practice ineffective if it were fought by the debtor. This is precisely the class of event that disclosure would give adequate protection to both parties in. Sometimes the undated reconveyance is a benefit. Buyers sometimes default and disappear, for example. In such a circumstance the recording of a previously undated instrument is a benefit and a saving all around. Disclosure rather than prohibition would permit proper use of such instruments but would go a long way toward eliminating abuses.

I hope these comments are of some assistance to the committee. If I can be of any additional help I will gladly do what I can.

Very truly yours,

James L. Magowan
Executive Director

JLM/0144M

National Bank of Alaska
Corporate Headquarters P.O. Box 600 • Anchorage Alaska 99510-0600 • (907) 276-1132

November 15, 1985

Wes Coyner
3111 Douglas Highway
Juneau, AK 99801

Re: House Bill #245

Dear Mr. Coyner:

In regard to the above-indicated bill, it seems that National Bank of Alaska will be impacted as a lender, as a servicer of loans for other institutional lenders, and as a servicer of escrows in our Contract Collections Department. Concerning Sections 34.21.040, which pertains to providing an additional Statement of Account, it seems that the bank will be charged a $250 penalty without any proof of damages when we do not respond in a 15-day period of time. Under the new rules, it will be more difficult for us to determine who actually has the legal right to obtain additional statements. We are also guided by Federal and State Right-to-Privacy regulations about giving out information, so this is of some concern to us. The Contract Collections Department generally provides a monthly statement which provides for account balances, interest, and other information. We believe that we are providing a public service in providing this additional information and therefore should be limited to a $250 penalty when damages are actually incurred and no penalty in cases where no damages are incurred.

In regard to Section 34.21.070, a penalty of $500 without proof of any damages for not releasing the security interest within a 15-day period of time is "totally unreasonable". In many cases the lenders are outside the state of Alaska and the 15-day period is difficult to meet unless prearranged by a borrower. Fannie Mae and other lenders have rather extensive bureaucracies, so I would find it difficult to respond in that period of time on a routine basis and would discourage lenders from making loans in the state. You are probably aware that the recording office has been as much as a year behind in recording reconveyances. How would it be decided as to who was at fault in late filing of the reconveyances? If the State of Alaska finds it impossible to record reconveyances in a timely manner, how can you hold lending and servicing institutions at a much higher level of conduct? Would the State of Alaska be subject to a $500 fine for not recording the reconveyance within the 15-day period? This could possibly amount to several million dollars in penalties to the State if it held itself accountable. We have not received many consumer complaints, so this must not cause many problems, but the fine is unreasonable. Perhaps $500 maximum with proof of damages would be reasonable in cases where a prior written request is received by the servicing agency.

In regard to Section 34.21.180, we are somewhat concerned as to the language which allows lenders with inferior priorities to be able to cure the fault. If, in fact, this section means that they may cure the default only by paying off the entire balance, then it would not cause any concern, but the section confuses us. Does this mean that the inferior institution can continue to make monthly payments indefinitely? If so, this language leads to a dilution of the "Due-on-Sale" clause, which violates federal policy under the Garn-St. Germain Act. This issue also relates back to Section 34.21.050, which states that a borrower can convey property regardless of the provisions of the security interest. Even though this language does not preclude us from foreclosing under the Due-on-Sale clause of a mortgage, the language is confusing and could lead to unnecessary legal action. Also, we have in our possession the commentary Booklet #7 which does not clarify the matter in our minds.

Basically, the issue of "posting of property" as stated in my letter of a year ago is still worrisome. We do not see that any of our previous concerns have been addressed.

I hope this is going to be of assistance to you.

Sincerely yours,

J. K. Sieberts
Senior Vice President

acm

cc: Hayden Kaden

February 28, 1984

Wes Coyner
3111 Douglas Highway
Juneau, AK 99801

Dear Wes:

In regard to last year's House Bill #341 pertaining to security interests in real property, we continue to have problems with the draft legislation.

From an historical point of view, Alaska lenders are generally not holders of long-term notes of Deeds of Trust on real property. We tend to be servicers of these real estate obligations or, as defined in the bill, "a secured party's agent". In this regard, we have provided a service not always found in other states. Early on in our banking history, we realized that we were not capable of internally generating the capital needs of the state of Alaska and consequently became extremely aggressive in seeking funds for mortgages from capital sources outside the state. Therefore, we service loans for pension funds, insurance companies, other financial institutions, and governmental agencies.

In addition to this servicing arrangement of external capital, most banks in the state provide a service for the public, generally described as an escrow function or a contract collection function depending on which bank you deal with. In these institutions, banks serve as a paying and receiving agent for the consumers who entrust the recordkeeping to the financial institution. This service is provided in the state for fees ranging from $30 to $75 per year which is extremely beneficial to the consumer. This service is not generally provided by banks in the Lower 48 due to liabilities to the institution created by various governmental regulations. Therefore, the consumer is on his own to maintain this recordkeeping service, which I believe probably creates more disputes and law suits than the system that has developed within Alaska.

Under either of these scenarios, acting as a collecting agent for a consumer or for another financial institution, certain penalties established in this bill are prohibitive and would cause lenders throughout the state to re-think the services that they are providing the consumer at a reasonable cost today. And, in cases of contract collections, the cost to the consumer would substantially increase in those institutions [illegible] to continue to provide the service.

We do not have any problem with the concept that a lender should provide a statement of account to a legally authorized party. We provide statements in most cases at no cost at all to the consumer. These statements, however, do not generally provide for the status of escrow funds being held by a secured party. However, I believe under Section 34.21.040(a) that the escrow information should be specifically requested for by the consumer in addition to a request for a statement of principal and interest due.

The language states that the bank or collection agent is liable for all damages caused to that person because of failure to comply, and $250 without proof of actual damages is excessive. If, in fact, no damages are incurred by the party, why should any damages be paid? We suspect that if a consumer has been damaged they will seek restitution from the bank in any case. Under Section 34.21.260, Waiver of Rights, a bank is not able to limit their liability and the consequential damages they might be faced with. As a matter of practice, the consumer who sets up a collection in a bank would do so under almost any circumstances because of the bank's ability to provide satisfactory recordkeeping. Under paragraph (c) this legislation prohibits us from charging a fee for an additional statement every six months, and we feel that if the government wishes to legislate on this matter we should be allowed to set up our own schedule of charges. The $20 fee for each additional statement furnished may not be an adequate fee 10 years from today; however, the current demand for our Contract Collection Department by our consuming public leads us to believe that our service charges are at least economically competitive within the community.

Paragraph (e) states that if a mistake is made on the statement the collection agent can be held liable and may not request additional funds. It would seem obvious that if a clerk mistakenly sends out a statement showing a zero balance on a million dollar loan the bank would not be able upon payoff to collect the million dollars. However, on the proposed legislation we would have to accept a payoff of zero dollars and release the security interest. Mistakes are often made despite our attempts to be extremely careful in recordkeeping, and I would suspect that we should be allowed to correct reasonable errors. As a matter of practice in the community, selling agents seek payoff balances preliminarily and at later dates seek final payoff figures on closing.

Under Section 34.21.070(c)(1) we would be fined $500 for not providing a reconveyance on property within 15 days and no proof of damages is required. It could be that it would take the Contract Collection personnel 15 days to research and determine if a reconveyance is actually warranted. Certain out-of-state lenders sign their own reconveyances which takes more time. Such a penalty seems excessive when no harm has been done.

We continue to be concerned about the posting requirement as defined in Section 34.21.130(3). Our attorney has reviewed this and feels this is a very difficult requirement because:

1. Many foreclosures in this state occur in rural locations, and the proposed posting requirement could ultimately discourage lenders to provide financing in rural outposts.

2. The property may be raw land where there is no conspicuous place to post and would be difficult to post at best.

3. The lender may not have legal access to the real property and could be shot as a trespasser in attempting to post the property.

We can see the logic of posting the property as an additional method of notification; however, to make it a mandatory requirment for providing foreclosure services to real property, we believe that this is an excessive requirement that will cause a great deal of problems in the industry. The notice could be rapidly torn down if the foreclosed party has not left the premises and would, therefore, not serve its purpose as notification to other interested parties. We think the language in this regard should be re-thought or possibly eliminated. Our legal counsel additionally informs us that there are probably some technical problems with the bill when it comes to leasehold estates, etc.

In summary, though we are not opposed to the whole piece of legislation, we believe that the consequential damages called for and posting notices are excessive and will discourage the good services provided by banks to the consumers at large. We do not feel that the intent of providing a notice to the consumer in itself is a bad concept; however, the State Recording Office has not returned recorded documents to us in the past year. If the State cannot perform in a reasonable time frame, how can you put the burden on institutions attempting to provide good service. The change in the method

of handling foreclosures is not objectionable in itself, except that the posting requirement probably should be eliminated. We have not found the existing methods of foreclosing on real property to be burdensome to lenders or the public and do not quite understand why legislation is being undertaken to change a law which seems to work reasonably well. We are asking our legal counsel to continue to research the matter, so if you have any additional questions in this regard, please give me a call at 265-2991.

Sincerely,

J. K. Sieberts
Senior Vice President

sb

cc: Lucille Stietz
Dick Hall
Stan Reitman

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James O. Smith
Signature of Camera Operator

7/25/89
Date

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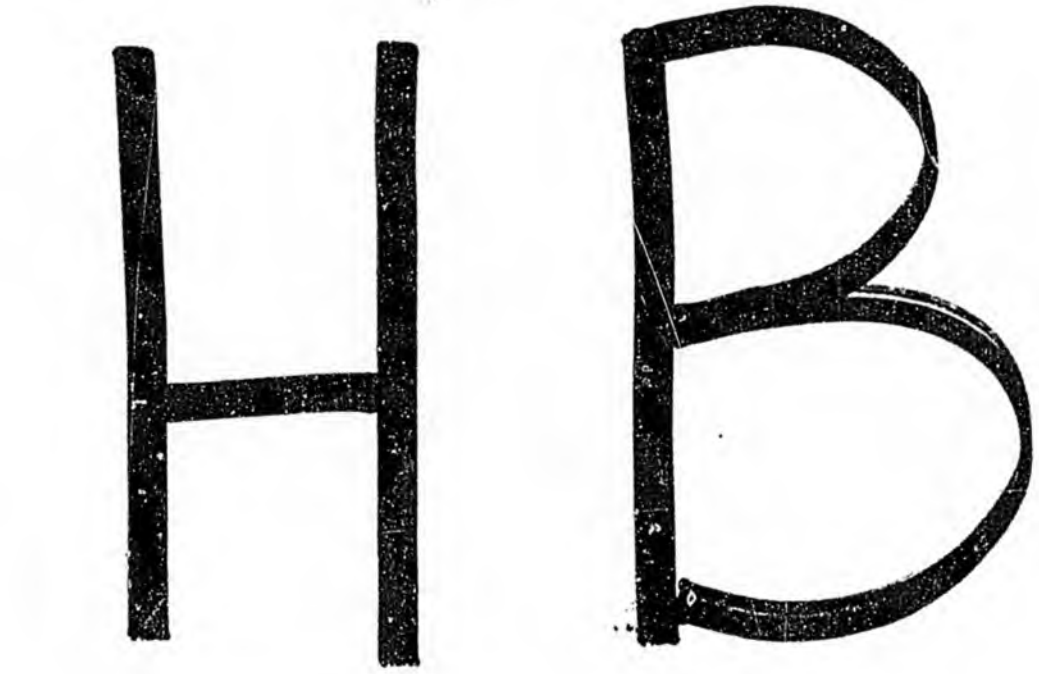
HB


246

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary 3-29-85 1:30 pm

Alaska State Legislature

House of Representatives

House Judiciary Committee

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

House Bill 246 was heard by the House Judiciary Committee during an interim work session on September 20, 1985. See tapes C, D & E dated September 20.

December 30, 1985

Senator Patrick M. Rodey,
Pouch V,
Juneau, Alaska 99811

Dear Senator Rodey:

Thank you for your prompt answer to my request in seeking background information regarding House and Senate Joint Journal Supplement #8 regarding the proposed revision of Alaska Corporate Code.

My children, who are grown, have requested that I write on their behalf also in this letter and the previous one I mailed to you in November regarding these proposed revisions. We are shareholders in the Sealaska Native Corporation, and had heard that there were proposed bills in the State Legislature which would affect our situation as shareholders. Hence, we have an earnest interest in the status of these bills.

If you were a shareholder in a Native Corporation, such as ours, Sealaska, and had waited 14 years to receive some form of appreciable benefit from the corporation, and had not been satisfied to the present time, I am sure you, also, would be apprehensive about what proposals were being made which would affect your future.

You are probably aware that the AFN has also been lobbying the U.S. Congress to prohibit us (shareholders) from selling our stock in 1991 on the market, but would have to sell back to the corporation, at the price they determine with the stock being devalued (without land value), which would ultimately leave the stock virtually worthless. The corporate entity could then repurchase our stock cheaply from us, but paradoxically could receive generated income from stock containing the land value.

In addition to the above efforts by our trusted leaders, we now have their efforts in lobbying our State government to allow passage of these bills which are heavily pro-management, in my opinion. I have listed on the attached papers, my comments relative to various sections and language contained in these bills.

We also are concerned that the AFN has had so much impact in supporting these bills, when this organization is not a shareholder under ANCSA and

does not own any stock. Is this a legal entity in representing the wishes of the vast majority of Alaska Native shareholders? These proposals to amend Alaska Corporate Code are too serious to us, to be passed without careful and cautious deliberation by your committee.

We appreciate your serious concerns about these bills, and request that you also view these revisions from the shareholder perspective. Thank you for allowing us to express our opinions, on behalf of my son, Michael O. Smith, daughters, Diana L. Smith, Sylvia Lythgoe and myself.

Respectfully Yours,

Mary Antonson

Mary Antonson
2024 Waldron Dr.
Anchorage, Alaska 99507

Senate Bill No. 199: " An Act revising the corporations code; and providing for an effective date."
H.B. No. 246: Identical.

One of our major concerns regarding the above mentioned Act and S.B. 199 and H.B. 246 is that the AFN organization is listed as one of the prime supporters of these revisions to the Alaska Corporate Code. The AFN is not recognized as a shareholder entity under ANCSA and does not own any stock, so how can the AFN legally represent Alaska Native Corporation shareholders and impact decisions made by members of our State government? This is an important consideration and should be deliberated cautiously.

Sec. 10.06.010
(6) lend money to its employees and, if properly approved, to its officers and directors, and otherwise assist its employees, officers and directors;

(Comment) This seems to place the corporation at the beck and call of the personnel with support of money and covers the personnel in any manner of assistance whatsoever with such a blanket statement of support with "otherwise assist its employees, etc. The shareholders at large are not listed as receiving this type of support and are not included. This statement too generous for the corporate employees and the shareholders at large would be bearing the expense of such potential generosity.

(15) pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans and other incentive plans for its directors, officers, and employees;

(Comment) Again, this is biased towards the corporate personnel, particularly when you consider that the corporation could loan money to its personnel, who could then purchase stock along with sharing in the profits of the corporations. There could be created a situation where the corporate personnel could finally own the corporations with all this assistance in securing the stock. Definitely pro-management at the expense of the shareholder at large.

Sec. 10.06.433. Annual Report to Shareholders: Content; Financial Statement on Request. (b) (1)" all transactions, excluding compensation of officers and directors,"

(Comment) Why is this necessary to exclude information regarding compensation to officers and directors from the owners of the corporations, the shareholders? Should not the law protect the rights of the majority also? This information should not be kept secret from the shareholders so that the checks and balances would be in place to prohibit undue extravagance on the part of corporate management. Again, this clause is pro-management at the expense of the shareholder.

Sec. 10.06.435. Shareholders Derivative Action.

(Comment) Since we are not corporate attorneys and cannot interpret the legalese in this section, we, nevertheless, get a sense that a shareholder bears the heaviest burden in proving a wrongful case against the corporation and has to initially put up the money to sue, and cannot receive financial satisfaction. If we are interpreting this correctly, then again, we feel this is decidedly pro-management and orphans the shareholder. If we are wrong, then please advise.

ARTICLE 7. Amendments and Changes.

(Comment) Since our native corporations have been created and organized by the U.S. Congress with each shareholder being issued 100 shares prior to the cut-off date, this above section seems to allow considerable latitude to the corporate management in rearranging the framework of the native corporation as it now stands. Since our native corporations utilize the Alaska Corporate Code as it was written and legislated, we feel uneasy in allowing our corporate leaders to reclassify our shares, changing preferences, limitations, and relative rights of the shares, and allowing corporate management to cancel dividends, etc. Again, pro-management.

Sec. 10.06.576. Rights of Dissenting Shareholders: Procedure to Enforce Shareholders Right to Receive Payment for Shares. Withdrawal of Demand.

(a) Page 93. Line 4. ".....and a demand for payment of the fair value of the shares.....," and

(e) Page 94. "Upon completion of the corporation action, the shareholder shall cease to have the rights of a shareholder except the right to be paid the fair value of the shares as to which the dissenters rights were perfected under this chapter." and

P.95 ".....the corporation may elect to pay the shareholder the fair value of the shares in cash at the value, as determined by the board.....".

(Comment) The term FAIR VALUE for payment of the stock by the corporation to the dissenting shareholder is too broad in interpretation. This term we find objectionable, for we believe that stock to be fair should have the terms PAR or MARKET value. What is considered fair to the corporate leaders would not be considered fair to the shareholder, particularly, when the corporate leaders have been petitioning U.S. Congress to devalue our stock by not including our major asset, our land. This term of fair value with reference to the value of our stock has been a source of conflict already and to include this language in this bill is objectionable to us.

Since we do not have the legal background to properly interpret areas of these amendments to Alaska Corporate Code and how they would affect the general population of shareholders, there are probably sections that need careful scrutiny and evaluation by others knowledgeable in corporate law from the perspective of the shareholder, and not what has already been promoted to the State Legislative Committee from the perspective of the corporate managers.

We understand the House Bill #246 is identical to this S.B. 199, so we petition that the same consideraton of our views apply to the House Bill #246 as it does to Senate Bill #199.

Your efforts to advocate the shareholder perspective will protect the majority interest, for there are more shareholders than corporate managers. We appreciate your efforts on our behalf.

ROBERTS & SHEFELMAN

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

JAMES GAY
ROBERT G. MOCH
GEORGE M. MACK
BRIAN L. COMSTOCK, P.S.
TIMOTHY R. CLIFFORD
LEE R. VOORHEES, JR.
DAVID B. SWEENEY
WILLIAM G. TONKIN
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JAMES C. HARPER

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November 1, 1985

Mike Miller, Chairman
House Judiciary Committee
Box 1494
Juneau, Alaska 99802

Dear Representative Miller:

I briefly attended the hearings which were recently conducted in Anchorage on H.B. 246 pertaining to revisions of Alaska's corporate code. During the short period of my attendance, I gained the impression that the Committee may be of the belief that the Native community in Alaska is in favor of H.B. 246.

I represent a fair number of Native clients, and I was not aware that they even knew that a revision of the corporate code was being considered, much less that they agreed with the substance of the amendments. Since the hearing, I have contacted three of my clients and have discovered that my initial assumption was correct: none of them even knew that the corporate code revision was being considered by the legislature. When I explained to them the substance of the provisions of § 10.06.488, which would abolish the limitation of liability for their subsidiary corporations up to $2,500 per creditor, they uniformly told me that they were against any such change in the law.

As you are undoubtedly aware, many of the Native corporations possess substantial assets in the form of cash and land. You may also be aware of the fact that one of the chief concerns in the Native community is to protect their asset base, particularly the land, from the threat of seizure by third parties. One of the ways that the corporations have sought to accomplish this is by the

formation of subsidiary corporations to perform their actual business operations. Those subsidiary corporations draw their officers and directors from two sources: from amongst the shareholders of the Native corporation and from those with some experience in the subsidiary's field of operation. Frequently, directors and officers of the subsidiary corporations are not members of the parent corporation's management, and do not receive significant sums of money for their service. They consider their service to be something of a "public service" that they do for their corporation because it will benefit their shareholders. If they could be held personally liable for undertaking this activity, they might not be willing to serve. Similarly, persons with expertise in areas of business in which Native corporations wish to operate, who might otherwise agree to serve on the boards of these subsidiaries, may not be willing to do so if they were exposed to personal liability because of their service on the board of such a subsidiary. For these reasons, the enactment of § 10.06.488 of the proposed corporate code could exert a chilling effect upon the activities of the Native corporation subsidiaries.

Very truly yours,

ROBERTS & SHEFELMAN

Roger W. DuBrock

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cc: Don Clocksin
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Robin Taylor
John Sund
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THE ALASKA CODE REVISION COMMISSION

April 1985

A COMPARATIVE STUDY

OF THE PROPOSED ALASKA CORPORATIONS CODE (ACC) WITH THE FINAL 1984 DRAFT OF THE REVISED MODEL BUSINESS CORPORATION ACT (RMBCA)

INCLUDING THE ORIGIN AND SUMMARY OF EACH SECTION OF THE ACC

Prepared by

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ABBREVIATIONS USED

In this publication the following abbreviations are used:

ACC--Alaska Corporations Code (the short title of the comprehensive revision of corporation law to be made by House Bill 246 and Senate Bill 199, identical bills introduced in the Fourteenth Alaska Legislature).

ABCA--The present Alaska Business Corporation Act (chapter 126, Session Laws of Alaska 1957, now Alaska Statutes Sections 10.05.003-10.05.828).

MBCA or "the Model Act"--Model Business Corporation Act as revised through July 1, 1969 (a product of a committee of the American Bar Association first published in 1950 and carried forward with changes until generally revised in 1984. The 1953 version became the basis of the existing Alaska Business Corporation Act).

RMBCA or Revised Model Act--Revised Model Business Corporation Act (1984) (the 1984 comprehensive revision by a committee of the American Bar Association of its earlier Model Business Corporation Act).

CGCL or GCL--California General Corporation Law (the 1977 omnibus revision of California's for profit corporations code, one of the two principal sources for the ACC).

NBCL or BCL--New York Business Corporation Law (the second of the two principal sources for the ACC).

ANCSA--Alaska Native Claims Settlement Act (Public Law 92-203, as amended, 43 U.S.C. sec. 1601, et seq., the federal Act of December 18, 1971, and its amendments settling land claims and providing for the formation of regional and village corporations. The Act and its amendments are reprinted in Volume 1 of Alaska Statutes).

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PREFACE

This study paper consists of three parts, each designed to familiarize the reader with the contents and origin of the proposed Alaska Corporations Code (ACC) and its relationship to the 1984 Revised Model Business Corporation Act (RMBCA).

Part I follows the organizational structure of the ACC and gives a brief description of the origin of each section, its content, and a specific comparison to provisions of the RMBCA. This work was originally produced by the Alaska Code Revision Commission in March, 1984, to provide a comparative study of the ACC and the tentative exposure draft of the RMBCA, for use by the Alaska Legislature, the Alaska Bar Association, and others interested in the content of the ACC. The study paper demonstrates the substantial similarity between the draft RMBCA and the proposed provisions of the ACC. In June, 1984, the final draft of the RMBCA was produced by the Committee on Corporate Laws Section of Corporation, Banking , and Business Law of the American Bar Association. The Alaska Code Revision Commission again considered the content of the RMBCA, and adopted additional RMBCA provisions into the content of the ACC. Part I's comparative study has been updated to reflect these recent revisions to the ACC.

Part II consists of three comparison charts which provide a section-by-section cross-reference of the ACC to the existing Alaska Business Corporations Act- AS 10.05 (ABCA) and the RMBCA. These charts have also been updated to reflect revisions made to the ACC following the release of the 1984 RMBCA.

Part III is a source chart showing the origin of each provision of the ACC and its comparable coverage in existing Alaska law (ABCA), the former Model Business Corporation Act (MBCA), the California General Corporation Law (GCL), the New York Business Corporation Law (NBCL), other sources (e.g. Delaware or Oregon business corporation law), and the RMBCA.

The Alaska Code Revision Commission's goal in drafting the ACC was to provide Alaska with a modern, balanced corporations statute crafted to the special needs of Alaska. An examination of these study materials, especially the source chart in Part III, shows that the ACC has drawn its content from the very best statutory provisions found in the United States and in the Revised Model Business Corporation Act.

For the most comprehensive study of the ACC, readers are encouraged to use this study paper in conjunction with the Official Commentary to the ACC, found in the House and Senate Joint Journal Supplement to HB 246/ SB 199, dated February 7, 1985.

PART I.

A SECTION-BY-SECTION COMPARATIVE STUDY
OF THE PROPOSED ALASKA CORPORATIONS CODE (ACC)
AND THE
1984 REVISED MODEL BUSINESS CORPORATION ACT (RMBCA)

ARTICLE 1. CORPORATE PURPOSES AND POWERS

Section .005 PURPOSES

ORIGIN: ACC Section .005 alters the content of AS 10.05.003 to conform to the content of Section 3 of the Model Business Corporation Act (MBCA).

SUMMARY OF COVERAGE: ACC Section .005 permits an Alaska corporation to be formed for any lawful purpose(s) other than insurance and banking. Stock and mutual insurance companies are formed under AS 21.69; the companies are of a corporate nature and are governed by the ACC to the extent provided in AS 21.69.020. Reciprocal insurance companies, noncorporate in nature, are formed under AS 21.75.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: ACC Section .005 is functionally identical to RMBCA Section 3.01(a). The limitations spelled out in RMBCA Section 3.01(b) are found in ACC Section .010.

Section .010 GENERAL POWERS

ORIGIN: ACC Section .010 is predicated upon AS 10.05.009 which was, in turn, predicated upon Section 4 of the Model Business Corporation Act.

SUMMARY OF COVERAGE: The introductory phrase was adopted from Section 207 of the California General Corporation Law (hereafter the "GCL") and makes explicit that while the general grant of powers are co-extensive with that of a natural person, this grant is subject to limitation by provisions in the articles of incorporation or other law. Subsection (6) makes direct reference to the new provisions on loans to officers and directors (Section . 485). Subsection (15) adds "stock option plans" to the list of incentive plans which a corporation may establish for its directors, officers and employees.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: Section 3.02 also contains a general grant and specific enumeration of corporate powers. It is functionally identical to ACC Section .009, except that it does not contain express authority to make loans to corporate officers and directors. Within the RMBCA loans to directors are governed by Section 8.32. They are licit if approved by a majority of the outstanding voting shares. The loan may also be authorized by the direc-

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tors if the board, in its collective judgment, determines that the loan is in the best interest of the corporation.

Section 3.02 follows ACC Section .009 in specifically listing "share option plans" among the incentive plans which a corporation may establish. The idea that a corporation has powers which are presumptively coextensive with those of a natural person is explicit in ACC Section .009. It is left to implication in the comment to RMBCA 3.02.

Section .015 DEFENSE OF ULTRA VIRES

ORIGIN: ACC Section .015(a) is predicated upon Section 203 of the New York Business Corporation Law (hereafter the "NBCL"). It is a modified version of former AS 10.05.018 and Section 7 of the MBCA. Section .015(b) is new and is taken from Section 208 of the GCL.

SUMMARY OF COVERAGE: ACC Section .015 governs the limited circumstances in which a claim of "ultra vires" may affect the rights of third parties who have dealt with a corporate entity and the impact of such behavior in creating liability on the part of the corporate officers and directors of the corporation. While the concept of "ultra vires" is frequently included in the discussion of agency problems within the corporate framework, properly understood it is not a traditional doctrine of agency law. A transaction is ultra vires when it is beyond the powers of the corporation as those powers are conferred by law and the terms of the articles of incorporation.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The provisions of ACC Section .015 and those of RMBCA 3.04 are functionally identical.

Section .020 LIMITATIONS ON AUTHORITY OF CORPORATE AGENTS

ORIGIN: ACC Section .020 is predicated upon GCL Section 208.

SUMMARY OF CONTENT: Unlike conduct assailed as beyond the powers of the corporation, a subject covered by ACC Section .015, Section .020 deals with the consequences of an abuse of authority which was within the power of the corporate principal to confer. The provisions of Section .020 confront the common law of agency as it has been applied to the unique problems generated by an artificial corporate person as principal. The thrust of Section .020 is to shift the risk of transactions which exceed the authority of corporate agents to the corporation thus relieving the interests of innocent third persons. Subsection (3) makes it clear that either the corporation or a shareholder suing in a derivative capacity may assert lack of authority in any action against the faithless agent.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The official comment to RMBCA Section 3.04 makes it clear that the Model Act has no coverage of this important question at all. See pp. 3-17, 18.

Section .025 CONTRACTS OR CONVEYANCES BINDING DOMESTIC AND FOREIGN CORPORATIONS

ORIGIN: ACC Section .025 is predicated upon GCL Section 208.

SCOPE OF COVERAGE: ACC Section .025 settles two important questions associated with contracts or conveyances entered by corporate agents who have exceeded their actual authority. If the transaction is within the scope of the agent's "apparent authority", it is binding upon the corporate principal and upon the third party. Thus, the defect in the authority of the agent does not defeat the corporation's liability on the transaction, nor does it prevent it from acquiring rights against the third party measured by the terms of the transaction.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA has no statutory provision covering this important question.

ARTICLE 2. NAME AND SERVICE OF PROCESS

Section .105 CORPORATE NAME

ORIGIN: ACC Section .105 is a reenactment of AS 10.05.021 as amended.

SUMMARY OF COVERAGE: ACC .105 requires that a corporation adopt as part of its name one of the listed alternatives designed to warn third parties that they are dealing with a corporate entity. ACC .105 also prohibits a person from adopting a name that contains words suggesting a corporation unless that person has either been issued a certificate of incorporation in Alaska or has obtained a certificate of authority for a foreign corporation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: ACC Section .105 is functionally identical to RMBCA Section 4.01(a) and (b). There are, however, differences in content.

RMBCA Section 4.01(a)(1) requires that a corporation include as part of its name one of the traditional words or abbreviation designed to indicate corporate status. In a break with the prior Model Act and exposure draft, the final version would allow this requirement to be satisfied by the inclusion of "words or abbreviations of like import in another language. . . ." The official comment merely indicates that the change has been made. It offers no justification. At least two reasons to oppose such permission come to mind. First, I doubt that many persons would appreciate the import of initials such as "GmbH" as a signal that this was a limited liability entity. Further, even if one knew that this was a German designation for a corporation she might be fooled into belief that the entity was in fact a German entity.

RMBCA Section 4.01(c) contains provisions whereby a corporation may give written consent to the use by another entity of a name which would otherwise be deceptively similar.

The final draft of Section 4.01(b)(4) requires that a corporate name be distinct from the name of a registered nonprofit corporation. This provision is not contained in the ACC.

ACC Section .105(b) continues a 1976 amendment by the terms of which the Legislature forbade a corporation from adopting a name which contained the word "city", "borough", or "village" or otherwise implying that the corporation is a municipality. Reflecting its detachment from Alaskan concerns, RMBCA Section 4.01 contains no similar prohibition.

Section .110 RESERVATION OF CORPORATE NAME

Section .115 APPLICATION TO RESERVE CORPORATE NAME

Section .120 TRANSFER OF RESERVED NAME

ORIGIN: ACC Sections .110, .115, and .120 are reenactments without change of former AS 10.05.024, .027, and .030 which were, in turn, predicated upon Section 9 of the MBCA.

SUMMARY OF COVERAGE: ACC Sections .110, .115, and .120 set forth the natural or corporate persons who may reserve a corporate name.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 4.02 is functionally identical to these provisions of the ACC except for their substitution of the commissioner for the "secretary of state."

Section .125 REGISTRATION OF CORPORATE NAME

Section .130 USE OF SAME OR DECEPTIVELY SIMILAR NAME

Section .135 PROCEDURE FOR REGISTRATION OF CORPORATE NAME

Section .140 FEE FOR AND DURATION OF REGISTERED NAME

Section .145 RENEWAL OF REGISTERED NAME

ORIGIN: ACC Sections .125, .130, .135, .140, and .145 are reenactments of AS 10.05.033, 034, .036, .039, and .042, and are based on Sections 10 and 11 of the MBCA. Section .034 was added by the Legislature in 1966. Minor language changes have been incorporated to recognize the recently enacted scheme to allow the Department of Commerce and Economic Development to determine various fees by administrative regulation.

SUMMARY OF COVERAGE: ACC Sections .125, .130, .135, .140, and .145 provide for the registration, protection, duration, and renewal of a corporate name. Under ACC Section .130, registration of a corporate name gives the registered holder the right to seek an injunction against the use of that name or a deceptively similar name by another. The registered name must be renewed each year under ACC Section .145.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 4.03 combines the coverage of former Model Act Sections 10 and 11. Unlike ACC Section .130, RMBCA Section 4.03 does not explicitly confer exclusive right to the use of a registered corporate name, nor does it declare that a person who has registered the corporate name may enjoin the use of the same or a deceptively similar name. Section .130 clearly provides that the remedy available for abuse of a registered corporate

name is not limited to injunctive relief, but may be a cause of action for damages. RMBCA Section 4.03 contains no such provision.

Section .150 REGISTERED OFFICE AND REGISTERED AGENT

ORIGIN: ACC Section .150 is a reenactment without change of AS 10.05.045 which was based on Section 12 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .150 establishes the requirement that a corporation maintain both a registered office and a registered agent in the State of Alaska. The agent is necessary for service of process; and, the office is required to serve as the depository for various books and records as provided or required by the the ACC.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.03 is functionally identical to ACC Section .150.

Section .155 REGISTRATION OF AGENT BY NONRESIDENT WITH CONTROLLING INTEREST

ORIGIN: ACC Section .155 is a reenactment without substantive change of AS 10.05.791 as amended in 1980. A rewording has been undertaken to make explicit that the designated agent must be within the State of Alaska.

SUMMARY OF COVERAGE: In order that the commissioner may readily establish official contact with a nonresident possessed of a controlling interest (ACC Section .955(12)), ACC Section .155 requires such a person to designate an agent within Alaska upon whom notice and process may be served.

Service on the Section .155 agent is equivalent to personal service on the controlling nonresident. Section .155(b) enforces this requirement by forbidding, in the event of noncompliance, either the controlling person or the controlled corporation use of the courts of the State of Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Again, reflective of its concern with the problems of no particular jurisdiction, the content of the Revised Model Act contains no provision requiring designation of agents by nonresidents with a controlling interest.

Section .160 FILING LIST OF REGISTERED CORPORATIONS WITH SUPERIOR COURT; UPDATING AND PUBLISHING

ORIGIN: ACC Section .160 is a reenactment of AS 10.05.048 which, has been changed to require yearly compilation and weekly updating of the stipulated information.

SUMMARY OF COVERAGE: ACC Section .160 reflects the view that

it is vital that the practicing attorney be able to quickly ascertain information concerning the corporate name, address of the registered office, and the name and address of the registered agent of both domestic and authorized foreign corporations. Both geographical and communications considerations have dictated that such information be available locally and updated frequently.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.20 contains absolutely no provision requiring that this vital information be maintained or made available.

Section .165 CHANGE OF REGISTERED OFFICE OR AGENT

ORIGIN: ACC Section .165 is a reenactment of AS 10.05.051 which was, in turn, predicated upon Section 13 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .165 establishes the procedure whereby a domestic or foreign corporation may change its registered office or agent.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.02(a) is identical to ACC Section .165. Subsection (b) differs only in that the ACC has a uniform provision on filing with the commissioner which is not reflected in the RMBCA.

Section .170 CHANGE OR RESIGNATION OF REGISTERED AGENT

ORIGIN: ACC Section .170 is a reenactment of AS 10.05.054, which was based on Section 13 of the MBCA. The final sentence has been changed to permit a resignation of the registered agent, to become effective sooner than 30 days after the filing of written notice with the commissioner if the corporation appoints a successor within this shortened period. This change is based upon Section 57.070(3) of the Oregon Revised Statutes.

SUMMARY OF COVERAGE: ACC Section .170 establishes the procedure by which a registered agent may change address or resign. Unless and until the registered agent follows these statutory procedures, the commissioner may continue to regard the last address of record as effective for all notice provisions under the ACC.

Subsection (b) sets forth the procedures which must be observed for a registered agent to effectively resign. Unless and until such procedures are followed, the commissioner may continue to deal with the agent and effectively notice or bind the corporate principal. In the event that such an agent ceases to function without observing these statutory provision, there would be a breach of the contract of agency with the corporation but such a breach would not serve as a defense to the corporate principal in dealing with or ac-

countin to the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.03 does not provide for a shortened effective date if the corporation appoints a successor registered agent. The minimum information to be contained in the written resignation is governed by Section 5.02. The "circularity problems" noted in the official comment to RMBCA Section 5.03 have been directly solved by ACC Section .170(b). The commissioner is directed to mail a copy of the written notice of resignation to "the corporation at its principal office."

Section .175 SERVICE OF PROCESS ON CORPORATION

ORIGIN: ACC Section .175(a), (c), and (d) are a reenactment of AS 10.05.057, and are based on Section 14 of the MBCA. ACC Section .175(b) is new to the law of Alaska. It is taken from Section 57.075(3) and (4) of the Oregon Revised Statutes and eliminates the commissioner's burden under prior law to transmit process served on the commissioner given the default of a registered agent. Under ACC Section .175(b), that burden is placed upon the party seeking to initiate litigation against the corporation.

SUMMARY OF COVERAGE: To assure that notice sent to a corporation without a registered agent is the best available under the circumstances, ACC Section .175(b)(2)(B) requires that the moving party send notice to such address as it knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice. Under ACC Section .175(b)(3), the moving party is obliged to file proof of the attempted service in the appropriate superior court or other tribunal.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.04 admits that there were substantial problems with the provisions of former MBCA Section 14. It, too, eliminates the burden formerly placed upon a state official to serve the substitute process. Unlike the Oregon law and the ACC, RMBCA Section 5.04(b) does not require that a best effort be made to find the actual address of the corporation. It is content if the notice is mailed to the principal office. Given the official comment's express solicitude that actual notice be communicated to the foreign corporation, it would appear that the Oregon/ACC approach is superior.

ARTICLE 3. FORMATION OF CORPORATIONS

Section .205 INCORPORATORS

ORIGIN: ACC Section .205 is a reenactment with one change of AS 10.05.252 as amended in 1976 by the Legislature.

SUMMARY OF COVERAGE: The minimum age for an incorporator has been reduced from 19 to 18 to bring Section .205 into conformity with Alaska's general policy on legal majority. ACC Section .205 varies from Section 53 of the MBCA in the requirement that incorporators be natural persons. This is a continuation of prior Alaska law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.01 differs from ACC Section .205 and existing Alaska law by permitting artificial persons (including unincorporated associations, partnerships, trusts, estates, and governments) to act as incorporators. There is no minimum age for natural persons to so function. Further, the requirement that the incorporators sign a verified copy of the articles has been eliminated.

Section .208 ARTICLES OF INCORPORATION

Section .210 ARTICLES OF INCORPORATION; OPTIONAL PROVISIONS

ORIGIN: ACC Section .208 subsections (1),(2), and (3) are predicated upon AS 10.05.255(1), (3), and (10), which were derived from Section 54 of the MBCA. Subsections (4) and (5) are taken from Section 202 of the GCL. Subsection (6) reenacts AS 10.05.255(13) as amended. The provision of the ACC governing the content of the articles is modeled upon Sections 202 and 204 of the GCL. ACC Section .210 is based upon GCL Section 204, Delaware Section 102(b)(4) and (5), and AS 10.05.255.

SUMMARY OF COVERAGE: In addition to the specific changes noted, Sections .208 and .210 make vital a drafting decision which was unimportant under prior Alaska law. The goal of the ACC is to follow California's example requiring that the articles of incorporation function as the fundamental agreement which structures the basic purpose of the corporation, the prerogatives of management, and the rights of shareholders. Section .208 requires that several fundamental decisions be addressed in the articles. While the provisions may be amended by following the procedures outlined in the ACC, at all times the subject matter content of Section .208 must

be defined in the current corporate articles. Section .210 enumerates provisions which are optional as contents of the articles. The critical point is that if the subject matters enumerated in Section .210(1) are not settled by the initial or amended provisions of the articles, they may not be resolved or governed by the bylaws, shareholder agreements, or any other form of treaty.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: An initial comparison between RMBCA Section 2.02 and ACC Sections .208 and .210 would suggest significant differences. It would be misleading. It is true that RMBCA Section 2.02(a) has a rather short list of mandatory provisions when contrasted with ACC Section .208. In part this is because ACC Section .208(4) reflects Alaska's concern for identification of alien affiliates, a concept unknown to the Model Act. Further, there is no single provision in the RMBCA which is comparable to ACC Section .210 in gathering into one convenient place all of the optional decisions which cannot be made effective unless they are reflected in the articles. The MBCA does have such requirements, only they are scattered throughout the act. See the official comment to RMBCA Section 2.02 at page 2-9,10.

The topics which are conveniently gathered in ACC Section .210(1) and scattered throughout the lengthy text of the RMBCA are not identical. In general, it may be said that the ACC is more protective of the interests of shareholders (both actual and potential) and their interest in locating in one document a definitive statement of these basic decisions. Under the RMBCA, such decisions could be found in extrinsic resolutions or agreements which might be known and available to some but not to others.

Section .213 FILING OF ARTICLES OF INCORPORATION

ORIGIN: ACC Section .213 continues the policy of AS 10.05.258, which had been predicated upon Section 55 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .213 also reflects the general scheme of the ACC to standardize the procedures for filing with the commissioner as set forth in ACC Section .910.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.03 suggests to the legislatures of the several states that they abolish the concept and practice of a "certificate of incorporation." Instead, filing is completed upon delivering a copy of the articles to the secretary of state and having it "stamped and filed." There is to be no certificate of incorporation. Elimination of the certificate of incorporation would destroy the "bright line" event selected by the Commission for fixing the de jure commencement of corporate existence.

Section .215 DISCLOSURE OF CORPORATE PURPOSES

ORIGIN: ACC Section .215 is a reenactment without change of AS 10.05.259, as amended in 1980.

SUMMARY OF COVERAGE: ACC Section .215 perpetuates a decision of the Legislature made in 1980 which requires that a corporation disclose to the Department of Commerce and Economic Development the activities in which it will initially engage. This is not done for the purpose of limiting corporate activity. Under the ACC, incorporation can still be as general as the pursuit of "any lawful purpose." The information is elicited so that the state may obtain a clearer idea of the dimension of economic activity.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Again, reflecting its lack of familiarity with the aspirations of the Alaska Legislature, the standard recommended text of the RMBCA contains no provision requiring disclosure of corporate purposes.

Section .218 EFFECT OF ISSUANCE OF CERTIFICATE OF INCORPORATION

ORIGIN: ACC Section .218 is derived from AS 10.05.810.

SUMMARY OF COVERAGE: ACC Section .218 fixes the issuance of the certificate of incorporation as the point in time when the de jure existence of a corporation commences. In adopting this "bright line" rule, the ACC goes beyond Section 56 of the MBCA and AS 10.05.810 to expressly abolish the common law doctrines of de jure compliance, de facto incorporation, and corporation by estoppel.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.03 would also create a "bright line" event fixing the initial existence of a corporation. Under RMBCA Section 2.03, that event is "the secretary of state's filing of the articles of incorporation. . . ."

RMBCA Section 2.04 leaves the current body of conflicting and confusing common law on de facto incorporation and corporation by estoppel unreformed. This notwithstanding the official comment that: "Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability." ACC Section .218 adopts that "strong argument".

Section .220 ASSUMPTION OF PURPORTED POWERS OF NONEXISTENT CORPORATION: LIABILITY

ORIGIN: ACC Section .220 is a modification of former AS 10.05.810, which had been predicated upon Section 146 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .220 determines the liability consequences of persons who assume to act as a corporation for which there has been no issuance of a certificate of incorporation (Section 218). Unless there is a written agreement, wherein a third party agrees to deal on a limited liability basis with individuals purporting to act for a corporation for which no certificate has been issued, those persons are jointly and severally liable.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.04 imposes joint and several liability on all persons purporting to act as or on behalf of a corporation who knew that there was no incorporation [effective filing with the secretary of state]. It does nothing to relieve the conflicting interpretations given to prior Model Act provisions dealing with the consequences of defective incorporation. See, e.g., Sherwood & Roberts-Oregon, Inc. v. Alexander, 269 Or. 389, 525 P.2d 135 (1974), which is in direct conflict with Heintze Corp. v. Northwest Tech-Manuals, Inc., 7 Wash. App. 759, 502 P.2d 486 (Div.One. 1972).

Section .223 ORGANIZATION MEETING

ORIGIN: ACC Section .223 is a reenactment of AS 10.05.267 and is based upon Section 57 of the MBCA. Language modifications have been made to coordinate with Section .210(3), which makes optional the naming of initial directors in the articles. Another modification is the phrase in the first sentence which is intended to preclude a construction of Section .223 as a precondition to the attainment of corporate existence.

SUMMARY OF COVERAGE: ACC Section .223 defines the transition by which the entity being formed passes from the control of incorporators to that of the initial board of directors. In a reform designed to facilitate corporate formation, the articles are competent to name initial directors in which case they, and not incorporators, hold the initial meeting.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.05 parallels the ACC and permits the articles to name the initial directors.

Section .225 POWERS OF INCORPORATORS BEFORE DIRECTORS' ELECTION

ORIGIN: ACC Section .225 is new to Alaska law being predicated upon Section 210 of the GCL and Section 107 of the

General Corporation Law of the State of Delaware.

SUMMARY OF COVERAGE: Since the naming of initial directors in the articles is optional, Section .255 defines the powers which incorporators shall have in the event that they, and not the initial directors, shall hold the organizational meeting.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.05(2) is in substantial accord with the California, Delaware, and ACC innovations.

Section .228 BYLAWS: ADOPTION, AMENDMENT OR REPEAL

ORIGIN: ACC Section .228 is taken from Section 211 of the GCL and works a major change in AS 10.05.135.

SUMMARY OF COVERAGE: Under current Alaska law the power to adopt, amend, and repeal provisions of the bylaws is vested exclusively in the board unless reserved to the shareholders in the articles of incorporation.

Absent provisions in the articles, ACC Section .228 vests equal powers in the board and the shareholders with respect to determining the content of the bylaws. However, the articles are competent to restrict or eliminate the power of either the board or the outstanding shares. There are thus three possibilities: (1) concurrent, independent power in the board and the outstanding shares (the default rule); (2) an article provision restricting or eliminating the power of the board; or, (3) an article provision restricting or eliminating the power of the outstanding shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.20 provides a default rule identical to ACC Section .228. In the absence of a provision in the articles, the power to adopt, amend, or repeal bylaws is shared by the directors and shareholders. The RMBCA does not use the term "adopt", but the official comment makes explicit that it is to be included within the meaning of "amend." Under RMBCA Section 10.20(a)(1), the articles are competent to extinguish the power of the board. Apparently they cannot extinguish the power of the shareholders who, under RMBCA Section 10.20(b), are guaranteed power over the content of the bylaws. Thus the flexibility available under California, Delaware, and ACC provisions is not attainable under the RMBCA.

The ACC's concern that shareholders ultimately control the corporation is manifested in Section 460 wherein they are given the right to remove any or all of the directors at any time for any reason.

Section .230 BYLAWS: NUMBER OF DIRECTORS AND OTHER CONTENT

ORIGIN: ACC Section .230 is predicated upon Section 212 of

the GCL, and substantially enlarges the coverage of AS 10.05135, which had been based on Section 27 of the MBCA.

SUMMARY OF COVERAGE: Under ACC Section .230, the bylaws have a mandatory content only if the articles have not fixed the number of directors or established a formula from which that number may be derived. The ACC's provisions on the number of directors establish three as the default minimum unless the corporation has fewer than three shareholders. In that instance, the number of directors need not exceed the number of shareholders. This will provide significant flexibility in the formation and operation of closely held corporations. Any bylaw which would change the number of directors must obtain approval of the outstanding shares. Further, if the effort is to reduce the number of positions on the board to fewer than five, subsection 230(d) protects the interests of minority shareholders by invalidating the attempt if sixteen and two-thirds percent of the outstanding shares vote against it.

Under subsection (e), the optional content of the bylaws is partially enumerated. These provisions need not be adopted but are intended to suggest to those forming corporations some of the important matters governing procedures, e.g. for shareholder and director meetings, the qualifications, duties, authority and compensation of directors and officers, and such other matters relating to the day to day management of the corporation as are usefully stabilized in a formal agreement.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.06(b) simply states that the bylaws may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles. This is in accord with ACC Section .230(e). The absence of the enumerated list of optional provisions should not be taken to suggest that the RMBCA is less exacting than the ACC. The cross-references to RMBCA Section 2.06 indicate twenty-two matters which should be considered for regulation in the bylaws. Rather than the convenience of ACC Section .230(e), one has to page through the provisions of the RMBCA.

Section .233 BYLAWS TO BE KEPT AT OFFICE; INSPECTION BY SHAREHOLDERS

ORIGIN: ACC Section .233 is taken from Section 213 of the GCL.

SUMMARY OF COVERAGE: The corporation is obligated to keep at its principal business office in Alaska a copy of its bylaws reflecting all current provisions including amendments. The shareholders are to have a right to inspect the bylaws at all reasonable times. A foreign corporation which does not have a principal business office in Alaska is obligated to furnish a copy of its current bylaws to any Alaska shareholder who

makes a written request.

AS 10.05.237 through .249 cover the content of ACC Section .233, but do not clearly obligate a foreign corporation to make a copy of its bylaws available to requesting shareholders who are citizens of Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains a similar requirement although it is somewhat difficult to locate. Section 16.02 directs that a corporation keep copies of the records required in Section 16.01(c). One of the items set forth in in Section 16.01(c) is a copy of the corporate bylaws.

ARTICLE 4. CORPORATE FINANCE

Section .305 CREATION, CLASSES, AND ISSUANCE OF SHARES

ORIGIN: ACC Section .305 is premised upon GCL Section 400, with modifications to accommodate MBCA Sections 15 and 16, which were the basis of AS 10.05.060 and .069. Section .305(a) replaces AS 10.05.060 without substantive change, and Section .305(b) replaces AS 10.05.069 without substantive change.

SUMMARY OF COVERAGE: ACC Section .305 permits great flexibility to the corporation in creating distinctions as among various classes or series of shares with respect to voting rights, as well as preferences or privileges regarding distributions during the life or at the dissolution of the entity.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.01 is functionally identical to ACC Section .305. ACC Section 210(6)'s warning that the rights, privileges, and limitations on classes of stock must be contained in the articles is reflected in RMBCA Section 6.01(b).

Section .308 ISSUANCE OF PREFERRED OR SPECIAL CLASSES OF SHARES

ORIGIN: ACC Section .308 is largely a reenactment of AS 10.05.063, which was predicated upon Section 15 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .305 allows the establishment of classes and series with varying rights and liabilities. ACC Section .308 specifies a number of particulars which may be the subject of variation between different classes. This list should aid the practitioner in discussing with clients the variations possible in such areas as redemption, dividend preferences, liquidation preferences and conversion options.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.02 is functionally identical to ACC Section .308.

Section .310 ISSUANCE OF SHARES IN SERIES

Section .313 VARIATION IN RIGHTS AND PREFERENCES OF SHARES

Section .315 SERIES RIGHTS AND PREFERENCES ESTABLISHED BY BOARD

Section .318 MANNER OF ESTABLISHING SERIES

Section .320 FILING OF STATEMENT BEFORE ISSUANCE OF SERIES

ORIGIN: ACC Section .310 is based upon AS 10.05.066 and MBCA Section 16 without substantive change.

MBCA Section 16 and AS 10.05.069 form the basis for ACC Section 313. Subsection (7), which permits a variation in voting rights in preferred or special classes, is new to Alaska law. The provision was added to MBCA Section 16 in 1966, after enactment of AS 10.05.069. This section thus represents an updating of Alaska law to conform to the Model Act.

ACC Section .315 is predicated upon MBCA Section 16 and reenacts AS 10.05.072 without substantive change.

ACC Section .318 is a reenactment without substantive change of AS 10.05.075 and MBCA Section 16.

ACC Section .320 is essentially a reenactment of AS 10.05.078, which was predicated upon MBCA Section 16. A modification has been made to the language of Section .320(a) to accord with the broader power of delegation to the board to fix by resolution an unissued class.

ACC Section .323 is a reenactment of AS 10.05.084, which was modeled upon Section 16 of the MBCA. A wording change has been made to reflect the broader power of a board to fix by resolution the rights and privileges of an authorized but wholly unissued class.

SUMMARY OF COVERAGE: ACC Section .310 makes clear that preferred and special classes of shares may be divided into series.

ACC Section .313 enumerates the rights and preferences which may vary between series of the same preferred or special class of shares.

ACC Section .315 specifies that the board may be granted the power by the articles to divide a class into series and fix the relative rights and preferences of the shares of a series. This power is subject to any limitation placed upon it by the articles or by ACC Sections 305-323.

ACC Section .318 specifies the procedure for establishing a series.

ACC Section .320 vindicates the interest of the state in securing information as to the equity interests outstanding for Alaska corporations. This information is supplied by the articles or any amendment thereto in cases not involving board power to fix the relative rights and preferences. However, when the power has been delegated to the board (ACC Section .208(5)(B)(C)), Section 320 requires that this information be filed with the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.03 establishes with fewer guidelines to the practicing lawyer, the authority, scope, manner, and steps which must be

taken to create series within a class of preferred shares and to report the same to the secretary of state.

RMBCA Section 6.03 departs from prior provisions of the Model Act and the statutory law of all states, including Alaska, by permitting creation of a repurchase obligation in the corporation with respect to all or a part of a series. This precedent breaking suggestion would create a "put" in the hands of the holders of such shares to force the corporate issuer to reacquire the stock.

Section .325 REDEMPTION OF SHARES; CREATION OF SINKING FUND; REPURCHASE AGREEMENTS

ORIGIN: ACC Section .325 is new and has no precedent in Alaska law. It is taken from GCL Section 402(a), (b), and (d).

SUMMARY OF COVERAGE: ACC Section 325 covers three crucial questions: (1) it establishes the right of the corporation to create classes or series of shares which are redeemable at the option of the corporate issuer; (2) it forbids (subject to an exception for an open-end investment company) the creation of shares which vest a right to demand redemption in the shareholders; and, (3) it permits the creation a sinking fund or similar provision, or an agreement outside of the articles which covers the subject of redemption.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.01(d) covers the topics addressed in ACC Section .325. Under the RMBCA, the extent of redemption rights, if any, must be authorized in the articles. It would thus appear that the flexibility attainable under ACC Section .325(c) is not possible under the RMBCA.

Section .328 IRREVOCABILITY OF SUBSCRIPTIONS FOR SHARES

ORIGIN: This section is a verbatim reenactment of AS 10.05.087, modeled after MBCA Section 17.

SUMMARY OF COVERAGE: A subscription for shares of a corporation to be organized is basically a promise to buy shares under specified terms. Many common law cases have held that a subscription is deemed an offer and as such inherently revocable at any time prior to acceptance. These holdings cast doubt upon the ability of promoters to insure an adequate financial start for a fledgling corporate entity. In order to settle the issue of the nature of a subscription, provide a fair result to those who act in reliance on subscriptions, and put an end to any litigation over the question of revocability, ACC Section .328 makes a subscription irrevocable for a period of six months.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section

6.20(a) is identical to ACC Section .328.

Section. 330 PAYMENT OF SUBSCRIPTION FOR SHARES

ORIGIN: ACC Section .330 is in substance a reenactment of AS 10.05.090. Minor changes in language have been made to conform Alaska law to MBCA Section 17.

SUMMARY OF COVERAGE: ACC Section .330 places the power to determine the time of payment for subscriptions with the board. A call for payment by the board must be uniform as to all shares of the same class or series.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(b) and (c) is identical to ACC Section .330. Section 6.20 controls share subscriptions issued before incorporation. The initial board is given complete control over their disposition. Section 6.20(f) states that subscriptions entered into after incorporation are treated as a contract between the corporation and the subscriber and governed by Section 6.21. Unless the shareholders reserve powers granted under Section 6.21, the board has the power to control the disposition of post incorporation subscriptions.

Section .333 FORFEITURE OF SHARES FOR DEFAULT IN PAYMENT

ORIGIN: ACC Section .333 reenacts AS 10.05.093, which was based upon MBCA Section 17. The terms "penalties" and "penalty" have been changed to "remedies" and "remedy" to reflect the approved case law construction.

SUMMARY OF COVERAGE: ACC Section .333 establishes the general rights of the corporate issuer in the event of default in the payment obligation for shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(d) and (e) are identical to ACC Section .333.

Section .335 CONSIDERATION FOR SHARES

Section .338 PAYMENT FOR SHARES

Section .340 JUDGMENT OF BOARD OR SHAREHOLDERS AS TO VALUE OF CONSIDERATION CONCLUSIVE

ORIGIN: ACC Section .335 retains the essence of AS 10.05.096, which was derived from MBCA Section 18. Much of the former section has been deleted in the wake of the new financials (ACC Sections .358 to .370), which eliminate the concepts of par value, treasury shares, stated capital, and surplus accounts.

ACC Section .338 is a verbatim reenactment of AS 10.05.099, which was derived from Section 19 of the MBCA.

ACC Section .340 is a reenactment of AS 10.05. 102, which was modeled upon Section 19 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .335 recognizes two modes for fixing the amount of consideration (expressed in dollars) for the issuance of shares. Unless the power has been reserved to the shareholders in the articles (ACC Section .210(1)(H)), it is vested in the board. The exercise of this power is subject to the fraud standard articulated in ACC Section .340.

ACC Section .338 specifies what may and may not be received as consideration for shares. Common law authorities which have attempted to prevent "watered shares" by requiring that consideration be limited to cash are rejected in favor of a more realistic recognition that the corporation may be advantaged by the receipt of other valuable property (tangible and intangible) as well as services.

ACC Section .340 sets proof of fraud as the standard necessary to overturn a determination of the value of consideration received by the corporate issuer. The most common victim of an improper consideration exchanged for shares is the corporate creditor whose claims against the entity go unsatisfied in the wake of corporate bankruptcy, dissolution, or simple door-closing. The ACC provides considerable protection to creditors in its provision on financials and in ACC Section .488 on secondary liability of officers and directors. These provisions substantially mitigate tne harshness to creditors of the fraud standard provided in ACC Section .340.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.21 is functionally identical to ACC Sections .335, .338, and .340.

Section .343 STOCK RIGHTS AND OPTIONS

ORIGIN: ACC Section .343 is new to Alaska law and is predicated upon Section 20 of the MBCA with one modification. This section eliminates the final sentence of the Model Act provision to conform to the financial provisions of the ACC. This section was adopted to clarify and regulate the exercise of the the corporation's right to issue stock rights and options under the general power to contract.

SUMMARY OF COVERAGE: Unless otherwise defined or restricted in the article, ACC Section .343 gives the corporation acting through its board broad powers to create and issue rights or options covering authorized but unissued shares of any class or classes. The only substantive command of ACC Section .343 is that if such rights or options are to be made available to directors, officers, or employees of the corporation, or to any subsidiary but not to the shareholders generally, is-

suance shall not be licit until the plan is approved by the outstanding shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.24 is identical to ACC Section .343, except that it does not protect shareholders by requiring their prior approval for a plan which would grant share rights and options to directors, officers, or employees only. The omission of this protection from the RMBCA is unprecedented in existing law and at variance with the Model Act. It may also contravene the rules of the New York Stock Exchange. See, Section A-25 of the Company Manual. The official comment state that shareholder approval of such a plan may be required in order to comply with SEC regulations.

Section .345 EXPENSES OF ORGANIZATION, REORGANIZATION, AND FINANCING

ORIGIN: ACC Section .345 is a reenactment of AS 10.05.111 with a minor language modification in order to parallel MBCA Section 22.

SUMMARY OF COVERAGE: ACC Section .345 recognizes that there are costs incurred in the issuance and marketing of shares, and protects the purchasers from further liability on the theory that since it received only the "net amount" from the gross price paid, the shares are not "fully paid" and thus "assessable."

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.28 is identical to ACC Section .345 except that it does not contain the express protection for purchasers precluding a claim that their shares are assessable. The framers of the tentative draft recognize that this language is standard in nearly all state codes, but feel that the problem has rarely arisen and the language is thus surplusage.

Section .348 CERTIFICATES REPRESENTING SHARES

Section .350 INFORMATION REQUIRED TO BE STATED ON CERTIFICATE

ORIGIN: ACC Section .348 is a verbatim reenactment of AS 10.05.114, and is modeled upon MBCA Section 23.

ACC Section .350 is a verbatim reenactment of AS 10.05.117 with the deletion of paragraph (4) regarding par value, which is no longer a matter of consequence under the ACC. With this modification Section .350 is predicated upon MBCA Section 23.

SUMMARY OF COVERAGE: ACC Section 348 is designed to facilitate the trend toward electronic substitutes for the traditional share certificate by permitting the seal of the corporate issuer to be affixed in a facsimile form, and to permit

the signatures of the corporate officers to be facsimiles so long as the "certificate" is countersigned by a transfer agent or a registrar who is not an employee of the corporation.

ACC Section .350 recognizes that information regarding the rights, preferences, and limitations of the shares is of importance to shareholders. If the corporation is authorized to issue only one class of stock, such shares enjoy all attribute of participation, control, and ownership defined by the ACC. However, if the corporate articles authorize the issuance of more than one class, it is both possible and likely that the relative rights, privileges, preferences, and limitations of the classes will differ. In this instance, ACC Section .350(a) requires that the corporation furnish to each shareholder either a statement or summary of the designations, preferences, limitations, and relative rights of shares of the class she has purchased, and similar basic information regarding the shares of any other authorized class. This information may be printed on the certificate, or the certificate may be imprinted with a legend that the corporation will furnish the information without charge.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: In yet another break with the prior act and the statutory content of Alaska and other states, the framers of the tentative draft recommend that the issuance of share certificates be optional with the board. This suggestion allows the corporation the ability to decide that it will issue shares which have no tangible expression at all. If the corporation does opt for share certificates, RMBCA Section 6.25(b) sets forth a minimum content which is identical to that of ACC Section .350(a). RMBCA Section 6.25(c) is functionally identical to ACC Section .350(a).

If the corporation opts to issue shares without certificates, RMBCA Section 6.26(b) requires that it send the "shareholder a complete written statement of the information required on certificates by Section 6.25(b) and (c)." As a result of this last provision, the only accomplishment of the suggested innovation would be to place the owners of "uncertificated shares" in grave danger that they would have no tangible evidence of their interest in the corporation. Should such an individual die, the burden of one charged with marshalling the assets of the estate would be obvious.

Section .353 FULL PAYMENT REQUIRED FOR CERTIFICATE

ORIGIN: ACC Section .353 is a reenactment of AS 10.05.120, which is predicated upon Section 23 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .353 continues the Alaska policy of insisting that a share certificate may not be issued until the agreed consideration has been fully paid.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: This classical

restriction from Section 23 of the original Model Act is repeated in a rather obscure manner in the RMBCA. In Section 6.21(c) and (d) shares are deemed non assessable when fully paid. Further, the corporation is empowered to escrow shares for which the full consideration has yet to be received.

Section .355 ISSUANCE OF FRACTIONAL SHARES OR SCRIPT

ORIGIN: ACC Section .355 is a verbatim reenactment of AS 10.05.123, and as such is a modification of Section 24 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .355 provides two basic options to the board under which it may deal with claims to fractional share ownership. The board may issue a certificate for a fractional share in which case the holder is entitled to the privileges conferred by shares of that class; or, the board may issue scrip entitling the holder to receive a certificate for a full share upon surrender of scrip aggregating a full share. If the second alternative is selected, the holder of the scrip is not entitled to the privileges of share ownership until the exchange of scrip aggregating a full share. Under subsection (c), the board may establish machinery to eliminate the outstanding scrip so long as it is noticed on the scrip at the time of issuance.

ACC Section .355 continues the Legislature's prior determination that it would not follow the Model Act which gives the board a third option, under which it could eliminate fractional shares by simply paying their fair market value. Given the difficulties experienced with that Model Act provision (see, e.g., Teschner v. Chicago Title & Trust Co., 59 Ill.2d 452, 322 N.E.2d 54 (1974)), that decision seems wise. A further reason for opting to continue prior Alaska policy is to prevent the use of this "cash out" option to facilitate management strategies to eliminate outside shareholders in a move to "go private". The technique is a board ordered reverse stock split that is calculated to reduce outsider shareholdings to fractions which can then be cashed out irrespective the wishes of those shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.04 is functionally similar to ACC Section .355, except that it grants the third, or "cash out", option previously rejected by the Alaska Legislature.

Section .358 DISTRIBUTIONS; CONDITIONS

Section .360 PROHIBITED DISTRIBUTION; INABILITY TO MEET MATURING DEBTS AND LIABILITIES

Section .363 PROHIBITED DISTRIBUTION OF JUNIOR SHARES; LIQUIDATION PREFERENCE

Section .365 PROHIBITED DISTRIBUTION TO JUNIOR SHARES; RATIO OF RETAINED EARNINGS

ORIGIN: ACC Section .358 supplants the earned surplus test of AS 10.05.204(1) (payments of dividends) and .012 (repurchase of shares). With the additions and deletions noted in the Official Comment, it is premised upon the amended version of Section 500 of the GCL.

ACC Section .360 replaces AS 10.05.201 and is based on GCL Section 501.

ACC Section .363 is taken from GCL Section 502, and replaces AS 10.05.207(4).

ACC Section .365 adopts the language of GCL Section 503, and supplants AS 10.05.207(3).

SUMMARY OF COVERAGE: In general: ACC Sections .358 through .368 contain the essence of a major reform, in which antiquated and unworkable concepts of "balance sheet" and "earned surplus" (with the myriad of exceptions) are replaced by a simple ratio of assets to liabilities in determining the circumstances in which the board of directors has discretion to declare and pay distributions of corporate assets to shareholders. With minor modifications they are predicated upon the 1977 California General Corporations Law.

Pending passage of CSSB 246/HB 343, Alaska continues to rely upon a mid-1950's version of the Model Act. To its credit, the Alaska Legislature did not authorize certain aspects of Section 45 of the Model Act, which would have further enhanced the circumstances in which the board could dissipate corporate assets to the prejudice of creditors and the holders of preferred and other senior shares. Alaska, for instance, did not adopt a "nimble dividends" provision such as that suggested by alternative Section 45(a) of the Model Act. Further, if the distribution had to be charged to "capital accounts", Alaska insisted upon a two-thirds authorization of the shareholders rather than the simple majority suggested by the Model Act.

Notwithstanding these prudential rejections of Model Act suggestions, Alaska was committed to a system predicated upon an equitable insolvency test supplemented by an exception ridden earned surplus test. Though not as weak as the system in some states, this scheme is still premised upon unsound norms of "legal accounting" and mired in statutory and common law exceptions which make it nearly impossible to draw sensible limits upon the power of the board. Such a status quo is objectionable not only because it fails to deter those bent upon abusing corporate creditors, but for the more important reason that it fails to guide the honest director who is seeking maximum, licit flexibility.

In the mid-1970's, the California Legislature joined the bar association of that state in the creation of a committee to study, with a view toward revision, the California Corporations Code. At that time, California law relied upon the earned surplus test burdened by the possibilities of

reduction surplus and nimble dividends. Two irrebuttable criticisms set the stage for reform: (1) the existing restraints upon dissipation of corporate assets afforded insufficient protection to corporate creditors; and, (2) the language of the law meant little to accountants who were relied upon to prepare and audit the books and records. After a substantial debate, the 1977 California Corporations Code was framed in a manner designed to meet both of these problem areas. The earned surplus test was junked. Also discarded were the concepts of par value, stated capital, and all manner of capital surplus. In their place the statute articulated a simple test of the ratio of assets to corporate liabilities. For the purpose of complying with this test, the corporate books were to be kept in accordance with Generally Accepted Accounting Principles (GAAP).

In 1980, the Alaska Code Revision Commission concluded that both the substantive scheme and deference to the accounting profession pioneered in California were worthy models for a new Alaska Corporations Code. Accordingly, with the modifications hereinafter noted, Alaska is presented with the opportunity to become the second state to adopt the ratio/assets surplus test.

Protection of Creditors: Protection for the legitimate interests of corporate creditors begins with ACC Section .360's injunction that no distribution (defined by ACC Section .990(17) as a transfer of cash or property by a corporation to its shareholders without consideration) may be undertaken when the result would produce equitable insolvency. The content of this equitable insolvency restraint has been altered in several particulars:

> Neither a corporation nor any of its subsidiaries shall make any distribution to the corporation's shareholders if the corporation or the subsidiary making the distribution is, or as a result thereof would be, likely to be unable to meet its liabilities as they mature.

Two significant changes are incorporated in this formulation of the equitable insolvency standard.

The "likelihood" element of the formula is intended to be more restrictive than the traditional inquiry. AS 10.05.201 asked whether the corporation is now, or, giving effect to the dividend, would be insolvent. ACC Section .360 is more cautious, prohibiting distributions if the corporation is, or giving effect to the distribution, would likely be unable to meet its liabilities as they mature.

The inclusion of subsidiaries is the second reform. A parent corporation and its subsidiaries are to be considered as a unit; the various corporate shells are disregarded in favor of viewing the financial position of the total operations of an affiliated group. For a definition of "subsidiary" see ACC Section .990(42).

Assuming that insolvency within the meaning of ACC Section .360 is not threatened, ACC Section .358 establishes

two circumstances under with the board enjoys discretion to declare and pay a distribution to shareholders.

Distributions in cash or other assets may be declared and paid against "retained earnings" (ACC Section .358(a)(1)). Like the earned surplus test, this requirement reflects a legislative judgment that routine distributions should only be made from operating profits. Unlike the Model Act, the ACC contains no provision for permitting net operating losses to be charged off by writing down capital surplus. There is no such concept. If the corporation cannot make the payment out of assets charged against retained earnings, the ACC deems it a distribution in partial liquidation.

Distributions in partial liquidation are within the discretion of the board if a two part test is met.

The first requirement is that the assets of the corporation which would remain after the distribution are at least equal to 1.25 time liabilities. Compliance with this ratio guarantees a minimum cushion to creditors in that the corporation must continue to hold five dollars of assets for every four dollars of liabilities.

The second requisite focuses upon current liquidity of the corporation. The general rule is that the corporation's current assets be at least equal to current liabilities. Both current assets and current liabilities are defined by Generally Accepted Accounting Principles. Special concern is manifest for corporations which have a recent history of paying more in interest on their debt than their earnings would reflect if interest and taxes were not deducted in computing net profits. Such corporations must comply with a further requirement that current assets be at least 1.25 times current liabilities.

Protecting the interests of senior shares: The basic thrust of both classical and the ratio/assets restraints upon distributions has been the protection of creditors. This emphasis is natural, for by definition the creditor is an "outsider" precluded from any direct voice in corporate management. The ACC also attempts to accommodate a second source of recurrent tension respecting distribution: the interests of quasi-outsiders who have purchased shares with either a dividend or liquidation preference.

"Senior shares" achieve this status by dent of a contract between the corporate issuer and the holder of the securities. The specific terms used to identify this arrangement is "the indenture." While the content of an indenture may reflect specific understandings between the potential investors and the corporation, most are comprised of either or both of the following elements: (1) a "dividend preference" (the holders of this class of stock are "guaranteed" a dividend preference over subordinated or "junior" classes of stock); and (2) a "liquidation preference" (in the event of dissolution, the holders are guaranteed a preferential claim to assets which exceed the claims of all creditors). Neither of these guarantees is chiseled in stone. Performance is permitted only if the corporation can other-

wise meet its legal obligations. Thus if the distribution would threaten the security of creditors mandated by ACC Section .358, it cannot be made to even senior shares.

Adding to the vulnerability of the holders of these securities is a third classical feature of their status: they normally do not enjoy a right to elect members to the board of directors. The directors are, instead, elected by the owners of the junior, or "common", shares. Unless restrained by easily understood guidelines, there is danger that the directors will advance the interests of their constituents at the expense of the non-voting senior shares.

AS 10.05.207 and .210 show that the Legislature has long been interested in affording protection to senior shares. ACC Section .365 continues this policy by restricting the board's authority so that there can be no distribution to junior shares unless the amount of retained earnings immediately prior thereto equal or exceeds the amount of the proposed distribution plus the aggregate amounts of cumulative dividends in arrears on all shares having a dividend preference. The net effect of ACC Section .365 is to foreclose the use of payments in partial liquidation to holders of junior shares so long as the indenture obligations to senior shares are unmet.

The liquidation preference of senior shares is guarded by ACC Section .363. By its terms neither a corporation nor any of its subsidiaries may make any distribution to junior shares if, after giving effect to the proposed distribution, the excess of corporate assets over liabilities would be less than the liquidation over the class or series to which the distribution is made.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: If supporters could be found for a continuation of the baroque concepts of "legal accounting" contained in current Alaska law, they will find no comfort in the RMBCA. The official comment to RMBCA Section 6.40 makes it clear that it is intended to "sweep away all the distinctions among the various types of surplus and impose realistic restrictions on distributions build around the equity insolvency test of earlier statutes." (p. 6-60). The RMBCA also follows the California/ACC approach and yields all notions of legal accounting. It stops short, however, of requiring that books and records according to generally accepted accounting principles. While it expects that ". . .their use will be the basic rule in most cases. . . ." the final judgment is left within the business judgment of the board. (6-78).

There are differences between the existing California and proposed Alaska statutes and RMBCA Section 6.40. While the former use the equity insolvency test as the first of a two prong concept, RMBCA Section 6.40 relies upon it almost exclusively. Put most simply, the cushion of $5 in assets to every $4 in liabilities is not mandatory under RMBCA Section 6.40. The standard is explicit under the proposed content of the ACC. It would present a moving target under the RMBCA. A miss would ensure harm to creditors and promote litigation

against the directors and shareholders of the defaulting entity. Neither seems a desirable outcome.

RMBCA Section 6.40(c)(2) does contain protection for the holder of senior securities which is similar in object to ACC Section .360.

Section .368 EXCEPTION FOR PURCHASE OR REDEMPTION OF SHARES OF DECEASED SHAREHOLDER

ORIGIN: ACC Section .368 is new to Alaska law; it is taken verbatim from GCL Section 503.1.

SUMMARY OF COVERAGE: It is often desirable in smaller corporation to provide for the death of a shareholder with a plan permitting the corporation to purchase or redeem the shares of the deceased. Such a plan prevents the potentially troublesome problems of having the deceased's heirs participating in the business. A common method used in effecting such plans is a corporate purchase of insurance on the shareholder's life. The insurance proceeds are to be used for the purchase or redemption. ACC Section .368 provides that, notwithstanding an inability to comply with Sections 358 through .365, the amount of the proceeds from the policy in excess of the total amount of premiums paid may be used to purchase or redeem the decedent's shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no explicit provision enabling such limited repurchase plans.

Section .370 INAPPLICABILITY TO REGULATED INVESTMENT COMPANY

ORIGIN: ACC Section .370 is new to Alaska law, and is derived from GCL Section 504.

SUMMARY OF COVERAGE: In order to avoid any conflict with federal law, an exception to the provisions of ACC Section .358 is made for corporations defined as regulated investment companies under the United States Internal Revenue Code.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA appears to have no comparable exception, although the result would doubtless be reached through litigation.

Section .373 SHARE DIVIDENDS: RESTRICTIONS

ORIGIN: This section is a reenactment without change of AS 10.05.204(5), and is predicated upon Section 45(e) of the MBCA.

SUMMARY OF COVERAGE: Share dividends present no direct threat to creditors who are protected by the ratio/assets

surplus test of ACC Section .358. However, if the corporation has more than one class of shares, the power of the board to distribute shares of the "senior" or "preferred" class to the common shareholders as a dividend is a direct threat to their proportional interest in the corporation. ACC Section .373 continues Alaska law by prohibiting the board from taking such a step unless it is authorized in the articles or is the subject of a majority vote of the holders of the senior shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.23 is functionally identical to ACC Section .373.

Section .375 ADDITIONAL RESTRICTIONS IN ARTICLES, BYLAWS, INDENTURES OR AGREEMENTS

ORIGIN: This section does not change prior Alaska law; it merely makes the law explicit.

SUMMARY OF COVERAGE: ACC Section .375 makes it explicit that the provisions of the ACC on the declaration of dividends and purchase or redemption of shares do not "occupy the field" and thereby prevent further regulation by the articles, bylaws, indentures or agreements.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.40 contains a prefatory clause which accomplishes the same result as ACC Section .375.

Section .378 LIABILITY OF SHAREHOLDERS RECEIVING PROHIBITED DISTRIBUTIONS; SUIT AGAINST SHAREHOLDERS

ORIGIN: ACC Section .378 is new to Alaska law, and is derived from GCL Section 506. It supplements ACC Section .480(b), itself a reenactment of AS 10.05.225.

SUMMARY OF COVERAGE: ACC Section .378 provides a non-exclusive remedy against shareholders who have received any distribution with knowledge that it is illicit. The remedy runs to the corporation and may be asserted to the use of the corporation by any non-consenting creditor for violation of Sections .358 or .360, provided that the creditor's claim had arisen prior to the distribution. Under subsection (b), non-consenting holders of senior shares may commence the action for violation of Section .363 or .365 provided that the senior shares were held at the time of the distribution.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.33(b)(2) achieves the goal of ACC Section .378 by indirection. Shareholders are rendered liable for contribution to a director sued for an illicit distribution to the extent that they knew it to be in violation of the act or provisions of the articles.

Section .380 IDENTIFICATION OF DISTRIBUTION IN NOTICE TO SHAREHOLDERS

ORIGIN: ACC Section .380 is taken from GCL Section 507. It replaces AS 10.05.207(5).

SUMMARY OF COVERAGE: In order to set the stage for recovery of illicit distributions and to inform shareholders when a dividend represents a partial liquidation (as opposed to a distribution of profits), ACC Section .380 requires that management identify the source and accounting treatment of a dividend charged against any source other than the retained earnings account. Such a policy is consistent with current Alaska practice. AS 10.05. 207(5) requires identification of distributions in partial liquidation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.40 does not require that shareholders be given this prudential information. Omitting such a step fails to alert Alaskans of potentially favorable tax treatment of the dividend on their federal returns.

Section .383 INAPPLICABILITY TO WINDING UP AND INVOLUNTARY OR VOLUNTARY DISSOLUTION

ORIGIN: ACC Section .383 is taken from GCL Section 508.

SUMMARY OF COVERAGE: The provisions of Article 9 for the winding up of corporate affairs and the involuntary or voluntary dissolution of the corporation are plenary in their coverage. No additional law is required to protect the interest of creditors and holders of senior shares. Thus, the provisions of Sections .358 through .365 are made inapplicable to such procedures by ACC Section .383.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: There is no comparable provision in the RMBCA.

Section .385. REDEMPTION OF SHARES AT THE OPTION OF CORPORATION; MANNER

ORIGIN: Current Alaska law provides no statutorily approved procedure for the redemption of shares. ACC Section .385 is derived from GCL Section 509, with the deletion of language in subsection (c) which would have, nonsensically, required a corporation to send a notice to itself if it did not have the shareholder's address.

SUMMARY OF COVERAGE: ACC Section .385 creates a statutory procedure for redemption. The notice provisions of subsection (b) are subject to modification by the articles of

incorporation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.31 empowers a corporation to acquire its own shares. However, the RMBCA does not appear to contain any provision defining the manner of taking such a step.

Section .388 ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT

ORIGIN: ACC Section .388 is taken from GCL Section 510. It continues existing Alaska law (AS 10.05.312 to .345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies existing law by the elimination of the concept of "treasury shares".

SUMMARY OF COVERAGE: ACC Section .388 specifies the treatment to be given redeemed or repurchased shares. They return to the status of authorized but unissued shares unless the articles prohibit reissuance. If reissuance is prohibited, the articles stating the number of authorized shares must be amended to reflect the lower number. Such an amendment must be filed with the commissioner. Shareholder approval of the required amendment is unnecessary.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.31 is functionally identical to ACC Section .388

Section .390 CAPITALIZATION OF RETAINED EARNINGS

ORIGIN: ACC Section .390 continues the policy of existing Alaska law, which permits directors to increase either the stated capital (AS 10.05.108) or the capital surplus (AS 10.05.366) accounts by charging the earned surplus account. There is no corresponding provision in the GCL financials.

The accounting provisions of existing law require that an amount equal to the total par value of shares distributed as dividends be transferred to the stated capital account from a surplus account (AS 10.05.204(4)(A)). No such accounting treatment is required under the ACC since the use of par value has been eliminated.

SUMMARY OF COVERAGE: ACC Section .388 permits the board to pass a resolution which transfers amounts properly allotted to the retained earnings account into the paid-in account. The effect of such a transfer would limit the ability of the board in future to make distributions under ACC Section .358(a).

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no similar provision.

ARTICLE 5. MEETINGS OF SHAREHOLDERS

Section .405 MEETINGS OF SHAREHOLDERS

ORIGIN: ACC Section .405 is predicated upon Section 28 of the MBCA and Section 600(d) of the GCL. It replaces AS 10.05.138.

SUMMARY OF COVERAGE: ACC Section .405 requires that shareholders of any corporation organized under or subject to this Chapter meet at least once annually. For the first time in Alaska law, a shareholder is provided with standing to seek a summary court order to convene an annual meeting if such a meeting has not been held within the prior thirteen month period. ACC Section .405(c) differs from the Model Act in conferring the power to summon special meetings of the shareholders upon the chairman of the board and the president of the corporation. AS 10.05.138 confers such power upon the president, but does not reach the chairman of the board.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The content of ACC Section .405 is paralleled in RMBCA Sections 7.01, 7.02, and 7.03. RMBCA Section 7.01 requires an annual meeting of shareholders. RMBCA Section 7.03(a)(1) is similar to ACC Section .405(b) in authorizing aggrieved shareholders summary access to a court ordered meeting in the event the annual meeting is not held. Special meetings may be called by shareholders under both ACC Section .405(c) and RMBCA Section 7.02. The ACC continues current Alaska law and the original recommended content of the Model Act by requiring that 10% of the voting shares are needed to call a special meeting. In the exposure draft Section 7.02(a)(2) recommended that the minimum be lowered to 5%. In the final draft the figure was restored to the traditional 10%.

Section .408 CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE

ORIGIN: ACC Section .408 is predicated upon Section 30 of the MBCA with two modifications. In both subsections (a) and (b), the Model Act's ten day minimum period before the action is taken has been extended to twenty days, to further the use of the twenty day notice periods found throughout the ACC. AS 10.05.144 utilizes a ten day period. Also, sixty day limitations have replaced the fifty day formula now found in Alaska law respecting the closing of transfer books or fixing of a record date. Finally, the ACC follows the Model Act in making a shareholder list compiled from the closed transfer books or by virtue of the record date effective as to any