IN THE SUPREME COURT FOR THE STATE OF ALASKA

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| ALASKA TRUSTEE, LLC, ROUTH CRABTREE OLSEN, PS, and RICHARD ULLSTROM,<br>Petitioners,<br>vs.<br><br>ELISABETH B. BACHMEIER,<br>Respondent<br>Superior Court Case No. 3AN-09-8695 CI | ) | Supreme Court No. S-13978 |

**BRIEF OF AMICUS CURIAE UNITED TRUSTEE'S ASSOCIATION**

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(b) Not less than 30 days after the default and not less than three months before the sale the trustee shall record in the office of the recorder of the recording district in which the trust property is located a notice of default setting out (1) the name of the trustor, (2) the book and page where the trust deed is recorded or the serial number assigned to the trust deed by the recorder, (3) a description of the trust property, including the property's street address if there is a street address for the property, (4) a statement that a breach of the obligation for which the deed of trust is security has occurred, (5) the nature of the breach, (6) the sum owing on the obligation, (7) the election by the trustee to sell the property to satisfy the obligation, and (8) the date, time, and place of the sale. An inaccuracy in the street address may not be used to set aside a sale if the legal description is correct. At any time before the sale, if the default has arisen by failure to make payments required by the trust deed, the default may be cured by payment of the sum in default other than the principal that would not then be due if no default had occurred, plus attorney fees or court costs actually incurred by the trustee due to the default. If, under the same trust deed, notice of default under this subsection has been recorded two or more times previously and the default has been cured under this subsection, the trustee may elect to refuse payment and continue the sale.

## I. Introduction.

Amicus Curiae United Trustee's Association ("UTA") respectfully submits its brief in support of Petitioner Alaska Trustee LLC in the above-captioned matter. This brief addresses one of the two issues this court requested the parties to brief in its Order dated November 4, 2010: the scope of permissible charges to be included in the "cure" (reinstatement amount) given to homeowners facing non-judicial foreclosure under AS 34.20.070(b). For purposes of this brief, UTA concurs in and relies upon the Statement of Facts, Procedural History, Discussion of Standard of Review and Legislative History set forth in the Brief of Petitioner Alaska Trustee, LLC.

## II. Permissible Charges in Non-Judicial Foreclosure.

Like most things in life, the non-judicial foreclosure process necessarily comes with costs. A typical foreclosure involves many costs, including the cost of title report, publishing and posting costs, trustee's fees, property inspections and the lender's payment of other costs affecting the security of its interest such as payment of prior liens, insurance or taxes. UTA's interest in this case arises from its belief that a non-judicial trustee's ability to charge and collect, as part of the reinstatement amount after default, a reasonable trustee's fee and its third party costs associated with the foreclosure process is the only logical interpretation of the pre-2010 version of AS 34.20.070(b). Any other interpretation would diminish the express purpose of the statute permitting non-judicial foreclosure in Alaska.

If a beneficiary under a deed of trust could not recover the costs associated with having a trustee process a non-judicial foreclosure, the beneficiary would be forced to opt for the more expensive and time consuming judicial foreclosure process, where all such costs are recoverable. Such a holding would clearly undermine the legislative intent to allow the speedy remedy of non-judicial foreclosure. Borrowers would lose as well. If a deed of trust is foreclosed judicially, a borrower could face a deficiency judgment, while the non-judicial foreclosure process prohibits a deficiency judgment. AS 34.20.100.

In providing the statutory scheme for non-judicial foreclosures, the legislature was clearly aware of the typical costs associated with such foreclosures. In fact, the statutory scheme laid out by the legislature requires some of the typical foreclosure costs such as costs for recording (AS 34.20.070(b) and AS 34.20.080(d)), mailing (AS 34.20.070(c)), publishing (AS 34.20.080(a) (2)) and posting (AS 34.20.070(c)). Moreover, the legislature was clearly aware that a beneficiary would incur trustee's fees for the trustee processing the non-judicial foreclosure. It is not reasonable to conclude the legislature intended to provide a comprehensive foreclosure remedy but restrict its use by not allowing the lender or trustee to recover typical foreclosure costs that were required because of the borrower's default.

Other states make these typical foreclosure costs recoverable upon reinstatement after default. For examples, see Arizona Revised Statutes 22-813;

California Civil Code 2924(c); Idaho Code 45-1506; Nevada Revised Statutes 107.080; Oregon Revised Statutes 86-753; Revised Code of Washington 64.24.090; and Wyoming Statutes Annotated 34-2-102. While the experience of these many other states does not require a similar result in Alaska, the fact that so many other legislatures fashioning non-judicial foreclosure remedies similar to Alaska's process allow such fees and costs is highly relevant to the determination that the Alaska legislature intended that such fees and costs were recoverable under AS 34.20.070(b) as amended in 1976.

Prior to that amendment, Alaska law required payment of the full indebtedness when an acceleration clause in the note was exercised after a borrower's default. The 1976 amendment prohibited a lender from requiring payment of the "accelerated debt" after default and required the lender to accept reinstatement of the loan by a borrower's payment of arrearages and costs. The statute provided:

> At any time before the sale, if the default has arisen by failure to make payments required by the trust deed, the default may be cured by **payment of the sum in default** other than the principal that would not then be due if no default had occurred, **plus attorney fees or court costs actually incurred by the trustee due to the default**. (Emphasis added.)

The trial court's decision that the trustee's fees and cost were not recoverable upon reinstatement after a default, because they were not "attorney's fees" or "court costs," ignores this court's only previous ruling construing AS 34.20.070(b) and the

legal and practical underpinnings of that case. In *Hagberg v. Alaska National Bank*[1], this court held that AS 34.20.070(b), which required a lender that was pursuing a non-judicial foreclosure to allow a borrower to reinstate a defaulted loan up to the day of the foreclosure sale by paying arrearages and costs and prohibited the lender from requiring the borrower to pay the entire accelerated amount due, did not violate the contract clause of the federal constitution. In upholding the modification of the lender's contractual remedy on default, the court stated:

> An obligor on a note must still pay the principal and interest and, in case of default, the beneficiary is still entitled to foreclosure **and to his costs.** The beneficiary is deprived of his right to insist on payment of the entire debt as a condition to stopping the non-judicial foreclosure process where the overdue amount is brought current **and costs are paid**.
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> The right of an obligor to call a halt to a non-judicial foreclosure **by paying costs** and by bringing his payments current carries with it an implied duty on the part of the beneficiary to accept a tender of the sum in default and to seasonably advise the obligor on request of the **amount in default**. (Emphasis added.)[2]

In fact, some of these costs, including a lender's payment of prior liens, insurance or taxes were specifically pointed out by the *Hagberg* court to be properly

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[1] *Hagberg v. Alaska National Bank*, 585 P.2d 559, (Alaska 1978)

[2] *Id.* at 561-562.

included in costs the reinstatement amount.[3] For more than thirty years following this decision, non-judicial foreclosure trustees and lenders have relied upon this court's clear statements that the recovery of foreclosure costs in non-judicial foreclosures was authorized by AS 34.20.070(b).

In light of the *Hagberg* decision indicating that such non-judicial foreclosure costs were properly chargeable and collectible as part of the reinstatement amount, it strains credibility to claim as does Bachmeier that the legislature intended that such costs are only recoverable if the non-judicial foreclosure is processed by an attorney (rather than by a non-attorney trustee) or that such foreclosure costs are not recoverable because they are not "attorney's fees" or "court costs." It a further stretch to claim, as Bachmeier also does, that the legislative intent was to require a lender to accept reinstatement after default upon the borrower's payment of arrearages only, without recovery of the costs and fees occasioned by the borrower's default and to require a lender to bring a separate judicial action to recover such costs from the borrower. These interpretations lead to the conclusion that the legislature created a streamlined and comprehensive non-judicial foreclosure process, with advantages for both lenders and borrowers, and then gummed it up by not allowing the fees and costs necessary to run the process in the efficient manner intended by the legislature.

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[3] *Id.* at 561-562, n.8.

These absurd results are not consistent with a reasonable interpretation of the statute or with the statute's intent to provide for a speedy and efficient foreclosure process. It is absurd to claim, as does Bachmeier, that the legislature would allow recovery of typical non-judicial foreclosure costs if incurred by an attorney but not allow them if incurred by a trustee who was not an attorney. The statute provides that "attorney fees" and "court costs" incurred by a trustee are recoverable on reinstatement. A trustee does not incur such fees and costs during a non-judicial foreclosure unless the borrower or some other party has commenced a judicial action to oppose the non-judicial process. That the legislature provided that when a trustee actually incurs such attorney's fees and court costs they are recoverable is not inconsistent with an interpretation of the statute which allows for recovery of the typical costs in the non-judicial foreclosure process.

Alternatively, it is reasonable to conclude that while using the words "attorney's fees and "court costs" the legislature intended to use the words to include the typical fees and costs associated with the non-judicial foreclosure process it created and that such costs were to be recoverable. Such an interpretation is consistent with this court's statutory construction cases. This court has rejected the plain meaning rule in favor of analysis which reviews a statute's "language, its purpose, and its legislative history, in an attempt to give effect to the legislature's

intent, with due regard for the meaning of the statutory language conveys to others."[4] For more than 30 years, this statute has been understood to convey that reasonable non-judicial foreclosure costs and fees incurred by a trustee were chargeable and recoverable upon reinstatement by a borrower. The recovery of such amounts is consistent with the legislative purpose in creating the remedy and fosters use of the process.

The recent amendments to AS 34.20.070(b) which provide the reinstatement amount after default includes, "attorney fees and other foreclosure fees and costs actually incurred by the beneficiary and trustee due to the default" codifies the long standing industry practice regarding collection of typical foreclosure fees and costs and that such practice was consistent with the legislature's intent that such costs were recoverable. In fact, consistent with the *Hagberg* holding that a modification of a remedy is applicable to pre-existing contracts, if the Bachmeier foreclosure process had commenced after this recent amendment, the fees and costs at issue here would clearly be recoverable upon reinstatement after default.[5]

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[4] *Martinez v. Cape Fox Corporation*, 113 P.2d 1226, 1230 (Alaska 2005); See also, *Mechanical Contractors of Alaska v. State*, 91 P.3d 240, 248 (Alaska 2004)

[5] *Hagberg v. Alaska National Bank*, 585 P.2d, at 561-562.

## III. AS 34.20.070(b) Allows Recovery of the Fees and Costs as Part of the "Sum in Default."

As noted above, the statute provides that a borrower may cure the default and stop the foreclosure process by paying "the sum in default other than the principal that would not then be due if no default had occurred." This language is reasonably interpreted to mean that the legislature intended that, while a lender was no longer allowed to accelerate the loan, a borrower's cure required payment of all other amounts due and owing under the borrower's note and deed of trust. Because the term "sum in default" is not defined in the statute, it is reasonable to conclude the legislature intended that the amounts due and owing would be found by resort to the parties' contract as set forth in a note and deed of trust. In fact, the note and deed of trust in the case below[6] are typical of residential loan documents in Alaska, which provide that upon default by the borrower, if the lender is required to pay amounts for protection of the asset, such as payment of taxes or insurance, or expend sums after the default in the foreclosure process, that such sums are payable upon demand. Thus, such expenses of the lender or trustee after the borrower's default are properly included in the sum in default under the parties' contract.

This interpretation is also consistent with language a few lines earlier in AS 34.20.070(b) which requires the notice of default to contain "the sum owing on the

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[6] Exc. 122, Deed of Trust in this case. See among other sections, A.2, A.3, A.4, B.4 and B.5 and C.6.

obligation." It is a reasonable interpretation of the statute that the "sum in default" is the same as the "sum owing on the obligation" and includes amounts reasonably expended by the lender to protect the asses and the reasonable costs of the foreclosure process caused by the borrower's default.

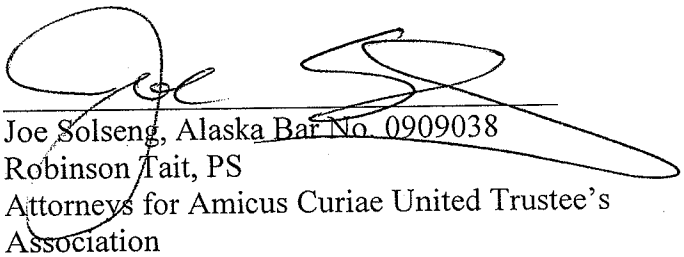
It is simply not reasonable to conclude that the legislature created the non-judicial foreclosure process in a manner that would not allow recovery of the costs and fees typically incurred in such a process. This court should conclude that the legislature intended the term "sum in default" to provide for the recovery of those expenses reasonably incurred after default to protect the asset and to enforce the obligations of the parties' contract.

**IV. Conclusion.**

UTA believes a ruling by this court affirming the trial court's orders that non-judicial foreclosure costs and fees actually incurred after a borrower's default are not recoverable upon reinstatement will lead to confusion and unnecessary litigation concerning potentially thousands of prior non-judicial foreclosure sales and, potentially and unnecessarily, cloud the title of property which has previously been the subject of foreclosure sales before the recent amendment of AS 34.20.070(b). An interpretation of the statute which provides that reasonable and typical costs actually incurred in the non-judicial foreclosure process are recoverable upon reinstatement after a borrower's default, is a correct and common sense

interpretation of the statute and clearly furthers the legislative purpose of providing a speedy, efficient and less costly non-judicial foreclosures. Thus, this court should conclude that all typical costs of processing a non-judicial foreclosure actually incurred by a beneficiary or trustee are and have been properly chargeable and recoverable under AS 34.20.070(b).

Dated this 21st day of January, 2011.



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