Alaska Distress Law in the Commercial Context: Ancient Relic or Functional Remedy?

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I. INTRODUCTION

At early common law, when a tenant's rent became overdue, the landlord simply showed up at the door, seized any property on the leased premises, and held this property until the rent was paid. Courts viewed this right to distress[1] as an *in rem* remedy for past-due rent against property situated on the leased premises. The landlord's right was absolute; distress was proper even if the distrained property did not belong to the delinquent tenant.[2]

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1. *See* 52 C.J.S. *Landlord & Tenant* §§ 674, 680 (1968). Distress is "[t]he taking of goods and chattels out of the possession of a wrong-doer into the custody of the party injured to procure a satisfaction for a wrong committed; as for non-payment of rent." BLACK'S LAW DICTIONARY 474 (6th ed. 1990). Distraint is "the act of distraining or making a distress," and is often used as a synonym. *Id.* Some courts have attempted to distinguish between these two terms. *See, e.g.*, Davis v. Odell, 729 P.2d 1117, 1121 (Kan. 1986) ("Distraint" is any seizure of personalty to enforce a lien, while "distress" specifically refers to landlord distraint for past due rent.). This article, however, will treat the two terms as equivalent.

2. *See, e.g.*, Allan W. Rhynhart, *Distress*, 3 MD. L. REV. 185, 185 (1953) ("goods of a stranger are liable to distress with those of the tenant"); 52 C.J.S. *Landlord & Tenant* § 681 (1968) (property of third persons subject to distress). The third party who owned the distrained property could bring an action against the

Consistent with the trend toward consumer protection and away from self-help, modern property law has limited the distress remedy.[3] Commentators have characterized distress as "a surviving feudal prerogative, adopted when no rights amounted to much of anything except those of the owner of land, and when personal property was not so much prized as at present."[4] Some jurisdictions still recognize the common law distress remedy or have statutory provisions permitting distress.[5] This article will analyze whether and to what extent the concept of landlord distress in the commercial context exists under Alaska common law.[6]

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tenant for damages. DAVID S. HILL, LANDLORD AND TENANT LAW IN A NUTSHELL 288 (2d ed. 1986).

3. *See* Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 937, 1040 (1984) [hereinafter *Self-Help*] (arguing that self-help still has a beneficial purpose, but trend has been to shift remedies from landlords to tenants).

4. Annotation, *Goods Owned by Stranger or Subject to an Encumbrance in His Favor As Subject to Distraint for Rent*, 62 A.L.R. 1106, 1107 (1929) [hereinafter *Goods Owned by Stranger*]; *see also* Van Ness Indus., Inc. v. Claremont Painting & Decorating Co., 324 A.2d 102, 104 (N.J. Super. Ct. Ch. Div. 1974) (Distress procedure arose "'out of the early feudal conception of self-help, and stands as the sole surviving relic in modern statutory law of the absolutism incident to the ancient feudal doctrine governing land tenures.'" (quoting Commercial Credit Co. v. Vineis, 120 A. 417, 418 (N.J. 1923))); MILTON R. FRIEDMAN, 2 FRIEDMAN ON LEASES § 20.1 (3d ed. 1990) (Distress is a "crude, quick, and drastic" remedy.); EMANUEL B. HALPER, SHOPPING CENTER AND STORE LEASES § 16.11 (rev. ed. 1991) (Distress is a "vestige of the landlord-tenant law of another era.").

5. *See* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5 (1977) (listing 16 jurisdictions giving the landlord a statutory remedy similar to common law distress, 29 jurisdictions providing the landlord a lien on the tenant's property, 10 jurisdictions at least partially abolishing distress and 16 jurisdictions lacking any statutory provision). It should be noted that the Restatement incorrectly lists Alaska among the states that have completely abolished distress. *Compare id.* (stating "distress abolished" as opposed to "distress abolished for residential leases") *with* ALASKA STAT. § 34.03.250 (1990) (provision of adopted Uniform Residential Landlord and Tenant Act which the Restatement relies upon). For a detailed discussion of the continued validity of distress in Alaska, see *infra* text accompanying notes 147-165.

6. Alaska has no statutory provision allowing distraint. To the extent that other states codify the common law distress remedy, such statutes either follow the common law verbatim or reflect desired reforms in the common law. For a general overview of statutory landlord liens, see 49 AM. JUR. 2D *Landlord and Tenant* § 675 (1970).

Part II of this article examines the origin of distress as it existed at common law. Part III discusses possible priority conflicts between the distraining landlord and other interested parties. The constitutional implications of distress in light of modern due process requirements are explored in part IV. Part V considers whether distress in the commercial context remains a viable legal remedy in Alaska after recent reforms and the adoption of the Uniform Residential Landlord and Tenant Act.[7] Assuming an affirmative answer to that question, part VI explores what procedures govern distraint in Alaska.

This article concludes that distress remains a desirable component of commercial landlord-tenant law in Alaska. Because this conclusion rests on the premise that parties to a commercial lease are arms-length bargainers, common law priority rules should apply only to the parties to the lease. The common law priority rules must therefore be modified to leave the rights of non-bargaining third party creditors unimpaired. Distress would then be available solely between a landlord and a commercial tenant, and only to the extent that non-consenting third parties are not harmed. This article provides a suggested course of action for both landlords and tenants to follow until either the Alaska Supreme Court or the Alaska Legislature provides clearer guidelines.

II. THE ORIGIN OF DISTRAINT

To protect landlords from defaulting tenants who withdrew and concealed their effects, the law of distraint "'allow[ed] a man to be his own avenger.'"[8] The law permitted the landlord to go on the leased premises and take any chattel found there as security for overdue rent.[9] As a general rule, all movables were susceptible to a distraint lien whether they actually belonged to the tenant or to a stranger.[10]

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7. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT 7B U.L.A. 427 (1985). Alaska substantially adopted the major provisions of this Act in 1974. *Id.; see also* 1974 Alaska Sess. Laws 10 (codified as amended at ALASKA STAT. §§ 34.03.010-.380 (1990 & Supp. 1992)).

8. Smith v. Chipman, 348 P.2d 441, 442 (Or. 1960) (quoting 3-4 WILLIAM BLACKSTONE, COMMENTARIES *1024).

9. *See* 49 AM. JUR. 2d *Landlord and Tenant* § 726 (1970); 52 C.J.S. *Landlord & Tenant* § 674 (1968).

10. 49 AM. JUR. 2d *Landlord and Tenant* § 726 (1970); *see also Goods Owned by Stranger, supra* note 4, at 1109 (reasoning that "otherwise a door would be open to infinite frauds upon the landlord; and the stranger has his remedy over by action on the case against the tenant").

Property privileged under exceptions to this rule included goods *in custodia legis*,[11] goods in actual use by the tenant and tools and utensils of the tenant's trade.[12] These exclusions served the public interest by maintaining orderly legal processes and allowing the tenant to continue a trade that contributed to the commonwealth.[13] Other exceptions existed for goods belonging to a third party that were merely on the premises for manufacture, sale or repair.[14] Finally, property that was not returnable in the condition in which it was taken was also exempt from distress.[15] Any goods which did not fall under one of these categories were subject to distress if certain conditions were met.

A. Conditions for Distress

The initial requirement for distress was the existence of a landlord-tenant relationship.[16] At early common law, once a landlord terminated a lease, he waived any right to distrain the tenant's property.[17] However, the eighteenth century English Statute of 8 Anne, ch. 14, extended the right to distrain for six months beyond the termination of the lease.[18] This statute has been incorporated into the common law or adopted by statute in

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11. "*In custodia legis*" means "in the custody or keeping of the law," and would apply to chattels that had already been executed upon. BLACK'S LAW DICTIONARY 768 (6th ed. 1990). While goods of a bankrupt tenant, after bankruptcy has been filed, are *in custodia legis*, goods of an insolvent tenant in the possession of an assignee for the benefit of creditors are not. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 745 (1970).

12. *See* 49 AM. JUR. 2D *Landlord & Tenant* §§ 742-43 (1970).

13. *See* Smith v. Chipman, 348 P.2d 441, 443 (Or. 1960) (citing 3-4 WILLIAM BLACKSTONE, COMMENTARIES *1024).

14. *See Goods Owned by Stranger*, *supra* note 4, at 1119-25.

15. 49 AM. JUR. 2D *Landlord and Tenant* §§ 743-44 (1970). The requirement that goods be returnable in the same condition originally existed because the landlord had no power of sale and could hold the goods only until the tenant paid rent. One example is perishable goods, which were not subject to distraint. *See* Rhynhart, *supra* note 2, at 194-95 (suggesting the advent of refrigeration may have eliminated many prior exemptions).

16. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 731 (1970).

17. *Id.* § 756.

18. *Id.*

several states.[19] Nevertheless, a distraining landlord would be wise to exercise this right during the tenancy.[20]

Another prerequisite for distress was the existence of overdue rent.[21] At common law, actual overdue rent payments were the only claim that would support distress; this remedy did not exist for utilities, damages, penalties or interest.[22] A lease can be drafted, however, to place items such as utilities under the category of rent in order to expand the breadth of the distress remedy.[23]

Acceleration clauses[24] can make it difficult to determine when rent becomes overdue. Such clauses were unenforceable at common law[25] and some courts still refuse to allow distress for any future unearned rent.[26] Other courts have allowed the remedy under acceleration clauses if the lease clearly states that all rent becomes due on the date the lease begins and that the tenant, from that point forward, is merely a creditor of the landlord.[27]

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19. *Id. See, e.g., In re* Great Basin Holding Corp., 9 B.R. 79, 81 (Bankr. D. Nev. 1981) (ancient statute, in predating the Declaration of American Independence, became part of Nevada's common law); *Self-Help, supra* note 3, at 939 (referring to "common law" restriction that landlords must distrain within six months after lease termination).

20. *Cf.* Klosterman v. Hickel Inv. Co., 821 P.2d 118, 124 (Alaska 1991) (landlord accepting tenant's offer of surrender and retaking possession may terminate lease and relieve tenant of duty to pay rent).

21. 49 AM. JUR. 2D *Landlord and Tenant* §§ 732-35 (1970).

22. *Id.* § 372.

23. *Compare* Elmira Corp. v. Bulman, 135 A.2d 645, 649 (D.C. 1957) (Statutory lien for "rent" does not include water charges "unless the clear intention of the parties is shown in the [lease] to make this a part of the consideration.") *with* Chicago Hous. Auth. v. Bild, 104 N.E.2d 666, 667 (Ill. App. Ct. 1952) (excess electricity part of "rent"); *see generally* Donald M. Zupanec, Annotation, *Landlord's Remedy by Way of Distress or Lien on Defaulting Tenant's Property on Leased Premises as Including Right to Collect for All Unpaid Utility Expenses*, 99 A.L.R. 3d 1100 (1980).

24. An acceleration clause is a provision of a credit agreement that requires the obligor "to pay part or all of the balance sooner than the date or dates specified for payment upon the occurrence of some event or circumstance described in the contract." BLACK'S LAW DICTIONARY 12 (6th ed. 1990).

25. *See* Brunswick Corp. v. Long, 392 F.2d 337, 341-42 (4th Cir.), *cert. denied*, 391 U.S. 966 (1968).

26. *See, e.g., id.*; Gentry v. Recreation, Inc., 7 S.E.2d 63, 66-67 (S.C. 1940).

27. *See, e.g,* American Seating Co. v. Murdock, 169 A. 250 (Pa. Super. Ct. 1933); Francis H. Legget & Co. v. Orangeburg Piggly Wiggly Co., 180 S.E. 483 (S.C. 1935); *but see Brunswick Corp.*, 392 F.2d at 341 (finding that landlord waived right to distrain for total amount of lease through prior acts which were inconsistent with theory that total amount of rent was due at beginning of term).

The final condition to actuate the landlord's distress remedy was the seizure of personal property found on the demised premises. Distraint provided the landlord with a specific possessory lien which had no effect until some type of seizure occurred.[28] Before such a seizure occurred, the landlord had no true lien, but only an inchoate right which was in the nature of a lien.[29] Until this right was exercised, it did not in any way encumber the tenant's property.[30]

B. Common Law Distress Procedures and Consequences

At common law, the landlord could personally levy, or seize, the tenant's property or appoint an agent to do so.[31] Through the use of a warrant, authorized by the court, a bailiff often was designated by the landlord to act as his agent.[32] This warrant entitled the landlord to the distress remedy and created an implied obligation on his part to indemnify the bailiff if the distress was improper.[33]

The bailiff or the landlord then entered the leasehold and either impounded the chattels or declared and posted notice of the distress. This entry had to be made during the day and without force.[34]

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28. *See* RESTATEMENT OF SECURITY ch. 2, scope note (1941); *see also* MICHAEL BARNES, HILL AND REDMAN'S LAW OF LANDLORD AND TENANT 402-03 (16th ed. 1976) (actual or constructive seizure sufficient; constructive seizure sufficient if landlord interferes to prevent removal of chattel); Rhynhart, *supra* note 2, at 198 (seizure required, "but slight acts, such as walking around the premises and making an inventory of the goods, and declaring them to be seized are sufficient").

29. *See* Henderson v. Mayer, 225 U.S. 631, 638 (1912) ("Before the distraint, the landlord at common law has 'no lien on any particular portion of the goods, and is only an ordinary creditor, except that he has the right of distress by reason of which he may place himself in a better position.'" (quoting Sutton v. Rees, 9 Jur. (N.S.) 456 (1863))); *see generally* 49 AM. JUR. 2D *Landlord and Tenant* § 726 (1970).

30. *See* 52 C.J.S. *Landlord & Tenant* §§ 605, 674 (1968).

31. *See* BARNES, *supra* note 28, at 397; 52 C.J.S. *Landlord & Tenant* § 689(b) (1968).

32. 52 C.J.S. *Landlord & Tenant* § 689(b) (1968). The bailiff's role will be briefly discussed, as this author concludes that use of a bailiff violates the United States Constitution.

33. *See* BARNES, *supra* note 28, at 398.

34. *See id.* at 383-84 (distress only in daytime); *id.* at 400 ("legal and peaceful fashion"). However, if upon entering, the distrainor was forcibly expelled or driven away by the tenant's violence, the distrainor could re-enter by force with the assistance of a peace officer. *Id.* at 401.

Seized items were originally deposited in a public pound where they were securely held until the tenant paid the overdue rent. The Distress for Rent Act of 1737 permitted impounding on the premises, however,[35] and public pounds have practically disappeared.[36]

While distress initially provided no power of sale to the landlord, "the Sale of Distress Act of 1689 . . . extended the law . . . by authorizing the sale of distrained property in satisfaction of the claim for rent."[37] In order to allow the tenant time to replevy, this sale could not take place until five days after the seizure.[38]

III. DISTRAINT PRIORITY

The procedure by which the landlord distrained at common law became more complicated when other parties were involved. At early common law, the distraining landlord possessed a superpriority over all other creditors and claimants.[39] The landlord's priority sprang not from placing "first in a race of diligence, but [rather was] given by law because of the nature of the claim and the relation between [landlord and tenant]."[40] Even outright ownership of property by a person other than the tenant could not defeat the landlord's claim.[41] Modern property law, however, allows these common law priority rights to be modified by contract, bankruptcy or federal and state policy concerns.

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35. *Id.* at 405-06 n.d.; *see also* 52 C.J.S. *Landlord & Tenant* § 694 (1968).

36. BARNES, *supra* note 28, at 405 n.a.

37. Shaffer v. Holbrook, 346 F. Supp. 762, 763 (S.D. W. Va. 1972).

38. *See* BARNES, *supra* note 28, at 421. "Replevy" refers to the action of replevin, which allows the owner of chattels wrongfully distrained to recover them. *See* BLACK'S LAW DICTIONARY 1299, 1300 (6th ed. 1990).

39. *See* Henderson v. Mayer, 225 U.S. 631, 639 (1912).

40. *Id.*

41. 52 C.J.S. *Landlord & Tenant* § 681(b)(1) (1968) (Mortgaged property left in a tenant's possession is subject to distraint under the general rule allowing distress against the property of a third person.); *see supra* notes 1-2 and accompanying text.

A. Article Nine Coverage

1. Consensual Landlord Liens. A landlord may bargain with a commercial tenant to include in the lease a contractual lien provision providing for some form of distress. The Uniform Commercial Code ("UCC") expressly governs "all consensual security interests,"[42] including contractual liens.[43] A landlord desiring priority under a contractual lien must therefore file as a normal UCC creditor. Priority is then controlled by Article Nine's "first to file" rule, with the exception of purchase money lenders.[44]

2. Non-consensual Landlord Liens. A landlord may also secure a lien on a tenant's property through operation of the common law of distraint. Such liens are non-consensual and are therefore not covered by the UCC.[45] Rather, priority is established by the landlord-tenant relationship. Because no lien arises until the landlord actually seizes the tenant's property, a landlord could never win a UCC time-based priority battle. Basing priority solely on the landlord-tenant relationship, therefore, gives life to the distress remedy. While most jurisdictions have statutorily withdrawn some of this power,[46] they have done so "for the purpose of protecting the owner of the goods, rather than on account of any special privilege of the tenant."[47]

3. Non-consensual Liens vs. UCC Security Interests. Courts have used different approaches in deciding priorities between non-

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42. U.C.C. § 9-102 (1990) (official comment).

43. *See, e.g., In re* Leckie Freeburn Coal Co., 405 F.2d 1043, 1047 (6th Cir.), *cert. denied*, Foster v. Hamblin, 395 U.S. 960 (1969); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 23-7 (3d ed. 1988) (Article Nine is not applicable to liens authorized by statute or case law, but does apply to liens authorized by contract.).

44. ALASKA STAT. § 45.09.312 (Supp. 1992); U.C.C. § 9-312 (1987).

45. *See* U.C.C. § 9-102 (1990) (official comment). In fact, non-consensual landlord liens are specifically excluded. *Id.* § 9-104(b) (1990). Alaska adopted this exclusion verbatim. ALASKA STAT. § 45.09.104(2) (1986). An in-depth analysis of all possible approaches used when deciding priority between landlord liens and UCC liens is beyond the scope of this article. For a comprehensive analysis of this topic, see Gregory B. Wilcox & Frank B. Harty, *The Relative Priority of a Landlord's Lien and Article 9 Security Interest,* 35 DRAKE L. REV. 27 (1985-86).

46. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 748 ("[E]xceptions will, in the end, eat out the common-law rule."); *see generally id.* §§ 750-53 (discussing statutory modifications).

47. *Id.* § 748.

consensual distraint liens and consensual UCC security interests. One moderate position distinguishes between purchase-money[48] and blanket security interests. Under this priority rule, a properly filed purchase money security interest will prevail over the landlord's distress remedy, while a blanket security interest will not.[49] Another position is to determine priority based upon when tenancy begins and when property is brought onto the demised premises.[50] Finally, the greatest change from the common law has been to apply the general "first in time" priority rule.[51] Using "first in time," landlords generally lose, as their possessory lien does not come into existence until after distraint. However, "first in time" arguably creates the most equitable results for all concerned.[52]

B. Bankruptcy

As one federal district court has commented, "[t]he position of the landlord as a claimant in bankruptcy has steadily worsened since the inception of the Bankruptcy Act in 1898."[53] Despite landlords' "super-priority," the present Bankruptcy Code allows the trustee in bankruptcy to avoid the fixing of any statutory or common law lien "for rent" or "distress for rent."[54] This avoidance power has no

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48. A "purchase money security interest" is a "secured interest which is created when a buyer uses the money of the lender to make the purchase and immediately gives to the lender a security interest." BLACK'S LAW DICTIONARY 1357 (6th ed. 1990).

49. *See, e.g.*, Universal C.I.T. Credit Corp. v. Congressional Motors, Inc., 228 A.2d 463, 467 (Md. 1967) (under common law, conditional contracts of sale exempted property from distress, but UCC blanket security interest loses to landlord); Perkins v. Farmers Trust & Savings Bank, 421 N.W.2d 533, 535-36 (Iowa 1988) (purchase money security interest "primed" landlord's lien, but non-purchase money claim did not). "Prime" means "[t]o stand first or paramount; to take precedence or priority of; to outrank." BLACK'S LAW DICTIONARY 1191 (6th ed. 1990).

50. *See, e.g.*, Brunswick Corp. v. Long, 392 F.2d 337, 340 (4th Cir.), *cert. denied*, 391 U.S. 966 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 717 (1970).

51. *See* First State Bank v. De Kalb Bank, 530 N.E.2d 544, 548 (Ill. App. 1988) (landlord lien given no special priority in derogation of general principle of "first in time, first in right").

52. See *infra* part VII (arguing that landlords should be forced to bargain with creditors, limiting common law distraint to tenant equity in property).

53. Thomas v. Gulfway Shopping Ctr., Inc., 320 F. Supp. 756, 765 (S.D. Tex. 1970).

54. *See* 11 U.S.C. § 545 (1979 & Supp. 1992) (trustee has power to avoid statutory lien); *id.* § 101(53) (defines "statutory lien" to include "lien of distress for rent, whether or not statutory"); *see also In re* Allegheny Nursing Serv., Inc., 17

time limitation and applies even if the lien has been enforced by sale before the bankruptcy commences.[55] Thus, landlords are stripped of any preferred priority if the tenant files bankruptcy. This avoidance power appears to be inapplicable to *contractual* landlord liens, however.[56] The landlord can therefore avoid the status of an unsecured creditor by following UCC requirements.

C. Federal Liens

The federal government may obtain a lien against a tenant in various ways, most commonly through non-payment of taxes, although guaranteed loans and mortgages may give rise to liens as well. The Internal Revenue Code provides a specific lien attaching to all property of any delinquent taxpayer.[57] This lien will not take priority over other security interests or lien creditors until notice has been filed.[58] However, courts have not treated landlords graciously where the federal purse is at stake.

The leading case in this area is *United States v. Scovil*,[59] which addressed the priority between a federal tax lien and a landlord who had distrained under a South Carolina statute. The statute allowed the tenant five days in which to put up a bond and retrieve the distrained property before sale occurred.[60] During this five-day period, the Collector of Internal Revenue filed notice of a lien assessment.[61] The Court held that, although distraint occurred before the notice, the claim thus generated "was not perfected in the federal sense at the time the Government's liens were filed."[62] Because the tenant still could redeem its property, the landlord's "lien was only a caveat of a more perfect lien to come."[63] Therefore, the tax lien had priority over the landlord's distraint.

B.R. 594, 597 (Bankr. W.D. Pa. 1982) (construing 11 U.S.C. § 545).

55. *See* 11 U.S.C. § 545 (1979 & Supp. 1992).

56. *See Thomas,* 320 F. Supp. at 767 (Bankruptcy Act does not invalidate contractual liens.); *In re* Furniture Discount Stores, Inc., 11 B.R. 5, 7 (Bankr. N.D. Tex. 1980) (statutory and common law lien avoidable under 11 U.S.C. § 545; while the court recognized existence of a contractual lien, landlord's failure to file was fatal to that claim).

57. I.R.C. § 6321 (1991). This lien generally arises when tax assessment is made. *Id.* § 6322. The lien also is subject to special priority provisions. *Id.* § 6323.

58. *Id.* § 6323(a).

59. 348 U.S. 218 (1955).

60. *Id.* at 219.

61. *Id.*

62. *Id.* at 220.

63. *Id.*

Cases since *Scovil* have expanded and clarified this "perfected in the federal sense" concept. Where a federal lien is disputed, courts may even ignore state law governing perfection and apply federal common law. An example of this is *Stein v. Moot*,[64] in which the Small Business Administration ("SBA") had asserted a chattel mortgage against a commercial tenant's property. Under Delaware state law, landlords held perfected liens on tenants' property located on the landlords' premises for up to one year's overdue rent. These liens were paramount to any chattel mortgages. Even in the absence of any conflicting federal statute, the court held that "'federal common law is determinative where the question involved is the priority to be accorded to a lien of the federal government *whatever its source*.'"[65] *Stein* decided the priority issue using the federal rule of "first in time, first in right."[66] Because the landlord had not distrained before the SBA lien attached, the government prevailed.[67]

In order to compete with a federal lien, a *state* lien must be "choate"[68] under *federal* law.[69] This means that it must be "specific to the point that nothing further need be done to make the lien enforceable."[70] To meet this specificity requirement, the landlord must establish that: (1) the asset subject to the lien is specifically ascertained; (2) the lienor is identified; and (3) the amount of the encumbrance is certain.[71]

D. State Liens

Alaska statutes provide a host of statutory liens with varying priorities, including liens for mechanics and materialmen; mines and

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64. 297 F. Supp. 708 (D. Del. 1969).

65. *Id.* at 711 (emphasis added) (quoting United States v. Oswald and Hess Co., 345 F.2d 886, 887 (3d Cir. 1965)).

66. *Id.*

67. *Id.*

68. "Choate" refers to a lien which "has become perfected or ripened." BLACK'S LAW DICTIONARY 241 (6th ed. 1990).

69. *See, e.g.*, United States v. Saidman, 231 F.2d 503, 505-07 (D.C. Cir. 1956); United States v. Globe Corp., 546 P.2d 11, 16 (Ariz. 1976) (statutory lien perfected under state law held inchoate under federal law and subordinate to tax lien).

70. Trustees of the Clients' Security Fund v. Yucht, 578 A.2d 900, 904 (N.J. Super. Ct. Ch. Div. 1989) (citing United States v. Bond, 279 F.2d 837 (4th Cir. 1960)).

71. *Id.* (citing Illinois *ex. rel.* Gordon v. Campbell, 329 U.S. 362 (1946)). The landlord carries the burden of showing that his distraint lien meets these requirements. *Id.*

wells; improvement of chattels; transportation, storage and agistment;[72] timber and lumber; fish packers and processors; fishermen; watchmen; attorneys; wages; hospitals and nurses; and hotels and boardinghouses.[73] Many of these liens are granted special priorities, including a likely priority over a landlord's common law distraint lien.[74] These priorities evidence Alaska's public policy determination to protect the enumerated interests.

Alaska law also provides for liens to collect taxes and contributions for workers' compensation.[75] These likewise would have priority over any landlord distraint claims, as they are expressly given priority over "all other liens or claims except [prior tax liens]."[76]

IV. CONSTITUTIONAL IMPLICATIONS

A. Debtor Protectionism

In recent years, many self-help measures have come under constitutional attack as a violation of due process.[77] The Due Process Clause of the United States Constitution and article I, section 7 of the Alaska Constitution may require notice and an opportunity to be heard before seizure of a debtor's or tenant's

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72. "Agistment" refers to "[a] contract whereby a person, called an agister, has control of animals and retains possession of land." BLACK'S LAW DICTIONARY 66 (6th ed. 1990). An "agister" is "[a] person engaged in the business of pasturing of cattle as a bailee in consideration of an agreed price to be paid by [the] owner of cattle." *Id.*

73. *See* ALASKA STAT. §§ 34.35.050-.530 (1990).

74. *See* Great Western Sav. Bank v. George W. Easley Co., 778 P.2d 569, 576-77 (Alaska 1989) (Express statutory lien priority evidences legislative intent to provide a complete and prioritized system of remedies that preempts other remedies in situations specifically addressed by the particular statute.).

75. *E.g.*, ALASKA STAT. § 23.20.250 (1990) (workers' compensation contributions); *id.* § 29.45.310 (provides distraint and sale of personal property for municipal tax deficiency); *id.* § 43.10.030 ("The remedy of distraint on property [as statutorily specified] applies to all state revenue statutes existing or hereafter enacted for the collection of taxes and license fees.").

76. *Id.* § 23.20.250(a); *id.* § 29.45.300(b) (1992) (A property tax "lien is prior and paramount to all other liens or encumbrances against the property."); *see also id.* § 43.10.042(a) (1990) (certain statutory liens "superior to all other liens . . . upon . . . real and personal property").

77. *See generally Self-Help, supra* note 3 (analysis of various self-help remedies in modern society).

property.[78] The United States Supreme Court made this clear in *Sniadach v. Family Finance Corp.*,[79] where it invalidated a prejudgment wage garnishment procedure.[80] The Court recognized that such a procedure could meet due process requirements "in extraordinary situations," but concluded that the creditor's interest in payment in the instant case did not constitute such a situation.[81] *Sniadach* found wages to be a "specialized type of property."[82] Because a tremendous hardship would be imposed on wage earners deprived of such resources,[83] the Court determined that the procedure violated fundamental principles of due process.[84]

Three years later, *Fuentes v. Shevin*[85] clarified the scope of the *Sniadach* holding. *Fuentes* rejected any distinction based on deprivations that were "temporary"[86] or non-necessities, stating that *Sniadach* had "nothing to do with absolute 'necessities' of life."[87] Rather, the Court claimed that *Sniadach* simply established "that due process requires an opportunity for a hearing before deprivation of property takes effect."[88]

The appellants in *Fuentes* challenged the constitutionality of statutes allowing the seizure of goods under state-issued writs of replevin[89] without notice or a prior hearing.[90] Under the challenged statutes, seizure could occur once a creditor filed an

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78. *See* U.S. CONST. amend. XIV, § 1; ALASKA CONST. art. I, § 7. The Alaska Supreme Court has applied identical analysis and reasoning when deciding due process claims under either clause. Therefore, state decisions will not be separately addressed. *See* Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972) (no state-federal distinction made when considering due process claim).

79. 395 U.S. 337 (1969).

80. *Id.* at 342.

81. *Id.* at 339.

82. *Id.* at 340.

83. *Id.*

84. *Id.* at 342.

85. 407 U.S. 67 (1972).

86. *Id.* at 84-85.

87. *Id.* at 88.

88. *Id.*

89. The Court noted that the replevin action descended from common law and was typically used after a landlord had wrongfully distrained goods. *Id.* at 78. At common law, creditors were not entitled to utilize replevin. *Id.* at 79 ("[I]f a creditor wished to invoke state power to recover goods wrongfully detained, he had to proceed through the action of debt or detinue."). Creditors could, however, "proceed without the use of state power, through self-help, by 'distraining' the property before a judgment." *Id.* at 79 n.12.

90. *Id.* at 69-70.

application and posted a security bond.[91] The property would be taken at the same moment the defendant received the complaint, with no opportunity to challenge the issuance of the writ until the eventual hearing of the creditor's claim.[92]

The Court determined that the challenged statutes "[flew] in the face" of the right to procedural due process.[93] "If the right to notice and a hearing is to serve its full purpose," the Court reasoned, "it must be granted at a time when the deprivation can still be prevented."[94] A hearing occurring after seizure is insufficient, for a "'wrong may [not] be done [just because] it can be undone.'"[95] The Court noted that the application procedure under the challenged statutes did deter "wholly unfounded" claims, but nevertheless found the procedure to be an inadequate substitute for a prior hearing because it "test[s] no more than the strength of the applicant's own belief in his rights."[96] Where private gain is at stake, the Court reasoned, creditors are likely to have misplaced confidence that they ultimately will prevail at trial, and courts cannot normally take even tentative action before hearing both sides.[97]

B. State Action

Because self-help occurs without notice or a prior hearing, it would appear to be a dying remedy after *Sniadach* and *Fuentes.* The Supreme Court, however, may have resuscitated self-help in *Flagg Bros. v. Brooks.*[98] Recognizing that the Fourteenth Amendment only protects against *state* deprivation of property without due process, *Flagg Bros.* held that a warehouseman's private sale to enforce his UCC lien was not within the purview of this amendment.[99]

In order to violate constitutional protections, property deprivation must occur under color of a statute and be properly attributable to the state.[100] In characterizing the New York law which allowed property deprivation to occur as "mere acquiescence in a private

91. *Id.*
92. *Id.* at 75.
93. *Id.* at 83.
94. *Id.* at 81.
95. *See id.* at 82 (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972)).
96. *Id.* at 83.
97. *Id.*
98. 436 U.S. 149 (1978).
99. *Id.* at 153.
100. *Id.* at 156.

action,"[101] the Court stated that New York had "done nothing more than authorize . . . — without participation by any public official — what Flagg Brothers would tend to do, even in the absence of such authorization, *i.e.,* dispose of [the] property."[102]

In the Court's view, such passive conduct did not amount to state action. The Court emphasized that: (1) settlement of debtor-creditor disputes is not traditionally an exclusive public function; (2) the plaintiff never alleged that state law prevented bailors, at the time of storing goods, from seeking a waiver of the warehouseman's right to sell; and (3) that, presumably, aggrieved bailors could pursue other remedies for damages or replevin.[103] Therefore, according to the Court, the actions responsible for deprivation of the bailor's property were not attributable to the State of New York. The Court concluded:

> Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act.[104]

The question left unanswered then is whether a landlord's distraint constitutes private action or state action. While the Supreme Court has not addressed this precise issue, it has provided additional clarification of the "state-action" and action "under-color-of-state-law" confusion. In *Lugar v. Edmondson Oil Co.,*[105] the Court invalidated on due process grounds a Virginia prejudgment attachment law that enabled a county sheriff to sequester a debtor's property based solely upon a creditor's allegations.[106] The *Lugar* Court observed that while "state action" and action "under-the-color-of-state-law" are not always identical, when a state official is alleged to have caused the deprivation of property, the two principles "collapse into each other" and have equivalent meanings.[107] If the constitutional challenge is directed at a private party, however, the two principles diverge and denote separate areas of inquiry.[108] In such a case, "something more" is required to

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101. *Id.* at 164.
102. *Id.* at 162 n.12.
103. *Id.* at 160-61.
104. *Id.* at 165-66.
105. 457 U.S. 922 (1982).
106. *Id.* at 924-25.
107. *Id.* at 937.
108. *Id.*

attribute the actions of the private party to the state.[109] The Court characterized the process as a "fact-bound inquiry,"[110] but found that where the attachment is carried out by state officials acting on the ex parte application of one litigant in a private dispute, both requirements are met.[111] Virginia's "joint participation," therefore, constituted state deprivation of property without due process.[112]

C. Appellate Courts

The federal courts of appeals are divided regarding the "state action" status of landlord distraint. In *Hall v. Garson,*[113] the Fifth Circuit held that a Texas distraint statute constituted state action and was subject to constitutional constraints.[114] The Third Circuit, however, reached a distinguishable conclusion in *Parks v. "Mr. Ford."*[115] Although *Parks* was not a distraint case, it involved the similar issue of whether a private sale to enforce a mechanic's lien violated the Due Process Clause. The court held that although *retention* of a vehicle under a common law repairman's lien was not state action, subsequent *sale* to satisfy the lien was.[116] Thus, the court explained that the state statute, which authorized these sales and directed how they should be carried out, had the effect of rendering the sales judicial sales: "The statute not only extended the power of sale to the garageman but also directed him to follow the same procedures employed by a sheriff or constable."[117]

In *Davis v. Richmond,*[118] the First Circuit determined that private distraint under Massachusetts law was not state action, even though the statute made it illegal for the owner to remove belongings that were subject to a valid distress lien.[119] In *Davis*, which involved a boardinghouse keeper's lien, the court declined "to

109. *Id.* at 939.
110. *Id.*
111. *Id.* at 942.
112. *Id.* at 940, 942.
113. 430 F.2d 430 (5th Cir. 1970).
114. The court found state action to be present, even though the landlord acted without state assistance. *Id.* at 439-40. *Hall's* holding was based on a finding that lien execution was traditionally a state function in Texas. *Id.*
115. 556 F.2d 132 (3d Cir. 1977).
116. *Id.* at 141.
117. *Id.*
118. 512 F.2d 201 (1st Cir. 1975).
119. *Id.* at 202 n.1.

decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England."[120] A focus on common law origin, the court reasoned, would produce the anomalous result of finding common law conduct in one state constitutional, while prohibiting the identical statutorily sanctioned conduct in a neighboring state.[121]

The court instead focused on "the impact of the law on private ordering"[122] and determined that the state was acting as a rule maker rather than as a participant.[123] According to the court, the pro-landlord statute was merely one permissible alternative from a range of possible rules to promulgate.[124] *Davis* also decided that distress was not a delegated traditional public function because even in a "state of nature" or organized society without a law on point, assertion of this type of self-help was a reasonable expectation.[125]

Results similar to *Davis* were reached by the Seventh and Third Circuits.[126] The Third Circuit opinion in *Luria Bros. & Co. v. Allen*[127] is particularly informative, as it was decided after the Supreme Court decision in *Flagg Bros.*[128] *Luria Bros.* applied the two-part test of *Flagg Bros.* and held that because the state had not participated in the distraint process, the actions could not be attributable to the state.[129] In reaching this decision, the court relied upon several factors: (1) as in *Flagg Bros.*, no public officials were named as defendants in the complaint; (2) the statute merely permitted, but did not compel, creditor self-help; and (3) the private arrangements in ordering commercial relationships are not tradition-

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120. *Id.* at 203.

121. *Id.* at 204 (citing WILLIAM BURKE AND DAVID REBER, *Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 47 (1973)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975) (statutory hotelkeeper's lien not state action), *cert. denied*, 424 U.S. 928 (1976); Luria Bros. & Co. v. Allen, 672 F.2d 347 (3d Cir. 1982).

127. 672 F.2d 347 (3d Cir. 1982).

128. See *supra* text accompanying note 98.

129. *Luria Bros.*, 672 F.2d at 352, 354.

ally exclusive government functions.[130] The court explained that commercial subtenants, like Luria, who fear "a landlord-tenant squeeze play" can protect themselves by bargaining for a "no distraint clause in [their] sublease."[131]

D. Ninth Circuit Analysis

The critical (and unresolved) question for Alaska is how the Ninth Circuit will treat landlord distraint. The only case on point is the pre-*Flagg* decision of *Culbertson v. Leland*,[132] which involved an Arizona innkeeper's lien statute that permitted distraint of guests' possessions for accommodation charges. The court, while recognizing that it was "squarely in conflict with the First Circuit" holding in *Davis*, ruled that the state had significantly involved itself in the dispute and consequently must comply with the Due Process Clause.[133]

The *Culbertson* court noted an earlier case, *Adams v. Southern Cal. First Nat'l Bank*,[134] where the Ninth Circuit had allowed private self-help *repossession* under the UCC,[135] but distinguished it on three grounds. First, in *Adams* the *innkeeper's* lien statute was an extension, rather than a mere codification, of the common law.[136] Second, in the repossession context, the seized property, the purchase creating the debt and the security interest are all specifically related. In the distress setting of *Culbertson*, however, a general debt was satisfied by "indiscriminate seizure of property as collateral."[137] Finally, in *Culbertson*, the distress was authorized

130. *Id.* at 353. When stating that the statute at issue did not compel distress, the court noted that other means were also provided by the state to resolve financial disputes between the parties, such as ejectment, assumpsit, replevin, and confession of judgment. *Id.* at 353 n.13.

131. *Id.* at 354.

132. 528 F.2d 426 (9th Cir. 1975) (2-1 decision with concurrence).

133. *Id.* at 432.

134. 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

135. *Culbertson*, 528 F.2d at 428 (stating *Adams'* holding to be that UCC self-help repossession not action "under color" of state law).

136. *Id.* at 429. *Contra* Flagg Bros. v. Brooks, 436 U.S. 149, 162-63 (1978) (improper to base validity of statute on origin of law, as result would be "constitutional condemnation in one State of a remedy found perfectly permissible in another").

137. *Culbertson*, 528 F.2d at 431.

by statute and was not supported by a private contractual agreement collateralizing the lessee's property,[138] as it had been in *Adams*.

In *Melara v. Kennedy*,[139] decided between *Culbertson* and *Flagg*, the Ninth Circuit considered a proposed warehouseman's sale under the UCC. A unanimous court concluded that state action was not present and listed several factors relevant to the determination, including (1) the source of authority; (2) the pervasiveness of regulation; (3) the relationship between the property and underlying debt; (4) the existence of a contractual provision for the challenged activity; (5) the presence of joint participation by the state; and (6) the occurrence of a delegation of a traditional state function.[140]

The *Melara* court also criticized *Culbertson*, stating "there was very little agreement . . . absent the result"[141] and "each judge [was] writing independently [with] no opinion representing a majority."[142] The court also distinguished *Hall v. Garson*,[143] the Fifth Circuit opinion which held that a Texas distraint statute constituted state action,[144] noting that two conditions present in *Melara* were lacking in *Hall*: (1) a specific relation between the debt and property and (2) a contractual provision providing notice of the potential seizure.[145]

It remains unclear how the Ninth Circuit will rule on the issue in light of the Supreme Court's decisions in *Flagg Bros.* and *Lugar*.[146] Private seizures would likely be found constitutional, as nonregulated action which does not significantly involve the state. A subsequent sale without judicial proceedings, however, would unconstitutionally transfer ownership with state approval. Such a result seems consonant both with the Supreme Court's pronouncements and the factors articulated by the Ninth Circuit in *Melara*.

Distress is traditionally a private self-help remedy. Without a state's joint participation or pervasive regulation, the actual seizure

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138. *Id.* at 432.

139. 541 F.2d 802 (9th Cir. 1976).

140. *Id.* at 805 (noting that all of these factors should be considered; no specific formula controlled).

141. *Id.* at 806 n.7.

142. *Id.* at 804.

143. *Id.* at 807.

144. See *supra* text accompanying note 113.

145. *Melara*, 541 F.2d at 808.

146. See *supra* text accompanying notes 98-112.

should be upheld in spite of the weak relation between the property and debt, and the absence of a contractual provision. Because a subsequent sale of the property would require further state involvement in order to convey clear title, it seems unlikely that courts would uphold such an action. No federal appellate court has sanctioned this type of sale absent a contractual relationship.

V. DISTRESS AS A VALID LEGAL CONCEPT IN ALASKA

Assuming that some form of distress would pass constitutional muster, the current status of the remedy in Alaska remains uncertain. Although the Alaska Supreme Court has yet to rule directly on distraint,[147] the Alaska legislature has adopted the Uniform Residential Landlord and Tenant Act, which abolishes distraint for residential leases.[148] Whether some distress remedy still exists in the commercial lease setting, however, is an open question.

A. Common Law Distraint Acknowledged by *Bickel*

Prior to statehood, an Alaska district court recognized the common law remedy of distress in *Bickel v. Polaris Investment Co.*[149] In *Bickel*, a bankruptcy trustee attempted to set aside, as a voidable preference, the distraint of a tenant's office property that occurred within four months of the tenant's bankruptcy.[150] The court concluded that, although Alaska had no statutory landlord's lien nor specific provisions for distress warrant proceedings, the common law right to distress could be exercised.[151] The decision was based upon a statute declaring the law of the Alaskan Territory

147. *See* Klosterman v. Hickel Inv. Co., 821 P.2d 118, 126 n.16 (Alaska 1991) (On remand, the trial court may consider whether the landlord has "claim to [a] lien or to the remedy of distraint which justifies its possession" of the tenant's property.).

148. ALASKA STAT. § 34.03.250(b) (1990) ("Distraint for rent is abolished."); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT 7B U.L.A. 427 (1985).

149. 155 F. Supp. 411 (D. Alaska 1957).

150. *Id.* at 412. The bankruptcy code in effect at the time allowed the trustee to avoid any transfer of the debtor's property within 4 months of bankruptcy if the transfer placed a creditor in a better position than usual under the bankruptcy provisions. *See id. Cf.* 11 U.S.C. § 547(b) (1989) (current preference provision allows trustee to avoid transfer if within 90 days of filing bankruptcy).

151. *Bickel*, 155 F. Supp. at 413-14.

to be "so much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed by Congress or the Legislature of Alaska."[152] *Bickel* concluded that "[t]he right of distress by actual seizure of possession of the tenant's property upon demised premises must therefore be recognized."[153]

Two years after *Bickel* was decided, Alaska became the forty-ninth state. One of the constitutional provisions adopted as part of the statehood proceedings states that "[a]ll laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed."[154] Because *Bickel* has yet to be overruled, it would appear that distress still remains a valid remedy in Alaska.

B. Adoption of the Uniform Residential Landlord and Tenant Act

In 1974, Alaska adopted the Uniform Residential Landlord and Tenant Act ("URLTA")[155] which, in relevant part, states that "[d]istraint for rent is abolished."[156] Alaska adopted this clause verbatim from the model URLTA,[157] and the comments to the Model Act clearly state that the Act "does not apply to rental agreements made for commercial [purposes] or any purpose other than residential."[158] Despite the Act's limited residential scope,

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152. *Id.* at 413.

153. *Id.* at 414; *accord* City Bldg. Corp. v. Farish, 292 F.2d 620 (5th Cir. 1961) (common law distress still exists where not eliminated by statute).

154. ALASKA CONST. art. XV, § 1.

155. Uniform Residential Landlord and Tenant Act of 1972 ch. 10, § 1-6 (codified at ALASKA STAT. §§ 34.03.010-.380 (1990)). Although this statute did not adopt the entire URLTA verbatim, the URLTA characterizes the Alaska Act as a "substantial adoption of the major provisions of the Uniform Act." UNIF. RESIDENTIAL LANDLORD AND TENANT ACT 7B U.L.A. 427, 427 (1985).

156. ALASKA STAT. § 34.03.250(b) (1990).

157. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.205(b), 7B U.L.A. 427, 497 (1985).

158. *Id.* § 1.101 cmt., 7B U.L.A. 427, 433 (1985). It is conceivable that the Alaska legislature, in adopting the URLTA, did not intend to adopt the comments to the URLTA. However, the Alaska Supreme Court has used other non-enacted comments to construe the intent of other Alaska statutes. *See, e.g.,* McCall v. Fickes, 556 P.2d 535, 537 n.3, 538 n.6 (Alaska 1976) (using Model Act comments

the Second Restatement of Property interprets the no distraint clause as abolishing distraint in residential *and* commercial leases.[159]

The language of the Alaska URLTA, however, does not support such a broad interpretation. The stated purpose is to "revise the law governing the rental of *dwelling units* . . . [and to] improve the quality of housing."[160] The phrase "dwelling unit," as defined by the Act, "means a structure or a part of a structure that [is] issued as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household."[161] Similarly, the section of the Act which abolishes distraint states that a lien "on behalf of the landlord on the tenant's household goods is not enforceable."[162] A tenant is defined by the Act as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others."[163] It is clearly inappropriate to extract from such focused language the broad interpretation offered by the Second Restatement of Property.[164] Distraint, therefore, should continue to remain a valid and viable remedy for breach of a commercial lease.[165]

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to support the holding that the URLTA merely added to, but did not overrule, a prior forcible entry and detainer statute).

159. *See supra* note 5 (assertion that view is incorrect). At least one other author appears to have followed the Restatement's viewpoint. *See* Brandon, *supra* note 3, at 941 n.616. This seems to be merely an oversight, as both sources cite other state statutes which interpret the Uniform Act to abolish distraint for "residential leases" only. *Id.*

160. ALASKA STAT. §§ 34.03.010(b)(1)-(2) (1990) (emphasis added).

161. *Id.* § 34.03.360(3) (Supp. 1992).

162. *Id.* § 34.03.250(a) (1990).

163. *Id.* § 34.03.360(16) (Supp. 1992).

164. *Cf.* Watson v. Brown, 686 P.2d 12, 15 (Haw. 1984) (adoption of URLTA is "merely cumulative and does not abolish an existing common law remedy" thus leaving distraint "mainly applicable to commercial leases").

165. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.103, 7B U.L.A. 427, 435 (1985) (Unless specifically "displaced by the provisions of this Act," existing law is not intended to be modified.); *see also* Mason v. Schumacher, 439 N.W.2d 61, 67 (Neb. 1989) ("URLTA does not exclude or otherwise alter common law, unless the common law is expressly displaced."). *But cf.* Schaible v. Fairbanks Medical & Surgical Clinic, Inc., 531 P.2d 1252, 1260 n.31 (Alaska 1975) ("While [the URLTA] does not control the case at bar, the proviso reflects a legislative mandate for using the forcible entry and detainer procedure to evict tenants.").

Finding that commercial distraint survives Alaska's version of the URLTA does not end the inquiry, however, because it remains to be seen how Alaska courts will treat distraint. Several other jurisdictions have characterized distress as a "harsh and oppressive" doctrine based upon antiquated common law concepts that have no place in today's society.[166] A federal bankruptcy court has suggested that "[t]he absence of any decision on the point [by the Vermont Supreme Court] could very well [mean] that the doctrine is not recognized in this state."[167] Although the Alaska Supreme Court has acknowledged the existence of distraint,[168] it has offered no guidance on how distraint should be treated after Alaska's adoption of the URLTA.

C. Commercial/Residential Tenant Distinctions

Ample basis exists to distinguish commercial leases from their residential counterparts. The trend toward tenant protection is based on an increasing desire to protect consumers and prevent the harsh overreaching of landlords.[169] In a commercial context, however, the relative bargaining power of the parties and the interests to be protected are significantly different than in a residential context. The United States Supreme Court recognized this distinction in *D.H. Overmyer Co. of Oris v. Frick Co.*,[170]

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166. *See In re* King Furniture City, Inc., 240 F. Supp. 453, 456 (E.D. Ark. 1965) (Arkansas would not recognize "harsh and oppressive" remedy.); *accord* Davis v. Odell, 729 P.2d 1117, 1121 (Kan. 1986) (legislature adopted URLTA recognizing "antiquated common-law concepts and the absence of statutory law created problems"). *See also* Pawco, Inc. v. Bergman Knitting Mills, Inc., 424 A.2d 891, 894 (Pa. Super. Ct. 1980) ("'Too often courts have relied on outdated common law property principals'" and fail to reach conclusions just and equitable to the tenant. (quoting Albert R Greenfield & Co. v. Kolea, 380 A.2d 758, 760 (Pa. 1977))); *supra* note 4 and accompanying text.

167. *In re* M.A.P.P., Inc., 26 B.R. 391, 392 (Bankr. D. Vt. 1983).

168. *See* Klosterman v. Hickel Inv. Co., 821 P.2d 118, 126 n.16 (Alaska 1991) (On remand, the trial court may consider whether the landlord has "claim to lien or to the remedy of distraint which justifies its possession" of the tenant's property.).

169. *See* McCall v. Fickes, 556 P.2d 535, 537-38 n.3 (Alaska 1976) ("Existing landlord-tenant law . . . is a product of English common law developed" at a time when doctrines inappropriate to modern urban conditions were applied. These doctrines are "inexpressive of the vital interests of the parties and the public which the law must protect.").

170. 405 U.S. 174 (1972).

where it upheld a cognovit, or confession of judgment provision, in a commercial contract.[171] A cognovit is an ancient legal device that allows a creditor to obtain a judgment without notice, hearing, and possibly with the appearance of a creditor-assigned attorney on behalf of the debtor.[172] Several states disallow this type of provision; some even make its use a misdemeanor.[173] One court described the cognovit as "'the loosest way of binding a man's property that ever was devised in any civilized country.'"[174] In spite of this strong general disapproval and the fact that most states prohibit a cognovit in small loans and consumer sales, the Supreme Court upheld the provision.[175]

The Court supported its holding by reiterating that the defendant was a corporation that had been a party to "tens of thousands of contracts."[176] According to the Court, because the parties were of equal bargaining power, this was not a contract of adhesion nor a case of "overreaching."[177] Based on these narrow facts, the Court upheld a provision that would be repugnant in the consumer context.[178]

Courts have also distinguished between commercial and residential leases in other legal contexts.[179] For instance, some jurisdictions make the implied warranty of habitability available to residential, but not commercial, tenants.[180] Others have relied

171. *Id.* at 187-88. *Overmyer* was cited in *Fuentes v. Shevin* as describing conditions upon which the Court would allow a contractual waiver of due process rights. In that consumer case, however, the requirements were not met. *See* Fuentes v. Shevin, 407 U.S. 67, 94-95 (1972).

172. *Overmyer*, 405 U.S. at 176.

173. *Id.* at 177-78.

174. *Id.* at 177 (quoting Alderman v. Diament, 7 N.J.L. 197, 198 (1824)).

175. *Id.* at 187.

176. *Id.* at 186.

177. *Id.*

178. *See id.* at 187-88.

179. *See, e.g., In re* Great Basin Holding Corp., 9 B.R. 79, 83 (Bankr. D. Nev. 1981) ("The equitable factors which may have warranted the Nevada Legislature in abolishing distraint in residential settings are thus lost where, as here, the parties are business entities of approximately equal bargaining ability and strength.").

180. *See, e.g.,* Spialter v. Testa, 392 A.2d 1265, 1268 (N.J. Morris County Dist. Ct. 1978), *aff'd*, 408 A.2d 444 (N.J. Super. Ct. App. Div. 1979), *cert. denied*, 412 A.2d 806 (N.J. 1980).

upon assumed bargaining equality to allow distraint in commercial leases, while prohibiting the remedy in a residential context.[181]

D. Alaska Case Law

The Alaska Supreme Court recently implied that distraint remains a valid remedy in the commercial context. In *Klosterman v. Hickel Investment Co.*,[182] the court held that lease provisions did not permit the landlord to assert ownership of the defaulting tenant's property.[183] However, the Alaska Supreme Court remanded the case for a determination of the tenant's damages and instructed the trial court that, among other issues, it could consider whether the remedy of distraint justified the landlord's actions.[184] Although the *Klosterman* decision provides little guidance for distraint procedure, the court did recognize the remedy's existence.

Prior to *Klosterman*, it appeared that the Alaska Supreme Court had eliminated landlord self-help in general in the case of *Klinger v. Peterson*.[185] *Klinger* held that, absent a special provision in a lease, "a leasehold interest in land can be terminated prematurely only by judicial decree in a statutory action."[186] As support, *Klinger* relied upon the language of Alaska Statutes section 09.45.690: "'Unless otherwise provided in the lease, a landlord has a right to re-enter leased premises when a tenant fails to pay rent, and may bring action to recover possession.'"[187] The *Klinger* court interpreted the phrase "*may* bring action" to *require* a judicial decree.[188] This interpretation was followed in later cases.[189] *Klinger* did not directly address distraint, however, and its holding

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181. *See generally* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5 (1977) (listing nine jurisdictions which distinguish between residential and commercial leases in their distress laws).

182. 821 P.2d 118 (Alaska 1991).

183. *Id.* at 125.

184. *Id.* at 126 n.16.

185. 486 P.2d 373 (Alaska 1971).

186. *Id.* at 378.

187. *Id.* (quoting ALASKA STAT. § 09.45.690).

188. *See id.*

189. *See, e.g.*, Dillingham Commercial Co. v. Spears, 641 P.2d 1, 5 (Alaska 1982) (leasehold interest commonly may be terminated by judicial decree); Murray v. Feight, 741 P.2d 1148, 1152 (Alaska 1987) (noted that lower court had invalidated distraint based upon re-entry).

that a landlord cannot terminate a lease through self-help appears to have been abandoned in *Klosterman*.[190]

E. Oregon's Interpretation: A Potential Guidepost for Alaska

Since the Alaska Supreme Court has not affirmatively decided whether distraint exists after the legislature's adoption of URLTA, a look at Oregon's case law may be helpful given the similarity between Oregon statutes and those of Alaska. In *Smith v. Chipman*,[191] the Oregon Supreme Court expressly held that the common law distress remedy survived the reform of residential landlord-tenant laws.[192] *Chipman* relied upon an early territorial statute and a provision of Oregon's constitution that is very similar to Alaska's which incorporated English common law as state law.[193] The court distinguished common law "self-help" distress from the statutory attachment remedy, and held that the two were cumulative rather than inconsistent.[194] *Chipman* further relied upon the legislative enactment of an innkeeper's lien, the inclusion of distress in the Restatement of Security, and the fact most jurisdictions have some type of distress remedy, to reach the conclusion that distraint "is not foreign to[,] but consonant with today's sense of justice."[195]

Chipman's reasoning should be persuasive to the Alaska Supreme Court given the present character of Alaska property law. Alaska's forcible entry and detainer statute was borrowed from Oregon.[196] Furthermore, like Oregon, Alaska enacted a statutory innkeeper's lien, which applies even to personal property *not owned by the guest* unless the hotel operator has actual notice of that guest's non-ownership.[197] Alaska also has enacted the standard provision in its Uniform Commercial Code that "[t]his chapter does

190. *See* Klosterman v. Hickel Inv. Co., 821 P.2d 118, 122 (Alaska 1991) ("Although the statute [A.S. 09.45.690] refers to a landlord's right to initiate judicial action, it clearly does not make such action mandatory.").

191. 348 P.2d 441 (Or. 1960).

192. *Id.* at 444; *see also In re* Sabre Farms, Inc., 27 B.R. 532, 536-37 (Bankr. D. Or. 1982) (recognizing common law distress distinct from statutory landlord lien in commercial lease after adoption of URLTA).

193. *See Chipman*, 348 P.2d at 443-44.

194. *Id.* at 445.

195. *Id.* at 446-47.

196. *See* ALASKA STAT. § 09.45.060 note at 177 (1983) (citing Steil v. Dessmore, 3 Alaska 392 (1907)).

197. *See id.* § 34.35.510 (1990).

not apply ... to a landlord's lien," which clearly assumes the existence of some type of landlord lien.[198] Finally, chapter 27 of Alaska's property statutes, entitled "Modification or Abolition of Common Law Property Rules," does not prohibit distraint, a signal that the legislature intended to retain it.[199] The Alaska Supreme Court could decide to maintain the common law distraint remedy, in accordance with the legislature's public policy determinations evident in the innkeeper's lien statute, until such time as the legislature sees fit to change the status quo. As the Seventh Circuit stated when upholding Illinois' statutory distraint law, distraint remedies "are subject to the operation of normal political forces."[200]

VI. DISTRESS PROCEDURE AND PRACTICE IN ALASKA

Determining that distress exists in Alaska reveals little about what form and procedures would meet court approval. Most states have some law governing the manner in which the landlord may proceed, and the validity of the distress remedy itself may hinge on the procedures utilized.[201] Alaska does not have a provision covering distress in either its statutory property lien chapter[202] or its provisional remedy chapter.[203] An examination of the procedures found in analogous Alaska statutes, however, sheds some light on what might constitute the proper procedures for distress. This section will also identify some pitfalls landlords may encounter while drafting distraint provisions.

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198. *Id.* § 45.09.104(2) (1986).

199. *See id.* §§ 34.27.010-.030 (1990) (abolishing rule in Shelley's case and destructibility of contingent remainders, modifying rule against perpetuities).

200. Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150, 156 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976).

201. *Compare* Van Ness Indus., Inc. v. Claremont Painting & Decorating Co., 324 A.2d 102, 106 (N.J. Super. Ct. Ch. Div. 1974) ("[S]ince the common law substantive right of distraint is governed by invalid procedural methods it may not be exercised in New Jersey.") *with* USA I Lehndorff Vermoegensverwaltung v. Cousins Club, Inc., 348 N.E.2d 831, 835 (Ill. 1976) ("If our [distress statute was] to be adjudged unconstitutional, the landlord might claim his common law remedy and seek to proceed against the tenant unhindered by the restrictions of the statutes.").

202. ALASKA STAT. §§ 34.34.005-.930 (1990).

203. *See id.* §§ 09.40.10-.110 (1983).

A. Analogous Alaska Procedural Statutes

The first procedural question to be addressed is whether Alaska law will permit a distraint sale. Alaska has a statutory provision authorizing and circumscribing procedures for enforcing a chattel improvement mortgage. This statute even permits a private sale provided proper notice has been given.[204] It is unlikely, however, that a landlord will succeed in analogizing his situation to that of a chattel lienholder. The common law of distraint prohibits landlords from selling distrained property.[205] Until the Alaska legislature formally adopts a distraint provision, the Alaska courts will likely defer to the common law position. Furthermore, distraint sales have been held to constitute state action and therefore raise constitutional problems not present in the chattel lienholder context.[206] Given these difficulties, it is unlikely that Alaska courts will allow landlords to sell distrained property.

A procedure prohibiting self-help which leads to violence is far more likely to find approval in the Alaska courts. An aversion to violent re-entry is found in Alaska's forcible entry and detainer statute.[207] This same restriction existed at early common law and modern courts will surely continue to condemn any self-help which leads to violence. A landlord can, however, include a re-entry provision in the lease to avoid possible difficulties under *Klinger*.[208] Finally, the Alaska courts will likely construe the Alaska Exemptions Act[209] to limit the type of property subject to dis-

204. *Id.* §§ 34.35.175(b)-(d) (1990)

205. *See supra* text accompanying note 37 (power of sale did not exist at common law); *but see In re* Great Basin Holding Corp., 9 B.R. 79 (Bankr. D. Nev. 1981) (noting that English distress statutes may become part of common law).

206. Federal circuit courts have yet to sanction a distraint sale. *See supra* text accompanying notes 113-145.

207. ALASKA STAT. § 09.45.060 (1983); *see also* Klosterman v. Hickel Inv. Co., 821 P.2d 118, 122 n.5 (Alaska 1991) (""[A]ny self-help action must [occur] . . . in a peaceable manner and without a breach of the peace.").

208. See *supra* notes 185-190 and accompanying text for a discussion of possible problems in re-entering a leasehold without a judicial decree or specific lease provision; *see also* Murray v. Feight, 741 P.2d 1148, 1152 (Alaska 1987) (noting that trial court had disallowed distraint because no re-entry provision in lease or judicial decree).

209. ALASKA STAT. §§ 09.38.010-.510 (1983).

traint.[210] Although most commercial property would still be subject to distraint, the Act seems to demonstrate a public policy to protect exempted property against seizure.

B. Implied Waiver of Common Law Distress by Lien Provision in the Lease

Landlords should be cautioned about including overly broad distress provisions in commercial leases, as these may be construed to waive common law rights in favor of a contractual lien. Strictly speaking, the common law distress remedy requires no lease provision at all. However, inclusion of distress language in the lease may be a factor courts consider when weighing state property deprivation issues. A lease provision would place the tenant on notice and provide the contractual link between distrained property and the underlying debt which the Ninth Circuit considered important in *Culbertson* and *Melara.*[211] Any distress clause should, however, be explicitly cumulative and in no way limit common law remedies.[212]

Another problematic item for landlords is that the common law allows distress only *during* the landlord-tenant relationship.[213] Therefore, any distraint must occur before the landlord terminates the lease.[214] Once this distraint occurs, the validity of acceleration clauses, distraint for utility expenses, and distraint priority must be

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210. *See In re* Marriage of Logston, 469 N.E.2d 167, 173 (Ill. 1984) (applying exemption statute to limit distress).

211. See *supra* text accompanying notes 132-145 (Ninth Circuit considers factor of contractual provision notifying debtor of creditor remedies).

212. For examples of such distress clauses, see Dillingham Commercial Co. v. Spears, 641 P.2d 1, 4 (Alaska 1982) (lease provision reserving rights to distraint); *In re* King Furniture City, Inc., 240 F. Supp. 453, 454 (E.D. Ark. 1965) (provision waived exemption laws and made cumulative to statutory lien). *Compare* RESTATEMENT (SECOND) OF PROPERTY § 12.1 cmt. j (lease may expand or contract landlord's remedies).

213. See *supra* text accompanying note 17. Although the English Statute of 8 Anne, ch. 14, extended the right to distrain for six months beyond the lease termination date, this extension has not been adopted by all states. See *supra* text accompanying note 18.

214. *Cf.* Klosterman v. Hickel Inv. Co., 821 P.2d 118, 124 (Alaska 1991) (while lessor's re-entry is not necessarily acceptance of tenant's offer to terminate, if lessor does accept, rent obligations cease).

considered. However, these issues remain to be settled by the courts or legislature.

VII. CONCLUSION

While the status of the distress remedy remains uncertain in Alaska, there are precautions that all parties may take to improve their legal positions. Any party may insist upon "ideal" lease provisions, but may then be unable to find a party willing to concede to these demands. The ideal conditions should be considered, however, in order to ascertain what possible rights and remedies may *not* be available in a given lease.

A. Landlord-Tenant Bargaining

From the landlord's point of view, the lease should provide for a contractual lien that is expressly cumulative to common law rights of distraint. The agreement should then be filed as a blanket UCC financing statement to afford additional protection. The lease also should contain an explicit right to re-enter upon default without terminating the rental obligations of the tenant. If the landlord is paying utilities, they should be charged as part of rental payments, rather than as "rent plus utilities." Any acceleration clause should also be phrased to explicitly obligate the tenant to one lump-sum rent total, with periodic payments towards this amount. These precautions will not guarantee success in court, but will place the landlord in the best possible position.

A prudent tenant, on the other hand, will seek an express lease provision waiving distress. Security deposits will adequately protect the landlord, and the distress waiver enables the tenant to obtain necessary operating loans. Many wary creditors will demand such waivers and may even include conditions requiring notice and further waivers if the debtor changes location or landlords.

Under the theory of "equal bargaining power," the landlord and tenant will then compromise at some midpoint. The problem with this theory is that outside interests, such as creditors unaware of the lease arrangement, are not represented at the bargaining table. These individuals may then be defeated by the landlord's "super-priority." It is fundamentally unfair to allow a landlord to sever property from its owners, or the party who bargained for its use as collateral, simply because the tenant happened to have possession of the property when the landlord initiated distress.

B. Proposal of Fairness to Creditors

This article proposes that Alaska maintain the distress remedy in the commercial context and provides suggestions to the legislature to ensure that the remedy is fairly applied. The majority of jurisdictions recognize some type of distress remedy, and it intuitively seems proper to keep any such peaceably settled matters outside the court system. The common law distress remedy has been criticized, however, precisely because of the "super-priority" it affords landlords, providing them with "uniquely monopolistic bargaining power" over tenants, who may also be precluded from securing credit through other sources.[215]

The Alaska Legislature recognized the harsh consequences of this absolutist feudal concept in the residential context and statutorily abolished it. Yet it makes sense to continue the use of distraint in the commercial context where the bargaining factors are much different. Because commercial entities are on a relatively equal footing with their landlords, they can strike a fair bargain and hence do not need the same protection as consumers.

Other creditors of the tenant have not bargained with the landlord and their rights should not be subordinated to distress liens. If landlords are permitted to distrain based upon a theory of equal bargaining power, let them negotiate with creditors for priority. Leases can include lien provisions and be filed along with any other consensual UCC security interest.

This proposal puts creditors on notice of the landlord's lien and allows them to bargain for subordination before granting credit. A landlord would still be able to contract himself into a preferred lien but would not receive a windfall beyond the tenant's security deposit simply because other creditors were unaware of a lease arrangement. Landlords could continue to distrain against commercial tenants absent a lease-provided security interest, but such distraint would be limited to the value of the tenant's equity in the property. This proposal is equitable for all parties, as the tenant represents the only entity who has agreed to the lease obligations.

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215. *See Self-Help, supra* note 3, at 943.