ROSENBERG V. SMIDT: DRAMATIC RAMIFICATIONS FOR NONJUDICIAL FORECLOSURE SALES IN ALASKA?

I. INTRODUCTION

Last year, the Alaska Housing Finance Corporation handled more than twice the number of foreclosures on deeds of trust than it had the year before.[1] Most of these foreclosures in Alaska were instituted under power of sale provisions[2] included in deeds of trust.[3] Essentially, the power of sale provision allows a creditor to foreclose and sell the property without first going to court.[4] Quite simply, nonjudicial foreclosures are attractive to creditors because they offer a cheaper and faster way to foreclose on property than judicial sales.

The price of such expediency, however, is that debtors often do not receive adequate notice of the sale or an opportunity for a hearing. Both the Alaska courts[5] and the Alaska Legislature[6] have been examining the nonjudicial foreclosure law with an eye toward achieving a

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1. Margaret Nelson at the Alaska Housing Finance Corporation provided the figures for fiscal years 1986 and 1987. They are as follows: The Alaska Housing Finance Corporation handled 1,286 foreclosures in 1986 and 2,821 in 1987. These are not the figures for the entire state because foreclosures were handled by other agencies, as well. Telephone interview with Margaret Nelson, Alaska Housing Finance Corp. (Feb. 22, 1988).

2. *See Cost and Time Factors in Foreclosure of Mortgages,* 3 REAL PROP. PROB. & TR. J. 413, 414 (1968); Note, *The Constitutionality of Power of Sale Foreclosure in Alaska,* 6 UCLA-ALASKA L. REV. 90, 92 (1976).

3. Such power of sale provisions are sanctioned by Alaska law. ALASKA STAT. § 34.20.070 (1985) (stating that a creditor may institute nonjudicial or judicial foreclosure if the deed of trust contains a provision allowing for nonjudicial sale). The right to execute a power of sale foreclosure has been sanctioned by Alaska law since 1919. Act, ch. 61, § 1, 1919 Alaska Sess. Laws.

4. *See* Note, *Power of Sale Foreclosure After* Fuentes, 40 U. CHI. L. REV. 206, 208 (1972) (defining the power of sale as "a contractual right, either provided in a mortgage or incorporated by statute, that entitles a creditor to sell mortgaged property after a debtor's default without resorting to judicial proceedings").

5. *See, e.g.,* Alsop v. Alaska, 14 Bankr. 982 (D. Alaska 1981), *aff'd,* 22 Bankr. 1017, 1018 (D. Alaska 1982); McHugh v. Church, 583 P.2d 210 (Alaska 1978); Harris v. Alaska Title Guar. Co., 510 P.2d 501 (Alaska 1973); Semlek v. National Bank of Alaska, 458 P.2d 1003 (Alaska 1969).

6. *See, e.g.,* ALASKA STAT. § 34.20.090(a) (1985) (trustor has no right of redemption after sale takes place). *But see* ALASKA STAT. § 34.20.100 (trustee may not sue for deficiency on obligation after nonjudicial sale).

more equitable balance between the rights of debtors and creditors. So far, judicial interpretation of the nonjudicial foreclosure statutes has not achieved this balance. Because the courts in Alaska and most other jurisdictions now agree that nonjudicial foreclosures of real estate do not infringe upon the due process rights of debtors,[7] the framework of due process is not a potential outlet for reform. Thus, judicial reform has been limited to the frequently leaden history of the law of mortgages.

The primary judicial attempt to reform the nonjudicial foreclosure laws in Alaska occurred in *Rosenberg v. Smidt,*[8] in which the Alaska Supreme Court first interpreted the statutory notice procedures that a creditor must follow when exercising the power of sale option. *Rosenberg* basically enhanced the notice burden in two ways, which were not apparent from a literal reading of the statute: first, the court interpreted the statute to require creditors to exercise "due diligence" in finding the last known addresses of interested parties in order to notify them of the foreclosure proceedings;[9] second, the court held that a bona fide purchaser at a foreclosure sale could not rely on conclusive statements that the creditor had conducted a diligent search for these addresses,[10] but would be on "inquiry notice" unless the creditor had made a detailed recital of the steps taken to notify interested parties.

Although the *Rosenberg* court's intention to make the nonjudicial foreclosure statute fairer for debtors is admirable, its holding does not represent the best way to achieve that goal. *Rosenberg* imposes upon all creditors utilizing the nonjudicial foreclosure remedy burdensome requirements that would only be helpful to the debtor in the rare case that a creditor has been unable to find the debtor's new address and the debtor has not sent the creditor notification of the address change. Furthermore, since *Rosenberg* is the only case to discuss the scope of the notice provisions, creditors and potential purchasers will be uncertain about how far they must go to satisfy these requirements. This note will examine the *Rosenberg* holding and conclude that legislative action is needed in order to preserve the utility of the nonjudicial foreclosure system in Alaska and to provide a more equitable process for debtors and creditors.

In evaluating the notice requirement for nonjudicial foreclosures in Alaska, this note first briefly traces the history and purpose of that

7. *See infra* notes 42-44 and accompanying text.

8. 727 P.2d 778 (Alaska 1986).

9. *Id.* at 783.

10. *Id.* at 786. For a definition of the bona fide purchaser rule, *see infra* text accompanying note 113.

requirement within the general framework of mortgage law. Next follows a description of Alaska's statutory mortgage scheme. Section IV then examines the *Rosenberg* holding, specifically the "due diligence" standard imposed upon creditors and its accompanying redefinition of bona fide purchasers. Section V surveys notice requirements and statutory presumptions for bona fide purchasers in other jurisdictions and demonstrates that Alaska's *Rosenberg* requirements are largely unprecedented. Section VI suggests that while innovation in the spirit of *Rosenberg* is a worthwhile idea, the due diligence requirement is a largely ineffective way of alleviating the basic problem of unfairness to debtors. The Alaska Legislature, not the judiciary, is better situated to institute a truly innovative and effective solution to notice problems. Finally, this note proposes certain amendments to Alaska's mortgage law, which would preserve debtors' rights while maintaining the efficiency of the nonjudicial foreclosure system.

II. THE HISTORY AND PURPOSE OF THE NOTICE REQUIREMENT AND THE GENERAL FRAMEWORK OF MORTGAGE LAW

A. History

The law of mortgages in the United States today is based on English mortgage law, which was developed fully by the seventeenth century. Thus, the first step to understanding the role of notice in mortgage law is a brief review of its history and of the general purpose behind mortgage schemes. The history of mortgages dates back to ancient Rome, where a debtor agreed under the *Lex commissoria*[11] to accept forfeiture of his property in the event that he failed to make timely payment on a loan.[12] Occasionally, a creditor would even enslave a defaulting debtor.[13]

The use of the *Lex commissoria* continued in England throughout the Middle Ages. During most of that time mortgage law was based upon the theory that a mortgage began with a grant of legal title, or sometimes even possession of the property, from the mortgagor to the mortgagee.[14] The mortgagor could not reclaim the title until he had retired his debt.

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11. The *Lex commissoria* was a penalty clause in the form of "[a]n agreement providing for forfeiture if the debtor did not pay on time . . . ." McGovern, *Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective,* 74 NW. U.L. REV. 141, 145 (1979).

12. *See id.* at 145-46.

13. Report, *What the Killjoys Can Do to You,* 17 MONEY 110 (April 1987).

14. *See* Wechsler, *Through the Looking Glass: Foreclosure by Sale as* De Facto *Strict Foreclosure — An Empirical Study of Mortgage Foreclosure and Subsequent Resale,* 70 CORNELL L. REV. 850, 855 n.26 (1985).

If the debt was not paid by the allotted "law day," the mortgagor forfeited his investment.[15] The import of law day was so great that if it passed without the mortgagor having retired his debt, all of his rights in the property were extinguished.[16] The rule was a harsh one, and by the seventeenth century the chancellor of equity regularly was granting redemption requests to those able to raise the funds after law day.[17] One commentator has described this period in the following manner: "For six hundred years mortgagor and mortgagee have sat at opposite ends of a see-saw, with the chancellor balanced nimbly at the fulcrum, throwing his weight first one way, then the other."[18]

In time, creditors searched for ways to retaliate against this right to redeem after law day, also known as the "equity of redemption."[19] In effect, the equity of redemption gave debtors an unabridged right to reclaim their interests in the land years after the default.[20] Since this cloud on the title made it very difficult for creditors to resell the land, land was worth very little as security. Thus, creditors petitioned for and received a concession, which took the form of a deadline for redemption.[21]

The deadline for redemption operated in a way similar to a statute of limitations. After a certain time period, creditors were relieved of their obligation to honor the debtors' equity of redemption. The time frame within which redemption might be made thus became more predictable, and eventually creditors were able to institute the public sale of forfeited land.[22] The time and location of the sale, of course, then had to be posted. For a long time, debtors were entitled only to constructive notice, and the law deemed potential purchasers the more important targets of the posting.[23]

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15. *Id.* at 856.
16. *Id.*
17. *Id.*
18. Madway, *A Mortgage Foreclosure Primer,* 8 CLEARINGHOUSE REV. 146, 148 (1974) [hereinafter Madway I].
19. Wechsler, *supra* note 14, at 856.
20. *Id.*
21. Madway I, *supra* note 18, at 148.
22. *Id.*
23. *See* Cotellesse, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice,* 49 TEX. L. REV. 1085 (1971).

B. Purpose of Notice and Possible Constitutional Issues

Today, American case law and commentary demonstrates three distinguishable views of the purpose of notice.[24] One view is that notice serves to attract more bidders to the sale, which in turn will increase the price paid for the forfeited land.[25] In *Woodell v. Davis,*[26] the North Carolina Supreme Court recognized the role of notice in solving the problem of property selling at foreclosure sales for far less than fair value, stating that " 'the principal object in publishing notice of sale . . . is not so much to notify the grantor or mortgagor as it is to inform the public generally, so that bidders may be present at the sale and a fair price obtained.' "[27]

A second, quite different view of the purpose of notice is that actual notice is more important than strict procedural compliance. The outcome of some cases depends on whether the mortgagor received actual notice of the sale, regardless of whether the mortgagee complied with the statutory procedure. In *Macon-Atlanta State Bank v. Gall,*[28] the Missouri Court of Appeals held that, whenever a mortgagor actually knows about the sale, he may not complain about the inadequacy

24. The reason for the differences in views is probably that the balance of equity in this country has shifted back and forth in favor of debtors and creditors, based on the economic climate of the time period. Comment, *Mortgages—"Depression Jurisprudence"—Remaining Effects in Statutory Law,* 47 MICH. L. REV. 254 (1948). *See also* Hull v. Alaska Fed. Sav. & Loan Ass'n of Juneau, 658 P.2d 122, 124 n.3 (Alaska 1983) (acknowledging the importance of economic conditions in the balance between creditors' and debtors' interests in foreclosure law); Wechsler, *supra* note 14, at 858-62 (providing a quick history of the link between economic conditions in the United States and foreclosure laws).

One example of the impact of economic climate on mortgage law resulted from the Great Depression. Before the Depression, many state legislatures had enacted deficiency judgment statutes, whereby a creditor could sue the mortgagor for the balance due if the property had been sold for less than that amount. During the Depression, however, many states enacted anti-deficiency statutes to provide some relief to debtors. The Alaska territory enacted its anti-deficiency statute even before the Depression. Generally, these statutes provided that once the creditor sold the property he could not go against the debtor for any amount of the debt left unsatisfied. *See* Wechsler, *supra* note 14, at 860-61.

25. *See, e.g.,* Madway I, *supra* note 18, at 170 (stating that "the theory behind notice by advertisement is that the mortgagor will be protected by public knowledge of the sale; that bidders will be encouraged to attend and that this will ensure a fair price for the property"). Indeed, most of the property sold at foreclosure sales goes for a price far less than its fair value. *See* McElhone & Cramer, *The Costs of Mortgage Loan Foreclosure,* 1975 FED. HOME LOAN BANK BOARD J. 7, 10-12 (June).

26. 261 N.C. 160, 134 S.E.2d 160 (1964).

27. *Id.* at 163, 134 S.E.2d at 163 (quoting 59 C.J.S. *Mortgages* § 563 (1949)). Ironically, even though a high price is a primary goal of the foreclosure sale, the general rule is that a low price alone will not invalidate the sale. *See, e.g.,* Alsop v. Alaska, 14 Bankr. 982, 989 (D. Alaska 1981), *aff'd,* 22 Bankr. 1017 (D. Alaska 1982).

28. 666 S.W.2d 934 (Mo. Ct. App. 1984).

of the statutory notice procedure.[29] Thus, the court upheld the sale because the mortgagor had actual knowledge of it, despite the fact that the mortgagee in the case did not send notice to the mortgagor's last known address as required by the state statute.[30]

Alternatively, a third view of the purpose of notice emphasizes procedural compliance. Some courts enforce the statutory requirements even when the mortgagor admits he had actual knowledge of the sale. For example, in *Security Pacific Finance Corporation v. Bishop,*[31] the Court of Appeals of Idaho explained that strict compliance with the state notice procedure was required even though the mortgagor had admitted in a deposition that he knew about the pending foreclosure proceedings.[32] Such strict treatment of notice requirements may give the mortgagor a strong but unfounded defense claim in a foreclosure proceeding.

Relevant to the approach taken by state courts toward notice in nonjudicial foreclosure sales is the approach taken by the United States Supreme Court regarding notice in deprivation of property situations. It generally is conceded now that the United States Supreme Court is unlikely to hold that the due process clause of the fourteenth amendment[33] requires state nonjudicial foreclosure statutes to contain any particular notice requirements, at least as long as personal notice is already required.[34] A line of due process cases from the United States Supreme Court requiring notice and hearing procedures in certain property forfeiture cases could conceivably be applicable to nonjudicial foreclosure, but most courts have held that such cases are not.[35] The greatest obstacle to the applicability of due process is the lack of state action, and, even if it were present, the fact situations in the Supreme Court cases are not necessarily sufficently analogous to nonjudicial foreclosure schemes. These Supreme Court cases are worth reviewing, however, because the concept of deprivation of property may provide some guidance in the nonjudicial sale area even if they will not be held directly applicable.

In *Mullane v. Central Hanover Bank and Trust Co.,*[36] the United States Supreme Court expressed broad concern for the importance of

29. *Id.* at 940. *See also* Cotellesse, *supra* note 23, at 1087 (stating that "[i]f the traditional purpose of notice is to protect the equity of redemption, a method of giving notice should be required that is reasonably calculated to accomplish that purpose").

30. 666 S.W.2d at 940.

31. 109 Idaho 25, 704 P.2d 357 (Ct. App. 1985).

32. *Id.* at 28, 704 P.2d at 360.

33. Notice in some cases is required by due process. U.S. CONST. amend. XIV, § 1.

34. *See infra* note 43.

35. *Id.*

36. 339 U.S. 306 (1950).

notice and hearing procedures for parties whose interests in a trust fund were being determined. The dispute in *Mullane* centered on a $3 million trust fund created under a New York banking statute by many small investors who wanted to have their money managed by professional investors.[37] Under the relevant New York banking law, the trustee, Central Hanover Bank, was to petition the trustors periodically, notifying them by publication, to obtain investor approval of the status of the fund.[38]

Mullane, the special guardian appointed to represent those with an interest in the trust fund income, challenged the sufficiency of notice given by publication, saying that it infringed upon the trustors' due process rights.[39] The Court agreed and held that in this situation due process required "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[40] The Court held that the bank should have sent personal notice by mail to those whose names and addresses were available or reasonably ascertainable, but personal notice was not necessary for those whose whereabouts would require "impracticable and extended searches."[41]

Although the situation in *Mullane* is comparable to the nonjudicial foreclosure context, there is one important distinction. In *Mullane,* the interests of all the parties who should have received notice were substantially similar. Therefore, if a substantial number of them received notice by the method established in *Mullane,* then all of their interests would be protected. Conversely, in nonjudicial foreclosure proceedings the various parties may have interests adverse to each other. Thus, whether notice is sent to a particular address actually may determine the outcome of the proceeding.

The *Mullane* reasoning, therefore, does not apply directly to nonjudicial foreclosure, but the case has still inspired scholarly and judicial analysis of whether the same notice and hearing rule should apply to nonjudicial foreclosures.[42] Courts and commentators in Alaska and most other jurisdictions now agree that the *Mullane* due process rule is inapplicable to nonjudicial foreclosures because there is not sufficient state action present in transactions between private creditors and debtors.[43] Although the statutory procedures for recording notice

37. *Id.* at 307-09.

38. *Id.* at 308-09 (citing N.Y. BANKING LAW § 100-c as amended by c.602, L. 1943 and c.153, L. 1944 (McKinney 1944)).

39. *Id.* at 311.

40. *Id.* at 314.

41. *Id.* at 317-18.

42. *See* text accompanying notes 43-59.

43. Rosenberg v. Smidt, 727 P.2d 778, 780 n.8 (Alaska 1986) (indicating that even though the Alaska Supreme Court has not addressed the issue, it has been litigated

could be construed as state action, most courts have stated that many scholars believe that such a construction would be unwise since it would cause most private actions, even in other contexts, to be subject to constitutional scrutiny.[44]

More specifically, pursuant to Alaska's power of sale foreclosure scheme, creditors and debtors actually enter into a private agreement that nonjudicial proceedings will serve as the foreclosure mechanism.[45] The State of Alaska offers the parties a choice between judicial and nonjudicial foreclosure.[46] Thus, since the parties agree in an arm's length transaction to utilize nonjudicial foreclosure, no state action would seem to be present.

A further argument against the application of the federal due process analysis to nonjudicial foreclosure law is the trend recently established by the United States Supreme Court against finding an automatic due process violation in property forfeiture cases. *Mitchell v. W.T. Grant Co.*,[47] for example, marked a shift away from the due process framework in one deprivation of property situation. The shift was especially significant because two years earlier, in *Fuentes v. Shevin*,[48] the Court had held that two state statutes that allowed replevin without a prior hearing were unconstitutional on due process grounds. In *Mitchell*, a Louisiana statute allowed sequestration of personal property that the debtor bought on an installment contract and upon which he defaulted.[49] In upholding the statute, the Court balanced the interests involved in the enforcement of protective procedural requirements.[50] The Court found that the statute at issue in *Mitchell* was not unconstitutionally devoid of procedural safeguards.[51]

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enough that the court will not address the question because there is insufficient state action to qualify for federal due process); *see also* Young v. Ridley, 309 F. Supp. 1308, 1312-13 (D.D.C. 1970); Garfinkle v. Superior Court, 21 Cal. 3d 268, 272, 578 P.2d 925, 927, 146 Cal. Rptr. 208, 210-11 (1978). For cases decided the same way but on other grounds, see Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973); Roos v. Belcher, 79 Idaho 473, 477, 321 P.2d 210, 211 (1958); Great Falls Nat'l Bank v. McCormick, 152 Mont. 319, 324-25, 448 P.2d 991, 994-95 (1968). Those courts that have concluded that state power of sale statutes were unconstitutional were interpreting statutes that did not have a personal notice requirement like that of Alaska. *See, e.g.*, Rau v. Cavenaugh, 500 F. Supp. 204, 208-09 (D. S.D. 1980); Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976); *see also* Note, *supra* note 2.

44. *See, e.g.*, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 7.27, at 575-76 (Lawyer's ed., 2d ed. 1985); Note, *supra* note 2, at 100.

45. *See* ALASKA STAT. § 34.20.070(a) (1985).

46. *See* ALASKA STAT. § 09.45.170 (1983) (judicial foreclosure); ALASKA STAT. § 34.20.070 (1985) (nonjudicial foreclosure).

47. 416 U.S. 600 (1974).

48. 407 U.S. 67 (1972).

49. 416 U.S. at 601.

50. *Id.* at 607-10.

51. *Id.* at 619.

The statute called for judicial approval of the forfeiture, revolved around credit extended by the seller, provided a hearing after the seizure that would allow the buyer to regain immediate possession, and required the plaintiff to demonstrate the basis for the sequestration.[52] The Court explained that these procedures provided sufficient protection to debtors and, thus, did not encroach upon their due process rights.[53]

The Supreme Court further refined the due process analysis in *D.H. Overmyer Co. v. Frick Co.*[54] In that case, the Court explained that it would weigh heavily any facts that tended to show that the parties actually bargained for applicable procedures.[55] Thus, it could be argued in the nonjudicial foreclosure context that due process rights are not contravened because the trustor and trustee do indeed bargain when putting the nonjudicial sale clause in the deed of trust. Although the trustor and trustee probably possess unequal bargaining power,[56] any ensuing inequality alone is not necessarily strong enough to trigger due process analysis. Indeed, the Court implies this argument would be stronger if the deed of trust contained a waiver of constitutional rights.[57] Additionally, the Court implied that it will consider other factors, such as the state statute's usefulness in the commercial world and whether the debtor receives any consideration in return for his waiver of procedural safeguards.[58] Both of these elements would seem to be satisfied by nonjudicial foreclosure. Nonjudicial foreclosure provides cheaper and faster credit,[59] benefiting commerce generally and the debtor seeking credit specifically.

Furthermore, *Mitchell* and *Overmyer* show that even where state action is involved, not all prejudgment sequestration proceedings will be held unconstitutional. Absent these holdings, a broad reading of *Fuentes* may have suggested that the presence of state action would automatically invalidate many forfeitures of property. Despite the

52. *Id.* at 605-07.

53. *Id.* at 607-10.

54. 405 U.S. 174 (1972).

55. *Id.* at 187-88.

56. Although due process rights may be waived, the Court suggested that when there has been unequal bargaining power, the outcome of the case may be different than in *Overmyer*. *Id.* at 184-86, 188.

57. *Id.* at 188. The Court mentions the waiver as a possible factor in its decisions. Arguably, the waiver referred to must be a more knowing waiver of explicitly constitutional rights as opposed to a waiver of the right to judicial foreclosure. The intricacies of the factual analogies to be made with the cases cannot be covered adequately here. For a view that absent the state action obstacle, nonjudicial foreclosure could be unconstitutional, see NELSON & WHITMAN, *supra* note 44, § 7.24, at 562-71.

58. *Overmyer*, 405 U.S. at 188.

59. *See* McElhone & Cramer, *supra* note 25, at 10.

strong argument that state action is not present in nonjudicial foreclosures, *Mitchell* and *Overmyer* hold that even if state action were found to be present such action still might not be sufficient to trigger due process concerns.

Nonjudicial foreclosure should, nonetheless, contain some procedural safeguards. Any analysis of the degree of notice required in a particular foreclosure proceeding should draw from Supreme Court reasoning and balance the costs of the procedural protection and the interests involved.[60] Even if the mortgage process, as a matter of private bargaining, does not entail sufficient state action to trigger full due process protection, due process concerns do demonstrate how the nonjudicial foreclosure proceeding may be made fairer. The creditor may have some leverage over the debtor, even though the state provides a choice between the judicial and nonjudicial sale options.[61] Thus, although due process does not require a specific level of notice in nonjudicial foreclosures, in the interest of fairness states should nevertheless strive to afford actual notice both to mortgagors and to the public generally. This notice requirement will ensure increased prices at foreclosure sales and will give interested parties an opportunity to contest the issue. Because due process does not require strict guidelines, states should institute notice procedures only after balancing the interests of creditors and debtors. In other words, procedural requirements should be imposed only to the extent that the benefits derived from the procedures outweigh the burden on creditors and do not significantly decrease the supply of available credit.

III. ALASKA'S STATUTORY MORTGAGE SCHEME

The State of Alaska uses an instrument called a deed of trust, rather than a mortgage, to represent a security interest in real estate.[62] Alaska treats the device merely as a lien and not as a complete transfer of title as described in the foregoing history of mortgages.[63] In the deed of trust, the debtor and creditor agree in advance whether the creditor may bring a judicial or a nonjudicial foreclosure proceeding in the event of default.[64] Like the nonjudicial foreclosure process, the judicial process usually involves a sale. Before a judicial sale can proceed, however, all of the formalities of a court proceeding, including service of process, must be met.[65]

60. *See supra* text accompanying note 50.

61. *See infra* text accompanying notes 64-65.

62. ALASKA STAT. § 34.20.070 (1985); *see also* Brand v. First Fed. Sav. & Loan Ass'n of Fairbanks, 478 P.2d 829 (Alaska 1970).

63. *See supra* text accompanying note 14.

64. ALASKA STAT. § 34.20.070(a) (1985).

65. *Id.* § 09.45.170 (1983).

In contrast, a nonjudicial sale proceeding is not subject to court formalities, and, thus, the creditor's adherence to procedural requirements is subject to much less supervision. Notice of nonjudicial foreclosure sales in Alaska must be provided in the following manner: three months before the sale the trustee must record notice of the default in the district recording office where the property is located;[66] within ten days after notice is recorded, further notice must be sent by registered mail to the last known address of the debtor and his or her successors.[67] Once the sale finally takes place, Alaska's anti-deficiency judgment statute for nonjudicial sales becomes relevant.[68] This statute provides that once a trustee sells a piece of property pursuant to a nonjudicial foreclosure of the deed of trust, no further action may be taken against the debtor on the obligation secured by the deed of trust.[69] Debtors, on the other hand, are not entitled to an equitable period of redemption.[70] Upon sale of the property by the trustee, the buyer receives full title, and the debtor cannot reacquire the property by paying off the debt.[71] The statute does allow debtors to cure their default before the sale takes place.[72]

Courts that have interpreted Alaska's nonjudicial foreclosure statute have been very generous to purchasers. Although *Rosenberg* was the only case to construe the notice provision of the nonjudicial foreclosure statute, when faced with related issues, Alaska courts have been reluctant to set aside sales of foreclosed property. *Rosenberg* marks a shift away from this earlier concern for maintaining the validity of the nonjudicial foreclosure sale.

In *McHugh v. Church,*[73] the Alaska Supreme Court refused to set aside a sale when the property was sold at a low price or because the trustee sold the property as a single lot rather than in parcels.[74] Moreover, in *Semlek v. National Bank of Alaska,*[75] the supreme court held

66. *Id.* § 34.20.070(b) (1985).

67. *Id.* § 34.20.070(c). This section also requires that notice be sent to any other possessor or occupier and anyone with a lien or interest in the deed.

68. *Id.* § 34.20.100. The policy behind this anti-deficiency statute is most likely that creditors must make this concession for the privilege of conducting nonjudicial sales.

69. *Id.*

70. *Id.* § 34.20.090(a). About half the states still allow an equity of redemption, but the device is rarely employed. *See* Wechsler, *supra* note 14, at 860-61.

71. ALASKA STAT. § 34.20.090(a) (1985).

72. *Id.* § 34.20.070(b); *see also* Hull v. Alaska Fed. Sav. & Loan Ass'n of Juneau, 658 P.2d 122, 127 (Alaska 1983).

73. 583 P.2d 210 (Alaska 1978).

74. *Id.* at 218.

75. 458 P.2d 1003 (Alaska 1969).

that the sale would only be set aside for noncompliance with the statutory procedure in cases that "reach unjust extremes."[76] A federal court in Alaska used similarly strong language in *Alsop v. Alaska,*[77] and held that under Alaska law a sale could not be set aside simply because the price was too low, absent fraudulent circumstances.

Until *Rosenberg,* Alaska courts had been very pro-purchaser in cases involving conflicts between the rights of purchasers and debtors. At the very least, these cases are relevant because they articulate a definite policy of preserving the validity of the nonjudicial foreclosure sale, which was a question at issue in *Rosenberg.* The facts presented in *Rosenberg* perhaps reached the "unjust extremes" that *Semlek* held would invalidate a sale, but most of the foreclosures affected by the *Rosenberg* rule will not suffer from the extreme problem that triggered the *Rosenberg* decision. Had the court been more conscious of preserving the validity of sales, it might have devised a narrower solution.

IV. *ROSENBERG V. SMIDT*

A. Due Diligence Search

The facts of *Rosenberg* are not typical of nonjudicial foreclosure notice cases. Basically, two parties encumbered two deeds of trust secured by the same piece of property, but one of them received no notice that the first encumbrancers had stopped making their installment payments.[78] More specifically, in December 1973, Rodney Spendlove and William Johnson sold some land to Alvin and Janice Smidt.[79] The sale provided that both the sellers and the buyers would continue to make payments on their respective deeds of trust. Although the Smidts made their payments without fail from 1973 to May of 1981, Spendlove and Johnson defaulted on their payments in early 1980.[80]

The beneficiaries of the first deed of trust, the one executed by Spendlove and Johnson, thus commenced nonjudicial foreclosure proceedings in June of 1980.[81] Alaska Title Guaranty Company ("Alaska Title"), which was handling the proceedings, sent notice, as required

76. *Id.* at 1006; *see also* Harris v. Alaska Title Guar. Co., 510 P.2d 501 (Alaska 1973) (reiterating the principle that the setting aside of a foreclosure sale would not occur except in the case of "unjust extremes").

77. 14 Bankr. 982 (D. Alaska 1981), *aff'd,* 22 Bankr. 1017, 1018 (D. Alaska 1982) (court refusing to set sale aside, holding, "Under Alaska law, a deed of trust becomes perfected against subsequent bona fide purchasers when it is recorded.").

78. 727 P.2d 778, 779 (Alaska 1986).

79. *Id.*

80. *Id.*

81. *Id.*

under the statute,[82] to the Smidts, as well as to Johnson and Spendlove. Alaska Title sent notice to the address designated by the Smidts in the second deed of trust as the one to which foreclosure notice should be sent. The Smidts had moved from that address in 1975, however, and the certified letters sent to them were returned "unclaimed."

Consequently, the Smidts did not receive actual notice of the sale, and they diligently continued making payments.[83] In 1980, Fred and Rita Rosenberg bought the property, valued at more than $20,000, for $5,626.25. The Smidts thereafter sued the Rosenbergs, Alaska Title, Spendlove, and Johnson to set aside the sale. The Alaska Supreme Court held that the notice required by Alaska's nonjudicial foreclosure statute[84] mandated that trustees exercise "due diligence" in searching for the last known addresses of interested parties.[85]

The court gleaned the due diligence requirement from the following portion of the notice statute:

> Within 10 days after recording the notice of default, the trustee shall mail a copy of the notice by certified mail to the last known address of each of the following persons or their legal representatives: (1) the grantor in the trust deed; (2) the successor in interest to the grantor whose interest appears of record or of whose interest the trustee or the beneficiary has actual notice, or who is in possession of the property. . . .[86]

Citing several avenues the trustees could have followed to find the Smidts' most recent address, the majority argued that the creditors, and not the debtors, had the burden of ensuring that the correct address was used.[87] The court also based its holding on "last known address" phrases found in tax statutes, service of process rules, and trust deed statutes. The tax statutes, for example, place most of the burden on the taxpayer to notify the Internal Revenue Service ("IRS") of address changes.[88] However, the court distinguished those statutes because the IRS relies on addresses that are, by definition, kept up to date on a yearly basis with the filing of a tax return.[89]

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82. ALASKA STAT. § 34.20.070(c) (1985).

83. 727 P.2d at 780.

84. ALASKA STAT. § 34.20.070(c) (1985).

85. 727 P.2d at 783.

86. ALASKA STAT. § 34.20.070(c) (1985).

87. 727 P.2d at 780. The *Rosenberg* court cited as possible sources of information the Anchorage Municipality Real Property Taxation Department, any utility company, and the Department of Motor Vehicles. Significantly, the phone directory in the present case did not list the Smidts' address. *Id.*

88. *Id.* at 781 (citing Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), *aff'd mem.*, 538 F.2d 334 (9th Cir. 1976) (interpreting 26 U.S.C. § 6212(b) (1981))).

89. *Id.*

Another analogy the court drew was with service of process rules. The court cited *Shanklin v. Bender,*[90] in which the District of Columbia Court of Appeals had interpreted Illinois law to require reasonable diligence in serving process on non-resident motorists.[91] As the *Rosenberg* court acknowledged in regard to both the tax statutes and the service of process rules, however, "these holdings involve statutory schemes with concerns somewhat different from the deed of trust sale."[92] The court argued on one hand that, because the tax statute placed the change of address burden on the addressee, the different policy concerns of the tax statute were reason enough to impose a due diligence requirement on the addressor in nonjudicial foreclosures.[93] On the other hand, the court inconsistently reasoned that the different policy concerns in the service of process rules provided no impediment to imposing a due diligence requirement in nonjudicial foreclosures similar to the one included in service of process statutes.[94]

The court acknowledged that its argument could not be buttressed directly by federal due process concerns,[95] although its holding was certainly influenced by the due process goal that notice should be designed actually to reach a party.[96] However, the opinion cited no other case in which a due diligence search has been explicitly required for nonjudicial foreclosure. The most similar case cited by the court came from the Idaho Court of Appeals, but that case is factually distinguishable from *Rosenberg.* In *Security Pacific Finance Corporation v. Bishop,*[97] the Idaho Court of Appeals invalidated a sale because the trustor did not receive notice of the sale, although notice had been sent. Although the trustor did actually know about the sale, the court held that trustees must comply strictly with the notice procedures so that trustors would be certain to have the same protection afforded those whose homes are foreclosed judicially.[98] Unlike the *Rosenberg* case, however, the *Security Pacific* case did not involve a search for a trustor's address.[99] Thus, the majority's reliance on it in imposing a due diligence search is somewhat misleading.

The final justification that the *Rosenberg* court cited was the tension between the freedom of alienation of property and the rights of

90. 283 A.2d 651 (D.C. 1971).
91. *Id.* at 654.
92. 727 P.2d at 781.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. 109 Idaho 25, 704 P.2d 357 (Ct. App. 1985).
98. *Id.* at 28, 704 P.2d at 360.
99. *Id.* at 25-27, 704 P.2d at 357-59.

those interested in the property to receive notice about its status.[100] The court rejected the California rule,[101] which explicitly did not require a due diligence search but was based soundly on a narrower statute than that of Alaska.[102] The court also rejected the California court's policy justification for not requiring a due diligence search, which was that only "passive investors" would be affected by a narrow interpretation of notice.[103]

Thus, *Rosenberg* imposed a duty upon creditors to search for the last known addresses of parties who have an interest in the property. Interested parties would include those with a debt secured by the property, those in possession of the property, or those whose names appear on the deed of trust. Yet, once it had imposed a due diligence search, that requirement would be inconsequential unless the court required further proof that the search had been made.

B. Bona Fide Purchasers on Inquiry Notice

To complete its holding, the *Rosenberg* court went further than merely imposing a due diligence search upon creditors. It also required diligence on the part of the purchasers.[104] Under the due diligence rule created in the first part of the *Rosenberg* opinion, the Smidts still would not have been vindicated if the Rosenbergs were considered bona fide purchasers. The general rule is that a foreclosure sale made to a bona fide purchaser will not be set aside by a court if it was merely voidable rather than void.[105] A voidable sale is one in which the creditor failed to follow a procedural requirement correctly, whereas a void sale is one in which the creditors had no right to foreclose in the first place.[106]

The notice statute involved in *Rosenberg* states that:

> A recital of compliance with all requirements of law regarding the mailing or personal delivery of copies of notices of default in the

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100. 727 P.2d at 783.

101. *Id.* at 782 (citing I.E. Assoc. v. Safeco Title Ins. Co., 39 Cal. 3d 281, 702 P.2d 596, 216 Cal. Rptr. 438 (1985)).

102. CAL. CIV. CODE § 2924(a)-(c) (West 1974 & Supp. 1988).

103. 727 P.2d at 783 n.11.

104. *Id.* at 783-86.

105. *See, e.g., id.* at 787 (Moore, J., dissenting) (explaining that "[t]here is no doubt that Alaska follows the universal rule of refusing to set aside a voidable foreclosure sale when title has passed to a [bona fide purchaser]"); Semlek v. National Bank of Alaska, 458 P.2d 1003, 1006 (Alaska 1969) (stating that "the remedy of setting aside the sale will be applied only in cases which reach unjust extremes"); Note, *supra* note 2, at 112 (interpreting the statute subsequently interpreted in *Rosenberg* as reinforcing the Alaska bona fide purchaser rule).

106. G. NELSON & D. WHITMAN, *supra* note 44, § 7.20, at 537-38. When the defect is merely voidable rather than void, the trustor may sue the trustee for damages resulting from harm caused by the procedural defects. *Id.*

> deed executed under a power of sale is prima facie evidence of compliance with the requirements. The recital is conclusive evidence of compliance with the requirements in favor of a bona fide purchaser or encumbrancer for value and without notice.[107]

The pivotal task in the second part of the case, therefore, was to interpret whether a "recital" refers to a conclusive statement stating that a search had been made or to a detailed statement of facts setting forth the actual steps taken in locating the interested party. The court held that the conclusive statement in the Rosenbergs' deed was insufficient to protect them as bona fide purchasers and that they were put on notice to inquire about whether the second encumbrancers had received actual notice of the sale.[108]

Thus, the sale is final only if the trustee has pursued the last known address of interested parties with due diligence and has conveyed such diligence through a statement of facts in a foreclosure deed sufficient to absolve the purchaser from being placed on inquiry notice. As the basis for this interpretation, the court first associated the term "recital" with another section of the statute in which facts were required to be included in the deed regarding price, remedy, and publication.[109] The court referred, as well, to dictionary definitions of "recital."[110] Finally, the court made a policy argument that even though the presumptions in the foreclosure statutes were available to protect the trustee, they were also intended to ensure that proper notice procedures were followed.[111]

C. Criticism

Although the intent to improve notice to trustors is laudable, the very procedure instituted by the majority in *Rosenberg* is the primary shortcoming of the holding. In a dissenting opinion, Justice Moore discussed two of these shortcomings. He first made a policy argument that "where the injury was caused by the trustee's failure to discover the debtor's new address, it should be the debtor, not the innocent purchaser, who should lose title to the property."[112] This position is sound because the debtor is in a better position to provide the trustee

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107. ALASKA STAT. § 34.20.090(c) (1985).

108. 727 P.2d at 786.

109. *Id.* at 786 n.18 (citing Real Estate Comm'n v. Johnston, 682 P.2d 383, 386-87 (Alaska 1984)). The court is using the associated words theory of statutory construction. *Id.* Its analysis is weak, however, because in another part of the statute, addressing notice to be sent to the State of Alaska when the state is a party, the statute only requires the notice to include "the name and address, if known" of the debtor. ALASKA STAT. § 34.20.070(d) (1985).

110. *Rosenberg*, 727 P.2d at 786 n.19 (citing BLACK'S LAW DICTIONARY 1435 (rev. 4th ed. 1968); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

111. *Id.* at 786.

112. *Id.* at 787 (Moore, J., dissenting).

with the address. Moore next argued that the court was unduly broadening the possible sources of disqualification for being a bona fide purchaser.[113] The traditional requirements for being a bona fide purchaser are that the purchaser has paid a sum, is not a relation of the trustor, has had no actual knowledge or notice in a recorded instrument of the procedural defects, and would not as a reasonable person have received such notice from being at the sale.[114]

To expand upon Moore's cogent analysis, the problem with the *Rosenberg* due diligence search is that it is potentially limitless. The majority indicated several avenues upon which a trustee could embark on his search, for example, but implied that the list was not exhaustive.[115] Thus, making bona fide purchaser status contingent on a satisfactory recital of this search makes the rule even more sweeping.

A third criticism against the *Rosenberg* holding is the weak basis for its reasoning. The majority, for example, used the Oregon notice statute to buttress its argument for requiring recitals.[116] Its use of the Oregon statue, however, is misplaced and may be criticized in three ways. First, the language of the Oregon statute is phrased as requiring "recitals of the facts" concerning notice, and there is, accordingly, a strong argument that Oregon is one of the few states in which the legislature has enacted a requirement that factual recitals be given. In conjunction with this requirement, however, the statute also provides a strong case for bona fide purchasers "relying" on such recitals.[117] One commentator on the Oregon statute has explained that "if the

113. *Id.* at 787-88 (Moore, J., dissenting).

114. *See* Sabo v. Horvath, 559 P.2d 1038, 1043 (Alaska 1976); *see also* Swindell v. Overton, 310 N.C. 707, 714-15, 314 S.E.2d 512, 517 (1984) (defining a bona fide purchaser as follows: "if the sale purchaser has paid value and is unrelated to the mortgagee, it would seem that he should take free of voidable defects if: (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale would have been aware of the defect.").

115. 727 P.2d at 780. *See supra* note 87.

116. *Id.* at 785. The Oregon statute provides as follows: "The trustee's deed to the purchaser at the trustee's sale shall contain, in addition to a description of the property conveyed, a recital of the facts concerning the default, the notice given, the conduct of the sale and the receipt of the purchase money from the purchaser." OR. REV. STAT. § 86.775 (1985).

The Oregon statute further provides:

> When the trustee's deed is recorded in the deed records of the county or counties where the property described in the deed is situated, the recitals contained in the deed and in the affidavits required under [Oregon Revised Statutes §] 86.750(3) shall be prima facie evidence in any court of the truth of the matters set forth herein, but the recitals shall be conclusive in favor of a purchaser for value in good faith relying upon them.

Id. § 86.780 (1984).

117. OR. REV. STAT. § 86.780 (1984).

trustee recites in the deed it carried out notice procedures required by the statutes, such recitals provide absolute protection to a bona fide purchaser relying on them."[118] That commentator seems to believe that Oregon does not require that detailed a recital, unlike the one the *Rosenberg* court envisions for Alaska. Indeed, his opinion is supported by the fact that the Oregon statute indicates that purchasers may rely on the recital given. Thus, no one has yet interpreted the Oregon statute quite as broadly as the *Rosenberg* court did in using it to support a holding that factual, as opposed to conclusory, recitals are required.

Second, even if the statute had been interpreted broadly, the language of the Oregon statute more clearly supports the argument that factual recitals are required than does the language of the Alaska statute.[119] Third, even if the Oregon statute were to be interpreted as broadly as the majority in *Rosenberg* advocates, *Rosenberg*'s reliance on this interpretation is misleading. This is because the ramifications of the *Rosenberg* holding are much greater than even the broadest reading of the Oregon statute. The *Rosenberg* holding combines a requirement of recitals with an open-ended due diligence search for the debtor's last known address, thus making the notice procedure a possibly limitless duty. Thus, the validity of the foreclosure sale is uncertain. The Oregon statute is much more reliable from the purchaser's point of view because it allows the purchaser to rely on the recitals.[120] Unlike the Oregon statute by itself, even broadly interpreted, the *Rosenberg* opinion thoroughly weakens the reliability of the sale.

The Alaska courts[121] and Legislature[122] have acknowledged the need for reliability of sales to bona fide purchasers. In *Rosenberg,* however, the Alaska Supreme Court eroded the protections previously afforded to purchasers in the form of the bona fide purchaser rule. By imposing a duty on purchasers to inquire about any address search which is not described thoroughly and factually in the deed of trust,[123] the court is, in effect, requiring purchasers to employ a watch-dog approach at foreclosure sales. Finally, the court's statutory interpretation was weak. As the dissent recognized,[124] legislatures usually

118. Randolph, *Updating the Oregon Installment Land Contract,* 15 WILLAMETTE L. REV. 181, 200 n.64 (1979).

119. *Rosenberg,* 727 P.2d at 785.

120. OR. REV. STAT. § 86.780 (1984).

121. *See, e.g.,* McHugh v. Church, 583 P.2d 210, 216 (Alaska 1978); Harris v. Alaska Title Guar. Co., 510 P.2d 501, 505 (Alaska 1969); Semlek v. National Bank of Alaska, 458 P.2d 1003, 1006 (Alaska 1969).

122. *See, e.g.,* ALASKA STAT. § 34.20.090 (1985) (no right of redemption after sale to bona fide purchaser).

123. *Rosenberg,* 727 P.2d at 788.

124. *Id.* at 788 (Moore, J., dissenting).

intend presumptions in favor of purchasers to help the creditors and purchasers, rather than to harm them.[125] Disgruntled mortgagors still have the option to sue mortgagees for damages if they have suffered a genuinely voidable defect.[126]

V. NOTICE AND PRESUMPTIONS IN FAVOR OF BONA FIDE PURCHASERS IN OTHER STATES

Another way to analyze the *Rosenberg* ruling is to compare its analysis of the notice statute with the interpretations other state courts and legislatures have given their respective notice statutes. Quite simply, the drastic nature of the *Rosenberg* ruling is much more evident when compared to the laws in other states. No state that allows nonjudicial foreclosure has combined a due diligence address search requirement for creditors with an inquiry notice burden on purchasers as Alaska now has.

To date, laws regarding notice in nonjudicial foreclosures have developed in a piecemeal fashion, due in part to the uncertainty surrounding the purpose of notice and how much, if any, is constitutionally required.[127] The importance of the notice requirement in a particular state will depend largely on its entire foreclosure scheme. Although state statutory schemes vary greatly, one commentator has categorized them into five groups: those that allow strictly judicial foreclosure and statutory redemption; strictly judicial foreclosure with a pre-sale waiting period; strictly judicial foreclosure with unconditional sale; and, within the category of nonjudicial sales, those that allow statutory redemption and those that do not.[128] Alaska is in the latter group.

Thirty-one states and the District of Columbia now allow nonjudicial foreclosure sales;[129] use of the power of sale option is a growing

125. *See* Madway, *A Mortgage Foreclosure Primer Part II,* 8 CLEARINGHOUSE REV. 250, 269 (1974) [hereinafter Madway II]. As Madway explains, "[h]istorically, the holder in due course doctrine was developed to promote the free flow of negotiable instruments by protecting the innocent purchaser of commercial paper from liability for the failure and misdeeds of the original payee." *Id.* Later he continues, "[t]he rationale has been that this protection is necessary to the health of the economic system and that without it liquidity would be destroyed and credit would become either impossible to obtain or ruinously expensive." *Id.* Madway does not necessarily support the use of the holder in due course doctrine in the mortgage context; he is a staunch supporter of the rights of debtors.

126. *See Rosenberg,* 727 P.2d at 789.

127. *See supra* notes 33-61 and accompanying text.

128. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection Over Credit,* 71 IOWA L. REV. 1, 4-5 n.8 (1985).

129. *Id. See also infra* note 134.

trend in the United States.[130] Twenty-four of the thirty-one states that allow nonjudicial foreclosure do not include a right of statutory redemption.[131] Of the states that allow only judicial foreclosure, nine explicitly prohibit nonjudicial sales,[132] and the others do so implicitly by refraining from mentioning them.

Of the thirty-one states that allow power of sale foreclosure, none has construed its statute to be as comprehensive as Alaska's, which was interpreted as requiring the trustee to search with due diligence for the last known address of the mortgagor[133] and states that the purchaser may not rely on a conclusive statement that the trustee completed such a search.[134] A survey of some of the more important and

130. *See, e.g.,* Bauer, *supra* note 128, at 4-5.

131. *Id.* at 5 n.11.

132. *Id.* at 4 n.8. Bauer indicates that creditors and debtors may not agree to have a nonjudicial foreclosure sale without a statute that provides for the procedure.

133. *See* Morrell v. Arctic Trading Co., 21 Wash. App. 302, 584 P.2d 983 (1978) (refusing to impose a due diligence search for the address of successors in interest). Some state statutes require that the interested party be responsible for submitting a change of address to the county creditor recorder. *See, e.g.,* GA. CODE ANN. § 44-14-162.2 (1982). The only state that comes close to requiring a search is Massachusetts. *See* MASS. GEN. L. ch. 244, § 14 (1986) (delineating several places where the mortgagor should look to find the address, but limiting that search to the delineated avenues; also, the legislature has not imposed any explicit requirement of factual recitals along with the limited search).

134. The following seven states of the 31 judicial sale states have some type of explicit requirement for providing recitals of facts in either a deed or an affidavit. *See* ARK. STAT. ANN. § 18-50-111 (Supp. 1987) (requiring "recitals of compliance . . . including recitals concerning mailing and publication of notice of default . . . ."); GA. CODE ANN. § 44-14-162 (1982) (requiring recitals "setting forth the giving of notice" in compliance with the statutory procedures); IDAHO CODE § 45-1510 (1977) (requiring that the deed contain a recital, which will constitute prima facie evidence of its truth); MONT. CODE ANN. § 71-1-318(1) (1987) (requiring "recitals of the facts concerning the default," including notice); OR. REV. STAT. § 86.775 (1984) (stating that the deed "shall contain a recital of the facts concerning the default," including notice); UTAH CODE ANN. § 57-1-28 (1986) (if recitals of mailing are in the deed, they are "conclusive evidence in favor of bona fide purchases . . . ."); WIS. STAT. ANN. § 846.66-67 (1977) (setting forth a scheme for filing an affidavit which will include facts about notice given and serve as presumptive notice of the facts therein). None of these states has had a case setting aside a sale on this basis, probably because the practice has become custom in those states that require such recitals. Although these states do require recitals, such requirements alone do not create the same impact as *Rosenberg* because none of them foster uncertainty by combining a requirement of recitals without which one cannot be a bona fide purchaser with a due diligence search.

Fourteen states either say nothing about bona fide purchasers and presumptions in favor of them or are ambiguous about what their "recitals" require. *See* ALA. CODE § 35-10-1 (1975); ALASKA STAT. § 34.20.090(c) (1985); HAWAII REV. STAT. § 667-8 (1985); MASS. GEN. LAWS ANN. ch. 244, § 15 (1986); MICH. COMP. LAWS ANN. § 600.3241a (1987); MINN. STAT. § 580.15 (Supp. 1988); MISS. CODE ANN. § 89-1-55 (1972); N.H. REV. STAT. ANN. § 479:25 (Supp. 1987); N.Y. REAL PROP.

representative power of sale states indicates that most are still in the rudimentary stages of developing their notice schemes. A comparison between Alaska and those states is worthwhile, however, because it demonstrates that other states face similar problems as Alaska and that the *Rosenberg* rule provides a unique solution. The comparison further shows that the *Rosenberg* interpretation of the Alaska statute represents an extreme interpretation of the statutory language, given the interpretations of nonjudicial foreclosure statutes in other states. While Alaska could be innovative, such innovation should work generally to improve the entire foreclosure scheme.

Some state courts have interpreted their statutes very conservatively and, in turn, have been far slower than Alaska to require any personal notice of nonjudicial sales to mortgagors. Texas, for example, traditionally has imposed very lax notice requirements upon creditors instituting foreclosure proceedings.[135] Because nonjudicial foreclosure sales are largely free of hassle, creditors may use them almost exclusively.[136] The Texas statute traditionally required either the posting of written notices in three public places in the county or some other form of notice bargained for between the parties.[137] No personal notice was necessary unless it had been contracted for.[138]

The Texas Legislature has recently enacted a statute requiring notice to be sent to the "debtor's last known address as shown by the

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ACTS. LAW § 1411 (McKinney 1979); R.I. GEN. LAWS § 34-27-2 (1984); S.D. CODIFIED LAWS ANN. § 21-48-1 (1987); TEX. PROP. CODE ANN. § 51-002 (Vernon 1984); UTAH CODE ANN. § 57-1-28 (1986); W. VA. CODE § 38-1-3 (1985); WYO. STAT. § 34-4-103 (1977).

The remaining 10 states have some type of legislation which explicitly makes the sale valid without the benefit of factual recitals. *See* ARIZ. REV. STAT. ANN. § 33-811 (1986) (the deed itself creates a conclusive presumption in favor of bona fide purchasers and does not require factual recitals); CAL. CIV. CODE § 2924 (West Supp. 1988); COLO. REV. STAT. § 38-39-109 (1982); ME. REV. STAT. ANN. tit. 14, § 6203-E (1980); MD. REAL PROP. CODE ANN. § 7-105(a)(3) (1981); MO. REV. STAT. § 443.380 (1986); NEV. REV. STAT. § 107.030(8) (1986); TENN. CODE ANN. § 35-5-101 (1984) (a voidable defect simply does not invalidate a sale); VA. CODE ANN. § 55-59 (1986); WASH. REV. CODE ANN. § 61.24.040(1)(b) (Supp. 1987) (searching is precluded explicitly by the statute, thus precluding a recital of such a search).

135. *See, e.g.*, Snider v. Forrest Lumber Co., 448 S.W.2d 130 (Tex. Ct. App. 1969) (since personal notice was not required by statute in Texas, notice to the mortgagor was irrelevant to whether foreclosure proceedings were valid); Cotellesse, *supra* note 23, at 1088.

136. Cotellesse, *supra* note 23, at 1085.

137. *Id.* at 1088; *see also* TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1988) (current version at TEX. PROP. CODE ANN. § 51-002 (Vernon 1984)); *Cost and Time Factors in Foreclosure of Mortgages, supra* note 2, at 414.

138. Madway I, *supra* note 18, at 147.

records of the holder of the debt."[139] The language "last known address" does not require a *Rosenberg* search because the Texas statute specifies that the "last known address" is the one that appears on the official record.[140] If the Smidts' case had been litigated under Texas law, then, Alaska Title would have given sufficient notice because the creditors sent notice to the Smidts at the address recorded in the deed.

Texas courts have interpreted the statute equally narrowly, holding, for example, that "[t]he general purpose of the statute is to provide only a minimum level of protection for the debtor, and it provides for only constructive notice of the foreclosure."[141] Moreover, "[t]o establish a violation of the statute, it must be shown that the holder of the debt had in its records the most recent address of the debtors and failed to mail a notice by certified mail to that address."[142] Thus, the creditor is under no obligation to engage in any search.[143]

The Texas statute does not include any provision relating to bona fide purchasers or legal presumptions in their favor. The courts do recognize the general rule of a presumption in favor of bona fide purchasers with regard to voidable defects.[144] That is, the sale will not be set aside for a defect that is merely voidable but not void.[145] Moreover, no Texas case has narrowed the bona fide purchaser rule to the extent that *Rosenberg* did.

Like Texas, the Virginia Legislature has only recently imposed a personal notice requirement on nonjudicial foreclosure sales. This requirement may be satisfied by sending the notice by registered mail to the address that will "appear in the records of the party secured."[146] If the trustee fails to give such notice, however, the statute explicitly directs that the sale will not be set aside.[147] The bona fide purchaser

139. TEX. PROP. CODE ANN. § 51-002(e) (Vernon Supp. 1988).

140. *Id.*

141. Krueger v. Swann, 604 S.W.2d 454, 457 (Tex. Civ. App. 1980).

142. *Id.*

143. Incidentally, Texas traditionally has had the least expensive foreclosure proceedings in the country and, apparently, is trying to retain that position. *See* Note, *supra* note 2, at 206 n.5.

144. *See, e.g.,* Slaughter v. Qualls, 149 S.W.2d 651, 657 (Tex. Civ. App. 1941).

145. *See supra* note 106.

146. VA. CODE ANN. § 55-59.1 (1986); *see also Cost and Time Factors in Foreclosure of Mortgages, supra* note 2, at 414.

147. VA. CODE ANN. § 55-59.1 (1986) (stating that "[f]ailure to comply with the requirements of notice contained in this section shall not affect the validity of the sale under the deed of trust and a purchaser for value at such sale shall be under no duty to ascertain whether such notice was validly given.") Virginia is one of the least expensive states in which to foreclose. *See* Note, *supra* note 2, at 206 n.5.

rule, therefore, is not even needed in Virginia to protect innocent purchasers. Interestingly, the statute also requires notice by advertisement.[148]

Even in states in which the personal notice requirement is somewhat more established, such as Missouri,[149] the last known address rule has been strictly limited. Although Missouri courts have not considered the issue of whether the trustee is under any duty to search for the last known address, the statute expressly provides that the *mailing* is the important task to undertake for evidentiary purposes.[150] Actual receipt is unnecessary, and registration at the post office constitutes compliance with the notice requirement.[151] Moreover, in *Mueller v. Simmons,*[152] the Missouri Court of Appeals held that statutory requirements were fulfilled even though a letter went unclaimed at the post office.

The Missouri courts and Legislature worked together to maintain the bona fide purchaser rule in order to preserve the utility of the nonjudicial sale. The statute indicates that general recitals in the deed of trust regarding compliance are generally sufficient for bona fide purchasers at foreclosure sales to rely upon.[153] The courts have held in complementary fashion that such recitals constitute prima facie evidence of their truthfulness.[154]

In Colorado, the trustee must also mail a copy of the advertisement to the trustor and his successors in interest "at the address given in the recorded instrument of writing."[155] If the instrument does not contain an address, the statute states specifically that no notice must be given to that person.[156] The form of the deed need not include any recitals of the notice procedure followed,[157] although one commentator has recommended that recitals nevertheless be included.[158] Even if the trustee does include a recital it would be based on a fixed address and the sufficiency of the recital would not be uncertain as it is under

148. VA. CODE ANN. § 55-59.2 (1986).
149. MO. REV. STAT. § 443.325(3), (4) (1986).
150. *Id.* § 443.325(3).
151. *Id.*
152. 634 S.W.2d 533, 535 (Mo. Ct. App. 1982).
153. MO. REV. STAT. § 443.380 (1986). Thus, the reasoning in Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986), that a "recital" means a statement of facts, *see supra* notes 108-10 and accompanying text, is not followed in Missouri.
154. *Mueller,* 634 S.W.2d at 535; *see also* Murphy v. Butler County, 352 Mo. 1082, 180 S.W.2d 732 (1944).
155. COLO. REV. STAT. § 38-37-113(2) (1982). The trustee must use the recorded address even if another actual address is known.
156. *Id.* § 38-37-113(3) (1982).
157. *Id.* § 38-39-109 (1982).
158. Morris, *Foreclosure on Sale by Public Trustee of Deeds of Trust in Colorado,* 28 DICTA 437, 458 (1951).

the *Rosenberg* rule. In any case, an issued deed constitutes prima facie evidence of compliance with statutory procedure.[159]

Unlike the states previously discussed, some state legislatures have enacted laws containing more ambiguous language. The courts in these states, however, have shaped the statutory language so as not to burden creditors unduly. For example, the Nevada statute requires the trustee to send personal notice to each debtor at his or her last known address.[160] In *Turner v. Denco Services, Inc.*,[161] the post office returned a letter of notice because no forwarding address had been left by the addressees. The court refused to impose a due diligence requirement on the creditor and construed the statute to mean only that notice must be sent "by certified mail at the address known by the grantor."[162] In a similarly cautious manner, the Nevada Legislature preserved the bona fide purchaser rule. A statement in the deed that notice was given and the statute otherwise complied with provides conclusive proof that statutory requirements were satisfied.[163]

Even in states in which the legislature appears to be implementing reform in favor of debtors, the courts have frequently interpreted the statutes so as not to impose excessive burdens on creditors. In New Hampshire, the trustee must send notice by registered mail to the trustor or anyone owing a debt on the property at his or her last known address, at least twenty-five days before the sale.[164] The New Hampshire Supreme Court watered down the notice requirement by holding that proof of receipt of notice is not a prerequisite to the right of foreclosure.[165] In New Hampshire, the Smidts would have been denied recovery automatically because Alaska Title sent them notice by registered mail.

New Hampshire also maintained the bona fide purchaser rule. The court in *Dugan* used strong language in favor of bona fide purchasers,[166] and the statute corroborates the holding. The trustee must

159. COLO. REV. STAT. § 38-39-109 (1982).

160. NEV. REV. STAT. § 107.080.3 (Supp. 1987). Additionally, anyone with a legal interest may record his name and address with the county recorder. NEV. REV. STAT. § 107.090 (1986).

161. 87 Nev. 14, 479 P.2d 462 (1971).

162. *Id.* at 16, 479 P.2d at 464.

163. NEV. REV. STAT. § 107.030(8) (1986).

164. This statute also requires a reminder that the trustor may challenge the foreclosure in court. N.H. REV. STAT. ANN. § 479:25(II) (Supp. 1986).

165. Dugan v. Manchester Fed. Sav. & Loan Ass'n, 92 N.H. 44, 46, 23 A.2d 873, 875 (1942).

166. *Id.* at 47, 23 A.2d at 876 (stating a policy argument regarding bona fide purchaser that "[a]s between the mortgagor and the purchaser, the former rather than the latter should suffer the loss, because by granting to the mortgagee the right to sell, the mortgagor put it in the mortgagee's power to work the injury through the execution of that power").

file an affidavit stating simply that notice was sent to the trustor's last known address and stating what that address was.[167] Given the New Hampshire courts' preference for the bona fide purchaser rule, they would be unlikely to impose upon purchasers an attendant duty of inquiry notice.

Finally, even in those states with relatively progressive laws, the procedures do not impose nearly the same burdens on creditors and purchasers as does *Rosenberg*. No sale is effective in Georgia, for example, unless the creditor sends notice to the debtor by registered mail.[168] The debtor, however, is responsible for ensuring that the creditor has his correct address.[169] Also, the deeds granted under power of sale transactions must contain recitals "setting forth the giving of notice in compliance"[170] with the notice provisions. Thus, unlike the Alaska statute, the Georgia statute explicitly calls for an explanatory statement of facts.

Although Georgia law requires a statement of facts in the deed, the law lacks the impact of the *Rosenberg* rule because it does not require a due diligence search as an accompaniment to the recital. Hence, the statement of facts required in a Georgia deed establishes compliance with the law rather than noncompliance. The Georgia statute, by placing the responsibility for the address upon the debtor, makes the validity of the sale more likely than that of the Alaska statute under the *Rosenberg* rule. Moreover, unlike the *Rosenberg* rule, Georgia law has transformed the recital requirement into a rule that strengthens the validity of sales to bona fide purchasers.[171]

The survey of states presented above highlights the differences in nonjudicial foreclosure schemes and demonstrates that even the most facially progressive statutes generally are applied in a conservative manner. None of the states discussed, nor any of the other nonjudicial foreclosure states, have a statute or an interpretation of a statute that will impact upon nonjudicial foreclosure sales to the same degree as does *Rosenberg*. The fact that no other state has adopted the approach set forth in *Rosenberg* indicates that certain policy reasons may dictate

167. N.H. REV. STAT. ANN. § 477:32 (1983).

168. GA. CODE ANN. § 44-14-161 (1982); *see also Cost and Time Factors in Foreclosure of Mortgages, supra* note 2, at 414.

169. GA. CODE ANN. § 44-14-162.2 (1982).

170. *Id.* § 44-14-162.4.

171. After the statute commands that factual recitals be provided, it states that their effect "shall be to protect the validity of the title of any subsequent purchaser in good faith other than the lender." GA. CODE ANN. § 44-14-162.4 (1982). *See, e.g.*, Abdalla v. Reagin Enter., Inc., 256 Ga. 279, 279, 347 S.E.2d 585, 586 (1986) (notice procedure mishandled; court interprets the statute to mean that "[t]he protection given by the section encourages the free alienation of property").

against such a procedure. For example, some of the underlying purposes for nonjudicial sales, to promote efficiency and availability of credit, may be defeated by procedures that excessively burden creditors.

VI. AFTER *ROSENBERG*: WILL JUDICIAL FORECLOSURE BE PREFERRED?

A. Problems with Alaska's Position

The law of nonjudicial foreclosure in Alaska is stricter than that of any other state in imposing burdens of notice on creditors and offering purchasers the least degree of certainty regarding the validity of the sale.[172] The new duties that *Rosenberg* imposes on creditors and purchasers could destroy the utility of nonjudicial foreclosures. Moreover, the rules created in response to the unusual facts in *Rosenberg* impose disproportionately large burdens on all power of sale proceedings, most of which will not profit from such extreme measures.

Given the present state of the law, potential purchasers cannot be certain whether their deeds contain sufficient recitals to remove the *Rosenberg* duty of inquiry notice.[173] Thus, the price of foreclosure properties will undoubtedly be lowered as purchasers will be less secure about the titles that they receive. Since the Alaska scheme includes an anti-deficiency statute, meaning that once the creditor sells the property he no longer can resort to action against the debtor, creditors may be more likely to rely on judicial foreclosure to ensure the validity of the sale and to preserve the right to a deficiency judgment.

It may be argued that the *Rosenberg* requirements will not discourage resort to nonjudicial foreclosure because in most cases the addresses of the interested parties will be easily ascertainable. Such an argument, however, necessarily admits that the benefit of the *Rosenberg* requirements is far outweighed by the substantial costs it will impose. If the address will ordinarily be so easily ascertainable, then the heavy burdens imposed by *Rosenberg* are unnecessary.

Indeed, researchers have shown that nonjudicial foreclosure sales with complicated procedural requirements are far more expensive than those without them and that judicial sales are far more expensive than any nonjudicial sales.[174] Although New York law recognizes nonjudicial foreclosure, creditors in that state use judicial foreclosure almost

172. *See supra* notes 62-171 and accompanying text.

173. *See supra* notes 104-26 and accompanying text.

174. McElhone & Cramer, *supra* note 25, at 12 (stating that "[t]he conclusion which comes through most strongly is that the financial impact of a foreclosure is, to a large extent, a function of state foreclosure law. The principal cost-determining legal elements appear to be the type of foreclosure provided (power-of-sale or judicial) and whether a redemption period is required."); *see also* Madway I, *supra* note 18; *Cost*

exclusively.[175] New York requires notice by publication in a local newspaper once a week for twelve weeks, advertisement eighty-four days before the sale in the area where the property is to be sold, delivery to the county clerk, and personal notice to the mortgagor or subsequent grantee whose interest is recorded.[176] The mortgagee is strictly required to serve the notice at the mortgagor's "dwelling-house."[177]

New York courts have understood the purpose of the notice requirement as providing a defense for mortgagors and, thus, have interpreted the statute in a manner allowing mortgagees no procedural error.[178] In *Mowry v. Sanborn,*[179] the New York Commission of Appeals (now the New York Court of Appeals) rendered a sale invalid because notice was sent to the place where the mortgagee thought the mortgagor lived, rather than to the address recorded in the deed. Another case held a sale void where no one but the auctioneer was present at the sale.[180] Moreover, when a purchaser is claiming title in a New York judicial proceeding, he bears the burden of proving that the mortgagee complied with all the statutory requirements.[181] Arguably, the low instance of resort to nonjudicial foreclosure in New York is a direct result of the strictness of that state's procedural requirements.

In short, the *Rosenberg* holding could lead to more frequent resort to judicial foreclosure in Alaska. In any event, the cost of nonjudicial foreclosure will be greater as the possibility of a swift sale is impeded by stiffer procedural obstacles.[182] Alaska should seek a better balance between the interests of debtors and those of the credit system generally. The ideal level of procedural requirements should consider "[h]ow much legal pressure on the debtor is needed to assure the optimal availability of credit."[183] The object must be to maintain an inexpensive, efficient system of credit and serve the interests of debtors at the same time.

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and Time Factors in Foreclosure of Mortgages, supra note 2; Note, *supra* note 2, at 206 n.5.

175. Madway I, *supra* note 18, at 169 n.201 (claiming that the early strict judicial scrutiny to which nonjudicial sales were subjected brought about the exclusive use of judicial sale in New York).

176. N.Y. REAL PROP. ACTS. LAW § 1402 (McKinney 1979).

177. *Id.* § 1403.1.

178. *See infra* notes 179-181 and accompanying text.

179. 65 N.Y. 581 (1875).

180. Campbell v. Swan, 48 Barb. 109 (N.Y. App. Div. 1865).

181. *See* Weir v. Birdsall, 27 A.D. 404, 50 N.Y.S. 275 (1898).

182. *See supra* note 174.

183. McGovern, *supra* note 11, at 165.

B. Reform for Alaska

Foreclosure of a security interest in the event of actual or uncured default is not inherently unjust. The ideal foreclosure system would allow debtors to show whether they have fallen into actual default, would give creditors security that they will be paid, and would assure purchasers that the sale is valid.[184] The need for a more efficient foreclosure system is especially evident in Alaska. The State of Alaska has suffered a large number of foreclosures recently. Even before the economic decline, the state experienced difficulty in convincing banks to extend credit to potential homeowners.[185] Indeed, private credit had become so difficult to establish by 1971 that the state was forced to enter the credit business in order to alleviate the problem.[186]

Three innovations would most efficiently improve the balance of interests among debtors, creditors, and purchasers in Alaska. First, the Alaska Legislature should hold debtors responsible for registering any change of address with the office of the recorder in the recording district in which the property lies. Moreover, debtors should be held responsible for providing an address to which notice can be sent in the event of that debtor's death. Having debtors provide their own addresses is much more efficient than having creditors engage in a rigorous search. Additionally, this system increases the chance that debtors will receive actual notice of the sale. Most importantly, this method eliminates the potentially limitless search encouraged by *Rosenberg* and reduces the uncertainty of achieving compliance with that holding as well.

The second proposed reform would require that the legislature institute an optional summary hearing procedure[187] to allow debtors

184. The significant economic issues involved in foreclosure are beyond the scope of this note, but some commentators have done empirical studies of the costs of foreclosure in a particular area at a particular time. *See, e.g.,* Wechsler, *supra* note 14. The impact of insurance is another issue. *See* McElhone & Cramer, *supra* note 25, at 12.

185. *See* Stietz, *Alaska: Out of the Real Estate Ice Age,* 1985 MORTGAGE BANKING 91 (Sept.).

186. *Id.* at 93.

187. This suggestion has been made previously in Note, *supra* note 2, at 126. Although similar to the unlawful detainer proceeding, which is a summary proceeding for a tenant involving only the immediate right to possession and strictly limiting the defenses that may be asserted, this hearing would allow for a few more defenses to be raised.

The legislature would want to avoid creating such a procedure which would cause state action problems with due process, as discussed earlier. *See supra* notes 42-46 and accompanying text. Even if the state action problem is a risk of instituting the summary hearing procedure, there may be an additional buffer to the power of sale process being held unconstitutional. As discussed above, in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), an important factor in holding Louisiana's sequestration

with legitimate defenses to assert them before any bona fide purchaser becomes involved in the process. At such a hearing, a judge can determine the extent of the "legal relationship"[188] between the creditor and debtor before another can purchase the property. Rather than burdening all purchasers with additional procedures, as the *Rosenberg* case does, this hearing would be appropriate only for the difficult cases. The hearing should be inexpensive for the debtor and quick for the creditor. Whereas judicial foreclosure requires the creditor to sue, in nonjudicial foreclosure the debtor is the one who ordinarily must sue if he wishes to have his claims heard. The summary hearing procedure will alleviate this unfairness of nonjudicial sales because debtors will be provided a cheap and efficient forum in which to sue if they need to vindicate their rights.[189]

Finally, the legislature should enact a law requiring sales of forfeited property to be advertised in the real estate section of the newspaper,[190] as well as the legal section. Ideally, such a widespread advertisement, combined with ensuring the certainty of sales to bona fide purchasers under the first two proposals, would increase interest in, and the price secured at, the foreclosure sale. The adoption of these three suggestions would balance effectively the rights of creditors, debtors, and purchasers, without imposing burdens that would benefit only a few parties.[191]

VII. CONCLUSION

While the "due diligence" standard and the redefinition of the bona fide purchaser rule in *Rosenberg* represent attempts to deal with some of the problems that still exist in Alaska's foreclosure process, they represent inefficient solutions because they burden the whole system while benefiting only a few participants. No other state has burdened creditors and purchasers to such an extent. If its holding is

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statute constitutional was that it allowed for a post-seizure hearing that had fair accompanying procedures. *See supra* note 52 and accompanying text.

188. Rosenberg v. Smidt, 727 P.2d 778, 787 (Alaska 1986).

189. *See* Madway, *A Mortgage Foreclosure Primer: Part III,* 8 CLEARINGHOUSE REV. 473, 475-76 (1974) [hereinafter, Madway III].

190. This suggestion was made in Wechsler, as well, *supra* note 14, at 891-92.

191. For more views on reform, see Madway III, *supra* note 189; *see also* Wechsler, *supra* note 14, at 894-95 (advocating a return to strict foreclosure, which means that the trustee simply reenters and takes back the title to the property). For a very different view of reform, see Bauer, *supra* note 128, at 7 (advocating strict adherence to judicial foreclosure with a right of redemption). A Uniform Land Transactions Act is proposed, but so far it has not been met with much acceptance. *See* Note, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act,* 1976 WIS. L. REV. 899, 901-31 (describing in detail the Act's provisions).

allowed to stand, *Rosenberg* is bound to hamper nonjudicial foreclosure sales. Thus, although creative innovation is a worthwhile idea in this constantly evolving area of the law, the Alaska Legislature should institute measures that will balance the interests involved by imposing duties where they can be most efficiently discharged.

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