

JUN 17 2005

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	AK-04-1373-SBK
7	KING FISCHER FISHERIES, LLC,)	Bk.No.	00-00695
8	Debtor.)	Adv. No.	03-90051
9	_____)		
10	CHERRIER & KING PARTNERSHIP)		
11	CHERRIER KING CHERRIER FISHERY))		
12	PARTNERSHIP, and DRAGNET)		
13	FISHERIES COMPANY, INC.,)		
14	Appellant,)		
15	v.)	MEMORANDUM¹	
16	LARRY COMPTON, CHAPTER 11)		
17	TRUSTEE; OFFICIAL FISHER)		
18	CREDITORS COMMITTEE,)		
19	Appellees.)		
20	_____)		

Argued and Submitted on
March 23, 2005 at Pasadena, California

Filed - June 17, 2005

Appeal from the United States Bankruptcy Court
for the District of Alaska

Honorable Donald MacDonald IV, Chief Bankruptcy Judge, Presiding

Before: SMITH, BRANDT, AND KLEIN, Bankruptcy Judges

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 This appeal is from a final order denying Cherrier & King
2 Partnership, Cherrier King Cherrier Fishery Partnership, and
3 Dragnet Fisheries Company, Inc.'s ("CK Group" or "Appellant")
4 motion for summary judgment and granting summary judgment in
5 favor of the trustee, Larry Compton ("Trustee"). We affirm.

6 FACTS

7 The relevant facts of this case, which involves a failed
8 sales transaction, are uncontested. Intending to set up a new
9 fish processing company in the Bristol Bay region of Alaska,
10 Chris Fischer ("Fischer") formed Triton Fisheries, LLC, which
11 later became King Fischer Fisheries, LLC ("KFF" or "Debtor"). In
12 early March of 2000, Fischer and CK Group entered into several
13 agreements for the purchase of real and personal property
14 including two fish processing plants, two fish buying stations, a
15 barge and the *M/V Dragnet* ("the Properties"). The purchase price
16 for all assets was \$3,351,000. Fischer paid \$50,000 in earnest
17 money. The closing was scheduled for May 1, 2000. Debtor hired
18 E&E Foods of Seattle Washington ("E&E") as its agent for
19 directing and overseeing inventory, marketing, sales, collection,
20 and administrative costs related to the marketing of Debtor's
21 fish product.

22 To address CK Group's concerns about Fischer's ability to
23 obtain financing, the parties executed a Second Addendum to the
24 Purchase Agreements on April 14, wherein Fischer agreed to
25 provide proof of financing within 10 days and to surrender the
26 Properties if the purchase did not close within 45 days. On
27 April 28, Fischer provided a financing commitment letter. CK
28 Group, however, was not satisfied with the letter and wanted

1 additional time to verify the prospective lender's
2 qualifications.

3 With the fishing season fast approaching, Fischer needed to
4 take possession of the Properties immediately. Consequently, he
5 and CK Group entered into a Third Addendum on May 2. Under this
6 arrangement, Fischer agreed to provide additional security for
7 the purchase in the event the closing did not occur by June 13.
8 If Fischer could not obtain sufficient financing by June 13, the
9 Third Addendum directed E&E to deposit the first \$1.7 million in
10 fish proceeds from the 2000 fishing season, payable to KFF, into
11 an escrow account as "additional security" for the purchase of
12 the Properties. If the sale closed after June 13 but before July
13 18, these proceeds were to be applied to the sale price. If the
14 sale did not close before July 18, the parties agreed that the
15 money would serve as reasonable rent for the facilities.

16 On May 22, in a letter to Fischer and representatives for CK
17 Group, E&E acknowledged its obligation to deposit fish sale
18 proceeds collected before June 13 into escrow for the benefit of
19 CK Group as requested by the parties. As of June 14, however,
20 the parties were still negotiating the terms of the escrow
21 instructions. In fact, the parties never agreed on or signed any
22 escrow instructions, never deposited any sale proceeds into the
23 escrow account, and failed to abide by numerous provisions of the
24 Third Addendum. In short, the Third Addendum was never
25 implemented.

26 Instead, on July 10, counsel for Fischer and KFF wrote to CK
27 Group seeking to modify the terms of the Third Addendum because
28 KFF was facing a "cash crunch." Fischer requested that KFF be

1 allowed to retain \$300,000 of immediately available funds for
2 operating expenses and that the next \$500,000 be paid to CK Group
3 as a lease payment for the 2000 season with the proviso that the
4 full payment could be used as part of a down payment should KFF
5 close the sale. This new agreement was memorialized in the July
6 10 letter to E&E and provides in part:

7 [CK Group and Debtor] have agreed to a modification of
8 the instructions with regard to the initial payments
9 you are to make. By this letter, which is signed by
the attorneys for the parties, you are directed to make
distributions as follows:

- 10 1. The first \$300,000 of net proceeds shall be
11 distributed to or at the direction of Chris
Fischer or Triton Fisheries.
- 12 2. The next \$500,000 of net proceeds shall be
13 distributed to [CK Group] as a minimum rental for
all facilities based on current production. . . .
- 14 3. Unless and until you are otherwise directed in
15 writing signed on behalf of the [CK Group and
16 Debtor], you shall then continue to make payments
17 into the National Bank of Alaska account pursuant
18 to the instructions you previously acknowledged
until such time as an additional \$1.2 million has
been paid into the account or you are advised that
the sale of the properties contemplated by the
transaction among the parties has closed.

19 As instructed, on July 13 and 14, E&E transferred
20 approximately \$377,000 and \$93,120, respectively, to a non-escrow
21 CK Group partnership account. To satisfy the remaining \$29,381,
22 KFF assigned three containers of fish to CK Group worth about
23 \$122,500.

24 On July 18, KFF filed for chapter 11² protection.
25 Thereafter, between July 20 and July 25, E&E transferred an
26 additional \$29,380 to CK Group.

27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 Debtor's liabilities exceed \$3.4 million and include
2 fishermen's liens of \$1,572,785, packers and processors' liens of
3 \$837,516,³ priority wage claims in the amount of \$143,000, and
4 general unsecured claims of \$893,000. Under Alaska law,
5 fisherman have statutory liens in all property of the processor,
6 while packers have statutory liens in the fish product or output
7 of the processing plant for which material or labor was
8 furnished, and the plant itself, for the value of labor and
9 material.

10 On August 25, 2000, the bankruptcy court appointed Larry
11 Compton as the chapter 11 trustee for the estate of KFF. The
12 Trustee filed this adversary proceeding claiming that the two
13 pre-petition transfers and the transfer of the interest in \$1.7
14 million were avoidable as preferences under §§ 547(b) and 550.
15 The Trustee also alleged that CK Group's asserted interest in the
16 net proceeds is avoidable under §§ 544 and 550 because they
17 failed to perfect their interest in the \$1.7 million. Next, the
18 Trustee claimed that the net proceeds are avoidable under §§ 548
19 and 550 as fraudulent conveyances, i.e., transfers made for less
20 than a reasonably equivalent value and without fair
21 consideration. The post-petition transfers, the Trustee argued,
22 are avoidable pursuant to §§ 549 and 550.⁴ CK Group cross-
23 claimed against the Fisher Committee.

24
25 ³ Fishermen, packers and processors are represented by the
Official Fisher Creditors Committee ("the Fisher Committee").

26
27 ⁴ The Trustee also sought declaratory relief that his
rights were superior and paramount to those of the Fisher
28 Committee but that issue has been settled and is not part of this
appeal.

1 549, or 544. Additionally, the argument continues, because the
2 assignment was made irrevocable on June 13, a full eight days
3 before operations began, it preceded any statutory lien rights
4 claimed by the fishermen. We disagree with Appellant's analysis.

5 Generally speaking, a security interest is implicated where
6 the assignee retains the right to a deficiency claim if the
7 assignment does not provide sufficient funds to satisfy the
8 debt. See Dewhirst v. Citibank (Arizona) (In re Contractors
9 Equip. Supply Co.), 861 F.2d 241 (9th Cir. 1988) citing In re
10 Evergreen Valley Resort, Inc. 23 B.R. 659, 661-62 (D. Maine
11 1982) (identifying factors relevant to determination whether
12 security interest or absolute assignment is involved). A
13 security interest is also indicated when the assignee
14 acknowledges that his rights in the assigned property would be
15 extinguished if the debt owed were to be paid from some other
16 source. 23 B.R. at 659, 661-62. By contrast, assignments have
17 been found to be absolute transfers where the assignment operates
18 to discharge the underlying debt. Id.

19 By its very terms, the Third Addendum can only be
20 characterized as a security assignment.⁵ As stated in the body

21 ⁵ The Third Addendum provides, in relevant part:

22 Because Buyer needs immediate possession, and
23 cannot wait until additional documentation is available
24 to verify the financing commitments he has submitted,
25 Buyer has proposed providing **additional security** for
26 the sale in the event the closing does not occur on or
27 before June 13, as required under the existing
28 documents. The **additional security** for closing of the
purchase will be a deposit in escrow of the first \$1.7
million in proceeds payable to [Debtor] from its
seafood sales, which are anticipated to be received not

(continued...)

1 of the agreement, "[Debtor] has proposed providing additional
2 security for the sale . . ." and "The additional security for
3 closing of the purchase will be . . .". (emphasis added).
4 Appellant's attempt to minimize the significance of this language
5 by arguing that these references appear *only* in the "preamble" to
6 the agreement is unavailing. Nothing in the agreement suggests
7 that the assignment was intended to discharge the underlying

8 _____
9 ⁵(...continued)

10 later than the last week of June and first week of
11 July. Those proceeds, less a payment in lieu of
12 interest, will be applied to a closing of the sale of
13 the properties on or before July 18, 2000. If closing
14 does not occur on or before July 18, the deposit shall
15 be paid to Sellers as compensation, and all property
16 shall be returned to Sellers.

17 * * *

- 18 1. Assignment and Escrow of the Sale Proceeds: If
19 closing of the purchase of the properties pursuant
20 to the underlying agreements does not occur on or
21 before June 13, [Debtor] hereby irrevocably
22 assigns to [CK Group] the first \$1.7 million in
23 net proceeds from seafood sales. E&E . . . which
24 will be the sole Sale Agent for sales of processed
25 seafood by Fischer and/or Triton Fisheries, shall
26 deposit the first \$1.7 million in net proceeds
27 payable to Fischer and/or Triton in an interest
28 bearing escrow that [CK Group] will establish with
Pacific Northwest Title of Alaska, or such other
escrow holder as may be designated unanimously by
[CK Group]. Only E&E sales commissions and any
reimbursements that may be due to E&E for
marketing or shipping costs may be deducted from
sale proceeds prior to making the Escrow deposit.
2. Ownership of Escrow Account: All funds deposited in the
Escrow account shall, upon receipt, become the sole
property of the [CK Group] free and clear of any claim,
lien or right of the [Debtor] or [Debtor's] creditors .
. . .

Emphasis added.

1 debt, which would have been an indication that it was "absolute"
2 under the Evergreen analysis. Further, as the Trustee correctly
3 points out, Fischer conditionally, not absolutely, agreed that
4 funds would be deposited into escrow if the sale did not close on
5 or before June 13. Had Fischer obtained financing and closed the
6 sale, Appellant would no longer have an interest in Debtor's fish
7 sale proceeds, indicating that the assignment was for security.

8 As the court noted, CK Group's own characterization of its
9 interest - "the right to receive payment from E&E," "E&E's
10 independent contractual obligation to make payment to CK," an
11 "assignment of revenue," and "a property right, the contractual
12 right to receive payment from E&E," - is more consistent with a
13 security interest in accounts than an absolute present interest.
14 Therefore, we agree with the court's analysis and conclude that
15 Appellant held a security interest in accounts which is governed
16 by Article 9.⁶

17
18
19 ⁶ Former Article 9 applies with respect to CK Group's
20 interest because the relative priorities of the parties were
21 established when Debtor filed bankruptcy in July 2000, before
22 Revised Article 9 became effective (July 2001). Under § 544, the
23 Trustee's rights as a judicial lien creditor and the relative
24 rights and priorities of the parties become fixed as of the
25 commencement of the case, even though they had not been finally
26 determined by the court. See e.g., In re Chorney, 277 B.R. 477,
27 486 (Bankr. W.D.N.Y. 2002); In re Wiersma, 283 B.R. 294, 299
28 (Bankr. D. Ida. 2002) (interpreting Idaho's savings clause, which
is similar to Alaska's (codified at AS § 45.29.702 (2004)), and
noting that courts consistently apply former Article 9 when a
debtor files for bankruptcy before the effective date of Revised
Article 9); see also, AS § 45.29.709(a) (2004) which provides that
Revised Article 9 determines the priority of conflicting claims
to collateral unless the relative priorities of the claims were
established before July 1, 2001, in which case Former Article 9
determines priority.

1 B. Even if the Third Addendum is Characterized as an "Absolute
2 Assignment," it is Still Subject to the Provisions of
3 Article 9.

4 The Third Addendum purported to assign to CK Group "the
5 first \$1.7 million in net proceeds from seafood sales." The
6 Alaska Uniform Commercial Code - Secured Transactions, defines
7 "goods" to include "all things that are movable at the time the
8 security interest attaches." AS § 45.09.105(a)(8) (repealed
9 2001).⁷ Seafood is a good, the sale of seafood creates a right
10 to payment, and the net proceeds from seafood sales constitute
11 "accounts" under the UCC. See e.g., Bank of Stockton v. Diamond
12 Walnut Growers, Inc., 244 Cal.Rptr. 744, 747-48 (Cal. Court. App.
13 1988) (farmer's walnuts were "goods" and right to receive proceeds
14 from their sale was an "account" under California UCC); Matter of
15 Bindl, 13 B.R. 148, 149 (Bankr. D. Wis. 1981) (milk is a "good"
16 and farmer's right to payment for proceeds from milk sales is an
17 "account" under Wisconsin UCC). An "account" is a "right to
18 payment for goods sold or leased or for services rendered that is
19 not evidenced by an instrument or chattel paper, whether or not
20 it has been earned by performance." AS § 45.09.106 (repealed
21 2001).

22 The assignment of accounts, whether absolute or for
23 security, is governed by Article 9, which requires that such

24 ⁷ AS 45.09.105(a)(8) defines "goods" as including all
25 things that are movable at the time the security interest
26 attaches or that are fixtures but does not include money,
27 documents, instruments, investment property, accounts, chattel
28 paper, general intangibles, or minerals or the like (including
oil and gas) before extraction; "goods" also includes the unborn
young of animals, growing crops, and standing timber that is to
be cut and removed under conveyance or contract for sale; . . .

1 assignments be perfected by filing a UCC-1 statement.⁸ In re
2 Contractors Equip. Supply Co. Inc., 861 F.2d at 245. Failure to
3 perfect as required by Article 9 may leave the transferee's
4 ownership of the receivables subject to the claims of third
5 parties, such as the seller's lien creditors or a trustee in
6 bankruptcy. PEB Commentary No. 14 to UCC 9-102, as printed in 8A
7 *Anderson on the Uniform Commercial Code* (3d ed. Cum. Supp. June
8 2003) § 9-102:1.5.

9 CK Group does not dispute that its interest was never
10 perfected, but insists that because the assignment was absolute,
11 and not one for security, the filing requirements of Article 9
12 are not implicated. As the bankruptcy court correctly
13 determined, however, whether the fish proceeds were assigned for
14 security purposes or were assigned as an absolute present
15 transfer, the assignment is governed by Article 9 and had to be
16 perfected by filing to be effective against statutory and
17 judgment lien creditors. See Octagon Gas Systems, Inc. v. Rimmer
18 (In re Meridian Reserve, Inc.), 995 F.2d 948, 955 (10th Cir.
19 1993).

20 None of Appellants' remaining arguments lead us to a
21 different result.

22 C. E&E was Acting as Debtor's Agent and Did Not Have an
23 Independent Obligation to Pay CK Group.

24 CK Group also claims that its assignment was absolute

25 ⁸ See AS § 45.09.102(a), in effect at the relevant time,
26 which provides that the perfection rules of Article 9 apply to
27 transactions intended to create a security interest in personal
28 property or fixtures, including goods, documents, instruments,
general intangibles, chattel paper, or accounts; as well as the
sale of accounts or chattel paper.

1 because under the May 22 letter agreement from E&E, Debtor had no
2 right to receive payment from E&E, while E&E had an absolute,
3 independent contractual duty to pay CK Group. The letter states,
4 in relevant part:

5 Please find enclosed and attached hereto a copy of the
6 THIRD ADDENDUM TO EARNEST MONEY RECEIPTS AND AGREEMENTS
7 TO PURCHASE AND AGREEMENTS TO SELL. Please note my
8 signature on said document in acknowledgment of the
9 provisions for E&E's obligation to remit 100 percent of net
proceeds . . . directly into escrow for the benefit of
sellers at Pacific Northwest Title of Alaska, Anchorage
pursuant to the provisions of the agreement.

10 In reading the agreement, I do not find any provision
11 for notice to E&E as to the status of our role on June
12 14. In simple language, we will be looking for Mr.
13 Mahoney, together with Mr. Davis [counsel for CK Group
14 and Fischer/KFF], to provide nonconflicting
instructions as to the disposition of sales funds post
June 13, as well as notice of satisfaction, in the
event of escrow.

15 Because E&E had a duty to pay CK Group rather than Debtor,
16 Appellant argues, CK Group is entitled to retain the payment
17 without the need for a UCC filing or other perfection of its
18 interest because the property did not belong to Debtor at the
19 time of its transfer. This argument is difficult to follow
20 because it requires transformation of the relationship between
21 Debtor and E&E from one of principal-agent to one of debtor-
22 creditor. That did not occur. Debtor's contract with E&E is an
23 unambiguous agency agreement that does not create a debtor-
24 creditor relationship. Under the contract, E&E held any fish
25 proceeds it received from the sale of Debtor's fish for the
26 benefit of Debtor. E&E did not purchase fish from Debtor with a
27 resulting E&E account debt that was assigned to CK Group and paid
28 from E&E's own funds. Indeed, E&E never held an ownership

1 interest in the funds. E&E was simply Debtor's agent, not an
2 account debtor.

3 Most of Appellant's argument is focused on the applicability
4 of UCC § 9-318(a)(1) (codified as AS § 45.09.318(a)) which governs
5 rights between an account debtor and an assignee. We conclude,
6 however, that § 9-318(a)(1) is inapplicable here. It provides

7 Unless an account debtor has made an enforceable
8 agreement not to assert defenses or claims arising out
9 of a sale as provided in AS § 45.09.206, the rights of
10 an assignee as subject to (1) all the terms of the
11 contract between the account debtor and assignor and
any defense or claim arising therefrom; and (2) any
other defense or claim of the account debtor against
the assignor which accrues before the account debtor
received notification of the assignment.

12 AS § 45.09.318(a).

13 The section does not address competing claims to the right
14 of payment from the account debtor asserted by competing
15 assignees and lien creditors. Those rights are determined by the
16 priority rule of Article 9 which are a function of the perfection
17 provisions.

18 Appellant's earmarking doctrine argument is also unavailing.
19 That doctrine applies when a third party lends money to a debtor
20 for the specific purpose of paying a selected creditor. E&E was
21 not a co-debtor or guarantor of the obligation to Debtor's
22 obligation to Appellant; it simply disbursed Debtor's fish
23 proceeds to one of Debtor's creditors in accordance with
24 instructions from its principal, the Debtor. Further, E&E was
25 not independently obligated to pay CK Group from any source of
26 revenue other than that belonging to Debtor.

27 We agree with the bankruptcy court and the Trustee that the
28 two cases on which Appellant primarily relies, Broadcast Music,

1 Inc. v. Hirsch, 104 F.3d 1163 (9th Cir. 1997) and Commerce Bank
2 v. Chrysler Realty, 244 F.3d 777 (10th Cir. 2001), are not
3 relevant. Broadcast Music is distinguishable because it
4 involves an assignment of royalties that are governed by
5 recording rules established under the Copyright Act, which is
6 clearly not applicable here. In Commerce Bank, the Tenth Circuit
7 held that an account debtor's contractual right to offset amounts
8 due under a contract is a valid defense that, by statute, is
9 enforceable against the assignee who held a perfected security
10 interest in the accounts receivable, because the contractual
11 right to offset was in the original account debtor's agreement.
12 Id. at 781. The case before us does not involve an assignment to
13 a third party, nor is the discussion of the offset instructive as
14 there is no offset issue here.

15 D. Preferential Transfers

16 Consistent with its earmarking argument, CK Group maintains
17 that because the transfer of the fish proceeds was "controlled"
18 by E&E, and because E&E contractually agreed to remit the funds
19 directly to CK Group, the proceeds never became property of the
20 estate and, therefore, no interest in property of Debtor was
21 transferred within the meaning of § 547(b). This argument fails,
22 however, because E&E, as Debtor's agent, did not hold an
23 ownership interest in the funds. Notwithstanding the agreement
24 regarding their disbursement, title to the funds were, at all
25 relevant times, held by Debtor.

26 In addition, both the \$1.7 million in fish sale proceeds
27 assigned to Appellant under the Third Addendum, and the \$500,000
28 in transfers paid as minimum rental under the July 10 letter

1 agreement, were ultimately to be applied against the purchase
2 price for the assets, an obligation which was an antecedent debt.
3 Finally, the \$29,380 post-petition payment to CK Group was made
4 from funds belonging to the bankruptcy estate and was made
5 without authority of the court. Accordingly, we agree with the
6 Trustee and the court, that the transfers are recoverable under
7 §§ 547 and 549.⁹

8 E. Attorney Fees

9 CK Group appeals the court's order awarding the fishermen
10 \$54,611 in attorney fees, arguing that because there is not

- 11 ⁹ Section 547 (b) provides
- 12 (b) Except as provided in subsection (c) of this section, the
13 trustee may avoid any transfer of an interest of the debtor
14 in property--
15 (1) to or for the benefit of a creditor;
16 (2) for or on account of an antecedent debt owed by the
17 debtor before such transfer was made;
18 (3) made while the debtor was insolvent;
19 (4) made--
20 (A) on or within 90 days before the date of the filing
21 of the petition; or
22 (B) between ninety days and one year before the date of
23 the filing of the petition, if such creditor at the
24 time of such transfer was an insider; and
25 (5) that enables such creditor to receive more than such
26 creditor would receive if--
27 (A) the case were a case under chapter 7 of this title;
28 (B) the transfer had not been made; and
29 (C) such creditor received payment of such debt to the
30 extent provided by the provisions of this title.

31 And Section 549 provides, in relevant part

32 § 549. Postpetition transaction.

- 33 (a) Except as provided in subsection (b) or (c) of this
34 section, the trustee may avoid a transfer of property of the
35 estate--
36 (1) that occurs after the commencement of the case; and
37 (2) (A) that is authorized only under section 303(f) or
38 542(c) of this title [11 USCS § 303(f) or 542(c)]; or
39 (B) that is not authorized under this title [11 USCS
40 §§ 101 et seq] or by the court.

1 enough money to pay the principal amount of the lien, such an
2 award acts as a deficiency judgment for personal liability.
3 Because CK Group had no contractual relationship with any of the
4 lien claimants, Appellant argues, there is nothing to support an
5 *in personam* judgment against it because this is an *in rem*
6 priority dispute over fish proceeds.

7 In certain cases, an award of attorney's fees is authorized
8 under AS § 34.34.005(b) which provides

9 In an action to enforce a lien, the court shall allow
10 as part of the costs all money paid for drawing the
11 lien and for filing and recording the lien claim, and a
reasonable attorney fee for the foreclosure of the
lien.

12 Alaska courts interpret AS § 34.35.005(b) as providing for a
13 mandatory award of attorney's fees whenever a party is successful
14 in enforcing a lien created by AS § 34.35.005 to AS 34.35.425.
15 D.H. Blattner & Sons, Inc. v. Rothschild & Sons, Ltd., 55 P.3d
16 37, 56 (Alaska 2002).

17 The judgment here was decided in favor of the Fisher
18 Committee as an entity enforcing its lien rights under AS
19 §§ 34.35.320 and 34.35.391, part of the statutory scheme designed
20 to protect the interests of those who contribute labor or
21 materials to the value of the processed fish products.

22 Appellant does not dispute that the Fisher Committee was
23 enforcing the fishermen's statutory lien rights under Title 34,
24 or that AS § 34.34.005(b) mandates a full fee award, but claims
25 that while the "foreclosure of the lien" is an *in rem* proceeding,
26 the award here is an *in personam* award not within the scope of
27 AS § 34.34.005(b). There is no legal basis for CK Group's
28 argument. As acknowledged in Alaska Civil Rule 82, Alaska

1 follows the English rule of awarding Attorneys' Fees to the
2 prevailing party in litigation, whether the matter is one *in rem*
3 or *in personam*. Moody-Herrera v. State Dep't of Nat. Res., 967
4 P.2d 79, 89 (Alaska 1998); State v. Johnson, 958 P.2d 440, 443
5 (Alaska 1998). Further, the party against whom Attorney Fees are
6 awarded does not have to be in contractual privity with the lien
7 claimant. All that is required under AS § 34.34.005(b) is that
8 the party against whom fees are awarded must simply have lost a
9 lien priority dispute to a party enforcing statutory lien rights.
10 55 P.3d at 56.

11 Appellant's argument that the statute is unconstitutional is
12 equally without merit. Appellant cites no authority supporting
13 its position that the Alaska legislature is constitutionally
14 prohibited from enacting fee-shifting statutes to provide
15 remedial protections for a protected class of people. As the
16 Trustee properly asserts, the remedial purpose behind the
17 statutory lien statutes alone is sufficient to find a rational or
18 compelling basis for AS § 34.34.005.

19 **CONCLUSION**

20 Based on the foregoing, we AFFIRM.
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