ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5317 SJUD SB 276 - SB 305 889

(12) the license was issued under AS 04.11.135, unless the transferor is also applying to transfer the beverage dispensary license required under AS 04.11.135 to the same transferee.

* Sec. 5. AS 04.11.450(b) is amended to read:

(b) A person who is a representative or owner of a wholesale business, brewery, winery, bottling works, or distillery may not be issued, solely or together with others, a beverage dispensary license or package store license. A holder of a beverage dispensary license may be issued a brewpub license, subject to the provisions of AS 04.11.135.

* Sec. 6. AS 04.11.450(c) is amended to read:

(c) In this section, "direct or indirect financial interest" means holding a legal or equitable interest in the operation of a business licensed under this title. However, credit extended by a distiller, a brewery, or a winery to a wholesaler, or credit extended by a wholesaler to persons licensed under this title, or a consulting fee received from a person licensed under this title, is not considered a financial interest in a business licensed under this title.

319

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: SB 276
Publish Date:

REQUEST

Revision Date:
Title: An Act Relating to Issuance of a Brewery License
Sponsor: Sen. Fahrenkamp
Requestor: State Affairs

Agency Affected: Revenue
BRU: Alcoholic Beverage Control Board

Components: Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES	-	-	-	-	-	-
TRAVEL	-	-	-	-	.	-
CONTRACTUAL	-	-	-	-	-	-
SUPPLIES	-	-	-	-	-	-
EQUIPMENT	-	-	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS:

Prepared By: Royce Weller RW
Division: Office of the Commissioner
Phone: 465-2300
Date: May 1, 1987

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: May 1, 1987

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA

DEPARTMENT OF REVENUE

ALCOHOLIC BEVERAGE CONTROL BOARD

STEVE COWPER, GOVERNOR

550 W. 7TH AVE
ANCHORAGE, ALASKA 99501-6698

May 1, 1987

The Honorable Mitch Abood, Chairman
State Affairs Committee
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Senator Abood:

Your office called to let me know that your committee will consider SB 276 concerning brewery licenses on Monday, May 4.

Members of the Alcoholic Beverage Control Board have informally discussed micro breweries and their increasing popularity. The board believes the innovation would contribute to a new dimension of operation for licensees and, therefore, has no objection to the proposed amendments.

Thank you for notifying the board. If I can provide any additional information, please do not hesitate to let me know.

Sincerely,

Patrick L. Sharrock

Patrick L. Sharrock
Director
(907) 277-8638

PLS:cr

cc: Senator Bettye Fahrenkamp

87-91

4-015LH

Back-up - SB 276

SB 276 An Act relating to the issuance of a brewery license by Senator Fahrenkamp 5/4/87

Before the Senate State Affairs Committee

Under current law, a person who has a brewery license may not receive, from the Alcohol Board of Control, a dispensary license. There is no explicit prohibition for the opposite case. However, lacking guidelines and explicit authorization, to date, ABC has not issued any brewery licenses to persons already holding a beverage dispensary license. This bill would provide clear authority and give them specific conditions under which they would be able to do use it.

If the bill passes, a new industry would be fostered in Alaska, i.e. "brew pubs" which are a growing trend in other states. A brew pub is the industry term for a bar that makes its own beer in small quantities for sale only on the premises. They are the size of micro breweries or smaller.

Sectional Analysis

Section 1. AS 04.11.130 Brewery License

New subsection (e) sets out the conditions under which a holder of brewery license and beverage dispensary license may sell beer:
(1) in quantities less than five gallons on premises
(2) not more than 16,000 gallons (5000 barrels) in a year.

Section 2. AS 04.11.450(b) Prohibited Financial Interest

Amended to authorize the holder of beverage dispensary license to obtain a brewery license, subject to AS 04.11.130(e).

Provided by Senator Fahrenkamp's office.

SB
282

5-1116B
Bradley
5/12/87

Original sponsor: Community and Regional Affairs Committee

adopted 4 OUT 5/12/87

IN THE SENATE

CS FOR SENATE BILL NO. 282 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to municipal sales and use taxes."

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

* Section 1. AS 29.45.650(e) is amended to read:

(e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales and use tax, and the interest, penalties, and administration costs in the event of delinquency. When recorded, a lien authorized under this section has priority over other liens except those for property taxes<u>,</u> [AND] special assessments<u>, and prior recorded mortgages, trust deeds, and land sale contracts. This subsection applies to home rule and general law municipalities</u>.

* Sec. 2. AS 29.10.200(42) is amended to read:

(42) AS 29.45.650(c), (d), <u>(e),</u> and (f) (sales and use tax)

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : SB 282
Publish Date :

REQUEST:

Revision Date:
Title : "An Act relating to municipal sales and use taxes."
Sponsor : Senate C&RA Committee
Requestor :

Agency Affected : Community & Regional Affairs
BRU : State Assessor
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page .. necessary)

MW

Prepared by : Mike Worley, State Assessor
Phone : 465-4750
Division : Municipal & Regional Assistance
Date : 5/6/87

Approved by Commissioner: M Worley for D.G. Hoffman
Date : 5/6/87
Agency : Community & Regional Affairs

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

page ____ of ____

SB
294

BILL #

An Act repealing AS 11.71.180(c)

AS 11.71.180(c) is repealed.

AS 11.71.180(c) reads:

"Schedule VA includes Loperamide."

The Federal Government and all other states have descheduled Loperamide. The State of Alaska has not descheduled Loperamide simply because this amendment usually ends up in a lengthy controlled substance bill that either doesn't get introduced or is not passed.

This year the Administration has just not introduced a bill . . . yet. Loperamide is an anti diarrheal drug that would remain a prescription drug under this amendment. There would be no change for pharmacists.

This amendment simply takes Loperamide, an anti-diarrheal, off our lowest schedule, schedule V; making us consistent with Federal Law and the other States.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: SB 294
Publish Date:

Revision Date:
Title: "An Act removing...loperamide from the schedules of controlled substances..."
Sponsor: Senator Josephson
Requestor: Senate Judiciary

Agency Affected: Department of Law
BRU: Prosecution

Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: May 11, 1987

Richard I. Pegues /FOR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date: May 11, 1987
Agency: Department of Law

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 294

This bill repeals AS 11.71.180(c), thereby removing the anti-diarrheal drug loperamide from the schedule of controlled substances under the Criminal Code. This drug has already been removed from the federal controlled substances schedules, after the DEA concluded that loperamide has a currently accepted use in medical treatment in the United States and does not have sufficient potential for abuse to justify its continued control in any schedule of the federal Controlled Substances Act. Therefore, the bill will not have a fiscal impact on the Department of Law.

SB
302

BILL NO: SB 302

DATE: March 25, 1988

TITLE: An Act relating to mediation in divorce actions

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault

MAR 29 1988

SB 302 would change AS 25.34 to require mediation of custody or of visitation with a minor child in a contested divorce action. Current law permits one party to request mediation or the court may order mediation in divorce cases. If mediation occurs, it is conducted informally, the parties and a court-appointed representative of any minor children are required to attend, and counsel is permitted to attend all the conferences. After the first conference, either party may withdraw or the mediator may terminate mediation if the mediator determines that mediation efforts are unsuccessful. Upon withdrawal, the court is notified and divorce action proceeds in the usual manner.

Under SB 302 the court is required to order mediation if custody of, or visitation with, a minor child is a contested issue in a divorce action. At least six hours of mediation is required. However, mediation is waived if, during the marriage, there has been a finding under AS 23.35 of sexual or physical abuse of a child or spouse by either party. The bill sets out qualifications for a mediator. Mediation is to be conducted informally, with the public excluded but the court "may allow persons to attend a conference if their attendance is compatible with the purposes of mediation." Counsel for the parties may not attend the conference, unless the mediator determines that counsel for both should be present.

POSITION

The Council on Domestic Violence and Sexual Assault opposes SB 302 for the following reasons:

* It requires mediation in the area of law where mediation is least likely to be successful. Mediation depends on equality of personal, social and economic power between the disputing parties. It is a self-directed rule-free process where each party is his or her own advocate. However, the reality of the relationship between men and women in our society is that in general women do not have equal personal, social or economic power to that of men.

* Mediation is most harmful to victims of domestic violence or sexual assault. Violence further distorts the balance of power in a relationship. Violent men physically and psychologically coerce women, by domination and intimidation. Women who are severely intimidated and frightened of the violence will not be able to make independent decisions in their own best interests or those of their children. Mediation cannot address the violence. Domestic violence and sexual assault occur much more

frequently than may be suspected. A recent study by Stockholm and Helms which surveyed women in Alaska on the extent of abuse of women by their spouses or live-in partners found that 26% of the women had been abused as adults during their lifetime. It is often difficult for victims in rural areas to obtain an injunctive relief order. Also, relief orders are rarely obtained in child abuse cases. Since this bill requires that there has been a finding of physical or sexual abuse under AS 23.35 (injunctive relief orders), there will be many victims of physical or sexual abuse, both children and adult women, who could have been abused but have not obtained an injunctive relief order. If the bill is retained, it should at least include adjudication of physical or sexual abuse of children.

* To be effective, mediation must be voluntary. Under SB 302, mediation is mandatory. Mediation fails where there are truly irreconcilable differences, no common interests, and where both parties are not committed to the process. Research on conflict resolution also indicates that to the extent that one or both parties feel coerced, negotiations will be deadlocked or agreements that are reached are likely to fail to be implemented. In one study conducted in California (Zemmelman, et. al.) mediation failed for approximately 20% of the families.

* Counsel is not permitted to attend the mediation hearings unless the court decides both will attend; however, "other persons" may attend if their attendance is compatible with the purposes of mediation. Who would such "other" persons be? To prohibit attorneys from attending further puts the women's rights in jeopardy.

* The qualifications of mediators will be very difficult to measure and qualified mediators as defined by SB 302 will not be available statewide, which means mediation will only be required in urban areas of the state. Standards and training in the fledgling mediation field are still being debated.

* Mediation cannot adequately protect the rights of women and children. As Schulman and Woods state: "Divorce and custody are first and foremost legal and financial problems which must be handled by trained lawyers or legal advocates. Women and children require the benefit of the full weight of our legal system with protections built in over the centuries, with rules of evidence, court reporters and an open court system. Women have never

fared well in a system that operates, as mediation does, behind closed doors and without strict legal protections. In mediation it is possible for women to unwittingly bargain away financial or custody rights which a trained lawyer, aware of the full legal ramifications of the professed 'solutions,' could have secured. Communications with mediators are not confidential and women can jeopardize their chances for securing child custody, divorce or alimony by making statements that could later be used against them in court."

* Mediators would have no power or authority to require the parties to disclose financial information. In mediation, the wife and mother must rely on the good faith of the husband to provide the information. In contested divorce cases, it is naive to think that good faith will ensure fairness. The legal system offers a number of methods to compel the disclosure of financial information. In addition, there are legal safeguards to protect the assets once court proceedings are under way. In mediation proceedings, there would be no such protection.

* Finally, who would pay for the costs of mediation? Six sessions would be costly. Would the court system pay for these sessions?

Drena McIntyre
Chair, Council on Domestic Violence and Sexual Assault

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 302
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act relating to mediation in divorce actions
Sponsor: Duncan
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Exec. Director BJM
Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault
Date: 3/2/88
Approved by Commissioner: [signature], Dep. Comm.
Date: 3-25-88
Agency: Dept. of Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

page ___ of ___

Alaska Dispute Resolution Association

HOMER • c/o Peninsula Mediation, P. O. Box 1044, Homer, AK 99693 · Phone: 235-6417
ANCHORAGE • c/o Laisner Mediation Service, 2052 Eastridge Dr., Anchorage, AK 99501 · Phone: 276-1355
FAIRBANKS • c/o Interior Ak. Dispute Resolution Service, Box 81596, College, AK 99708 · Phone: 456-6556

only Beth

December 17, 1987

JAN 28 1988

Senator Jalmar M. Kerttula, Chairman
Judiciary Committee
P.O. Box Z
Palmer, Alaska 99645

Dear Senator Kerttula,

In September of this year a group of professionals from around the State involved in the practice of alternative dispute resolution met and formed the Alaska Dispute Resolution Association. We believe that mediation is an excellent alternative for dispute resolution, and would like to see dispute resolution addressed on a Statewide level. This organization would like to be involved on a task force that explores alternative dispute resolution (ADR) on a Statewide level, and has input into legislation that may be considered.

While we support the concepts of Senate Bill #302 that was introduced last year, we feel that there are major problems with this bill. We feel that the Bill is premature, was written without thorough research in the subject of alternative dispute resolution, and that the most appropriate action at this time would be to postpone action on this bill until it is clear what the legislation is meant to accomplish. We would like to see Alaska be a leader in supporting legislation for alternative dispute resolution, therefore we feel that it is imperative that legislation that is adopted by this State be well thought out and consistent with what national leaders in the field of dispute resolution feel is appropriate.

Major problems we see in SB 302 include: 1) Section 1 (i), qualifications of a mediator. While we feel that certification requirements and qualifications are important, we do not feel that the qualifications listed here are appropriate. We feel that the most important qualification is mediation training. On a national level, 40 hours from a certified mediation training program is standard. We feel that an education is important, but also feel that substantial experience (possibly 3 yrs.) could be substituted for a degree. At this time there are no national guidelines for certification. Organizations that are prominent in the field of alternative dispute resolution (ADR) (Society of Professionals in Dipute Resolution

(SPIDR), Academy of Family Mediators) are looking into the process of certification, but have not yet made any recommendations. We feel that the State of Alaska should be consistent with what is happening on a National level.

2) Section 1 (a). This bill requires mandatory mediation in child custody disputes, but does not address the question of funding. If the State requires mediation, will the State also pay for it? What about those that can't afford to pay? What will prevent abuse of the process of mediation? Will the process be taken less seriously if the disputing parties are not required to pay in some way for the services.

3) Section 1 (c). This bill waives mediation if there has been sexual or physical abuse of a child or spouse. We do not feel that evidence of sexual or physical abuse should necessarily eliminate the process of mediation. Mediation may not be appropriate in all cases, but should not be routinely discarded.

4) SB 302 does not address the confidentiality issue. Confidentiality of all aspects of the mediation process is essential for open, honest negotiation during dispute resolution. It is critical that each party know that the mediation and the mediator cannot be used as evidence or witness in any subsequent court proceeding.

Other areas in which the State could become involved in dispute resolution include landlord/tennant, insurance, small claims, or environmental disputes. As an alternative to the court system, we would like to see the State fund a program for alternative dispute resolution (ADR). Education is a large part of ADR. We would like to see the State fund educational programs in methods of alternative dispute for the schools as well as for the general public.

We have contacted the American Bar Association Standing Committee on Dispute Resolution and asked for them to send appropriate copies of legislation that have been passed in other States. We will be happy to share this information with the Alaska legislature in order to help determine what is best for our State.

We are hoping that the Alaska Dispute Resolution Association can work together with the Alaska legislature to make atlernative dispute resolution (ADR) a reasonable and responsible process and choice for the people of Alaska. Governor Cowper discussed meediation in point 12 of the State of the State address recognizing this important process. Together we can make the alternative dispute resolution more known and used in our state. This will benefit all Alaskans. ADR has great potential!

We look forward to hearing from you.

Very sincerely,

[illegible]
for the Alaska Dispute Resolution Association

PENINSULA MEDIATION
P.O. Box 1044
Homer, Alaska 99603
(907) 235-6417

January 25, 1988

FEB 1 1988

Senator James Duncan
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Bill

Re: Senate Bill No. 302

Senator Duncan,

I am a trained mediator with a private practice in Homer, Alaska. I am a member of Alaska Dispute Resolution Association (ADRA).

Your time, energy and efforts in sponsoring Senate Bill #302 are most appreciated. I fully support alternative dispute resolution (ADR) and hope that the State of Alaska will support mediation.

Reasons to support mediation in this state include:

1. Mediation is easier on families than contested divorces. It does not put the parties in adversarial roles. The outcome of mediation benefits both parties. Since the mediated decision is the result of mutual participation, the result is more readily acceptable and compliance is expedited.

2. Studies have consistently shown a higher rate of satisfaction with agreements negotiated in mediation over those reached in litigation. (Stephen Bahr, "Mediation is the Answer," Family Advocate, Vol. 3, No. 4, Spring 1981. (Am. Bar Asso Family Law Section) pp. 32-35.)

3. Mediation is generally less expensive than the legal system.
4. Through mediation the parties gain a model process for future dispute resolution.

5. Mediation is usually less time consuming than litigation.

6. Mediation expands the range of possible remedies.

I have reservations in supporting Senate Bill #302. Problems I see with this bill are as follows:

1. Section 1 (i). Qualifications of a mediator. Certification is important, however, those listed are not appropriate. The most important qualification is mediation training. There are no national guidelines at this time. However, many national ADR organizations are in the process of writing guidelines for qualifications. I would suggest that the State of Alaska look at national organizations and structure qualifications that are consistent with national guidelines.

2. Section 1 (3). Who will pay for mandatory mediation?

3. The confidentiality issue must be addressed. Confidentiality of all aspects of the mediation process is essential for open, honest negotiation during dispute resolution.

4. Section 1 (c). Evidence of sexual or physical abuse should not necessarily eliminate the process of mediation.

I would like to see a comprehensive mediation bill that addresses child custody disputes as well as other disputes, such as landlord/tenant, insurance, other family disputes, small claims, or environmental disputes. I would like to see the State support and fund conflict resolution training in the school system.

I would be happy to work with your office, or to be involved on a task force that addresses mediation in the State of Alaska. I think that it is imperative that the Alaska legislature support mediation in this State.

Thank you for your support and efforts.

Very Sincerely,

Sara L. Jackinsky

Sara L. Jackinsky

cc A.D.R.A., Cowper, Fisher, Kerttula, Gruenberg, Navarre, Swackhammer, Ulmer

LAW OFFICES OF
WILLIAM L. MCNALL
310 "K" STREET
SUITE 212
ANCHORAGE, ALASKA 99501

WILLIAM L. MCNALL
ANN WALLER RESCH
DAVID RANKINE
PAULA WILLIAMS

AREA CODE 907
TELEPHONE 276-2535

March 3, 1988

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

Re: Amendments to Foreclosure Statutes

Dear Honorable Representative Brown:

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

Sincerely yours,

LAW OFFICES OF WILLIAM L. McNALL

By: William L. McNall
William L. McNall

WLM:sel

Enclosure - as stated.

SB 305

Article 3. Foreclosure of Liens.

Delete Sec. 09.45.170. Judgment on foreclosure of lien.

Add new to read as follows:

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

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

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

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

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

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

Add new Sec. to read as follows:

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

Delete Sec. 09.25.180. Sale of encumbered property.

Add new Sec. to read as follows:

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

Delete Sec. 09.45.200.

Delete Sec. 09.45.210.

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

THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD J. MOENING and COLLEEN M. MOENING, Appellants,	File No. S-1980
v.	OPINION
ALASKA MUTUAL BANK, Appellee.	[No. 3274 - February 26, 1988]

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

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

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

COMPTON, Justice.

SB 305

property purchased by Quest in Peters Creek.[3] Moening defaulted on this note as well.

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

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

---

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

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

(Footnote Continued)

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

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

---

6. AS 34.20.070(a) provides in part:

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

(Emphasis added).

7. AS 34.20.100 provides:

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

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

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

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

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

(Footnote Continued)

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

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

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

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

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

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10. The Kaiser note contained the following provision:

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

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

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

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

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

> [A] judgment recovered upon a debt _secured_ by a mortgage does not merge the mortgage nor operate as a discharge, abandonment, or release of the mortgage security.
>
> . . . The mortgage continues to secure such debt and is not released, discharged, or satisfied by a judgment on the debt, note, or bond. Such judgment stands _subordinate_ to the mortgage lien.

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

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

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

THE SUPREME COURT OF THE STATE OF ALASKA

MARSHALL LEE CONRAD and COLLEEN M. CONRAD, Appellants/Respondents, v. COUNSELLORS INVESTMENT CO., a partnership; BRIAN J. BRUNDIN; BILL LAWRENCE; MARCUS R. CLAPP; JERRY E. MELCHER; and JAMES M. POWELL, Appellees/Petitioners.	File No. S-1996/2102 OPINION [No. 3275 - February 26, 1988]

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

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

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

COMPTON, Justice.

SB 305

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

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

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

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

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

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

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

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

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

---

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

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

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

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

> Under the doctrine of res judicata (claim preclusion), a judgment on the merits of a controversy bars subsequent suits between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit. Pankratz v. State, Department of Highways, 652 P.2d 68, 74 (Alaska 1982); Calhoun v. Greening, 636 P.2d 69, 71-72 (Alaska 1981). The Restatement (Second) of Judgments § 24(a) (1982) states that the claim extinguished by the first judgment:
>
> > includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> A mere change in the legal theory asserted will not avoid the preclusive effect of the first judgment. Pankratz, 652 P.2d at 74.

Arguably, Conrad II is barred under this reasoning. Conrad I involved the same parties and resulted in a judgment on the merits. The Conrads could have joined a claim for judicial judgment for the creditor. Under AS 09.45.200, the creditor may bring these claims consecutively.[8]

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

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

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APR 1 C 1988

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M April 16, 1988

SUBJECT: Changes in current CSSB 305(Judiciary)

TO: Senator Jay Kerttula
Chair, Senate Judiciary Committee

FROM: Theresa L. Bannister TB
Legislative Counsel

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

If I may be of further assistance, please advise.

Enclosure

TLB:bb
b5/007

5-1200B
Bannister
4/15/88

Original sponsor: Rules/Legislative Council

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 305 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

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

(b) The legislature declares its intention to

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

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

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

CHAPTER 21. SECURITY INTERESTS IN REAL PROPERTY.

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

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

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

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

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

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

(2) cure a default under AS 34.21.180;

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

(4) recover losses under AS 34.21.340;

(5) receive statements under AS 34.21.040; and

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

Sec. 34.21.040. REQUEST FOR STATEMENT OF ACCOUNT. (a) A debtor or the holder of a subordinate security interest in the collateral may request a statement of account between the debtor and secured party as of a specified date. If the debtor makes payments to the secured party's agent, the debtor or the holder of the subordinate security interest shall make the request of the agent; if the debtor makes payments directly to the secured party, the debtor shall make the request of the secured party. A person receiving a written request shall comply with it within 15 days after receipt by sending a written statement of account that includes the principal amount due, accrued interest, other sums due, and the interest rate in effect, including the rate per day for the current interest period, and that indicates the status of an escrow account held by the secured party or the secured party's agent for receiving payments in connection with the loan. If the debtor has requested a statement of account from the secured party's agent and does not receive it within 20 days, the debtor may request it from the secured party. The secured party or the secured party's agent for receiving payments who without reasonable excuse fails to comply with a written request within 15 days after receiving it is liable to the person requesting the statement of account for

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

(2) $250 without proof of actual damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) foreclose on the collateral under AS 34.21.090 - 34.21.190.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the nature of the lien;

(B) the amount shown on the lien document;

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

(D) the recording information for the lien;

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

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

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

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

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

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

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

(1) a description of the collateral;

(2) the recording information for the security agreement;

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

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

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

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

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

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

(A) to increase the fees and costs; and

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

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

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

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

(C) [illegible]eive surplus proceeds under AS 34.21.320(c); and

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

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

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

NOTICE OF INTENT TO SELL

I

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

(set out legal description of collateral to be sold)

II

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

III

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

IV

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

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

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

....

....

....

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

V

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

VI

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

(set out fees and costs)

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

VII

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

VIII

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

IX

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

X

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

(signed)........................

....

Address.........................

....

Phone...........................

STATE OF ALASKA)

: ss.

______ JUDICIAL DISTRICT)

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

....

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

(SEAL)

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

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

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

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

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

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

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

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

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

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

(2) to seek an injunction under AS 34.21.340;

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

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

after the sale.

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

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

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

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

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

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

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

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

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

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

(1) a particular description of the collateral sold;

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

(3) the entire price paid; and

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

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

(1) the debtor; and

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

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

Sec. 34.21.240. SUBSEQUENT REDEMPTIONS. The collateral may be redeemed from the previous redemptioner within 60 days after the last redemption by paying the sum paid on the last redemption, interest at eight percent a year from the date of the last redemption, the taxes on the collateral that the last redemptioner has paid as part of or after redeeming, and the amount of the liens held by the last redemptioner that are prior in time to the lien of the last redemptioner. A lien creditor may not redeem the property from the debtor who has redeemed under AS 34.21.250.

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

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

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

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

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

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

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

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

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

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

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

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

(3) the actual consideration for the conveyance;

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

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

intent to sell; and

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

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

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

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

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

(2) the satisfaction of the indebtedness secured;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 09.45.170. JUDGMENT ON FORECLOSURE OF LIEN. A person having a lien upon real property, other than that of a judgment, whether created by <u>security agreement</u> [MORTGAGE] or otherwise, to secure a debt or other obligation may bring an action to foreclose the lien. In the action, the court may direct the sale of the encumbered property or a portion of it and the application of the proceeds of the sale to the payment of costs, expenses of sale, and the amount due the plaintiff. The <u>court</u> [JUDGMENT] shall also determine the personal liability of a defendant for the payment of the debt secured by the lien and <u>enter the determination in the judgment</u> [BE ENTERED ACCORDINGLY].

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

(b) In this section, "security agreement" means an agreement that creates or provides for a security interest in real property; in this subsection, "security interest" has the meaning given in AS 34.21.500.

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

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

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

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

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

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

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

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

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

SB 305

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

THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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

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

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

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

Deals w/ notice requirement

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

I. FACTS AND PROCEEDINGS

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

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

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

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

(Footnote Continued)

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

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

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

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(Footnote Continued)

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

4. AS 34.20.070(c) provides:

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

(Footnote Continued)

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

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

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

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(Footnote Continued)

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

(Emphasis added).

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

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

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

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

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

(Footnote Continued)

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II. DILIGENT INQUIRY UNDER AS 34.20.070(c).

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

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

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(Footnote Continued)

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

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

7. See supra n.4.

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

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

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

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

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

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

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

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

We recognize that, like cases construing the tax statute, these holdings involve statutory schemes with concerns somewhat different from the deed of trust sale. When service of process is involved, federal due process requires notice reasonably calculated to apprise the parties of the pendency of an action. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 873 (1950). Moreover, some states require proof of due diligence at attempted personal service before allowing substitute service. See, e.g., N.Y. Civ. Prac. R. 308(4) (West 1972). Thus the federal due process concerns raised by tax and process laws require some showing of due diligence. These federal due process rights are absent from a deed of trust foreclosure sale. Furthermore, unlike tax and process cases, deed of trust sales involve title to real property. Courts have traditionally favored the free and easy alienability of real property. Deed of trust provisions encourage ready transfer in two ways. By assuring creditors a speedy, inexpensive and uncomplicated remedy in the event of default, deeds of trust allow lenders to loan more cheaply the funds necessary to purchase the property initially. See 10 G. Thompson, Commentaries on the Modern Law of Real Property, § 5175 at 204-05 (1957). Thus, deeds of trust encourage debtors to buy by assuring creditors of easy resale. "[W]here it is in common use, power of sale foreclosure has provided an effective foreclosure remedy with a cost in time and money substantially lower than that of its judicial foreclosure counterpart." Real Estate Finance Law, § 7.19 at 477 (footnote omitted).

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

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

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

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

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

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

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

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

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

On one hand,

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

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

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

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

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

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

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

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12. AS 34.20.090(c) provides:

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

(Footnote Continued)

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

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

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

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

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(Footnote Continued)

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

(Emphasis added).

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

Second, the Smidts challenge the Rosenberg's status as "bfp's without notice." No case defines this phrase for purposes of AS 34.20.090(c). Cases generally interpret the phrase to apply to one who lacks actual, constructive (<u>i.e.</u>, from the land records) or inquiry notice. <u>See</u>, <u>e.g.</u>, <u>Swindell</u>, 314 S.E.2d at 517; <u>see also</u> <u>Sabo v. Horvath</u>, 559 P.2d 1038, 1043 (Alaska 1976). No one here contends that the Rosenbergs had actual or constructive notice of any defects in the notice sent to the Smidts. To bar their status as bfp's, the Smidts must hold the Rosenbergs to inquiry notice of the alleged defects.

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

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

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

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