

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5327 SJUD SB 461 - SB 515 899

risky. The legislature, for example, has granted immunity to EMTs, paramedics and ordinary citizens acting in emergency situations. These legislative choices reflect a policy decision that the need for swift action in emergency situations outweighs the policy of compensating injured plaintiffs. The Jackson decision undercuts this legislative policy.

** Hospital and Emergency room operating costs could be increased also if hospitals react to Jackson by imposing more "defensive medicine" requirements.

** Unless hospitals dramatically restructure their relationship to physicians (by requiring them to become hospital employees, for example) the net result of the Jackson decision probably will be to increase insurance costs as both hospital and doctor insure to cover the same risk.

** There is no showing that medical malpractice plaintiffs have experienced difficulty collecting their judgments. Most physicians carry adequate malpractice insurance. The addition of a "deep pocket" corporate hospital to the cast of defendants, however, will probably increase the size of jury verdicts.

** The burden of the Jackson decision will fall on municipally owned and non-profit hospitals, which are already caught in a cost squeeze from state and federal regulatory and rate requirements.

Effect of amendments. — The 1984 amendment substituted "by imprisonment for not more than one year or by a fine of not more than \$500" for "under AS 11.05.010"

Sec. 18.23.050. Protection of patient. Nothing in this chapter relieves a person of liability that the person has incurred or may incur to a person as a result of furnishing health care to the patient. (§ 40 ch 102 SLA 1976.)

Sec. 18.23.060. Parties bound by review. When a review organization reviews matters under AS 18.23.070(5)(A)(viii) a party is not bound by a ruling of the organization in a controversy, dispute or question unless the party agrees in advance, either specifically or generally, to be bound by the ruling. (§ 40 ch 102 SLA 1976)

Sec. 18.23.065. Patient access to records. Notwithstanding the provisions of this chapter or any other law, a patient is entitled to inspect and copy any records developed or maintained by a health care provider or other person pertaining to the health care rendered to the patient. (§ 35 ch 177 SLA 1978)

Sec. 18.23.070. Definitions. In this chapter, unless the context otherwise requires.

(1) "administrative staff" means the staff of a hospital or clinic;

(2) "health care" means professional services rendered by a health care provider or an employee of a health care provider, and services furnished by a sanatorium, rest home, nursing home, boarding home or other institution for the hospitalization or care of human beings;

(3) "health care provider" means a chiropractor licensed under AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under AS 08.71; an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist registered under AS 08.84; a physician licensed under AS 08.64; a podiatrist; a psychologist and a psychological associate licensed under AS 08.86; and a hospital as defined in AS 18.20.130, including a governmentally owned or operated hospital; a corporate entity covered under AS 21.88.050(b)(11); and an employee of a health care provider acting within the course and scope of employment;

(4) "professional service" means service rendered by a health care provider of the type the provider is licensed to render;

(5) "review organization" means

(A) a hospital governing body or a committee whose membership is limited to health care providers and administrative staff, except where otherwise provided for by state or federal law, and that is established by a hospital, by a clinic, by one or more state or local associa-

tions of health care providers from professional standards § 1320c, to treatment of (i) evaluation of the area or (ii) reduction (iii) obtaining to the treatment (iv) development of health care in (v) development of health care (vi) review of enrollees of health (vii) acting 42 U.S.C., § 1 (viii) review of questions between organization and professional license revocation by it when the professional license provider's patient charge or fee; be carrier or health for health care services a health care provider state or local government (ix) acting on or a grievance committee (B) the State 102 SLA 1976; a

Cross references. of the 1978 amendments 177. SLA 1978 as amended

SB

462

FISCAL NOTE

REQUEST

Revision Date: 3/25/88
Title: "An Act relating to seizure and forfeiture . . ."
Sponsor: Sen. Sturgulewski
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Criminal Investigation
Bureau

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES		31.7	31.7	31.7	31.7	31.7
TRAVEL		-0-	-0-	-0-	-0-	-0-
CONTRACTUAL		5.0	5.0	5.0	5.0	5.0
SUPPLIES		2.0	2.0	2.0	2.0	2.0
EQUIPMENT		7.6				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		46.3	38.7	38.7	38.7	38.7

CAPITAL						
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REVENUE		-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUNDS		46.3	38.7	38.7	38.7	38.7
FEDERAL FUNDS						
OTHER						
TOTAL		46.3	38.7	38.7	38.7	38.7

POSITIONS:

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis

Prepared by: Joseph Reeves, Program Budget Analyst
Division: Administrative Services
Approved by Commissioner: Arthur English
Agency: Public Safety

Phone: 465-3223
Date: 3/25/88
Date: 3-25-88

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

CSSB 462 (Jud)
Fiscal Note Analysis
Department of Public Safety

This legislation establishes a "summary administrative forfeiture procedure" that would allow the commissioner of the Department of Public Safety to summarily order the forfeiture of property used in drug law violations if the forfeiture action is not contested. Under this new scheme, the department would be required to estimate the value of seized property, notify property owners of the department's intent to forfeit the items, arrange to publish notice of the proposed forfeiture action in newspapers in the area, and review claims and bonds filed by persons claiming the property. To properly perform these tasks the services of a Clerk V will be required, located in Anchorage.

Assumptions made in the preparation of this fiscal note include that the bill's effective date would be July 1, 1988, that equipment will be needed in the first year only, and that no inflation is projected.

It is impossible to know at this point how many offenders will choose not to contest the summary administrative forfeiture proceedings, so it is impossible to estimate the amount of revenue that will result from the new procedure. We believe that most property that will be forfeited under the administrative scheme will be the same type of property on which forfeiture is now being sought, through criminal conviction or civil "in rem" forfeiture actions. For these reasons the fiscal note indicates a zero revenue impact.

Anchorage

Clerk V

PERSONAL SERVICES - 100

Base Salary (Range 11/A)	\$23,460	
Benefits	<u>8,211</u>	
TOTAL PERSONAL SERVICES		\$31,671

CONTRACTUAL - 300

Terminal Hook-up Fees	\$ 850	
Telephone/Postage, \$85 per month x 12	1,020	
Maintenance Agreement on Computer	175	
Professional Services (Appraisal Fees/ Public Notices)	<u>3,000</u>	
TOTAL CONTRACTUAL		5,045

SUPPLIES AND MATERIALS - 400

Forms	1,000	
Stationary, copy machine paper, etc.	<u>1,000</u>	
TOTAL SUPPLIES AND MATERIALS		2,000

EQUIPMENT - 500 (FY 89 only)

Desk	576	
Chair	223	
Microcomputer - Compaq 286	<u>6,850</u>	
TOTAL EQUIPMENT		<u>7,649</u>

TOTAL COST		\$46,365
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5-1354X'
Utermohle
3/25/88

Original sponsors: Sturgulewski, Uehling,
Fischer and Rodey

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 462 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to seizure and forfeiture of proper-
7 ty in cases involving controlled substances and
8 imitation controlled substances."

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

10 * Section 1. AS 11.73.060 is amended to read:

11 Sec. 11.73.060. FORFEITURES. (a) Property used during or in
12 aid of a violation of this chapter may be forfeited to the state to
13 the extent permitted under AS 17.30.110 - 17.30.138 [AND IN ACCORDANCE
14 WITH THE PROVISIONS OF AS 17.30.110 - 17.30.126].

15 (b) For purposes of this section the terms "controlled sub-
16 stance" and "this chapter", as used in AS 17.30.110 - 17.30.138
17 [AS 17.30.110 - 17.30.126], shall be construed as "imitation con-
18 trolled substance" and "AS 11.73" respectively.

19 * Sec. 2. AS 17.30.110 is amended to read:

20 Sec. 17.30.110. ITEMS SUBJECT TO FORFEITURE. The following may
21 be forfeited to the state or a municipality, except as provided in
22 AS 17.30.126:

23 (1) a controlled substance that [WHICH] has been manufact-
24 ured, distributed, dispensed, acquired, or possessed in violation of
25 this chapter or AS 11.71;

26 (2) property, including raw materials, products, and equip-
27 ment, that is [WHICH ARE] used or intended for use in manufacturing,
28 distributing, compounding, processing, delivering, importing, or
29 exporting a controlled substance that [WHICH] is a felony under this

1 chapter or AS 11.71;

2 (3) property that [WHICH] is used or intended for use as a
3 container for property described in (1) or (2) of this section;

4 (4) a conveyance, including but not limited to aircraft,
5 vehicles, or vessels, that [WHICH] has been used or is intended for
6 use in transporting or in any manner in facilitating the transporta-
7 tion, sale, receipt, possession, or concealment of property described
8 in (1) or (2) of this section in violation of a felony offense under
9 this chapter or AS 11.71; however,

10 (A) a conveyance may not be forfeited under this
11 paragraph if the owner of the conveyance establishes, by a pre-
12 ponderance of the evidence, at a hearing before the court as the
13 trier of fact, that use of the conveyance in violation of this
14 chapter or AS 11.71 was committed by another person and that the
15 owner was neither a consenting party nor privy to the violation;

16 (B) a forfeiture of a conveyance encumbered by a valid
17 security interest at the time of seizure is subject to the inter-
18 est of the secured party if the secured party establishes, by a
19 preponderance of the evidence, at a hearing before the court as
20 the trier of fact, that use of the conveyance in violation of
21 this chapter or AS 11.71 was committed by another person and that
22 the secured party was neither a consenting party nor privy to the
23 violation;

24 (5) books, records, and research products and materials,
25 including formulas, microfilm, tapes, and data, that [WHICH] are used
26 in violation of this chapter or AS 11.71;

27 (6) property, including money, securities, or negotiable
28 instruments, that is

29 (A) furnished by a person in exchange for a controlled

1 substance in violation of this chapter or AS 11.71;

2 (B) used in, intended for use in, or used to facili-
3 tate a violation of this chapter or AS 11.71; or

4 (C) proceeds derived directly or indirectly from a
5 violation of this chapter or AS 11.71; [, OR OTHER THINGS OF
6 VALUE USED IN FINANCIAL TRANSACTIONS DERIVED FROM ACTIVITY PRO-
7 HIBITED BY THIS CHAPTER OR AS 11.71; AND]

8 (7) a firearm that [WHICH] is visible, carried during, or
9 used in furtherance of a violation of this chapter or AS 11.71; and

10 (8) real property, including interests in real property and
11 appurtenances and improvements to real property, that is used or
12 intended for use to commit, or to facilitate the commission of, a
13 felony offense under this chapter or AS 11.71; however

14 (A) real property may not be forfeited under this
15 paragraph if the owner of the real property establishes, by a
16 preponderance of the evidence, at a hearing before the court as
17 the trier of fact, that use of the real property in violation of
18 this chapter or AS 11.71 was committed by another person and that
19 the owner was neither a consenting party nor privy to the vio-
20 lation;

21 (B) a forfeiture of real property encumbered by a
22 valid security interest at the time of seizure is subject to the
23 interest of the secured party if the secured party establishes,
24 by a preponderance of the evidence, at a hearing before the court
25 as the trier of fact, that use of the real property in violation
26 of this chapter or AS 11.71 was committed by another person and
27 that the secured party was neither a consenting party nor privy
28 to the violation;

29 (9) property acquired, maintained, produced by, or derived

1 from proceeds obtained directly or indirectly from a violation of this
2 chapter or AS 11.71.

3 * Sec. 3. AS 17.30.112 is repealed and reenacted to read:

4 Sec. 17.30.112. PROCEEDINGS RESULTING IN FORFEITURE. (a) Prop-
5 erty listed in AS 17.30.110 may be forfeited to the state or a munic-
6 ipality upon the order of the commissioner of public safety or a chief
7 of police in a summary administrative forfeiture proceeding under
8 AS 17.30.115, upon conviction of the defendant of a violation of this
9 chapter or AS 11.71, or upon judgment of a court in a separate civil
10 proceeding in rem.

11 (b) Unless the property is seized under a court order forfeiting
12 the property to the state or a municipality, the commissioner of
13 public safety or a chief of police, whoever is in custody of the
14 property, shall within 20 days after the property is seized under
15 AS 17.30.114

16 (1) cause a summary administrative forfeiture proceeding to
17 be commenced under AS 17.30.115;

18 (2) commence a civil proceeding in rem under AS 17.30.116;
19 or

20 (3) release the property, unless the property is subject to
21 AS 17.30.126.

22 (c) Notwithstanding (b) of this section, if forfeiture of seized
23 property is pursued as part of a criminal prosecution for a violation
24 of this chapter or AS 11.71, the commissioner of public safety or the
25 chief of police, whoever has custody of the property, may retain
26 custody of the property until the criminal prosecution is concluded or
27 until two years from the date of seizure, whichever occurs first.
28 This subsection does not prevent the release, remission, or sale of
29 the property under AS 17.30.120 - 17.30.138.

1 (d) A court may order a forfeiture in the in rem proceeding if
2 it finds that an item specified in AS 17.30.110 was used during or in
3 aid of a violation of this chapter or AS 11.71. It is not a defense
4 in an in rem proceeding brought under this chapter that a criminal
5 proceeding has resulted in a conviction or conviction of a lesser
6 offense for a violation of this chapter or AS 11.71.

7 * Sec. 4. AS 17.30.114 is amended to read:

8 Sec. 17.30.114. SEIZURE AND CUSTODY OF PROPERTY. (a) Property
9 listed in AS 17.30.110 may be seized by a peace officer upon an order
10 issued by a court having jurisdiction over the property upon a showing
11 of probable cause that the property may be forfeited under AS 17.30.-
12 110. Seizure without a court order may be made if

13 (1) the seizure is incident to a valid arrest or a search
14 under a valid search warrant;

15 (2) the property subject to seizure has been the subject of
16 an earlier judgment in favor of the state or a municipality in a
17 criminal proceeding or civil proceeding in rem under this chapter or
18 AS 11.71; or

19 (3) there is probable cause that the property was used, is
20 being used, or is intended for use, in violation of this chapter or
21 AS 11.71 and the property is easily movable; property seized under
22 this paragraph may not be held for more than 48 hours without a court
23 order obtained to continue its detention.

24 (b) Property taken or detained under (a) of this section shall
25 be held in the custody of either the commissioner of public safety or
26 a municipal law enforcement agency [AUTHORIZED BY THE COMMISSIONER OF
27 PUBLIC SAFETY TO RETAIN CUSTODY OF PROPERTY LISTED IN AS 17.30.110]
28 subject only to disposition under procedures set out in this chapter
29 [THE ORDERS AND DECREES OF THE COURT HAVING JURISDICTION OVER ANY

1 FORFEITURE PROCEEDINGS]. If property is seized under this chapter,
2 the commissioner of public safety or a [AN AUTHORIZED] municipal law
3 enforcement agency may

4 (1) place the property under seal;

5 (2) remove the property to a place designated by the court;

6 or

7 (3) take custody of the property and remove it to an appro-
8 priate location for disposition in accordance with law.

9 (c) Within 10 days after a seizure under AS 17.30.110 - 17.30.-
10 138 [AS 17.30.110 - 17.30.126], the commissioner of public safety or
11 the chief of police shall make an inventory of any property seized,
12 including controlled substances, and shall estimate [APPRAISE] the
13 value of any items seized other than controlled substances.

14 * Sec. 5. AS 17.30 is amended by adding a new section to read:

15 Sec. 17.30.115. SUMMARY ADMINISTRATIVE FORFEITURE PROCEEDING.

16 (a) If the estimated value of seized property is \$100,000 or less or
17 if the seized property is a conveyance subject to forfeiture under
18 AS 17.30.110(4), the official who has custody of seized property may
19 commence a summary administrative forfeiture proceeding by

20 (1) giving notice of the forfeiture proceeding to persons
21 known to have an interest in the property or who are ascertainable
22 from official registration numbers, licenses, or other state, federal,
23 or municipal numbers on the property; and

24 (2) publishing notice of the proceeding in a newspaper of
25 general circulation in the judicial district where the seizure was
26 made, or if no newspaper is published in that judicial district, in a
27 newspaper published in the state and distributed in that judicial
28 district; the notice shall be published once each week during three
29 consecutive calendar weeks; the notice must

1 (A) describe the property seized, including motor and
2 serial numbers, if any;

3 (B) state the time, place, and cause of seizure; and

4 (C) state that a person claiming an interest in the
5 property shall, within 20 days from the date of the first publi-
6 cation of the notice, file with the official a claim to the
7 property and a bond in the proper amount.

8 (b) A person claiming property subject to a proceeding under
9 this section shall submit a claim and a bond to the official within 20
10 days after the date of first publication of the notice required under
11 this section.

12 (c) The bond with satisfactory sureties shall be in the amount
13 of \$2,500 or 10 percent of the estimated value of the property, which-
14 ever is lower, but not less than \$500. The bond shall be in cash,
15 certified check, or satisfactory sureties. The bond shall be rendered
16 to the state or municipality, as appropriate, with sureties approved
17 by the official and conditioned that in the event of judicial forfei-
18 ture of the property the obligor shall pay from the bond all costs and
19 expenses of the civil proceeding in rem.

20 (d) When the claim and bond are received, the official shall
21 determine that the claim and bond are in proper form and the sureties
22 are satisfactory. If the claim and bond are satisfactory, the offi-
23 cial shall terminate the proceeding and commence a civil proceeding in
24 rem under AS 17.30.116. Notwithstanding AS 17.30.112(b), the official
25 shall commence the civil proceeding in rem within 20 days after the
26 timely and satisfactory claim and bond are filed. If the claim and
27 bond are not satisfactory when first received, a reasonable time for
28 correction of the claim and bond may be allowed. If satisfactory
29 corrections are not made to the claim and bond within a reasonable

1 time, the official may proceed as though the claim and bond had not
2 been tendered.

3 (e) The filing of a timely and satisfactory claim and bond
4 terminates the summary administrative forfeiture proceeding, but does
5 not entitle the claimant to possession of the property.

6 (f) If a timely and satisfactory claim and bond are not filed
7 within the time required under this section, the official shall de-
8clare the property forfeited. The official shall execute a declara-
9tion of forfeiture.

10 (g) In this section

11 (1) "commissioner of public safety" includes an employee of
12 the Department of Public Safety designated by the commissioner to
13 conduct summary administrative forfeiture proceedings;

14 (2) "official" means the commissioner of public safety or
15 chief of police who has custody of seized property.

16 * Sec. 6. AS 17.30.116(a) is amended to read:

17 (a) If the estimated value of seized property is more than
18 \$100,000, or the commissioner of public safety or chief of police in
19 custody of seized property elects to commence a civil proceeding in
20 rem against property with an estimated value of \$100,000 or less or
21 against a conveyance, [WITHIN 20 DAYS AFTER A SEIZURE UNDER AS 17.-
22 30.110 - 17.30.126,] the commissioner of public safety or chief of
23 police shall, by certified mail, notify any person known to have an
24 interest in an item with an estimated [APPRAISED] value of \$500 or
25 more, or who is ascertainable from official registration numbers,
26 licenses, or other state, federal, or municipal numbers on the item,
27 of the pending forfeiture action. Additionally, the commissioner of
28 public safety or chief of police shall publish notice of forfeiture
29 action of an item valued at \$500 or more in a newspaper of general

1 circulation in the judicial district in which the seizure was made, or
2 if no newspaper is published in that judicial district, in a newspaper
3 published in the state and distributed in that judicial district. The
4 notice shall be published once each week during four consecutive
5 calendar weeks. The requirements of this subsection do not apply to

6 (1) a civil in rem proceeding commenced after a summary
7 administrative forfeiture proceeding is terminated upon the timely and
8 satisfactory filing of a claim and bond under AS 17.30.115(d); or

9 (2) the forfeiture of controlled substances which have been
10 manufactured, distributed, dispensed, or possessed in violation of
11 this chapter or AS 11.71, regardless of their value.

12 * Sec. 7. AS 17.30.120 is amended to read:

13 Sec. 17.30.120. PETITION FOR SALE OF SEIZED ITEM. A claimant
14 may petition the court for sale of an item before final disposition of
15 court proceedings. The court shall grant a petition for sale upon a
16 finding that the sale is in the best interests of the state or munic-
17 ipality, whichever is in custody of the property, and the preservation
18 and maintenance of the item seized. Proceeds from the sale plus
19 interest to the date of final disposition of the court proceedings
20 become the subject of the forfeiture action.

21 * Sec. 8. AS 17.30.122 is amended to read:

22 Sec. 17.30.122. STATE DISPOSAL OF FORFEITED PROPERTY. Property
23 forfeited to the state under AS 17.30.110 - 17.30.138, [AS 17.30.110 -
24 17.30.126] other than controlled substances, shall be disposed of by
25 the commissioner of administration in accordance with applicable law.
26 The commissioner of administration may

27 (1) destroy property harmful to the public;

28 (2) sell the property and use the proceeds for payment of
29 all proper expenses of the proceedings for forfeiture and sale,

1 including expenses of seizure, custody, and court costs; proceeds re-
2 maining from the sale of the property after expenses are paid shall be
3 deposited in the general fund;

4 (3) take custody of the property and authorize its use in
5 the enforcement of this chapter or AS 11.71, or transfer it to another
6 agency of the state or a political subdivision of the state for a use
7 in furtherance of the administration of justice;

8 (4) take custody of the property and remove it for disposi-
9 tion in accordance with law;

10 (5) forward the property [IT] to the Drug Enforcement
11 Administration of the United States Department of Justice for disposi-
12 tion; or

13 (6) transfer ownership of an aircraft to the Alaska Wing,
14 Civil Air Patrol.

15 * Sec. 9. AS 17.30.126(a) is amended to read:

16 (a) A controlled substance manufactured, possessed, transferred,
17 sold, or offered for sale in violation of this chapter or AS 11.71 is
18 contraband and must be seized and summarily forfeited to the state.
19 The commissioner of public safety or the commissioner's designee,
20 including a municipal law enforcement agency [AUTHORIZED UNDER AS 17.-
21 30.114(b) OF THIS SECTION TO RETAIN CUSTODY OF CONTROLLED SUBSTANCES],
22 is responsible for the disposal of controlled substances which have
23 been forfeited. The controlled substances shall be disposed of in
24 accordance with procedures and requirements prescribed by the commis-
25 sioner.

26 * Sec. 10. AS 17.30 is amended by adding a new section to article 2 to
27 read:

28 Sec. 17.30.138. DEFINITIONS. In AS 17.30.110 - 17.30.138

29 (1) "chief of police" means the head of a law enforcement

1 agency of a municipality;

2 (2) "municipality" means a municipality that has adopted an
3 ordinance under AS 29.35.135 providing for summary administrative
4 forfeiture proceedings to be conducted by the municipality's chief of
5 police;

6 (3) "violation of this chapter or AS 11.71" includes an
7 attempt or solicitation to violate this chapter or AS 11.71.

8 * Sec. 11. AS 29.10.200 is amended by adding a new paragraph to read:

9 (49) AS 29.35.135 (forfeiture of property under AS 17.30)

10 * Sec. 12. AS 29.35 is amended by adding a new section to read:

11 Sec. 29.35.135. FORFEITURE OF PROPERTY UNDER AS 17.30. (a) The
12 governing body may adopt an ordinance authorizing the chief of police
13 to conduct a summary administrative forfeiture proceeding under
14 AS 17.30 for forfeiture of property seized by the municipal law en-
15 forcement agency in cases involving controlled substances.

16 (b) Property forfeited to the municipality under AS 17.30.110 -
17 17.30.138 shall be disposed of by the municipality under applicable
18 law and ordinance. The municipality may

19 (1) destroy property harmful to the public;

20 (2) sell the property and use the proceeds for payment of
21 all proper expenses of the proceedings for forfeiture and sale, in-
22 cluding expenses of seizure, custody, and court costs;

23 (3) take custody of the property and authorize its use in
24 the enforcement of AS 11.71 or AS 17.30 or for a use in the adminis-
25 tration of justice;

26 (4) take custody of the property and remove it for disposi-
27 tion under law; or

28 (5) forward it to the Drug Enforcement Administration of
29 the United States Department of Justice for disposition.

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 24, 1988

SUBJECT: CSSB 462(Judiciary)
TO: Senator Jalmar Kerttula
FROM: George Utermohle *GU*
Legislative Counsel

Enclosed is the Judiciary Committee Substitute for SB 462, an act relating to seizure and forfeiture of property involving controlled substances and imitation controlled substances.

The CS contains the substance of amendments suggested by the Department of Public Safety; however the CS varies from the department's proposed language as follows:

First, the title of the bill is amended to include a reference to imitation controlled substances.

Second, the department's proposed new AS 17.30.110(3), (6)(C), and (7) are combined into one provision in the CS. These provisions are included in AS 17.30.110(6).

Third, the department proposed an amendment to AS 17.30.112(b) to provide an exception to the process set out in that subsection, so that the commissioner of public safety or a police chief did not have to take action towards the final disposition of seized property within 20 days after seizure occurs. The proposed amendment would allow the commissioner or a chief of police to hold the seized property indefinitely if they intended to seek forfeiture of the property as part of a criminal case against the defendant. Under this approach seized property could be held until the statute of limitations has expired without any action being taken towards final disposition of the property. The CS contains language addressing part of the problem raised by the department. Property seized under an order of forfeiture issued by a court is exempted from the provisions of AS 17.30.112(b). Thus, property forfeited as

Senator Jalmar Kerttula
Page 2
March 24, 1988

part of a criminal proceeding against a defendant can be seized and forfeited without having to repeat the procedures set out in AS 17.30.112(b).

Fourth, the amendment of the definition of controlled substances to include imitation controlled substances is not necessary because imitation controlled substances are already subject to AS 17.30.110 - 17.30.138 under AS 11.73.060. Section 1 of the bill contains the provision making the forfeiture and seizure statutes apply to imitation controlled substances.

Enclosure

GU:gc
WKG2:071

5-1354L
Utermohle
3/24/88

Original sponsors: Sturgulewski, Uehling,
Fischer and Rodey

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

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

10 * Section 1. AS 11.73.060 is amended to read:

11 Sec. 11.73.060. FORFEITURES. (a) Property used during or in
12 aid of a violation of this chapter may be forfeited to the state to
13 the extent permitted under AS 17.30.110 - 17.30.138 [AND IN ACCORDANCE
14 WITH THE PROVISIONS OF AS 17.30.110 - 17.30.126].

15 (b) For purposes of this section the terms "controlled sub-
16 stance" and "this chapter", as used in AS 17.30.110 - 17.30.138
17 [AS 17.30.110 - 17.30.126], shall be construed as "imitation con-
18 trolled substance" and "AS 11.73" respectively.

19 * Sec. 2. AS 17.30.110 is amended to read:

20 Sec. 17.30.110. ITEMS SUBJECT TO FORFEITURE. The following may
21 be forfeited to the state or a municipality, except as provided in
22 AS 17.30.126:

23 (1) a controlled substance that [WHICH] has been manufact-
24 ured, distributed, dispensed, acquired, or possessed in violation of
25 this chapter or AS 11.71;

26 (2) property, including raw materials, products, and
27 equipment, that is [WHICH ARE] used or intended for use in manufactur-
28 ing, distributing, compounding, processing, delivering, importing, or
29 exporting a controlled substance that [WHICH] is a felony under this

1 chapter or AS 11.71;

2 (3) property that [WHICH] is used or intended for use as a
3 container for property described in (1) or (2) of this section;

4 (4) a conveyance, including but not limited to aircraft,
5 vehicles, or vessels, that [WHICH] has been used or is intended for
6 use in transporting or in any manner in facilitating the transporta-
7 tion, sale, receipt, possession, or concealment of property described
8 in (1) or (2) of this section in violation of a felony offense under
9 this chapter or AS 11.71; however,

10 (A) a conveyance may not be forfeited under this
11 paragraph if the owner of the conveyance establishes, by a pre-
12 ponderance of the evidence, at a hearing before the court as the
13 trier of fact, that use of the conveyance in violation of this
14 chapter or AS 11.71 was committed by another person and that the
15 owner was neither a consenting party nor privy to the violation;

16 (B) a forfeiture of a conveyance encumbered by a valid
17 security interest at the time of seizure is subject to the inter-
18 est of the secured party if the secured party establishes, by a
19 preponderance of the evidence, at a hearing before the court as
20 the trier of fact, that use of the conveyance in violation of
21 this chapter or AS 11.71 was committed by another person and that
22 the secured party was neither a consenting party nor privy to the
23 violation;

24 (5) books, records, and research products and materials,
25 including formulas, microfilm, tapes, and data, that [WHICH] are used
26 in violation of this chapter or AS 11.71;

27 (6) property, including money, securities, or negotiable
28 instruments, that is

29 (A) furnished by a person in exchange for a controlled

substance in violation of this chapter or AS 11.71;

(B) used in, intended for use in, or used to facilitate a violation of this chapter or AS 11.71; or

(C) proceeds derived directly or indirectly from a violation of this chapter or AS 11.71; [, OR OTHER THINGS OF VALUE USED IN FINANCIAL TRANSACTIONS DERIVED FROM ACTIVITY PROHIBITED BY THIS CHAPTER OR AS 11.71; AND]

(7) a firearm that [WHICH] is visible, carried during, or used in furtherance of a violation of this chapter or AS 11.71; and

(8) real property, including interests in real property and appurtenances and improvements to real property, that is used or intended for use to commit, or to facilitate the commission of, a felony offense under this chapter or AS 11.71; however

(A) real property may not be forfeited under this paragraph if the owner of the real property establishes, by a preponderance of the evidence, at a hearing before the court as the trier of fact, that use of the real property in violation of this chapter or AS 11.71 was committed by another person and that the owner was neither a consenting party nor privy to the violation;

(B) a forfeiture of real property encumbered by a valid security interest at the time of seizure is subject to the interest of the secured party if the secured party establishes, by a preponderance of the evidence, at a hearing before the court as the trier of fact, that use of the real property in violation of this chapter or AS 11.71 was committed by another person and that the secured party was neither a consenting party nor privy to the violation;

(9) property acquired, maintained, produced by, or derived

1 from proceeds obtained directly or indirectly from a violation of this
2 chapter or AS 11.71.

3 * Sec. 3. AS 17.30.112 is amended to read:

4 Sec. 17.30.112. PROCEEDINGS RESULTING IN FORFEITURE. (a) Prop-
5 erty listed in AS 17.30.110 may be forfeited to the state or a munic-
6 ipality upon the order of the commissioner of public safety or a chief
7 of police in a summary administrative forfeiture proceeding under
8 AS 17.30.115, [EITHER] upon conviction of the defendant of a violation
9 of this chapter or AS 11.71, or upon judgment of a court in a separate
10 civil proceeding in rem.

11 (b) Unless the property is seized under a court order forfeiting
12 the property to the state or a municipality, the commissioner of
13 public safety or a chief of police, whoever is in custody of the
14 property, shall within 20 days after the property is seized under
15 AS 17.30.114

16 (1) cause a summary administrative forfeiture proceeding to
17 be commenced under AS 17.30.115;

18 (2) commence a civil proceeding in rem under AS 17.30.116;

19 or

20 (3) release the property, unless the property is subject to
21 AS 17.30.126.

22 (c) A [THE] court may order a forfeiture in the in rem proceed-
23 ing if it finds that an item specified in AS 17.30.110 was used during
24 or in aid of a violation of this chapter or AS 11.71. [(b)] It is
25 not a defense in an in rem proceeding brought under this chapter
26 [SECTION] that a criminal proceeding has resulted in a conviction or
27 conviction of a lesser offense for a violation of this chapter or
28 AS 11.71.

29 * Sec. 4. AS 17.30.114 is amended to read:

1 Sec. 17.30.114. SEIZURE AND CUSTODY OF PROPERTY. (a) Property
2 listed in AS 17.30.110 may be seized by a peace officer upon an order
3 issued by a court having jurisdiction over the property upon a showing
4 of probable cause that the property may be forfeited under AS 17.30.-
5 110. Seizure without a court order may be made if

6 (1) the seizure is incident to a valid arrest or a search
7 under a valid search warrant;

8 (2) the property subject to seizure has been the subject of
9 an earlier judgment in favor of the state or a municipality in a
10 criminal proceeding or civil proceeding in rem under this chapter or
11 AS 11.71; or

12 (3) there is probable cause that the property was used, is
13 being used, or is intended for use, in violation of this chapter or AS
14 11.71 and the property is easily movable; property seized under this
15 paragraph may not be held for more than 48 hours without a court order
16 obtained to continue its detention.

17 (b) Property taken or detained under (a) of this section shall
18 be held in the custody of either the commissioner of public safety or
19 a municipal law enforcement agency [AUTHORIZED BY THE COMMISSIONER OF
20 PUBLIC SAFETY TO RETAIN CUSTODY OF PROPERTY LISTED IN AS 17.30.110]
21 subject only to disposition under procedures set out in this chapter
22 [THE ORDERS AND DECREES OF THE COURT HAVING JURISDICTION OVER ANY
23 FORFEITURE PROCEEDINGS]. If property is seized under this chapter,
24 the commissioner of public safety or a [AN AUTHORIZED] municipal law
25 enforcement agency may

26 (1) place the property under seal;

27 (2) remove the property to a place designated by the court;

28 or

29 (3) take custody of the property and remove it to an

1 appropriate location for disposition in accordance with law.

2 (c) Within 10 days after a seizure under AS 17.30.110 - 17.30.-
3 138 [AS 17 30.110 - 17.30.126], the commissioner of public safety or
4 the chief of police shall make an inventory of any property seized,
5 including controlled substances, and shall estimate [APPRAISE] the
6 value of any items seized other than controlled substances.

7 * Sec. 5. AS 17.30 is amended by adding a new section to read:

8 Sec. 17.30.115. SUMMARY ADMINISTRATIVE FORFEITURE PROCEEDING.

9 (a) If the estimated value of seized property is \$100,000 or less or
10 if the seized property is a conveyance subject to forfeiture under
11 AS 17.30.110(4), the official who has custody of seized property may
12 commence a summary administrative forfeiture proceeding by

13 (1) giving notice of the forfeiture proceeding to persons
14 known to have an interest in the property or who are ascertainable
15 from official registration numbers, licenses, or other state, federal,
16 or municipal numbers on the property; and

17 (2) publishing notice of the proceeding in a newspaper of
18 general circulation in the judicial district where the seizure was
19 made, or if no newspaper is published in that judicial district, in a
20 newspaper published in the state and distributed in that judicial
21 district; the notice shall be published once each week during three
22 consecutive calendar weeks; the notice must

23 (A) describe the property seized, including motor and
24 serial numbers, if any;

25 (B) state the time, place, and cause of seizure; and

26 (C) state that a person claiming an interest in the
27 property shall, within 20 days from the date of the first publi-
28 cation of the notice, file with the official a claim to the
29 property and a bond in the proper amount.

1 (b) A person claiming property subject to a proceeding under
2 this section shall submit a claim and a bond to the official within 20
3 days after the date of first publication of the notice required under
4 this section.

5 (c) The bond with satisfactory sureties shall be in the amount
6 of \$2,500 or 10 percent of the estimated value of the property, which-
7 ever is lower, but not less than \$500. The bond shall be in cash,
8 certified check, or satisfactory sureties. The bond shall be rendered
9 to the state or municipality, as appropriate, with sureties approved
10 by the official and conditioned that in the event of judicial forfei-
11 ture of the property the obligor shall pay from the bond all costs and
12 expenses of the civil proceeding in rem.

13 (d) When the claim and bond are received, the official shall
14 determine that the claim and bond are in proper form and the sureties
15 are satisfactory. If the claim and bond are satisfactory, the offi-
16 cial shall terminate the proceeding and commence a civil proceeding in
17 rem under AS 17.30.116. Notwithstanding AS 17.30.112(b), the official
18 shall commence the civil proceeding in rem within 20 days after the
19 timely and satisfactory claim and bond are filed. If the claim and
20 bond are not satisfactory when first received, a reasonable time for
21 correction of the claim and bond may be allowed. If satisfactory
22 corrections are not made to the claim and bond within a reasonable
23 time, the official may proceed as though the claim and bond had not
24 been tendered.

25 (e) The filing of a timely and satisfactory claim and bond
26 terminates the summary administrative forfeiture proceeding, but does
27 not entitle the claimant to possession of the property.

28 (f) If a timely and satisfactory claim and bond are not filed
29 within the time required under this section, the official shall

1 declare the property forfeited. The official shall execute a declara-
2 tion of forfeiture.

3 (g) In this section

4 (1) "commissioner of public safety" includes an employee of
5 the Department of Public Safety designated by the commissioner to
6 conduct summary administrative forfeiture proceedings;

7 (2) "official" means the commissioner of public safety or
8 chief of police who has custody of seized property.

9 * Sec. 6. AS 17.30.116(a) is amended to read:

10 (a) If the estimated value of seized property is more than
11 \$100,000, or the commissioner of public safety or chief of police in
12 custody of seized property elects to commence a civil proceeding in
13 rem against property with an estimated value of \$100,000 or less or
14 against a conveyance, or a summary administrative forfeiture pro-
15 ceeding is terminated upon the timely and satisfactory filing of a
16 claim and bond, [WITHIN 20 DAYS AFTER A SEIZURE UNDER AS 17.30.110 -
17 17.30.126,] the commissioner of public safety or chief of police
18 shall, by certified mail, notify any person known to have an interest
19 in an item with an estimated [APPRAISED] value of \$500 or more, or who
20 is ascertainable from official registration numbers, licenses, or
21 other state, federal, or municipal numbers on the item, of the pending
22 forfeiture action. Additionally, the commissioner of public safety
23 or chief of police shall publish notice of forfeiture action of an
24 item valued at \$500 or more in a newspaper of general circulation in
25 the judicial district in which the seizure was made, or if no news-
26 paper is published in that judicial district, in a newspaper published
27 in the state and distributed in that judicial district. The notice
28 shall be published once each week during four consecutive calendar
29 weeks. The requirements of this subsection do not apply to the

1 forfeiture of controlled substances which have been manufactured, dis-
2 tributed, dispensed, or possessed in violation of this chapter or AS
3 11.71, regardless of their value.

4 * Sec. 7. AS 17.30.120 is amended to read:

5 Sec. 17.30.120. PETITION FOR SALE OF SEIZED ITEM. A claimant
6 may petition the court for sale of an item before final disposition of
7 court proceedings. The court shall grant a petition for sale upon a
8 finding that the sale is in the best interests of the state or munic-
9 ipality, whichever is in custody of the property, and the preservation
10 and maintenance of the item seized. Proceeds from the sale plus
11 interest to the date of final disposition of the court proceedings
12 become the subject of the forfeiture action.

13 * Sec. 8. AS 17.30.122 is amended to read:

14 Sec. 17.30.122. STATE DISPOSAL OF FORFEITED PROPERTY. Property
15 forfeited to the state under AS 17.30.110 - 17.30.138, [AS 17.30.110 -
16 17.30.126] other than controlled substances, shall be disposed of by
17 the commissioner of administration in accordance with applicable law.
18 The commissioner of administration may

19 (1) destroy property harmful to the public;

20 (2) sell the property and use the proceeds for payment of
21 all proper expenses of the proceedings for forfeiture and sale, in-
22 cluding expenses of seizure, custody, and court costs; proceeds re-
23 maining from the sale of the property after expenses are paid shall be
24 deposited in the general fund;

25 (3) take custody of the property and authorize its use in
26 the enforcement of this chapter or AS 11.71, or transfer it to another
27 agency of the state or a political subdivision of the state for a use
28 in furtherance of the administration of justice;

29 (4) take custody of the property and remove it for

1 disposition in accordance with law;

2 (5) forward the property [IT] to the Drug Enforcement
3 Administration of the United States Department of Justice for disposi-
4 tion; or

5 (6) transfer ownership of an aircraft to the Alaska Wing,
6 Civil Air Patrol.

7 * Sec. 9. AS 17.30.126(a) is amended to read:

8 (a) A controlled substance manufactured, possessed, transferred,
9 sold, or offered for sale in violation of this chapter or AS 11.71 is
10 contraband and must be seized and summarily forfeited to the state.
11 The commissioner of public safety or the commissioner's designee,
12 including a municipal law enforcement agency [AUTHORIZED UNDER AS 17.-
13 30.114(b) OF THIS SECTION TO RETAIN CUSTODY OF CONTROLLED SUBSTANCES],
14 is responsible for the disposal of controlled substances which have
15 been forfeited. The controlled substances shall be disposed of in
16 accordance with procedures and requirements prescribed by the commis-
17 sioner.

18 * Sec. 10. AS 17.30 is amended by adding a new section to article 2 to
19 read:

20 Sec. 17.30.138. DEFINITIONS. In AS 17.30.110 - 17.30.138

21 (1) "chief of police" means the head of a law enforcement
22 agency of a municipality;

23 (2) "municipality" means a municipality that has adopted an
24 ordinance under AS 29.35.135 providing for summary administrative
25 forfeiture proceedings to be conducted by the municipality's chief of
26 police;

27 (3) "violation of this chapter or AS 11.71" includes an
28 attempt or solicitation to violate this chapter or AS 11.71.

29 * Sec. 11. AS 29.10.200 is amended by adding a new paragraph to read:

(49) AS 29.35.135 (forfeiture of property under AS 17.30)

* Sec. 12. AS 29.35 is amended by adding a new section to read:

Sec. 29.35.135. FORFEITURE OF PROPERTY UNDER AS 17.30. (a) The governing body may adopt an ordinance authorizing the chief of police to conduct a summary administrative forfeiture proceeding under AS 17.30 for forfeiture of property seized by the municipal law enforcement agency in cases involving controlled substances.

(b) Property forfeited to the municipality under AS 17.30.110 - 17.30.138 shall be disposed of by the municipality under applicable law and ordinance. The municipality may

(1) destroy property harmful to the public;

(2) sell the property and use the proceeds for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, custody, and court costs;

(3) take custody of the property and authorize its use in the enforcement of AS 11.71 or AS 17.30 or for a use in the administration of justice;

(4) take custody of the property and remove it for disposition under law; or

(5) forward it to the Drug Enforcement Administration of the United States Department of Justice for disposition.

Alaska State Legislature



SENATOR
ARLISS STURGULEWSKI

Chairman, Senate Community and Regional Affairs Committee
Vice-Chairman, Senate Judiciary Committee
Member, Senate Resources Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

M E M O R A N D U M

01 March 1988

TO: Senator Jay Kerttula
FROM: Senator Arliss Sturgulewski
RE: Senate Bill 462

As you know, Senate Bill 462 has been referred to the Senate Judiciary Committee. I would appreciate your scheduling this bill for a hearing as soon as is practicable.

The Senate State Affairs Committee heard this bill on 29 February and there was a committee substitute. I am enclosing copies of the sectional analysis of the committee substitute and the current law this bill is intended to amend.

This bill is designed to allow state and municipal law enforcement agencies to administratively pursue forfeiture of property seized as a result of a violation of the controlled substances act.

Current state law allows seized property to be forfeited to the state only through a civil proceeding against the property itself in court. This bill adds an administrative procedure to be followed by state agencies and municipalities in declaring seized property forfeit. This procedure is taken from that used by the federal Drug Enforcement Agency.

I feel this legislation strikes a balance between allowing our law enforcement agencies to perform their duties in a timely fashion and protecting the rights of property owners. Please call me or Melissa Fouse of my staff at 465-3818 if you have any questions.

CS FOR

SECTIONAL ANALYSIS

Senate Bill 462:

"An Act relating to seizure and forfeiture of property in cases involving controlled substances."

Section 1: Provides that the listed items subject to forfeiture may be forfeited to the municipality as well as to the state.

Adds real property to the list of items eligible for seizure. Provides that if the owner can establish that the owner was neither a consenting party nor privy to the violation then the property may not be forfeited. Makes the same exception for a party with a valid security interest.

Section 2: Adds summary administrative procedure by the state or by a municipality to the list of those proceedings resulting in forfeiture. Provides that any forfeiture proceeding must be commenced within 20 days after the property is seized or the property must be released.

Section 3: Clarifies that property can also be awarded to municipalities. Changes reference to the court having jurisdiction over forfeiture proceedings to procedures set out in the chapter. Adds chief of police of a municipality to section requiring inventory and appraisal within 10 days.

Section 4: Sets out the summary administrative procedure to be followed by the custodian of the seized property.

(a) Limits value of seized property that can be seized administratively to \$100,000 (unless it is a conveyance),

(1) requires notice to be sent to persons having an interest in the property,

(2) requires that notice be published in a newspaper for three weeks and sets out what must be contained in the published notice,

(b) requires a person claiming the property to respond within 20 days and also submit a bond,

(c) sets out the amount and type of the bond to be submitted,

(d) provides that if the bond is satisfactory, the administrative proceeding shall be terminated and within 20 days the civil proceeding against the property shall be commenced. Provides that if the bond is not satisfactory, a reasonable time must be allowed for corrections.

(e) makes it clear that the filing of a bond does not entitle the claimant to the property.

(f) if the property is not claimed, the custodian of the property shall declare the property forfeited and notify the custodian of the property.

Section 5: sets out notice requirements for circumstances under which the forfeiture proceeding is not done administratively, such as going to court.

Section 6: adds municipality to clarify that this section applies to municipalities as well as the state.

Section 7: clarifies that this section on disposal of property applies to property forfeited to the state. Clarifies that proceeds from sale of forfeited property goes to the state general fund after expenses are paid.

Section 8: deletes requirement that a municipal law enforcement agency must be authorized by the commissioner of public safety to disposal of controlled substances. This is a conforming change to section 3 of the bill.

Section 9: adds to definitions section.

Section 10: adds new section 29.35.135 to list of home rule limitations in Title 29.

Section 11: adds new section to Title 29 allowing municipalities to adopt an ordinance authorizing the chief of police to conduct a summary administrative forfeiture proceeding.

FROM SENATOR STURGULEWSKI
29 February 1988

FISCAL NOTE

REQUEST

Revision Date: _____
Title: "An Act relating to seizure and
forfeiture of property . . ."
Sponsor: Sen. Sturgulewski
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Criminal Investigation
Bureau

MAR 17 1988

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES		71.7	71.7	71.7	71.7	71.7
TRAVEL		-0-	-0-	-0-	-0-	-0-
CONTRACTUAL		4.6	4.6	4.6	4.6	4.6
SUPPLIES		4.0	4.0	4.0	4.0	4.0
EQUIPMENT		9.5				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		89.8	80.3	80.3	80.3	80.3

CAPITAL						
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REVENUE		-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUNDS		89.8	80.3	80.3	80.3	80.3
FEDERAL FUNDS						
OTHER						
TOTAL		89.8	80.3	80.3	80.3	80.3

POSITIONS:

FULL-TIME		2	2	2	2	2
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis

Prepared by: Francis C. Allan
Division: Alaska State Troopers

Phone: 269-5691
Date: 3/16/88

Approved by Commissioner: *Paul H. October*
Agency: Public Safety

Date: 3-17-88

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

SB 462
Fiscal Note Analysis

This legislation establishes a "summary administrative forfeiture procedure" that would allow the commissioner of the Department of Public Safety to summarily order the forfeiture of property used in drug law violations if the forfeiture action is not contested. Under this new scheme, the department would be required to estimate the value of seized property, notify property owners of the department's intent to forfeit the items, arrange to publish notice of the proposed forfeiture action in newspapers in the area, and review claims and bonds filed by persons claiming the property. To properly perform these tasks the services of an Administrative Assistant II and a Clerk Typist III will be required. Both positions will be located in Anchorage.

Assumptions made in the preparation of this fiscal note include that the bill's effective date would be July 1, 1988, that equipment will be needed in the first year only, and that no inflation is projected.

It is impossible to know at this point how many offenders will choose not to contest the summary administrative forfeiture proceedings, so it is impossible to estimate the amount of revenue that will result from the new procedure. For this reason the fiscal note indicates a zero revenue impact.

	<u>Admin. Ass't II</u>	<u>Clerk Typist III</u>	<u>Total</u>
Personal Services	42.8	28.9	71.7
Contractual	3.4	1.2	4.6
Supplies	2.0	2.0	4.0
Equipment	<u>1.8</u>	<u>7.7</u>	<u>9.5</u>
Total	50.0	39.8	89.8

Anchorage

Administrative Assistant II

PERSONAL SERVICES - 100

Base Salary (Range 14/A)	\$29.2	
Overtime	.8	
SUB TOTAL	<u>\$30.0</u>	
Benefits	12.8	
TOTAL PERSONAL SERVICES		\$42.8

CONTRACTUAL - 300

Telephone/Postage, \$85 per month x 12	\$ 1.0	
Advertising 200x12	2.4	
TOTAL CONTRACTUAL		3.4

SUPPLIES AND MATERIALS - 400

Forms	\$ 1.0	
Stationary, copy machine paper, etc.	1.0	
TOTAL SUPPLIES AND MATERIALS		2.0

EQUIPMENT - 500

File Cabinet	\$.3	
Desk	.6	
Chair (3)	.7	
Book Case	.2	
TOTAL EQUIPMENT		<u>1.8</u>
TOTAL COST		\$50.0

Anchorage

Clerk Typist III

PERSONAL SERVICES - 100

Base Salary (Range 8/A)	\$19.6	
Overtime (60 hours)	.9	
SUB TOTAL	<u>\$20.5</u>	
Benefits	8.4	
TOTAL PERSONAL SERVICES		\$28.9

CONTRACTUAL - 300

Telephone/Postage, \$85 per month x 12	1.0	
Maintenance Agreement on Computer	.2	
TOTAL CONTRACTUAL		1.2

SUPPLIES AND MATERIALS - 400

Forms	1.0	
Stationary, copy machine paper, etc.	1.0	
TOTAL SUPPLIES AND MATERIALS		2.0

EQUIPMENT - 500

Desk	.6	
Chair	.2	
Microcomputer -- Compaq 286	6.9	
TOTAL EQUIPMENT		<u>7.7</u>

TOTAL COST		\$39.8
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1.	POSITION TITLE Administrative Assistant II				RANGE/STEP 14/A	BARG. UNIT GCU	PAGE/LINE	GOV.	APPROV.	DISAPP
2.	TYPE OF POSITION PFT	STAFF MONTHS 12.0	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT 7-11	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION:					
4.	TYPE OF EXPENDITURE			AMOUNT						
	1			2		3				
	PERSONAL SERVICES									
5.	Salary			29.2						
6.	Benefits			12.8						
7.	Overtime			.8						
8.										
9.	TOTAL PERSONAL SERVICES		01	42.8						
10.	Travel			-0-						
11.	Contractual			3.4						
12.	Commodities			2.0						
13.	Equipment			1.8						
14.	Other									
15.	TOTAL COST		50.0							
	RECEIPT CODE			FUNDING SOURCE						
16.				Federal Receipts 1002						
17.				G.F. Match 1003						
18.				50.0		General Funds 1004				
19.				I-A Receipts 1005						
20.				Program Receipts 1028						
21.				Other						
FOR B&H USE ONLY										
KEY NUMBER - - - - -										

JUSTIFICATION:

This administrative assistant would be responsible for oversight of the administrative forfeiture program. These duties would include:

- Arranging for a value estimate of the property seized.
- Providing notice of (administrative and in rem) forfeiture proceedings to persons who may have an interest in the property.
- Publishing notices in appropriate newspapers for both administrative and in rem proceedings.
- Determining if the claim and bonds filed in administrative proceedings are "proper" and "satisfactory".

This position will supervise a Clerk Typist III that will provide clerical support for all forfeiture related activities.

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety

BRU Alaska State Troopers

COMPONENT Criminal Investigation Bureau

FY 89

Page 1 of 2

Revised Date _____

1.	POSITION TITLE Clerk Typist III				RANGE/STEP B/A	BARG. UNIT CCU	PAGE/LINE	COV.	APPROV.	DISAPP
2.	TYPE OF POSITION PFT	STAFF MONTHS 12.0	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT 7-11	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION:					
4.	TYPE OF EXPENDITURE			AMOUNT						
	1			2		3				
	PERSONAL SERVICES									
5.	Salary			19.6						
6.	Benefits			8.4						
7.	Overtime			.9						
8.										
9.	TOTAL PERSONAL SERVICES			01		28.9				
10.	Travel			02		-0-				
11.	Contractual			03		1.2				
12.	Commodities			04		2.0				
13.	Equipment			05		7.7				
14.	Other									
15.	TOTAL COST					39.8				
	RECEIPT CODE			FUNDING SOURCE						
16.				Federal Receipts 1002						
17.				G.F. Match 1003						
18.				General Funds 1004		39.8				
19.				I-A Receipts 1005						
20.				Program Receipts 1028						
21.				Other						
FOR B&M USE ONLY KEY NUMBER - - - - -										

JUSTIFICATION:

This clerical position will provide typing support to all phases of the forfeiture program. This will involve typing all correspondence necessary to notify affected parties of the forfeiture, publish required public notices, obtain appraisals, review bonds, and other related material. Further, this position will be responsible for the accumulation and retention of statistics related to forfeitures and for providing that information to interested parties.

REQUEST FOR
NEW POSITION

AGENCY Department of Public Safety

BRU Alaska State Troopers

COMPONENT Criminal Investigation Bureau

FY 89

Page 2 of 2
Revised Date _____

SB

467

5-1158L

Chenoweth
3/23/88

Original sponsors: Abood and Fischer

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 467 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the registration of persons
7 convicted of sexual offenses; and providing for an
8 effective date."

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

10 * Section 1. AS 33 is amended by adding a new chapter to read:

11 CHAPTER 40. REGISTRATION OF PERSONS CONVICTED OF SEXUAL
12 OFFENSES.

13 Sec. 33.40.010. PERSONS REQUIRED TO REGISTER. (a) A person who
14 has been convicted of a sexual offense and who is not confined to a
15 correctional facility shall, within 14 days of entering a municipality
16 or unincorporated community, register with the nearest law enforcement
17 agency.

18 (b) A person who has been convicted of a sexual offense and who
19 is confined to a correctional facility shall register with the nearest
20 law enforcement agency within 14 days of entering a municipality or
21 unincorporated community after being released from the correctional
22 facility.

23 Sec. 33.40.020. DUTIES OF COMMISSIONER. The commissioner shall
24 adopt regulations necessary to carry out this chapter and shall pre-
25 pare forms to be used to register under this chapter.

26 Sec. 33.40.030. REGISTRATION. (a) A person required to regis-
27 ter under AS 33.40.010 is required to register only once. The regis-
28 tration must include

29 (1) a written statement by the person giving the

1 information required by the department;

2 (2) two sets of fingerprints of the person; and

3 (3) two photographs of the person.

4 (b) Within three days after a person registers under (a) of this
5 section, the law enforcement agency with whom the person registers
6 shall send one set of the person's fingerprints and a photograph to
7 the commissioner or to an office that the commissioner may designate
8 by regulation.

9 (c) The law enforcement agency with whom the person registers
10 shall retain the written statement required by (a)(1) of this section,
11 the second set of the person's fingerprints, and a photograph of the
12 person.

13 Sec. 33.40.040. RELOCATION. (a) A person required to register
14 under this chapter shall notify the law enforcement agency with whom
15 the person last registered of a change of residence within the munici-
16 pality or unincorporated community within 10 days after the change of
17 residence.

18 (b) If a person required to register under this chapter relo-
19 cates from the municipality or unincorporated community in which the
20 person registered under AS 33.40.030, the person shall notify the law
21 enforcement agency nearest to the municipality or unincorporated
22 community to which the person relocates within 10 days after the
23 change of residence.

24 (c) The law enforcement agency that the person notifies under
25 (b) of this section shall ask the law enforcement agency having cus-
26 tody of the person's registration file to provide the registration
27 file. The law enforcement agency having custody of the file shall,
28 within 10 days of receiving the request, transmit the file to the law
29 enforcement agency that the person notified under (b) of this section.

1 Sec. 33.40.050. REGISTRATION FILE. (a) Except as otherwise
2 provided in this section, the statements, fingerprints, and other
3 records maintained by a law enforcement agency or the department under
4 this chapter are confidential and shall be maintained by the law
5 enforcement agency or the commissioner in a file separate from other
6 files and records maintained by the law enforcement agency or the
7 commissioner.

8 (b) The commissioner and the law enforcement agencies shall
9 remove copies of registration records, fingerprints, and other records
10 maintained under this chapter from the permanent registration after 20
11 years from the date the person registered under AS 33.40.030. How-
12 ever, if the person is convicted of another sexual offense during the
13 period the registration records, fingerprints, and other records are
14 maintained by the law enforcement agency or the commissioner, the
15 commissioner and the law enforcement agencies shall permanently retain
16 these records.

17 (c) Except as provided in AS 33.40.040, copies of statements,
18 fingerprints, and other records maintained under this chapter may be
19 transmitted only if

20 (1) the record requested is necessary for the investigation
21 of a crime and will be used only in the investigation of that crime;
22 and

23 (2) the request is received from

24 (A) a local law enforcement agency in the state or in
25 another place;

26 (B) a department of the state involved in the enforce-
27 ment of a criminal law of the state; or

28 (C) a federal law enforcement agency.

29 Sec. 33.40.060. PENALTY. A person convicted of a sexual offense

1 who fails to register as required under this chapter or who provides
2 false or misleading information to a law enforcement agency when
3 required under this chapter is guilty of a class A misdemeanor.

4 Sec. 33.40.070. DEFINITIONS. In this chapter

5 (1) "commissioner" means the commissioner of public safety;

6 (2) "correctional facility" has the meaning given in
7 AS 33.30.901;

8 (3) "department" means the Department of Public Safety;

9 (4) "sexual offense" means an offense

10 (A) in the state under AS 11.41.410 - 11.41.455;

11 (B) in the state under former law that would now
12 constitute an offense described in (A) of this paragraph;

13 (C) in another jurisdiction that would now be punish-
14 able as one of the offenses listed in (A) or (B) of this para-
15 graph if committed in the state.

16 * Sec. 2. Notwithstanding AS 33.40.010(a), enacted by sec. 1 of this
17 Act, a person who has been convicted of a sexual offense, as defined in
18 AS 33.40.070(4), enacted by sec. 1 of this Act, and who is not confined to
19 a correctional facility shall register with the nearest law enforcement
20 agency by January 31, 1989.

21 * Sec. 3. This Act takes effect January 1, 1989.
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SB

485

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: ...criminal records...
Sponsor: Senate Judiciary
Requestor: Senate HESS

Agency Affected: Education
BRU: Education Finance and Support Services
Components: Teacher Certification

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-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Steve Hole Phone: 465-2800
Division: Commissioner's Office Date: 4/25/88
Approved by Commissioner: William G. Demmert Date: 4/15/88
Agency: Education

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

SB

515

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

Rec'd 4:30pm
MAY 2 1988

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

MEMORANDUM

May 2, 1988

SUBJECT: Interpretation of CSSB 515 (Judiciary)

TO: Senator Jay Kerttula
Chair, Senate Judiciary Committee

FROM: Theresa L. Bannister *TB*
Legislative Counsel

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

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

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

If I may be of further assistance, please advise.

TLB:bb
b5/085

5-2103L
Bannister
4/27/88

Original sponsor: Judiciary Committee

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 515 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to foreclosure of a deed of trust or
7 a suit on a deed of trust note; and providing for an
8 effective date."

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

10 * Section 1. AS 34.20.070(a) is amended to read:

11 (a) If a deed of trust is executed conveying real property
12 located in the state to a trustee as security for the payment of an
13 indebtedness and the deed provides that in case of default or noncom-
14 pliance with the terms of the trust, the trustee may sell the property
15 for condition broken, the trustee, in addition to the right of fore-
16 closure and sale, may execute the trust by sale of the property, upon
17 the conditions and in the manner set forth in the deed of trust,
18 without first securing a decree of foreclosure and order of sale from
19 the court, if the trustee has complied with the notice requirements of
20 (b) of this section. If the deed of trust is foreclosed judicially or
21 the note secured by the deed of trust is sued on, the judgment ob-
22 tained extinguishes the deed of trust and the note, and the remedies
23 under this section may not be exercised. Before executing against
24 other assets, the beneficiary of the deed of trust must first proceed
25 against the real property that is the subject of the deed of trust if
26 the beneficiary executes under a judgment that was obtained in a

27 (1) judicial foreclosure of the deed of trust; or

28 (2) suit on the note, if the note secures part or all of

29 the purchase price of the real property, and if the deed of trust is

1 in the senior position for deeds of trust on the real property.

2 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 26, 1988

The Honorable Jay Kerttula, Chair
Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Re: CSSB 515(Jud)

Dear Senator Kerttula:

The Department of Law has serious concerns with the CSSB 515(Jud) work draft dated April 22, 1988. If enacted, the effect of this bill would be to encourage foreclosure by the holder of an inferior deed of trust. Currently, a lender will work with the borrower to see if time will help solve the borrower's problems. With this law, the only way a junior lien holder may recover the debt is to foreclose in order to obtain a money judgment. To avoid being extinguished by foreclosure of a senior lien, juniors are encouraged to rush to foreclosure and declare a default at the slightest infraction.

In this act, foreclosure by the junior is a feasible collection tool because the act does not require the lender to purchase the foreclosed property. Therefore, the lender could hold the sale, not bid, and most likely the borrower would purchase the property for \$1. The second could then obtain a money judgment to execute on. This foreclosure does not benefit the borrower. In fact, because most loan documents contain a provision to pass costs on to the borrower, the result is additional costs for the sale (anywhere from \$500 to \$1000) being owed by the borrower when the money judgment is rendered. Further, foreclosure by the second can be a trigger for foreclosure by the first in most deeds; the end result being the borrower is out of the house earlier than is now occurring, and also has judgments outstanding on both debts.

We also are concerned with the complexity of the work draft. The approach of the bill is confusing. For example, subsection (d) of section 4 concerns a judicial sale and thus would logically belong as an amendment to AS 09.45.180. We note that section 5 repeals the very statutes that could most logically be amended to provide the intended results.

STEVE COWPER, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

The Honorable Jay Kerttula, Chair
State Judiciary Committee

April 26, 1988
Page 2

Additionally, as legislative counsel Theresa Bannister has already pointed out, the current work draft raises constitutional questions.

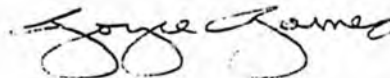
The Department of Law is informed that a committee substitute has been proposed that would require lenders to choose one remedy. We do not oppose that approach. Nor do we oppose the approach in HB 549 that requires notice in a promissory note of the remedies available to a lender. We note that SB 515 meets certain intentions of the committee, and would not oppose that version if "or a suit on the note" was deleted from lines 24-25.

Thank you for this opportunity to be heard on SB 515. If I may be of any further assistance, please advise.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:



Joyce James
Assistant Attorney General

JJ:prm

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

THE SUPREME COURT OF THE STATE OF ALASKA

MARSHALL LEE CONRAD and)
COLLEEN M. CONRAD,)

Appellants/Respondents,)

v.)

COUNSELLORS INVESTMENT CO.,)
a partnership; BRIAN J.)
BRUNDIN; BILL LAWRENCE;)
MARCUS R. CLAPP; JERRY E.)
MELCHER; and JAMES M. POWELL,)

Appellees/Petitioners.)

File No. S-1996/2102

O P I N I O N

[No. 3275 - February 26, 1988]

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

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

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

COMPTON, Justice.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

In Moening v. Alaska Mutual Bank, ___ P.2d ___, Op. No. 3274 at 6 (Alaska, February 26, 1988), we held that absent an agreement to the contrary, a secured creditor has the option whether to sue on the note or foreclose the security. If the creditor sues on the note and obtains a personal judgment which is returned unsatisfied, the creditor may then foreclose the security. Id.; AS 09.45.200.² In determining whether the parties agreed to limit the creditor's remedies, the note and trust deed are construed together and interpreted to carry out the reasonable expectations of the parties. ___ P.2d at ___, Op. No. 3274 at 7.

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

2. AS 09.45.200 provides:

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

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

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

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

(Emphasis added). Counsellors reasons that the language "Beneficiary shall execute" must be construed as a limitation on the Conrads' right to do anything else.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.")

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

4. AS 34.20.070 (a) provides in part:

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

...

(Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

7. See AS 09.45.200, supra note 2.

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

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).

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

I. FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

property purchased by Quest in Peters Creek.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)

II. THE RIGHTS OF A SECURED CREDITOR

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

Statutes provide a secured creditor with a variety of remedies when the debtor defaults. For example, the creditor may bring an action for judicial foreclosure. AS 09.45.170.⁵ The creditor is then entitled to a deficiency judgment against the debtor. Id.; Smith v. Shortall, 732 P.2d 548, 549 (Alaska 1987); Suber v. Alaska State Bond Comm., 414 P.2d 546, 555-56 (Alaska

(Footnote Continued)

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

5. AS 09.45.170 provides:

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

*Similar to
deficiency*

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

The creditor may elect to conduct a nonjudicial foreclosure sale if the deed of trust provides for this remedy. Suber, 414 P.2d at 555-56; AS 34.20.070(a).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.

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

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

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

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

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

Common law.

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

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

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

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

(Footnote Continued)

III. THE PARTIES' AGREEMENT

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

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

(Footnote Continued)

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

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

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

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

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

10. The Kaiser note contained the following provision:

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

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

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

IV. CANCELLING THE NOTES AND TRUST DEEDS

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

11. The trust deed states in part:

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

. . .

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

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

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

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

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

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

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

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

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

The conditional cancellation order does not constitute an abuse of that discretion.¹³

AFFIRMED.

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



Official Business

Alaska State Legislature

P.O. BOX V
State Capitol
Juneau, Alaska 99811

SB-515

MAR 30 1988

MEMORANDUM

Senate Joint Committee on Economic Recovery

TO: Members
Alaska State Senate

FROM: Senator Arliss Sturgulewski, Co-Chair *AS*
Senator Lloyd Jones, Co-Chair *LJ*
Senate Joint Committee on Economic Recovery

RE: Legislation Endorsement Statement

DATE: March 29, 1988

The Senate Joint Committee on Economic Recovery has endorsed the following legislation and recommends that it proceed through the normal standing committee hearing process.

SCR32 - Senator Fischer - "Urging the state's financial institutions to adopt more flexible lending and collection policies."

Status: House Labor & Commerce Committee

SB333 - Senator Halford - "An Act relating to wage, salary and benefit claims having priority in certain bank liquidations and to certain bank reports required by the Department of Commerce and Economic Development; and providing for an effective date."

Status: House Labor & Commerce Committee

SB392 - Senator Halford - "An Act relating to delinquent loans of the Alaska Industrial development Authority; and providing for an effective date."

Status: House Labor & Commerce Committee

CSSB408 - Senators Kelly and Sturgulewski - "An Act relating to the Alaska Stabilization Assistance Program; and providing for an effective date."

Status: Senate Finance

Endorsement qualifications:

The concept of a "Bridge Bank" is contained in CSSB408. This legislation offers a potential for relieving the pressure of property management for private financial institutions and some state agencies. However it should be structured to encourage private sector management, limited state contributions and provisions for eventual repayment of these contributions back to the state. This conceptual document should be referred to standing committees for further study and processing.

SSSB471 - Senator Halford - "An Act establishing a program in the Alaska Industrial Development and Export Authority to guarantee business loans and to refinance debt; and providing for an effective date."

Status: Senate Finance

Endorsement qualifications:

The committee endorsed this legislation at the March 16, 1988 and adopted the following intent at its meeting on March 22, 1988. "The bill needs further refinement in the Senate Finance Committee and the SJ CER recommends that the Finance Committee review setting a cap or maximum limit on the total amount of loan funds that can be guaranteed by AIDEA. This will prevent uncontrollable liability at some future date. The committee also recommends that AIDEA develop guidelines for allowing private financial institutions to offer refinanced debt packages as well as guidelines for new business loans that will stimulate economic growth. Finally, in order to evaluate its progress, the committee suggests a sunset date on the AIDEA loan guarantee program."

SSSB474 - Senator Halford - "An Act increasing property exemptions; and providing for an effective date."

Status: Senate Finance

SB476(CRA) - Senator Halford - "An Act creating the Supplemental Municipal Assistance Fund for Railbelt communities; and providing for an effective date."


Status: Senate Finance

SB477 - CRA Committee - "An Act making a special appropriation to the Department of Community and Regional Affairs for supplemental municipal assistance to Railbelt communities; and providing for an effective date."

Status: Senate Finance

Endorsement qualifications:

The committee adopted an amendment that reduces the appropriation amount to \$25,000,000.

 Proposed - Senator Josephson - "An Act relating to judicial and nonjudicial foreclosures."

Status: draft

Endorsement qualifications:

The committee adopted the concepts contained in the 5-2103A/Bradley/3-28-88 draft of the subject legislation and forwarded it to the Senate Rules Committee for introduction. The committee additionally recommended that the bill be referred to the Senate Judiciary Committee and that the committee incorporate the concept contained in HB549 "An Act relating to notice requirements on the use of a deed of trust."

The committee also endorsed the following House bills and recommends that they proceed through the normal Senate standing committee process when they are transmitted to the Senate.

HJR 72 - Rules Committee at the request of the HJCER - "Relating to the residential real estate market."

Status: House Labor & Commerce

HB 550 - Rules Committee at the request of the HJCER - "An Act authorizing the Department of Community and Regional Affairs to modify the terms of its mortgage loans; and providing for an effective date."

Status: House Community & Regional Affairs