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Linda S. Hume
University of Washington School of Law

THE WASHINGTON REAL ESTATE CONTRACT FORFEITURE ACT

Linda S. Hume*

The Real Estate Contract Forfeiture Act (the Act), which became effective January 1, 1986,[1] creates a nonjudicial procedure for forfeiture of the purchaser's interest in a real estate contract[2] that terminates the purchaser's rights in the contract and in the real property that is the subject matter of the contract.[3] Compliance with the Act's procedures should clear the seller's title to the property. The Act represents a significant departure from common law forfeiture procedures. This discussion will trace the origins of the Act, explain its basic design and purpose, and indicate where the Act changes or parallels the prior common law. In addition, some areas of future uncertainty that may arise under the new Act will be discussed.

I. BACKGROUND

The drafting of the Act followed several years of controversy concerning the use of real estate contracts for financing the sale of real property. Some attorneys thought that the legislature should abolish real estate contracts or treat real estate contracts like deeds of trust for purposes of terminating the purchaser's interest.[4] Several reasons were advanced for this position,

* Professor of Law, University of Washington School of Law. California State University at Los Angeles, B.A., 1967; U.C.L.A., J.D., 1970. Professor Hume was a member of the subcommittee that drafted the Real Estate Contract Forfeiture Act.

1. 1985 Wash. Laws ch. 237 (codified at WASH. REV. CODE §§ 61.30.010–.910).

2. The Act defines a real estate contract as "any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price." WASH. REV. CODE § 61.30.010(1) (1985). Earnest money agreements and options are not included. *Id.* The committee that drafted the Act, see *infra* note 8, decided to include only contracts in which the contract was used as a financing device similar to the mortgage or deed of trust because the issues raised by forfeiture of this kind of real estate contract are similar to those raised by foreclosure of mortgages or deeds of trust. Although an earnest money agreement may provide for forfeiture in the event of nonperformance, that issue is best resolved through application of the traditional doctrine governing liquidated damages for breach of contract. The functional, open-ended definition was chosen deliberately to give courts the flexibility to apply the Act to contracts that served as a financing device regardless of what the parties actually called the contract. For an example of a contract that in fact was used as a financing device, but called an "earnest money" agreement, see Reed v. Eller, 33 Wn. App. 820, 664 P.2d 515 (1983).

3. " 'Forfeit' means to cancel the purchaser's rights under a real estate contract and to terminate all right, title, and interest in the property of the purchaser and, to the extent provided in this chapter, of persons claiming by or through the purchaser." WASH. REV. CODE § 61.30.010(4) (1985).

4. D. Anderson, Real Estate Contract Forfeiture Act, Legislative History, 3–5 (Sept. 21, 1985), Continuing Legal Education Seminar Materials (available Univ. of Wash. School of Law Library),

probably the most important of which was the ability of the seller to abuse forfeiture rights.[5] In addition, it was unclear what procedural steps were necessary to achieve an effective forfeiture and clear the seller's title, particularly in western Washington.[6] In the event judicial action was needed, it was costly and time-consuming. Other lawyers, primarily those in eastern Washington, thought the real estate contract was an especially useful financing device, and did not experience procedural or title problems in accomplishing forfeitures.[7]

Eventually, the Washington State Bar Association agreed to draft a comprehensive statute.[8] The drafting committee had several objectives: to make the forfeiture procedures for real estate contracts consistent with existing mortgage foreclosure and deed of trust statutes; to increase the reliability of public records; to balance the rights of the seller and purchaser in a way that would prevent the worst abuses; to make the procedures clear and easy to follow; and finally, to avoid the need for judicial action to achieve forfeiture.[9] The Act largely reflects these objectives. The committee did not attempt to make any particular financing device more desirable

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[hereinafter cited as Drafting History]. *See generally* Warren, *California Installment Land Sales Contracts: A Time for Reform*, 9 UCLA L.REV. 608 (1962).

5. Testimony before the Senate Judiciary Committee had recounted the exploits of an unscrupulous Washington seller who sold the same property over and over again after purporting to "forfeit" previous purchasers without notice. Letter from Senator Phil Talmadge to Robert M. Leadon (January 30, 1984) (discussing the testimony of Susan Agid, Assistant Attorney General, before the Senate Judiciary Committee) (on file with the *Washington Law Review*).

6. Drafting History, *supra* note 4, at 4–5.

7. Drafting History, *supra* note 4, at 4. Real estate contracts are widely used in Eastern Washington because the deed of trust act exempts agricultural property, WASH. REV. CODE § 61.24.030(2) (1985), and a mortgage must be foreclosed by judicial action. *Id.* § 61.12.030. Eastern Washington title companies were willing to insure title after forfeiture without a quiet title action. In western Washington, title companies would not insure title without a judicial order quieting title in the forfeiting contract seller. Drafting History, *supra* note 4, at 4–5.

8. The Act was drafted by a subcommittee of the Real Property, Trust, and Probate Section of the Washington State Bar Association. It was sponsored in the Washington Legislature by Senator Phil Talmadge as Senate Bill No. 3091, 1985 Wash. Laws ch. 237.

Senator Talmadge had prepared a real estate contract forfeiture bill for the Washington Legislature in 1983. *See* Drafting History, *supra* note 4, at 5–6. It was largely based on the Iowa statute governing real estate contract forfeitures. IOWA CODE ANN. ch. 656 (West 1982). Senator Talmadge agreed to postpone introduction of the bill while the committee worked to draft a more comprehensive statute. Minutes of Committee Meeting (February 2, 1984) (on file with the *Washington Law Review*). The subcommittee was chaired by Robert M. Leadon, a Yakima attorney, and consisted of attorneys Douglas G. Anderson, W. Ronald Hulen, and David H. Rockwell, from western Washington; attorney Ned M. Barnes, Spokane; attorney Kim Prochnau, Evergreen Legal Services; attorney Warren S. Olson, Transamerica Title; attorney Kyle Aiken, Staff Counsel to the Washington State Senate; and Professor Linda Hume, University of Washington School of Law. The Committee represented a cross section of the legal community.

9. Real Property, Trust & Probate Section, Wash. State Bar Ass'n, Comments to the Proposed Real Estate Contract Forfeiture Act, 2–3 (undated) (unpublished) (on file with the *Washington Law Review*) [hereinafter cited as Drafters' Comments].

than any other.[10] It simply preserved the real estate contract as one of the financing devices available to buyers and sellers while clarifying the procedure for forfeiture. The Act is, therefore, primarily procedural and the parties are free, as at common law, to fashion their own bargain provided the minimum procedural requirements of the Act are observed.[11]

II. BASIC OPERATION OF THE STATUTE

The basic design of the Act is quite simple. If the seller desires to forfeit a defaulting purchaser's interest, the seller first sends the purchaser a notice of intent to forfeit.[12] Following receipt of this notice, the purchaser has ninety days in which to "cure" the default.[13] If the default is not cured, seller sends the purchaser a declaration of forfeiture.[14] This declaration effectively terminates the purchaser's interest in the real estate contract and in the property and no further action should be required to clear title.[15] Any interest dependent on the purchaser's, for example a mortgage on the purchaser's interest, may be eliminated by giving the same notices to the interest holder.[16]

In addition to setting up the basic procedure, the statute sets out the precise contents of each of the required notices,[17] the parties to whom the

10. Drafting History, *supra* note 4, at 6–7.

11. *Id.* at 7; Drafters' Comments, *supra* note 9, at 1–3. An example of the drafting freedom remaining with the parties is found in WASH. REV. CODE § 61.30.010(10) (1985), which permits the parties to agree that the time for cure may be any period longer than 90 days.

12. WASH. REV. CODE § 61.30.020 (1985) provides that "[f]orfeiture shall be accomplished by giving and recording the required notices as specified in this chapter." The "required notices" are the notice of intent to forfeit and the declaration of forfeiture. *Id.* at § 61.30.010(8). These provisions must be read together with WASH. REV. CODE § 61.30.030(2) (1985), which conditions the right to forfeiture on a breach of the purchaser's obligations under the contract.

13. *Id.* § 61.30.090(2).

14. *Id.* § 61.30.070(2). The two notices are known collectively as the "required notices." *See supra* note 12.

15. WASH. REV. CODE § 61.30.100 (1985). Subsection (2)(a) provides that rights in the contract and to the property are terminated. Subsection (1) states that the recorded and sworn declaration of forfeiture is prima facie evidence of the forfeiture and conclusive evidence of the forfeiture in favor of bona fide purchasers and encumbrancers for value. This should be sufficient to enable seller to obtain title insurance on resale. Committee member Warren Olson, counsel for Transamerica Title Insurance, represented the views of title insurers. The title insurance companies have not taken a formal position on this matter. Drafting History, *supra* note 4, at 26.

16. WASH. REV. CODE § 61.30.100(2)(a) (1985). The other persons whose interests may be forfeited are listed in WASH. REV. CODE § 61.30.040(2) (1985). They include lienholders (secured and unsecured), junior real estate contractors, and occupants of the property. The right to cure is granted to these parties in WASH. REV. CODE § 61.30.090(2) (1985).

17. *Id.* § 61.30.070. The notice of intent to forfeit must contain: (1) sellers' name, address, and telephone number; (2) a description of the contract and a legal description of the property; (3) a description of the default; (4) notification of the right to cure; (5) notification of the effect of forfeiture; and (6) any other information required by the contract. The declaration of forfeiture must contain: (1)

notices must be sent if their interests are to be forfeited,[18] methods of service of the notices,[19] the effect of failure to give the notices,[20] and the method and acceptability of cure.[21] The statute also covers the circumstances under which a public sale may be ordered in lieu of forfeiture[22] and the appropriate grounds to enjoin[23] or set aside[24] a forfeiture.

III. EFFECTS OF THE STATUTE

Attorneys will find much that is familiar in the Act because several of its provisions are codifications of common law that applied to real estate contracts prior to the Act. The Real Estate Contract Forfeiture Act, however, can be expected to cause difficulty arising from two sources—the newness of the procedures themselves and the open questions not answered by the Act. First, the Act's procedures are quite different from the ones with which attorneys are currently familiar—they will take some "getting used

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seller's name, address, and telephone number; (2) a description of the contract and a legal description of the property; (3) notification of the rights that have been forfeited; (4) notification that seller is entitled to possession; (5) affirmation of compliance with the Act; and (6) notification of the right to set aside the forfeiture. *Id.*

18. *Id.* § 61.30.040. Those who must be notified include the purchaser, holders of liens on the purchaser's interest, holders of subordinate contract interests, and occupants of the property. *Id.*

19. *Id.* § 61.30.050. Notices may be given as provided in the contract, by personal service, by mail, or in appropriate circumstances by posting and publication. The notices must be in writing. *Id.*

20. *Id.* § 61.30.080. Sellers must start over if they fail to give notice to all the parties they desire to forfeit. In other words, the seller cannot simply give notices to the persons left out the first time and proceed, but must instead again give notice to parties who may have received prior notices. The new notice must indicate that it supercedes and replaces prior notices. Drafters' Comments, *supra* note 9, at 10. Failure to give notice to each purchaser renders the entire procedure void. WASH. REV. CODE § 61.30.040(1) (1985). In contrast, failure to give notice to persons whose interests are dependent on the purchasers only makes the forfeiture "void as to each person . . . to whom the notices are not given." WASH. REV. CODE § 61.30.040(2) (1985). *See infra* text accompanying notes 115–28.

21. WASH. REV. CODE § 61.30.090 (1985). Cure is defined as:

> perform[ing] the obligations under the contract which are described in the notice of intent to forfeit and which are in default, to pay the costs and attorneys' fees prescribed in the contract, and, subject to RCW [WASH. REV. CODE] 61.30.090(1), to make all payments of money required of the purchaser by the contract which first become due after the notice of intent to forfeit is given and are due when cure is tendered.

Id. § 61.30.010(2).

22. *Id.* § 61.30.120. *See infra* text accompanying notes 57–65.

23. The Act limits the grounds on which a forfeiture can be restrained to: (1) proof that there is no default; (2) proof that the purchaser has an offsetting claim that would excuse the default; and (3) proof that the seller has failed materially to comply with the Act. WASH. REV. CODE § 61.30.110(3) (1985).

24. The completed forfeiture can be set aside only when it is established that seller was not entitled to forfeit (as for example, when the purchaser was not in breach) or that the seller failed materially to comply with the Act. The forfeiture may never be set aside if the rights of bona fide purchasers or encumbrancers for value would be adversely affected by this action. *Id.* § 61.30.140. This parallels the Deed of Trust Act in disfavoring upsetting a completed forfeiture. *See id.* § 61.24.040(7).

to." These procedures fall into two groups: those that represent a substantive change in pre-Act rights and those that elaborate the basic statutory scheme. Second, some questions of immediate importance remain to be interpreted either by litigation or corrections to the Act itself.

A. *Codification of Common Law*

The Act leaves unchanged several important pre-Act principles. The basic forfeiture concept is the same. The right to forfeit must be a part of the contract and is not available if the contract is silent.[25] Remedies other than forfeiture are not affected by the statute and may be pursued independently.[26] Finally, and probably most significantly, the consequences of forfeiture have not been changed. After forfeiture, the purchaser's rights in the contract and in the property subject to the contract are terminated.[27] The rights of any parties whose interests were dependent on the existence of the purchaser's rights are also terminated if they were properly served with the required notices.[28] The seller can also keep any payments made prior to forfeiture, but is not entitled to a deficiency judgment.[29] The Act permits the parties to vary the consequences of forfeiture by agreement.[30]

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25. *Id.* § 61.30.030(2). For the common law position, see Taylor v. Interstate Inv. Co., 75 Wash. 490, 135 P. 240 (1913). The contract must also contain a "time is of the essence" provision, or else the purchaser has the entire contracted time period to complete payment. Lillis v. Steinbach, 51 Wash. 402, 99 P. 22 (1909). Drafters' Comments, *supra* note 9, at 5.

26. WASH. REV. CODE § 61.30.020 (1985). The seller can sue for damages, Hogan v. Kyle, 7 Wash. 595, 35 P. 399 (1894), installments as they fall due, Underwood v. Tew, 7 Wash. 297, 34 P. 1100 (1893); or specific performance, Wood v. Mastick, 2 Wash. Terr. 64, 3 P. 612 (1891). Seller can also wait until all payments are due and then sue for the purchase price. First Nat'l Bank v. Mapson, 181 Wash. 196, 42 P.2d 782 (1935).

27. WASH. REV. CODE § 61.30.100(2)(a) (1985).

28. *Id.* § 61.30.100(2)(a). Welling v. Mt. Si Bowl, 79 Wn. 2d. 485, 487 P.2d 620 (1971); *cf.* Kendrick v. Davis, 75 Wn. 2d 456, 452 P.2d 222 (1969).

29. WASH. REV. CODE § 61.30.100(2)(b)–.100(3) (1985). For common law and theory permitting seller to keep payments, see Reddish v. Smith, 10 Wash. 178, 38 P. 1003 (1894). The seller may not sue for additional amounts due under the contract. The theory is that the contract is terminated following forfeiture and there is, therefore, no basis on which to collect more of the purchase price. Rose v. Rundall, 86 Wash. 422, 150 P. 614 (1915).

Courts in other states have ordered restitution following forfeiture on an unjust enrichment theory. To calculate the amount of restitution, the purchaser is given credit for amounts paid on the contract and then is charged a fair rental value for the time the property was occupied. *E.g.*, Freedman v. Rector, 37 Cal. 2d 16, 230 P.2d 629 (1951); Weyher v. Peterson, 16 Utah 2d 278, 399 P.2d 438 (1965). For a discussion of the *Freedman* opinion, see Comment, *Forfeiture Clauses in Land Installment Contracts: Time for Equitable Foreclosure*, 8 U. PUGET SOUND L. REV. 85 (1984).

30. WASH. REV. CODE § 61.30.100(2) (1985).

B. Major Changes in the Forfeiture Procedure

1. Recording

The Act places great emphasis on recording in order to further the drafting committee's objective of increasing the reliability of public records. The Act requires that the contract, the notice of intent to forfeit and the declaration of forfeiture be recorded in each county in which any part of the property is located.[31] This is a marked change from the current practice in which the real estate contract and forfeiture documents are rarely recorded. Until recently, the purchaser under a real estate contract could not qualify as a "bona fide purchaser" within the meaning of the Recording Act even if the contract was recorded.[32] Although a contract can be recorded just prior to beginning a forfeiture,[33] it will be important henceforth to ensure that all real estate contracts are in recordable form.

Despite the Act's emphasis on recording, the effect of a failure to record the required notices is not clear, except in the case of recording the contract itself. Recording the contract is a condition precedent to forfeiture.[34] However, although the Act requires that the notice of intent to forfeit and the declaration of forfeiture be recorded,[35] it does not directly state what

31. It is a condition precedent to forfeiture that the contract be recorded in each county in which any of the property is located. *Id.* § 61.30.030(1). The notice of intent to forfeit must be recorded "before the commencement of the time for cure." *Id.* § 61.30.040(5). The declaration of forfeiture must be recorded "after the time for cure has expired without the default having been cured." *Id.* § 61.30.040(6). WASH. REV. CODE § 61.30.070(2) (1985) permits the seller to forfeit the contract by "giving and recording a declaration of forfeiture." On the effect of failure to record, see *infra* text accompanying notes 33–42.

32. In Reed v. Eller, 33 Wn. App. 820, 664 P.2d 515 (1983), the court held that a real estate contract purchaser could not be a bona fide purchaser protected by the recording act until the purchaser acquired legal title to the property. The purchaser does not get legal title until the contract is completely performed since the seller retains legal title as security for payment of the purchase price. The *Reed* court relied on Peterson v. Paulson, 24 Wn. 2d 166, 163 P.2d 830 (1945). *Peterson* was decided at a time when the judicial view of the nature of the purchaser's interest in the land subject to a real estate contract was quite narrow. One opinion had stated a real estate contract purchaser had no interest, legal or equitable, in the property that was the subject of the contract. Ashford v. Reese, 132 Wash. 649, 233 P. 29 (1925), *overruled,* Cascade Sec. Bank v. Butler, 88 Wn. 2d 777, 567 P.2d 631 (1977). Following the decision in *Reed,* the recording act was amended to permit recording of real estate contracts. WASH. REV. CODE § 65.08.060–.070 (1985). Drafting History, *supra* note 4, at 1–3. The amendments to the Recording Act, coupled with the change in the judicial view of the purchaser's interest reflected in the overruling of *Ashford,* should change the *Reed* holding. *See* Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the Ashford Cloud,* 7 U. PUGET SOUND L. REV. 233 (1984).

33. Drafters' Comments, *supra* note 9, at 5. The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration. WASH. REV. CODE § 65.08.060(2) (1985). A purchaser acts in "good faith" when they have no notice of an outstanding equity. *See, e.g.,* Miebach v. Colasurdo, 102 Wn. 2d 170, 685 P.2d 1074 (1984).

34. WASH. REV. CODE § 61.30.030(1) (1985).

35. *See supra* note 31.

consequence flows from the failure to record these notices. The argument that the forfeiture is invalid if the required notices are not recorded is supported by language that states that forfeiture is accomplished by "giving and recording the required notices"[36] and that the seller "may forfeit the contract by giving and recording a declaration of forfeiture."[37] In addition, the language accompanying the recording requirement for the notice of intent to forfeit suggests that the cure period might not begin to run until the notice of intent to forfeit is recorded.[38] Other language indicates that the declaration of forfeiture cannot be recorded until the cure period has expired.[39] If the cure period never begins to run, the forfeiture procedure could never be consummated.

These arguments are, however, at best indirect inferences. All that is penalized in a direct sense is the failure to give the required notices.[40] The Act states that the entire procedure is void only if there is a failure to give notice to the purchaser,[41] and that the procedure is void as to the interest of other parties to whom notice must be given only if there is a failure to give notice to those parties.[42] Consequently, it can be argued that if the required notices are in fact given to the appropriate parties, the forfeiture is valid regardless of whether the notices are recorded. The Act also provides that forfeiture may be enjoined or set aside if there is a "material failure" to comply with the Act.[43] However, in the absence of clear consequences attached to the failure to record the required notices, it is doubtful that failure to record, especially in the case of the notice of intent to forfeit, is a material noncompliance.

It is clear from the statutory references to recording and from the drafting history of the Act that the drafters intended that the required notices be recorded.[44] It is unfortunate that the Act does not directly state the penalty for a failure to record as it does for the failure to give the required notices.[45]

36. WASH. REV. CODE § 61.30.020 (1985).
37. *Id.* § 61.30.070(2).
38. *Id.* § 61.30.040(5) (notice of intent to forfeit "shall be recorded" after time for cure has passed without default being cured).
39. *Id.* § 61.30.040(6) (declaration of forfeiture "shall be recorded" after time for cure has passed without default being cured).
40. *Id.* § 61.30.040(1)–.040(2).
41. *Id.* § 61.30.040(1).
42. *Id.* § 61.30.040(2).
43. *See supra* notes 23–24.
44. Drafting History, *supra* note 4, at 7, 11; Drafters' Comments, *supra* note 9, at 4, 7–8.
45. *See supra* notes 32–42 and accompanying text.

2. *Cure*

The Act accomplishes another major change by requiring that the seller give a minimum of ninety days to cure the default[46] and by stating that an effective cure reinstates the contract.[47] In this respect the Act represents a beneficial compromise—in return for a forfeiture procedure that does not require judicial action, the opportunity to cure is mandatory. In addition, the cure can be effected simply by bringing the contract current in the absence of an otherwise valid due on sale clause.[48] After a notice of intent to forfeit is recorded and served, the purchaser and those entitled to receive the required notices may cure the default by paying all amounts due under the contract, which include amounts owing at the time the notice of intent is recorded, amounts accruing during the cure period and costs and attorneys fees if permitted by contract.[49] If the cure is tendered, the contract is reinstated and the seller is required to record confirmation of cure.[50]

Prior to the Act, in theory at least, the seller did not have to give the purchaser the opportunity to cure.[51] The forfeiture was effective when the

46. WASH. REV. CODE § 61.30.010(10) (1985) provides that "time for cure" is the time provided in WASH. REV. CODE § 61.30.070(1)(e), which states that the time period is 90 days. The minimum 90 day period was part of the committee's effort to fairly balance the "rights, remedies, liabilities and responsibilities among the parties to a contract, while permitting those parties a significant amount of freedom in the manner in which they chose to structure their arrangement." Drafters' Comments, *supra* note 9, at 2; Drafting History, *supra* note 4, at 7.

47. "Cure" means to perform the obligations under the contract which are in default. WASH. REV. CODE § 61.30.010(2) (1985). Cure reinstates the contract. *Id.* § 61.30.090(4).

48. *Id.* § 61.30.090(1). For the appropriateness of acceleration of the balance of the contract on sale, see Terry v. Born, 24 Wn. App. 652, 604 P.2d 504 (1979).

49. WASH. REV. CODE § 61.30.010(2) (1985). For parties entitled to cure, see *id.* §§ 61.30.040(1)–.040(2) and *id.* § 61.30.090(2).

50. *Id.* §§ 61.30.090(4)–.090(5).

51. The purchaser had to file an action and show that relief from forfeiture should be granted. To obtain any relief at all, the purchaser had to show "equities" that required judicial intervention for relief. *E.g.*, Krieg v. Salkovics, 18 Wn. 2d 180, 138 P.2d 855 (1943); Sofie v. Kane, 32 Wn. App. 889, 650 P.2d 1124 (1982). A party whose interest was dependent on the purchaser's, for example a mortgagee of the purchaser's interest, could pay amounts in default to avoid the forfeiture, but the seller was not even required to notify these parties of the default and pending forfeiture unless seller had actual notice of their interest. Kendrick v. Davis, 75 Wn. 2d 456, 452 P.2d 222 (1969). If the purchaser sought a grace period, the court would weigh the relative equities of the parties to determine both the length of the grace period and whether the default could be cured by paying off the entire contract balance or by bringing payments current. Factors that can be identified are: payment of a substantial portion of the purchase price, John R. Hansen, Inc. v. Pacific Int'l Corp., 76 Wn. 2d 220, 455 P.2d 946 (1969); improvements by purchaser and an offer to pay the purchaser price, or a technical default, State *ex rel.* Foley v. Superior Court, 57 Wn. 2d 571, 358 P.2d 550 (1961); an honest dispute over amounts owed, Wallis v. Elliott, 154 Wash. 625, 282 P. 928 (1929); suggestion that seller is overreaching, Dill v. Zielke, 26 Wn. 2d 246, 173 P.2d 977 (1946). For length of grace period, see *infra* note 57. For reinstatement and acceleration, see *infra* notes 55–56. Courts commonly refused to permit purchasers simply to reinstate the contract by bringing payments current if the seller would suffer financially. *E.g.*, *Hansen*, 76 Wn. 2d at 220, 455 P.2d at 946.

declaration of forfeiture was given.[52] In addition, the seller did not have to give notice of intent to forfeit to any party whose interest was acquired after the purchaser's unless the seller had actual notice of the party.[53] In practice, however, a seller often had to bring a judicial action to declare forfeiture or quiet title.[54] As part of the judicial action, courts often granted a cure or "grace" period within which the contract could be reinstated either by bringing the contract current[55] or paying the entire amount of the contract.[56] There was much uncertainty about the length of the grace period because this matter rested with the discretion of the court.[57] This pre-Act uncertainty about the need to bring a judicial action, whether a grace period would be granted, and its length, is avoided under the Act.

The Act also gives the seller protection against abuse of the mandatory cure period. Unless otherwise agreed by the parties, the period for cure can be extended only by court order and only in the case of nonmonetary defaults.[58] In addition, a request for extension of the cure period must be accompanied by a showing that despite "due diligence" it is not possible to cure within ninety days and that in all other respects, the party is able to cure (for example, in the case of both a monetary and nonmonetary default).[59]

The seller need not, but may, accept a partial or late cure.[60] In the case of the partial cure, the seller must notify the party tendering the cure that it is only a partial cure in order to avoid any possible problem with a cure that is tendered in the mistaken belief that it is a complete cure.[61] If a partial cure has been tendered under such a mistaken belief, the tendering party may

52. Sleeper v. Bragdon, 45 Wash. 562, 88 P. 1036 (1907).

53. Kendrick v. Davis, 75 Wn. 2d 456, 452 P.2d 222 (1969).

54. *See generally* G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 3.28 (2d ed. 1985). A major reason for this Act, in the view of many attorneys, was to avoid the necessity for judicial action. Drafting History, *supra* note 4, at 7.

55. John R. Hansen, Inc. v. Pacific Int'l Corp., 76 Wn. 2d 220, 455 P.2d 946 (1969); Moeller v. Good Hope Farms, 35 Wn. 2d 777, 215 P.2d 425 (1950); Dill v. Zilke, 26 Wn. 2d 246, 173 P.2d 977 (1946).

56. Bruckart v. Cook, 30 Wn. 2d 4, 190 P.2d 725 (1948); Central Life Assur. Soc'y v. Impelmans, 13 Wn. 2d 632, 126 P.2d 757 (1942); Great Western Inv. Co. v. Anderson, 162 Wn. 58, 297 P. 1087 (1931); Wallis v. Elliott, 154 Wn. 625, 282 P. 928 (1929); Zane v. Hinds, 136 Wn. 352, 240 P. 6 (1925); Will Rogers Farm Agency v. Stafford, 4 Wn. App. 500, 482 P.2d 336 (1971).

57. Grace periods varied from thirty days to six months. *E.g.*, Radach v. Prior, 48 Wn. 2d 901, 297 P.2d 605 (1956) (thirty days); John R. Hansen, Inc. v. Pacific Int'l, 76 Wn. 2d 220, 455 P.2d 946 (1969) (six months). There was no standard length of time. Great W. Inv. Co. v. Anderson, 162 Wash. 58, 297 P. 1087 (1931).

58. WASH. REV. CODE § 61.30.110 (1985).

59. *Id.* § 61.30.110(3).

60. *Id.* § 61.30.090(3); Drafters' Comments, *supra* note 9, at 12–13.

61. Drafters' Comments, *supra* note 9, at 12–13.

request that the seller refund the amounts tendered and the seller is required to make such a refund or face statutory liability for failure to do so.[62]

3. *Public Sale*

A third major change in pre-Act law is the new public sale protection for some purchasers.[63] A purchaser with substantial equity in the property subject to forfeiture may be unable to cure within the relatively short ninety-day period. Since the Act also forecloses the possibility that this purchaser could seek an extension of the cure period for a monetary default,[64] the solution is to ask a court to order a public sale of the property in lieu of forfeiture.[65]

The request for a public sale may be made by any party entitled to cure under the Act and must be made prior to the expiration of the original cure period.[66] Before ordering a sale, a court must find that the fair market value of the property substantially exceeds the unpaid contract balance and other outstanding obligations against the property.[67] Following the sale, the proceeds of the sale are used to pay the seller and other outstanding obligations. Any surplus is distributed to the purchaser.[68]

Prior to the Act, purchasers who were unable to cure (or sell their interests to others who could) could not successfully request a sale in lieu of forfeiture on any ground. The purchaser's equity in the property was only one of the factors that would be considered by the court in awarding a grace period within which to cure.[69] Courts in some states had ordered contract forfeiture under analogous mortgage procedures. However, apart from several very early cases in which real estate contracts were foreclosed as mortgages, no Washington court had so ordered.[70] Consequently, the Act,

62. *Id.* (notification and responsibility to refund on request require seller to provide reasonable time to address mistakenly tendered cures).

63. WASH. REV. CODE § 61.30.120 (1985).

64. *Id.* § 61.30.110(3).

65. *Id.* § 61.30.120.

66. *Id.* § 61.30.120(1)–.120(2). This could be either the statutory 90 day minimum or a longer period agreed to in the contract. *Id.* § 61.30.010(10).

67. *Id.* § 61.30.120(3).

68. *Id.* § 61.30.120(6). There should, of course, be a surplus if the statutory criteria, see *supra* text accompanying note 67, were correctly applied.

69. The only relief from forfeiture was in the form of a grace period within which the purchaser could cure by paying off either the entire balance of the contract or bring the contract current and reinstate it. *See supra* notes 55–56 and accompanying text. *See, e.g.*, State *ex rel.* Foley v. Superior Court, 57 Wn. 2d 571, 358 P.2d 550 (1961).

70. For cases foreclosing contracts as equitable mortgages, see Aylward v. Lally, 147 Wash. 29, 264 P. 983 (1928); Roy v. Vaughn, 100 Wash. 345, 170 P. 1019 (1918). *See also* Nelson v. Robinson, 184 Kan. 340, 336 P.2d 415 (1959). For cases foreclosing contracts under statutory foreclosure procedure, see Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), and Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979). *See generally* G. NELSON & D. WHITMAN, *supra* note 54, at § 3.29.

on an appropriate showing, gives some additional protection to purchasers not available at common law. This protection gives the purchaser and other lienholders a means to recover the value in the property over and above the amount owed to seller. The provision is also a safeguard in a procedure that terminates valuable property rights without the involvement of a court or a disinterested third party such as a trustee.[71]

C. Other New Statutory Procedures

The Act contains some highly technical procedural requirements that require vigilance during forfeiture. Sellers must take prompt action to serve appropriate parties after recording. The notice of intent to forfeit must be "given not later than ten days after it is recorded."[72] Similarly, the declaration of forfeiture must be given within three days of the date it is recorded.[73] A notice is "given" for purposes of the Act when served, mailed, posted or first published.[74] There are also very specific requirements about the content[75] of the notice of intent to forfeit and the declaration of forfeiture and who can appropriately sign each notice.[76] Interestingly enough, however, no adverse consequences appear to flow from failure to observe these technical requirements. The Act only penalizes the "failure to give" notices and is completely silent about the failure to give notices within the statutorily required time or that are not in the statutorily required form.[77] Consequently, there would appear to be no penalty for failure to observe other requirements in the Act, except that a "material" failure to comply with the Act furnishes grounds for restraint of forfeiture[78] and for setting aside a forfeiture.[79] However, it is doubtful that minor variations in these technical requirements would amount to material noncompliance.

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71. Drafters' Comments, *supra* note 9, at 17–18.
72. WASH. REV. CODE § 61.30.060 (1985).
73. *Id.*
74. *Id.* § 61.30.050(3).
75. *Id.* § 61.30.070.
76. *Id.* § 61.30.050(1). The notice of intent to forfeit may be signed by seller, or seller's agent or attorney. By contrast, the declaration of forfeiture can only be signed by the seller. The drafters believed that because of the importance of the declaration of forfeiture, the seller should be required to sign it under penalty of perjury. Drafters' Comments, *supra* note 9, at 8.
77. WASH. REV. CODE § 61.30.040 (1985). Failure to give notice to the purchaser makes the forfeiture void. Failure to give notice to others makes the forfeiture void as to the interest of the party that did not receive the notice.
78. *Id.* § 61.30.110(3).
79. *Id.* § 61.30.140(4).

IV. PROBLEM AREAS

Although the Act sets out detailed procedures for forfeiture, some areas will no doubt require judicial interpretation. In one area—retroactivity—an immediate challenge to the Act can be expected. In others, judicial interpretation will be necessary to resolve questions not answered by the Act itself.

A. Retroactivity

The Act's retroactive effect may present difficult issues.[80] The Act states that it applies to all real estate contract forfeitures initiated on or after its effective date, regardless of when the real estate contract was entered into.[81] Since the forfeiture procedures in the Act are the sole method for forfeiture of real estate contracts,[82] the Act will no doubt be challenged on the ground that it applies retroactively in an impermissible manner. The decision to make the Act retroactive was based on the belief that it changes only remedies and does not affect substantive rights, as well as a policy decision that it is better to have a uniform procedure for forfeiture rather than endure a lengthy period of dual methods of forfeiture.[83]

Although the Act does not change the basic common law consequences of forfeiture,[84] the mandatory cure and public sale provisions are significant departures from the common law and the invalidation of acceleration clauses directly abrogates a provision contained in most real estate contracts. Additionally, the Act makes cure and reinstatement mandatory regardless of the relative position of the buyer and seller,[85] whereas such decisions were left to the courts' discretion at common law.[86] Finally, the Act permits the property to be sold at a public sale—something never permitted at common law.[87] The Act, therefore, gives purchasers rights where none previously existed and diminishes the rights of sellers. The seller no longer has an unfettered, bargained for right to forfeit or accelerate the debt on default. Nor does the seller have the right to have his economic

80. There are numerous Washington cases that discuss the retroactive application of statutes and they are difficult, if not impossible, to reconcile. Sutherland's observation that judicial statements of the standards being applied are little more than ways to restate the problem is apt. 2 SUTHERLAND, STATUTORY CONSTRUCTION, at 260 (4th ed. 1973). At least one Washington case recognizes the problem. *See In re* Santore, 28 Wn. App. 319, 623 P.2d 702 (1981).

81. WASH. REV. CODE § 61.30.910 (1985).

82. *Id.* § 61.30.020.

83. Drafters' Comments, *supra* note 9, at 25; Drafting History, *supra* note 4, at 28–29.

84. *See supra* text accompanying notes 25–27.

85. WASH. REV. CODE § 61.030.090(4) (1985).

86. *See supra* notes 45–51 and accompanying text.

87. WASH. REV. CODE § 61.30.120 (1985). *See supra* notes 58–59 & 63.

position or other equities evaluated by a court before a right to cure is granted.

Courts evaluating the retroactive application of statutes begin with a presumption that a statute applies prospectively, but will apply a statute retroactively, particularly where there is evidence that the legislature intended retroactive application.[88] If the court finds evidence of legislative intent, it will approve retroactive application in instances where a common law right is affected,[89] or where only procedures or remedies are being changed.[90] Retroactive application is not permitted, however, where a vested right or a contract right would be affected.[91]

The cases in which retroactive changes have been approved by the Washington courts are distinguishable from the retroactive changes made by the Act. First, contract rights are more directly affected by the retroactive changes in the Act because the Act invalidates acceleration clauses and grants a minimum ninety day cure period instead of the thirty days agreed to in most contracts.[92] Second, sellers have vested rights under the

88. In most cases, the court must infer that the legislature intended the statute to apply retroactively from words used in the statute. *See, e.g.*, Agency Budget v. Wash. Ins. Guar. Ass'n, 93 Wn. 2d 416, 610 P.2d 361 (1980). A clear expression of intent, such as is present in the Act, should be very persuasive. *See In re* Marriage of MacDonald, 104 Wn. 2d 745, 709 P.2d 1196 (1985), where the court found direct evidence that the Uniformed Services Former Spouses Protection Act was to be applied retroactively in the language of the statute and its legislative history. *Cf.* Johnston v. Beneficial Mgmt. Corp., 85 Wn. 2d 637, 538 P.2d 510 (1975).

89. Some cases contain the flat statement that retroactive changes of the common law are always permissible. *E.g.*, Overlake Homes, Inc. v. Seattle First Nat'l Bank, 57 Wn. 2d 881, 360 P.2d 570 (1961) (retroactive change of bank's common law obligation to customer).

90. Retroactive changes in the extent of recovery for tort actions was approved because the change resulted in a "more complete, workable and effective *remedy*." Godfrey v. State, 84 Wn. 2d 959, 965, 530 P.2d 630, 633 (1975) (emphasis in original). For a retroactive change in the method of service of process, see Tellier v. Edwards, 56 Wn. 2d 652, 354 P.2d 925 (1960).

91. In Johnston v. Beneficial Mgmt. Corp., 85 Wn. 2d 637, 538 P.2d 510 (1975), the court refused to apply the Consumer Protection Act retroactively since the rights created by that Act had not existed at common law, and in Miebach v. Colasurdo, 102 Wn. 2d 170, 685 P.2d 1074 (1984), the court refused to apply a provision changing redemption notices retroactively because it would affect title transferred under prior execution sales.

92. WASH. REV CODE § 61.30.090(1) (1985). All real estate contracts using standard form A-1964 permit a seller to collect attorney's fees if it is necessary to "bring suit" to enforce the contract. For form A-1964, see 2 WASH. REAL PROP. DESKBOOK, ch. 37.46 at SU-37-23-26 (1979). Since the Act's forfeiture procedures are entirely nonjudicial, this provision of many contracts is also affected. Although "costs and attorney's fees prescribed in the contract" must be paid in order to cure, no attorney's fees are due under form A-1964 until suit. It is, therefore, inappropriate to request that attorney's fees be paid as part of cure. If such a demand were made, it could be viewed as a material noncompliance with the Act, which authorizes payment of attorney's fees as part of a cure only when authorized by the contract. WASH. REV. CODE § 61.30.010(2) (1985). Material noncompliance is grounds to restrain the forfeiture or set the forfeiture aside. *Id.* §§ 61.30.110–.140.

definitions of vested rights given in previous cases.[93] The statute affects these rights because it gives a mandatory, not discretionary, right to cure to purchasers that delays, beyond the time negotiated in the contract, a seller's right to enjoyment of property to which seller holds legal title. There are, however, strong policy reasons that support retroactive application of the Act despite its impact on contract or vested rights. The Act is a compromise that attempts to balance the rights of the seller and the purchaser.[94] Although it is accurate to say sellers have lost contract rights, they have also gained much under the Act's forfeiture provisions. The seller has gained the advantage of a nonjudicial procedure for forfeiture that avoids the necessity of bringing an action to forfeit or quiet title and the possibility that a grace period of longer than ninety days might be ordered in specific cases. There is no redemption after forfeiture,[95] and title is cleared without waiting through a redemption period. Cure must be made within precise guidelines that are known in advance, not determined later by a court. Finally, the purchaser's right to enjoin or set aside the forfeiture is quite limited.[96] Consequently, a persuasive case can be made that the Act, on balance, simply provides "a more complete, workable and effective remedy that is retroactive in effect," and such remedial schemes have been frequently approved.[97]

The drafters of the Act chose to make the Act retroactive because of the length of duration of many real estate contracts.[98] If the Act did not cover all contracts at the outset, it might take as long as twenty years before all contracts were forfeited in the same manner. Uniformity in forfeiture procedures, especially where the uniformity promotes fairness and balances the interests of both the seller and the buyer, are important public policy goals.[99] Although the retroactivity question is a close one, it should be resolved in favor of retroactive application in order to avoid lengthy periods of dual procedures.

If the Act is applied retroactively, it will be subject to a challenge that it is an unconstitutional impairment of contract rights under article 1, section 10 of the United States Constitution. Recent Washington cases have moved from a literal interpretation of the contract clause, particularly in instances

93. A vested right exists if a party enjoys a "legal exemption from the demand of another" or if the party has a right to the "future enjoyment of property." Godfrey v. State, 84 Wn. 2d 959, 963, 530 P.2d 630, 632 (1975); *Miebach*, 102 Wn. 2d at 181, 685 P.2d at 1081.

94. Drafters' Comments, *supra* note 9, at 1–3.

95. WASH. REV. CODE § 61.30.100(2)(a) (1985).

96. *Id.* §§ 61.30.110–.140.

97. Godfrey v. State, 84 Wn. 2d 959, 965, 530 P.2d 630, 633 (1975).

98. Drafters' Comments, *supra* note 9, at 25.

99. *Id.*

involving the debtor-creditor relationship or changes that can be characterized as remedial.[100] It is probable, therefore, that such a constitutional challenge to the Act would be unsuccessful. None of these cases dealt with a direct abrogation of the right to accelerate, however, and therefore none approve such direct tampering with a substantive contract right.[101]

B. Treatment of Interests Dependent on the Purchasers

The most serious problem with the Real Estate Contract Forfeiture Act is what it does not say. The omission is most acute in the case of interests dependent on the continuance of the purchaser's interest because the Act does not specify comprehensively who is to be notified, what right or remedy these parties have if they exercise their statutory right to cure, or what right or remedy they have if the seller fails to give them the required notices.

1. Notice to Third Parties

The Act requires that the seller give the required notices to "holders of record . . . of security interests in or liens against the purchaser's interest."[102] However, it is not clear whether the record to which the statute refers is the record for deeds and other conveyances kept by the county auditor or simply any public record. If the reference is only to the real property records, the seller would not have to give notice to some of the purchaser's creditors because their liens are kept in separate records.[103] On the other hand, if the statutory reference is to any lien, wherever entered in

100. Macumber v. Shafer, 96 Wn. 2d 568, 571, 637 P.2d 645, 646–47 (1981). A suspension of foreclosure procedures was upheld in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), a case relied on by the Washington Supreme Court in *Macumber*.

101. For example, *Macumber* approves the retroactive application of a raise in the monetary amount of the homestead exemption. The amount of the exemption was not actually a term of the contract between the parties, but a statutory provision in effect at the time the parties entered into the contract. The United States Supreme Court approved the suspension of mortgage foreclosure rights on dates specified in the mortgage contracts in *Home Bldg. & Loan Ass'n*, 290 U.S. at 398, a case relied on by the *Macumber* court. Consequently, some kinds of direct tampering with contract rights may not be unconstitutional.

102. WASH. REV. CODE § 61.30.040(2)(a) (1985).

103. For example, a judgment becomes a lien on the real property of a debtor when properly entered or filed with the county clerk in the county in which the real estate is located. *Id.* § 4.56.200. The purchaser's interest in a real estate contract is real property for purposes of the judgment lien statute. Cascade Bank v. Butler, 88 Wn. 2d 777, 567 P.2d 631 (1977). In other instances, the statute granting the lien provides that the lien is to be recorded in the auditor's index for deeds and conveyances. *E.g.*, WASH. REV. CODE § 60.04.060 (1985) (mechanics' and materialmen's liens).

the public records, seller will have to check beyond the record for deeds and conveyances.

2. *Effect of Cure by Third Parties*

The Act permits holders of security interests in or liens against the purchaser's interest to cure the default.[104] Persons holding either seller's or purchaser's interests in real estate contracts subordinate to the contract being forfeited and persons occupying the property are also permitted to cure.[105] The Act is silent, however, on what rights these parties have if they do cure. The Act states only that timely tender of cure reinstates the contract.[106] One possibility is that the party tendering cure would be deemed to "step into the shoes" of the purchaser. This is probably not a desirable interpretation, however, since it could conceivably permit a party paying as little as one overdue contract installment to acquire the entire purchaser's equity. A more likely interpretation of the language would be that the purchaser's interest is reinstated if one of these parties tenders cure. If this is the interpretation, however, the third party who tenders cure wants and needs some method to recoup the amounts paid from the purchaser or from the property.

The various parties given the right to cure by the Act are in very different legal positions. Therefore, the manner and method of recouping amounts tendered on behalf of the purchaser should vary depending on the legal position of the tendering party. The remedies given to a lienholder, a subordinate contract interest or an occupier of the property should be different.

A sensible way to treat cure by the holder of a lien would be to add amounts tendered for cure to the lien. The Deed of Trust Act provides that amounts tendered to cure by persons having "subordinate liens" are added to the lien.[107] Since real estate contracts are financing devices like deeds of trust, it would be appropriate to grant a similar remedy to lienholders who cure defaults in real estate contracts.

Cure by a party with a subordinate contract interest requires different treatment because such parties are likely to be attempting to protect their own ability to complete the subordinate contract, and eventually acquire title to the property. Simply providing that amounts paid to cure shall be a lien on whatever property interest the defaulting purchaser possesses will not adequately recognize the nature of the interest held by the junior. The

104. WASH. REV. CODE § 61.30.090(2) (1985).
105. *Id.*
106. *Id.* § 61.30.090(4).
107. *Id.* § 61.24.090(4).

defaulting senior contract purchaser is in the de facto position of the original seller. Any title acquired under the purchaser's own contract is held in trust for the junior purchaser should the junior contract be completed, and the senior purchaser would be compelled to transfer that title to the junior on completion of the junior contract.[108] Therefore, the position of the junior contract interest is similar to the position of a grantee from the mortgagor.[109] Like the grantee, the junior purchaser should be entitled to contribution from the senior purchaser under the doctrine of equitable subrogation.[110] The right of contribution could then be enforced by offsetting amounts paid to cure the senior contract against amounts owed on the junior contract.

The most difficult problem is presented when an occupant of the property tenders cure. This difficulty results from the fact that persons occupying the property can run the gamut from lessees to adverse possessors to, one supposes, even visitors, if the seller can ascertain their identity[111] within the meaning of the Act. Should any of these parties tender cure, they should probably be treated under existing doctrines of equitable subrogation,[112] to the extent that the payment is made to protect an interest and not as a volunteer.[113]

3. *Omitted Parties*

The Act states that if the seller does not give the required notices to the purchaser, the forfeiture is void.[114] This apparently means that the entire procedure is a nullity and the seller will have to begin the procedure again.[115] However, the Act states that if the seller does not give the required notices to lienholders, subordinate contract interests or occupiers of the property the forfeiture is "void as to each person . . . to whom the notices are not given."[116] The Act, therefore, uses the language that traditionally

108. Culmback v. Stevens, 158 Wash. 675, 291 P. 705 (1930).

109. *See generally* G. NELSON & D. WHITMAN, *supra* note 54, at § 10.7.

110. *Id.* § 10.1.

111. WASH. REV. CODE § 61.30.040(2)(c) (1985).

112. G. NELSON & D. WHITMAN, *supra* note 54, at § 10.4.

113. *Id.* The Act includes a curious provision which allows uninterested parties to record a request to receive forfeiture notices. WASH. REV. CODE § 61.30.040(3) (1985). These parties are not, however, given any right to cure. Since such parties are pure volunteers, they would not be included in the existing equitable subrogation doctrines.

114. WASH. REV. CODE § 61.30.040(1) (1985).

115. *Id.* § 61.30.080; Drafters' Comments, *supra* note 9, at 10.

116. WASH. REV. CODE § 61.30.040(2) (1985). The drafters used this language to permit a seller to intentionally fail to give notice to a party to whom notice must otherwise be given and thereby preserve that party's interest. For example, the drafters wished to permit sellers to preserve economically viable leases by not notifying lessees of the purchaser of the forfeiture. Drafting History, *supra* note 4, at 11.

has been used by courts to describe the effect of a judicial foreclosure when a junior interest has been omitted from the foreclosure.[117] However, simply stating that the forfeiture is void as to an omitted interest does not clarify the rights the omitted party has vis-a-vis the property or other interests in the property, either still outstanding or forfeited in the action.

Several interpretations of this statutory provision are plausible. If the procedure is void as to the omitted interest only, the omitted interest could simply continue on the property in its current state of title. An omitted lien would then continue as a lien on the property in the seller's hands. This has an equitable ring to it since it was, after all, the seller who committed the error of omission. The effect of such a rule, however, could elevate junior interests over interests senior to them that were properly forfeited because the required notices were given. Suppose, for example that the omitted party was a lien creditor of the purchaser's, subordinate not only to the purchaser's equity, but to a senior mortgage on the purchaser's interest. If the lien remains on the property because the party was omitted, it in effect is elevated over the senior lien and the purchaser.

Analogous mortgage cases take account of the "elevation" problem in the case of omitted junior lienors by giving them one of two remedies—a right to foreclose their own lien by sale, with senior liens revived for this purpose, or the right to redeem senior interests.[118] The right to redeem is predicated on the existence of the common law "equity of redemption" and is not statutory. Two Washington cases involving omitted real estate contract purchasers have used this approach. In *Brost v. L.A.N.D., Inc.*[119] and *Haueter v. Rancich,*[120] the omitted party was granted a right to redeem, in the latter case by paying the purchase price for the property.

However, the Act states that "no person shall have any right, by statute or otherwise, to redeem the property."[121] Consequently, it would appear that the only remedy available to the omitted party is the action to set aside the forfeiture.[122] The Act apparently places parties omitted from a forfeiture procedure in a position similar to parties omitted in deed of trust foreclosures and rejects the mortgage analogy.[123] Further, if the success rate in

The conception is flawed, however, because a leasehold interest carved out of a purchaser's interest must of necessity terminate with the termination of the interest on which it is dependent.

117. Krutz v. Gardner, 25 Wash. 396, 65 P. 771 (1901). *See generally* G. NELSON & D. WHITMAN, *supra* note 54, at § 7.15.

118. G. NELSON & D. WHITMAN, *supra* note 54, at § 7.15.

119. 37 Wn. App. 372, 680 P.2d 453 (1984).

120. 39 Wn. App. 328, 693 P.2d 168 (1984).

121. WASH. REV. CODE § 61.30.100(2)(a) (1985).

122. *Id.* § 61.30.140.

123. Drafters' Comments, *supra* note 9, at 14; *see, e.g.*, Morrell v. Arctic Trading Co., 21 Wn. App. 302, 584 P.2d 983 (1978); Comment, *Non-Judicial Foreclosure of Deeds of Trust,* 59 WASH. L. REV. 323 (1984).

setting aside forfeitures were to parallel the success rate of similar actions challenging deeds of trust, it could be predicted that it would be difficult to set aside a forfeiture.[124]

The real estate contract, however, differs enough in its legal form from the deed of trust that the deed of trust analogy is inappropriate.[125] The real estate contract seller continues to hold title and forfeited interests are extinguished. There is no independent party in the contract forfeiture procedure like the trustee under a deed of trust conducting the forfeiture, nor is there a public sale resulting in a third party purchaser whose rights must be considered. Consequently, the party omitted from forfeiture lacks the protection of a public sale and the concern about the security of title in the hands of a third party purchaser is not present. There is, therefore, no compelling reason not to permit the omitted party to set aside the forfeiture, if the party demonstrates the capacity to cure. The reasons that limit the remedies under deeds of trust do not exist under the Act. Courts should, therefore, be more indulgent when considering actions to set aside forfeitures.

Curiously, the peculiar legal form of the real estate contract may also be the salvation of omitted parties. Because the forfeiture itself involves no sale and, with one exception, only recorded interests must be notified,[126] it should be rare that any party to a later sale can claim to be a bona fide purchaser or encumbrancer for value capable of defeating an action to set aside.[127] The forfeiting seller who omitted a recorded interest could not be a bona fide purchaser, nor could anyone to whom seller conveyed title, because both would have constructive notice of the omitted party from the record itself.[128] Therefore, parties omitted from forfeitures should have a

124. No reported Washington case has set aside a deed of trust foreclosure. The Act has a short statute of limitations for actions to set aside (60 days), although the limitation does not apparently apply to omitted parties. WASH. REV. CODE § 61.30.140(2) (1985). Drafters' Comments, *supra* note 9, at 21.

125. The Washington Supreme Court has held that deeds of trust and mortgages should be treated similarly for some purposes. Rustad Heating & Plumbing Co. v. Waldt, 91 Wn. 2d 372, 588 P.2d 1153 (1979). However, the court clearly refused to treat the two financing devices similarly on an across the board basis. This suggests that the court would be sensitive to differences in the form of the different financing devices.

126. Nonrecorded possessory interests must also be notified if reasonably ascertainable. WASH. REV. CODE § 61.30.040(2)(c) (1985). Although these interests are not of record and constructive notice of them would not be provided from the record, possession would not be enough to place purchasers and encumbrances on inquiry notice. Miebach v. Colasurdo, 102 Wn. 2d 170, 685 P.2d 1074 (1984). *But see* Scott v. Woolard, 12 Wn. App. 109, 529 P.2d 30 (1974), which held that because possession of property by a tenant is not inconsistent with the record holder's right to convey, the possession does not give notice.

127. WASH. REV. CODE § 61.30.140(4) (1985).

128. This should result from the fact that the Act requires seller to give notice to all interests recorded "at the time the notice of intent to forfeit is recorded." *Id.* § 61.30.040(1). The holding in Kendrick v. Davis, 75 Wn. 2d 456, 452 P.2d 222 (1969), that seller did not have to give notice to

much easier time in a set aside action than their deed of trust counterparts.

Finally, omitted parties may challenge forfeiture procedures on constitutional due process grounds. In *Mennonite Board of Missions v. Adams*,[129] the United States Supreme Court held that before interests are extinguished by a public sale, every party with a "legally protected property interest" must receive "notice by mail or other means as certain to ensure actual notice . . . when their interests are reasonably ascertainable." Parties that are totally left out of the forfeiture clearly have been denied due process. In *Mennonite*, however, parties whose only notice was by publication were held to have been denied due process as well. This will cause a particularly sticky problem with the Act, at least at the outset. As previously discussed, it has not been customary to record real estate contracts in Washington. It will then take some years of recording before the records are complete and reliable. In the meantime, the only "safe" way to forfeit must include routine publication as permitted in the Act.[130] If any unrecorded, but "reasonably ascertainable" interest later challenged the forfeiture because the only notice was by publication, the challenge would appear sound under *Mennonite*.

V. CONCLUSION

The Act needs some clarification, either legislative or judicial. It does, however, provide much needed standardized procedures for forfeiture of real estate contracts and furthers the policy goals of encouraging the reliability of public records and clarifying and balancing the rights of both purchasers and sellers. When coupled with a well-drafted contract, the Act should make the decision to use this form of real estate financing more informed.

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interests recorded after the real estate contract should be changed by the Act.

129. 462 U.S. 791 (1983). In *Mennonite*, a recorded mortgagee was not given actual notice of a tax sale; the only notice offered was by publication.

130. WASH. REV. CODE § 61.30.050 (1985). The Act permits posting and publication if the "identity of a person for whom the required notices are intended is not known to or reasonably discoverable by the seller." To the extent that the "reasonably discoverable" standard set out in the Act, see *supra* note 126, parallels the "reasonably ascertainable" standard in *Mennonite*, notice by publication or posting only would violate the Act as well.