Creditors' vs. Debtors' Rights Under Alaska Foreclosure Law: Which Way Does the Balance Swing?

This Note examines traditional secured transaction law in Alaska as well as recent developments in the judiciary and legislature that have helped shape the balance of rights and protections currently offered to mortgage creditors and debtors. To better judge the choices Alaska has made in establishing this balance, the Note compares Alaska's choices to the secured transaction laws and related policies in California, Oregon and Washington. The Note concludes with the view that while the recent changes to the Alaska statutory scheme have moved the balance more in the debtors' favor, the scheme as a whole still largely favors creditors, and that given the boom or bust nature of the Alaskan economy, which is still largely dependent upon the swings of the oil industry, the legislature should take the opportunity to move the balance more toward the center.

I. INTRODUCTION

Under the common law, a creditor holding a promissory note secured by a mortgage[1] or deed of trust[2] on real property has two

1. A mortgage is "an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt." BLACK'S LAW DICTIONARY 1009 (6th ed. 1990). In traditional common law, and still in certain states, a mortgage is regarded as "a conveyance of the legal title . . . subject to defeasance on payment of the debt or performance of the duty." *Id.* at 1010. In most other states, including Alaska, a mortgage is regarded as a form of lien, *i.e.* a pledge or security, rather than an actual conveyance. *Id.* The mortgagor is "that party to a mortgage who gives legal title or a lien to the mortgagee to secure the mortgage loan." *Id.* at 1012. The mortgagor is therefore the debtor, and the mortgagee is the party that takes or receives the pledge, *i.e.* the creditor.

2. A deed of trust is "an instrument . . . taking the place and serving the uses of a mortgage, by which the legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions." *Id.* at 414. A grantor is the party offering the deed to property to the trustee as the collateral for a loan obligation, *i.e.* the debtor, and a beneficiary is the party for whom the property is held in trust, *i.e.* the creditor. Under Alaska law, "a deed of trust, given to secure an indebtedness, shall be treated as a mort-

possible remedies following default and acceleration[3] of the loan obligation: the creditor may foreclose the security, or may ignore the security and seek a personal judgment on the note. Furthermore, if permitted by statute and if the mortgage or deed of trust so provides, the creditor may foreclose on the property either judicially or nonjudicially.[4] Each type of remedy is associated with different rights and protections for both creditors and debtors. Often, efforts to recover under one of these remedies will not satisfy the debt in full. Creditors may therefore try to recover under several alternative remedies, either within a single complaint, in simultaneous yet separate claims or in sequential actions.

State law determines which remedies are available to creditors and debtors, what rights will be associated with each remedy and whether separate or subsequent actions may be used to ensure collection of the full debt obligation. If a state does allow separate or subsequent actions, state law will likewise dictate the order in which the remedies may be pursued. By crafting statutory schemes regarding foreclosure and having these laws interpreted in the courts, state governments carefully balance the rights and protections between creditors and debtors, and between judicial and nonjudicial foreclosure. While the same general remedies and protections are common throughout the states, the manner in which each legislature limits and balances these components makes nearly all the states unique, with some states more favorable to creditors and others more favorable to debtors.

This Note examines traditional secured transaction law in Alaska as well as recent developments in the judiciary and legislature that have helped shape the balance of rights and protections currently offered to mortgage creditors and debtors. To better judge the choices Alaska has made in establishing this balance, the Note compares the options chosen by three other states. Part II begins with an outline of general common law rights and protec-

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gage of real estate .... The person who makes or executes the deed of trust shall be indexed as 'mortgagor,' and the trustee and the beneficiary . . . as the 'mortgagees.'" ALASKA STAT. § 34.20.110 (Michie 1996).

3. When a debtor breaches the loan agreement, *i.e.* defaults, normally the creditor has the right to make the entire debt due and payable, which is called "acceleration." GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.1 (2d ed. 1985).

4. Nonjudicial foreclosure results when the creditor sells the property without first instituting an action in court to secure a decree of foreclosure and order of sale. *See* ALASKA STAT. § 34.20.70(a) (Michie 1996). This is also known as foreclosure by power of sale. *See* BLACK'S LAW DICTIONARY 646, 1172 (6th ed. 1990).

tions associated with particular remedies. It then looks more deeply at secured transaction law in California, which is the most unique among the states, and sets the standard after which several states have modeled their own statutory schemes. Finally, Part II examines the law in Oregon and Washington, states faced with policy considerations similar to those confronting Alaska, yet whose statutory schemes differ significantly from Alaska's.

Part III examines secured transaction law in Alaska, including recent legislative and judicial developments in the field. Part IV analyzes the policy goals, similar to those held by the states studied in Part II, that underlie the Alaska statutory scheme. Part IV then compares the manner in which all four states choose to reflect these policy goals in balancing the rights and remedies of creditors and debtors, and measures where Alaska falls on the spectrum of creditor-debtor rights. Part V concludes with the view that while the recent changes to the Alaska statutory scheme have moved the balance more in the debtors' favor, the scheme as a whole still largely favors creditors. Although the vulnerability of debtors may seem less pressing due to recent prosperity and economic diversity that should provide greater stability to the traditionally "boom or bust" Alaska economy,[5] debtors remain in need of additional protection, and the legislature should work to move the creditor-debtor balance more toward the center.

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5. By 1986, "nearly 90[%] of Alaska's revenue [came] from oil and gas taxes and royalties." *Sharp Decline In Oil Prices Forcing Alaska Into Recession*, SEATTLE TIMES, Mar. 17, 1986, at B1. Thus the economic fortunes of the state relied almost entirely on the oil industry, as shown by the "decade-long cycle of expansion and speculation" leading up to the sudden drop in oil prices in 1985, and by the deep recession that followed. Michael Zielenziger, *Overbuilding In Alaska Makes Boom Go Bust*, CHI. TRIB., Sept. 27, 1987, at 1F; *see infra* notes 211-15 and accompanying text.

A large cash infusion as part of the Exxon Valdez oil spill cleanup and the oil price increase resulting from the Gulf War were largely responsible for pulling Alaska out of that recession. *See* Gloria Collins, *Residential Real Estate Bounces Back*, ALASKA BUS. MONTHLY, May 1, 1991, at 14; Jeffrey Richardson, *Anchorage's Recession Recovery Is Slow . . . But Real*, ALASKA BUS. MONTHLY, Dec. 1, 1990, at 33. In addition, advances in the construction, tourism, timber, fishing and hard rock mining industries have not only helped to pull the state out of the recession, but have given the economy a more diversified foundation with which to face any future fluctuations in oil prices. *See* Governor Tony Knowles, *Governor Announces Alaska Economy at Historic Highs*, Press Release #95-203 (Aug. 24, 1995).

II. REMEDIES AND PROTECTIONS IN OTHER STATES

A. General State Law

1. *Available remedies.* Traditionally, a creditor may choose between two general categories of remedies in order to collect on a defaulted promissory note secured by a mortgage or a deed of trust. The first type of remedy is foreclosure of the security.[6] However, the use of a mortgage or a deed of trust to secure the debt does not by itself imply that the creditor is to look only or primarily to foreclosure of the security for payment of the debt.[7] Thus, in the absence of a statutory restriction, "the holder of the note and mortgage is not required first to foreclose the mortgage but may bring his action on the note alone."[8] This is the second general type of creditor remedy. While a judgment on the note merges the debt into the judgment, it does not merge the mortgage, and therefore "does not preclude its foreclosure in a subsequent suit . . . or the exercise of [nonjudicial foreclosure]."[9] Where it is not prohibited by statute, "the mortgagee may pursue all his remedies concurrently or successively."[10]

While a suit on the note is relatively straightforward, the specifics of foreclosure proceedings vary widely among the states. In a large majority of the states, foreclosure can be broken down into two types: judicial and nonjudicial.[11] When viewed in light of the

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6. Foreclosure is "[a] proceeding in equity whereby a mortgagee either takes title to or forces the sale of the mortgagor's property in satisfaction of the debt." BLACK'S LAW DICTIONARY 646 (6th ed. 1990).

7. *See* 55 AM. JUR. 2D *Mortgages* § 517 (1996).

8. 3 LEONARD B. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 1572 (8th ed. 1928). For examples of such actions, see Anderson v. Warren, 164 P.2d 221, 223 (Okla. 1945); Universal Credit Co. v. Wyoming Motor Co., 136 P.2d 512, 515 (Wyo. 1943); Page v. Ford, 131 P. 1013, 1021 (Or. 1913).

9. 55 AM. JUR. 2D *Mortgages* § 524 (1996). Some good examples of judicial foreclosure are Berg v. Liberty Fed. Sav. & Loan Ass'n, 428 A.2d 347 (Del. 1981); Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg., 393 P.2d 749 (Colo. 1964); Klondike, Inc. v. Blair, 211 So. 2d 41 (Fla. Dist. Ct. App. 1968).

10. JONES, *supra* note 8, § 1565 (citing Gilman v. Illinois & Miss. Tel. Co., 91 U.S. 603, 616 (1875)).

11. Only Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, New Jersey, North Dakota, Ohio, Pennsylvania, South Carolina, Vermont and Wisconsin have no provisions for nonjudicial foreclosure. *See* A.B.A. SECTION ON REAL PROPERTY, PROBATE & TRUST LAW, FORECLOSURE LAW & RELATED REMEDIES: A STATE BY STATE DIGEST (Sidney A. Keyles et al. eds.

"delay and expense incident to [judicial foreclosure],"[12] nonjudicial foreclosure offers substantial benefits to creditors. It provides a less expensive, quicker and easier method than judicial foreclosure for satisfying a loan obligation. There is no need to petition the court for a deed of foreclosure and an order of sale,[13] and notice requirements are usually less rigorous.[14] Also, by replacing the lengthy, complicated procedures that make judicial foreclosure unattractive to creditors, nonjudicial foreclosure helps alleviate the workload of often overcrowded court systems. Yet to offset the benefits nonjudicial foreclosure affords creditors, in most jurisdictions the sales must be confirmed by a court, and in others a sheriff, public trustee or other official must conduct the sale.[15]

2. *Redemption.* To further level the playing field between creditors and debtors, every state offers the debtor/mortgagor some form of equitable redemption, whereby the mortgagor has the right to perform his or her full obligation under the mortgage and thereby have title to the security restored free of the mortgage.[16] The right to cure the default under equitable redemption is available only after default and before a valid foreclosure sale.[17] Some states offer a further statutory right to de-accelerate the loan obligation by allowing the mortgagor to pay the amount that would be due at that time if no default had occurred.[18] This right, which is becoming increasingly common among the states,[19] runs for a set length of time following default, but usually ends before the foreclosure sale. The process is often termed "reinstatement," because when the debtor de-accelerates the obligation in this manner, the mortgage or deed of trust is reinstated as if no default had occurred. To prevent abuse of the reinstatement process, states often require the debtor to pay the creditor's legal fees and other costs associated with the default, and may also prescribe the number of times a debtor may reinstate the loan obligation in this manner before the creditor has a right to

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1995) [hereinafter DIGEST].

12. JONES, *supra* note 8, § 2285.

13. *See id.*

14. *See* NELSON & WHITMAN, *supra* note 3, § 7.19.

15. *See* 55 AM. JUR. 2D *Mortgages* § 532 (1996).

16. *See* NELSON & WHITMAN, *supra* note 3, § 7.1.

17. *See id.*

18. *See, e.g.*, CAL. CIV. CODE § 2924c(a)(1) (West 1987 & Supp. 1997); OR. REV. STAT. § 86.753 (1988); WASH. REV. CODE ANN. § 61.24.090 (West 1990).

19. *See* NELSON & WHITMAN, *supra* note 3, § 7.7.

refuse reinstatement.[20]

In addition to equitable redemption and reinstatement, about one-half of the states have established statutory rights of redemption that allow the mortgagor to redeem the property for a set period after a valid foreclosure sale.[21] To redeem the property under these rights, the debtor must pay the purchaser the foreclosure sale price plus any taxes or other costs paid by the purchaser due to the sale.[22] Many states enhance the benefits of nonjudicial foreclosure by offering a statutory right of redemption following a judicial foreclosure sale, but not following a nonjudicial sale.[23] However, the states usually offset any restriction of the debtor's right of redemption by restricting the creditor's right to a deficiency judgment.[24]

3. *Deficiency judgments.* Since most foreclosure sales are forced sales, the price obtained for the property is rarely the full market value as reflected in the mortgage or deed of trust. For this reason, most states allow the creditor to obtain a judgment for any deficiency between the amount of the debt obligation and the amount received from the foreclosure sale.[25] This is usually accomplished by directing the courts in judicial foreclosure proceedings to render a personal judgment for any deficiency that remains after applying the proceeds from the foreclosure sale to the debt obligation.[26] In this manner, a complaint requesting both foreclosure and deficiency decrees is viewed as stating only one cause of action, and the deficiency judgment is considered a necessary incident of a foreclosure suit.[27]

In economic hard times, such as the Great Depression of the 1930's and the recession in the 1970's, provisions for deficiency judgments have resulted in abuses by creditors. During these periods, "[f]oreclosures were pervasive, and few had the courage or the capital to bid at foreclosure sales . . . [which,] in turn, led to large deficiency judgments against mortgagors, resulting in the

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20. *See id.*

21. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1282(A) (West 1994); KAN. STAT. ANN. § 60-2414(a) (Supp. 1993); NEV. REV. STAT. § 21.210 (1996).

22. *See* NELSON & WHITMAN, *supra* note 3, § 7.1.

23. *See infra* notes 55-56, 87, 89, 122, 126 and accompanying text.

24. *See infra* notes 57, 64, 91, 94, 127-29, 132 and accompanying text.

25. *See* NELSON & WHITMAN, *supra* note 3, § 8.1.

26. *See id.* § 7.4; Perpetual Bldg. & Loan Ass'n v. Braun, 242 S.E.2d 407 (S.C. 1978).

27. *See* Shepherd v. Pepper, 133 U.S. 626, 651-52 (1890); Jamaica Sav. Bank v. M. S. Investing Co., 8 N.E.2d 493, 494 (N.Y. 1937).

'complete ruin of the real estate mortgage debtor.'"[28] The mortgagor, at either a judicial or nonjudicial foreclosure sale, could "acquire the property for pennies on the dollar, sell the property on the open market at a much higher price, and then sue the borrower for the deficiency."[29] In this manner, the mortgagor had an incentive to conduct the foreclosure sale in a way that created the possibility of "a double recovery at the expense of the financially burdened borrower."[30] In response, many states enacted anti-deficiency statutes that remain to this day.[31]

In judicial foreclosure, where courts have greater oversight and responsibility for the proceedings, anti-deficiency legislation often takes the form of "fair value," "minimum bid" or "upset price" statutes.[32] These laws allow a court to determine the fair market value of the security and then either to refuse confirmation of the foreclosure sale if the price is below the "upset price" or "minimum bid," or to apply the determined "fair value" of the property when calculating the deficiency from the sale.[33] Since nonjudicial foreclosure is often outside the oversight of the court, anti-deficiency statutes often entirely eliminate the ability to supplement deficient nonjudicial foreclosure sales.[34]

Since most states allow a creditor to pursue foreclosure and an action on the note concurrently or consecutively, a creditor may choose to collect on a deficiency from a foreclosure sale by filing a subsequent suit on the note, or vice versa.[35] However, if a subsequent and separate action for one type of remedy is filed to supplement a deficient judgment on another type, some state courts may find that the claim preclusive effect of res judicata creates an

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28. Carol Burns, Comment, *Will Refinancing Your Home Mortgage Risk Your Life Savings? Refinancing And California Code Of Civil Procedure Section 580b*, 43 UCLA L. REV. 2077, 2081 (1996) (quoting Sol P. Perlman, *Mortgage Deficiency Judgments During An Economic Depression*, 20 VA. L. REV. 771, 771 (1934)).

29. James S. Hering, Comment, *Real Property Foreclosure In Texas: What Is Deficient About The Texas Deficiency Judgment Statute?*, 37 S. TEX. L. REV. 377, 380 (1996).

30. *Id.*

31. *See* NELSON & WHITMAN, *supra* note 3, § 8.3.

32. *See id.* §§ 7.16, 8.3.

33. *See id.*

34. *See, e.g.*, CAL. CIV. PROC. CODE § 580d (West 1976 & Supp. 1997); OKLA. STAT. ANN. tit. 12, § 686 (West 1988 & Supp. 1997); OR. REV. STAT. § 86.770(2)(a) (1988 & Supp. 1996); WASH. REV. CODE ANN. § 61.24.100 (West 1990 & Supp. 1997).

35. *See* NELSON & WHITMAN, *supra* note 3, § 8.1.

election of remedies and thus bars the subsequent action.[36] In addition to the courts, state legislatures may also eliminate deficiency judgments by enacting one-action rules that create an election of remedies.

4. *One-action rules.* To increase the protections for debtors, a number of states have enacted statutes, called "one-action rules," that require a creditor to pursue its remedies in a single action, and usually require a mortgagee to exhaust the security first when satisfying the debt.[37] Seeking a specific remedy will preclude any other remedies that might normally be available to the creditor.[38] Typically, the purpose behind such one-action rules is

> "to protect the mortgagor against multiplicity of actions when the separate actions, though theoretically distinct, are so closely connected that normally they can and should be decided in one suit . . . [and] to compel a creditor who has taken a mortgage on land to exhaust his security before attempting to reach any unmortgaged property to satisfy his claim."[39]

Along with the anti-deficiency statutes mentioned above, one-action rules are intended to guide the creditor back toward judicial foreclosure, which offers greater oversight protection by the courts and lengthier proceedings than those under nonjudicial foreclosure, thus allowing a greater opportunity for equitable redemption or reinstatement.[40]

The balancing of rights and protections for creditors, such as

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36. The doctrine of res judicata provides that "a judgment 'on the merits' in a prior suit involving the same parties or their privies bars [a subsequent claim] based on the same cause of action." Lawlor v. National Screen Serv., 349 U.S. 322, 326 (1955). 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 . . . out of which the action arose." RESTATEMENT (SECOND) OF JUDGMENTS § 24(a) (1982).

37. *See, e.g.*, CAL. CIV. PROC. CODE § 726(a) (West 1980 & Supp. 1997); IDAHO CODE § 6-101 (1990 & Supp. 1996); NEV. REV. STAT. ANN. § 40.430 (Michie 1996); UTAH CODE ANN. § 78-37-1 (1996). Other states that have some kind of one-action rules are Connecticut, Iowa, Kansas, Michigan, Montana, Nebraska, New Jersey, New York, North Dakota, South Carolina, South Dakota and Washington. *See generally* DIGEST, *supra* note 11.

38. *See* DIGEST, *supra* note 11, at xiv.

39. FDIC v. Shoop, 2 F.3d 948, 950 (Mont. 1993) (quoting GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 334, at 701 (2d ed. 1970)); *see also* Walker v. Community Bank, 518 P.2d 329, 333 (Cal. 1974); Milton Widem, *Deficiency Judgments Arising Out of Foreclosure Actions,* REAL ESTATE FORECLOSURES 61, 68 (James L. Lipscomb et al. eds., 1992).

40. *See* Burns, *supra* note 28, at 35.

the remedy of nonjudicial disclosure and deficiency judgments, with rights and protections for debtors, such as anti-deficiency statutes and one-action rules, underlies the foreclosure and secured transaction law in each state. Examining the statutory schemes in a few surrounding states will be helpful in analyzing the current and former foreclosure law in Alaska.

B. California Jurisprudence

1. *Available remedies.* In California, creditors faced with a defaulted mortgage or deed of trust may choose either judicial or nonjudicial foreclosure, or may ignore the security and file suit on the underlying debt. If pursuing judicial foreclosure, filing the complaint is adequate notice of default, absent a contrary contractual arrangement.[41] Once the complaint is filed, the parties conduct discovery, and then, either upon motion or after a trial, the court may grant a decree of foreclosure.[42] This process can take anywhere from a few months to several years, depending upon the length of discovery, the necessity for a trial and the status of the court's calendar.[43]

If the court grants a decree of foreclosure, the creditor obtains a writ of sale from the court clerk, which the creditor then gives to the sheriff or receiver appointed by the court. The sheriff or receiver then executes a notice of levy, and serves the notice on the debtor.[44] So long as the debtor does not have a right of redemption, the creditor must wait at least 120 days after the notice of levy has been served before a notice of sale can then be served on the debtor.[45] The notice of sale will set the date and the specifics of the foreclosure sale, and the sale may not occur until at least twenty days after service of the notice of sale.[46] If the debtor does have a right of redemption, then "notice of sale may be given upon entry of the judgment for sale of the property," and the creditor need not wait 120 days.[47]

Since the lengthy and detailed nature of judicial foreclosure usually results in delay and expensive legal fees, the California

41. *See, e.g.*, Title Guar. & Trust Co. v. Fraternal Fin. Co., 30 P.2d 515, 516 (Cal. 1934).

42. *See* DIGEST, *supra* note 11, at 41.

43. *See id.*

44. *See id.* at 43; CAL. CIV. PROC. CODE § 700.015 (West 1987 & Supp. 1997).

45. *See* CAL. CIV. PROC. CODE § 701.545 (West 1987).

46. *See id.*

47. *Id.* § 729.010(b)(2) (Supp 1997).

legislature enacted the more streamlined option of nonjudicial foreclosure. Nonjudicial foreclosure by trustee's sale commences once a notice of default is recorded in the office of the county recorder.[48] This notice must be mailed to the debtor within ten business days of the filing date.[49] At least three months after the notice of default has been filed, but at least twenty days prior to the foreclosure sale, the creditor must mail to the debtor a notice of sale giving the date and specifics of the foreclosure sale.[50] As is readily apparent, nonjudicial foreclosure in California is a much shorter, less complex and less expensive option than judicial foreclosure.

2. *Redemption.* California has long recognized the common law equity of redemption.[51] In both judicial and nonjudicial foreclosure proceedings, until completion of the foreclosure sale, the debtor has the ability to redeem the security by paying the full amount due under the mortgage or deed of trust plus any damages caused by the default.[52] In addition to equitable redemption, a debtor in California may reinstate the mortgage or deed of trust by paying all of the principal, interest payments and other costs due on the obligation at the time of reinstatement, plus any costs associated with the default.[53] The debtor may exercise the right of reinstatement until the court issues a decree of foreclosure in a judicial proceeding, or until five business days prior to the date set for the foreclosure sale in a nonjudicial proceeding.[54]

In addition to the rights of equitable redemption and reinstatement, the debtor may exercise a statutory right to redeem the property after the foreclosure sale whenever a creditor retains a right to a deficiency judgment.[55] Once the sale is completed, the debtor may redeem the property up to one year after the date of the sale, except if the proceeds of the sale are sufficient to satisfy the underlying debt, in which case the debtor has three months from the date of sale to redeem the property.[56] Since the creditor has no right to a deficiency judgment in nonjudicial foreclosure, the debtor likewise has no right of redemption following a trustee's

48. *See* CAL. CIV. CODE § 2924 (West 1993 & Supp. 1997).
49. *See id.* § 2924b(b)(1).
50. *See id.* § 2924b(b)(2), (c)(3).
51. *See* Wilson v. Brannan, 27 Cal. 258, 270 (1865).
52. *See* CAL. CIV. CODE §§ 2903, 2905 (1993).
53. *See id.* § 2924c(a)(1).
54. *See id.*
55. *See* CAL. CIV. PROC. CODE § 729.010 (Supp. 1997).
56. *See id.* § 729.030.

sale.

3. *Deficiency judgments.* The statutory scheme in California has intricate provisions for deficiency judgments that depend upon the remedy sought by the creditor. A deficiency judgment is allowed following a foreclosure sale, so long as the mortgagee has not waived the option and it is not prohibited under California Code of Civil Procedure section 580b.[57] However, a deficiency judgment is limited to the amount by which the full debt obligation exceeds the fair market value of the property, not the amount it exceeds the purchase price from the sale.[58] This "fair value" provision thereby remedies the evil of double recovery often associated with deficiency judgments.

Creditors may not obtain a deficiency judgment where the mortgage "is given to secure the unpaid portion of the purchase price of real property."[59] The character of the note determines whether the loan is classified as a purchase money loan, and this classification is made according to the facts at the time the loan was made rather than when notice of default was filed.[60] If the loan was given by a vendor, or by a third-party lender to secure payment of a borrower-occupied dwelling to be used by four or fewer families, there can be no deficiency decree.[61] The purpose behind this statute is to discourage vendors from overvaluing the security, and to avoid burdening defaulting purchasers with personal liability.[62] One concern with burdening the mortgagors is that this would aggravate the economic downturn responsible for the decline in property values that caused the deficiency in the first place.[63]

In California, there is virtually a complete bar on deficiency judgments following nonjudicial foreclosure sales.[64] This provision

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57. *See id.* § 726(b).

58. *See id.*; Roseleaf Corp. v. Cheirighino, 378 P.2d 97, 99 (Cal. 1963) (en banc).

59. Winklemen v. Sides, 88 P.2d 147, 158 (Cal. Ct. App. 1939); CAL. CIV. PROC. CODE § 580b (West 1972 & Supp. 1997).

60. *See* Andrew A. Bassak, Comment, *Secured Transaction Guarantors In California: Is It Time To Reevaluate The Validity And Timing Of Waivers Of Rights?*, 32 SANTA CLARA L. REV. 265, 270 (1992).

61. *See* CAL. CIV. PROC. CODE § 580b.

62. *See Roseleaf*, 378 P.2d at 102.

63. *See id.*

64. *See* CAL. CIV. PROC. CODE § 580d. The only exceptions are for instruments authorized by the Commissioner of Corporations or issued by public utilities. *See id.*

is intended "to put judicial enforcement on a parity with private enforcement," because "[i]f a creditor wishes a deficiency judgment, [he must choose judicial foreclosure, and] his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forgo the right to a deficiency judgment [and choose nonjudicial foreclosure]. In either case, the debtor is protected."[65]

4. *One-action rule.* Secured transaction law in California is perhaps best known for its one-action rule. While a creditor in California may attempt to ignore the security and instead sue on the underlying debt, California Civil Procedure Code section 726 states "there can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property[,] . . . which action shall be in accordance with the provisions of this chapter [concerning actions for the foreclosure of mortgages]."[66] Thus, if a mortgagee files a suit on the note, the mortgagor may invoke the statute as an affirmative defense in order to force the mortgagee judicially to foreclose the security instead.[67]

If the mortgagor does not assert this defense, and the mortgagee begins a foreclosure action to remedy a prior deficient judgment on the note, the mortgagor can invoke the sanction effect of the statute.[68] Under the sanction effect, the subsequent action will be dismissed, since "where a creditor elects to obtain a personal money judgment rather than enforce his mortgage, the effect of the election is to waive the right to foreclose on his security."[69] Thus, by obtaining a judgment on the note, the creditor "loses all right to his security, thereby relegating himself to the position of an ordinary judgment creditor."[70] The practical effect of the statute is to eliminate the option of pursuing an action on the note first and then judicially foreclosing the security to recover any deficiency from the judgment on the note.[71] Instead, "property given as security furnishes the primary fund for the payment of the debt and this fund must be exhausted before recourse can be had to the

65. *Roseleaf*, 378 P.2d at 102.

66. CAL. CIV. PROC. CODE § 726(a) (Supp. 1997).

67. *See* Bassak, *supra* note 60, at 267.

68. *See* Fernandez-Lopez v. Fernandez-Lopez, 37 B.R. 664, 669 (B.A.P. 9th Cir. 1984); James v. P.C.S. Ginning Co., 276 Cal. App. 2d 19, 22 (1969).

69. *James*, 276 Cal. App. 2d at 23.

70. *Id.*

71. *See* Bassak, *supra* note 60, at 267.

maker of the note."[72] Thus, "section 726 is a 'security first' rule as well as a 'one-action' rule."[73]

C. Oregon Jurisprudence

1. *Available remedies.* Unlike California or Alaska, in Oregon a creditor's remedies following default of a secured note are not entirely the same for a mortgage as for a deed of trust. A creditor holding either of these securities may judicially foreclose on the property,[74] or may ignore the property and sue on the note.[75] Only a creditor holding a deed of trust may elect to foreclose the security nonjudicially.[76]

For judicial foreclosure, Oregon does not require the creditor to give the debtor notice of default or intent to foreclose; the creditor need only file a complaint.[77] If foreclosure is contested, discovery proceeds and may result in either summary judgment or a trial, after which the court may issue a judgment and decree of foreclosure and sale directing the sheriff to conduct a foreclosure sale.[78] After a decree of foreclosure and sale is entered, the sheriff must give notice of the sale to the debtor and then publish the notice in a local newspaper at least once a week for four consecutive weeks, with the last publication occurring at least one week before the sale.[79] Thus, the sale cannot take place until approximately six weeks after the decree of foreclosure and sale is entered.

In Oregon, nonjudicial foreclosure is a right found in all trust deeds, and is accomplished through foreclosure by advertisement and sale.[80] Before a trustee's sale may occur, the creditor or trus-

72. Winklemen v. Sides, 88 P.2d 147, 156 (Cal. Ct. App. 1939); *see also* Roseleaf Corp. v. Cheirighino, 378 P.2d 97, 98 (Cal. 1963) (noting that in California, a creditor must look to the security before enforcing the debt).

73. *See* Bassak, *supra* note 60, at 267.

74. *See* OR. REV. STAT. §§ 86.710, 88.010 (1988).

75. *See* Director of Veterans' Affairs v. Bierlein, 859 P.2d 1182, 1184 (Or. Ct. App. 1993).

76. *See* OR. REV. STAT. § 86.710. A trust deed "is deemed to be a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with the provisions [for nonjudicial foreclosure], in which event [those provisions] shall control." *Id.* § 86.715.

77. *See* George M. Platt, *The Uniform Land Security Interest Act: Vehicle For Reform Of Oregon Secured Land Transaction Law*, 69 Or. L. Rev. 847, 891 (1990).

78. *See* DIGEST, *supra* note 11, at 466; OR. REV. STAT. §§ 88.010, .060, .080.

79. *See* OR. REV. STAT. § 23.450(2) (1988).

80. *See id.* § 86.710.

tee must file a notice of default and election to sell the property with the county clerk.[81] After filing the notice of default and intent to sell, the creditor or trustee must then serve notice of the sale to the debtor at least 120 days before the date of sale.[82] Nonjudicial foreclosure also has a publication requirement identical to that for judicial foreclosure, except that the last publication must occur at least twenty days before the date of sale.[83]

2. *Redemption.* The common law equitable right of redemption is recognized for both judicial and nonjudicial foreclosure, regardless of whether the debt is secured by a mortgage or a deed of trust.[84] Equitable redemption in a judicial foreclosure proceeding is accomplished by paying the entire debt obligation, assuming there was an acceleration clause in the security agreement.[85] In a nonjudicial foreclosure proceeding, the debtor has the added right to de-accelerate the debt and reinstate the trust deed if the default can be cured by paying any missed or inadequate installments prior to five days before the foreclosure sale.[86]

In addition to common law equitable redemption, both mortgagors and trust deed debtors have a statutory right to redeem the property after a judicial foreclosure sale.[87] This may be accomplished at any time within 180 days after the date of the foreclosure sale by paying the amount of the buyer's purchase money and other expenses, plus a set rate of interest.[88] If the creditor forecloses nonjudically, the debtor has no statutory right to redeem the property following the foreclosure sale.[89]

3. *Deficiency judgments.* In Oregon, deficiency judgments are allowed only in specific instances. The Oregon Supreme Court has suggested that for mortgages other than purchase money mortgages,[90] judicial foreclosure and an action on the underlying

81. *See id.* § 86.735(3).
82. *See id.* § 86.740(1).
83. *See id.* § 86.750.
84. *See* Sellwood v. Gray, 5 P. 196, 198 (Or. 1884).
85. *See id.*
86. *See* OR. REV. STAT. § 86.753.
87. *See id.* §§ 23.560, 88.080.
88. *See id.*
89. *See id.* § 86.770(1).
90. A mortgage is a purchase money mortgage or deed of trust if
[it] is given to a vendor to secure the unpaid balance of the purchase price of real property or if the mortgage is given to a lender or any other

debt are not considered inconsistent remedies, so each remedy may be used to supplement a deficient judgment resulting from the other.[91] For purchase money mortgages, a deficiency judgment is not allowed following foreclosure.[92] As for deeds of trust, a deficiency judgment should be included in a judgment resulting from judicial foreclosure of non-residential trust deeds,[93] but is not allowed following judicial foreclosure of a residential trust deed or any nonjudicial foreclosure.[94]

4. *One-action rule.* Absent "statutory prohibition," there is no one-action rule or election of remedies concerning secured creditors rights in Oregon.[95] Consequently, "a mortgagee may pursue all statutory remedies concurrently or successively."[96] Thus, a mortgagee or trust deed beneficiary may join claims for judicial foreclosure of the security and a personal judgment on the note in one action,[97] proceed on the note and then judicially foreclose the security, or judicially foreclose the security and sue on the note.[98] One statutory prohibition that does create an election of remedies concerns purchase money mortgages or deeds of trust, since a secured creditor is not entitled to a deficiency

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person to secure up to $50,000 of the unpaid balance of the purchase price of real property used by the purchaser as the primary or secondary single family residence of the purchaser.

Id. § 88.075.

91. *See* Jesse v. Birchell, 257 P.2d 255, 259 (Or. 1953). The reason there is no election of remedies problem presented by concurrently or simultaneously pursuing a foreclosure proceeding and an action on the note is that the Oregon Supreme Court has determined that these remedies are not inconsistent with each other, but are rather both "aids to assist plaintiffs in the accomplishment of the desired end result; that is, the collection of money due them." *Id.*

92. *See* OR. REV. STAT. § 88.070.

93. Even if the creditor does not join a claim on the note to his or her foreclosure claim, so long as the creditor has not waived the right to a deficiency judgment, if the creditor has such a right, the court should issue a personal judgment against the debtor for the amount of the debt along with its decree of foreclosure and sale. *See id.* § 88.010.

94. *See id.* § 86.770(2)-(3). A residential trust deed is defined as "a trust deed on property upon which are situated four or fewer residential units and one of the residential units is occupied as the principal residence of the [debtor], the [debtor's] spouse or the [debtor's] minor or dependent child at the time a trust deed foreclosure is commenced." *Id.* § 86.705(3) (Supp. 1996).

95. *See* State v. Bierlein, 859 P.2d 1182, 1184 (Or. Ct. App. 1993).

96. *Id.*

97. *See* OR. REV. STAT. § 88.010.

98. *See* Platt, *supra* note 77, at 891.

following foreclosure and sale of a purchase money mortgage.[99] While this does not prevent the creditor from ignoring the mortgage and suing on the note, or from pleading both remedies in the alternative, if the creditor does so a judgment on one claim bars any further relief.[100]

The other statutory prohibition that creates an election of remedies concerns nonjudicial foreclosure of deeds of trust. A creditor may only foreclose a deed by trustee's sale if "[n]o action has been instituted to recover the debt or any part of it then remaining . . . or, if such action has been instituted, the action has been dismissed."[101] Thus, if the creditor has received a judgment in either a suit on the debt or judicial foreclosure of the security, an election of remedies will prevent the creditor from utilizing nonjudicial foreclosure to eliminate any deficiency.

D. Washington Jurisprudence

1. *Available remedies.* In Washington, except as provided by statute, a deed of trust has the same legal effect as a mortgage.[102] A creditor holding a defaulted note secured by a deed of trust or mortgage may "use either judicial or nonjudicial procedures to enforce that security."[103] Thus, the secured creditor may ignore the security and sue on the underlying note, judicially foreclose the security, or, so long as the deed of trust contains a power of sale, nonjudicially foreclose the security.[104]

A creditor begins judicial foreclosure by filing a complaint to foreclose the equity of redemption contained in the mortgage.[105] If the court finds for the creditor, it will render a judgment and decree of foreclosure ordering the sale of the mortgaged premises to satisfy the mortgage and the costs of the action.[106] The court may, at that time, "take judicial notice of economic conditions" and fix a

99. *See supra* note 92 and accompanying text.

100. *See Bierlein*, 859 P.2d at 1184.

101. OR. REV. STAT. § 86.735(4) (1988).

102. *See* WASH. REV. CODE ANN. § 61.24.020 (West 1990).

103. Fluke Capital & Management Servs. Co. v. Richmond, 724 P.2d 356, 363 (Wash. 1986).

104. *See* John D. Sullivan, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure* — Washington Mutual Savings Bank v. United States, *115 Wash.2d 52, 793 P.2d 969, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990)*, 67 Wash. L. Rev. 235, 237 (1992).

105. *See* WASH. REV. CODE ANN. § 61.12.040.

106. *See id.* § 61.12.060.

minimum or upset price below which it will not confirm the sale.[107] At least thirty days prior to the foreclosure sale, the creditor must serve notice of sale on the judgment debtor and the judgment debtor's attorney.[108] At least four weeks prior to the foreclosure sale, the sheriff must post the same notice of sale and must publish a less detailed notice at least once a week in a newspaper of general circulation.[109] The notice of sale served by the creditor and posted by the sheriff must clearly inform the debtor of any available rights of possession, equitable redemption or statutory redemption.[110] Once all requirements are met, the property is sold, the court confirms the sale and all redemption rights have lapsed, the sheriff will issue the purchaser a deed to the property.[111]

A beneficiary of a defaulted deed of trust may elect to nonjudicially foreclose the security so long as the deed contains a power of sale, no other action to satisfy the debt is pending and the security "is not used principally for agricultural or farming purposes."[112] Once the beneficiary elects nonjudicial foreclosure, either the beneficiary or the trustee must mail notice of default to the creditor, and must either post the same notice on the property securing the deed or personally serve it on the debtor.[113] This notice must include a clear indication of the grantor's right of equitable redemption and the amount necessary to reinstate the deed of trust.[114] At least thirty days after notice of default is given, and at least ninety days before the date of the foreclosure sale, the trustee must give notice of sale.[115] The trustee must also publish the notice of sale in a public newspaper.[116] Once all requirements have been

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107. *See id.* The court may not set the fair market value in this manner for any mortgage "held by the United States or by any agency, department, bureau, board or commission thereof." *Id.* § 61.12.061.

108. *See id.* §§ 6.21.030(1)(a)-(b), 61.12.090.

109. *See id.* § 6.21.030(2)(a)-(b).

110. *See id.* § 6.21.040.

111. *See id.* § 6.23.060.

112. *Id.* § 61.24.030.

113. *See id.*

114. *See id.*

115. *See id.* § 61.24.040. The notice must give the date and specifics of the foreclosure sale, and must attest that no other action is pending on the debt and that the grantor and others with a lien on the property have a right of equitable redemption. *See id.* The trustee must include with the notice of sale that is mailed to the grantor a statement reiterating that the grantor has a right to equitable redemption, the manner in which the default may be cured, and the fact that the sale will serve to deprive the grantor of all interest in the property. *See id.*

116. *See id.*

met, and at least 190 days have passed from the date of default, the trustee may sell the security at a foreclosure sale and execute a deed for the property to the purchaser.[117] The purchaser is entitled to possession of the property as soon as twenty days have passed from the date of the foreclosure sale.[118]

2. *Redemption.* In Washington, the common law right to equitable redemption is recognized for both judicial and nonjudicial foreclosure. In an action for judicial foreclosure, the mortgagor may satisfy the debt by paying the full value of the mortgage debt plus interest and costs at any time until the date of the foreclosure sale.[119] To offset the absence of post-sale redemption rights following a trustee's sale, a grantor pursuing nonjudicial foreclosure is given reinstatement rights. Thus, up until eleven days before the foreclosure sale, the grantor may reinstate the deed of trust by curing any defaults described in the notice of default.[120] If the default was caused by a failure to pay an interest payment or installment, the grantor may cure by paying the amount that would have been due up until that time if no default had occurred, plus any expenses incurred by the trustee as a result of the default.[121]

Along with the right of equitable redemption, a judgment debtor has a statutory right to redeem the property following a completed judicial foreclosure sale.[122] The debtor may do so by paying the amount of the purchase price plus interest and any taxes the purchaser paid on the property.[123] Post-sale redemption generally may occur at any time within one year after the foreclosure sale; that time is limited to eight months if (1) the mortgage specifically declares that the mortgaged property is not used principally for agricultural or farming purposes and (2) the complaint expressly waives the rights to a deficiency judgment.[124] If the prop-

117. *See id.*

118. *See id.* § 61.24.060.

119. *See id.* § 61.12.060.

120. *See id.* § 61.24.090.

121. *See id.*

122. *See id.* § 6.23.010. There is an exception to this rule. In an action to foreclose a mortgage on real property that has been improved by a structure or structures, if the court finds the mortgagor has abandoned the property for six months or more, the mortgagor is held to have waived its rights of redemption so long as the property is not used primarily for agricultural purposes. *See id.* §§ 61.12.093, .095.

123. *See id.* § 6.23.020(2).

124. *See id.* § 6.23.020(1). If the property fits under the statutory definition of

erty is not an occupied homestead, or land being used at the time for farming purposes, and if the mortgage or deed of trust does not specifically provide otherwise, the purchaser is entitled to possession of the property during the redemption period.[125] By statute, there is no right of redemption following a nonjudicial foreclosure sale.[126]

3. *Deficiency judgments.* Washington provides for limited rights to a deficiency judgment following judicial foreclosure, but only if the mortgage or a separate instrument, such as a note, expressly agrees to repayment of the debt obligation in full.[127] If the creditor is entitled to a deficiency judgment, the decree of foreclosure should state that the balance remaining after the foreclosure sale should be satisfied from any other property of the mortgage debtor.[128] Any additional levy and sales necessary to satisfy a deficiency judgment may be made under the same execution as that for the foreclosure sale.[129] To make a deficiency judgment more fair to the debtor, when a party applies for confirmation of the foreclosure sale, the court may, at that time, hold a hearing to determine the fair value of the property, and may credit this amount against the mortgage debt.[130] If the court does so, the deficiency judgment will then entitle the creditor to only the difference between the fair value of the property and the full amount of the mortgage debt.[131] Regardless of the sale price or fair value of the secured property, a creditor is not entitled to a

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a homestead, after the foreclosure sale the purchaser must send notice to the judgment debtor at least 40 but no more than 60 days before the applicable redemption period expires informing the debtor that the right of redemption will soon expire, and giving the deadline and requirements for redeeming the property. If the purchaser does not do so, the right of redemption is extended for another six months. *See id.* § 6.23.030(1)-(2).

125. *See id.* § 6.23.110.

126. *See id.* § 61.24.050.

127. *See id.* § 61.12.050. One exception in the case of property not used primarily for agricultural purposes is that a creditor is not entitled to a deficiency judgment if the secured property has been improved by a structure or structures and has been abandoned for six months or more. *See id.* §§ 61.12.093-.095.

128. *See id.* § 61.12.070.

129. *See id.* § 61.12.100.

130. *See id.* § 61.12.060. The same exemption for mortgages held by the United States or its agencies as that found in setting a minimum or upset bid price applies in post-sale assignment of fair market value. *See supra* note 107 and accompanying text.

131. *See* WASH. REV. CODE ANN. § 61.12.060.

deficiency judgment following a nonjudicial foreclosure sale.[132]

4. *One-action rule.* Washington has a statutory one-action plan that prevents a creditor from foreclosing on a mortgage or deed of trust while prosecuting or seeking execution of a judgment for an action on the underlying debt, and vice versa.[133] By statute, a nonjudicial foreclosure sale satisfies the underlying obligation regardless of sale price or fair value, so that "the remedies of a creditor who chooses nonjudicial procedures are limited to foreclosure alone."[134] If the creditor elects judicial foreclosure, then so long as a deficiency is not waived or otherwise prohibited, and the actions are not independent and concurrent, a creditor may satisfy the entire debt obligation through judgments both on the security and against the debtor personally.[135] Furthermore, in an action for judicial foreclosure where the creditor is entitled to a deficiency judgment, the court is instructed that it should include sua sponte, as part of its decree of foreclosure, a deficiency judgment to be executed against the personal property of the debtor.[136]

III. SECURED TRANSACTION LAW IN ALASKA

A. Traditional Rights and Remedies

Alaska secured transaction law is anchored by the same general rights and remedies as the other states examined above. The common law antecedents to these rights and remedies existed long before Alaska statehood.[137] With the exception of a few minor amendments, nearly all of the specific statutory rights, remedies and procedures examined below were available to mortgage credi-

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132. *See id.* § 61.24.100.

133. *See id.* § 61.12.120.

134. Fluke Capital & Management Servs. Co. v. Richmond, 724 P.2d 356, 363 (Wash. 1986).

135. *See* Hinchman v. Anderson, 72 P. 1018 (Wash. 1903). The purpose behind the statute was "to prevent a multiplicity of suits for the same debt at the same time." *Id.* at 1021.

136. *See supra* note 128 and accompanying text.

137. *See, e.g.*, Dikeman v. Jewel Gold Mining Co., 7 Alaska 361 (1925), *aff'd*, 13 F.2d 118 (9th Cir. 1926) (recognizing statutory redemption rights and deficiency judgments in judicial foreclosures); Strong v. Gilmore, 6 Alaska 384 (1921); Hammer v. Alaska-Ebner Gold Mines Co., 6 Alaska 193 (1919) (recognizing a right to a deficiency judgment in judicial foreclosures).

tors and debtors in Alaska by 1962.[138]

1. *Available remedies.* Under Alaska law, a creditor "has the option whether to sue on the note or foreclose the security."[139] If the creditor chooses to foreclose on the security, the creditor may pursue judicial or, if the mortgage or deed of trust so provides, nonjudicial foreclosure.[140] Through the choice of remedy pursued, the creditor determines the rights available to the creditor and the debtor.

Alaska does not require notice of default and acceleration before filing an action for judicial foreclosure; the only notice the debtor need receive is the filing of the complaint. In the action, "the court may direct the sale of the encumbered property . . . and the application of the proceeds of the sale to the payment of costs, expenses of sale, and the amount due the plaintiff."[141] Pursuant to the judgment of foreclosure and the order of sale, the court shall issue a writ of execution against the secured property, and should also determine the personal liability of the debtor for the amount due on the underlying note.[142] Notice giving the date and specifics of the foreclosure sale must be posted not less than thirty days before the date of the sale, and must be printed once a week for four consecutive weeks in the newspaper published nearest the property serving as the security.[143] Following the sale, the debtor has the option to apply for a court order confirming the sale.[144] The court shall deny confirmation and order a resale if it determines there were "substantial irregularities" in the proceedings of the first sale.[145]

In addition to judicial foreclosure, "if a deed of trust . . . 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 . . . may execute the trust by sale of the property."[146]

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138. The few statutory amendments made after 1962 dealt mainly with the wording and length of notice requirements for nonjudicial sales, and had little affect on substantive rights. *See, e.g.*, 1977 Alaska Sess. Laws ch. 44; 1972 Alaska Sess. Laws ch. 3; 1966 Alaska Sess. Laws ch. 19.

139. Conrad v. Counsellors Inv. Co., 751 P.2d 10, 12 (Alaska 1988).

140. *See* ALASKA STAT. §§ 09.45.170, 34.20.070 (Michie 1996).

141. *Id.* § 09.45.170.

142. *See id.* §§ 09.45.170, .35.010.

143. *See id.* § 09.35.140(2).

144. *See id.*

145. *Id.*

146. Moening v. Alaska Mut. Bank, 751 P.2d 5, 7 (Alaska 1988) (quoting ALASKA STAT. § 34.20.070) (Michie 1996)).

Before the trustee's sale can occur, the trustee must first satisfy certain notice requirements. Not less than thirty days after the default and at least three months before the date of sale, the trustee must record a notice of default at the office of the local recorder.[147] No more than ten days after filing the notice of default, the trustee must then either mail a copy of the notice to the debtor or serve it in person.[148] The trustee must also give public notice of the sale in the same manner as is required for judicial foreclosure.[149] Once these requirements have been met, the trustee may conduct an auction sale of the property and deliver a deed for the property to the purchaser.[150]

2. *Redemption.* In Alaska, the common law right of equitable redemption is available to debtors in both judicial and nonjudicial proceedings.[151] If the debtor pays the court clerk the full amount due on the debt plus costs at any time before the court renders a judgment of foreclosure, the action will be dismissed.[152] If the debtor pays the debt after the judgment is rendered, but before the foreclosure sale, the judgment will be terminated and the execution recalled.[153] If, in a nonjudicial foreclosure proceeding, the default is due to a failure to make payments, and if at any time before the foreclosure sale the debtor pays the amount that would then be due if no default had occurred, in addition to attorney's fees and costs, the default is considered cured and the deed of trust is reinstated.[154] However, if the debtor has cured the deed of trust in this manner twice or more previously, the trustee may elect to refuse payment of the amount due and may continue to foreclose the security.[155]

In addition to the right of equitable redemption, in a judicial foreclosure proceeding, the debtor has a statutory right to redeem the property following the foreclosure sale, in which case the sale is terminated and the estate is restored.[156] The debtor may exercise this right by repaying the purchase money, with interest, plus any

147. *See* ALASKA STAT. § 34.20.70.
148. *See id.* § 34.20.70(c).
149. *See id.* § 34.20.080.
150. *See id.* § 34.20.070.
151. *See id.* §§ 09.45.220, 34.20.070(b).
152. *See id.* § 09.45.220.
153. *See id.*
154. *See id.* § 34.20.070.
155. *See id.*
156. *See id.* §§ 09.45.190, .35.210, .35.220, .35.260; Moening v. Alaska Mut. Bank, 751 P.2d 5, 7 (Alaska 1988).

taxes and expenses incurred by the purchaser, within twelve months of the order confirming the sale.[157] The purchaser is entitled to possession of the property from the time of the sale until the debtor exercises the right to redemption.[158] Following a nonjudicial foreclosure sale, the mortgagor has "no right or privilege to redeem the property, unless the deed of trust so declares."[159]

3. *Deficiency judgments.* As was mentioned above, a court issuing a judgment of foreclosure should include as part of that judgment a deficiency decree determining the personal liability of the debtor for the full payment of the debt, thereby providing deficiency judgments in foreclosure suits.[160] As a result, "[a] deficiency between the amount of the judgment and the sale price [of the security] may be enforced by execution [against the personal property of the debtor]."[161] A creditor is not entitled to a deficiency judgment, or any action to recover a deficiency, following a nonjudicial foreclosure sale.[162]

4. *One-action rule.* Alaska's one-action rule traditionally has applied only when the creditor elects to pursue nonjudicial foreclosure. Once a nonjudicial foreclosure sale has been made, "no other or further action or proceeding may be taken nor judgment entered against the [debtor] on the obligation secured by the deed of trust."[163] Thus, by electing to foreclose nonjudicially, the creditor bars any future action to foreclose the security judicially or to sue on the underlying note.[164] When a creditor has chosen judicial remedies to collect on a secured debt, there have been no statutory provisions preventing the creditor from pursuing judicial foreclosure and an action on the note concurrently or consecutively to collect on the full value of the debt. Indeed, state statutes specifically allow a creditor to collect on a deficiency following a judicial foreclosure sale as part of the same action,[165] or to supplement a successful, yet unsatisfied suit on the note with

157. *See* ALASKA STAT. § 09.35.250.

158. *See id.* § 09.35.310.

159. ALASKA STAT. § 34.20.090(a); *accord Moening*, 751 P.2d at 7.

160. *See* ALASKA STAT. § 09.45.170; *see also* Hammer v. Alaska-Ebner Gold Mines Co., 6 Alaska 193, 201-02 (1919).

161. ALASKA STAT. § 09.45.180; *see also id.* § 09.35.030; Dikeman v. Jewel Gold Mining Co., 7 Alaska 361, 364 (1925), *aff'd*, 13 F.2d 118 (9th Cir. 1926).

162. *See* ALASKA STAT. § 34.20.100.

163. *Id.*

164. *See* Smith v. Shortall, 732 P.2d 548, 549 (Alaska 1987).

165. *See* ALASKA STAT. § 09.45.170; *Smith*, 732 P.2d at 549.

independent judicial foreclosure of the security.[166]

B. Legislative and Judicial Developments

The secured transaction statutory scheme described above has been in place since the early days of the Alaska legislature. In 1983, at the request of the Alaska Legislative Council, the Rules Committee of the state House of Representatives proposed a bill that was intended "to provide fair and uniform treatment of real property security interests, regardless of form."[167] If enacted, this bill would have replaced title 34, chapter 20 of the Alaska Statutes, entitled Mortgages and Trust Deeds, with a new chapter 21, entitled Security Interests in Real Property.[168] The bill would have continued to uphold most of the rights, remedies and duties under the current law. However, it would have repealed Alaska Statutes section 09.45.200 (barring foreclosure without an execution of judgment returned unsatisfied) and added a requirement that for nonjudicial foreclosure, notice of sale must be given to all interested parties and posted on the property itself.[169]

In listing the remedies available to a secured creditor, the proposed bill stated that the creditor could judicially foreclose on the security or sue on the note "in any order or simultaneously," but if the property was sold nonjudicially, the creditor would have to dismiss any pending judicial actions.[170] Also, instead of requiring a sale at public auction for nonjudicial foreclosure, the bill would have allowed sale of the property "at any time and place and on any terms" so long as the sale was "commercially reasonable."[171] If electing foreclosure by a "commercially reasonable" sale, the creditor would have been able to enter the property to show it to prospective buyers once thirty days had passed following notice of intent to sell.[172] The creditor would also have been able to take possession of the property in order to prepare it for sale once sixty days had passed from notice of intent to sell.[173]

Although the House assigned the bill to the Labor and Commerce, Judiciary, and Rules Committees, it did not enact this legislation during the Thirteenth Legislature. Identical bills were

166. *See* ALASKA STAT. § 09.45.200.
167. H.R. 341, 13th Leg., 1st Sess., § 1 (Alaska 1983).
168. *See id.* §§ 2, 5.
169. *See id.*
170. *See id.* § 2.
171. *Id.*
172. *See id.*
173. *See id.*

taken up by the House in the Fourteenth Legislature in 1985 and by the Senate and the House in the Fifteenth Legislature in 1987, but these bills never made it out of committee.[174]

In February of 1988, the Alaska Supreme Court added its voice to the debate over rights appurtenant to security interests in real property. In two decisions handed down on the same day,[175] the court surveyed the remedies available to creditors holding defaulted notes secured by deeds of trust. In *Moening v. Alaska Mutual Bank*,[176] the court contrasted the remedies of judicial and nonjudicial foreclosure, stating the manner in which creditors' remedies are balanced by corresponding debtors' rights.[177] In judicial foreclosure, the creditor's right to a deficiency judgment is balanced with a debtor's statutory right to post-sale redemption, while in nonjudicial foreclosure the creditor is not entitled to a deficiency judgment, so the debtor is not entitled to redeem the property unless a right of redemption is included in the deed of trust.[178]

The court then listed a third possible remedy, an action on the note. Prior to the decision, the courts had not interpreted section 09.45.200, which on its face states that a creditor may not maintain a foreclosure action during or after the pendency of a suit on the note, unless the suit on the note is successful yet unsatisfied.[179] The *Moening* court held that the statute was a clear indication that the legislature intended a remedy whereby the creditor may ignore the security and sue directly on the note, and "[m]oreover, 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."[180] Responding to the argument that this does not mean the creditor can remedy a deficiency from the judgment on the note with a nonjudicial foreclosure sale, the court held that while section 34.20.100 prohibits a deficiency judgment following nonjudicial foreclosure, it does not preclude nonjudicial foreclosure following a deficiency judgment

174. *See* H.R. 245, 14th Leg., 1st Sess. (Alaska 1985); H.R. 321, 15th Leg., 1st Sess. (Alaska 1987); S. 305, 15th Leg., 1st Sess. (Alaska 1987).

175. Moening v. Alaska Mut. Bank, 751 P.2d 5 (Alaska 1988); Conrad v. Counsellors Inv. Co., 751 P.2d 10 (Alaska 1988).

176. 751 P.2d 5 (Alaska 1988).

177. *See id.* at 7-8.

178. *See id.*

179. *See* ALASKA STAT. § 09.45.200 (Michie 1996).

180. *Moening*, 751 P.2d at 8.

on the note.[181] Furthermore, the court suggested that action on the note and foreclosure proceedings are not inconsistent remedies, since "'[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.'"[182] Since there is no statutory prohibition against the application of both remedies and they are not inconsistent, the court held that "[o]nce the creditor obtains a personal judgment which is returned unsatisfied in whole or in part, the creditor may judicially or nonjudicially foreclose the security."[183]

In *Conrad v. Counsellors Investment Co.*,[184] handed down the same day as *Moening*, the court stated "[t]he fact that a creditor may foreclose nonjudicially does not imply that it may not foreclose judicially."[185] In such a case, the court held, a creditor is "entitled to exercise any other remedies permitted by law," unless the creditor's remedies are "expressly waived in the note or deed of trust."[186] In *Conrad*, the debtor argued that foreclosure subsequent to a suit on the note would nevertheless be precluded by the doctrine of res judicata.[187] The court reasoned that while this argument had merit, the common law and the court's own interpretation of section 09.45.200 allow foreclosure following an action on the note.[188] Thus, the court reasoned that the section should be viewed as "an express statutory exception to general principles of res judicata" or, in the alternative, "a special form of execution on the prior judgment."[189] In dicta, the court suggested that failure to join a deficiency claim in a judicial foreclosure complaint may preclude any subsequent action on the note, because there is no express statutory exception that allows a creditor to proceed in this manner.[190]

Shortly after these two decisions were handed down, and perhaps prompted by the *Moening* decision, John Abbott, Chairman of the Alaska Code Revision Commission, proposed that the Sen-

181. *See id.*

182. *Id.* at 10 (quoting Silver v. Williams, 175 A.2d 673, 676 (N.J. Super. Ct. Ch. Div. 1961), *rev'd on other grounds*, 178 A.2d 649 (N.J. Super. Ct. App. Div. 1962)).

183. *Id.* at 8.

184. 751 P.2d 10 (Alaska 1988).

185. *Id.* at 12.

186. *Id.* at 12-13.

187. *See id.* at 13.

188. *See id.*

189. *Id.*

190. *See id.* at 13 n.8.

ate Judiciary Committee revise Senate Bill 305 in order to allow redemption following a nonjudicial foreclosure sale.[191] Although this proposal was backed by Senator Pat Rodey,[192] it died along with the bill when the bill was held over and never enacted. However, shortly thereafter two other bills concerning secured transactions were introduced.

In late March, 1988, the House considered House Bill 549, sponsored by Representative Steve Rieger, that would have added a new section to Title 34, Chapter 20.[193] The bill required affirmative notice in the note secured by the deed of trust of all recourse and remedies available to the creditor in the event of a default, and notice of the option to ignore the security in favor of a suit on the note.[194] If the note did not contain such notice, the creditor could only resort to nonjudicial foreclosure in the event of a default, and would not be able to initiate any subsequent action to collect on a deficiency.[195]

While reviewing the bill in April, 1988, the House Labor and Commerce Committee, under pressure from lending institutions, changed the wording in order to ease the notice requirement and the penalty if such notice was missing.[196] The new committee substitute provided that the note must give notice only if the creditor wishes to reserve the right to ignore the security and sue on the note.[197] A creditor that did not give such notice would not be able to sue on the note, but would still retain the options of judicial or nonjudicial foreclosure. The committee substitute also added a clause that sufficient notice would state that the creditor could sue on the note to satisfy the debt "either before or after a judicial foreclosure of the deed of trust."[198] When it reviewed the committee substitute at the end of April, the House Judiciary Committee changed the wording so that the bill would apply to mortgages as well as deeds of trust, and stated that this amendment would become the new section 34.20.160.[199]

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191. *See Hearings on S. 305 Before the Senate Judiciary Comm.*, 15th Leg., 2d Sess. 1340 (Alaska 1988) (statement of John Abbott, Chairman, Alaska Code Revision Commission).

192. *See id.*

193. *See* H.R. 549, 15th Leg., 2d Sess. (Alaska 1988).

194. *See id.*

195. *See id.*

196. *See* Labor & Commerce Committee Substitute for H.R. 549, 15th Leg., 2d Sess. (Alaska 1988).

197. *See id.*

198. *Id.*

199. *See* Judiciary Committee Substitute for H.R. 549, 15th Leg., 2d Sess.

At the same time House Bill 549 was winding through the legislative process, the Senate introduced Senate Bill 515, which would have amended section 34.20.070, the statute establishing nonjudicial foreclosure sales.[200] Introduced in late April, the bill stated that a judgment resulting from judicial foreclosure or a suit on the note extinguished the trust deed and the note, and that the creditor would be unable to thereafter foreclose nonjudicially.[201] The bill added that any execution resulting from a suit on the note or from judicial foreclosure would have to proceed against the security before turning to other personal property of the debtor.[202] Finally, the bill provided that, if passed, it would take effect immediately.[203]

After several hearings on the bill in the Judiciary Committee, the committee substituted its own amended version of the bill.[204] This version deleted the language providing that the deed of trust and the note would be extinguished if the creditor received a judgment from a judicial remedy.[205] Instead, the committee substitute provided that if the creditor received a judgment from a suit on the note or judicial foreclosure, the creditor could not then foreclose nonjudicially.[206] The committee substitute also eliminated the provision that the creditor must exhaust the security before turning to the debtor's personal property.[207] Like the earlier draft, the committee substitute provided that the bill would take effect immediately, but added a section stating that it would apply to any judicial proceedings in progress, or that had not resulted in a completed foreclosure sale or a final judgment before the effective date of the Act.[208]

This Committee Substitute for Senate Bill 515 was adopted by the Senate and transmitted to the House for consideration, where it was referred to the Judiciary Committee.[209] While the committee made no changes to the language of the Senate committee substi-

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(Alaska 1988).

200. *See* S. 515, 15th Leg., 2d Sess. (Alaska 1988).

201. *See id.*

202. *See id.*

203. *See id.*

204. *See* Judiciary Committee Substitute for S. 515, 15th Leg., 2d Sess. (Alaska 1988).

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.*

209. *See* Senate Journal, 15th Leg., 2d Sess. 3343 (May 2, 1988); House Journal, 15th Leg., 2d Sess. 3640 (May 8, 1988).

tute, it created its own substitute that inserted the final version of House Bill 549 as a new section of Senate Bill 515.[210] This last version of Senate Bill 515 was passed by the House and the Senate, and was signed into law effective May 24, 1988. As a result, section 34.20.070 was amended, so that if a creditor elects judicial foreclosure or action on the note rather than nonjudicial foreclosure, the creditor cannot subsequently resort to nonjudicial foreclosure.[211] In addition, section 34.20.160 was added, providing that a creditor has no right to ignore the security and pursue an action on the underlying note unless that right is specifically reserved in the mortgage or deed of trust.[212]

IV. THE BALANCE OF POLICY GOALS: A STATE-BY-STATE COMPARISON

A. Policy Goals in Alaska

As in other states, secured transaction law in Alaska is designed to further two general policy goals: to protect the interests of borrowers, particularly individual homeowners and small businesses, and to facilitate lenders' efforts to collect the full debt obligation on defaulted loans, which will thereby encourage lending. Implementation of these very different and usually contradictory goals is guided by further derivative policy considerations. In carefully constructing a detailed statutory scheme to govern loans secured by real property, the Alaska legislature and courts aim to maintain a balance between the rights and remedies available to debtors and creditors.

One reason legislators seek to protect borrowers in secured loan transactions is that the very nature of loan arrangements puts the creditor in a superior bargaining position, which can easily result in creditor abuses. However, commercial borrowers are usually not as disadvantaged as residential borrowers because they represent ongoing business opportunities for creditors. As a result, debtor protections in some states are limited based upon whether the debtor is a commercial or residential borrower.

There is also a strong political motivation to protect borrowers. A common type of loan transaction secured by real property is the home mortgage or home equity loan, and homeowners are a

210. *See* House Committee Substitute for S. 515, 15th Leg., 2d Sess. (Alaska 1988).

211. *See* ALASKA STAT. § 34.20.070 (Michie 1996).

212. *See id.* § 34.20.160.

particularly large and powerful voting group. While one might argue that only those homeowners who have defaulted on their mortgages will be seriously affected by secured transaction statutes, appraisal values of all homes are affected by the total number of foreclosure properties on the market and the prices those properties command at foreclosure sales.

The recession that hit Alaska in the latter half of the 1980's is perhaps the best example of how debtors and homeowners are linked.[213] Thousands of workers lost their jobs and came to realize that they owed more on their mortgages than the properties were worth. They then abandoned their mortgages and moved to other states, leaving a huge number of foreclosures in their wake.[214] Nearly one in twelve mortgage holders in the Anchorage area lost property to foreclosures at that time, and the number of foreclosures grew from 263 in the first quarter of 1985 to approximately 1,700 per quarter by early 1988.[215] Attempts by institutional lenders to liquidate their vast inventories of these foreclosed properties only made matters worse, as they "helped to stimulate the plunge in residential real estate prices."[216] By 1988, single-family homes in Anchorage were selling for twenty-five to thirty percent less than their original purchase price, and condominium values had dropped by up to seventy-five percent.[217] Thus, it is easy to see how legislators' efforts to protect mortgage debtors can, in the right circumstances, have an appreciable impact on the economy as a whole.

While homeowners certainly exert strong political pressure on the Alaska legislature, banks and other lending institutions have a great deal of political clout as well. Since much of financial institu-

213. This recession, which began in 1985, was caused by an "economy badly overheated by a spending binge, [which] was [then] rocked by a sudden decline in oil prices." Ken Wells, *Alaska Economy Still Feeling Effects of Oil Collapse*, SEATTLE TIMES, Nov. 29, 1988, at B1. The combination of these two factors "set off an economic crash that [] ravaged parts of the state's real-estate market, crushed half of its banks and left its linchpin construction industry battered and struggling for survival." *Id.* Since the oil industry produces 89% of the gross state product, state employment dropped from 233,000 jobs in 1985 to 207,000 jobs in late 1987. *See* Bill Dietrich, *Chill Winds Still Blow: But Alaskans Say Their Economy Can Only Start Looking Up*, SEATTLE TIMES, Aug. 21, 1988, at D1. As a result, many people left Alaska in search of a healthier economy, with approximately 29,000 leaving Anchorage, representing 12% of its residents. *See id.*

214. *See* Dietrich, *supra* note 213, at D1.

215. *See id.*

216. Collins, *supra* note 5, at 14.

217. *See* Dietrich, *supra* note 213, at D1.

tions' profit comes from lending activities, they depend on keeping bad debt to a minimum. If a state's foreclosure laws do not sufficiently facilitate the ability of lenders to collect on the full value of defaulted loans, lending institutions will either fail or begin to invest their money in states with statutory schemes more favorable to creditors.[218] Loss of investment funds in this manner will affect the entire community as real estate development dries up, causing interest rates for homeowners, small businesses and other borrowers to rise. The recession in Alaska in the 1980's is a good example of how important efficient debt foreclosure laws are to lending institutions. Workers fled from the state, leaving behind a glut of foreclosures that could not be sold on the open market. The real estate market subsequently collapsed, and eight banks failed in Anchorage alone.[219]

Therefore, in order to best protect their constituencies – and their own political fortunes – for the long term, legislators must craft statutory schemes that maintain a balance between creditors' and debtors' rights and remedies. Generally, the components of secured transaction statutes are the same throughout the states; it is the manner in which states limit or combine these components that makes states unique. To determine if Alaska has balanced the interests of creditors with those of debtors, and whether it has favored one over the other, it is instructive to compare the statutory scheme in Alaska with those of the other states examined in Section II.

B. Alaska in Comparison

From the point of view of lending institutions, the ideal secured transaction scheme is one that allows them to recover the full value of the debt obligation quickly and efficiently. The key to full recovery of the debt, especially in times of depressed land values, is the ability to reach not only the security, but also the debtor's other personal property. Thus lending institutions seek to maximize their freedom and flexibility in choosing and combining remedies once a default occurs. Debtors, on the other hand, often do not understand that they have contracted to put their personal property at risk. In their eyes, the very purpose of a mortgage or deed of trust is to limit to a particular piece of property the security for repayment of the loan. It is the debtor's expectation that in

218. *See Hearings on S. 515 Before the Senate Judiciary Comm.*, 15th Leg., 2d Sess. 0950 (Alaska 1988) (statement of Ed van Patten, representing Alaska Federal Bank and Alaska Bank's Association).

219. *See* Richardson, *supra* note 5, at 33.

return for his or her designation of property as a security, the creditor has agreed to collect on the security if a default occurs. Thus, to best protect the expectations of the debtor, a state statutory scheme should limit the creditor's remedies to foreclosure of the security, and not allow a preemptive action on the note.

Notwithstanding debtor expectations, on their face all four of the statutory schemes examined in this Note offer at least the possibility of an action on the note before recourse is made to the security. In Oregon and Washington, it is settled law that a creditor may ignore the security and sue on the note.[220] In contrast, while it is possible to ignore the security and sue on the note in California, the state's one-action rule has restricted this right to such an extent that it now barely exists.[221] Alaska falls somewhere in the middle in terms of remedies offered.

While it is possible for a creditor in Alaska to ignore the security and sue on the note, it may do so only if it has explicitly reserved this right under the terms of the note.[222] This notice requirement was prompted by a desire to fulfill the expectations of the parties at the time they drafted the note and the security agreement, and by the manner in which lender expectations changed following the recession in the 1980's.[223] Until the statute was revised in 1988,

> bankers ha[d] never given any serious thought to the question [of] suing on the note apart from foreclosing on the security . . . . The bankers didn't think in terms of suing on the note because . . . it was always the expectations of all the parties, the bankers included, that the security would always be sufficient to satisfy the underlying indebtedness.[224]

Following the recession, however, "banks [were] not interested in taking the security back."[225] They now wanted to turn directly to the note, without wasting time attempting to sell a devalued asset in a depleted market. Thus, in enacting section 34.20.160, the Alaska legislature wanted to ensure that contracting parties clearly understand whether the creditor has the right to sue on the note before foreclosing. So long as the parties agree that the creditor does have such a right, then the creditor may use the

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220. *See supra* notes 75, 104 and accompanying text

221. *See supra* notes 66-73 and accompanying text.

222. *See* ALASKA STAT. § 34.20.160 (Michie 1996).

223. *See Hearings on S. 515 Before the Senate Judiciary Comm.*, 15th Leg., 2d Sess. 0950 (Alaska 1988) (statement of John Abbott, Chairman, Alaska Code Revision Commission).

224. *Id.*

225. *Id.*

right to sue on the note freely, either before, during or after a foreclosure action. For this reason, the Alaska statute, while having more restrictive remedies than Oregon or Washington, is not as severe as the provisions in California.

The greatest concession legislatures have made to creditors' rights is the provision for nonjudicial foreclosure. So long as the deed of trust contains a power of sale, all four of the states examined in this Note allow creditors the option of nonjudicial foreclosure.[226]

The overview of judicial foreclosure procedures provided in Parts II and III make it clear that notice requirements, lengthy waiting periods and other administrative rules for judicial foreclosure make that option a more complicated, expensive and time-consuming process than nonjudicial foreclosure. The primary goal of state legislatures in writing nonjudicial foreclosure statutes is to equip lenders with a process that provides a quicker, easier and less expensive means to foreclose on the security.

Although it is the remedy most beneficial to the creditor, nonjudicial foreclosure is the remedy most harmful to the debtor's interests. These interests are best summed up as (1) avoiding the loss of the security, and (2) if avoiding foreclosure is not possible, then maximizing the price realized on the property at the foreclosure sale. Judicial foreclosure is the option most favorable to the debtor, and nonjudicial foreclosure is most favorable to the creditor. Since the choice of pursuing judicial or nonjudicial foreclosure is left to the creditor, without any extra enticements to choose judicial foreclosure, the creditor would nearly always elect nonjudicial foreclosure. To maintain some semblance of balance between the two types of remedies, and consequently between creditors' and debtors' protections, legislatures have added certain creditor benefits to judicial foreclosure but not to nonjudicial foreclosure, and certain debtor benefits to nonjudicial foreclosure, but not to judicial foreclosure.

In judicial foreclosure, the court's greater control over the

226. *See supra* notes 48-50, 80, 112, 146 and accompanying text. The one exception, as noted above, is that nonjudicial foreclosure is not allowed in Washington if the security is used primarily for farming or agricultural purposes. *See supra* note 112 and accompanying text. Also, in Oregon a creditor can resort to nonjudicial foreclosure only if the note is secured by a deed of trust, rather than a mortgage. *See supra* note 76 and accompanying text. This provision has little substantive effect, however, since in all states that allow nonjudicial foreclosure, creditors will use a deed of trust rather than a mortgage if they want to include a power of sale.

proceedings gives it a larger influence over the price received. The downside for creditors, as mentioned above, is that the process is lengthy and expensive. Accordingly, legislatures will often include deficiency judgments as part of the same action for judicial foreclosure, but will not allow deficiency judgments in nonjudicial foreclosure actions.[227] This is true in each of the four statutory schemes studied in this note, and three of the four add further limitations to the availability of deficiency judgments in judicial foreclosure proceedings. Both California and Oregon do not allow deficiency judgments if the mortgage involved is a purchase money mortgage or a residential trust deed.[228] Washington only allows deficiency judgments if they are provided for in the note or security agreement.[229] Alaska, on the other hand, adds no limitations to its provisions for deficiency judgments, and is thus for creditors the most favorable of the four.

Another debtor protection that is closely related to anti-deficiency statutes is the one-action rule. Traditionally, the common law allows a creditor to pursue all remedies available to it either concurrently or subsequently.[230] In this manner, the creditor may use concurrent claims to pursue alternative remedies, or may use subsequent actions to collect on deficiencies from prior actions. Several states have passed statutes, called one-action rules, that prevent creditors from using subsequent claims to recover deficiencies.

California's one-action rule is the best known and most restrictive. It states that there can only be one form of action on a defaulted loan obligation, and that the action should be one of the two foreclosure options.[231] In this manner, the rule is a "security-first" rule, and once the creditor has chosen one remedy to pursue, it is prevented from pursuing any other form of recovery.[232]

Oregon technically does not have a one-action rule. However, a creditor is not entitled to a deficiency judgment on a purchase money mortgage, so if the creditor is successful on one claim, it must then dismiss any other claims that are pending on the same security arrangement.[233] Also, a creditor may not begin nonjudicial foreclosure proceedings if any other action has been filed pursuing

227. *See supra* notes 57, 64, 90-94, 127, 132 and accompanying text.
228. *See supra* notes 61, 99 and accompanying text.
229. *See supra* note 127 and accompanying text.
230. *See supra* note 10 and accompanying text.
231. *See* CAL. CIV. PROC. CODE § 726(a) (West Supp. 1997).
232. *See id.*
233. *See* OR. REV. STAT. § 88.070 (1988).

either of the other two remedies.[234]

Under Washington's one-action statute, a creditor cannot foreclose the security concurrently with an action on the note, and vice versa.[235] The creditor can, however, wait until a judgment from one of the remedies has been exhausted and then begin a suit using the other remedy. This is not true for nonjudicial foreclosure, which satisfies the obligation regardless of the price received.[236] In this manner, once a creditor completes a nonjudicial foreclosure sale, it can no longer begin judicial foreclosure or a suit on the note.[237]

Alaska's one-action plan is the least restrictive of the four, and thus the most favorable to creditors. The only restriction as to concurrent or separate actions is that no other action may be taken on the debt once a nonjudicial foreclosure sale has been completed,[238] and a nonjudicial foreclosure sale is not permitted once the creditor elects either of the judicial remedies.[239] In the aftermath of the recession in the second half of the 1980's, various proposals were introduced further to limit sequential use of the various remedies.[240] However, even though the legislature and the Alaska Supreme Court indicated a desire to restrict creditors' remedies, the only restriction that actually occurred (the 1988 amendment to section 31.20.070) was minimal. Alaska has thus remained one of the more generous states in terms of allowing creditors to combine concurrent or subsequent claims in order to recover the full debt obligation.

Due to the risk of double recovery and other hardships debtors face when deficiency judgments are available,[241] legislatures usually balance deficiency judgments with several protections for the debtor. One basic protection is the inclusion of lengthy waiting periods as part of judicial foreclosure proceedings. By extending the length of time during which the debtor may utilize equitable redemption, a right recognized in all states, the legislatures give debtors a better opportunity to prevent the foreclosure sale. States may also increase the length of the redemption period by granting statutory rights of redemption that may be exercised after the

234. *See id.* § 86.735(4).
235. *See* WASH. REV. CODE ANN. § 61.12.060 (West 1990).
236. *See id.* § 61.12.120.
237. *See id.*
238. *See* ALASKA STAT. § 34.20.100 (Michie 1996).
239. *See supra* note 211 and accompanying text.
240. *See supra* notes 193-208 and accompanying text.
241. *See supra* notes 25-31 and accompanying text.

foreclosure sale. Thus if a creditor is allowed post-sale redemption rights, the state will usually not grant it a lengthy waiting period, and vice versa. It should be noted that redemption rights, in addition to making a sale more difficult, also tend to drive up the foreclosure sale price.

California requires a 120-day waiting period in judicial foreclosure proceedings if the debtor has no right of redemption.[242] The debtor has no right of redemption if the creditor has no right to a deficiency judgment.[243] If a deficiency judgment is available, the debtor has a one-year right of redemption.[244] In Oregon, creditors have a 120-day waiting period for nonjudicial foreclosure actions, but no lengthy delay for judicial foreclosure.[245] In return, debtors in judicial foreclosure proceedings are granted a post-sale right of redemption, which runs 180 days.[246] In Washington, creditors have a 190-day waiting period for nonjudicial foreclosure, but no lengthy delay for judicial foreclosure.[247] Thus the debtor has redemption rights for one year following a judicial foreclosure sale.[248] In Alaska, nonjudicial foreclosure requires a 120-day waiting period, whereas judicial foreclosure has no such restriction.[249] Accordingly, there is a one-year redemption period following a judicial foreclosure sale, but none following a nonjudicial foreclosure sale.[250]

Another protection that states sometimes offer debtors in order to counter the effect of deficiency judgments is the ability to reinstate the mortgage or deed of trust by paying the outstanding balance due had there been no default. This is a different, easier way to prevent a foreclosure sale. California offers debtors reinstatement rights in both judicial and nonjudicial foreclosure actions.[251] In Washington, Oregon and Alaska, only debtors in non-

242. *See* CAL. CIV. PROC. CODE § 701.545 (West 1997).

243. *See supra* note 55 and accompanying text.

244. *See* CAL. CIV. PROC. CODE § 729.010 (West Supp. 1997). The redemption period is shortened to three months if the foreclosure sale price is sufficient to cover the full loan obligation. *See id.*

245. *See supra* notes 77-79, 82 and accompanying text.

246. *See* OR. REV. STAT. §§ 88.080, 23.560 (1980).

247. *See* WASH. REV. CODE ANN. § 61.24.030(g) (West 1990).

248. *See supra* notes 122-24 and accompanying text. The redemption period is shortened to eight months if the land is not used for farming purposes and the creditor does not have a right to a deficiency judgment. *See supra* note 124 and accompanying text.

249. *See supra* notes 141-50 and accompanying text.

250. *See supra* notes 157, 159 and accompanying text.

251. *See supra* notes 53-54 and accompanying text.

judicial proceedings have reinstatement rights.[252] Alaska limits the right even further, providing that once a debtor cures the deed in this manner twice or more, the creditor may elect to refuse payment and continue with foreclosure.[253]

A final protection for debtors, aimed at driving up foreclosure prices, is fair value or minimum bid provisions.[254] California and Washington have fair value rules, whereas Oregon and Alaska do not.[255] Instead, Alaska has a weaker provision that allows the court to order a resale of the property if it determines there were "substantial irregularities" in the first sale, a solution that is both vague and too indirect.[256]

Compared to California, Oregon and Washington, Alaska's secured transaction law is the most favorable to creditors. Alaska's provisions for anti-deficiency and one-action rules are the most lenient of the four. Alaska's post-sale rights of redemption provisions are average among the group. Although the state does offer reinstatement rights, it adds a restriction to those rights that is not found in any of the other three states. While Alaska allows a court to order a resale if there are "substantial irregularities" in the proceedings at the first sale, this language is vague and seems to offer little support in keeping foreclosure prices high. Finally, while the addition of section 34.20.160 did help clarify the expectations of parties in drawing up deeds of trust, it does little to limit creditor remedies.

V. CONCLUSION

On the surface, the recent addition of section 34.20.160 to the statutory scheme and the amendment to section 34.20.70 seem to push the balance of secured transaction law in Alaska toward the protection of debtors. While these changes do shift the balance somewhat, a closer inspection shows that the effect is not significant. For instance, section 34.20.160 only clarifies the expectations of contracting parties, and does little to limit creditor remedies. In fact, the language the statute proposes for inclusion in deeds of trust would actually increase creditors' available remedies from the level of rights suggested by the Alaska Supreme Court in *Coun-*

252. *See* ALASKA STAT. § 34.20.070 (Michie 1996); OR. REV. STAT. § 86.753 (1988); WASH. REV. CODE ANN. § 61.24.030.

253. *See* ALASKA STAT. § 34.20.070.

254. *See supra* notes 32-33 and accompanying text.

255. *See* CAL. CIV. PROC. CODE § 729.010 (West Supp. 1997); WASH. REV. CODE ANN. § 62.23.060 (West 1990).

256. *See supra* note 145 and accompanying text.

sellors.

Given the widespread effect the recession of the late 1980's had on the entire Alaska economy, it is surprising that it did not trigger stronger reform of creditors' rights. While banks admittedly suffered a great deal, it would seem the tremendous plunge in the value of housing and the crash of the real estate market would have had a greater effect on the legislature. When compared to the majority of states, which do not have anti-deficiency or one-action legislation, Alaska is certainly more favorable to debtors. However, when compared to those states that do have such legislation, like the three others studied in this Note, or when tallying the weight of creditors' rights against those accorded debtors, Alaska is certainly more favorable to creditors.

Given the boom or bust economy of the state, both borrowers and lenders in Alaska are in greater need of statutory protections than those in most other states. While Alaska currently offers lenders a solid array of remedies and protections, there is still much the legislature can do to better protect borrowers. The legislature should therefore consider moving the balance more towards the center.

Joseph E. Gotch Jr.