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Some Legal Developments in Lands, Property, and Real Estate in the Last Year

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INTRODUCTION

Lands, property, and real estate issues are related but somewhat distinct disciplines. Lands issues connote the broadest range of topics typically involving the transfer of land areas from the sovereign to other sovereigns, entities, or individuals. The most important lands issues in Alaska today involve the transfer of lands to the State of Alaska pursuant to the Statehood Act of 1959, as amended, set out in a note preceding 48 U.S.C. section 21, the transfer of lands to Native Corporations, Native Villages, other Native entities, and individuals pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), as amended, 43 U.S.C. sections 1601-1628, and the transfer to various executive branch agencies such as the National Park Service, Fish and Wildlife Service, Forest Service, etc. of lands to be administered for defined public purposes pursuant to the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), as amended, 16 U.S.C. sections 3101-3233. The Federal Land Policy and Management Act of 1976 (FLPMA), the Organic Act for the Bureau of Land Management, is of great interest to those in Western States and particularly in Alaska; the Congress declared that it is the policy of the United States that "the public lands be retained in Federal ownership." Most of the critical acts are codified in Title 16 (Conservation), Title 25 (Indians), and Title 43 (Public Lands) of the United States Code.

Property, one of the half dozen first-year law school subjects, could be regarded as the all-encompassing field. Property law generally addresses the acquisition, use and disposition of personal property, real property, and fixtures (personal property that becomes affixed to and a part of real property). The typical first-year course discusses estates and future interests, rights incident to possession and ownership of land, conveyancing, land use control, and personal property. The instruments and security agreements and other means to acquire, use and dispose of property are of the most interest to practitioners.

Real estate as a field of inquiry connotes real property often with some improvements or development. Real estate covers such topics as finance and development of property, landlord and tenant relationships, zoning, covenants, easements, condemnation and a myriad of other subjects. Real estate and most property law questions are typically the province of state law.

In the presentation below, state law cases and issues are discussed first. Cases construing federal law follow. This discussion is presented with the caveat that only a very limited insight into the vast array of lands, property, and real estate issues is attempted. The Alaska Supreme Court is referred to as the "Court," although a few references to decisions of that body may have escaped detection and are inadvertently referred to as the "court."

SOURCES

One of the most important single sources on Alaska lands issues is the discussion contained in chapters 70-73 of the American Law of Mining publication. The publication is prepared by the Rocky Mountain Mineral Law Foundation. The four chapters discuss an "Introduction" to Alaska issues, "Lands in Alaska," "Acquisition of Mineral Rights in Alaska," and "Access and Land Exchanges." The Gower Federal Service is another source that provides copies of decisions involving Royalty Valuation and Management, Mining, Oil and Gas, Outer Continental Shelf and perhaps of most interest Miscellaneous Land Decisions. Gower reprints important decisions of the Bureau of Land Management and the Interior Board of Land Appeals. The decisions are also collected in binders in the Interior Department Resources Library in the Federal Building.

The Alaska Law Review recently initiated an Alaska Supreme Court Year in Review that appears in the June issue. The Year in Review includes sections on Alaska Native law, property law, and business law among others that may be of interest. The annual updates prepared by the Alaska Native Law, Environmental Law, Natural Resources Law, and Real Estate Law Sections of the Alaska Bar Association are instructive in keeping one abeam of recent developments in the law and of the attorneys currently involved in addressing emerging issues. The meetings held and the updates prepared by the Bankruptcy Law and Taxation Law Sections of the Bar Association are an excellent means for the energetic individual to stay informed of the bankruptcy and tax consequences of actions.

Native law issues are inextricably entwined with lands issues. One of the touchstone sources is David Case, Alaska Natives and American Laws (University of Alaska Press, 1984). Chapter Fourteen, Section A "Alaska Natives" in Felix Cohen, Handbook of Federal Indian Law (University of New Mexico, 1982) provides a thumbnail overview. Robert Arnold, Alaska Native Claims (Alaska Native Foundation, 1978) provides a somewhat dated but nonetheless excellent historical and sociological treatment of Native and lands issues. The Librarian for the Federal District Court Library compiled an annotated bibliography of sources on lands, Native law, subsistence, and sovereignty issues that now spans fifty pages.

Traditional real estate matters are discussed at the monthly meetings of the Real Estate Law Section. The Alaska Real Estate Commission produces and distributes the "Alaska Real Estate News." The Anchorage Board of Realtors conducts monthly mini-seminars on Wednesday mornings and holds a general monthly luncheon meeting. The Alaska Landlord and Property Managers Association holds monthly meetings on issues of interest to landlords and property managers. And the Right of Way Association holds monthly meetings on property and real estate issues of interest to its members. The luncheon programs are excellent.

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STATE ISSUES

1. Eminent Domain - Damages - Zoning

In Bocek Bros. v. Anchorage, 750 P.2d 335 (Alaska 1988), the Court addresses the damages to be awarded when a single tract of property is "split-zoned." A split-zoned property is one that is zoned for more than one use. The property in question was zoned two-thirds industrial and one-third residential. The Court held that the compensation is dependent upon the permitted use for each particular zone. The Court held that "use district boundaries should be respected even where they do not coincide with lot boundaries." Id. at 338. The Court construes Anchorage Municipal Code Section 21.40.040(K) to mean that parking in R-2 residential districts is prohibited "unless associated with a permitted R-2 use." The Court refused to award enhanced damages for an increased industrial taking in a situation where off-street parking and/or loading was not permitted in the residential section to provide for the needs of the industrial use of the property.

2. Eminent Domain - Attorney's Fees - Offers of Judgment

In State, Dep't of Transportation v. 4.085 Acres, 752 P.2d 1008 (Alaska 1988), the Court addresses the standard to apply in awarding attorney's fees in eminent domain proceedings in instances where the state appeals the master's allowance, but the landowner does not challenge the decision. Alaska R. Civ. P. 72(k) addresses awards in eminent domain proceedings and suggests that they be awarded only when "necessary to achieve a just and adequate compensation of the owner." The Court, Moore, J., restates that the fees are allowable only if "necessarily incurred." The Court does not specify how Rule 72 dovetails with the rule and practice governing Rule 68 offers of judgment, but notes that courts should consider and weigh any pre-judgment settlement offers by the state as well as the landowner's response. The dissent, Compton, J. and Burke, J., criticizes the latter suggestion of the majority as an advisory opinion that should await another day for consideration.

3. Eminent Domain - Section Line Rights-of-Way - Damages

In 0.958, More or Less v. State of Alaska, 762 P.2d 96 (Alaska 1988), the superior court, Greene, J., awarded damages for condemned land other than the land within a section line right-of-way and nominal damages for the condemned fee interest in the land underlying the right-of-way. Plaintiffs sought compensation for the taking of their right of direct access to the section line right-of-way and for loss of reasonable access to the remainder of their property. They also sought more than nominal damages for the condemnation of their fee interest underlying the right-of-way. The Court, Moore, J., remanded for further findings relating to whether the remaining access is reasonable and affirmed on the other issues.

4. Eminent Domain - Prejudgment Interest

In Hofstad v. State, 763 P.2d 1351 (Alaska 1988), the Court refused to allow condemnees prejudgment interest on funds deposited by the State as estimated just compensation. The Supreme Court, Matthews, C.J., held that condemnees' failure to move to withdraw funds deposited by the state as estimated just compensation constituted delay attributable to them and precluded recovery of prejudgment interest on the funds.

5. Upset Price at a Judicial Sale - Standard for Setting an Upset Price

In Hayes v. Alaska USA Federal Credit Union, et al., 767 P.2d 1158 (Alaska 1989), the Court addresses two important issues of first impression. The Court addresses whether a court may establish a minimum bid or "upset price" for the sale of real property at a judicial foreclosure sale. The Court also addresses the proper standard to use in establishing an upset price. The Court, Moore, J., held that a sale is a sale is a sale.

The authority to set an upset price, that Court states, derives from the inherent equitable power of a court to oversee judicial foreclosure sales. The Court notes that this remedy is rarely employed and that superior courts should allow bidding to proceed and then, in ruling on a motion to confirm the sale, determine whether confirmation should be granted or a resale ordered. The Court notes some of the policy reasons for not refusing to confirm a sale because of a mere inadequacy of price. The Court concludes that current economic conditions in Alaska are not so severe as to eliminate the usefulness of the public bidding process. After discussing other cases, the Court concludes that most other courts have held that prices above 40 percent of the property's value are not grossly inadequate. The denial of defendant's request for appointment of a special master to establish the upset price was also upheld.

In Northern Commercial Co. v. Les Cobb et al., S-2351, ___ P.2d _____ (Alaska 1989), however, the Court, Matthews. C.J., scrutinizes the sale of collateral pursuant to AS 45.09.504(c) ("Secured party's right to dispose of collateral after default; effect of disposition") for its commercial reasonableness. This section is the codification of section 9-504(c) of the Uniform Commercial Code. The sale of collateral under this section is conducted according to the terms and timing established by the seller. Sales of real estate pursuant to a judicial or non-judicial foreclosure, by contrast, are governed by statute. The Court held that a private sale is not necessarily a commercially reasonable sale.

For a general discussion of upset bids and valuation hearings in sales of property in federal court, see United States v. F/V Fortune, 1987 WL 27270, 1987 A.M.C. 2351 (D. Alaska 1987), a decision in the same vein as the decision in Hayes. For a discussion of the upset bidding process in federal court, see Puget Sound Production Credit Ass'n v. O/S Johnny A, 819 F.2d 242, 1987 A.M.C. 2572 (9th Cir. 1987), a case that also arose in the District Court for the District of Alaska.

6. Deeds of Trust - Promissory Notes - Remedies - Election of Remedies - Deficiencies

Two much-discussed cases decided last year, Moening v. Alaska Mutual Bank, 751 P.2d 5 (Alaska 1988), and Conrad v. Counsellors Investment Co., 751 P.2d 10 (Alaska 1988), re-affirm the options available to a creditor\mortgagee\beneficiary. In the event of a default, a creditor has the right either to sue on the promissory note or to foreclose on the property that secures the promissory note, absent contrary language in the deed of trust. In Conrad, the Court, Compton, J., held that because a deed of trust enables the creditor to foreclose non-judicially does not mean that the creditor cannot foreclose judicially. AS 34.20.070(a) ("Sale by trustee"). In Moening, the Court, Compton, J., notes that a creditor who elects to pursue a non-judicial foreclosure of the property does lose the right according to statute to sue on the promissory note and receive a deficiency judgment. On the other hand, a creditor who sues on the promissory note and receives a deficiency judgment, if the judgment remains unsatisfied, may still foreclose the property that secures the note either judicially or non-judicially.

When the two decisions were handed down, they were castigated in many quarters as allegedly providing additional options for creditors. The two decisions, however, simply re-affirmed the options available to creditors under the statute for decades. During the golden years of real estate in Alaska, when a purchaser defaulted, the creditor sold the property in a non-judicial foreclosure and, because of rising prices, the amount obtained at the sale usually satisfied the total amount of the debt. There were few judicial foreclosures during this time period. During these leaden years of real estate, when a purchaser defaults, the creditor is not likely to recoup the amount of the debt via a sale of property. In the last year, moreover, more lending institutions are undertaking the added expense and inconvenience of a judicial foreclosure and then seeking a deficiency.

Most criticism has been directed at the Court's unwillingness to modify the statutory scheme to require a creditor first to foreclose on the property before suing on the promissory note. The two decisions indeed allow a creditor to sue on the promissory note before attempting to sell the property. The advantage to the creditor is that he or she is able to proceed against other assets of the purchaser without first pursuing the lengthy foreclosure action. The creditor is collecting personally from the debtor without knowing what deficiency will result after sale of the property.

At this time, most lending institutions include language in their instruments protecting their right to sue on the promissory note or on the deed of trust that secures the note. The typical language states:

> "The mortgagor or trustor (Borrower) is personally obligated and fully liable for the amount due under the note. The mortgagee or beneficiary (Lender) has the right to sue on the note and obtain a personal judgment against the mortgagor or trustor for the satisfaction of the amount due under the note either before or after a judicial foreclosure of the mortgage or deed of trust under AS 09.45.170-.220."

These decisions and suggested language in the instruments are discussed in the Loan Documentation materials that accompanied the Loan Documentation Continuing Legal Education Program sponsored by the Alaska Bar Association in March, 1989.

Two cases involving the rights of junior lienholders, one involving real property and the other involving personal property, were addressed by the Supreme Court this year. With more foreclosures on the horizon, the rights of junior lienholders are likely to be asserted and contested with more vigor.

7. Second Deed of Trust - Promissory Note - Deficiency Judgment

In Adams v. FedAlaska Federal Credit Union, 757 P.2d 1040 (Alaska 1988), Adams signed a promissory note in favor of FedAlaska Federal Credit Union and, as security for the loan, signed a deed of trust naming FedAlaska beneficiary. The deed of trust was a second deed of trust on the property. FedAlaska later advanced an additional sum of money to forestall a foreclosure of the property under the first deed of trust. The property was transferred to a third-party and later sold at a non-judicial foreclosure sale to FedAlaska pursuant to default on the first deed of trust. FedAlaska purchased the property for an amount just over what was owed on the first deed of trust and sold it thereafter for a more substantial amount. FedAlaska filed suit against Adams on the promissory note then in default. Upon motion, the court, Peter A. Michalski, J., ordered a writ of attachment be issued. Summary judgment was granted in favor of FedAlaska on all counts. The Supreme Court affirmed both the grant of summary judgment and issuance of the writ of attachment.

Citing AS 34.20.070 ("Sale by trustee"), the Supreme Court, Compton, J. writing and Rabinowitz, J., notes that a trustee of a deed of trust may foreclose and sell the property that has been provided as security for an indebtedness without first securing a decree of foreclosure from the court. Citing AS 34.20.090 ("Title, interest, possessory rights and redemption") and case law, the Court notes that upon selling the property, the interests created subsequent to the deed, including those of junior lienholders, are cut off. The Court embraces FedAlaska's interpretation that upon sale by the senior lienholder, the junior lienholder, FedAlaska,

lost its security interest in the property. The Court notes that the statutes contain no exception to this rule when the purchaser at a sale is a junior lienholder.

The Court discusses and rejects judicially-recognized exceptions from California and Nevada partly out of a concern not to invade the province of the legislature. These two jurisdictions developed exceptions because of the possible inequity of a junior lienholder purchasing for slightly more than the amount owed the senior creditor, selling the property at a more substantial amount, and then nonetheless collecting on the promissory note. Unlike Alaska, the Court notes, both jurisdictions have fair market value legislation that provides for an inquiry into the fair market value of property sold. The Court also notes that if Alaska law is strictly followed, then Adam's position is no different whether FedAlaska or a third party buys the property. In either case, the Court notes, FedAlaska would lose its security and Adams would be personally liable for the note. Under the approach argued by Adams, Adams fortuitously benefits by FedAlaska's purchase. The prejudgment writ of attachment was also upheld because of the Court's holding above that FedAlaska no longer had a security interest on which to foreclose.

In dissent, Bryner, J., a member of the Alaska Court of Appeals sitting by designation, expresses concern at the unfairness in allowing FedAlaska to purchase the property, sell it for almost enough to cover the amount of the obligation, and then bring suit to recover separately on the underlying obligation. He notes that in a typical real estate transaction, the fair market value of the secured property serves to protect the legitimate interests of both borrower and lender. There is an equipoise, he argues, in the lender's right of foreclosure and sale and the borrower's ability to look to the value of the secured property for protection against catastrophic financial loss in the event of financial default. The rule adopted by the Court, he argues, upsets the balance and allows junior lienholders to do indirectly that which would be prohibited if done directly. He cites AS 34.20.100 ("Deficiency judgment prohibited") and notes that if FedAlaska had nonjudicially foreclosed on and sold the secured property, FedAlaska could not have sued Adams on the underlying promissory note. He endorses the approach of California and Nevada and does not flinch at creating a judicial gloss to avoid a double recovery. He argues further that the concept of fair market value is not so novel or complex as to be unworkable in the absence of express statutory implementation. He would not altogether bar the holder of a second deed of trust from recovering on the underlying obligation after buying the secured property, but he would permit recovery only to the extent that the "fair" fair market value of the secured property at the time of purchase is inadequate to cover the amount due on the obligation.

Other cases and arguments regarding the sweep of a dragnet clause and the possible merger of the two deeds of trust when they are both held by one entity are alluded to by the parties in the pleadings.

8. Execution of Judgment - Seizure and Sale of Property - Distribution of Proceeds

In Dahlby et al. v. Guzzardi, 763 P.2d 223 (Alaska 1988), plaintiff executed against furniture of the defendants. The inventory was subject to a prior lien by a bank. After demand by the bank for either full payment of the loan or surrender of the collateral, plaintiff tendered full payment with a personal check. The parties agreed that sale of the inventory would be conducted by a private auctioneer rather than the process server and that payment was set at ten percent of the gross proceeds of the sale. Defendants also agreed to pay moving and storage fees to a moving company and the process server's fees connected with the execution to the extent that they were reasonable.

After sale, plaintiff moved to use the proceeds to satisfy his writ, interest on the writ, and the payoff to the bank. The motion also requested payment of the moving and storage fees, auctioneer's costs, advertising costs, and process server's fees. Defendants objected to use of the proceeds to satisfy a lien where the lien was not discharged by the execution sale. Because the bank lien was not discharged by the execution sale, defendants contended that the proceeds should not have been used to reimburse plaintiff for satisfying the debt. Defendants also argued that when plaintiff paid off the bank loan, he received no assignment from the bank of its lien. Defendants contended that the bank merely released its security interest in the goods and, therefore, plaintiff had no lien against the proceeds of the execution sale. Defendants also contended that even if the bank had assigned its lien to plaintiff, plaintiff would have been required to follow the procedures delineated in Article 9 of the U.C.C. for seizing and selling the goods; Article 9 of the U.C.C. is codified as AS 45.09. The superior court concluded that plaintiff did not pay off the bank loan as a mere volunteer, that defendants were benefited by plaintiff's payment, and that plaintiff succeeded to the rights of the bank. The court held that the property was seized pursuant to the writ of execution not the bank lien and, therefore, the U.C.C. requirements do not apply. When the inventory was sold pursuant to the writ of execution, the bank lien continued against the proceeds of sale. AS 45.09.306(a), (b) ("'Proceeds'; secured party's rights on disposition of collateral"). Because plaintiff held the bank lien, the supreme court held that the trial court properly distributed some of the proceeds to him to satisfy the amount paid to the bank.

The Court, Matthews, C.J., upheld as reasonable the amount distributed to the process server. The court did not scrutinize

the services performed in light of Administrative Rule 11 but rather looked at the total charges. The court held that the commission was reasonable in light of the work performed, the hours worked, and the hourly rate and that the charges for inventorying the property and for security services were reasonable. The issue regarding damage allegedly caused to defendants' inventory was remanded to the superior court. The court upheld the superior court's decision to call the process server as a witness, citing AK. R. Evid. 614 and noting that defendants failed to object and exercised their right to cross-examine him at the time of the hearing.

Upshot

Both the Hayes and Adams decisions, in addition to the earlier Moening and Conrad decisions, suggest that the Supreme Court is not inclined to tinker with the consequences of the statutory scheme even if the results in a particular situation may not be fair to each party. Judge Bryner, the dissenter in Adams, was sitting by designation for that one case. He ordinarily sits on the Alaska Court of Appeals and hears only criminal appeals. Of some interest to Court watchers is the fact that Justice Compton wrote Adams, Moening, Conrad, and Rosenberg, a case discussed below.

The Court continues to impose additional duties on trustees and beneficiaries who exercise the power of sale provisions included in deeds of trust. In the celebrated case of Rosenberg v. Smidt, 727 P.2d 778, 780 (Alaska 1987), the Court, Compton, J., interpreted the statutory notice procedures that a creditor must undertake when exercising the power of sale option. Alaska Statute 34.20.070 ("Sale by trustee") is the primary section sanctioning power of sale provisions in Alaska. The notice obligation was expanded in two ways in Rosenberg. Creditors are required to exercise "due diligence" in uncovering the last known addresses of interested parties so as to notify them of the foreclosure proceedings. The Court also held that a bona fide purchaser at a foreclosure sale could not rely on conclusory statements that the creditor had conducted a diligent search for the addresses but was on "inquiry notice" unless the creditor had provided a detailed recital of the steps undertaken to notify interested parties.

The recent Supreme Court case discussed below cites Rosenberg and AS 34.20.070(c) and notes that the trustee and beneficiary must exercise due diligence to notify any person with a lien or interest before conducting the foreclosure sale. A recent superior court decision requires the trustee independently to consider requests to continue a foreclosure sale of property.

9. Duty of a Trustee and Beneficiary - Notice - Priority of Liens - Mechanics and Materialmen Liens - Deeds of Trust

In Nystrom v. Buckhorn Homes, S-2342, ____ P.2d ____ (Alaska 1989), the superior court, Hunt, J., addressed a lien foreclosure action and granted a motion for summary judgment finding that a mechanics' lien took priority over a prior-recorded deed of trust. Baldly stated, the deed of trust was recorded prior to improvements being made on the property.

The Court, Matthews, C.J., notes that under Alaska deed of trust statutes, a foreclosure sale by a senior lienor extinguishes the junior lienor's interest and cites Burnett, Waldock & Padgett v. C.B.S. Realty, 688 P.2d 819, 822 (Alaska 1983). The Court notes that a purchaser at a deed of trust sale takes the same title that the maker of the deed of trust had at the time the instrument was executed. The Court cites AS 34.20.090(a) ("Title, interest, possessory rights and redemption") and Burnett, 668 P.2d at 822. The court concludes that land purchased at a deed of trust sale is subject to prior encumbrances but not to those made after the deed of trust is executed and cites Burnett, 668 P.2d at 823.

The Court notes that whether a foreclosure sale, without notice to unrecorded lien claimants, extinguishes a subsequently perfected mechanic's lien is an issue of first impression. The Court held that under Alaska's trust deed statutes, a duty exists to make a physical inspection of the property before foreclosure. Nystrom at 26. The Court reads Rosenberg broadly to require that

"trustees are obligated to exercise due diligence in attempting to notify those who will be affected by the foreclosure. Rosenberg, 727 P.2d at 783." Nystrom at 28. The decision suggests that the trustee could notify all lienholders of the action, including the subsequently-recorded mechanic's lien holder, conduct a sale, and extinguish all the subsequently-recorded liens.

This duty to inquire via a physical inspection of the property is one of the few developments in recent Alaska real estate law not grounded in or required by a specific statutory provision.

10. Duty of a Trustee - Non-Judicial Foreclosure - Independent Duty to Consider a Continuation of a Sale

In Stanton et al. v. New York Life Insurance Co. et al., 3AN-89-99 Civil (February 3, 1989), plaintiffs brought an action seeking to enjoin the beneficiary of a deed of trust from pursuing a non-judicial foreclosure of a building. Trustors' counsel advised the trustee that the trustors desired an extension of the date of the foreclosure sale and further put the trustee on notice that it was the trustors' position that the trustee should make the decision independently.

Judge Fabe notes that AS 34.20.080(e) ("Sale at public auction") provides a trustee with the authority to postpone the sale of all or any portion of the property. A review of the provisions of AS 34.20.070 et seq. ("Deeds of Trust"), the judge states, indicates a legislative intent providing that the trustee has the fiduciary obligation and the power to act as an independent third party during the conduct of a non-judicial foreclosure sale. The judge held that the law in Alaska is that a trustee owes a fiduciary obligation to both the trustor and the beneficiary. Although the fiduciary obligations of the trustee do not rise to the full magnitude of a traditional fiduciary, the trustee is obligated to "take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interest." The trustee must act with absolute impartiality and fairness to both parties in performing the powers vested in it by the deed of trust.

In the Amended Findings of Fact and Conclusions and Order Granting Preliminary Injunction, Judge Fabe ordered the sale enjoined, instructed the trustee to conduct the sale in compliance with its obligations and duties to act as an impartial and neutral trustee as discussed therein, and directed the trustee to act independently upon requests for extensions of time by the trustor prior to the rescheduled foreclosure date consistent with the principles set out in the conclusions of law. Plaintiffs filed an order for relief in bankruptcy and thus any possible appeal was not undertaken. The question has arisen in recent cases and is likely to be subject to further judicial attention.

Trustees are reluctant to acknowledge the duty without an individual expressly referring to the decision. Trustees required to confront the decision and the duty deny the request for a continuance by stating that the property has not been listed for sale with a real estate broker, that there is no recent appraisal of the property, that no "pre-sale" has been worked out with the private mortgage insurance carrier, or that no written confirmation from a proposed purchaser to purchase the property has been proffered.

On the other hand, the trustee is caught in a trying dilemma. The section cited in the decision, AS 34.20.080(e), allows a trustee to continue the sale but does not state when and under what circumstances the sale must be continued. The decision relied upon by Judge Fabe, Cox v. Helenius, 693 P.2d 683 (Wash. 1985), is cited in cases filed in but has not been developed by the Washington courts.

Upshot

These two decisions in Nystrom and Stanton imposing a duty to inquire via a physical inspection of the property and a duty to entertain a request for continuance of the sale, respectively, are not founded upon specific statutory provisions. The Court may be concerned that a person have additional notice before losing a lien and be afforded one more extension of time before losing one's property. Another perspective is to recall that trust companies are basically insurance companies. The Alaska Supreme Court has imposed stringent duties and requirements on insurance companies.

11. Ownership of Fixtures and Post-Foreclosure Rent

In Interior Energy Corp. v. Alaska Statebank, 771 P.2d 1352 (Alaska 1989), the Court addresses two questions that arose from a real property foreclosure. The foreclosure purchaser and former tenant disagreed as to the ownership of fixtures on the property and disagreed as to the amount of post-foreclosure rent owed by the former tenant to the foreclosure purchaser for the period between the foreclosure sale and the eviction.

The Bank acquired title to a mall by foreclosure sale of the deed of trust held as security by the bank for a construction loan to the mall's owner. Interior Energy, the tenant, claimed ownership of fixtures. The court states that the threshold issue in trade fixture cases is who purchased and installed the disputed fixtures. If the tenant was not the one who installed them, or succeeded in interest to them from a former tenant who did, he or she has no right to remove them. Who actually owned the fixtures when they were installed was unclear because of the common ownership of both the landlord and the tenant. The court found that the tenant made no effort to controvert landlord's representations to the Bank, and because the Bank relied on those representations, tenant is estopped from asserting that it was the true owner of the fixtures covered by landlord's representations.

The Bank acquired everything except the kitchen sink. The tenant was entitled to the kitchen sink if it could show that it installed it, it did not intend to donate it to the landlord, and it could now remove it and restore the premises to their former condition. The court noted at the foot that the factors to consider in determining whether an object is a removable fixture are different in different settings such as the instant landlord-tenant dispute or in eminent domain and taxation cases.

The Bank contended that it was entitled to judgment at the lease rental rate for the post-foreclosure period, whereas Interior contended that it should only pay rent based on fair market value. In analyzing this question of first impression, the court notes that Alaska Statute 34.20.090(b) ("Title, interest, possessory rights and redemption") provides that a purchaser of property at a foreclosure sale is entitled to possession of the property as against the party who executed the deed of trust or any person claiming by, through or under that party. The logical effect of this right of possession, at least where the purchaser chooses to exercise the right, is to extinguish the existing leasehold interest. Absent an agreement with the foreclosure purchaser, if the lessee remains in possession after the sale, his or her status is that of a tenant by sufferance. As a tenant by sufferance, such a lessee would be liable to the purchaser not for contract rent but for the fair rental value of the premises. The court found that the Bank demanded the contract rate and held that the record evinced an implied agreement to pay the rent demanded.

12. Suit on a Note and Foreclosure of a Deed - Real Party in Interest

Smith v. Lee, 770 P.2d 754 (Alaska 1989), involved a dismissal of plaintiffs' suit for judgment on a note and for foreclosure of a deed of trust. The note and deed were given to plaintiffs by two of the defendants and later assumed by another defendant. That defendant asserted that a bank and other unnamed parties were the real parties in interest. The trial court dismissed the suit for failure to prosecute in the name of the real party in interest.

The Court, Compton, J., addresses whether the bank's assent constituted a ratification sufficient to allow the named plaintiffs to maintain the action. Ratification by the real party in interest is authorized by AK. R. Civ. P. 17(a). Ratification, the court observes, assures that each party not only reaps the benefit but bears the burden of claims litigated on its behalf. The court concluded that a real party in interest need not expressly agree to be bound to an adverse judgment regarding costs and attorney fees when ratifying an action. Ratification only requires that the party agree to adopt the court proceedings. Thus, the court reversed on the ground that the bank, the only named entity identified by the defendant as a real party in interest, ratified the action pursuant to the district court order.

13. Adverse Possession - Summary Judgment

In Smith v. Krebs, 768 P.2d 124 (Alaska 1989), plaintiff brought an action to quiet title on the ground that she adversely possessed the parcel. Defendant counterclaimed for damages based on trespass and nuisance. The district court granted plaintiff's motion for summary judgment and entered judgment giving plaintiff the entire parcel. The Court, Rabinowitz, J., reiterated the time-honored elements of an action for adverse possession and the clear and convincing standard of proof. The Court reversed the judgment and remanded the matter because an affidavit filed by defendant raised a genuine issue of material fact as to whether plaintiff's use of the disputed parcel was permissive.

The case is also of interest to those who follow the Court's interpretation of civil procedure. The Court in this and many other cases has reversed a grant of summary judgment on the ground that there are genuine issues of material fact that must be presented to the trier of fact, typically the jury.

14. Insurance Coverage - Rot and Hidden Decay in a Condominium

In Whispering Creek Condominium Owner Ass'n v. Alaska National Insurance Co., S-2621, ____ P.2d ____ (Alaska 1989), the Court addresses a question regarding the construction of an insurance policy. Plaintiffs sued seeking payment for damages caused by rot and deterioration of some of the condominium ceilings at

plaintiffs' complex. Defendant successfully moved for summary judgment arguing that damages caused by rot and deterioration were specifically excluded under the terms and conditions of the policy. The Court, Compton, J., reversed the grant of summary judgment and held as a matter of law that coverage existed under provisions of the policy relating to collapse.

15. Real Estate Broker Misrepresentation - Excusing a Juror

In Mitko Dalkovski v. Gail Glad d/b/a Glad Realty and Gail Strickland, S-2600, ___ P.2d ___ (Alaska 1989), the Supreme Court addresses the propriety of seating a juror with personal knowledge of the facts of the case. The underlying case involved an action by a subsequent purchaser of land against the initial purchaser and the real estate broker who made the initial sale. The initial purchaser bought an unimproved lot, lot 18, and the subsequent purchaser made improvements on another lot, lot 19, before closing the purchase of lot 18. The subsequent purchaser claimed that the initial purchaser and the broker made affirmative misrepresentations as to the boundaries of his parcel. He sought damages equal to the value of the improvements he made on lot 19.

The superior court, Cranston, J., seated a juror with some personal knowledge of the case. The jury returned a special verdict for the defendants finding that although the broker misrepresented the boundaries of the parcel, she did not intend to induce plaintiff to rely on them. Plaintiff, moreover, also should have known about the misrepresentations earlier. The court entered judgment in favor of the defendants because plaintiff failed to prove an essential element of his misrepresentation claim. The Court cites Bevins v. Ballard, 655 P.2d 757, 763 (Alaska 1982), the seminal case that recognized a cause of action against a real estate broker for innocent misrepresentation. The court also cites Restatement (Second) of Torts Section 552C(1) (1977) and notes that an innocent misrepresentation must be made "for the purpose of inducing the other to act or refrain from acting in reliance upon it." The claim was also barred under the applicable statute of limitations, AS 09.10.070 ("Actions to be brought in two years").

The Court held that the superior court abused its discretion in refusing to excuse the juror, but nonetheless the Court affirmed the jury verdict for the defendants because the error did not affect the verdict.

16. Lease - Novation - Reformation - Specific Performance - Intentional Interference with Prospective Economic Advantage - Intentional Infliction of Emotional Distress - Punitive Damages

In Oaksmith v. Brusich, S-2377/S-2378, ____ P.2d ____ (Alaska 1989), the cross appeals arose out of a family spat over the terms of a lease of marina property and claims of business interference and intentional infliction of emotional distress against Daniel Brusich, co-owner of the marina and father of Bonnie Oaksmith, the co-lessee of the marina property.

The Brusich couple, owners and operators of a marina, subdivided the property into two tracts and entered into a transaction with a third party to lease one of the tracts and to execute a memorandum of sale of the personal property. The third party indicated that he desired to terminate the agreements. Bonnie Oaksmith, daughter of the Brusichs, approached them about taking over the marina. The Brusichs and Oaksmiths concluded an assumption agreement. The Brusichs and the third party concluded a termination agreement and embarked on litigation that was ultimately settled.

David Brusich regularly harassed the Oaksmiths and interfered in the operation of the marina. The Brusich couple sent notice of an increase in rent pursuant to the terms of the lease assumed by the Oaksmiths. The Oaksmiths demurred and filed suit that they had entered into an agreement, partly oral and partly written, for the purchase of both tracts and, subsequent to a later oral modification, a small island. Daniel Brusich disagreed. After trial, the court held that the Oaksmiths had failed to prove that they had entered into a contract materially different from the assumption agreement except as to the date when the lease would begin.

The Court, Moore, J., discusses the elements of a novation, the doctrine of reformation, and the specific performance of the alleged oral agreement. The Court also discusses claims for intentional interference in economic relations, intentional interference with contractual relations, intentional infliction of emotional distress, and the covenant of good faith and fair dealing. The Court also discusses the propriety of separate damages for intentional interference with the lease contract and reviews the award of punitive damages. These latter causes of action and damages may be discussed in more detail in the Tort Law Section Update.

17. Energy Conservation Act - Application to State-Financed Purchase of Buildings

In Alaska State Homebuilders Ass'n. et al. v. State of Alaska and Alaska Housing Finance Corp., 3AN-88-9737 Civil (March 8, 1989), appeal pending, Judge Fabe addressed cross-motions for summary judgment regarding implementation of state regulations imposing the energy conservation standard for new residential buildings on homes purchased with state financial assistance. In the Fall of 1988, Judge Katz entered a temporary restraining order. After hearing argument on the merits, Judge Fabe granted the motion challenging the state's statutory authority to apply the regulations and the resulting energy conservation standards to residences purchased with state financial assistance.

Plaintiffs argued that AS 46.11.040 ("Applicability of thermal and lighting energy standards to private buildings") and AS 46.11.900(8) ("Definitions" - "state financial assistance") mention only state-financed construction of buildings and thus the defendants have no authority to implement the statutory energy conservation standards on state-financed purchase of buildings. The legislative "declaration of policy" in section 1 of the Act suggests that the Act was intended to cover "buildings purchased or constructed with state financial assistance." Section 1 of the Act, the legislative declaration of policy, was never codified, but it is reprinted in the Temporary and Special Acts of 1980, Ch. 83, Section 1. Judge Fabe, citing rules of statutory construction, accepts the plain meaning of the term "construction" and declines to undertake any judicial legislation to expand the purview of the Act.

The action was brought on behalf of builders, suppliers and others. Builders are concerned that the cost of a new home would be driven up by the new regulations. Suppliers are concerned about whether to order double pan windows or perhaps triple pane windows or other materials. Some critics of the regulations intimate that the drafters of the regulations probably never constructed a tree house. The decision may be sound as a matter of policy but suspect as a matter of law. Section 1 of an act is typically the Alaska Legislature's declaration of policy. Other acts, particularly federal acts, include a section discussing the "statement of findings" and a section enunciating the "declaration of policy." Merely because the declaration of policy is codified in another volume of the statutes does not suggest that the section is any less valuable as a source of legislative insight. Rules of statutory construction are as malleable as Play-do. A court, citing a long and distinguished line of cases, could have held that the Act construed in its entirety applies to buildings purchased or constructed with state financial assistance. A decision by the Supreme Court and perhaps action by the legislature may be forthcoming.

18. Hazardous Waste and Environmental Torts - From oil tankers to underground storage tanks

The potential liability of a property owner for environmental torts is staggering. An investor could provide financing for a facility represented to be used as a florist shop and discover, after foreclosure and much to its dismay, that the facility was used as a toxic waste dump. The federal and State environmental protection agencies are tickled if the landowner cleans up the property and seeks some indemnification from the offending party. The agencies, however, bring actions against any party who may have contributed to the problem. The action against the Fairbanks battery storage yard is perhaps the most publicized case.

In the last few years, the cases involving claims for environmental damage against insurance policies seem to have found for the insurance companies more often than for the insureds. In the last year, more courts are finding that the insurance policy is ambiguous and must be construed in favor of the insureds. London is more comfortable insuring tankers in the Persian Gulf, but some carefully defined and not inexpensive policies are being written to cover some environmental damages.

Anyone contemplating the purchase of property in an area where underground storage tanks may be in place should determine with care what is buried on the property. Most underground storage tanks rust out within fifteen years and become a problem for the property owner. Anyone contemplating burying an underground storage tank should review "Musts for USTs" (EPA/530/UST-88/008), a publication prepared by the Office of Underground Storage Tanks. There are federal and State insurance requirements that require operators with underground storage tanks to have a million dollars of insurance coverage by October, 1990. A bill, HB 220, was introduced to address some of the insurance requirements and to afford some relief to small operators. An organization in Alaska, the Alaska Underground Tank Owners & Operators, Inc. ("A.U.T.O.O."), has questioned the regulations. If small operators are not afforded some relief, gas stations between Anchorage and Fairbanks and other communities may close. The Igloo at Milepost 188 may lose its opportunity to be included in the National Register of Historic Places.

A two-day continuing legal education program entitled "Hazardous Waste in Real Estate Transaction" was presented in June, 1989 by CLE International. The topics included "Introduction & Overview of Federal & State Regulatory Schemes," Hazardous Wastes - Impact of State Law," "Effect of Federal Environmental Law on Private Commercial Transactions," "Negotiating & Drafting Real Estate Sale Agreements - Seller's Point of View," "Preventing Liability - Purchaser's Point of View," "Negotiating & Drafting Lease Agreements," "Environmental Hazards Problems for Brokers, Developers and Managers," "Lenders' Concerns," "Impact of

Bankruptcy," "Insurance - The Insured's Perspective," "Insurance - The Insurer's Perspective," "Tax Strategies," and "The Use of Consultants & Experts." The discussion of the impact of bankruptcy may be presented again in later months at one of the Bankruptcy Section luncheons.

19. Land Title and Escrow Matters

The Alaska Land Title Association held the first of what will hopefully be an annual program entitled "Title and Escrow Seminar" in February, 1989. The program was directed to and almost exclusively attended by members of the Alaska land title community. Among the topics addressed were "Hazardous Waste and Title Insurance Implications," "Section Line Rights of Way and the PLO Issue," "Recap of Recent Losses and Claims in Alaska and Suggestions for the Prevention Thereof," and "Native Claims Update: Title Implications."

One of the speakers discussed Stanton et al. v. New York Life Insurance Co. et al., 3AN-89-99 Civil (February 3, 1989), among other cases. Nystrom v. Buckhorn Homes, S-2342, ____ P.2d ___ (Alaska 1989), and other cases that impose duties on trustees may be discussed next year. The Alaska Land Title Association filed an amicus curiae brief in Nystrom.

FEDERAL ISSUES

20. Section 8 of the Act of 1866, RS 2477, previously codified at 43 U.S.C. section 932, repealed by section 706(a) of FLPMA.

Leroy Latta discussed RS 2477 at the September meeting of the Right of Way Association. His article is published at Latta, "Public Access Over Alaska Public Lands As Granted By Section 8 of the Lode Mining Act of 1866," 28 Santa Clara L. Rev. 811 (1988).

The changes in Department of the Interior policy on Section 8 were discussed in February, 1989 at the meeting of the Natural Resources Section. The materials are reprinted in the Natural Resources Law Update for 1989.

RS 2477 was discussed at the Resource Development Conference on Alaska's Resources in February, 1989. The written materials are available from the RDC.

Alaska Greenhouses, Inc. v. The Municipality of Anchorage, No. A85-630 (D. Alaska filed in 1985) involves RS 2477. RS 2477 is discussed in United States v. Vogler, 859 F.2d 638 (9th Cir. 1988).

21. Alaska Statehood Act - Mining pursuant to section 6(i) on State Lands

The Statehood Act grants the State the right to select 103,350,000 acres of land from the United States under section 6(a) and (b) of the Alaska Statehood Act, set out in a note preceding 48 U.S.C. section 21. Mineral deposits in selected lands were also conveyed subject to restrictions in section 6(i). Section 6(i) states:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

(Emphasis in original). In Trustees for Alaska et al. v. State of Alaska, 736 P.2d 324 (Alaska 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 2013 (1988), the Court construes section 6(i). The Court held that the mineral leasing requirement mandates a system under which the State must receive rent or royalties for its mining leases. The court also notes that because the mineral leases do not require rent and royalties, the leasing laws do not meet the mineral leasing requirement of the Act. The Court also held that the grant language in the first sentence of the section was intended to convey only mineral deposits in selected lands whose mineral character was known at the time of selection.

The legislature passed a bill to establish a system for collecting rents and royalties from mining claims on State lands. The bill also contains a provision that requires "reclamation of state land from the effects of mining."

Senate Bill 1126, the Mining Law of 1989, has been introduced in the United States Congress to rectify perceived problems with the Mining Law of 1872, 30 U.S.C. sections 26 et seq. The bill requires retention of public ownership of land and establishment of leasing and royalty requirements on federal lands. The bill is before a Senate Committee and is likely to be acted on in this or the next Congress.

22. Alaska Native Claims Settlement Act - Sand and Gravel under section 7(i)

The most celebrated sand and gravel cases litigated in Alaska have involved construction and interpretation of the language regarding "timber resources and subsurface estate" in section 7(i), 43 U.S.C. Section 1606(i), of the Alaska Native Claims Settlement Act (ANCSA) of 1971. In Aleut Corp. v. Arctic Slope Regional Corp., 421 F. Supp. 862 (D. Alaska 1976), aff'd, 588 F.2d 723 (9th Cir. 1978), the Ninth Circuit held that sand and gravel were part of the subsurface estate for all purposes under ANCSA. In Tyonek Native Corp. v. Cook Inlet Region, Inc., 853 F.2d 727 (9th Cir. 1988), the Ninth Circuit affirmed Judge Holland's decision that the regional corporation owned the disputed sand and gravel pursuant to section 7(i). In Eklutna Corp. v. Cook Inlet Region, Inc., Judge Fitzgerald is addressing another 7(i) case. Other cases involving section 7(i) are pending in Federal Court.

The sand and gravel cases and section 7(i) may be discussed in much more detail in the 1989 Update on Native Lands prepared by the Alaska Native Law Section.

The Alaska Native Claims Settlement Act (ANCSA) authorized the conveyance of 40 million acres of federal lands to Native corporations subject to third-party claims discussed in section 14(c) and (h), 43 U.S.C. sections 1613(c) and (h). The claims of third parties have been and continue to be the subject of controversy and litigation. Some native village corporations are in the process of distributing lands to shareholders pursuant to section 21(j), 43 U.S.C section 1620(j).

23. Alaska Native Claims Settlement Act - Public Lands - Trespass under section 14(c)

Buettner v. Kavilco, Case No. K83-01 Civil (D. Alaska Dec. 18, 1986), rev'd, 860 F.2d 341 (9th Cir. 1988), is an action brought pursuant to section 14(c), 43 U.S.C. section 1613(c), of the Alaska Native Claims Settlement Act (ANCSA). The Ninth Circuit reversed Judge Fitzgerald and remanded the case for a factual determination.

Plaintiffs entered the land near Ketchikan pursuant to a U.S. Forest Service permit prior to December 18, 1971, the date ANCSA was passed and became effective. After conveyance of the land to the Village Corporation, the corporation sought to evict the plaintiffs in state court and, after plaintiffs challenged title, the matter was filed in federal court. Section 14(c) requires Native Village Corporations to convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 as, among other things, a "primary place of residence." Judge Fitzgerald held that the plaintiffs were trespassers who could not gain title to land via section 14(c). The Ninth Circuit reversed and held that the plaintiffs could gain title to the land if they could provide a factual basis for their claims that the land was being used on the critical day as a "primary place of residence."

Judge Fitzgerald's decision in Buettner is indeed similar to his decisions in Lee v. United States, 629 F. Supp. 721 (D. Alaska 1985), aff'd, 809 F.2d 1406 (9th Cir. 1987), and Donnelly, 850 F.2d 1313 (9th Cir. 1988). Judge Fitzgerald's decisions in these two cases followed the avenue of analysis advanced by him in the Buettner decision. These two cases, however, were more complex procedurally and factually. Judge Fitzgerald's decisions in the two earlier cases were upheld on somewhat different grounds. There are also other unpublished decisions of the District Court of Alaska addressing section 14(c) in circulation.

In Hakala v. Axtam Corp., 753 P.2d 1144 (Alaska 1988), decided prior to Buettner, the Alaska Supreme Court construes section 14(c) following an avenue of analysis similar to the Ninth Circuit decision in Buettner. Section 14(c) was discussed at the February 8, 1989 meeting of the Alaska Native Law Section. A tape of the program may be available. Section 14(c) was also discussed at the October 11, 1989 meeting of the Alaska Native Law Section.

After remand, the Buettner case was transferred to Judge Kleinfeld. After a very recent hearing, Judge Kleinfeld held that one of the co-plaintiffs had indeed occupied the land as of the date of passage of ANCSA. Buettner's occupancy on the magic date, however, was disputed and, if there is no settlement, must be presented to the trier of fact. Judge Kleinfeld rejected arguments that attempted to add a requirement that the 14(c) claimant also had to occupy the land as of the date the land in question was interim conveyed or patented to the village corporation. He also suggested that village determinations of eligibility pursuant to 14(c) would not be subject to any deference in the court. At this time, most commentators agree either that Donnelly is wrong or is limited to its facts. Most 14(c) contests are now primarily factual matters not likely to be subject to appeal.

Section 14(c) cases are discussed in much more detail in the 1989 Update on Native Lands prepared by the Alaska Native Law Section. Section 14(c) is also likely to be discussed at the upcoming Second Annual Native Law Program.

24. Alaska Native Claims Settlement Act - Public Lands - Section 14(h)

In Haynes v. United States, appeal pending No. 88-3944, plaintiff seeks to be granted 160 acres pursuant to section 14(h)(5) of ANCSA, 43 U.S.C. section 1613(h)(5). The court must decide whether the United States may refuse to grant in full an Alaska Native primary place of residence entitlement up to 160 acres on lands where occupancy has been proven pursuant to section 14(h)(5) of ANCSA.

Up to 2 million acres of land may be distributed pursuant to section 14(h). The United States contends that an award of 160 acres to Haynes and similar substantial awards would result in a distribution of more than 2 million acres. Haynes sought to discover how much land was subject to claims and how the agency apportioned the land among claimants. The district court denied the discovery request and the request for more than four acres.

25. Alaska Native Claims Settlement Act - Navigability Determinations

In State of Alaska v. United States [Gulkana River], 662 F. Supp 455 (D. Alaska 1987), appeal pending, the District Court, Waters. J., held that the navigability of a particular water body was not dependent on nature of commerce conducted in region surrounding water body at any given time. The portion of the river in question was navigable in that it was capable of transporting people and goods and consequently was susceptible to use as highway for commerce. The Ninth Circuit heard oral argument in August, 1989. The parties disputed the specific test to be employed to determine the navigability of water bodies.

Judge von der Heydt and the Ninth Circuit address navigability questions in Alaska v. United States [Slopbucket Lake], 754 F.2d 851 (9th Cir.), cert. denied, 474 U.S.968 (1985). A law review article discussing submerged lands appeared in a recent issue of the Alaska Law Review. Hollomon, "The Struggle For Alaska's Submerged Land," V AK. L. Rev. 69 (1988).

Access and land exchange issues are discussed together in Chapter 73 of the American Law of Mining. The two issues are somewhat interrelated because of the desire to obtain access by exchange or some other means short of condemnation. Those attorneys involved in land exchange negotiations are extremely reticent even to acknowledge that there are on-going discussions. The terms of the land trades were disclosed in part in the newspapers in the Fall of 1987. Congress now requires approval before the trades can be effective. The newspaper recently discussed the efforts by Koniag, Inc. to trade for land in Nevada. What lands are traded and when the trades are completed is not certain, but there is far too much energy and enthusiasm behind the land exchange efforts for them to fail.

26. Alaska National Interest Lands Conservation Act - Title XI and Access Issues

In Trustees for Alaska et al. v. United States Dep't of the Interior, No. A87-055 (D. Alaska filed Feb. 9, 1987), plaintiffs challenge the regulations promulgated to implement Title XI of the Alaska National Interest Lands Conservation Act (ANILCA). Title XI is constituted of sections 1101-1113 and is codified at 16 U.S.C. sections 3161-3173. A recent law review article discusses Title XI in detail. Quarles & Lundquist, "The Alaska Lands Act's Innovations In The Law of Access Across Federal Lands: You Can Get There From Here," IV Alaska L. Rev. 1 (1987). The authors state:

> ANILCA became the focal point for innovations in access law for several reasons. In terms of acreage, ANILCA is the most significant federal conservation measure ever enacted. ANILCA added nearly 104 million acres of "conservation system units" ("CSUs") in Alaska--thereby doubling the size of the National Park and National Wildlife Refuge Systems, and tripling the size of the National Wilderness Preservation System. Congress recognized that existing law "allows only limited public access" across the massive CSUs, and enacted specific access guarantees to ensure "full rights of access" for CSU inholders.[fn.] Also recognizing that Alaska's "existing transportation and utility systems are in their embryonic stage of development," Congress provided for Alaska's economic growth by adopting "a procedure for future siting of transportation facilities . . . which supersedes rather than supplements existing law when such systems cross CSU lands."[fn.] Finally, Congress enacted specific access guarantees across BLM and Forest Service lands "to resolve any lingering questions by making it clear that non-Federal landowners have a right of access."[fn.]

Id. at 7-8 (citations omitted). The authors conclude:

> In response to several impediments to securing access across federal lands, Congress included in the Alaska Lands Act some of the most important and innovative provisions on access and rights-of-way yet enacted. In sections 1110(b) and 1323, ANILCA guarantees inholder access across CSUs in Alaska and the lands of the Forest Service and the BLM. A similar provision guaranteeing such access nationwide across all federal lands appears to be desirable. Responding to the immature stage of development of Alaska's transportation and utility systems, ANILCA provides uniform procedures for obtaining approval of such systems that cross federal lands. Although a wholesale application of similar procedures nationwide may be unwarranted, the authors conclude that Congress should establish uniform procedures and standards for the evaluation of all forms of rights-of-way across federal lands. Until such time as Congress so responds, Alaska may be the only state where the lament that "you can't get there from here" does not have an element of truth.

Id. at 36.

The case is assigned to Judge Kleinfeld and was before Magistrate Roberts for his report and recommendation. In January, 1989, Magistrate Roberts issued a lengthy report and recommendation discussing each of the regulations and addressing the most controversial provisions. He recommended upholding the regulations on the ground that they were not arbitrary or capricious or otherwise contrary to law. The motions to intervene filed by the Pacific Legal Foundation and Arctic Slope Regional Corporation were discussed and granted in June, 1989. These intervenors commented on the treatment of inholdings created after the passage of ANILCA in 1980. A final report and recommendation was filed in September, 1989. The report and recommendation is now before Judge Kleinfeld for his consideration and disposition. The case involves critical and complex access questions and is likely to be in the judicial system before the Niners and the Supremes over the next five years or more.

The case only involves the regulations promulgated pursuant to Title XI of ANILCA. Section 1323(a) and (b), codified at 16 U.S.C. section 3210(a) and (b), assures adequate access to inholdings located within the National Forest System and BLM-managed public lands, respectively. No regulations pursuant to this section are addressed in the above case. The Ninth Circuit held that the access provisions of section 1323(a), however, are not limited to Alaska but instead apply nationwide. Montana Wilderness Ass'n v. United States Forest Service, 655 F.2d 951 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982). The disposition of the case will have far-reaching consequences.

Section 1110(b) of ANILCA, 16 U.S.C. section 3270(b), the section that requires the Park Service to provide an applicant for an access permit with "adequate and feasible access for economic and other purposes," is mentioned in passing in United States v. Vogler, 859 F.2d 638, 641 (9th Cir. 1988).

These access questions were discussed at the Resource Development Conference on Alaska's Resources in February, 1989. The written materials are available from the RDC.

27. Federal Land Policy and Management Act - Section 314 - Recordation of Mining Claims

Section 314 of the Federal Land Policy and Management Act, codified at 43 U.S.C. section 1744, establishes filing requirements for the recordation of mining claims on public lands. The section requires a claimant within three years of the effective date of the Act to register claims with the Bureau of Land Management and thereafter to file annually with the BLM either a notice of intent to hold or proof of completion of the annual assessment work. The section was intended to provide an easy way of discovering which Federal lands are subject to either valid or invalid mining claim locations, but as implemented it has been used to deprive hundreds of miners, particularly small operators, of their claims. The regulations implementing the section were ambiguous, inconsistent and often amended. In Red Top Mercury Mines, Inc. v. United States, A87-326 (D. Alaska Sept. 19, 1988), aff'd, No. 88-4270 (9th Cir. Oct. 3, 1989), the Ninth Circuit adopted without comment Judge Holland's order dismissing plaintiff's complaint that plaintiff's efforts and documents did not constitute a notice of intent to hold the claim. The decision, issued ten years and a day after the effective date of FLPMA, and dozens of decisions before have proven the prescience of an observation made by an Anchorage attorney ten years ago.

> Harsh and inflexible interpretations of the claim recordation provision have put claimholders in fear of forfeiture and resulted in a widespread conviction that, come October 2, 1979, only commercial claimholders will be sophisticated and wealthy enough to interpret and comply with the myriad and ever-changing regulations which FLPMA has engendered.

DeStefano, "The Federal Land Policy And Management Act and The State of Alaska," 21 Ariz. L. Rev. 417, 423 n.99 (1979). Volume 21 of the Arizona Law Review contains more than a dozen articles discussing FLPMA. For more information on the legislative history of the FLPMA beyond the standard legislative history included in the United States Code Congressional and Administrative News, there is a four inch volume of legislative history in the Alaska collection in the Federal District Court Library.

For many miners, section 1744 was their 1984. Many miners in Alaska and elsewhere see in the Mining Bill of 1989 the same nightmares that were engendered by FLPMA.

Ben Franklin intended to declare that there are three certainties in life - death, taxes and bankruptcy. Two cases involving lien stripping of property are of interest to real estate practitioners. The first case discussed below involves a chapter 7 action, the chapter enabling an individual to liquidate his or her assets, and the second case involves a chapter 13 action, the chapter allowing an individual to reorganize his or her economic affairs. The divergent conclusions reached in the two cases are plausible in light of the different purposes of a chapter 7 and a chapter 13 action.

28. Bankruptcy - Lien Stripping in a Chapter 7 Proceeding

Judge Ross issued a written opinion in a case seeking to "strip down" the amount of the secured claim of the bank in a chapter 7 proceeding. In Larson v. Alliance Bank, Adv. No. A-88-00291-001 (Bankr. Alaska April 14, 1989), debtors in the chapter 7 case/plaintiffs in the adversary proceeding sought to strip down the amount of the claim secured by a deed of trust on nonexempt real estate, a commercial building, from the total amount owed on the debt to a lesser amount equal to the decreased value of the property. The value of the real estate was substantially less than the balance owed the bank.

The court states that the key question boils down to whether section 506(d) can be used to strip down a lien for the benefit of a chapter 7 debtor as an adjunct to the debtor's "fresh start" in a situation involving nonexempt property that the trustee is abandoning. The court held: "To subject a creditor to the vagaries and uncertainties of a valuation hearing where the strip down serves no valid chapter 7 purpose and is not an element of an honest debtor's fresh start is unfair to the creditor." The court states, however, that in a situation involving nonexempt property involved in a reorganization or liquidation case or in a case involving exempt property, in particular a residence, there may be some logical justification for stripping down the property. The instant decision involves an attempt by the debtor rather than by the trustee to strip down the lien. The decision has been appealed to the Bankruptcy Appellate Panel (BAP). Other cases involving some of these latter facts and circumstances are proceeding in the bankruptcy court.

If the decision is reversed by the BAP, an individual or entity paying on a home or building worth less than the amount owed could simply go into bankruptcy and "strip down" the value of the lien. The individual or entity may have some tax implications, although the tax consequences in a chapter 7 proceeding are usually borne by the entity known as the bankruptcy estate. The stigma of a bankruptcy may still be considered undesirable, although it seems to be a rite of passage today in Alaska. The consequences to lenders of a reversal are ominous.

29. Bankruptcy - Lien Stripping in a Chapter 13 Proceeding

In a few recent cases, Judge Ross indicated from the bench that he intended to issue a short opinion allowing the debtor in a chapter 13 action to strip down the value of a lien on his or her residence to the fair market value of the property.

The following discussion was posted on the bulletin board of the bankruptcy court by Judge Ross. [Judge Ross' continuing efforts to inform the members of the bar of recent decisions should not be cited as authority.]

"On October 4, 1989, the 9th Circuit held, in In re HOUGLAND, 1989 U.S. App. LEXIS 15083, that a debtor in a chapter 13 case can reduce to the value of the residence the "secured claim" of a creditor holding a security interest only in the debtor's residence. Many residential properties in Alaska, purchased within the last 7 years, are worth less than the amount owed against them.

There is a conflict in court rulings from other jurisdictions concerning the interpretation of 11 U.S.C. Section 1322(b)(2). This section says that a chapter 13 plan may:

> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtors principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims ... [Emphasis added.]

11 U.S.C. Section 506(a) provides that a claim is secured only to the extent of the value of the property on which the lien is fixed. The remainder of that claim is considered unsecured.

Some courts hold that the debt secured by the security interest in only a residence cannot be modified by a chapter 13 plan. Others say that the "secured claim" can be limited to the value of the collateral, even though this is less than the amount of the debt.

The conclusion of the 9th Circuit in HOUGLAND is:

> Congress quite plainly has provided for the separation of undersecured claims into two components--a secured component and an unsecured component. It has then provided for their treatment in Chapter 13 proceedings. The secured portion has special protection when residential real estate lending is involved. The unsecured portion does not."

The decision is also discussed in the Saturday, October 14, 1989 "Anchorage Daily News."

The case is seen by some as a panacea for the ills of the Alaska homeowner. An individual contemplating the possibilities of a chapter 13 action should consult a reputable bankruptcy attorney. There are a number of considerations to ponder. An individual who is substantially in arrears and an individual who is making too much disposable income are not good candidates for a chapter 13 proceeding. To file a chapter 13 action, an individual must meet the definition of a wage earner and fit within the debt limits of the Code. 11 U.S.C. section 109(e). The debtor must propose a plan. 11 U.S.C. section 1321. The typical plan is for a term of three years. See 11 U.S.C. section 1322(c).

The bankruptcy court, upon motion by the debtor, can strip down the value of the lien on a personal residence to its fair market value. The debtor is likely to suggest that the Municipality green card is a fair indication of value. The creditor is likely to obtain an appraisal. The debtor can then come back with another appraisal. Appraisers are doing a land-office business in this economy. The amount of the debt that is actually secured by the property is deemed a secured claim. The remaining amount is an unsecured claim and must be paid off at least in part over the course of the plan. Any arrears for past payments must also be paid off in a reasonable period of time, probably within the term of the plan.

A chapter 13 debtor must dedicate all disposable income to the plan to cover secured and unsecured claims. One of the battles will be over what is necessary living expenses. A debtor's claim that his regular expenditure of $500 a month at Chilkoot Charlie's is reasonable and hence a necessary living expense is likely to be challenged. The creditor is likely to suggest that the debtor buy a short rack of Bud and watch the late show. The bankruptcy court does not have the authority to modify the terms of the note. Thus, the amount that must be paid each month is not reduced. A debtor who is cash-pinched is still in dire straits. The property, however, will be paid off sooner. One of the ironies or antinomies of the decision is that the modification of the term of the payoff is in fact a modification of the terms of the note. If the property is subsequently sold, one practitioner contends that the basis is still the amount stated in the note.

The decision does not state expressly that it does not apply to chapter 7 proceedings. The consequences to a chapter 13 debtor converting in midstream to a chapter 7 proceeding are not clear. If the HOUGLAND case applies to both chapters, a debtor might be benefitted more in the chapter 7 proceeding. A chapter 7 debtor typically does not suffer any tax consequences because they are borne by the bankruptcy entity known as the estate. If the decision does not apply to a chapter 7 proceeding, the chapter 13 debtor converting in midstream to a chapter 7 proceeding may lose the benefit of the lien strip down. The consequences of Hougland are still not entirely clear.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

A number of bills are before the Alaska Legislature to revise the Alaska Landlord and Tenant Act. The common thread in the proposals is a reduction in the notice times that must be afforded tenants.

The Alaska Railroad Corporation (ARRC) recently adopted its Public Entity Lease Policy that sets forth its guidelines and principles upon which the ARRC will lease property to the State of Alaska and its political subdivisions.

The Housing and Urban Development (HUD) recently adopted final rules and regulations to implement changes in Title VIII of the Civil Rights Act of 1968. The Amendments expand the coverage of Title VIII to prohibit discriminatory housing practices based on handicap and familial status, establish an administrative and judicial enforcement mechanism for cases where discriminatory housing practices cannot be resolved informally, and provide for monetary penalties in cases where housing discrimination is found. The Amendments also establish design and construction requirements for certain new multifamily dwellings for first occupancy on or after March 13, 1991 (30 months after the date of enactment) and an exemption from the prohibitions against discrimination on the basis of familial status for certain housing for older persons.

The final rules adopt new regulations describing the nature of conduct made unlawful with respect to the sale, rental and financing of dwellings or in the provision of services and facilities in connection therewith (24 C.F.R. Part 100); establishing procedures for the investigation of complaints of discriminatory housing practices (24 C.F.R. 103); and establishing procedures for administrative proceedings involving discriminatory practices (24 C.F.R. Part 104).

Senate Bill 1126, the Mining Law of 1989, has been introduced in the United States Congress to rectify perceived problems with the Mining Law of 1872, 30 U.S.C. sections 26 et seq.. The bill requires retention of public ownership of land and establishment of leasing and royalty requirements on federal lands. The bill is before a Senate Committee and is likely to be acted on in this or the next Congress.

PROGRAMS

The Bankruptcy Section discussed the "Depression" defense to judicial foreclosures in late 1988. Two cases, Hayes (discussed above) and Great Northern Insured Annuity Corp. v. 201 Danner Office Bldg. et al., Case No. 3AN-88-3488 (now settled), were discussed.

The Young Lawyer's Section of the Anchorage Bar Association and the Real Estate Section sponsored a tour of the TransAlaska Title Company plant on November 29, 1988.

The Tax Section discussed the tax consequences of foreclosures on January 11, 1989.

The Real Estate Section sponsored a Continuing Legal Education program the new Recording Act on January 26, 1989.

The Natural Resources Section discussed recent developments in R.S. 2477 rights of way matters on February 1, 1989.

The Alaska Bar Association sponsored a CLE on Loan Documentation in March, 1989 that includes, among other things, a discussion of language designed to address the legislation enacted in response to the Moening and Conrad decisions.

The Real Estate Section sponsored a tour of the Stewart Title Company plant on May 4, 1989.

The Real Estate Section sponsored a program on Current Foreclosure Issues on July 18, 1989.

PUBLICATIONS

Warren, "Rosenberg v. Smidt: Dramatic Ramifications For Nonjudicial Foreclosure Sales In Alaska?," V AK. L. Rev. 357 (December 1988).

Hollomon, "The Struggle For Alaska's Submerged Land," V AK. L. Rev. 69 (June 1988).

William McNall and Jerome Erickson wrote an article on the tax consequences of a foreclosure. "The Tax Consequences of a Foreclosure," Alaska Bar Rag, January/February 1989, p. 4.

Stephen Greer also wrote an article on the tax consequences of foreclosures. "Foreclosure Tax Consequences," Alaska Bar Rag, March/April 1989, p. 4.

Frank Nosek, "The deceptive deed-in-lieu of foreclosure," Alaska Bar Rag, July/August 1989, p. 5.