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PRESERVING REAL ESTATE CONTRACT FINANCING IN WASHINGTON: RESISTING THE PRESSURE TO ELIMINATE FORFEITURE

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Abstract: There is pressure in Washington to abolish the forfeiture remedy from real estate contracts. Eliminating forfeiture would cripple the real estate contract and thus provide a disincentive for sellers to finance sales of their property. This result would be economically unsound and in conflict with the public policy in favor of promoting home ownership. Instead of abolishing forfeiture, the Washington State Legislature should amend current legislation to provide a more sensible and certain forfeiture remedy.

A *owns property that* B *is eager to purchase.* A *would prefer to receive full payment for the property on the closing date of the sale.* B *is unable to obtain bank financing for one or more of several possible reasons: he is a poor credit risk; he has insufficient funds for a down payment; he is unwilling to make the required down payment; or the bank is unwilling to take the proposed property as security. In the absence of other buyers who can pay cash for the property or obtain third-party financing,* A *must choose to finance the transaction with* B *or take the property off the market.* A *is unwilling to finance* B*'s purchase of the property unless* B *agrees to conditions that will substantially lower* A*'s financial risk. To avoid the financial burdens associated with exercising a remedy under mortgage or deed of trust law,* A *determines that the only way to reduce the risk is to require* B *to forfeit all rights and claims to the property if* B *defaults on the loan. If* B *will agree to a forfeiture remedy,* A *will accept installment payments with interest in lieu of cash.* B *agrees to the forfeiture provision and the sale is completed.*

The common forfeiture provision is contained in a real property security device known in Washington as a real estate contract.[1] This Comment suggests an approach that would bolster the forfeiture remedy and thus preserve real estate contract financing in Washington. First, the Comment distinguishes real estate contracts from other real property security devices and discusses limitations that have been placed on real estate contract forfeiture in Washington and elsewhere. It then reveals

1. This security device is also known as an "installment land contract," "contract for deed," or "long-term land contract." Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 3.26, at 68 (3d ed. 1993).

indications that the forfeiture remedy may be eliminated in Washington. Finally, it examines the legal, economic, and policy reasons for encouraging the enforcement of real estate contract forfeitures and proposes specific amendments to strengthen the Real Estate Contract Forfeiture Act.

I. REAL ESTATE CONTRACTS AS ALTERNATIVES TO TRADITIONAL FINANCING DEVICES

The predominant device used to secure a real property loan in the United States is the mortgage. Generally, a lender can realize on mortgage-secured property in the event of a default only through judicial foreclosure, a long, burdensome, and costly transaction.[2] In Washington today, land is more commonly mortgaged by the statutory deed of trust,[3] a less costly and burdensome device than the straight mortgage. The deed of trust is ordinarily more attractive to the lender because its foreclosure requires no judicial intervention.[4]

The real estate contract is the most widely used alternative to the mortgage and deed of trust.[5] In the real estate contract's most basic

2. Nelson & Whitman describe mortgage foreclosure as follows:

> A typical action in equity to foreclose and sell involves a long series of steps: a preliminary title search to determine all parties in interest; filing of the foreclosure bill of complaint and lis pendens notice; service of process; a hearing, usually by a master in chancery who then reports to the court; the decree or judgment; notice of sale; actual sale and issuance of certificate of sale; report of the sale; proceedings for determination of the right to any surplus; possible redemptions from foreclosure sale; and the entry of a decree for a deficiency.

Id. § 7.11, at 491–92. Obviously, the costs of these steps can be prohibitive. Moreover, the various parties' rights to re-acquire the property through redemption create so much uncertainty that there is little incentive for potential bidders to even attend the sale. For example, the right to redemption in Washington generally lasts eight months but can extend as long as a year. Wash. Rev. Code § 6.23.020(1) (1994).

3. The deed of trust is a form of mortgage with a "power of sale" in a third-party trustee. Nelson & Whitman, *supra* note 1, § 1.6, at 11. On default, the third-party trustee sells the property in a public sale. *Id.* § 7.19, at 513. The third-party trustee then distributes the proceeds to the various parties in order of priority.

4. The purpose of a deed of trust statute is to "avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender." Peoples Nat'l Bank of Washington v. Ostrander, 6 Wash. App. 28, 31, 491 P.2d 1058, 1060 (1971). In addition to eliminating burdensome procedures, the Washington deed of trust statute gives sellers the added advantage of no redemption after a valid sale. Wash. Rev. Code § 61.24.050 (1994). An actual deed of trust foreclosure can take as little as 190 days. *See* timeline in Wash. State Bar Ass'n, *Washington Real Property Deskbook* § 49.21 (2d ed. 1986). However, the lender's procedural advantages are offset by the fact that he usually cannot proceed against the mortgagor individually for a deficiency. Wash. Rev. Code § 61.24.100 (1994).

5. Nelson & Whitman, *supra* note 1, § 3.26, at 68.

form, the seller and purchaser sign a contract in which the seller, like a purchase-money mortgagee, agrees to accept installment payments of principal and interest for part of the purchase price. Unlike a mortgagee, however, the seller retains legal title to the property until all the contractual obligations are fulfilled. These obligations are similar to those found in mortgage and deed of trust financing and, at minimum, normally include timely payments of all principal and interest, payment of insurance and taxes, upkeep and repair of the property, and a duty not to commit waste.

The distinguishing feature of the real estate contract is the standard provision allowing a forfeiture remedy in case of default. Upon default, this provision gives the seller the right to reclaim all rights to the property in question and retain all amounts paid on the contract and any improvements made to the property by the buyer up to the point of the forfeiture.[6]

The sweeping consequences of this remedy to the purchaser can create the perception in an extreme case that forfeiture is unfairly harsh. Some Washington courts have taken this position by citing the maxim "equity abhors a forfeiture,"[7] and denying forfeiture. Indeed, it is not impossible to imagine a case in which forfeiture might be harsh. Theoretically, a purchaser who buys a home on a twenty-year real estate contract, substantially complies with all the obligations of the contract for nineteen years, and then misses one or two payments can be forced to forfeit the contract and surrender all claims and rights to the property. In this situation, the purchaser would have paid off almost all of the debt, may have spent considerable amounts of money improving the home, and probably would have gained a substantial increase in the market value of the property.

It is true that a standard real estate contract provides no possibility of compensation for the value of the buyer's accrued equity.[8] The seller retains the amounts paid on the contract, the improvements, and the

6. *See, e.g., Form Real Estate Contract* in *Washington Real Property Deskbook, supra* note 4, § 47.37, at 47–56.

7. *See, e.g.*, Dill v. Zielke, 26 Wash. 2d 246, 252, 173 P.2d 977, 979 (1946); *cf.* Sleeper v. Bragdon, 45 Wash. 562, 567–68, 88 P. 1036, 1038 (1907) (stating the maxim, but enforcing forfeiture under the equitable rule that contracts will be enforced as made and in accordance with the acts of the parties thereunder).

8. Equity is defined as the remaining interest belonging to one who has pledged or mortgaged his property, the surplus of value which may remain after the property has been disposed of for the satisfaction of liens, or the amount or value of a property above the total liens or charges. *Black's Law Dictionary* 374 (Abr. 6th ed. 1991).

increased value of the property. Mortgagors in the position of the hypothetical defaulting real estate contract buyer discussed above would likely have been compensated for the value of their equity through the judicial foreclosure process. Many mortgagors in default, however, are in no better position than a real estate contract purchaser. In a mortgage or deed of trust default, there is a public sale from which the mortgagor is entitled to the amount in excess of the funds required to meet the remaining obligations on the loan plus the mortgagee's costs. Mortgagees will commonly bid only this amount at a public sale. Third-party buyers, on the other hand, will enter bids only if there is enough equity in the property to yield a profitable return. Hence, only defaulting mortgagors with substantial equity will ever receive any compensation upon default.

Because of perceived harsh results, courts and legislatures throughout the country have limited the right to forfeiture,[9] either through common law or by statute. These limitations are often closely analogous to mortgage and deed of trust debtor protections and range from the complete disallowance of forfeitures to the requirement that sellers comply with minimal procedural requirements before forfeitures become final.

II. LIMITATIONS ON REAL ESTATE CONTRACT FORFEITURE

Traditionally, the common law governed the enforcement of standard forfeiture clauses. Since earlier jurists emphasized the contractual nature of the real estate contract, forfeiture clauses were customarily enforced to carry out the intent of the parties,[10] even when buyers stood to lose substantial amounts.[11] But as time passed, more judges became concerned with inequity in the enforcement of forfeiture clauses and placed increased limitations on their use. Some state legislatures also supported this trend and adopted statutes that govern the use of forfeiture. As one might expect, these efforts have not been implemented in a uniform manner. As a result, the law in this field is not subject to orderly description.[12]

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9. *See infra* part II.A–B.

10. *See infra* note 91 and accompanying text.

11. Nelson & Whitman, *supra* note 1, § 3.27, at 69.

12. *Id.* at 70.

A. *Judicial Limitations on Forfeiture*

Judges control the enforcement of forfeiture clauses through equitable power, relieving buyers from forfeiture to prevent any result that would be inequitable, unjust, or shocking to the court's conscience.[13] Upon determining that enforcing a forfeiture would be inequitable, a court employs various remedial techniques. Many courts set a date by which a defaulting buyer may pay the amount remaining on a contract and redeem the land from forfeiture.[14] While some courts view this right as unconditional, other courts allow it only when the buyer has a substantial amount of equity in the property or when there has been no bad faith on the buyer's part.[15] Common law courts in Washington often allowed this "grace period" in which the buyer could pay the remaining balance of the contract.[16]

In addition to a grace period, most states require the seller to give the buyer advance notice of an intent to declare a forfeiture.[17] California and a few other states allow forfeiture, but condition it upon the seller's restitution to the buyer of any amount that exceeds the actual damages.[18] In such a state, the court must determine the value of the buyer's equity and the actual damages to the seller—a process which can require expensive litigation.

One state supreme court has employed a "convertibility" approach to forfeiture clauses. In *Skendzel v. Marshall*, the Indiana Supreme Court held that a forfeiture clause was "clearly excessive" and "unreasonable," as the vendee had already paid $21,000 of a $36,000 contract price.[19] Although the *Skendzel* court forced the seller to judicially foreclose the contract, it did not completely eliminate the forfeiture remedy. Rather, the court merely limited forfeiture to situations where the buyer abandons or absconds with the property or has paid only a minimum amount and wants to stay in possession while the seller is paying

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13. 7 Richard R. Powell, *Powell on Real Property* ¶ 938.22[6], at 84D-59 (Patrick J. Rohan ed. 1993).

14. Nelson & Whitman, *supra* note 1, § 3.29, at 77. Some courts will allow the buyer to merely pay the arrearages to reinstate the contract. *Id.*

15. *Id.*

16. *See, e.g.*, Dill v. Zielke, 26 Wash. 2d 246, 252, 173 P.2d 977, 980 (1946); Zane v. Hinds, 136 Wash. 352, 357, 240 P. 6, 8 (1925); Rohlinger v. Coletta Land & Orchard Co., 64 Wash. 348, 353, 116 P. 1095, 1097 (1911).

17. *See* 7 Powell, *supra* note 13, ¶ 938.22[5], at 84D-56–84D-57.

18. *See* Nelson & Whitman, *supra* note 1, § 3.29, at 84–85 & n.32, at 82.

19. 301 N.E.2d 641, 645 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974).

property maintenance costs.[20] This is considered a "convertible" approach because the *Skendzel* court determined that at a certain point the equities were such that the only fair remedy was to require judicial foreclosure.[21] The point of conversion is not clearly defined in the decision. Indiana courts have subsequently applied the stated limitations very narrowly, making judicial foreclosure the only alternative in most cases.[22]

The Kentucky Supreme Court is the only state supreme court that has unequivocally eliminated the forfeiture remedy from real estate contracts.[23] In the sweeping decision of *Sebastian v. Floyd*,[24] it held that the only remedy available to a seller on default of a real estate contract is judicial foreclosure.[25] Some commentators believe that the Kentucky decision is a natural result of the judicial trend of limiting forfeitures and portends a wave of similar decisions.[26] However, because there have been no similar decisions since the Kentucky Supreme Court's holding in 1979, it is doubtful that forfeiture will be judicially eliminated anytime soon. In most states, the law remains that forfeiture is generally subject only to an equitable grace period in an appropriate case.[27]

B. *Statutory Limitations on Forfeiture*

Several states have dealt with the perceived harshness of real estate contract forfeitures by statute. The most sweeping and decisive statute to date is Oklahoma's, which, like *Sebastian v. Floyd*, eliminates the remedy of forfeiture from real estate contracts by providing that "[real estate contracts] shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."[28]

20. *Id.* at 650.

21. *See* 7 Powell, *supra* note 13, ¶ 938.22[6], at 84D-62.

22. *Id.* ¶ 938.22[6], at 84D-61; Nelson & Whitman, *supra* note 1, § 3.29, at 88.

23. One state appellate court has also clearly eliminated the forfeiture remedy from real estate contracts. *See* White v. Brousseau, 566 So. 2d 832, 835 (Fla. Dist. Ct. App. 1990) (holding that a real estate contract should be foreclosed judicially).

24. 585 S.W.2d 381 (Ky. 1979).

25. *Id.* at 384.

26. *See, e.g.*, Nelson & Whitman, *supra* note 1, § 3.29, at 89–90.

27. *See supra* notes 15–16 and accompanying text.

28. Okla. Stat. Ann. tit. 16, § 11A (West 1986).

Oklahoma's statute is the only legislative resolution to the real estate contract forfeiture problem that totally eliminates forfeiture. Most states have enacted less sweeping statutes that govern forfeitures through procedural requirements. For example, Iowa, North Dakota, Minnesota, and Arizona have statutes that allow forfeiture of a contract if a seller gives written notice to the purchaser and other persons in interest and waits a required grace period in which the purchaser or other person holding an interest in the property may cure the default.[29] In Arizona and Minnesota, the length of the grace period depends on the percentage of the contract price the vendee has paid prior to default.[30]

Some state statutes take a more substantive approach in governing forfeitures. For example, Maryland's statute does not allow forfeitures on residences of non-corporate purchasers.[31] Ohio's statute, on the other hand, looks first to whether the property in question has been improved by a dwelling.[32] If so, the real estate must be judicially foreclosed unless the contract has been in effect less than five years or less than twenty percent of the principal amount of the contract has been paid.[33] This is a statutory version of the judicial "convertibility" approach mentioned above.[34]

C. *The Uniform Land Security Interest Act*

Some commentators conclude that the best way to deal with the differences in real property security realization is to abandon the existing system altogether and replace it with a comprehensive statute covering all devices.[35] In 1985, the National Conference of Commissioners on Uniform State Laws approved the Uniform Land Security Interest Act (ULSIA)[36] with the intention of creating an uncomplicated and unified method of security realization that is certain and inexpensive.[37] The

29. 7 Powell, *supra* note 13, ¶ 938.22[5], at 84D-57 & n.55.

30. Ariz. Rev. Stat. Ann. § 33-742 (West 1990); Minn. Stat. Ann. § 559.21 (West 1988 & Supp. 1994).

31. Md. Real Prop. Code Ann. §§ 10-101–10-108 (1988); Md. Rules W70–W72, W77 & W79 (1994).

32. Ohio Rev. Code Ann. § 5313.01(A)–(B) (Anderson 1989).

33. *Id.* § 5313.07.

34. *See supra* note 21 and accompanying text.

35. *See, e.g.*, Grant S. Nelson & Dale A. Whitman, *Installment Land Contracts—The National Scene Revisited*, 1985 B.Y.U. L. Rev. 1, 30.

36. Unif. Land Security Interest Act, 7A U.L.A. 207 (Supp. 1994).

37. *Id.* at 210.

ULSIA all but eliminates the differences between security devices,[38] allowing realization of a security interest only by judicial or non-judicial foreclosure.[39] Although this statute would eliminate forfeiture, it would provide realization periods for sellers that are as short as five weeks.[40] No state has yet adopted the ULSIA. Several states, however, are either studying the ULSIA as a possible alternative or are considering sections of the ULSIA as part of new legislation.[41]

D. *The Real Estate Contract Forfeiture Act*

Until 1985, when the Washington State Legislature passed the Real Estate Contract Forfeiture Act (RECFA) to comprehensively govern forfeitures, courts in Washington turned to the common law[42] to deal with issues arising in real estate contract litigation. The decision to appoint a committee to draft a statute governing the forfeiture of real estate contracts came after years of controversy. Probably the most important concern raised by critics of real estate contracts in Washington was the potential under the common law for sellers to abuse their forfeiture rights.[43] Two of the main intentions of the RECFA's drafters were to advance the public policy of dependable public records and to define clearly and fairly sellers' and buyers' rights vis-à-vis real estate contracts.[44] While the statute proposed by the committee and adopted by the legislature preserves real estate contract forfeiture in Washington,[45] it still contains strict protective procedures that make the remedy less attractive to sellers.

The RECFA requires that the real estate contract, the notice of intent to forfeit, and the declaration of forfeiture be recorded in every county in which any part of the property is located.[46] These procedural provisions are intended to rectify problems caused by sales to bona fide purchasers

38. *Id.* § 102(b), at 213 & § 111(25), at 218.

39. *Id.* § 507, at 244–46.

40. *Id.* § 507(b), at 244 & § 509(b), at 247.

41. Norman Geis, *The Uniform Land Security Interest Act: Progress and Detours on the Path to Mortgage Law Reform*, Abstracts (Newsl. Am. Real Est. Law., PLACE) Vol. 12 No. 3, Oct. 1994, at 4, 6–7.

42. See *infra* part IV.A for a discussion of the Washington common law prior to the RECFA.

43. Linda S. Hume, *The Washington Real Estate Contract Forfeiture Act*, 61 Wash. L. Rev. 803, 803–04 (1986).

44. *Id.* at 804.

45. Wash. Rev. Code § 61.30.020(1) (1994).

46. *Id.* §§ 61.30.030(1), 61.30.040(5)–(6).

that occur when a party neglects to record a real estate contract or forfeiture. In addition, the RECFA defines sellers' and buyers' rights by codifying several aspects of the common law.[47] Most importantly, it continues to allow forfeiture of a buyer's rights.[48] The RECFA also requires that the right to forfeit must be explicitly included in the contract.[49] Like the Washington deed of trust law,[50] the seller is not entitled to any deficiency judgment against the purchaser if the seller chooses to terminate the contract.[51] However, in lieu of forfeiture, the seller may pursue any other remedies available for default under the common law or under any other statute.[52]

The RECFA combats seller abuse through a combination of procedural and substantive provisions. In addition to very specific notice requirements,[53] it grants the purchaser and persons owning an interest in the property a 90-day statutory grace period from the time of notice, in which they may cure the default and reinstate the contract.[54] The RECFA prevents the acceleration of the contract if the seller wishes to exercise his forfeiture rights, notwithstanding a clause to that effect in the contract.[55] The purchaser or other persons in interest need only pay the amount in default and any costs the seller incurred by reason of the default.[56] In cases of non-monetary default, the purchaser may petition the court to extend the 90-day period for curing default.[57] The purchaser may also petition the court during this period to bar forfeiture on the grounds of prior payment, the existence of an offset, or lack of compliance with the RECFA's provisions.[58]

One of the most important substantive features of the RECFA provides that the purchaser may force a judicial sale if the value of the

47. Hume, *supra* note 43, at 806.

48. Wash. Rev. Code § 61.30.020(1)–(2) (1994).

49. *Id.* § 61.30.030(2).

50. *See supra* note 4.

51. Wash. Rev. Code § 61.30.100(4) (1994).

52. *Id.* § 61.30.020(1).

53. *Id.* §§ 61.30.040–080.

54. *Id.* §§ 61.30.010(10), 61.30.070(1)(e), 61.30.090(2), 61.30.110(3).

55. *Id.* § 61.30.090(1). The seller still retains the option to accelerate and sue for money judgment for the full accelerated balance, provided the contract contains an acceleration clause. *Id.* § 61.30.020(1).

56. Since the amount statutorily required to cure is only the minimum amount necessary to bring the contract up to date, a buyer is more likely to be able to cure a default and retain the property.

57. Wash. Rev. Code § 61.30.110(3) (1994).

58. *Id.*

property is "substantially" more than the debt.[59] The term "substantial" is not defined in the statute and has been only minimally explained by Washington courts.[60] Presumably, this provision is intended to provide protection for buyers who have built substantial equity in the property during the contractual relationship. Still, there is no clear statutory guideline as to how much equity is needed before the buyer can force a judicial sale.[61]

The practical application of the RECFA is quite simple. Once the seller records and delivers notice of intent to forfeit, it is up to the purchaser either to cure the default, state one of the statutory exemptions[62] from forfeiture, or, if entitled, force a judicial sale[63] within the 90-day period. If the buyer fails to take advantage of these statutory opportunities, the real estate contract will be terminated and the purchaser's rights and prior payments and improvements forfeited.[64] Strangely, even after the declaration of forfeiture has been filed and notice of the declaration has been delivered, the purchaser still has 60 days in which to bring an action to set aside the forfeiture.[65]

The RECFA provides abundant protections to buyers whose property is subject to forfeiture, while maintaining the real estate contract as an alternative security device. The RECFA also ensures that the seller's remedy will not be encroached upon, theoretically preserving a seller's incentives to sell to less attractive buyers. Unfortunately, despite the RECFA's benefits, there are indicators that the forfeiture remedy may have a limited future in the state of Washington.

59. *Id.* §§ 61.30.120(1) & 61.30.120(3).

60. *See infra* part VI.B.

61. *See infra* part VI.B.

62. Wash. Rev. Code § 61.30.110 (1994).

63. *Id.* § 61.30.120(3).

64. *Id.* § 61.30.100.

65. *Id.* § 61.30.140. The forfeiture will be set aside if the buyer can establish that the seller was not entitled to forfeit the contract, or that the seller did not materially comply with the requirements of the RECFA and the rights of bona fide purchasers for value and encumbrancers for value are not adversely affected. *Id.* § 61.30.140(4). Note that these elements are very similar to the elements required to enjoin forfeiture during the 90-day grace period under § 61.30.110(3). *See infra* part VI.A.

III. CHALLENGES TO REAL ESTATE CONTRACT FORFEITURE IN WASHINGTON

A. *Judicial Challenge*

The Washington Supreme Court recently handed down an opinion that indicated a disposition to eliminate the forfeiture remedy. In *Tomlinson v. Clarke*,[66] a decision holding that real estate contract buyers can be "purchasers for value" under the recording act, the court cites an Eastern District of Washington Bankruptcy Court decision[67] as support for its determination that Washington law considers the purchaser's interest under a real estate contract a property interest and the seller's interest a lien-type security device.[68] *Tomlinson* states:

> We find no relevance in the historical distinction between real estate contracts and other forms of real property security devices. There is no valid reason to distinguish between those cases in which legal title is conveyed to secure the payment of a debt and those cases in which legal title is retained to secure the payment of a debt.[69]

There is an initial question about the force of such a statement, given the existence of the RECFA, a statute that clearly defines the real estate contract as a separate form of security device and explicitly permits forfeiture. The statement was only dictum, far beyond what was necessary to resolve the questions before the court in *Tomlinson*.

66. 118 Wash. 2d 498, 825 P.2d 706 (1992).

67. *Id.* at 509, 825 P.2d at 712 (citing In re McDaniel, 89 B.R. 861 (Bankr. E.D. Wash. 1988), a bankruptcy case that determined whether a real estate contract is an "executory contract" within the meaning of 11 U.S.C. § 365). In bankruptcy, a debtor generally has to give a secured creditor the full value of the creditor's secured interest. Under 11 U.S.C. 365, however, executory contracts can be assumed or rejected by the bankrupt party. A contract is executory if the obligations of both the bankrupt and the other party to a contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing performance by the other. Depending on the situation, a debtor may argue that a real estate contract is either a security device or an executory contract. As a result, bankruptcy courts have often been in a position to decide whether real estate contracts are security devices. Interestingly, *McDaniel* is against the weight of authority. Wash. State Bar Ass'n, *Washington Real Property Deskbook*, § 47.48A (Supp. 1989). The debtor-vendor's interest is generally treated as an executory contract for purposes of § 365. *Id.*

68. The *Tomlinson* court does not rely exclusively on *McDaniel.* It also cites the Washington Court of Appeals case Terry v. Born, 24 Wash. App. 652, 655, 604 P.2d 504, 506 (1979), for support of its position that Washington law considers the purchaser's interest under a real estate contract a property interest and the seller's interest a lien-type security device. 118 Wash. 2d 498, 509, 825 P.2d 706, 712 (1992).

69. *Id.* at 509–10, 825 P.2d at 712.

Nevertheless, the dictum demonstrates the court's[70] disposition to restrict real estate contracts to the extent it can. The court's language is similar to that in *Sebastian v. Floyd*,[71] suggesting its desire to do away with forfeiture.

B. *Statutory Challenge*

Another indication of pressure in Washington to abolish the forfeiture remedy is the Unified Real Property Security Interest Foreclosure Act (URPSIFA),[72] a statute proposed by a committee of the Washington Law Revision Commission to comprehensively alter realization procedures for all real property security interests. Although the URPSIFA is only in bill form, and may never become law in Washington, its existence as a compilation of work and research by experienced professors, commentators, and attorneys is further evidence of the trend to abolish real estate contract forfeiture in Washington.

The proposed statute would abolish real estate contract forfeitures.[73] Real estate contracts would be governed by the "non-judicial foreclosure" portion of the proposed statute,[74] the provisions of which would be similar to those in the current deed of trust statute. Under this provision, most devices could be foreclosed by non-judicial trustee's sale not less than 190 days after default.[75] Real estate contracts and other purchase money security interests retained by a seller of real property to secure payment of any portion of the purchase price thereof could be non-judicially foreclosed by trustee's sale not less than 120 days after a default.[76]

Except for this difference of 70 days in the realization period, the commission would treat a real estate contract with a forfeiture provision like a deed of trust with a power-of-sale clause.[77] This would work two changes in real estate contract realization procedures. First, forfeiture would be replaced by non-judicial foreclosure. Second, the minimum realization period for non-judicial foreclosure would be 120 days, 30

70. The opinion in *Tomlinson* was unanimous. *Id.* at 512, 825 P.2d at 713.

71. 585 S.W. 2d 381 (Ky. 1979).

72. Code Reviser No. Z-0372.2/95 § 101.

73. *Id.* § 105(1).

74. *Id.* §§ 104(11), 104(13), 104(14), 104(15), 105(1), 301. A seller may also choose to judicially foreclose the real estate contract. *Id.* §§ 105(1), 201.

75. *Id.* § 304(6).

76. *Id.*

77. *Id.* §§ 105(2), 302, 304(2).

days longer than the minimum realization period currently required by the RECFA.

One of the main purposes of the RECFA was to define fairly the rights of sellers and purchasers under real estate contracts.[78] Although the committee seems to recognize the need for different treatment of "seller financed" security interests by imposing a shorter realization period,[79] the URPSIFA would nevertheless eliminate the most important equity balancing factors that are present in the recently-adopted RECFA.

C. *Empirical Data Forebodes the Demise of the Real Estate Contract*

There are a considerable number of real estate contracts recorded every year in Washington.[80] In fact, real estate contracts are so common in Washington that they are bought and sold on an active secondary market.[81] Even though the widespread use of real estate contracts continues, available evidence suggests a decrease in their popularity.[82]

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78. Hume, *supra* note 43, at 804.

79. Code Reviser No. Z-0372.2/95 § 304(6).

80. There were 1187 real estate contracts recorded in 1993 in Spokane County. *See infra* note 82. In addition, there were 411 real estate contracts recorded in 1993 in King County. Data collected by author from King County Records office.

81. Many firms even advertise their willingness to buy real estate contracts in telephone directories. *See, e.g.*, U.S. West Direct, *The Yellow Pages*, Seattle, pp. 1392–1405 (April 1994/1995); Alliance Mortgage Company, *id.* at 1394; Guardian Discount Mortgages Inc., *id.* at 1401; Lakeshore Mortgage Service Inc., *id.*; and Pacific Coast Investment, *id.* at 1403.

82. The following data was collected by the author from the Spokane County Auditor's records. Cited data is in bold-face type.

YEAR	DEEDS OF TRUST	REAL ESTATE CONTRACTS	TOTAL	DEEDS OF TRUST/ TOTAL	REAL ESTATE CONTRACTS/ TOTAL	REAL ESTATE CONTRACTS/ DEEDS OF TRUST
1993	**34,311**	**1,187**	35,498	96.66%	3.34%	3.46%
1992	26,746	1,375	28,121	95.11%	4.89%	5.14%
1991	17,889	1,272	19,161	93.36%	6.64%	7.11%
1990	15,277	1,284	16,561	92.25%	7.75%	8.40%
1989	12,202	933	13,135	92.90%	7.10%	7.65%
1988	11,122	951	12,073	92.12%	7.88%	8.55%
1987	13,985	862	14,847	94.19%	5.81%	**6.16%**

Despite the fact that the RECFA mandates document recordation,[83] the percentage of real estate contract recordings relative to deeds of trusts has dropped markedly since the RECFA was drafted. In Spokane County in 1977, when common law governed real estate contracts in Washington, 2,642 real estate contracts and 12,949 deeds of trust were recorded. In 1993, by contrast, there were 1,187 real estate contracts and 34,311 deeds of trust recorded in Spokane County. Much of this decline in real estate contract usage occurred between 1984 and 1987, when the public became aware of the RECFA. In fact, real estate contracts as a percentage of deeds of trust dropped from 14.28% to 6.16% in that four-year time span.

This drop is not so surprising when one considers the uncertainty that must have resulted from a new law that altered the traditional balance of equities. Surely sellers were less willing than before the adoption of the RECFA to finance a real property sale. The RECFA increased the minimum realization period and entitled the buyers, in some situations, to force a judicial foreclosure in lieu of forfeiture. It is improbable that other variables, particularly the high interest rates of the mid-eighties, account for this sudden and substantial drop in the use of real estate contracts. The continuing lower usage of real estate contracts that has

YEAR	DEEDS OF TRUST	REAL ESTATE CONTRACTS	TOTAL	DEEDS OF TRUST/ TOTAL	REAL ESTATE CONTRACTS/ TOTAL	REAL ESTATE CONTRACTS/ DEEDS OF TRUST
1986	16,025	885	16,910	94.77%	5.23%	5.52%
1985	12,590	1,220	13,810	91.17%	8.83%	9.69%
1984	11,068	1,580	12,648	87.51%	12.49%	**14.28%**
1983	10,784	1,790	12,574	85.76%	14.24%	16.60%
1982	7131	1,705	8836	80.70%	19.30%	23.91%
1981	7389	2,458	9847	75.04%	24.96%	33.27%
1980	7813	2,772	10,585	73.81%	26.19%	35.48%
1979	12,040	2,803	14,843	81.12%	18.88%	23.28%
1978	14,003	2,785	16,788	83.41%	16.59%	19.89%
1977	**12,949**	**2,642**	15,591	83.05%	16.95%	20.40%

83. Wash. Rev. Code § 61.30.030(1) (1994).

occurred since this drop excludes interest rates and other fluctuating variables as causes of the drop in usage.

This section is not intended to challenge the balance of equities achieved by the RECFA for buyers and sellers under real estate contracts. Rather, it is intended to forebode the decrease in real estate contracts that would occur upon eliminating forfeiture entirely. As a result of the RECFA, real estate contracts in Washington are already less attractive to sellers than they were before. Abolishing forfeiture would virtually eliminate their use.

IV. LEGAL, ECONOMIC, AND POLICY REASONS FOR ENFORCING FORFEITURE PROVISIONS

The main argument for abolishing real estate contract forfeitures is that a real estate contract simply serves the same function as a purchase money mortgage; hence, the realization procedures for real estate contracts should be the same as those for mortgages.[84] However, this reasoning is fundamentally flawed in its assumption that foreclosure is *the* proper method of security realization. A similar argument could be made that, since a purchase money mortgage serves the same purpose as a real estate contract, it should be forfeited as a contract.

The Washington Supreme Court in *Tomlinson* seems to agree with this flawed reasoning without directly addressing the question of forfeiture. Its statement that "there is no relevance in the historical distinction between real estate contracts and other forms of real property security devices"[85] evinces its attitude, which suggests little respect for the historical or contemporary value of the real estate contract and its inextricably intertwined forfeiture remedy.

The forfeiture remedy is not a completely separate component of the real estate contract. The historical development of a contractual alternative to mortgage financing produced a quick and efficient forfeiture remedy as an inseparable feature of the real estate contract. Many of the factors that made this distinct remedy historically relevant are still relevant today, bolstered by new social and economic factors that make the continued viability of forfeiture even more important.

84. *See, e.g.*, Nelson & Whitman, *supra* note 1, § 3.29 at 86–87.

85. Tomlinson v. Clarke, 118 Wash. 2d 498, 509, 825 P.2d 706, 712 (1992).

A. *The Legal Basis for Enforcing Real Estate Contract Forfeitures*

Real estate contract forfeiture clauses have been enforced throughout Washington's history. It can be argued that early Washington decisions allowed forfeitures based on the concept that the buyer had no legal or equitable interest in the real property. If a buyer had no real property interest, it logically followed that what was forfeited was only the buyer's contractual rights. Indeed, the question of a buyer's interest under a real estate contract has been a lively topic throughout the twentieth century.[86] The extent of a buyer's interest, however, has not been the focus of courts that have enforced forfeiture provisions.

Courts in Washington have been aware of the similarity of real estate contracts and equitable mortgages since the latter part of the nineteenth century. In *St. Paul & Tacoma Lumber v. Bolton*,[87] a case that involved what the court called a bond for deed, the court stated, "[t]here can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure payment."[88] The parties in *St. Paul*, however, never agreed to a forfeiture remedy in the event of a default. In fact, the same judges who decided *St. Paul* enforced a contractual forfeiture clause less than two years later in *Pease v. Baxter*.[89] In that case, the court grappled strenuously with the property interest question, finally allowing forfeiture by focusing on the fact that the transaction involved the *sale* of real estate and not merely a loan with property taken as security.[90]

Washington courts have also shown a consistent willingness to focus on the validity of the bargaining process rather than on any technical

86. *See, e.g.*, P. John Lichty, *Rights and Estates of Vendor and Vendee Under an Executory Contract for the Sale of Real Property*, 1 Wash. L. Rev. 9 (1925); Alfred J. Schweppe, *Rights of a Vendee Under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on the Washington Law*, 2 Wash. L. Rev. 1 (1926); Stuart G. Oles, Comment. *The Vendor-Purchaser Relationship in Washington*, 22 Wash. L. Rev. 110 (1947); Linda S. Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the* Ashford *Cloud*, 7 U. Puget Sound L. Rev. 233 (1984). Prior to 1977, Washington courts held many times that a buyer under a real estate contract had rights totally inconsistent with the concept that a buyer has no title or interest, legal or equitable, in property subject to a real estate contract. Cascade Security Bank v. Butler, 88 Wash. 2d 777, 782, 567 P.2d 631, 633 (1977). In Cascade Security Bank v. Butler, the Washington State Supreme Court held "specifically" that a real estate contract buyer has a "real estate" interest after analyzing prior Washington case law. *Id.* at 782, 567 P.2d at 634. The *Cascade* court arguably did nothing more than recognize the doctrine as developed in these prior cases.

87. 5 Wash. 763, 32 P. 787 (1893).

88. *Id.* at 766, 32 P. at 788.

89. 12 Wash. 567, 41 P. 899 (1895).

90. *Id.* at 573, 41 P. at 900–01.

distinction involving the parties' real property interests.[91] This willingness shows a judicial attitude that parties can reach an effective and equitable agreement on their own. Under the common law, when the enforcement of a particular forfeiture was directly at issue, the focus was not on whether the contractual forfeiture clause should be declared void but on whether conditions should equitably be imposed before it was enforced. Courts generally dealt with any perceived harshness of the remedy not by disallowing forfeiture, but by allowing an equitable grace period in which the buyer could cure the default.[92] This suggests that courts of common law and equity presupposed the validity and the necessity of forfeiture provisions, regarding forfeiture as not merely a remedy, but as an invaluable and indispensable part of the real estate contract.

B. The Economic Basis for Real Estate Contract Forfeiture

Historically, third-party loans for property purchases were not available in certain markets even to credit-worthy individuals.[93] Many sellers had no alternative to financing transactions with buyers themselves. Since the seller was both conveyor and financier of the property, the contractual agreements regarding conveyance and financing were often contained in a single document: the real estate contract. This arrangement was not only convenient but also crucial to the seller. Because financing was not by mortgage but by contract, the seller was able to avoid the uncertainty and burdens associated with traditional foreclosure. The seller could instead proceed with a simple forfeiture, which at most imposed a short grace period for the buyer to pay the balance of the loan and protect his property from forfeiture.

In the modern economic environment, where a security-backed mortgage or deed of trust is immediately marketable, third-party

91. *See, e.g.*, Dill v. Zielke, 26 Wash. 2d 246, 252, 173 P.2d 977, 979–80 (1946); Sleeper v. Bragdon, 45 Wash. 562, 567–68, 88 P. 1036, 1038 (1907) (stating that legal contracts will be enforced as made and in accordance with the acts of the parties thereunder); Drown v. Ingels, 3 Wash. 424, 428, 28 P. 759, 760 (1892) (recognizing that the hardship of any case will not justify a court in setting aside the solemn agreement of the parties); Chambers v. Cranston, 16 Wash. App. 543, 545, 558 P.2d 271, 273 (1976).

92. *See supra* notes 14–16 and accompanying text.

93. There are many plausible explanations for this situation. For example, there may have been few or no institutional lenders in many rural counties and smaller towns, resulting in a lack of competition and prohibitive rates. In addition, lenders may have been unwilling to lend in many areas due to inadequacy of title information. Lending in remote areas also may have been prohibitive due to high administrative costs.

financing is more readily available. Moreover, parties to a real estate sale and purchase usually prefer to finance with third-party funds because the benefits of such financing are numerous. An explanation of those benefits is pertinent to a discussion about forfeiture because it clarifies the risks of engaging in seller financing.

Third-party financing is important for sellers because individual sellers are generally not in the business of financing real estate transactions. Financing an individual sale of property is a burden to most sellers because, unlike a bank or other lending institution, an individual seller presumably has neither a risk-spreading portfolio of property loans nor the resources to administer a loan efficiently. In addition, since the need for liquidity and investment flexibility is met by cash, sellers who have a choice logically elect to receive cash on the closing of a real estate transaction.

Buyers also benefit greatly from third-party financing. While buyers who qualify for third-party lending will generally have to pay more in transaction costs,[94] the loan terms and interest rate from a third-party lender may be so superior to the terms and rate under a real estate contract that the long-term costs of the debt are substantially lower. Due to the protections built into the loan application process, it is especially beneficial for unsophisticated buyers to utilize third-party financing.[95]

Despite the modern market in mortgage-backed securities, a buyer is not always able to obtain third-party financing for a variety of reasons. First, the buyer may not have the substantial down payment required by a third-party lender.[96] Second, the buyer's income stream may be such that a high risk exists for default on the loan. Third, the property the buyer offers as security may be in a high-risk category, either because of its intended use or because of its physical condition. These risk factors tend

94. For a comparison of transactional costs between deed of trust financing and real estate contract financing, see John Mixon, *Installment Land Contracts: A Study of Low Income Transactions, With Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 Hous. L. Rev. 523, 530–35 (1970).

95. The typical Federal Housing Administration loan requires that the parties to the loan obtain an appraisal of the property, title insurance, recordation of the deed, mortgage insurance, and hazard insurance. *Id.* at 530. These requirements ensure that the property meets minimum construction requirements, that there will be a much lower possibility of title disputes, and that the loan will be paid back in spite of unforeseen problems.

96. *Id.* at 526 (it is the rare low income buyer who can come up with substantial down payments). *See also* 7 Powell, *supra* note 13, ¶ 938.20[2], at 84D-6 (stating that a purchaser benefits from installment land contracts through a low down payment and through the opportunity to buy without satisfying stringent mortgage credit requirements).

to be more significant in times of economic prosperity.[97] Finally, the real estate market may be such that no buyers qualified for third-party financing come forward during the time in which the seller wishes to sell a piece of property. If so, the seller's only alternative is to finance the transaction, leaving neither the seller nor the buyer able to benefit from the normal third-party financing advantages, but leaving both with distinct needs.

Sellers financing sales to under-qualified buyers need to cover the cost of the incurred risks. They may do this by requiring a higher down payment, a higher interest rate, a higher purchase price, a quick and efficient remedy in case of default, or a combination of these features. The most important needs of the typical buyer, on the other hand, are for a low down payment, minimal transaction costs, clear property title, and a fair method for realizing any substantial equity in the property in case of default.

When the buyer does not qualify for third-party financing, a seller can finance the sale either through a mortgage, a deed of trust, or a real estate contract. In most cases, the only two techniques that help the seller prevent loss, as distinct from compensating for risk, are a high down payment and a right to realize the security upon default quickly and efficiently. Because a high down payment is one of the main barriers that keeps a buyer from obtaining third-party financing in the first place,[98] a seller who requires a high down payment reduces the market. Moreover, since risk of default is high and the seller wishes to avoid a costly and time-consuming realization process upon default, a mortgage or deed of trust is not attractive. The quick and efficient forfeiture remedy of real estate contracts is the only adequate risk-lowering alternative in most seller financing situations.

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97. "In prosperous times when the economy is growing and there are numerous competitive sources seeking the available capital, the money market becomes restrictive and permits commercial lenders to become more selective in the terms on which they are willing to invest their funds." Garrett Power, *Land Contracts as Security Devices*, 12 Wayne L. Rev. 391, 395 (1966).

98. When the initial loan-to-value ratio is high, it is more likely that the value of the property may be less than the value of the loan at a subsequent date. Robert J. Aalberts & Terrence M. Clauretie, *The Impact of Legal Costs in the Default-Foreclosure Process of Residential Mortgages*, 25 Am. Bus. L.J. 571, 576 (1988). Mortgagors are more likely to default when the value of the property falls below the loan balance. *Id.* Thus, banks generally prefer to require down payments high enough to substantially decrease the initial loan-to-value ratio.

C. *The Policy Basis for Enforcing Forfeitures: The Goal of Home Ownership*

The diminishing use of real estate contracts is not consistent with the public policy to encourage home ownership.[99] By its nature, the real estate contract is used in that part of the real estate sales market that is unattractive to third-party lenders because of high loan risks. The inability of a person in that market segment to make a substantial down payment is a risk factor that has become increasingly commonplace as real estate prices have risen faster than salaries. Since seller financing is such an individualized type of lending, a seller is able to assess the required down payment on a personal level. The seller can usually make a personal determination of the character of the buyer and may sense a special level of "owner psychology"[100] that decreases the need for a substantial down payment. At any rate, sellers need not demand the higher down payments required by third-party lenders because, unlike third-party lenders, they do not have to sell the property to realize their security.[101]

Some commentators argue that real estate contracts can facilitate housing transactions for low-income buyers.[102] In fact, in Washington, real estate contracts are often used for financing residential property sales. Since real estate contracts in Washington finance the sale of residential property to parties who cannot obtain third-party lending, the real estate contract promotes the public policy in favor of home ownership. Abolishing the forfeiture remedy would virtually end the use of real estate contracts, thus denying home ownership to some low-income persons who now enjoy ownership and tending to defeat the public policy in favor of home ownership.

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99. *See, e.g.*, Clark v. Davis, 37 Wash. 2d 850, 852, 226 P.2d 904, 905 (1951) (recognizing that home ownership inculcates independence, protects society from its citizens becoming paupers, and promotes the stability and welfare of the state).

100. *See* Mixon, *supra* note 94, at 553 (arguing that a person who buys a house will tend to take care of it, repair it, and spend considerable sums improving it).

101. Third-party lenders in Washington generally use deeds of trust which require a public sale of the property by a trustee to realize the security upon default. *See supra* note 3.

102. *See, e.g.*, Mixon, *supra* note 94, at 555 (arguing that the real estate contract has great potential to streamline housing transactions, as long as it insures protection for buyers); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low Income Purchaser*, 62 N.Y.U. L. Rev. 293, 304–05 (1987) (stating that real estate contracts are appealing to purchasers with little equity to invest in a home).

VI. AMENDING THE RECFA

There are several reasons for the wide use of real estate contracts despite the protections the RECFA provides buyers. First, the statute balances and protects the basic interests of both buyers and sellers. Second, the seller's remedies in the RECFA have short enough realization periods[103] to induce sellers to use real estate contracts.[104] Finally, the recording requirements of the RECFA yield more stable titles than under the common law, making real estate contracts more likely to be covered by title insurance policies. The certainty of an insurable title after forfeiture increases the attractiveness of the forfeiture remedy.

The legislature can achieve more certainty in the forfeiture process without tilting the balance of RECFA in favor of either buyers or sellers. Increasing certainty would cause growth in the usage rate of real estate contracts, thus expanding the availability of credit for lower income buyers. Two specific and simple changes in the RECFA would preserve the equities between buyers and sellers, while at the same time increasing the certainty of the realization process.

A. Eliminating Procedural Redundancy

The legislature should eliminate the 60-day period to bring an action to set aside forfeiture under the Revised Code of Washington section 61.30.140. The only statutory bases for bringing such an action are that the seller either did not comply with the provisions of the RECFA or was not entitled to forfeit the contract.[105] Both of these factors are bases for a claim in the original 90-day notice period.[106] This redundancy is unnecessary and augments the inefficiency of the realization process.

The 90-day notice period is more than adequate to allow the buyer to protect his interest. Allowing a buyer to bring an action for claims he neglected to bring in the 90-day notice period for 60 days *after forfeiture becomes final* is unfair to the seller. Furthermore, it clouds the seller's remedy because he can never be certain until the 60-day post-forfeiture period has passed that he has acquired the full right to the property. This

103. Deed of trust foreclosure takes at least 190 days. *See supra* note 4. Real estate contract forfeiture can take as little as 90 days. Wash. Rev. Code § 61.30.070(1)(e) (1994).

104. *See* Power, *supra* note 97, at 401.

105. Wash. Rev. Code § 61.30.140(4) (1994).

106. *Id.* § 61.30.110(3).

makes forfeiture under the RECFA a less predictable process that, in turn, makes would-be vendors less likely to sell to higher-risk buyers.

B. Rethinking the "Substantial" Equity Test

The RECFA makes an attempt to eliminate the perceived harshness from forfeiture by giving the buyer the ability to force a judicial sale of the property when "the court finds the then fair market value of the property substantially exceeds the unpaid and unperformed obligations secured by the contract."[107] Unfortunately, the ambiguity of this provision introduces uncertainty to forfeiture, making a seller less likely to finance a sale. *Powell v. Rinne*,[108] a case in which the Washington Court of Appeals determined that the legislature intended a court to order a judicial sale of the property only when there would be a "significant benefit"[109] to the purchaser, exemplifies this uncertainty. The court determined that a property value twenty percent in excess of the outstanding obligations did not provide a sufficient cushion to warrant a public sale.[110] Unfortunately, the court's displeasure with the plaintiff's payment record, his failure to pay real estate taxes, and his previous attempts to evade forfeiture obscure the court's rationale in reaching the decision.[111] It is difficult to determine whether the court's conclusions regarding substantiality would have been the same had the plaintiff not had such a poor record. Further clouding this provision of the RECFA is the court's insistence that the trial court had the discretion to refuse to order a sale even if it concluded that the value of the property substantially exceeded the obligations.[112] Again, whether the court would have exercised this discretion in the case of a more sympathetic plaintiff is unclear.

1. The Percentage-of-Purchase-Price Test

The legislature should amend the RECFA to define precisely the point at which a buyer earns the right to force a sale of property. A buyer in default should be allowed to force a sale only when he has paid 25% of

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107. *Id.* § 61.30.120(3).

108. 71 Wash. App. 297, 857 P.2d 1090 (1993).

109. *Id.* at 302, 857 P.2d at 1093.

110. *Id.* at 303, 857 P.2d at 1093.

111. *Id.*, 857 P.2d at 1094.

112. *Id.*

the purchase price of a home in which he lives, or 40% of the purchase price of any other real property. This objective test relies on measurable standards that have a realistic basis. The typical down payment required by a bank for a home loan to a credit-worthy individual is 10%.[113] The typical down payment required by a bank for an investment property loan to a credit-worthy individual is 25%.[114] As the use of a real estate contract generally indicates the presence of higher risk factors and the absence of traditional financing, it is only fair that a buyer under a real estate contract be required to pay a higher percentage of the purchase price before he can realize the benefits of a traditional remedy. A 15% premium is more than reasonable, considering the added risk a seller incurs in financing a sale.

This percentage-of-purchase-price test places the burden on the buyer to protect his interest. The more the property has increased in value, the more incentive the buyer will have to pay his obligations as they become due. This burden is balanced by the fact that a seller and buyer know exactly when the buyer can force a public sale of the property, increasing the buyer's leverage when the amount paid on the contract reaches the appropriate percentage. The pressure of forfeiture provides the impetus for a buyer to pay the arrearages, or to arrange for an independent sale or substitute financing.[115] The pressure of a forced public sale provides the impetus for a seller to negotiate with the buyer to avoid foreclosure.

The percentage-of-purchase-price test also eliminates costly court battles over the market value of the property. Sellers and buyers avoid expensive appraisal fees and exorbitant attorney fees. These high costs can force the average low-income buyer to relinquish his rights after a default, even when there is substantial equity in the property. They can also deter potential seller-financiers from ever placing their properties on the market in the first place.

2. *Allowing Non-Judicial Foreclosure*

The RECFA should further be amended to provide that a buyer in default can demand a *non-judicial* foreclosure sale by the seller's

113. *See, e.g.*, Washington Mutual Savings Bank marketing literature (notes on file with the Washington Law Review).

114. *Id.*

115. If the value of the property has increased, a buyer should generally be able to protect a large percentage of the accrued equity in the property through an independent sale or substitute financing.

appointee[116] when a buyer has met the percentage-of-purchase-price test as previously defined. Judicial involvement would occur only if a seller opposes this demand. The percentage-of-purchase-price test is such a precise standard that a seller would have no reason to oppose the sale unless the buyer had not in fact met the obligations of the contract.

The rationale for allowing non-judicial rather than judicial foreclosure is that most traditional financing in Washington is carried out using deeds of trust.[117] Given this fact, even if a buyer would have qualified for traditional financing at the outset, the buyer would generally not be entitled to anything more protective than non-judicial foreclosure. It is not fair to the seller to give a buyer the right to judicial foreclosure after earning the right to be treated like an average credit risk through the percentage-of-purchase-price test.

Judicial foreclosure is also impractical. The eight-month to one-year redemption period[118] it provides is wholly at odds with the RECFA's goal of providing a fair and efficient remedy for buyers and sellers under real estate contracts. The uncertainty judicial foreclosure introduces into the remedy is completely unacceptable for sellers who wish to know ahead of time when they will be able to realize their security in event of default.

VII. CONCLUSION

The real estate contract is the security device used in thousands of real property sales each year in Washington. Because it allows forfeiture, the real estate contract provides the least costly and time-consuming remedy and is thus best able to serve the vital function of seller financing. The pressure to abolish forfeiture is based on the flawed premise that foreclosure is a superior remedy to forfeiture. In reality, the RECFA provides an excellent alternative remedy in situations where sellers have no other choice than to finance sales of property themselves. With the amendments proposed in this Comment, the RECFA reasonably protects both buyers and sellers while promoting the public policy in favor of home ownership.

Legislators in many states will have to decide whether to adopt comprehensive laws governing realization of all real property security

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116. Allowing non-judicial foreclosure of a real estate contract instead of judicial foreclosure is a concept incorporated in the proposed URPSIFA. Code Reviser No. Z-0372.2/95 §§ 105(1), 301.

117. *See supra* note 82.

118. *See supra* note 2.

interests. These legislators should carefully consider the usefulness of forfeiture in seller-financing situations and work to incorporate forfeiture into comprehensive laws, thereby preserving the real estate contract as an alternative to the mortgage and deed of trust.