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# Depression Jurisprudence Revisited: Minnesota's Moratorium on Mortgage Foreclosure

Roland C. Amundson

Lewis J. Rotman

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# DEPRESSION JURISPRUDENCE REVISITED: MINNESOTA'S MORATORIUM ON MORTGAGE FORECLOSURE

ROLAND C. AMUNDSON†  
& LEWIS J. ROTMAN††

*The Minnesota Legislature has twice acted to provide relief to mortgagors and contract vendees in economically hard times. The effects of the Depression prompted a two-year moratorium on mortgage foreclosure which was enacted in 1933 and extended until July 1942. In response to the current unemployment crisis and low farm commodity prices, the Minnesota Legislature enacted the state's second moratorium in May 1983. The legislature recently extended the moratorium for another year. Professor Amundson and L.J. Rotman's thorough examination of these moratoria concludes with innovative considerations for providing more complete relief to deserving homeowners and farmers.*

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† Member, Minnesota Bar. Mr. Amundson received his B.A. from Gustavus Adolphus College in 1971 and his J.D. from Notre Dame in 1975. He is presently a partner in the Minneapolis firm of Amundson & Campbell. Mr. Amundson is also an adjunct professor at William Mitchell College of Law where he teaches a course on mortgage law.

†† L.J. Rotman received his B.A. from the University of Colorado in 1980 and his J.D. from William Mitchell College of Law in 1984. He served as an Executive Editor on the *William Mitchell Law Review* and authored Note, *Regulating Timeshare Interests in Minnesota: A Comprehensive Solution*, 10 WM. MITCHELL L. REV. 115 (1984). Mr. Rotman survived Professor Amundson's course on mortgage law. Mr. Rotman intends to become an associate with the Minneapolis firm of Halpern & Druck.

The authors are in the process of completing a mortgage law treatise which will focus on Minnesota case law.

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## I. INTRODUCTION

The legislature finds that the number of unemployed persons in this state has reached the highest level since the Depression of the 1930's; that farm commodity prices are below the break-even point for the cost of production; that the number of mortgage loans currently in default due to the unemployment of the principal wage earner has reached critical levels; and that by reason of these conditions and the high rates of interest on mortgage loans, many of the citizens of this state will be unable for extended periods of time, to meet payments of taxes, interest, and principal of mortgages on their properties and are, therefore, threatened with loss of their real property through mortgage foreclosure, contract termination, and judicial sales. The legislature further finds that these conditions have resulted in an emergency of a nature that justifies and validates legislation for the extension of the time prior to foreclosure and execution sales and for other relief.

—Legislative Findings, Minnesota's  
Moratorium on Mortgage Foreclosure<sup>1</sup>

1. Act of May 23, 1983, ch. 215, § 4, 1983 Minn. Laws 654, 654-55 (codified at MINN. STAT. § 583.01 (Supp. 1983)).

On May 23, 1983, the Minnesota Legislature addressed these concerns by enacting a moratorium on mortgage foreclosure and contract for deed termination<sup>2</sup> (Act). Although the Act originally had only a thirteen-month duration, expiring on July 1, 1984,<sup>3</sup> the legislature recently extended it for another year.<sup>4</sup> Notwithstand-

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2. See Act of May 23, 1983, ch. 215, 1983 Minn. Laws 654.

3. See *id.* § 16, 1983 Minn. Laws at 658.

4. On April 19, 1984, near the end of the 1984 legislative session, the House of Representatives adopted a bill extending the Act until July 1, 1985 (1984 Legislation). See 1984 MINN. H.J. 9314-15. Governor Perpich signed the bill into law on April 25, 1984, thus providing farmers and homeowners with another year of relief.

The 1984 Legislation makes three substantial changes to the Act. First, the legislation adds a notice provision. This provision will require foreclosing mortgagees and terminating contract for deed vendors to specify to defaulting mortgagors and contract vendees that relief is available under the Act. See Act of Apr. 25, 1984, ch. 474, §§ 1-2, 1984 Minn. Sess. Law Serv. 361, 361-62 (West) (to be codified at MINN. STAT. §§ 47.20, subd. 15, 559.21, subd. 6). The need for the notice provision is discussed *infra* notes 271-73 and accompanying text. The 1984 Legislation also extends, from four to eight weeks, the time in which notice of a foreclosure sale must be served on a defaulting homeowner or farmer. See Act of Apr. 25, 1984, ch. 474, § 3, 1984 Minn. Sess. Law Serv. 361, 362 (West) (to be codified at MINN. STAT. § 580.031). The personal service requirement now mirrors the publication requirement of eight weeks. See Act of May 23, 1983, ch. 215, § 3, 1983 Minn. Laws 654, 654 (codified at MINN. STAT. § 580.031 (Supp. 1983)).

Another change to the Act is an additional factor which courts are encouraged to consider in determining whether to order a delay in the sale of foreclosed property. The 1984 Legislation provides that courts will be able to consider that the petitioning homeowner or farmer is "facing catastrophic medical expenses." See Act of Apr. 25, 1984, ch. 474, § 5, 1984 Minn. Sess. Law Serv. 361, 363 (West) (to be codified at MINN. STAT. § 583.05(1)). Standards for awarding relief under the Act are discussed *infra* notes 154-56 and accompanying text.

The final substantive addition made to the Act by the 1984 Legislation affects the Act's provision for partial payment. See *infra* notes 176-84 and accompanying text. The Act requires that the court order the defaulting farmer or homeowner to make some payment to the mortgagee or vendor during the period of relief. The 1984 Legislation encourages the court to consider the "equity in the property held by the mortgagor or contract vendee" in determining the amount of partial payment. See Act of Apr. 25, 1984, ch. 474, § 6, 1984 Minn. Sess. Law Serv. 361, 364 (West) (to be codified at MINN. STAT. § 583.08).

Noticeably absent from the 1984 Legislation are a number of provisions that were considered during the session. Provisions to create a guaranty fund, *infra* notes 265-70 and accompanying text, and to establish a method of reamortization, *infra* notes 238-40 and accompanying text, were considered at one point or another. Similarly, a number of technical changes, which were contained in an earlier bill before the House of Representatives, were not included in the final legislation. See, e.g., H.F. 2036 (first engrossment on file in the William Mitchell Law Review office).

Undoubtedly, the concept of reamortization antagonized the lending institutions and became too controversial to be introduced as an amendment. The guaranty fund, although not opposed by the banking industry, required an appropriation. Therefore, it was difficult to garner support for the concept. The technical changes, however, were not

ing the Act's limited duration, it raises concerns over its effect on Minnesota real property law and its validity as a proper solution to an emergency situation.

Exact statistics on mortgage foreclosures and contract for deed terminations in the state were unavailable as the legislature contemplated passage of the Act.<sup>5</sup> National statistics, however, indicated an increasing number of mortgage defaults by farmers and homeowners.<sup>6</sup> In response to this compounding problem, the moratorium was enacted. The result, however, was less than originally intended by the Act's sponsors and far from comprehensive.<sup>7</sup>

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at all controversial and did not involve an appropriation. Rather, these important clarifications apparently slipped through the cracks in the legislative process, as the legislature feverishly pursued adjournment.

5. Telephone interview with Mr. Roger Culhane, Coordinator, Home Preservation Hotline, Minnesota Attorney General's Office (Dec. 22, 1983). The Attorney General's Office operates a telephone hotline for persons faced with foreclosure or termination. The coordinator of the project, Roger Culhane, channels callers to appropriate agencies for assistance and provides them with copies of the Act and related information. The program commenced with the Act's passage. In its relatively short existence, the program has received thousands of calls. See REPORT UPDATE: HOME PRESERVATION HOTLINE (Jan. 25, 1984) (on file in the William Mitchell Law Review office).

Since passage of the Act, foreclosures in at least one area of Minnesota, the "Iron Range," have continued to increase. See *Foreclosures up in St. Louis County*, Minneapolis Star & Trib., Apr. 1, 1984, at 8B, col. 2. According to the county sheriff's records "[f]oreclosures are up 233 percent . . . since 1980, from 52 then to 173 last year. . . ." *Id.* Notwithstanding the depressed economy of the Iron Range, Minnesota's economy appears to be on the rise overall. See Meyers, *State's recovery moving now with gusto*, Minneapolis Star & Trib., Apr. 1, 1984, at 1D, col. 2 (relying on the Minnesota Index of Leading Economic Indicators which reached its all-time high in January 1984).

6. In 1981, the number of mortgage foreclosures was nearly 30,000. See FED. HOME LOAN BANK Bd. J., Oct. 1982, at 39. The increase between 1980 and 1981 in the dollar amount of delinquent mortgage loans was 31%. Dentzer, *The Depression Syndrome*, NEWSWEEK, Mar. 8, 1982, at 75. By the end of 1982, the number of residential foreclosures across the country was at its highest level since 1952. *Again, the Fear of Foreclosure*, NEWSWEEK, Jan. 17, 1983, at 12.

Foreclosure is not just a threat to farmers or persons in low-income brackets. A recent study by the Investors Mortgage Insurance Company indicated that "[h]igher-income borrowers (defined as those earning \$60,000 yearly and up) are nearly as likely to end up in foreclosure as home buyers at the opposite end of the scale, those with annual incomes of \$18,000 or less." *Foreclosure study shows high income not always sure bet*, Minneapolis Star & Trib., Mar. 31, 1984, at 1S, col. 1. Moreover, as a result of the widespread use of adjustable-rate mortgages in recent years, as the interest rate increases, these mortgagors may be unable to make continued payments. See *Climb in interest rates brings fear to booming house market*, Minneapolis Star & Trib., Apr. 7, 1984, at 3S, col. 2. Thus, persons holding adjustable-rate mortgages may fall victim to foreclosure in the years ahead.

7. See Knapp, *Minnesota Foreclosure Relief Act: How It Works*, 1 MINN. REAL EST. L.J. 190, 191-92 (1983). "As the bill proceeded through the legislative process, its provisions were tempered, and the bill as finally enacted was more favorable to mortgagees and contract-for-deed vendors than the bill originally introduced." *Id.* at 192.

As a model for the Act, the legislature used the 1933 Minnesota moratorium on mortgage foreclosure<sup>8</sup> (1933 Legislation). Designed to ward off the harsh effects of the Depression,<sup>9</sup> the 1933 Legislation survived a constitutional challenge in the United States Supreme Court in *Home Building & Loan Association v. Blaisdell*.<sup>10</sup> The 1983 Act was also enacted in response to a perceived emergency, albeit an emergency entirely distinct from the crisis existing during the Depression.<sup>11</sup>

Following a review of Minnesota's procedures on contract for deed termination and mortgage foreclosure, this Article discusses the history of moratory legislation, focusing on Minnesota's first moratorium on mortgage foreclosure. The Article then addresses the specific provisions of the Act, analyzing the standards for review under the Act and suggesting more detailed criteria for determining eligibility for relief. It also focuses on the concept of "partial payment" required by the Act and suggests an alternative approach. The Article raises concern over the Act's impact on Minnesota's real property law and concludes with several additional considerations for a continued moratorium in Minnesota and for moratoria in other jurisdictions.

## II. MORTGAGE FORECLOSURE AND CONTRACT FOR DEED TERMINATION PROCEDURES

The Act changed various aspects of Minnesota's traditional mortgage foreclosure and contract for deed termination procedures. Before addressing these changes, this Article examines the

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8. See Act of Apr. 18, 1933, ch. 339, 1933 Minn. Laws 514. The 1933 Legislation provided that a defaulting mortgagor could petition the district court to issue an ex parte order postponing foreclosure. *Id.* pt. I, § 2, 1933 Minn. Laws at 516. If foreclosure had already been commenced, the court could extend the period of redemption. *Id.* § 4, 1933 Minn. Laws at 517.

9. Many of the harsh effects of the Depression are set out in the Preamble to the 1933 Legislation. See, e.g., *id.* 1933 Minn. Laws at 514-15. As the United States Supreme Court noted in construing the 1933 Legislation, "the economic emergency which threatened 'the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence' was a 'potent cause' for the enactment of the statute." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934).

10. 189 Minn. 422, 249 N.W. 334 (1933), *aff'd*, 290 U.S. 398 (1934).

11. See Knapp, *supra* note 7, at 199. The presence of an emergency is an essential factor in justifying a state's impairment of individuals' contract rights under article I, section 10 of the United States Constitution. Although the Act raises this same constitutional concern, discussion of the constitutionality of the Act is beyond the scope of this Article. For a discussion of this issue, see *id.* at 198-99; *infra* note 120 and accompanying text (discussing five essential criteria for upholding moratoria legislation). See generally Annot., 86 A.L.R. 1539 (1933) (discussing judicial treatment of moratoria legislation).

procedures as they existed prior to the Act in order to measure the Act's impact more comprehensively.

### A. Contract for Deed Termination

The contract for deed is a popular substitute<sup>12</sup> for the conventional mortgage.<sup>13</sup> Under a contract for deed, the vendor retains title to the property while relinquishing possession to the vendee.<sup>14</sup>

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12. There are a number of advantages in using a contract for deed as a security device to convey property. In a residential setting, the advantages generally are: (1) transactions may often be closed more quickly than when institutional lenders are involved; (2) when institutional financing is scarce, contract for deed financing is always available; and (3) financing terms may provide greater flexibility than institutional financing.

There are a number of advantages to persons choosing to sell their property by contract for deed. These advantages include: (1) the property need not meet Federal Housing Administration (FHA) or Veterans Administration (VA) qualifications; (2) a relatively quick remedy exists if the vendee defaults; (3) buyers are available because of the financing flexibility; (4) an opportunity exists to earn interest on the entire balance, which is secured by a known asset, rather than to seek a return by reinvesting after-tax sale proceeds; (5) an opportunity exists to spread payments and gains for tax purposes; and (6) a possibility of windfall, if the vendee defaults and the property is retaken by termination of the contract.

The advantages to persons acquiring property by contract for deed are also numerous. Vendees can obtain flexible financing terms and are virtually assured of financing, since they do not have to qualify for institutional financing. Furthermore, vendees may be able to assume low-interest rate mortgages along with the contract.

Today, other factors exist to increase the popularity of contracts for deed in the residential setting. Sellers may now charge higher interest rates without risking violation of usury laws. Minnesota Statutes section 559.21 contains a grace period allowing defaulting vendees a period in which to cure. There also appears to be a tremendous availability of purchasers for the vendors' contract interests at discount prices. Finally, the availability of institutional financing is drying up. Mortgage interest rates are seldom fixed, varying with numerous economic indicators.

For a general discussion of the advantages and disadvantages of contracts for deed, see R. KRATOVIL & R. WERNER, *REAL ESTATE LAW* 368-78 (8th ed. 1983); Hall & Bruess, *Real Property and Security Financing*, in *MINNESOTA REAL ESTATE* 175, 220-26 (Minn. Continuing Legal Education 1973).

13. For purposes of this Article, reference to a mortgage also contemplates deed of trust arrangements which are similar to mortgages and are used more frequently in other jurisdictions.

14. Comment, *The Uniform Land Transactions Act: Time to Reform Washington's Default Procedures For Secured Sale of Land*, 17 GONZ. L. REV. 119, 122 (1982) [hereinafter cited as Comment, *Time to Reform*]. The author succinctly describes the contract for deed:

The installment land contract and mortgage serve an identical purpose — the financing of the unpaid purchase price by the seller. Under the contract, the purchaser takes possession, making monthly payments of principal and interest until the contract price is paid. The vendor retains legal title to the property as security for payment of the debt until the vendee pays in full. When the vendee has completed performance of all payments and obligations according to the contract, the vendor conveys legal title to the vendee.

*Id.* (footnotes omitted); see also Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the Ashford Cloud*, 7 U. PUGET SOUND L. REV. 233 (1984)

These parties are equivalent to the mortgagee and mortgagor in a mortgage arrangement. Although the contract for deed is a security device analogous to the mortgage, it is not treated as a mortgage;<sup>15</sup> rather, it is viewed as a contract and the parties are limited to contractual remedies.<sup>16</sup>

Contracts for deed generally contain a provision specifying that "time is of the essence."<sup>17</sup> Traditionally, this provision has been

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(comparing the contract for deed and mortgage). For a general discussion of contracts for deed, see Clark, *Installment Land Contracts in South Dakota—Part 1*, 6 S.D.L. REV. 248 (1961); Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931); Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550 (1965); Ming, *Contract For Deed—A Practical Prohibition*, 54 OKLA. B.J. 3001 (1983); Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. REV. 541; Power, *Land Contracts as Security Devices*, 12 WAYNE L. REV. 391 (1966); Vanne- man, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342 (1930); Warren, *California Installment Land Sales Contracts: A Time For Reform*, 9 U.C.L.A. L. REV. 608 (1962); Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALB. L. REV. 71 (1977); Comment, *The Installment Land Contract in Idaho: A Game of Chance*, 15 IDAHO L. REV. 89 (1978); Comment, *Installment Contracts for the Sale of Land in Missouri*, 24 MO. L. REV. 240 (1959); Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786 (1961); Note, *Toward Abolishing Installment Land Sale Contracts*, 36 MONT. L. REV. 110 (1975). Cf. C.F. ROLAND, J. HYMES & L. SCHICKLI, *INSTALLMENT RELATIONSHIPS* (1984).

15. Although the rule that a contract for deed is not a mortgage has remained steadfast for many years, it has recently begun to crumble. See, e.g., *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), cert. denied, 415 U.S. 921 (1974) (court ordered vendee's interest to be foreclosed under mortgage statute because his equity in the property was approximately 66% of the contract price); *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979) (court held no distinction between contract for deed and purchase money mortgage); OKLA. STAT. ANN. tit. 16, § 11A (West Supp. 1983-1984) (treating mortgages and contracts for deed similarly).

The Uniform Land Transactions Act (ULTA) specifically provides that under its provisions a contract for deed is treated just as a mortgage. See UNIF. LAND TRANSACTIONS ACT § 3-102(a), 13 U.L.A. 654 (1980). Under the ULTA, "the traditional distinctions among security interests based largely on form or whether the creditor had 'title' to the real estate collateral are not retained." *Id.*, Introductory Comment to Article 3, 13 U.L.A. 652-53. For a general discussion of the ULTA and the concept of treating the contract for deed and the mortgage as one and the same, see Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245 (1976); Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL. EST. L.J. 179 (1979); Trevaskis, *Summary of the Uniform Land Transactions Act*, 13 REAL. PROP. PROB. & TR. J. 672 (1978); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. U.L. REV. 359 (1978); Comment, *ULTA and Non-Judicial Mortgage Foreclosure in Texas*, 12 ST. MARY'S L.J. 1104 (1981); Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 WIS. L. REV. 899.

16. A vendor's contractual remedies include bringing an action for damages for breach of contract. See *Home Counsellors v. Folta*, 246 Minn. 481, 75 N.W.2d 417 (1956); *Kirk v. Welch*, 212 Minn. 300, 3 N.W.2d 426 (1942); *Wilson v. Hoy*, 120 Minn. 451, 139 N.W. 817 (1913).

17. See Cane, *Equity and Forfeitures in Contracts for the Sale of Land*, 4 U. HAWAII L. REV. 61, 61 (1982); Lee, *supra* note 14, at 561; Comment, *Time to Reform*, *supra* note 14, at 123. It is well-settled in Minnesota that the contract must expressly provide that "time is of the



the most important difference between a contract for deed and a mortgage, because it implies that no grace period for reinstatement, or period of redemption, is contemplated. Therefore, upon the vendee's default, the vendor historically has been able to terminate the contract, retain the land and installments already paid, and sue for the amount due.<sup>18</sup>

The harsh effects of contract for deed termination on defaulting vendees have been ameliorated by judicial decisions<sup>19</sup> and abrogated by statute.<sup>20</sup> Minnesota Statutes section 559.21 grants contract for deed vendees a right of redemption or grace period in which to reinstate the contract.<sup>21</sup> The statute distinguishes between contracts by the date of their execution: (1) the period before August 1, 1976;<sup>22</sup> (2) the period between August 1, 1976 and May 1, 1980;<sup>23</sup> and (3) the period from May 1, 1980 to date.<sup>24</sup>

Contracts executed during any one of these periods may be terminated by the vendor upon the vendee's default. The vendor must serve notice<sup>25</sup> on the defaulting vendee, specifying the conditions of default and stipulating the statutory terms which establish the length of reinstatement.<sup>26</sup> In certain instances, the vendor may obtain attorneys' fees.<sup>27</sup>

The three time periods are significant because they control the length of the reinstatement period. Vendees of contracts that were executed in the period before August 1976 have a thirty-day rein-

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essence" since it will not otherwise be implied. *See* *Porten v. Peterson*, 139 Minn. 152, 166 N.W. 183 (1918); *Austin v. Wacks*, 30 Minn. 335, 15 N.W. 409 (1883); *Gill v. Bradley*, 21 Minn. 15 (1874).

18. *See Lee*, *supra* note 14, at 123.

19. From the maxim "equity abhors a forfeiture," courts have prevented cancellation of contracts for deed and ordered specific performance on equitable grounds. *See Cane*, *supra* note 17, at 63. This action is the doctrine of equitable conversion, under which a vendee is entitled to specific performance of the contract. *See Johnson v. Quaal*, 250 Minn. 154, 83 N.W.2d 796 (1957); *Reynolds v. Franklin*, 41 Minn. 279, 43 N.W. 53 (1889). Courts will not, however, compel specific performance by a seller where such a result would be inequitable. *See Hilton v. Nelsen*, 283 N.W.2d 877 (Minn. 1979).

20. *See, e.g.*, MINN. STAT. § 559.21 (1982 & Supp. 1983). *See generally* Note, *Cancellation of Contracts for Deed: The Constitutionality of the Minnesota Statutory Procedure*, 58 MINN. L. REV. 247 (1973).

21. MINN. STAT. § 559.21 (1982 & Supp. 1983).

22. *See id.* § 559.21, subd. 1a.

23. *See id.* § 559.21, subd. 1.

24. *See id.* § 559.21, subd. 2.

25. *See, e.g., id.* § 559.21, subd. 3.

26. The applicable factors are set forth in subdivisions 1, 1a, and 2. *See id.* § 559.21, subds. 1, 1a, 2.

27. *See id.*

statement period.<sup>28</sup> For contracts executed between August 1976 and May 1980, the length of the reinstatement period varies according to the percentage of the purchase price paid, exclusive of interest thereon and any mortgages or prior contracts for deed which have been assumed by the vendee.<sup>29</sup> The breakdown is as follows:

<u>Percent Paid</u>	<u>Length of Reinstatement</u>
0-30%	30 days
30-50%	45 days
50% or more	60 days <sup>30</sup>

The length of reinstatement for contracts executed after May 1, 1980 is also determined by the percentage of the purchase price paid.<sup>31</sup> The relationship is as follows:

<u>Percent Paid</u>	<u>Length of Reinstatement</u>
0-10%	30 days
10-25%	60 days
25% or more	90 days <sup>32</sup>

The various periods of reinstatement for a contract for deed described in Minnesota Statutes section 559.21 are relatively short compared to the six or twelve-month periods available to redeeming mortgagors.<sup>33</sup> Nevertheless, the contract for deed reinstatement periods represent a significant departure from the harsh consequences suffered by defaulting vendees before the enactment of section 559.21.

### *B. Mortgage Foreclosure*

There are two methods of mortgage foreclosure available in Minnesota:<sup>34</sup> foreclosure by action<sup>35</sup> and foreclosure by advertise-

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28. *Id.* § 559.21, subd. 1a.

29. *Id.* § 559.21, subd. 1.

30. *Id.*

31. *Id.* § 559.21, subd. 2.

32. *Id.*

33. *See id.* § 580.23.

34. A third method of foreclosure, strict foreclosure, is virtually unavailable in Minnesota. *See id.* § 581.12. Strict foreclosure allows the mortgagee to obtain the property without having to acquire it at a sheriff's sale. Strict foreclosure is available in other states, including Connecticut and Vermont. *See R. KRATOVIL & R. WERNER, MODERN MORTGAGE LAW AND PRACTICE* § 41.11, AT 625 (2D ED. 1981); *see also* Note, *The Relation of the Equitable Doctrine of Subrogation to Vermont's Strict Foreclosure Laws*, 7 Vt. L. Rev. 71 (1982). For the tax consequences of mortgage foreclosure, *see* Wetstone, *Involuntary Dispositions of Real Estate in a Recessionary Economy - Minimizing Tax Impact of Repossessions, Foreclosures and*

ment.<sup>36</sup> The determining factor in the mortgagee's ability to select one procedure over the other is whether the mortgage contains a power of sale clause.<sup>37</sup> Absent a power of sale clause in the mortgage, the mortgagee must foreclose by action: commencing a civil action against the mortgagor, seeking a judgment for the amount due on the mortgage, and obtaining an order directing the sale of the real estate.<sup>38</sup> Although this process is cumbersome and time-consuming, the mortgagee is entitled to maintain an action for a deficiency judgment if the proceeds from the sale do not satisfy the amount secured by the mortgage.<sup>39</sup> After the property is sold, the mortgagor is granted a statutory period of redemption.<sup>40</sup>

Foreclosure by advertisement is available to mortgagees when the mortgage contains a power of sale clause.<sup>41</sup> This extrajudicial process is less time-consuming than foreclosure by action, taking approximately eight to ten weeks to complete.<sup>42</sup> Rather than commencing a civil action, the mortgagee initiates foreclosure proceedings by publishing notice of a sheriff's sale for six weeks<sup>43</sup> in a legal newspaper within the county where the property is situated and by serving a copy of the notice upon the person in possession of the mortgaged premises.<sup>44</sup> Unless the mortgagor tenders payment of the amount actually due on the mortgage, including insurance, delinquent taxes, interest, cost of publication and service of pro-

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*Defaults; Bankruptcy Tax Act; Restructuring and Recasting of Real Estate Transactions, Moratoriums, Refinancing*, 41 INST. ON FED. TAX'N 24-1, 24-16 to -25 (1983).

Federal law may affect the foreclosure process if one of the federal programs is involved. Loans may be backed by one of a number of the federal agencies, including the FHA, Farmer's Home Administration (FmHA), Small Business Administration (SBA), or VA. Discussion of federal law and its effect on mortgage foreclosure in Minnesota, however, is beyond the scope of this Article. For an excellent guide to foreclosing mortgages in Minnesota, see BURKE & BURTON ON MORTGAGE FORECLOSURES: A STEP BY STEP GUIDE FOR LENDERS AND ATTORNEYS (Wm. Mitchell Forums 1981).

35. See MINN. STAT. §§ 581.01-.12 (1982).

36. See *id.* §§ 580.01-.30 (1982 & Supp. 1983).

37. See *id.* § 580.01.

38. The procedure for conducting a sheriff's sale is set out in Minnesota Statutes section 580.06. See *id.* § 580.06.

39. See *id.* § 580.23. See generally Nelson, *Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 MO. L. REV. 151 (1982) (survey of law governing deficiency judgments).

40. See MINN. STAT. § 580.23 (1982).

41. See *id.* § 580.01. The mortgage must also be recorded to foreclose by advertisement. See *id.* § 580.02.

42. See Knapp, *supra* note 7, at 192.

43. MINN. STAT. § 580.03 (1982).

44. See *id.*

cess, and attorneys' fees before the foreclosure sale,<sup>45</sup> the property may be sold by the sheriff at a public sale.<sup>46</sup> After the sale, the mortgagor has either six<sup>47</sup> or twelve<sup>48</sup> months to redeem the property, depending on whether one of three statutory conditions is met.<sup>49</sup> The mortgagee is entitled to seek a deficiency judgment only if the mortgaged property qualifies for a twelve-month redemption period.<sup>50</sup>

### C. *Redemptory Periods*

Redemption provides the mortgagor with an opportunity to preserve his equity in the property. Two distinct periods of redemption are available to defaulting mortgagors in Minnesota: equitable and statutory.<sup>51</sup>

Equitable redemption is the period between the mortgagor's failure to make a payment, or other default, and the foreclosure sale. In foreclosure by action, the equitable period of redemption is the actual time necessary for the mortgagee to obtain a judgment and an order, and have the property sold.<sup>52</sup> In foreclosure by advertisement, the equitable period of redemption is the time required by statute to publish notice and consummate the sale.<sup>53</sup> Thus, in Minnesota the period of equitable redemption can vary from two months to over one year. Under either procedure, the defaulting mortgagor may cure his default by paying the amount in arrears before the sheriff sells the property.<sup>54</sup>

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45. *See id.* § 580.30.

46. *See id.* § 580.06.

47. *See id.* § 580.23, subd. 1.

48. *See id.* § 580.23, subd. 2.

49. *See id.*; *see also infra* notes 194-99 and accompanying text (discussing three statutory conditions affecting length of statutory redemptory periods).

50. MINN. STAT. § 580.23, subd. 2 (1982).

51. For a concise discussion of these two periods of redemption, see Comment, *Statutory Redemption Following Power of Sale Foreclosure in Missouri*, 47 MO. L. REV. 309, 310-14 (1982).

52. *See* MINN. STAT. § 581.03 (1982).

53. *See supra* notes 42-44 and accompanying text.

54. *See* MINN. STAT. § 580.30 (1982). This section permits the mortgagor to reinstate the mortgage at any time before the property is sold by paying:

to the holder of the mortgage so being foreclosed, or to the attorney foreclosing the same, or to the sheriff of the county, the amount actually due thereon and constituting the default actually existing in the conditions of the mortgage at the time of the commencement of the foreclosure proceedings, including insurance, delinquent taxes, if any, upon the premises, interest to date of payment, cost of publication and services of process or notices, attorney's fees not exceeding \$150 or one half of the attorney's fees authorized by section 582.01, whichever is greater, together with other lawful disbursements necessarily incurred in connec-

Following the foreclosure sale, statutory redemption provides the defaulting mortgagor with a second opportunity to redeem the property. This period is the same for both foreclosure by action<sup>55</sup> and foreclosure by advertisement:<sup>56</sup> either six<sup>57</sup> or twelve months.<sup>58</sup>

Minnesota's procedures on mortgage foreclosure and contract for deed termination reflect the state's strong historical concern over protecting farm and home ownership. These procedures, particularly those establishing the redemptory periods, were carefully created by the legislature. Similarly, the legislature carefully considered the state's desire to preserve home ownership when it passed the Act. In doing so, the legislature avoided "[t]he grave danger [that] lies in the hasty adoption of proposals which are not bottomed on the experience of the past."<sup>59</sup>

### III. A HISTORY OF MORATORIA LEGISLATION

The basis of the Act, a moratorium, is rooted in earlier legislative endeavors in the area of mortgage foreclosure and, more broadly, the efforts of others throughout the course of ancient and modern American history. Generally, moratoria legislation has been used to protect the economic structures of nations and to provide equitable relief to the populace. A moratorium essentially is the postponement of obligations decreed by the sovereign through the judiciary or the legislature.<sup>60</sup>

#### A. Ancient Moratoria

The concept of moratoria legislation originated in antiquity.

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tion with the proceedings by the party foreclosing, then, and in that event, the mortgage shall be fully reinstated and further proceedings in such foreclosure shall be thereupon abandoned.

*Id.*

55. *See id.* § 581.10.

56. *See id.* § 580.23.

57. *Id.* § 580.23, subd. 1.

58. *Id.* § 580.23, subd. 2.

59. *See Feller, Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061, 1065 (1933).

60. *See id.* at 1061. Special moratoria applying to individual debtors, or classes of debtors, and general moratoria affecting the entire populace are the two primary types of moratoria. Special moratoria have been soundly criticized as usually "more productive of evil than good," and as "the sources of corruption and uncertainty." *Id.* General moratoria, on the other hand, have been endorsed as "a vital necessity in critical periods." *Id.*

*Plutarch's Lives*<sup>61</sup> provides an example of a moratorium from the Greek experience. Solon reduced the principal and interest on debts by a "Seisachthea," a decree that operated analogously to a moratorium.<sup>62</sup> Demosthenes also mentioned the use of a moratorium in one of his speeches. In reference to a suit for the misappropriation of property owned by a warrior who had been serving in the military, Demosthenes stated: "I could not commence a private action as there were no actions at that time, all such business being postponed on account of the war."<sup>63</sup>

The first general moratorium was perhaps that decreed by Justinian in 555 A.D., in response to the Frank's invasion of Italy and Sicily.<sup>64</sup> After the invasion, the Justinian Code was construed to permit a sovereign to issue orders staying court actions involving individual debtors.<sup>65</sup> The authority of the courts was extended to stay proceedings for entire classes of debtors.<sup>66</sup> The practice of affording equitable relief, however, was disparaged by the debtor's ability to purchase a grant of respite from the sovereign.<sup>67</sup>

A number of continental codes followed the Justinian example and authorized the courts to grant moratoria during times of war.<sup>68</sup> Moratoria, however, have not been limited solely to periods of armed conflict. Emergency legislation in the form of moratoria, authorizing the extension of time in which a debtor may satisfy his obligations, has also been enacted over the course of history in response to various national calamities such as floods, civil unrest, and events disrupting the economy.<sup>69</sup>

### *B. The American Experience with Moratoria Legislation*

Emergencies giving rise to popular demands for debtor relief have created a consistent theme in American history. From the

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61. SOLON, I PLUTARCH'S LIVES 182 (Clough ed. 1899), *quoted in* Feller, *supra* note 59, at 1062 n.3.

62. *See* Feller, *supra* note 59, at 1062 n.2.

63. 5 DEMOSTHENES ORATIONS, AGAINST STEPHANUS I 46 (Kennedy ed. 1881), *quoted in* Feller, *supra* note 59, at 1062 n.3.

64. Feller, *supra* note 59, at 1062.

65. *Id.*

66. *Id.* For example, the Justinian Code allowed French kings to provide equitable relief to the Crusaders and to persons indebted to Jews. *Id.* Moratoria were similarly used in England during the Tudor period, where the English Privy Council maintained the power to stay proceedings brought against individual debtors. *See id.* at 1063.

67. *See id.* at 1062-63.

68. *See id.* at 1064.

69. *See* Lorenzen, *Moratory Legislation Relating to Bills and Notes and the Conflict of Laws*, 28 YALE L.J. 324, 325 (1919).

early days of the Republic, colonial legislatures passed various stay laws, legal tender laws, laws of valuation, and other laws providing relief to debtors.<sup>70</sup> These enactments had a disastrous effect upon public and private credit.<sup>71</sup> The problem was compounded by the Republic's battles with England during the American Revolution which drew heavily on the public treasury. Although the Continental Congress attempted to ameliorate the credit problem in 1775,<sup>72</sup> state legislatures refused to cooperate with the national scheme.<sup>73</sup> As a result, inflation besieged the American economy and a general economic chaos, which represented a profound peril to creditors, ensued.<sup>74</sup>

Concerns over the economic chaos, resulting primarily from state interference, provided the basis for the adoption of the contract clause of the Constitution: "No State shall coin Money; emit Bills of Credit; make any thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts . . ." <sup>75</sup> One of the earliest successful attacks on

70. See 1 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 228-41 (1903).

71. Problems in the availability of credit were also a result of the difficulty political leaders had in providing an expanding American economy with an adequate supply of currency. Gold and silver coin was lost because of the unequal trade balance between the Republic and England. See S. RATNER, J. SOLTOW & R. SYLLA, THE EVOLUTION OF THE AMERICAN ECONOMY: GROWTH, WELFARE, AND DECISION MAKING 71 (1979).

72. The Continental Congress issued bills of credit that passed for currency to meet the expenses of the revolution. See *id.* at 86.

73. Instead of levying taxes to satisfy the demands of the Continental Congress, the states further complicated the national scheme by printing their own paper money. *Id.*

74. Inflation resulted in a sharp decline in the specie value of the original continental paper money. See *id.*

75. U.S. CONST. art. I, § 10. Chief Justice Marshall reflected on this period in history:

The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those which things he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-55 (1827). As one commentator suggested, one of the principal objectives in calling the 1787 Constitutional Convention was to restrict excesses in state government and compel conformity to further national unity. See Hynning, *Constitutionality of Moratory Legislation*, 12 CHI.-KENT L. REV. 182, 188 (1934).

a statute premised upon the contract clause occurred in *Champion v. Casey*.<sup>76</sup> The Circuit Court for the District of Rhode Island construed the validity of a Rhode Island statutory scheme which granted debtors the right to petition for a three-year extension to settle accounts with creditors.<sup>77</sup> According to Supreme Court historian Charles Warren, a newspaper account of *Champion* noted: "The defendant's counsel pleaded a resolution of the State in bar of the action, by which he was allowed three years to pay his debts and during which he was to be free from arrests on that account."<sup>78</sup> The *Champion* court held that the individual states are prohibited by the United States Constitution from making laws which impair contractual obligations.<sup>79</sup>

Popular demand created pressure for various moratoria in response to emergency situations. Although many state courts resisted the pressures of these events, state legislatures frequently yielded to the public will, enacting moratoria legislation notwithstanding the invalidity of the Rhode Island scheme. In construing these moratoria, courts developed a two-prong analysis, focusing on the effect of the moratorium on the rights of the parties to the impaired contract and the impetus for the legislation.

In applying the first prong of the analysis, courts developed an artificial distinction between moratoria that changed the obligations of the parties to the contract and moratoria that altered the remedy for breach of contract. In *Sturges v. Crowninshield*,<sup>80</sup> Chief Justice Marshall stated:

The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.<sup>81</sup>

Thus, if the moratorium was construed to impinge upon the remedy only, it was constitutionally permissible.<sup>82</sup> If, however, the ex-

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76. *Champion* was an unreported decision. See Hynning, *supra* note 75, at 191. The Rhode Island moratorium also allowed creditors to avoid arrest and exempted their property from attachment. See 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 67 (rev. ed. 1926).

77. See 1 C. WARREN, *supra* note 76, at 67.

78. *Id.*

79. See *id.*

80. 17 U.S. (4 Wheat.) 122 (1819).

81. *Id.* at 200.

82. In *Bronsen v. Kinzie*, 42 U.S. (1 How.) 311 (1843), Chief Justice Taney opined: [U]ndoubtedly, a state may regulate at pleasure the modes of proceeding in its



press terms of the contract were affected by the moratorium, then the legislation was held violative of the contract clause.

In the second prong of the analysis, courts focused on the impetus of the legislation. The existence of an emergency satisfied this prong and legitimized moratoria legislation. The Louisiana Supreme Court, upholding a moratorium imposed after an invasion of Louisiana by British troops in 1814, commented:

[We] presume that in any time obnoxious to the due administration of justice, it is the duty, and within the power of the legislature, to pass laws to avert or diminish the consequences of the general calamity; and a law called for by such circumstances, and fairly intended to meet the exigency of the day, could not be properly classed among those which impair the obligations of contracts, though one of its consequences would be some delay in the recovery of debts.<sup>83</sup>

Thus, the principle emerged that, in circumstances where the public welfare, health, or safety is involved, constitutional rights protecting private contracts must yield to the greater public need. This principle is expressed in the police power of the states.

The exercise of a state's police power, however, is constrained by the limitation of reasonableness. The *Rent Cases*<sup>84</sup> demonstrated the breadth of the police power available to legislatures. During World War I, hundreds of thousands of people moved into New York and Washington, D.C. The influx placed a great strain on available housing. Landlords took undue advantage of these people as the situation worsened, demanding exorbitant rents and summarily evicting tenants who failed to pay. The housing situation deteriorated to the point where public health and safety were jeopardized. In response to this emergency, corrective legislation

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courts in relation to past contracts as well as future . . . . Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract.

*Id.* at 315-16. Thus, a moratorium could validly impair a contractual remedy, but only to the extent that the obligations provided within the contract remained unimpaired.

83. *Johnson v. Duncan*, 3 Mart. 530, 545 (La. 1815). The Louisiana legislation provided that "[n]o civil suit or action shall be commenced, or prosecuted, before any court of record, or any tribunal of the state, till the first of May next." *Id.* at 546.

84. *See Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921); *Gutttag v. Shatzkin*, 230 N.Y. 647, 130 N.E. 929 (1921); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 130 N.E. 601, *appeal denied*, 257 U.S. 665 (1921).

was enacted.<sup>85</sup>

The New York corrective legislation limited rentals to "reasonable" amounts and gave the courts authority to determine whether the rent charged was reasonable.<sup>86</sup> The legislation had only a prospective effect, allowing lease arrangements entered into before its enactment to remain unimpaired.<sup>87</sup> As leases expired, the legislation provided that landlords could not evict tenants who were willing to pay reasonable rents.<sup>88</sup>

Notwithstanding the prospective application of the New York legislation, a landlord's right to complete, unfettered contractual freedom was diminished. When brought under judicial scrutiny, the legislation was sustained by the New York Court of Appeals in *People ex rel. Durham Realty Corp. v. La Fetra*.<sup>89</sup> The court held that the state was justified in exercising its police power as a legitimate response to an emergency threatening the public welfare.<sup>90</sup> In *Marcus Brown Holding Co. v. Feldman*,<sup>91</sup> the United States Supreme Court also addressed the validity of the New York legislation, sustaining it as a valid exercise of the state's police power for the protection of the public interest.<sup>92</sup> In reconciling the New York legislation with the constraints of the contract clause, the Court stated: "Contracts are made subject to this exercise of power of the state when otherwise justified."<sup>93</sup> The Court's decision was premised on the existence of an emergency that threatened the public welfare. As Justice Holmes noted in a later decision, sustaining moratoria legislation enacted in response to an emergency "went to the verge of the law."<sup>94</sup>

### C. *Minnesota's First Experience with a Mortgage Foreclosure Moratorium*

By 1933, the mortgage debts in Minnesota posed a grave prob-

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85. For a general discussion of New York's rent control laws, see Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54 (1950).

86. See *La Fetra*, 230 N.Y. at 438-39, 130 N.E. at 604 (Pound, J.).

87. See *id.* at 440, 130 N.E. at 604.

88. See *id.* at 439, 130 N.E. at 604.

89. 230 N.Y. 429, 130 N.E. 601, *appeal denied*, 257 U.S. 665 (1921).

90. See *id.* at 436, 130 N.E. at 609.

91. 256 U.S. 170 (1921).

92. See *id.* at 198.

93. *Id.*

94. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (referring to the Court's earlier decision in *Block v. Hirsh*, 256 U.S. 135 (1921), which sustained a Washington, D.C. rent control law similar to the New York legislation).

lem. Over half of the farm land in Minnesota was mortgaged.<sup>95</sup> As William Prosser noted:

The increase in the value of the dollar, together with the almost complete collapse of farm prices, which had fallen below the cost of production, made it inevitable that these mortgages should be in default when payment fell due. The result was a constantly mounting wave of foreclosures and forced sales, which flooded the market and drove land values abruptly down, until in many counties land virtually could not be sold. This in turn caused an entire absence of competitive bidding at foreclosure sales, so that in most cases the mortgage holder was in a position to bid in the property at a nominal figure, and recover a deficiency judgment against the mortgagor for an amount almost equal to the unpaid debt.<sup>96</sup>

As a result of this crisis, foreclosed mortgagors were reduced to economic serfs.

In acknowledgement of the increasing public demand for an end to the malaise, remedial action was taken. One attempt involved the concept of "penny sales." When a farmer was foreclosed, neighboring farmers packed the sheriff's sale, purchased the assets for a penny, and resold the personal property to the foreclosed mortgagor. The courts created their own remedial device—the "upset price."<sup>97</sup> An upset price was a court-imposed minimum price for which the foreclosed property could be sold at a sheriff's sale.<sup>98</sup>

These homegrown remedies, however, failed to ameliorate the crisis and to allay the growing concerns of the public. Instances of mob activities and concerted protests were widespread.<sup>99</sup> When the Minnesota Legislature was about to convene in 1933, Governor Floyd B. Olson<sup>100</sup> was under significant pressure from state

95. See Prosser, *The Minnesota Mortgage Moratorium*, 7 S. CAL. L. REV. 353, 353-54 (1934); see also Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 334 (1983) (crisis on the farms stirred national debate for farm relief). Prosser noted that "[a] survey of farm mortgages in Minnesota . . . indicated that, in 1930, 53.8% of the owner-operated farms in Minnesota were mortgaged." Prosser, *supra*, at 354 n.10.

96. Prosser, *supra* note 95, at 354-55 (footnotes omitted).

97. See Nelson, *supra* note 39, at 154.

98. See *Brinckley v. Sager*, 232 Wis. 88, 286 N.W. 570 (1939).

99. See Prosser, *supra* note 95, at 355 n.18.

100. Governor Olson, described by a biographer as "more a rebel than a radical," was a natural to take up the cause of the disadvantaged. See G. MAYER, *THE POLITICAL CAREER OF FLOYD B. OLSON* 3 (1951). Olson was reared in a North Minneapolis slum where he acquired a life-long sympathy for the poor. See *id.* at 7. His concern for the economically disadvantaged was evidenced by earlier efforts with major Depression re-

leaders and the general public to address the crisis of farmers facing mortgage foreclosure.<sup>101</sup>

In response to the public clamor for relief, Governor Olson issued an executive order prohibiting county sheriffs from proceeding with foreclosure sales until the legislature adjourned.<sup>102</sup> Accompanying the Governor's order was the following message:

[The order is] not based upon a moratorium but it is based upon the necessity for preserving order within the boundaries of

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forms including a graduated state income tax and a ban on "yellow dog" contracts. *See id.* at 122-23.

101. *See* Prosser, *supra* note 95, at 355. Prosser described the scene facing Governor Olson as the legislative session commenced: "When the legislature assembled, a caravan of two or three thousand farmers descended upon St. Paul from southern Minnesota, in an astonishing array of antedeluvian automobiles, and swarmed over the capitol, making demands and threats and uttering dire predictions." *Id.* (footnotes omitted).

102. *See id.* The executive order provided:

'Whereas, many persons are at present unable to pay interest or principal payments due upon mortgages given by them upon their homes, particularly persons engaged in agricultural pursuits, because of an economic depression, the causes of which, and the remedies for which, are beyond their control, and

'Whereas, as a consequence thereof mortgage foreclosure proceedings are being had throughout the state of Minnesota upon the homes of such persons, and

'Whereas, many persons are unable for the same reason to pay interest or principal payments due upon notes secured by chattel mortgages upon furniture and upon livestock, agricultural produce and farm machinery, and

'Whereas, many of such persons and many other persons sympathetic to the plight of such persons about to lose their homes and personal property through such foreclosure proceedings, have undertaken by force to restrain such foreclosure proceedings, and

'Whereas, such attempted restraint is the act of persons otherwise obedient to law and order, and otherwise desirous of upholding the constitution and laws of the United States and of the State of Minnesota, and

'Whereas, under the constitution of Minnesota, it is the duty of the governor to 'take care that the laws be faithfully executed,' and,

'Whereas, it would be unwise and unjust in this present emergency to use the armed forces of the state of Minnesota to compel such foreclosure proceedings as may be instituted or are now instituted against such properties, and

'Whereas, the legislature of the state of Minnesota is now assembled and has the power and authority by adequate legislation to prevent injustice in such foreclosures by altering the procedure now prescribed for foreclosures:

'Now, therefore, it is hereby ordered that each and every sheriff and each and every constable and police officer of the state of Minnesota refrain and desist until May 1, 1933, or until further order from foreclosing or attempting to foreclose any mortgage upon any of the following properties situated in the state of Minnesota, to-wit:

'Real estate upon which the mortgagor has his residence, furniture and household goods used by a householder mortgagor.

'Farm machinery and livestock in use and possessed by a mortgagor actively engaged in farming.

'Agricultural produce in the hands of the producer thereof.'

*Suspension Runs to May 1 or "Until Further Order," Homes and Farms Involved*, St. Paul Dispatch, Feb. 24, 1933, at 1-2 [hereinafter cited as *Suspension*].

this state. 'I have refrained heretofore, from making such an order because I did not believe that I had the legal authority therefore until an acute situation developed in the State. Such an acute situation has now developed.'<sup>103</sup>

Although the executive order was later held unconstitutional,<sup>104</sup> it tempered public concern and stimulated legislative action.

With Governor Olson's executive order in place, the Minnesota Legislature convened and deliberated over various solutions to the mortgage foreclosure crisis.<sup>105</sup> After considerable compromise,<sup>106</sup> the Minnesota Mortgage Moratorium Act<sup>107</sup> (1933 Legislation) was passed on the last day of the legislative session.

The 1933 Legislation was premised on a legislative declaration of an economic emergency.<sup>108</sup> The legislation contained several principal provisions allowing mortgagors to seek a stay of the foreclosure proceedings by applying to the district court.<sup>109</sup> The 1933 Legislation authorized courts to overturn sheriffs' sales where the

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103. *Suspension*, *supra* note 102, at 1. The legislature hastily enacted a measure sustaining Governor Olson's order in the early days of the legislative session. The measure validated the acts of county sheriffs in postponing foreclosure sales. See Act of Mar. 2, 1933, ch. 44, 1933 Minn. Laws 46. Governor Olson seized the legislative initiative and sent the following telegram to county sheriffs:

House File 1279 passed by Minnesota Legislature and signed by me today authorizes you to postpone any sale upon the foreclosure of any real estate mortgage by action or advertisement for a period of ninety days or to any date subsequent to April thirtieth, nineteen thirty three without incurring any liability whatsoever upon your part stop Compliance with my proclamation of February twenty four, nineteen thirty three ordering you to cease and desist from the foreclosure of certain mortgages specified in my order necessarily follows stop With the assistance of your county attorney as requested by the Attorney General of Minnesota today you will prepare a notice of postponement in the case of each mortgage you have already postponed and in the case of each mortgage foreclosure the sale of which is set for a date prior to May first stop You will prepare a typewritten notice thereof sign it and post it at one of the entrance doors of the court house of your county stop This law also validates all postponements previously made by you without the necessity of any publication in any legal newspaper and without the necessity of any notice except the one hereinbefore referred to stop I greatly appreciate your past compliance with my Order and am sure of having your cooperation in the future, particularly in view of the fact that I have removed any possibility of legal liability on your part by reason of such compliance.

Telegram from Governor Floyd B. Olson to Minnesota County Sheriffs (Mar. 2, 1933) (on file in the William Mitchell Law Review Office).

104. See *State ex rel. Lichtscheidl v. Moeller*, 189 Minn. 412, 249 N.W. 330 (1933).

105. For a short summary of the various proposals brought before the legislature, see Prosser, *supra* note 95, at 356.

106. See *id.* at 360 n.55.

107. See Act of Apr. 18, 1933, ch. 339, 1933 Minn. Laws 514; see also Act of Apr. 22, 1933, ch. 422, 1933 Minn. Laws 798 (moratorium on contracts for deed).

108. See Act of Apr. 18, 1933, ch. 339, pt. I, § 1, 1933 Minn. Laws 514, 516.

109. See *id.* § 2, 1933 Minn. Laws at 516.

amount received for the property was inadequate<sup>110</sup> and to extend either the equitable or statutory periods of redemption.<sup>111</sup> The legislation also contained a provision prohibiting mortgagees from maintaining actions for deficiency judgments until the expiration of the statutory period of redemption.<sup>112</sup>

The constitutionality of the 1933 Legislation was promptly tested in *Home Building & Loan Association v. Blaisdell*.<sup>113</sup> The challenge arose out of a factual context probably not envisioned by Governor Olson or the legislature—foreclosure on a boarding house in urban Minneapolis.<sup>114</sup> Fourteen days before the period of statutory redemption was to expire, the mortgagor petitioned the Hennepin County District Court seeking relief under the 1933 Legislation.<sup>115</sup> The trial court upheld the 1933 Legislation and its decision was affirmed by the Minnesota Supreme Court.<sup>116</sup>

On appeal, the United States Supreme Court sustained the validity of the 1933 Legislation.<sup>117</sup> In upholding the legislation against the challenge that it violated the contract clause of the Constitution, the Court stated:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grant of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.<sup>118</sup>

The Court's statement is significant: the Constitution, whether it be the contract clause or any other provisions, may not be suspended by the existence of an emergency. Rather, "the reservation of the reasonable exercise of the protective power of the State is read into all contracts . . . ."<sup>119</sup>

The Court's decision in *Blaisdell* rested upon five essential crite-

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110. *See id.* § 3, 1933 Minn. Laws at 517.

111. *See id.* § 4, 1933 Minn. Laws at 517-19.

112. *See id.*

113. 189 Minn. 422, 249 N.W. 334 (1933), *aff'd*, 290 U.S. 398 (1934).

114. *Blaisdell*, 290 U.S. at 420. The boarding house contained fourteen rooms, three of which the mortgagor and his family occupied. Thus, the property was the mortgagor's homestead and properly subject to relief under the 1933 Legislation. *See id.*

115. *See id.* at 419.

116. *Blaisdell*, 189 Minn. 422, 249 N.W. 334.

117. *Blaisdell*, 290 U.S. 398.

118. *Id.* at 425.

119. Prosser, *supra* note 95, at 365.

ria: (1) the existence of an emergency; (2) legislation addressed to a legitimate societal interest; (3) appropriate relief afforded only on reasonable conditions; (4) reasonable protection of those whose contractual rights are impaired; and (5) legislation of limited duration.<sup>120</sup> Upon these criteria, Minnesota's first experience with a mortgage foreclosure moratorium was sustained and the framework for enacting a similar moratorium fifty years later was established.

#### IV. THE SCOPE OF MINNESOTA'S MORATORIUM ON MORTGAGE FORECLOSURE

The scope of the Act is limited to homestead property,<sup>121</sup> whether it be agricultural or residential.<sup>122</sup> The Act is retroactive, covering property encumbered by first mortgages<sup>123</sup> or contracts

120. See *Blaisdell*, 290 U.S. at 444-47.

121. Act of May 23, 1983, ch. 215, § 6, 1983 Minn. Laws 654, 655 (codified at MINN. STAT. § 583.03 (Supp. 1983)). The term "homestead" is defined as "residential or agricultural real estate, a portion or all of which is entitled to receive homestead credit under section 273.13, subdivision 15a." *Id.* § 5, 1983 Minn. Laws at 655 (codified at MINN. STAT. § 583.02 (Supp. 1983)). One commentator noted that owners of manufactured homes may seek relief under the Act given the definition of "homestead." See Knapp, *supra* note 7, at 194; see also Telephone interview with Mr. Joe Chrastil, Citizens Organizations Acting Together (COACT) (Dec. 22, 1983) (mobile homeowners have received relief under the Act).

122. See Act of May 23, 1983, ch. 215, § 5, 1983 Minn. Laws 654, 655 (codified at MINN. STAT. § 583.02 (Supp. 1983)). Foreclosure of agricultural property has received considerable attention recently. In 1981, the earnings of Minnesota farmers plunged to their lowest levels in more than a decade. Brandt, *Farm earnings rise 77 pct., but are still low*, Minneapolis Star & Trib., June 14, 1983, at 1B, col. 1. Farmers were also plagued by high property taxes and decreasing land values. See Klauda, *Property tax, land price drop whipsaws farmers*, Minneapolis Star & Trib., Mar. 25, 1984, at 1D, col. 6. The FmHA, often called the credit agency of last resort for farmers who cannot get loans elsewhere, was temporarily enjoined from foreclosing farm property through the balance of 1983. See Kendall, *FmHA offices ordered to halt foreclosures for rest of year*, Minneapolis Star & Trib., Nov. 17, 1983, at 6B, col. 1; see also *Court forbids foreclosing of 7 farm loans*, Minneapolis Star & Trib., July 1, 1983, at 3B, col. 3. For a discussion of the current injunction prohibiting the FmHA from foreclosing farm real estate, see *infra* note 157. To compound the FmHA's troubles, even when it was not enjoined from foreclosing by a court, it was thwarted by a local sheriff who refused to conduct a sale of farm property. See Brandt, *Wisconsin sheriff holds up FmHA on nonjudicial farm foreclosures*, Minneapolis Star & Trib., June 26, 1983, at 1D, col. 1.

123. Act of May 23, 1983, ch. 215, § 6, 1983 Minn. Laws 654, 655 (codified at MINN. STAT. § 583.03, subd. 1 (Supp. 1983)). Proponents of the Act attempted to extend the relief provisions to include second mortgages as well during the 1984 legislative session. See *Tape Recording of H.F. 2036 Before the House Judiciary Committee* (1984) (testimony of Rep. Ellioff). Lobbyists for the banking industry opposed inclusion of second mortgages in the Act's relief provisions, arguing that many second mortgages were given to secure funds to

for deed<sup>124</sup> executed prior to its enactment.<sup>125</sup> It also covers mortgages and contracts for deed that have been extended or renewed for less than one year after its enactment.<sup>126</sup> Furthermore, the Act applies to mortgages held by federal agencies.<sup>127</sup> The relief provided by the Act is available only once to a mortgagor or vendee on a particular piece of property.<sup>128</sup> Finally, the Act has a limited duration.<sup>129</sup>

The Act permits mortgagors and vendees to obtain an ex parte stay of foreclosure or termination, thus extending the period of equitable redemption.<sup>130</sup> It also provides for a delay in the sale of

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travel and send children through college. *See id.* (testimony of Mike George and John Corbitt). Second mortgages, therefore, were not included in the Act. *See id.*

124. Act of May 23, 1983, ch. 215, § 6, 1983 Minn. Laws 654, 655 (codified at MINN. STAT. § 583.03, subd. 2 (Supp. 1983)).

125. *Id.*

126. *Id.*

127. *Id.* (codified at MINN. STAT. § 583.03, subd. 1 (Supp. 1983)). This provision is considerably different from the Act's predecessor which specifically excluded such mortgages from relief. *See* Act of Apr. 18, 1933, ch. 339, preamble, 1933 Minn. Laws 514, 514-15; *see also* *Leuthold v. Des Moines Jt. Stock Land Bank*, 197 Minn. 132, 266 N.W. 450 (1936); *Weisman v. Massachusetts Mut. Life Ins. Co.*, 196 Minn. 574, 265 N.W. 431 (1936). Inclusion of federal mortgages in the Act raises concern over the possible violation of the supremacy clause of the United States Constitution. *See* U.S. CONST. art. VI. The preemptive effects of federal regulations over state mortgage foreclosure law are beyond the scope of this Article. For a brief analysis of the ramifications of preemption, *see* Knapp, *supra* note 7, at 199-200.

Notwithstanding the legal concerns over preemption, the Act also has an impact on the availability of mortgage money in Minnesota from federal agencies and an effect on the secondary mortgage market for mortgages originated by Minnesota lenders. At hearings on the extension of the Act, Mike George, a representative of the Mortgage Lenders Association of Minnesota, noted that two-thirds of mortgage money in Minnesota comes from outside the state. *See Tape Recording of Hearings on H.F. 2036 Before the House Judiciary Committee* (1984) (testimony of Mike George). Mr. George stated that if the legislature continues to impair the ability of mortgagees to foreclose, federal lenders could take action to dry up mortgage money in the state. Mr. George noted a recent example of a federal agency response to earlier Minnesota legislative efforts prohibiting the enforceability of due-on-sale clauses—the Federal Home Loan Mortgage Corporation's red-lining of Minnesota at a cost of nearly \$300 million in mortgage money. *See id.* John Corbitt, a representative of the Savings League of Minnesota, testified at the same hearings that the Act has had an effect on the ability of Minnesota lenders to sell mortgages in the secondary mortgage market. *See id.* (testimony of John Corbitt). Once the ability to sell mortgages on the secondary market is hindered, it is difficult for Minnesota lenders to obtain funds to originate future mortgage loans. *See id.*

128. *See* Act of May 23, 1983, ch. 215, § 14, 1983 Minn. Laws 654, 657-58 (codified at MINN. STAT. § 583.11 (Supp. 1983)).

129. The Act was originally limited to 13 months. *Id.* § 16, 1983 Minn. Laws at 658. The Act has recently been extended for 12 months. *See supra* note 4.

130. *See id.* § 7, 1983 Minn. Laws at 655-56 (codified at MINN. STAT. § 583.04 (Supp. 1983)).



property, further lengthening the equitable period of redemption.<sup>131</sup> The result of the stay and the delay of sale allows the mortgagor or vendee to reinstate the mortgage or contract by paying only the arrearages, rather than having to obtain outside financing in order to redeem.<sup>132</sup>

Extension of the period of equitable redemption, however, is accompanied by a corresponding reduction of the statutory period of redemption.<sup>133</sup> The Act also provides that "in no event shall the [statutory] redemption period be less than 30 days."<sup>134</sup> Therefore, when all of its various provisions are taken together, the Act provides for only thirty days of relief to qualifying mortgagors or vendees. Nevertheless, the allocation of the relief between the periods of equitable and statutory redemption is significant, since defaulting mortgagors and contract vendees can postpone the actual sale of their property.

#### A. *Blanket Relief Provisions*

The Act contains several provisions affecting foreclosure and termination procedures which apply regardless of any affirmative action by the mortgagor or contract vendee. These provisions extend the period of equitable redemption, delaying foreclosure or termination.

The Act simplifies the notice provision for terminating a contract for deed contained in Minnesota Statutes section 559.21 and provides for either a sixty or ninety-day period.<sup>135</sup> A defaulting contract vendee is entitled to ninety days notice if the contract was entered into after May 1, 1980 and he has paid twenty-five percent

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131. *Id.*

132. Mortgagors may reinstate the mortgage at any time before the property is sold by paying the arrearages. *See* MINN. STAT. § 580.30 (1982); *see also supra* note 54 (description of what constitutes arrearages for purposes of reinstatement). Contract vendees may also reinstate the contract at any time before the expiration of the notice period. *See* MINN. STAT. § 559.21, subd. 4 (1982). To reinstate, the contract vendee "makes all payments due and owing to the vendor under the contract through the date payment is made and pays the costs of service, the mortgage registration tax, if actually paid by the vendor, and attorneys' fees . . ." *Id.*

133. Act of May 23, 1983, ch. 215, § 10, 1983 Minn. Laws 654, 656-57 (codified at MINN. STAT. § 583.07 (Supp. 1983)).

134. *Id.*

135. *Id.* § 2, 1983 Minn. Laws at 654 (codified at MINN. STAT. § 559.21, subd. 6 (Supp. 1983)). The ninety-day period did not change existing law. *See, e.g.*, MINN. STAT. § 559.21, subd. 2 (1982).

or more of the purchase price.<sup>136</sup> All other defaulting vendees are entitled to a minimum of sixty days notice prior to termination.<sup>137</sup>

The procedure for foreclosing a mortgage is also altered by the Act. The notice of default requirement is extended from thirty to sixty days,<sup>138</sup> thus providing the defaulting mortgagor additional time within which to cure his default.<sup>139</sup> Where published notice is required, the length of notice is extended from six to eight weeks.<sup>140</sup>

### *B. Relief Provisions Available by Petition*

Under the Act, defaulting mortgagors and contract vendees may petition the district court to delay the sale of the property or postpone termination of the contract, thus extending the redemptory periods.<sup>141</sup> Petition may be made by a defaulting mortgagor<sup>142</sup> "at any time after the issuance of the notice of the foreclosure proceedings and prior to the sale"<sup>143</sup> of the property, or

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136. See Act of May 23, 1983, ch. 215, § 2, 1983 Minn. Laws 654, 654 (codified at MINN. STAT. § 559.21, subd. 6 (Supp. 1983)).

137. See *id.*

138. See *id.* § 1, 1983 Minn. Laws at 654 (codified at MINN. STAT. § 47.20, subd. 15 (Supp. 1983)). This provision extends the thirty-day requirement of Minnesota Statutes section 47.20, subdivision 8(3)(c). Thus, the minimum period of equitable redemption is now sixty days.

139. See MINN. STAT. § 580.03 (1982).

140. See Act of May 23, 1983, ch. 215, § 3, 1983 Minn. Laws 654, 654 (codified at MINN. STAT. § 580.031 (Supp. 1983)).

141. *Id.* § 7, 1983 Minn. Laws at 655-56 (codified at MINN. STAT. § 583.04 (Supp. 1983)). The petition must be filed in the district court of the county where the mortgage foreclosure proceedings are pending. See *id.*

142. *Id.* An owner in possession of the mortgaged premises, anyone claiming under the mortgage, or anyone liable for the mortgage debt may petition for relief under the Act. See *id.*

143. *Id.* This provision is slightly different from the Act's predecessor which permitted a mortgagor to apply for relief after foreclosure proceedings were commenced and before the expiration of the period of statutory redemption. See Act of Apr. 18, 1933, ch. 339, pt. I, § 2, 1933 Minn. Laws 514, 516.

The provision raises a strategic question of whether to file a petition after receipt of notice of default or after receipt of a notice of sale. Robert Snyder, an attorney with the Agricultural Extension Service of the University of Minnesota, has described the choices available to eligible mortgagors:

The advantage of waiting is that the Notice of Sale establishes a definite date from which the six- or twelve-month delay can be measured. If the foreclosure proceedings are stopped prior to publication of the Notice of Sale, no sale date has yet been established. The court may decide to measure the six- or twelve-month delay from the date of the hearing on the postponement instead of from the date of a theoretical sale date that might have been established if the foreclosure proceedings had not been halted. This will reduce the time gained by the postponement.

by a defaulting vendee<sup>144</sup> where the contract has not yet been terminated.<sup>145</sup> Mortgagors may request postponement of the foreclosure sale for up to six months,<sup>146</sup> or in the case of a farm homestead situated on more than ten acres, for up to twelve months.<sup>147</sup> Contract vendees may request a delay in the contract termination for up to ninety days.<sup>148</sup>

Petitioning the district court operates as an ex parte stay on further foreclosure or termination proceedings for a period of up to thirty days.<sup>149</sup> The Act provides that “[u]pon receiving the petition, the court shall order a stay in the foreclosure proceedings until after the hearing on the petition.”<sup>150</sup> The Act also provides that a hearing on the petition must be held within thirty days.<sup>151</sup> Thus, a defaulting mortgagor or vendee can bring the foreclosure or termination proceedings to a grinding halt simply by filing a petition with the court.

Foreclosing mortgagees and terminating contract vendors are compensated for the ex parte stay. The defaulting mortgagor or contract vendee must pay the foreclosing or terminating party the actual costs, including attorneys’ fees, incurred in the foreclosure or termination proceeding before postponement.<sup>152</sup> The foreclosing mortgagee and the terminating vendor must also be served

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R. SNYDER, SELF-HELP RELIEF FROM MORTGAGE FORECLOSURE 5 (1984). Mr. Snyder notes, however, that “[t]he disadvantage of waiting until the Notice of Mortgage Foreclosure Sale has been published is that obtaining the postponement will be more costly.” *Id.* The costs that Mr. Snyder referred to are those which a petitioning mortgagor must pay to the clerk of court to stay the proceedings. *See infra* note 152 and accompanying text. If the mortgagor waits until after receipt of the notice of sale, attorneys’ fees, which constitute the bulk of the required costs, will be increased. *See R. SNYDER, supra*, at 5.

144. Act of May 23, 1983, ch. 215, § 7, 1983 Minn. Laws 654, 655-56 (codified at MINN. STAT. § 583.04 (Supp. 1983)). Persons claiming under the contract or liable for the contract payment may also apply for relief. *See id.*

145. *Id.*

146. *See id.*

147. *Id.*

148. *See id.*

149. *See Knapp, supra* note 7, at 195.

150. *See Act of May 23, 1983, ch. 215, § 7, 1983 Minn. Laws 654, 655-56 (codified at MINN. STAT. § 583.04 (Supp. 1983)).*

151. *See id.* § 13, 1983 Minn. Laws at 657 (codified at MINN. STAT. § 583.10 (Supp. 1983)).

152. *See id.* § 7, 1983 Minn. Laws at 655-56 (codified at MINN. STAT. § 583.04 (Supp. 1983)) (payment is actually made to the clerk of court); *see also Knapp, supra* note 7, at 195-96 (raises issue of whether attorneys’ fees are actually required). If the Act were amended to permit mortgagors and contract vendees to seek relief before the mortgagee or contract vendor initiated foreclosure proceedings, these costs could be substantially reduced or eliminated.

with a verified complaint, a copy of which must be filed with the court before the stay is ordered.<sup>153</sup>

## V. STANDARDS FOR AWARDING RELIEF

### A. *Standards Under the Act*

The Act sets standards for awarding relief, providing that the court "may" consider certain criteria in determining whether to order a delay in the mortgage foreclosure or the contract termination.<sup>154</sup> These criteria are: "(1) that the petitioner is unemployed, underemployed or facing economic problems due to low farm commodity prices; and (2) that the petitioner has an inability to make payments on the mortgage or contract for deed."<sup>155</sup> The court is not compelled to consider these criteria, but is empowered to do so at its discretion. This approach is essentially the same as that used under the Act's predecessor, the 1933 Legislation, which allowed the courts to self-style their standards.<sup>156</sup> Since the Act provides little direction in determining whether to fashion relief, the courts should look beyond the Act's criteria to sweep deserving farmers and homeowners under the umbrella of the Act's relief.

### B. *Other Standards for Consideration*

An examination of analogous moratoria legislation illustrates the inadequacy of Minnesota's standards for awarding relief. Two more detailed moratoria are presently available: the Farmers Home Administration moratorium policy<sup>157</sup> (FmHA Moratorium)

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153. See Act of May 23, 1983, ch. 215, § 7, 1983 Minn. Laws 654, 655-56 (codified at MINN. STAT. § 583.04 (Supp. 1983)).

154. See *id.* § 8, 1983 Minn. Laws at 656 (codified at MINN. STAT. § 583.05 (Supp. 1983)).

155. *Id.*

156. Under the 1933 Legislation, courts were entitled to award relief if it was "equitable and just to do so." See Act of Apr. 18, 1933, ch. 339, pt. I, § 2, 1933 Minn. Laws 514, 516. One standard the courts developed under the 1933 Legislation was that the mortgagor must have considerable equity before relief was granted. See, e.g., *Hoey v. First Nat'l Bank & Tr. Co.*, 200 Minn. 366, 274 N.W. 239 (1937); *Falk v. Massachusetts Mut. Life Ins. Co.*, 196 Minn. 341, 265 N.W. 60 (1936); *Shepard v. Midland Lumber & Coal Co.*, 196 Minn. 78, 264 N.W. 126 (1936); *Rivkin v. Niles*, 195 Minn. 635, 263 N.W. 920 (1936).

157. The FmHA currently has three different moratoria on mortgage foreclosure. See, e.g., 7 U.S.C. § 1981a (1978); 7 C.F.R. §§ 1951.33, 1915.313 (1983). Section 1981a provides that the FmHA may not foreclose mortgages securing farm loans upon a determination that, "due to circumstances beyond the borrower's control," the borrower is temporarily unable to continue making scheduled payments without unduly impairing his or her standard of living. 7 U.S.C. § 1981(a) (1978). This moratorium has been subject to considerable judicial debate in recent years because the Secretary of Agriculture has failed

and recent moratoria legislation in Connecticut<sup>158</sup> (Connecticut Moratorium). The federal Emergency Housing Act of 1975<sup>159</sup> (Emergency Moratorium) expired of its own volition in 1977,<sup>160</sup> but also contained detailed criteria.

The FmHA Moratorium provides the most detailed criteria. It states that a defaulting mortgagor is entitled to relief upon a determination that, "due to circumstances beyond the borrower's control, the borrower is unable to continue making scheduled payments without unduly impairing his or her standard of living."<sup>161</sup> The term "unduly impaired standard of living" is defined as "a condition whereby the borrower, due to circumstances beyond the borrower's control, is unable to pay normal living expenses and scheduled payments as provided by the loan documents."<sup>162</sup> To show that his standard of living is impaired, a borrower "must present evidence that the inability to repay the loan will probably last for a period of 6 months or more and that income will be available to resume payment after the moratorium period."<sup>163</sup>

To ascertain "circumstances beyond the borrower's control," the FmHA Moratorium provides for examination of factors causing "substantial reduction of income"<sup>164</sup> and factors causing extraordi-

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to promulgate regulations specifying the standards for determining when relief is available and the procedures for obtaining such relief. As a result, the Secretary has been required to promulgate regulations before the FmHA can foreclose mortgages securing farm loans. *See Allison v. Block*, 723 F.2d 631, 638 (8th Cir. 1983); *Jacoby v. Schuman*, 568 F. Supp. 843, 846 (E.D. Mo. 1983); *Matzke v. Block*, 564 F. Supp. 1157, 1166-67 (D. Kan. 1983); *Curry v. Block*, 541 F. Supp. 506, 523-26 (S.D. Ga. 1982). *But see Neighbors v. Block*, 564 F. Supp. 1075, 1079-80 (E.D. Ark. 1983) (Congress did not intend the establishment of standards and procedures for section 1981a).

The second FmHA moratorium is contained in title 7, section 1951.33 of the Code of Federal Regulations and allows county supervisors to either consolidate, reschedule, or defer installments due on existing farm operating loans. *See* 7 C.F.R. § 1951.33(b) (1983).

The third FmHA moratorium, and the one referred to in this Article, is contained in title 7, section 1951.313 of the Code of Federal Regulations. Section 1951.313 authorizes a moratorium on principal and interest payments on single-family rural housing loans. *See id.* § 1951.313.

158. Act of June 9, 1983, Pub. Act No. 83-547, §§ 6-12, 1983 Conn. Legis. Serv. Jan. Sess. 1795, 1800-02 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, §§ 71-77, 82, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2234-38, 2241 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 299 (West Supp. 1984).

159. 12 U.S.C. §§ 2701-2712 (1976).

160. *See id.* § 2708(b).

161. 7 C.F.R. § 1951.313 (1983).

162. *Id.* § 1951.313(a)(2).

163. *Id.*

164. *See id.* § 1951.313(a)(2)(i).

nary expenses which may result in a lien being placed on the borrower's dwelling.<sup>165</sup> Elements to be considered in determining the existence of the first general factor include: (1) unemployment or underemployment;<sup>166</sup> (2) "[l]oss or reduction in benefits which constituted a substantial part of the [borrower's] annual income . . . ;"<sup>167</sup> (3) "[i]llness, injury, or death of the borrower or other adult who contributed to annual income . . . ;"<sup>168</sup> and (4) situations where a spouse has lived apart from the financed dwelling due to divorce<sup>169</sup> or broken marriage.<sup>170</sup> The second general factor is described as the "need to pay certain essential family expenses which have resulted or may result in a lien being placed on the borrower's dwelling, and which if not paid are likely to result in the loss of the dwelling."<sup>171</sup> Expenses contemplated under this factor include those resulting from: "(A) Accident, illness, or injury to the borrower or dependent member of the borrower's family, or (B) Death of a member of the borrower's family, or (C) Cost or repairs for uninsured damage to the security if the loss occurred because adequate insurance coverage was not available."<sup>172</sup>

The standards for relief set forth in the FmHA Moratorium provide a comprehensive approach to delineating potential grounds for relief. In contrast, the Act fails to articulate detailed standards. Minnesota courts are given two broad standards upon which to afford relief, but are not encouraged to look beyond these criteria to factors similar to those contemplated by the FmHA Moratorium. Thus, mortgagors and contract vendees may not be granted relief even though they are deserving. Therefore, Minnesota courts should look past the Act's criteria to those used in other jurisdictions' moratoria to award appropriate relief to Minnesota farmers and homeowners.

## VI. BALANCING OF INTERESTS

The ultimate relief available under the Act, a delay in the sale

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165. *See id.* § 1951.313(a)(2)(ii).

166. *Id.* § 1951.313(a)(2)(i)(A).

167. *Id.* § 1951.313(a)(2)(i)(B).

168. *Id.* § 1951.313(a)(2)(i)(C).

169. *See id.* § 1951.313(a)(2)(i)(D).

170. *See id.* § 1951.313(a)(2)(i)(E).

171. *Id.* § 1951.313(a)(2)(ii).

172. *Id.*

of the property,<sup>173</sup> is further constrained by the requirement that the mortgagor or contract vendee make some partial payment during the delay.<sup>174</sup> Thus, what the Act provides in one section, it limits in another, effectively mitigating any potential relief. The determination of partial payment is made by the court with little direction other than it must be "just and equitable."<sup>175</sup> The Connecticut Moratorium offers an alternative to this approach for determining partial payment.

#### A. *Partial Payment Under the Act*

The Act requires the court to determine an amount of partial payment on the debt to be paid by the petitioning party.<sup>176</sup> The court must ascertain the income or rental value for the payment of taxes, insurance, and interest and principal on the debt.<sup>177</sup> Once this valuation is made, the court must assess all or part of the amount against the defaulting party and establish the dates on which such payments must be made to the mortgagee or contract vendor.<sup>178</sup> The Act attempts to assist the court in reaching this determination, providing: "In determining the amount of income or rental value to be paid, the court may consider the relative financial conditions and resources of the parties and the ability of the mortgagor or contract vendee to pay."<sup>179</sup> The Act offers further guidance to the court by providing that a determination is proper if made in a "just and equitable manner."<sup>180</sup>

The Act clarifies its definition of a "just and equitable manner," providing that, in the case of contracts for deed, the court "insure the payment required by the contract vendee is sufficient to adequately maintain the vendor's standard of living."<sup>181</sup> Undoubtedly, the legislature contemplated individual vendors as opposed to corporations or other business entities in enacting this provision. Since the Act does not provide similar protection for an individual mortgagee's standard of living, the legislature apparently was either

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173. See Act of May 23, 1983, ch. 215, § 10, 1983 Minn. Laws 654, 656-57 (codified at MINN. STAT. § 583.07 (Supp. 1983)).

174. See *id.* § 11, 1983 Minn. Laws at 657 (codified at MINN. STAT. § 583.08 (Supp. 1983)).

175. See *id.*

176. See *id.*

177. *Id.*

178. See *id.*

179. *Id.*

180. *Id.*

181. *Id.* "Standard of living," however, is not clearly defined in the Act.

unaware of his existence or unconcerned by his plight.<sup>182</sup>

Finally, the Act limits all relief granted by providing that:

No postponement or extension shall be ordered under conditions which would substantially diminish or impair the value of the contract or obligation of the person against whom the relief is sought without reasonable allowance to justify the exercise of the police power . . . or which would cause irreparable harm or undue hardship to any mortgagee, contract vendor, judgment creditor, or their successors or assigns.<sup>183</sup>

This provision was undoubtedly included to give the Act constitutional imprimatur.<sup>184</sup> When combined with the other limitations set forth, the provision works to engulf the relief available on the face of the Act.

### *B. Partial Payment Under the Connecticut Moratorium: A Comparison*

The Connecticut Moratorium<sup>185</sup> also attempts to balance the competing interests of mortgagors and mortgagees. This balancing is somewhat easier for Connecticut courts to accomplish than the balancing suggested under the Act because the Connecticut Moratorium covers only mortgages held by institutional lenders.<sup>186</sup>

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182. Under the 1933 Legislation, Act of Apr. 18, 1933, ch. 339, 1933 Minn. Laws 514, courts were cognizant of the rights of individual mortgagees in awarding relief to defaulting mortgagors. See *Frissel Co. v. O'Brien*, 204 Minn. 398, 283 N.W. 756 (1939); *Hoey v. First Nat'l Bank & Tr. Co.*, 200 Minn. 366, 274 N.W. 239 (1937); *First Nat'l Bank v. Hammill*, 195 Minn. 185, 262 N.W. 160 (1935); *Young v. Penn Mut. Life Ins. Co.*, 192 Minn. 446, 256 N.W. 906 (1934). The drafters of the Act apparently looked to this line of cases in providing for protection of the contract vendor. The legislature either overlooked individual mortgagees in excluding them from similar protection or the legislature's rationale for excluding mortgagees, in light of a strong judicial concern over their interest, was nonsensical.

183. Act of May 23, 1983, ch. 215, § 14, 1983 Minn. Laws 654, 657-58 (codified at MINN. STAT. § 583.11 (Supp. 1983)).

184. See *supra* note 11 and accompanying text.

185. Act of June 9, 1983, Pub. Act No. 83-547, §§ 6-12, 1983 Conn. Legis. Serv. Jan. Sess. 1795, 1800-02 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, §§ 71-77, 82, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2234-38, 2241 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 299 (West Supp. 1984).

186. See *id.* § 7, 1983 Conn. Legis. Serv. Jan. Sess. at 1800 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, § 72, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2235 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 300 (West Supp. 1984). The Connecticut Moratorium originally affected only financial institutions which it defined as "a state bank and trust company, savings bank, savings and loan association, credit union, or any federally chartered banking institution." *Id.* § 6(5), 1983 Conn. Legis. Serv. Jan. Sess. at 1800 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, § 71(5), 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2235 (West). The moratorium was amended to apply to "lenders" instead of "financial institutions." A lender is defined as "any person who makes or holds mortgage loans in the ordinary course of business and



The Connecticut Moratorium requires the court to consider "any substantial prejudice to the lender" in awarding relief.<sup>187</sup> It also grants the court discretion to order partial payment by the mortgagor.<sup>188</sup> The amount of payment ordered by the court cannot exceed twenty-five percent of the mortgagor's net income per month.<sup>189</sup> This provision is designed to "demonstrat[e] the homeowner's good faith effort to reduce his mortgage indebtedness."<sup>190</sup>

Connecticut's moratorium works well in balancing the interests of the parties. The discretionary nature of its partial payment statute stands in stark contrast to the Minnesota Act's mandatory provision.<sup>191</sup> Furthermore, the twenty-five percent limitation on partial payment fixes the maximum amount that a defaulting mortgagor must pay during the relief period. The twenty-five percent cap also makes it easier for the court to ascertain a proper amount of partial payment. The court can order the maximum partial payment of twenty-five percent of the mortgagor's net income, unless the mortgagor demonstrates that the amount should be less. Thus, Connecticut courts are not burdened with the assignment of determining a "just and equitable" amount of partial payment as are the Minnesota courts.<sup>192</sup>

## VII. READING BETWEEN THE LINES

Although the Act is rather circuitous in providing only thirty days of relief, it unintentionally affects other areas of Minnesota real property law. One area affected by the Act is the six or

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who is the holder of any first mortgage on residential real estate which is the subject of a foreclosure action." Act of June 29, 1983, Pub. Act No. 83-29, § 71(5), 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2235 (West) (amending Act of June 9, 1983, Pub. Act No. 83-547, § 6(5), 1983 Conn. Legis. Serv. Jan. Sess. 1795, 1800 (West)), *reprinted in* CONN. GEN. STAT. ANN. ch. 547 app. at 300 (West Supp. 1984). The new definition is narrow enough to include only institutional lenders.

187. Act of June 9, 1983, Pub. Act No. 83-547, § 8(c)(5), 1983 Conn. Legis. Serv. Jan. Sess. 1795, 1800-01 (West), *as amended by* Act of June 29, 1983, Pub. Act No. 83-29, § 73(c)(5), 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2236 (West), *reprinted in* CONN. GEN. STAT. ANN. ch. 547 app. at 300-01 (West Supp. 1984).

188. *Id.* § 10, 1983 Conn. Legis. Serv. Jan. Sess. at 1801 (West), *as amended by* Act of June 29, 1983, Pub. Act No. 83-29, § 75, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2237 (West), *reprinted in* CONN. GEN. STAT. ANN. ch. 547 app. at 302 (West Supp. 1984).

189. *Id.*

190. *Id.*

191. *Compare id. with* Act of May 23, 1983, ch. 215, § 11, 1983 Minn. Laws 654, 657 (codified at MINN. STAT. § 583.08 (Supp. 1983)).

192. Under the Act, the court *must* order some amount of partial payment and the burden of assessing the amount falls on the court. *See* Act of May 23, 1983, ch. 215, § 11, 1983 Minn. Laws 654, 657 (codified at MINN. STAT. § 583.08 (Supp. 1983)).

twelve-month period of statutory redemption provided in Minnesota Statutes section 580.23.<sup>193</sup> Another affected area is the enforceability of the power of sale clause contained in most mortgages. Finally, the Act's provisions may become permanent or lay the groundwork for an immutable extension of existing redemptory or reinstatement provisions.

#### *A. Statutory Redemption: Section 580.23*

Minnesota Statutes section 580.23 sets forth two distinct periods of statutory redemption. The section provides for a period of six months,<sup>194</sup> unless one of three conditions is met:

- (a) The mortgage was executed prior to July 1, 1967, or;
- (b) The amount claimed to be due and owing as of the date of the notice of foreclosure sale is less than 66 2/3 percent of the original principal amount secured by the mortgage; or,
- (c) The mortgaged premises, as of the date of the execution of the mortgage, exceeded ten acres in size.<sup>195</sup>

If one of the three conditions is satisfied, the period of redemption is twelve months.<sup>196</sup> This section governs the length of statutory redemption regardless of the method of foreclosure.<sup>197</sup>

Section 580.23 also limits the ability of mortgagees to maintain actions for deficiency judgments against defaulting mortgagors. If the six-month period applies, the mortgagee purchasing at the foreclosure sale waives his right to a deficiency judgment.<sup>198</sup> The prospect of being barred from a deficiency judgment is particularly alarming to a mortgagee in a declining real estate market, because the possibility of having the purchase price at the foreclosure sale bid up to the amount of the mortgage declines correspondingly. Deficiency judgments are available, however, if the twelve-month redemptory period is available under section 580.23.<sup>199</sup> Thus, in many instances, the incentive exists for mortgagees to attempt to apply the twelve-month period.

In *American National Bank v. Blaeser*,<sup>200</sup> the Minnesota Supreme

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193. See MINN. STAT. § 580.23 (1982).

194. See *id.* § 580.23, subd. 1.

195. *Id.* § 580.23, subd. 2.

196. *Id.*

197. See *id.* § 581.10 (redemption periods specified in section 580.23 also apply to foreclosure by action).

198. *Id.* § 580.23, subd. 1.

199. See *id.* § 580.23, subd. 2.

200. 326 N.W.2d 163 (Minn. 1982).

Court addressed an attempt by a mortgagee to use the twelve-month period of redemption to obtain a deficiency judgment. Although the mortgaged property in *Blaeser* did not meet one of the three conditions necessary to qualify for a twelve-month redemptory period,<sup>201</sup> the mortgagee specified in the foreclosure documents that twelve months was the applicable period.<sup>202</sup> The mortgagee foreclosed by advertisement after the mortgagor defaulted.<sup>203</sup> The property was eventually sold at a sheriff's sale and the mortgagee was the highest bidder.<sup>204</sup> The proceeds of the sale, however, were considerably less than the amount of the note.<sup>205</sup> Therefore, the mortgagee commenced a suit against the mortgagor for a deficiency judgment.<sup>206</sup>

The *Blaeser* court held that the mortgagee was not entitled to maintain an action for a deficiency judgment.<sup>207</sup> The court's holding was premised on the language of section 580.23 which it found to prohibit unambiguously a mortgagee's election between the six or twelve-month period.<sup>208</sup> The court also relied on its perception of the legislature's intent in enacting section 580.23: "The statute manifests legislative intent that the redemption period be 6 months unless the facts dictate the application of the exceptions set out in subd. 2."<sup>209</sup> Thus, under the *Blaeser* rationale, a mortgagee may not elect between the six or twelve-month period. Rather, the period of redemption will be six months unless the property qualifies under one of the three conditions for the twelve-month period.

Although *Blaeser* was decided before the Act, the decision may have been mitigated by the Act, which provides: "If the parties to a foreclosure action agree in writing to a compromise settlement thereof, or of composition of the mortgage indebtedness, or both, the court shall have jurisdiction and may by its order confirm and approve the settlement or composition, or both, as the case may be."<sup>210</sup> Since the very nature of the relief provided by the Act is the extension of time, this provision is apparently broad enough to

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201. See *supra* note 195 and accompanying text.

202. 326 N.W.2d at 164.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See *id.* at 165.

208. See *id.*

209. *Id.*

210. Act of May 23, 1983, ch. 215, § 9, 1983 Minn. Laws 654, 656 (codified at MINN. STAT. § 583.06 (Supp. 1983)).

contemplate a compromise regarding the length of the redemptory period. The objective of any petitioning mortgagor is to obtain more time to either cure the default or redeem the foreclosed property. The trade-off for the mortgagee is the ability to obtain a deficiency judgment.

The *Blaeser* court stated that the three conditions of section 580.23 were unique circumstances "involv[ing] special equities favoring a longer [redemptory] period."<sup>211</sup> Nevertheless, the court held that "[t]hese exceptions represent legislative judgments that when such facts exist the mortgagor is more likely to redeem and, therefore, the inefficiencies incident to the longer redemption period are warranted."<sup>212</sup>

The rationale of the Act is strikingly similar to the *Blaeser* court's reading of section 580.23. The Act permits a court to grant relief on the basis of special equitable considerations.<sup>213</sup> The Act also requires the court to consider the position of the mortgagee and ensure that its interests are not detrimentally affected by the relief provided.<sup>214</sup> In essence, the Act allows the court to fashion relief based on equitable grounds within fixed boundaries, while section 580.23 lists three specific equitable grounds upon which to fashion such relief in the absence of judicial supervision. The Act apparently represents a legislative judgment that the three conditions of section 580.23 are no longer exhaustive. Rather, the court is free to approve an agreement between the parties within fixed limitations. Conceivably, an agreement could provide for a twelve-month redemptory period with concurrent liability on the part of the mortgagor for a deficiency judgment.

### B. *The Power of Sale Clause*

The Act may also usurp the mortgagee's ability to foreclose by advertisement pursuant to a power of sale clause. The process afforded by the Act, which permits defaulting mortgagors to seek relief from the courts, has the dual effect of converting the procedure to foreclosure by action and obviating the function of the power of sale clause.<sup>215</sup>

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211. *Blaeser*, 326 N.W.2d at 165.

212. *Id.*

213. See Act of May 23, 1983, ch. 215, § 8, 1983 Minn. Laws 654, 656 (codified at MINN. STAT. § 583.05 (Supp. 1983)).

214. See *id.* § 14, 1983 Minn. Laws at 657-58 (codified at MINN. STAT. § 583.11 (Supp. 1983)).

215. The 1933 Legislation also had the effect of obviating the power of sale clause

A power of sale clause "provides for a non-judicial sale conducted after advertising, serving and posting of notice of sale as specified in the mortgage and applicable state law."<sup>216</sup> Chapter 580 of the Minnesota Statutes governs this process known as foreclosure by advertisement.<sup>217</sup> Foreclosure by advertisement can be achieved in a relatively short time frame.<sup>218</sup> The Act extends the time frame, which, in essence, is the required period of notice, from six<sup>219</sup> to eight weeks.<sup>220</sup>

Foreclosure by action, on the other hand, involves a lengthy process,<sup>221</sup> and is often disfavored by foreclosing mortgagees. Foreclosure by action, however, has one attraction for foreclosing mortgagees; it permits the mortgagee to maintain an action for a deficiency judgment.<sup>222</sup> As the court in *Blaeser* noted, "should the [mortgagee] wish to purchase the real estate and obtain a deficiency judgment under facts where the 6-month redemption period applies, it must foreclose by action."<sup>223</sup> The rationale underlying the availability of deficiency judgments in foreclosure by action, which are otherwise unavailable in foreclosure by advertisement, is the role of the court. The presence of the court in foreclosure by action provides protection for defaulting mortgagors.<sup>224</sup>

The Act provides defaulting mortgagors with direct access to the protection of the court after the mortgagee selects its form of foreclosure. Once the action is before the court, however, the court can fashion relief just as if the mortgagee had foreclosed by action. Thus, the Act permits mortgagors to avoid a power of sale clause and forces mortgagees into foreclosure by action.

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which prevented foreclosure by advertisement. See Prosser, *supra* note 95, at 362 n.59. Prosser noted that "[a] similar Minnesota law passed in 1877 was held unconstitutional in *O'Brien v. Krenz*, 36 Minn. 136, 30 N.W. 458 (1886)." *Id.*

216. R. KRATOVIL & R. WERNER, *supra* note 34, § 41.08, at 601.

217. See MINN. STAT. §§ 580.01-30 (1982 & Supp. 1983).

218. See *supra* note 42 and accompanying text.

219. MINN. STAT. § 580.03 (1982).

220. Act of May 23, 1983, ch. 215, § 3, 1983 Minn. Laws 654, 654 (codified at MINN. STAT. § 580.031 (Supp. 1983)).

221. See R. KRATOVIL & R. WERNER, *supra* note 34, § 41.08(a)(1), at 601. Foreclosure by action is a lengthy process because it requires the mortgagee to bring a suit in a district court to obtain a judgment against the defaulting mortgagor. Aside from the inherent delay in crowded court calendars, district court judgments are governed by the rules of civil procedure which permit appeals to be taken.

222. See MINN. STAT. §§ 581.09-10 (1982).

223. 326 N.W.2d at 165.

224. See R. KRATOVIL & R. WERNER, *supra* note 34, § 41.08(a)(1), at 601.

The drawback for mortgagors is that mortgagors effectively expose themselves to deficiency judgments. The Act apparently contemplates this result, providing that “[n]o action shall be maintained for a deficiency judgment until the period of redemption as allowed by section 580.23 . . . has expired.”<sup>225</sup> Thus, the Act does not prohibit mortgagees from maintaining actions for deficiency judgment; it merely requires mortgagees to wait until the applicable period of statutory redemption has expired.

This concept is distinctly similar to the language contained in Minnesota Statutes chapter 581 which governs foreclosure by action.<sup>226</sup> Section 581.10 specifies that the applicable redemptory period is that which is set forth in section 580.23.<sup>227</sup> Section 581.09 provides that an action for a deficiency judgment may be maintained after expiration of the redemptory period.<sup>228</sup> Thus, a petition filed by a defaulting mortgagor under the Act converts the foreclosure proceeding to one by action rather than by advertisement. If the Act permits a conversion to foreclosure by action, then according to the *Blaeser* decision,<sup>229</sup> the mortgagee may maintain an action for a deficiency judgment.

### C. *Groundwork for Prolonged Effect*

The Act provides for a limited duration.<sup>230</sup> While such a provision is necessary in any piece of legislation impairing contractual relationships pursuant to the exercise of the state's police power,<sup>231</sup> the Act may lay the foundation for extension of the redemptory periods.

The Act's predecessor, the Minnesota Mortgage Moratorium Law enacted in 1933, was also a temporary piece of emergency legislation designed to expire two years after its enactment.<sup>232</sup> Yet it was extended by a series of acts<sup>233</sup> until July 1, 1942.<sup>234</sup> The

225. Act of May 23, 1983, ch. 215, § 11, 1983 Minn. Laws 654, 657 (codified at MINN. STAT. § 583.08 (Supp. 1983)).

226. See MINN. STAT. §§ 581.01-.12 (1982).

227. See *id.* § 581.10.

228. See *id.* § 581.09.

229. See 326 N.W.2d at 165.

230. Act of May 23, 1983, ch. 215, § 16, 1983 Minn. Laws 654, 658.

231. The *Blaisdell* Court focused on the limited duration of the 1933 Legislation which was only two years. See *Blaisdell*, 290 U.S. at 441, 447.

232. See Act of Apr. 18, 1933, ch. 339, pt. II, § 9, 1933 Minn. Laws 514, 522.

233. See, e.g., Act of Mar. 15, 1935, ch. 47, 1935 Minn. Laws 47; Act of Feb. 13, 1937, ch. 21, 1937 Minn. Laws 52; Act of Feb. 4, 1939, ch. 7, 1939 Minn. Laws 9; Act of Feb. 28, 1941, ch. 38, 1941 Minn. Laws 42.

Minnesota Legislature has recently extended the Act for an additional year and may extend the Act similarly in the future.<sup>235</sup> Thus, the Act may not be a temporary measure that will expire long before defaulting mortgagors or contract vendees will need to take advantage of its relief. Rather, the Act may have a prolonged effect on Minnesota real property.

### VIII. ADDITIONAL CONSIDERATIONS

Although the Act provides relief to troubled mortgagors and contract vendees, it provides only a stop gap measure in reconciling the difficult social and economic ramifications of the current malaise in farm and home ownership. As it now reads, the Act merely delays the inevitable—mortgage foreclosure or contract termination. The defaulting mortgagor, for example, is still required to tender the full amount of his arrearage in payments, which after twelve months can be a considerable sum, or he may fail to do so and allow the mortgagee to sell the property. After the sale, the mortgagor must locate other financing in order to redeem; financing which will undoubtedly be difficult to obtain. Thus, by merely delaying the inevitable, the Act fails to provide a comprehensive solution.

#### A. "Fresh Start" Concept

The purpose of a mortgage foreclosure moratorium deserves re-examination. The purpose should be permanent correction of the problem rather than mere postponement of the inevitable. A permanent solution would provide troubled farmers or homeowners with a "fresh start" or at least an opportunity to prevent their debts from compounding during the moratorium period.<sup>236</sup> Two fundamental considerations must be addressed in effectuating this purpose. First, the mortgagor's equity must be preserved. Second, the mortgagee must not bear the undue burden of protecting the mortgagor. The concepts underlying reamortization and reverse annuity mortgages can accommodate these fundamental considerations and can be used to provide a "fresh start" to mortgagors or

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234. See Act of Feb. 28, 1941, ch. 38, pt. II, § 9, 1941 Minn. Laws 42, 51.

235. See *supra* note 4 and accompanying text.

236. This purpose is analogous to the goals of the present bankruptcy system. For a general discussion of mortgage default in bankruptcy proceedings, see Comment, *Home Foreclosures Under Chapter 13 of the Bankruptcy Reform Act*, 30 U.C.L.A. L. REV. 637 (1983).

contract vendees defaulting on institutional financing.<sup>237</sup>

### 1. *Reamortization*

The FmHA Moratorium uses a reamortization approach.<sup>238</sup> At the expiration of the final moratorium period,<sup>239</sup> the mortgagor can apply to have the entire mortgage debt reamortized if he has made payments on at least ten percent of the loan<sup>240</sup> and cannot satisfy the arrearages.<sup>241</sup> The unpaid principal and interest on the loan balance can either be amortized within the original term of the loan<sup>242</sup> or reamortized over the remaining term of the loan plus the time in which the moratorium was effective.<sup>243</sup> Under the FmHA Moratorium, the interest rate for the reamortized loan remains unchanged.<sup>244</sup>

The Connecticut Moratorium follows a similar approach.<sup>245</sup> It directs the court to “restructure” the mortgage debt, providing that “[t]he amount of the mortgage debt at the end of any period of restructuring shall in no event exceed the amount of the original mortgage debt.”<sup>246</sup> The stated purpose of the Connecticut legislation is “to eliminate an arrearage in payments on the mortgage debt . . . .”<sup>247</sup> The Connecticut Moratorium postpones foreclo-

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237. The concepts of reamortization and reverse annuity mortgages may also apply to contract for deed or mortgage financing through private individuals. Nevertheless, private individuals are less likely to be able to suffer through the rescheduling of payments. Therefore, the Act's present balancing approach should be maintained for property financed through individuals.

238. See 7 C.F.R. §§ 1951.313(e)(1)(ii)-(iii), 1915.314 (1983).

239. See *id.* § 1951.314(a)(2). Mortgagors can obtain an initial six-month moratorium and may also seek extensions, the total of which cannot exceed three years. See *id.* § 1951.313(b)(4)-(5).

240. See *id.* § 1951.314(a)(1).

241. See *id.* § 1951.313(e)(1)(ii)-(iii).

242. See *id.* § 1951.313(e)(1)(ii).

243. See *id.* § 1951.313(e)(1)(iii).

244. See *id.* § 1951.314(b)(5).

245. See, e.g., Act of June 9, 1983, Pub. Act No. 83-547, §§ 6-12, 1983 Conn. Legis. Serv. Jan. Sess. 1795, 1800-02 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, §§ 71-77, 82, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2234-38, 2241 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 299 (West Supp. 1984).

246. *Id.* § 11(a), 1983 Conn. Legis. Serv. Jan. Sess. at 1801 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, § 76(6), 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2238 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 302 (West Supp. 1984).

247. *Id.* § 9(a), 1983 Conn. Legis. Serv. Jan. Sess. at 1801 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, § 74, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2236-37 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 302 (West Supp. 1984).



sure for six<sup>248</sup> months. At the end of this period, the mortgagor resumes payments on the mortgage debt, which are slightly higher than his original payments, to compensate the mortgagee for lost revenue during the moratorium period.

The FmHA and Connecticut moratoria minimize the possibility that the mortgagor will again default on the mortgage debt. The moratoria assist the mortgagor through a difficult economic period without cancelling any part of the debt. The mortgagor resumes his mortgage payments with a "fresh start." Thus, the mortgagor's equity is preserved without unduly burdening the mortgagee.

## 2. Reverse Annuity Mortgages

Another method to provide defaulting mortgagors with a "fresh start" exists in the concept used in reverse annuity mortgages (RAMs). The reverse annuity mortgage has been used by elderly homeowners who have paid all or nearly all of the mortgage debt on their homes. The RAM approach converts home equity, offering:

[A] loan from an institutional lender to an older homeowner in the form of monthly draws or disbursements. Under the [RAM] program, home equity serves as collateral, and the lender pays a fixed amount to the borrower every month for a scheduled number of years. Each payment enlarges the loan balance on which interest is charged. The monthly payment is determined by the appraisal value of the home, the term of the loan, and the age of the borrower. The loan must be paid off or renegotiated at maturity.<sup>249</sup>

Although the RAM approach has been used for mortgagors who

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248. *Id.* § 9(b), 1983 Conn. Legis. Serv. Jan. Sess. at 1801 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, § 74, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2236-37 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 302 (West Supp. 1984). Six months is the mandatory period of relief if the mortgagor is unemployed. *See id.*

249. Comment, *The Effect of Reverse Annuity Mortgages on SSI*, 16 U.C.D. L. REV. 435, 441 (1983) (footnotes omitted) [hereinafter cited as Comment, *Reverse Annuity Mortgages*]; see also R. KRATOVIL & R. WERNER, *supra* note 34, § 29.02(d), at 468-72; Browne, *Alternative Mortgage Instruments*, in MORTGAGES AND ALTERNATE MORTGAGE INSTRUMENTS, 437, 462-63 (P.L.I. Real Estate Law And Practice No. 187, 1981); Draper, *Alternate Mortgage Instruments*, in MORTGAGES AND ALTERNATE MORTGAGE INSTRUMENTS, 319, 335-37 (P.L.I. Real Estate Law And Practice No. 187, 1981); Hagel, *Home Equity Conversion Programs: Are They Compatible with Public Entitlement Programs?*, 15 CLEARINGHOUSE REV. 254 (1981); Izeman, *Alternative Mortgage Instruments: Their Effect on Residential Financing*, 10 REAL EST. L.J. 3, 23-25 (1981); Sweat, *Mortgages and Alternative Mortgage Instruments*, in MORTGAGES AND ALTERNATE MORTGAGE INSTRUMENTS, 13, 29 (P.L.I. Real Estate Law And Practice No. 187, 1981); Note, *Reverse Annuity Mortgages and the Due-on-Sale Clause*, 32 STAN.

have paid off their mortgages, the concept could also apply to farmers and homeowners facing mortgage foreclosure. As noted throughout this Article, the goal of Minnesota's foreclosure process, including the provisions of the Act, is to protect farmers and homeowners from losing their equity. At the time of foreclosure, the largest asset undoubtedly owned by a mortgagor is his farm or home, just as the elderly person benefiting from a RAM is "house-rich and cash-poor."<sup>250</sup> The RAM concept should therefore be considered as an alternative method of preventing foreclosure and maintaining owner equity without detrimentally affecting the interests of institutional lenders.<sup>251</sup>

In general terms, the RAM concept could be used in mortgage moratoria. Rather than providing an annuity to mortgagors, the mortgage itself would be reversed upon a mortgagor's application to a court. In effect, the mortgagee would impute monthly mortgage payments to the mortgagor by fictionally transferring a fixed amount at designated intervals.<sup>252</sup> The process would continue until the mortgagor was able to resume payments on the mortgage debt. To ensure that sufficient time is available for the mortgagor to remedy the circumstances affecting his inability to make payments, a minimum amount of equity must be established. For example, the amount of equity necessary to trigger the reverse mortgage could be the equivalent of the sum of twelve monthly mortgage payments. If the mortgagor were unable to resume making payments before his equity was reduced to zero, the mortgagee would take title upon its last imputed payment.

The preceding approach provides mortgagors time to remedy the circumstances causing their inability to make mortgage payments. It also protects their investment in the property. Each month that the mortgagor remains in possession, the imputed payments serve as rent. The imputed payments also obviate the need for the mortgagor to struggle to make partial payments during the delay of the foreclosure. If the equity is reduced to zero, the mortgagor has not lost his equity, rather he has paid rent for the use of

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L. REV. 143 (1979); Comment, *The New Mortgages: A Functional Legal Analysis*, 10 FLA. ST. U.L. REV. 95, 110 (1982).

250. See Comment, *Reverse Annuity Mortgages*, *supra* note 249, at 435.

251. Again, the RAM approach may not be helpful where individual mortgagees or contract vendors are involved. As suggested earlier, the current balancing of interest approach used in the Act should be maintained in these instances. See *supra* note 237.

252. See K. SCHOLEN & Y. CHEN, UNLOCKING HOME EQUITY FOR THE ELDERLY 108 (1980), cited in Comment, *Reverse Annuity Mortgages*, *supra* note 249, at 438 n.27.

the premises.<sup>253</sup>

The reverse mortgage approach does not cause unreasonable harm to institutional lenders. Mortgagees are able to realize the full amount of their loan and are able to acquire the secured property in a time frame no longer than most redemptory periods. Mortgagees may raise the concern that the reverse mortgage approach affects the stability of their loan portfolios.<sup>254</sup> The lenders' concerns, however, could be addressed under the reverse mortgage approach. The interest rate could be adjusted at the time the mortgage applies for relief. The mortgagor could then be compelled to pay the difference between the amount of the imputed payment to him, which would reflect a new interest rate, and the amount of his old payment. This minimal amount could be paid by the mortgagor when he is able to turn the mortgage around or it could be added to the outstanding principal on the note.

Recent legislation extends the authority of national banks<sup>255</sup>

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253. In essence, the RAM approach could be used to create a residential sale-leaseback arrangement. Although federal tax law hampers true residential sale-leaseback, legislation is currently pending in Congress to permit this form of home equity conversion. *See* Harney, *Sale-leaseback would release homeowners' equity in house*, *Minneapolis Star & Trib.*, Feb. 18, 1984, at 1S, col. 6.

One drawback for the mortgagor, and for the mortgagee in a falling real estate market, is that he is not compensated for the appreciation of the mortgaged property, since the starting point for reversing the mortgage is his equity in the property. This is a problem of valuation only if the equity is reduced to zero. The valuation problem can be ameliorated by determining either an appraised or fair market value of the property at the time the mortgagor seeks relief. This valuation could be converted to a percentage which could be used to multiply the amount of equity. The valuation problem could also be resolved after the process of reversing mortgage payments has been completed. When the lender takes title, it will turn around and sell the property. This produces a true fair market value which can be used to determine the amount of the mortgagor's appreciation in the property. Once the amount of appreciation is ascertained, the lender could be compelled to tender the amount to the mortgagor.

254. This concern has been asserted by mortgagees and recognized by courts in recent due-on-sale clause litigation. *See, e.g.*, *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Gate Co. v. Midwest Fed. Sav. & Loan Ass'n*, 324 N.W.2d 202 (Minn. 1982). The term "disintermediation" encompasses this concern and is defined as:

The process of individuals investing their funds directly instead of placing their savings with banks, savings and loan associations, and similar institutions for investment by such institutions. This bypassing of financial institutions occurs when proportionately higher yields are available on secure investments (such as high grade corporate bonds and government securities) than can be obtained on savings deposits. Disintermediation has a direct influence on the scarcity of mortgage money since diverted savings rarely find their way into mortgages.

J. REILLY, *THE LANGUAGE OF REAL ESTATE* 121 (1977).

255. Through a number of provisions, the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1469 (1983), extends the lending authority of na-

and state financial institutions<sup>256</sup> to make reverse mortgages. In Minnesota, the reverse mortgage approach could be implemented with minor adjustments to existing financial institution laws. Minnesota Statutes section 47.58 authorizes lenders<sup>257</sup> to make reverse mortgage loans provided that the "total of committed principal of the investment in reverse mortgage loans . . . does not exceed five percent of that lender's total deposits and savings accounts."<sup>258</sup> Section 47.58 also requires that the lender have a first lien on the property which qualifies for homestead credit.<sup>259</sup>

Section 47.58 requires that the appraisal value of the property be used at the inception of the loan.<sup>260</sup> It also requires that the committed principal of the loan not exceed eighty percent of the appraised value.<sup>261</sup> In essence, the statute sets forth a minimum amount of equity, which also includes appreciation and other financing on the property of at least twenty percent. Interest may be set at the maximum lawful interest rate<sup>262</sup> and the borrower must pay taxes, insurance premiums, and assessments on the property.<sup>263</sup> Section 47.58 also provides that "[t]he borrower may cancel the reverse mortgage loan at any time without penalty by payment of the outstanding loan balance."<sup>264</sup>

The reverse mortgage scheme outlined above will work within the provisions of section 47.58 with one exception: section 47.58 would have to be amended to permit the mortgagor to cancel the reverse mortgage arrangement once he began to make payments. Use of the reverse mortgage concept in moratoria legislation would then work to protect a mortgagor's equity giving him a "fresh start" once he was able to make payments, without adversely affecting the mortgagee's interests.

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tional banks to make reverse annuity mortgages. Comment, *Reverse Annuity Mortgages*, *supra* note 249, at 443 n.43.

256. *See, e.g.*, MINN. STAT. § 47.58 (1982); COLO. REV. STAT. § 11-41-115(5) (Supp. 1983); CONN. GEN. STAT. ANN. § 36-9g (West 1981).

257. Lenders are defined to include state chartered banks, savings and loans associations, and insurance companies, as well as "any federally chartered bank supervised by the comptroller of the currency or federally chartered savings and loan association supervised by the federal home loan bank board . . . ." MINN. STAT. § 47.58, subd. 1(b) (1982).

258. *Id.* § 47.58, subd. 2.

259. *See id.*

260. *See id.* § 47.58, subd. 3.

261. *See id.*

262. *See id.* § 47.58, subd. 5.

263. *See id.* § 47.58, subd. 6.

264. *Id.* § 47.58, subd. 4.

### B. Guaranty Fund

The Minnesota Legislature could broaden the relief afforded by the Act with a state guaranty fund. This fund could be used to ameliorate lenders' concerns under the existing scheme or under the two new approaches suggested above. Unlike the FmHA Moratorium, where the lender itself has elected to provide relief from mortgage foreclosure, the Act impairs the contracts of private lenders. To reconcile lenders' concerns and assure constitutionality,<sup>265</sup> any impairment must be reasonable with respect to the problem it is designed to resolve. With the state insuring the obligations of the mortgagor, legislation could provide greater relief, since the unreasonableness of the impairment would be mitigated by the presence of insurance against financial loss.

The Emergency Moratorium<sup>266</sup> provided a fund<sup>267</sup> that served as a source of indirect payments to defaulting mortgagors<sup>268</sup> and as an insurance fund to financial institutions that extended credit to defaulting mortgagors.<sup>269</sup> The insurance fund served as an incentive to financial institutions to extend credit to troubled homeowners.

Minnesota could adopt a similar approach in its efforts to provide relief from mortgage foreclosure and contract for deed termination. The existing assurance fund for torrens property<sup>270</sup> provides one possible source of funding for an insurance program. Unlike Emergency Moratorium, which induced lenders to extend credit, under Minnesota's moratorium, lenders would be com-

265. See *supra* note 11 and accompanying text.

266. 12 U.S.C. §§ 2701-2712 (1976). The Emergency Moratorium expired of its own volition on September 30, 1977. *Id.* § 2708(b).

267. *Id.* § 2706.

268. *Id.* § 2705. Rather than payments going directly to defaulting mortgagors, the mortgage payments were paid directly to the mortgagee on behalf of the mortgagor. See *id.* § 2705(a). The maximum amount of assistance available was \$250 each month. *Id.* § 2703(b). Assistance was available for up to two years. *Id.* § 2703(c)-(d).

269. *Id.* § 2704. This insurance fund covered "banks, trust companies, finance companies, mortgage companies, savings and loan associations, insurance companies, credit unions, and such other financial institutions . . . against losses which they may sustain as a result of emergency loans or advances of credit . . . with respect to mortgages eligible for assistance . . ." *Id.* § 2704(a).

270. See MINN. STAT. § 508.75 (1982). Proponents of the Act attempted to introduce a guaranty fund into the Act's provisions in the 1984 legislative session, but were unsuccessful. Proponents suggested that the Minnesota Housing Financing Agency and the Commissioner of Agriculture administer a guaranty fund insuring the payment of deferred amounts to mortgagors or contract vendees. The proposal called for a separate appropriation and was never introduced.

pelled to stay foreclosure proceedings. The length of the stay could be extended since the state would insure any losses incurred by the lender after the foreclosure process expired. Thus, the impairment would be all the more "reasonable," and the length of the delay in sale or extension of the statutory redemption period could possibly be extended. The Minnesota Legislature could then consider providing more than thirty days of relief to defaulting mortgagors or contract vendees.

### *C. Notice of Available Relief*

One of the Act's major drawbacks is that very few financially distressed farmers and homeowners are aware of its existence,<sup>271</sup> since terminating contract vendors and foreclosing mortgagees are not required to inform defaulting parties of the available relief under the Act. The Connecticut Moratorium<sup>272</sup> and the FmHA Moratorium<sup>273</sup> both require that notice of available relief be given at the commencement of foreclosure proceedings. The Act should be amended to provide a similar notice requirement.<sup>274</sup>

## IX. CONCLUSION

Minnesota's moratorium on mortgage foreclosure arrived in the midst of considerable attention over the plight of real property owners facing mortgage foreclosure or contract for deed termination. The Act, however, inadequately addresses the real needs of those it was designed to protect. Thirty days of additional relief provides a defaulting party with little opportunity to cure his default. Furthermore, by seeking relief under the Act, a mortgagor may expose himself to a deficiency judgment. This trade-off is particularly harsh to a mortgagor, in light of the six month trade-off for the right to maintain an action for a deficiency judgment underlying section 580.23. Finally, the Act fails to provide the troubled farmer or homeowner with a "fresh start" once the relief period expires.

The alternative approaches discussed in this Article could offer

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271. Telephone interview with Mr. Joe Chrastil, Citizens Organizations Acting Together (COACT) (Dec. 22, 1983).

272. See Act of June 9, 1983, Pub. Act No. 83-547, § 7, 1983 Conn. Legis. Serv. Jan. Sess. 1795, 1800 (West), as amended by Act of June 29, 1983, Pub. Act No. 83-29, § 72, 1983 Conn. Legis. Serv. June Spec. Sess. 2194, 2235 (West), reprinted in CONN. GEN. STAT. ANN. ch. 547 app. at 300 (West Supp. 1984).

273. See 7 C.F.R. § 1951.313(b)(1)(i)-(iii) (1983).

274. See *supra* note 4 and accompanying text (discussing 1984 legislation).

more effective relief than the Act currently provides and merit consideration by the legislature as it reviews the vitality of the Act. Although the Act fails to provide comprehensive relief, it nevertheless represents a positive effort reflecting Minnesota's historically strong concern for protection of real property owners.<sup>275</sup>

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275. In January 1984, the Attorney General's Office assembled statistics on the number of petitions filed pursuant to the Act which sought relief from mortgage foreclosure and contract for deed termination. The statistics showed that approximately 150 petitions had been filed in less than seven months. *See* REPORT UPDATE: HOME PRESERVATION HOTLINE (Jan. 25, 1984) (on file at William Mitchell Law Review office). What the statistics are unable to show is perhaps even more significant: the number of foreclosures or terminations worked out between the lender and the homeowner or farmer. The Act has undoubtedly forced compromise rather than unilateral action.