Duke Law Journal

VOLUME 1988 SEPTEMBER NUMBER 4

VAGUENESS AND THE RULE OF LAW: RECONSIDERING INSTALLMENT LAND CONTRACT FORFEITURES

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The law of installment land contract forfeitures is amazingly muddled these days, to an unhealthy degree. Decades ago the law was relatively clear. Courts enforced forfeiture clauses with few questions asked, except perhaps when a forfeiture was shocking in amount or otherwise grossly unfair.[1] A vendor with an enforceable forfeiture clause could declare a default and forfeiture when a purchaser missed a payment. After the declaration, the vendor could recover his property and retain all of the purchaser's payments.

Today, however, the landscape looks much different, and for largely magnanimous, if poorly directed, reasons. Courts now show greater solicitude toward the purchaser, a person whom they perceive as poorly informed, inadequately represented, and relatively low in income. New rules give the purchaser additional time to reinstate the contract and redeem the property, while diminishing the adverse consequences when forfeiture is unavoidable.[2]

The direction of change is unambiguous: lawmakers today are decidedly pro-purchaser, fashioning rules that protect the purchaser against losing his home and his investment in it. A few states have even gone so far as to treat the installment land contract as the functional equivalent of a mortgage, an approach that extends to the purchaser the full range

1. *See, e.g.*, Pease v. Baxter, 12 Wash. 567, 570, 41 P. 899, 899 (1895).

The Lynds, in their classic study of Muncie, Indiana in the 1920s, took note of the problems created by the strict enforcement of payment clauses in installment land contracts. The complaint of purchasers, many of whom were factory workers, was that their factory bosses could lay them off whenever work was slow, but as purchasers they were obligated to make all installment payments or risk losing everything. "Untrained in such matters as the amount a family can afford and coaxed by constant pressure to buy, it is not surprising that ventures in home ownership not infrequently end in shipwreck. There is much bad feeling among the working class of Middletown over the operation of this system." R. LYND & H. LYND, MIDDLETOWN 105 n.23 (1929).

2. *See infra* text accompanying notes 40-52.

of protections enjoyed by mortgagors.[3] Unfortunately, the consequence of this solicitude is a large dose of vagueness and confusion, for the new "rules" today are unacceptably imprecise. As states have protected purchasers, they have excessively favored rules that allow flexibility over rules that provide guidance.

The installment land contract has a special role in real estate practice. It is, as one court has explained, the " 'poor man's mortgage'."[4] Installment contracts are commonly signed by purchasers who lack the equity and the credit rating to obtain traditional mortgage financing.[5] When a vendor can rely on a forfeiture clause and know that she can recover her property without the delays and costs of foreclosure, she will often sell with a lower down payment, and to a purchaser who cannot satisfy the loan criteria of traditional mortgage lenders. In addition, closing costs are often minimal under installment contracts. With no deed delivered until all the payments are made, purchasers usually forgo title searches. With no outside lender, a purchaser need not pay loan origination fees or await loan processing. Without the cautious, demanding presence of an outside lending institution, purchasers often avoid the time and expense (as well as the protections) of property inspections and appraisals. For a purchaser with only a little money to invest, however, the installment land contract can provide the only possible method for purchasing real estate.

Not all installment purchasers fit this rough profile, but many do, and courts plainly view this typical purchaser as their "client." As this Article explains, however, courts have served this client poorly. Like mortgagors, installment purchasers need and deserve extensive protections.[6] But purchasers are best served by clearer and more reliable rules than those now in place. Vendors also want clear rules, rules that they can apply in routine cases without resort to expensive legal advice and exhaustive legal proceedings. If installment land contract law is not clarified, the installment contract may cease to fulfill its long-standing function as a financing mechanism for low-equity purchasers.

This Article assesses the efforts that states have made to cushion the fall of the defaulting installment land contract purchaser. Part I considers procedural and substantive limits that now make forfeitures more costly and unreliable from the vendor's perspective. Part II considers

3. *See infra* text accompanying notes 97-121.

4. Ellis v. Butterfield, 98 Idaho 644, 646, 570 P.2d 1334, 1336 (1977).

5. *See* 7 POWELL ON REAL PROPERTY ¶ 938.20[2] (P. Rohan ed. 1987) [hereinafter POWELL].

6. *See* Note, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform,* 1986 U. ILL. L. REV. 91, 92-93.

two conflicting theories of forfeiture, and the tension between them, a primary source of confusion in installment land contract law. Part III describes the alternative remedies from which vendors can choose, remedies that, in more instances than vendors seem to realize, are decidedly more advantageous than forfeiture. Part IV discusses the costs and benefits of vagueness. From this survey, three important conclusions emerge; they support the recommendations made in Part V.

The first and clearest conclusion is that forfeiture law in many states today is so vague and so subject to unpredictable judicial manipulation that vendors cannot safely rely upon it without regular resort to expert, if not omniscient, legal advice. Purchasers are no better able to determine where they stand. The cause of this uncertainty is not a dearth of law; the vagaries persist despite hundreds of reported decisions on forfeiture law every decade. Although vagueness may have its virtues, the virtues come with undue costs in the installment land contract setting.

A second conclusion is that in reforming forfeiture law, courts have not done a particularly good job of examining how the new purchaser-protection rules interact. For this reason and others,[7] the remedial schemes that courts have created respond poorly to the legitimate needs of vendors and purchasers.

The third and final conclusion is somewhat surprising: vendors, it appears, can avoid many of the problems under the new forfeiture rules by turning to remedies other than forfeiture—principally by bringing actions for rescission, breach of contract, or specific performance. The availability of these other remedies further complicates installment land contract law and, if left unrestricted, could threaten many of the protections that purchasers otherwise enjoy.

This Article, then, is as much about legal vagueness as it is about contract forfeitures: it measures in one setting the consequences of legal standards that leave the important questions unanswered. As explained below, greater clarity and simplicity in the law of installment land contracts are desirable and achievable. In order to protect purchasers, states need not require all vendors to foreclose, a requirement that would largely eliminate the installment land contract as an option for independent financing. Rather, current forfeiture rules, once modified along the lines proposed, can fairly respond to the distinct interests of vendors and purchasers.

7. *See infra* notes 20-121 and accompanying text.

I. THE MANY CONFUSIONS OF FORFEITURE LAW

A. *Background.*

Forfeiture law would be a relic today if courts had not long ago exempted installment land contracts from the firmly established rules of mortgage law, which offer defaulting mortgagors substantial protections against the consequences of default. Under the "functional equivalence doctrine," courts developed these protections paternalistically, applying them to any transaction that was, in substance, the functional equivalent of a mortgage.[8] Substance governed form, and mortgage law governed any transaction that in substance created the relationship of mortgagor and mortgagee.

A related rule of mortgage law barred any attempt by the mortgagee to "clog" the mortgagor's equitable rights, principally his right of redemption.[9] Again, the form of the transaction and the parties' intentions carried no weight. Mortgage law rules were status rules, not contract rules; they applied to any party whose practical and economic position was that of a mortgagor.

No doubt with some hesitation, courts chose to respect the installment land contract as a distinct financing mechanism and spared it from the otherwise firm grip of mortgage law.[10] They did so presumably because the installment contract at an early date came to occupy a useful niche in the law of real estate transactions. The installment contract enabled low-equity purchasers to acquire property without satisfying the rigorous requirements imposed by commercial mortgage lenders. The contract was useful for vendors as well, because it expanded the range of possible buyers and thereby facilitated sales.

Over the years, the installment contract has enjoyed great popularity in those states that have allowed it to flourish.[11] Because installment contracts allow sales to occur without the delays of loan processing and deed preparation, sellers of vacation lots use them to close a sale quickly while the purchaser is enthusiastic about the purchase. Also, during times of high interest rates, vendors often sell property on installment contract at below-market rates to facilitate sales that might otherwise not occur. The installment land contract thus offers the possibility of quick consummation and low closing costs, and it avoids the rigid requirements

8. *See* G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 3.28-.31 (2d ed. 1985).

9. *See id.* § 1.7. *See generally* Licht, *The Clog on the Equity of Redemption and Its Effect on Modern Real Estate Finance,* 60 ST. JOHN'S L. REV. 452 (1986) (examining present viability of clogging doctrine and its potential impact on modern real estate financing techniques).

10. *See* 7 POWELL, *supra* note 5, ¶ 938.20[2].

11. *Id.*

of lender loans; whenever these benefits are useful, the installment contract enjoys popularity as a mortgage alternative.

By deciding not to treat installment land contracts as mortgages, courts have deprived installment purchasers of many benefits, some judicially created, others of legislative origin. Defaulting mortgagors, for example, have an equitable right at any time before foreclosure to redeem their property by paying off their debt.[12] Some states have expanded this right of redemption by allowing mortgagors to redeem their property *after* a foreclosure sale by paying off a foreclosure-sale purchaser.[13] Mortgagors can insist, alternatively, on a foreclosure sale and claim an entitlement to any proceeds that exceed outstanding claims against the property.[14] Foreclosure procedures also require clear notice to mortgagors and often give them a chance to retain their property while proceedings are pending.[15] Many states allow defaulting mortgagors to reinstate their loan by simply paying the unaccelerated balance due, a task much easier than paying the full amount of their debt.[16] Finally, some states restrict the mortgagors' liability for deficiency judgments by employing various antideficiency rules, including rules that ban deficiency judgments in certain circumstances.[17] Taken together, these rules help mortgagors to avoid losing their property and soften the effects when a loss is unavoidable.

As courts have developed sympathy for the installment purchaser, they have begun to reassess the wisdom of denying installment purchasers the numerous protections of mortgage law. A few states, as noted below,[18] have reversed direction in full and have decided to treat the installment contract as the functional equivalent of a mortgage, at least in certain categories of cases.[19] In these states, installment purchasers can require foreclosure and claim the other rights of mortgagors. Most jurisdictions, however, have tailored a separate set of protections for in-

12. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 7.1.

13. *See id.* § 8.4, at 616 & n.2 (more than half the states).

14. *See id.* § 7.31. The only foreclosure method that does not require a sale of the property is strict foreclosure, which is rarely permitted. *See id.* §§ 7.9-.10. A "strict foreclosure" decree "finds the amount due under the mortgage, orders its payment within a certain limited time, and provides that, in default of such payment, the debtor's right and equity of redemption shall be forever barred and foreclosed." BLACK'S LAW DICTIONARY 582 (5th ed. 1979). Some states permit these decrees in cases involving installment land contracts. *See infra* text accompanying notes 137-39.

15. An example of notice rules is ILL. REV. STAT. ch. 110, para. 15-303 (Smith-Hurd Supp. 1988); *see also infra* notes 20-29 and accompanying text. For a discussion of the mortgagor's right to retain possession of the property, see G. NELSON & D. WHITMAN, *supra* note 8, §§ 4.1-.3.

16. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 7.7, at 493-94.

17. *See id.* § 8.8, at 628 (mortagagor not liable for deficiency judgment when mortgagee acquired real estate for bargain price at foreclosure sale).

18. *See infra* notes 97-121 and accompanying text.

19. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 3.29.

stallment purchasers, protections that echo mortgage law but in weakened form. In state after state, these separate rules have become more extensive and complex, coming to resemble mortgage law in most respects. Regrettably, however, these separate rules operate less smoothly than the rules of mortgage law, and they fail to accommodate effectively the competing concerns of vendors and purchasers.

The remainder of part I, a long one, considers the difficulties that arise under the various rules designed to protect installment purchasers. Section B considers the numerous procedural rules that have arisen, including rules authorizing redemption and reinstatement by defaulting buyers. Section C discusses the uncertainties of the aged election-of-remedies doctrine, a doctrine now ready for retirement. Sections D and E consider the more substantive rules that require, in various settings, restitution to purchasers of their excess payments and foreclosure in lieu of forfeiture. Finally, section F brings the cumulative problems into focus with a brief hypothetical.

B. *The Pitfalls of Declaring a Forfeiture.*

1. *The Need for Notice.* Many states have taken the remedial step of requiring vendors to employ fairer procedures in declaring a default and carrying out a forfeiture. The terms of many installment contracts allow a vendor to declare a default and to accelerate the unpaid balance with no notice to the purchaser. But in nearly all states, common law rules and statutory provisions override these contract terms and require vendors to give fair notice of a possible forfeiture.[20] If a contract or statute specifies a particular, "fair" procedure for declaring a forfeiture, the vendor must follow that procedure precisely.[21] When the contract establishes no procedure, statutory and common law rules govern.

20. *See, e.g.*, Curry v. Tucker, 616 P.2d 8, 12 (Alaska 1980); Petersen v. Hartell, 40 Cal. 3d 102, 106, 707 P.2d 232, 234, 219 Cal. Rptr. 170, 172 (1985); Martinez v. Martinez, 101 N.M. 88, 91-92, 678 P.2d 1163, 1166-67 (1984); Farmer v. Groves, 276 Or. 563, 567, 555 P.2d 1252, 1255 (1976); ARIZ. REV. STAT. ANN. § 33-743 (Supp. 1987); IOWA CODE ANN. § 656.2 (West 1987); MICH. COMP. LAWS ANN. § 600.5728 (West 1987); MINN. STAT. ANN. § 559.21 (West 1988); N.D. CENT. CODE § 32-18-04 (1976); OHIO REV. CODE ANN. §§ 5313.05-.06 (Anderson 1981 & Supp. 1987); WASH. REV. CODE ANN. § 61.30.070 (Supp. 1988). Only a few states apparently allow a vendor to declare a forfeiture without prior notice of a default and a chance to cure. *See* Bell v. Coots, 451 So. 2d 268, 269 (Ala. 1984); Borchert v. Hecla Mining Co., 109 Idaho 482, 485, 708 P.2d 887, 890 (1985); Hansen v. Transamerica Ins. Co., 175 Mont. 273, 278, 573 P.2d 663, 666 (1978); *see also* Johnston v. Austin, 748 P.2d 1084, 1089 (Utah 1988) (vendor not obligated to give notice before accelerating unless acceleration would be unconscionable under the circumstances).

21. *See, e.g.*, Fajen v. Powlus, 98 Idaho 246, 248, 561 P.2d 388, 390 (1977); Bocchetta v. McCourt, 115 Ill. App. 3d 297, 299-300, 450 N.E.2d 907, 909-10 (1983); Tobin v. Alexander, 63 Ill. App. 3d 397, 400, 380 N.E.2d 45, 47-48 (1978); SAS Partnership v. Schafer, 200 Mont. 478, 486, 653 P.2d 834, 838 (1982); Adair v. Bracken, 745 P.2d 849, 852-53 (Utah Ct. App. 1987); Note, *supra* note 6, at 103-05.

Statutory notice rules tend toward precision[22] and seem to work well. Judicially crafted notice requirements, on the other hand, are typically phrased in terms of reasonableness and fairness, terms that vendors have difficulty applying.[23] Some courts require, for example, that a vendor give notice a "reasonable" period of time before declaring a forfeiture.[24] In this setting as in others, the reasonableness concept is slippery and confounding.

A vendor must properly phrase a notice of default, but courts again are vague in defining what constitutes proper phrasing.[25] Generally, the notice of forfeiture must specify the nature of the default, the action needed to cure, and the time by which the cure must take place. The notice must state clearly that a forfeiture *will* occur *if* the cure is not performed. Vendors often err at this stage. The notice cannot *declare* a forfeiture, and if it does, it will be ineffective even as a notice of intent to declare a forfeiture in the future.[26] Moreover, a notice that specifies one ground for forfeiture can preclude the vendor from later seeking forfei-

22. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-743 (Supp. 1987) (20 days); IOWA CODE ANN. § 656.2 (West 1987) (30 days); MICH. COMP. LAWS ANN. § 600.5728 (1987) (15 days); MINN. STAT. ANN. § 559.21 (West 1988) (30-90 days); N.D. CENT. CODE § 32-18-04 (1976) (six months or one year); PA. STAT. ANN. tit. 68, § 904 (Purdon 1965) (60 days); WASH. REV. CODE § 61.30.070 (1987) (90 days). Problems, however, can arise. *See, e.g.*, Hoffman v. Halter, 417 N.W.2d 747, 750-51 (Minn. Ct. App. 1988) (court must determine whether failure to state amount due and use of wrong typeface renders notice invalid); O'Meara v. Olson, 414 N.W.2d 563, 566 (Minn. Ct. App. 1987) (statutory notice for cancellation can be avoided by seeking judicial cancellation).

23. *See, e.g., Petersen*, 40 Cal. 3d at 112-13, 707 P.2d at 239, 219 Cal. Rptr. at 177 (stating that court decrees that fix time for vendee's performance should give definite deadline for performance, after which vendee will face foreclosure of right to property); *Martinez*, 101 N.M. at 91-93, 678 P.2d at 1166-68 (under contractual "reasonable notice" provision, no "reasonable notice" when vendee not given at least 30 days to perform before forfeiture); Elsasser v. Wilcox, 286 Or. 775, 781-82, 596 P.2d 974, 977 (1979) (no reasonable notice when only notice given was that contract was, at time of notice, "null and void" and vendee had no opportunity to cure).

24. *See, e.g., Martinez*, 101 N.M. at 92-93, 678 P.2d at 1167-68; *Elsasser*, 286 Or. at 779-82, 596 P.2d at 976-77.

25. *See* 7 POWELL, *supra* note 5, ¶ 938.22[5], at 84D-57 to -59. *But cf. Adair*, 745 P.2d at 852-53 (notice declared insufficient because it omitted amount sellers were demanding, including principal, accrued interest, and back taxes).

26. *See, e.g., Martinez*, 101 N.M. at 92-93, 678 P.2d at 1167-68. A notice is likely to be defective if it understates the length of time that the purchaser has in which to cure, *see, e.g.*, Legg v. Allen, 72 Or. App. 351, 356, 696 P.2d 9, 13 (1984), or fails to specify the date on which forfeiture will occur, *see* Powell v. Moss, 51 Wash. App. 530, —, 754 P.2d 697, 700 (1988), although a minor error that clearly causes no prejudice might be overlooked, *see* Curry v. Tucker, 616 P.2d 8, 12 (Alaska 1980). Also, the notice is likely to be defective if it requires payment of the outstanding balance in full when the purchaser has the right to reinstate the contract. *See* Grow v. Marwick Dev., Inc., 621 P.2d 1249, 1251-52 (Utah 1980) (notice must accurately advise purchaser what he must do to make contract current).

ture on another ground.[27]

Once the notice is sent and a reasonable time has passed, the vendor can then declare the forfeiture. An actual declaration of forfeiture must be clear and unambiguous and must speak of a forfeiture in the present tense.[28] A declaration will be ineffective if it refers simply to an intent to declare a forfeiture in the future or to an intent to bring a civil action seeking a forfeiture. By all appearances, courts are prepared to invalidate default and forfeiture declarations because of minor deficiencies, whether or not the error has prejudiced the purchaser.[29]

Notice, then, is clearly required. But in the absence of statutory provisions, a vendor often can only guess when the notice must be sent and what it must say.[30]

2. *Waiving the Vendor's Rights.* As courts scrutinize forfeiture measures in particular cases, they are quick to conclude that a vendor has waived the right to declare a forfeiture by accepting late payments or

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27. *See* Progressive Farmers Ass'n v. Farrington, 829 F.2d 651, 656 (8th Cir. 1987) (applying Missouri law) (when notice mentions default in payment, vendor cannot later seek forfeiture based on purchaser's insolvency), *cert. denied,* 108 S. Ct. 1574 (1988).

28. *See, e.g., Curry,* 616 P.2d at 12-13; Dahm, Inc. v. Jarnagin, 133 Ill. App. 3d 14, 15, 478 N.E.2d 641, 643 (1985); Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc., 99 N.M. 95, 103, 654 P.2d 548, 556 (1982); First Sec. Bank v. Maxwell, 659 P.2d 1078, 1081 (Utah 1983); *Adair,* 745 P.2d at 852.

29. *See* Jamison v. Knosby, 423 N.W.2d 2, 5 (Iowa 1988) (notice defective because it was not sent to purchaser's tenant, even though tenant took possession after forfeiture proceedings had begun). *But cf. Curry,* 616 P.2d at 12 (omission of cure deadline "does not automatically make the notice ineffective").

30. State statutes often precisely specify not only the time for service of default notice, but also what the notice must contain. For example, the Michigan statute states:

> The notice of forfeiture shall state the names of the parties to the contract and the date of its execution, give the address or legal description of the premises, specify the unpaid amount of moneys required to be paid under the contract and the dates on which payment thereof were [sic] due, specify any other material breaches of the contract and shall declare forfeiture of the contract effective in 15 days, or specified longer time, after service of the notice, unless the money required to be paid under the contract is paid and any other material breaches of the contract are cured within that time. The notice shall be dated and signed by the person entitled to possesion, his attorney or agent.

MICH. COMP. LAWS ANN. § 600.5728(2) (West 1987); *see also* N.D. CENT. CODE § 32-18-02 (1976) (requiring written notice to state "that . . . default occurred and that [the] contract will be cancelled or terminated, and the time when such cancellation or termination shall take effect, which shall be as provided in section 32-18-04"); PA. STAT. ANN. tit. 68, § 904(b) (Purdon 1965) ("The notice shall specify the nature of the default and whenever the default arises out of the purchaser's failure to keep the premises in good repair pursuant to the provisions of the installment land contract, the notice shall contain a reasonably specific statement of the items in disrepair."); TEX. PROP. CODE ANN. § 5.062 (Vernon 1984) (notice must include the statement: "YOU ARE LATE IN MAKING YOUR PAYMENT UNDER THE CONTRACT TO BUY YOUR HOME. UNLESS YOU MAKE THE PAYMENT BY (DATE) THE SELLER HAS THE RIGHT TO TAKE POSSESSION OF YOUR HOME AND TO KEEP ALL PAYMENTS YOU HAVE MADE TO DATE.").

otherwise delaying the right's enforcement.[31] Courts frequently invoke the waiver rule because vendors often overlook a few late payments before they feel compelled to act against a defaulting purchaser. Courts are thus oddly hostile to forbearing vendors. One message that the numerous waiver cases communicate, and an uncomfortable message indeed, is that vendors should act on any default, however minor.

The waiver rule is difficult to define. The acceptance of one late payment, it seems clear, will not effect a waiver in most states.[32] But after a second late payment, predictions become difficult. In theory, a waiver is a voluntary relinquishment of a right. But courts require no showing of an intent to waive. They also require no showing of prejudice to a purchaser, although the presence of prejudice might encourage a finding of waiver in an otherwise doubtful case.[33]

A few courts distinguish between late payments and a suspension of payments, and hold that a vendor's acceptance of late payments will not waive her right to act when the purchaser halts payments altogether.[34] But this common sense rule can be difficult to apply.[35] Overall, the waiver rule can be a nasty trap for the unwary vendor who is good-natured enough to overlook a few late payments. The flexibility of the rule frustrates any effort to decide whether or not a waiver has occurred.

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31. *See, e.g., Progressive Farmers Ass'n,* 829 F.2d at 657 (applying Missouri law); Nelson v. Butcher, 170 Ind. App. 101, 107, 352 N.E.2d 106, 110 (1976) (citing McBride v. Griffith, 134 Ind. App. 12, 16, 185 N.E.2d 22, 24 (1962)); Bailey v. Lilly, 205 Mont. 35, 38, 667 P.2d 933, 935 (1983); Farmer v. Groves, 276 Or. 563, 567, 555 P.2d 1252, 1255 (1976). Some courts, however, do consider whether a purchaser was actually lulled into lax payment by a vendor's prior acceptance of late payments. *See, e.g.,* Eurton v. Smith, 357 So. 2d 324, 326-27 (Ala. 1978); Ferrara v. Collins, 119 Ill. App. 3d 819, 823, 457 N.E.2d 109, 111 (1983); Shervold v. Schmidt, 359 N.W.2d 361, 363 (N.D. 1984).

32. *See, e.g.,* Smith v. Christofalos, 74 Ill. App. 3d 204, 207, 392 N.E.2d 756, 759 (1979) ("The general rule . . . is that acceptance of a single late payment does not constitute a waiver of timeliness as to subsequent payments."); *see also* Koch v. Kostichek, 409 N.W.2d 680, 684-85 (Iowa 1987) (vendor allowed vendee to delay his payments in two consecutive years); McCarthy v. Louisiana Timeshare Venture, 426 So. 2d 1342, 1345 (La. Ct. App. 1982) (two late payments accepted), *cert. denied,* 433 So. 2d 163 (La. 1983); Wright v. Associates Fin. Servs. Co., 59 Or. App. 688, 694, 651 P.2d 1368, 1372 (1982) (court to consider "[a]ll of the circumstances and conduct of the parties"), *review denied,* 294 Or. 391, *cert. denied,* 464 U.S. 834 (1983).

33. *See* 7 POWELL, *supra* note 5, ¶ 938.23[2].

34. *See, e.g., Ferrara,* 119 Ill. App. 3d at 823, 457 N.E.2d at 111.

35. The confusion can arise when a purchaser has made payments a few weeks late and a subsequent payment is now a month or two late. If the purchaser is silent, the vendor can only guess whether the late payment will still be made (and hence is simply more delayed than the earlier late payments) or whether payments have stopped completely. The late versus suspended distinction is also hard to apply when a purchaser contends that he will make the missed payments but then simply does not do so. In both cases, a vendor or court must decide when a delay is so great that cessation can be assumed. The rule is easy to apply only in the case when the purchaser expressly admits that he has halted his payments.

When a waiver occurs, the vendor can reinstate her right to declare a default only if she gives the purchaser reasonable notice of her intention to insist on prompt payment in the future.[36] After the reasonable time has passed, the vendor regains her rights, at least if she has not waived them again. As might be expected, however, the "reasonableness" of a time period is difficult to predict, and vendors act at their own risk when they move quickly. If a vendor declares a default without giving adequate notice or without properly reinstating her rights after a waiver, a court might well find that she has repudiated the contract.[37] The vendor, then, would be in breach of contract and liable for damages, even though she acted entirely in response to a material breach by the purchaser.

The cases concerning a vendor's waiver and reinstatement of the right to forfeiture reveal two problems. First is the recurring problem of vagueness: it is simply too hard to determine when a waiver has occurred and whether a reinstatement notice is properly phrased and properly timed. Second, courts are much too prone to find a waiver and too punctilious about what a vendor must do to reinstate her rights after a waiver. Installment vendors, if at all human, will typically accept a few late payments and show other forbearances before taking harsh action. Compassionate treatment should gain the respect rather than the condemnation of the courts, at least when the purchaser is not materially harmed.

Presumably, courts use the waiver doctrine simply to give defaulting purchasers additional time to avoid a forfeiture when their causes evoke sympathy.[38] Waiver rules evolved at a time when purchasers had little or no right to pre-forfeiture notice and little or no right to reinstate or redeem before a forfeiture took effect.[39] By seizing upon some minor procedural irregularity, courts could give a purchaser a chance to correct a deficiency. The waiver doctrine thus provided a useful tool, and courts began intermittently to focus on minor forbearances and turn them into

36. *See, e.g., Eurton,* 357 So. 2d at 327; Perona v. Stark, 114 Ariz. 570, 571, 562 P.2d 743, 744 (Ct. App. 1977); Skendzel v. Marshall, 261 Ind. 226, 230, 301 N.E.2d 641, 644 (1973), *cert. denied,* 415 U.S. 921 (1974); Montana Williams Double Diamond v. Royal Village, Inc., 186 Mont. 359, 364-65, 607 P.2d 1120, 1123 (1980); *Shervold,* 359 N.W.2d at 363; Fisher v. Tiffin, 275 Or. 437, 440, 551 P.2d 1061, 1062 (1976); Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980); *see also* Annotation, *Necessity and Reasonableness of Vendor's Notice to Vendee of Requisite Time of Performance of Real-Estate Sales Contract After Prior Waiver or Extension of Original Time of Performance,* 32 A.L.R.4TH 8 (1984).

37. *See* Farmer v. Groves, 276 Or. 563, 567, 555 P.2d 1252, 1255 (1976); Legg v. Allen, 72 Or. App. 351, 356, 696 P.2d 9, 13 (1984); *cf.* Upchurch v. Henderson, 505 N.E.2d 455, 457 (Ind. Ct. App. 1987) (vendor who fails to give notice and wrongfully evicts for alleged breach is liable for damages).

38. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 3.29; Note, *supra* note 6, at 105-06.

39. *See* G. NELSON & D. WHITMAN, *supra* note 8, §§ 3.26-.29.

waivers. In doing so, however, they put together a body of caselaw that sets a serious trap for the ordinary vendor but fails to offer clear entitlements to the purchaser.

3. *The Purchaser's Right to Redeem.* The principal right that states have extended to defaulting purchasers is the right to redeem an installment contract by paying the entire purchase price. In a few states, statutes grant an express right of redemption.[40] In more states, courts use notice rules to this end, allowing a purchaser to redeem during the required notice period prior to forfeiture.[41] California and a few other states employ a somewhat different method, granting purchasers a right of specific performance for a reasonable period after a default and forfeiture declaration.[42] In California, for example, the defaulting purchaser can obtain specific performance as a matter of right even if his default is willful, so long as he has made substantial payments or substantial improvements on the property.[43] In other states, courts assert an equitable power to deny or delay forfeiture when fairness demands.[44] In doing so, they create the equivalent of a redemption period by giving the purchaser more time to perform.

These various redemption rules, except for the express statutory rights of redemption, suffer from considerable uncertainty. Notice periods, as pointed out above, are difficult to define.[45] The specific performance right in California is available for an imprecise period of time, and

40. *See, e.g.,* MICH. COMP. LAWS ANN. § 600.5744 (West 1987); S.D. CODIFIED LAWS ANN. § 21-50-3 (1987).

41. *See supra* text accompanying notes 20-30; 7 POWELL, *supra* note 5, ¶ 938.23[3], at 84D-78 to -79.

42. *See* Petersen v. Hartell, 40 Cal. 3d 102, 114, 707 P.2d 232, 240, 219 Cal. Rptr. 170, 178 (1985); Clements v. Castle Mortgage Serv. Co., 382 A.2d 1367, 1372 (Del. Ch. 1977); Aden v. Alwardt, 76 Ill. App. 3d 54, 59, 394 N.E.2d 716, 720 (1979); Commonwealth v. Pendleton, 480 Pa. 107, 112, 389 A.2d 532, 534 (1978). *See generally* Annotation, *Specific Performance of Land Contract Notwithstanding Failure of Vendee to Make Required Payments on Time,* 55 A.L.R.3D 10 (1974) (discussing cases).

43. *See Petersen,* 40 Cal. 3d at 114, 707 P.2d at 240, 219 Cal. Rptr. at 178.

44. *See, e.g.,* Hatfield v. Mixon Realty Co., 269 Ark. 803, 808-09, 601 S.W.2d 894, 897 (Ct. App. 1980); Grombone v. Krekel, 754 P.2d 777, 779 (Colo. Ct. App. 1988); Ellis v. Butterfield, 98 Idaho 644, 647-48, 570 P.2d 1334, 1338 (1977); *Aden,* 76 Ill. App. 3d at 59, 394 N.E.2d at 719; Perkins v. Penney, 387 A.2d 205, 209 (Me. 1978); O'Meara v. Olson, 414 N.W.2d 563, 567 (Minn. Ct. App. 1987); Beck v. Strong, 572 S.W.2d 484, 489-91 (Mo. Ct. App. 1978); Sharp v. Holthusen, 189 Mont. 469, 476, 616 P.2d 374, 377 (1980); Martinez v. Martinez, 101 N.M. 88, 92, 678 P.2d 1163, 1166-67 (1984); Straub v. Lessman, 403 N.W.2d 5, 7 (N.D. 1987); Schumacher Homes, Inc. v. J & W Enters., 318 N.W.2d 763, 765 (N.D. 1982); T-Anchor Corp. v. Travarillo Assocs., 529 S.W.2d 622, 627 (Tex. Civ. App. 1975); Call v. Timber Lakes Corp., 567 P.2d 1108, 1109 (Utah 1977); Bailey v. Savage, 160 W. Va. 523, 529, 236 S.E.2d 203, 206 (1977). *But see* Burgess v. Shiplet, 750 P.3d 460, 462 (Mont. 1988) (trial court cannot order one-year redemption period when contract expressly provides for 30-day cure and 30-day redemption periods).

45. *See supra* notes 20-30 and accompanying text; 7 POWELL, *supra* note 5, ¶ 938.22[5].

only if the purchaser's investment is substantial. Elsewhere, both the timing and the availability of redemption rights are governed by vague standards. The equitable discretion cases do not even purport to articulate a test that parties can use in determining where they stand. Vagueness, of course, allows courts flexibility in achieving justice, but it makes planning difficult and probably augments the chance of litigation in disputed cases.

From the perspectives of both the defaulting purchaser and the vendor, a vague redemption right has its costs, and they can be high. The defaulting purchaser cannot seek alternate financing with confidence when his right to redeem is uncertain. Third-party lenders who would otherwise help a purchaser might hesitate to do so when the prospective borrower may or may not have the right to redeem. For the vendor, of course, a right of redemption can be disruptive, particularly when the vendor cannot determine how long she must wait before safely reselling the property. A redemption right, to be sure, is valuable to the purchaser, and all purchasers should have some period in which to redeem. But vagueness and unreliability detract from the benefits of that right.

4. *The Right to Reinstate.* A few states, typically by statute, give defaulting purchasers an additional right that can be quite valuable—the right to reinstate the contract by paying only the past-due installments (rather than, as in redemption, the entire unpaid debt).[46] A reinstatement right usually extends for a specific time period that begins on the date of default or on the date of an enforcement action's commencement.[47] In some states, the reinstatement period is longer for purchasers who have paid a substantial proportion of their contract debt.[48] Because reinstatement rights are governed by statutes, the terms of their availabil-

46. On reinstatement in the mortgage context, see generally G. NELSON & D. WHITMAN, *supra* note 8, § 7.7, at 493. These statutes are sometimes referred to as arrearages statutes, since they allow the mortgagor or purchaser to return to good status under the agreement simply by paying the accumulated arrearages.

47. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-742 to -743 (Supp. 1987) (grace period of 30 days to nine months, depending on amount of indebtedness previously paid, plus 20 days from date of service); IOWA CODE ANN. § 656.2 (West 1987) (30 days from service of notice); MINN. STAT. ANN. § 559.21 (West 1988) (30 days from service of notiee); N.D. CENT. CODE § 32-18-04 (1976) (six months to one year, depending on amount of original indebtedness remaining due); OHIO REV. CODE ANN. § 5313.05 (Anderson 1981) (30 days from date of default); WASH. REV. CODE ANN. § 61.30.070 (Supp. 1987) (90 days after notice of intent to forfeit is recorded); *see also* Sindlinger v. Paul, 428 Mich. 161, 164, 404 N.W.2d 212, 213 (1987) (purchaser in default can reinstate so long as he acts before vendor formally invokes acceleration clause). Courts tend to apply these statutory limits strictly. *See, e.g.*, Hoffman v. Halter, 417 N.W.2d 747, 751 (Minn. Ct. App. 1988) (payment one to four days after end of 60-day cure period too late).

48. *See, e.g.*, ILL. ANN. STAT. ch. 110, para. 9-110 (Smith-Hurd 1984 & Supp. 1988).

ity and duration are commonly more specific than those of redemption and notice rights.

The courts' involvement in the creation of reinstatement rights, however, again results in vagueness and uncertainty. Some courts have announced, without elaboration, that reinstatement is available only if it will not prejudice the vendor.[49] Other courts have suggested that reinstatement may turn somehow on the willfulness of the purchaser's default, an exceedingly difficult factual issue to judge. In Montana, for example, a purchaser can obtain reinstatement "except in case of a grossly negligent, willful, or fraudulent breach of duty."[50] Courts applying this kind of test will have special difficulty with the common case of the purchaser who knowingly defaults simply because he believes that he cannot afford the payments.

Like redemption, reinstatement is a right of considerable value to a defaulting purchaser. Reinstatement's cost to the vendor is minimal, at least if the reinstatement period is kept short and the purchaser can exercise the right only occasionally.[51] Reinstatement, in fact, simply adds a type of substantial performance rule to the purchaser's rights, a rule that operates in other settings to give parties who breached a contract an opportunity to cure.[52] Reinstatement is a valuable and appropriate right. But it is a right that, like many others, diminishes in value and rises in cost when its availability is put in doubt.

C. *The Elusive Consequences of a Forfeiture Election.*

A vendor who seeks a forfeiture remedy will encounter the election-of-remedies doctrine, an old rule of law applied in the installment land

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49. *See, e.g.*, Chambers v. Cranston, 16 Wash. App. 543, 545, 558 P.2d 271, 273 (1976) (reinstatement allowed "unless the financial stability of the seller is threatened through recurring default or otherwise"). Other courts assert the power to set aside an acceleration on equitable grounds, which in effect creates a reinstatement period. *See* State-William Partnership v. Gale, 169 Mich. App. 170, —, 425 N.W.2d 756, 759 (1988).

50. Parrott v. Heller, 171 Mont. 212, 214, 557 P.2d 819, 820 (1976) (quoting MONT. CODE ANN. § 17-102 (1947)).

51. Some states bar reuse of the reinstatement for a specified period following its first use. *See, e.g.*, ILL. ANN. STAT. ch. 110, para. 9-110 (barred for up to 60 days if amount unpaid is more than 75% of original purchase price, and for 180 days if amount unpaid is less than 75% of purchase price).

52. Under basic contract law, particularly the law relating to construction contracts, the nonbreaching party to an executory contract can terminate the contract only if the other side materially fails to perform. *See* E. FARNSWORTH, CONTRACTS §§ 8.15-.18 (1982). A defaulting party has the right to cure a minor default within a reasonable period of time. If a party to a long-term contract fails to perform fully at one stage, the other party can terminate the entire contract only if the breaching party repudiates all future performance or if the breach is otherwise material considering the contract as a whole. *See id.* § 8.18. A right of reinstatement gives the purchaser a similar chance to cure.

contract context to prevent a vendor who declares a forfeiture from also obtaining a deficiency judgment.[53] Courts reason that a forfeiture and a deficiency judgment are somehow inconsistent remedies, and they bar the vendor from pursuing both.[54] An astute vendor, however, can easily avoid the consequences of the doctrine; thus, the election-of-remedies doctrine, too, has become a trap for the uninformed vendor and an elusive protection for the purchaser. As purchasers have gained other protective rights, the election doctrine's rationale has lost its strength and, as part IV of this Article discusses, there are good reasons why states should abandon it.

1. *The Election Doctrine as an Antideficiency Rule.* The election-of-remedies doctrine relies on the notion that forfeiture is a rescission-based remedy and that a vendor who elects rescission should not also have the right to enforce a contract in an action for damages.[55] As explained below,[56] one can more realistically view forfeiture as a remedy based theoretically on contract termination, and thus fully consistent with a deficiency judgment. In reality, the rescission theory is more the excuse than the justification for the election-of-remedies doctrine.

The election-of-remedies doctrine serves in practice as a type of antideficiency rule in that it bars a post-forfeiture deficiency judgment. As such, it is comparable in operation to the many antideficiency statutes that currently limit a mortgagee's ability to recover a deficiency judgment after a mortgage foreclosure.[57] No state, however, bans mortgage deficiencies in all settings, and true bans are unusual in any case. Most antideficiency rules are more limited in effect. Many are "one-action" or "security-first" rules that prohibit a mortgagee from seeking a deficiency judgment unless she does so at the same time that she forecloses.[58] These rules give the mortgagor notice of the possible deficiency so that he can decide intelligently whether to assert his redemption right and can closely supervise the foreclosure sale.[59] The other principal type of antideficiency statute is the "fair-value" statute, which allows deficiencies

53. *See, e.g.,* Vogel v. Dawdy, 107 Ill. 2d 68, 76-77, 481 N.E.2d 679, 683 (1985); Powers v. Ford, 415 N.E.2d 734, 736 (Ind. Ct. App. 1981); Gruskin v. Fisher, 405 Mich. 51, 59-60, 273 N.W.2d 893, 897 (1979); Butler v. Michel, 14 Ohio App. 3d 116, 117, 470 N.E.2d 217, 218 (1984).

54. *See* 7 POWELL, *supra* note 5, ¶ 938.24[2].

55. *See, e.g.,* Herrington v. McCoy, 105 Ill. App. 3d 527, 530-32, 434 N.E.2d 67, 69-70 (1982); Gray v. Bowers, 332 N.W.2d 323, 325 (Iowa 1983); Nygaard v. Anderson, 229 Or. 323, 330-31, 366 P.2d 899, 903 (1961).

56. *See infra* text accompanying notes 128-32.

57. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 8.3.

58. *See id.* § 8.2.

59. One-action rules also protect the mortgagor against multiple lawsuits and indirectly push the mortgagee to exhaust her security before seeking a deficiency. *See id.* § 8.2, at 598.

but limits them to the difference between the unpaid loan balance and the fair value of the property at the time of the foreclosure.[60] Fair-value statutes protect mortgagors against the loss that arises when a foreclosure sale fails to bring the full value of the property.

Compared with these mortgage antideficiency rules, the election-of-remedies doctrine is particularly harsh. A possible reason for the harshness is that, by barring all deficiencies, the doctrine allows courts to avoid the often difficult task of determining the value of property under a breached installment contract. When a mortgage foreclosure occurs, the property is sold and the sale price establishes the value of the property. When forfeiture occurs, on the other hand, the vendor retains the property, and the court must determine its value in order to assess a deficiency.

This convenience-based justification, however, provides only weak support for the election doctrine. Courts must often value property governed by an installment contract, particularly when the purchaser seeks restitution and the court must determine whether, in fairness, foreclosure should be required. Moreover, courts in states with fair-value deficiency rules must regularly value property in mortgage foreclosure cases, since those rules can result in sale prices being disregarded. Valuing property, therefore, is not an unfamiliar task for the courts.

2. *The Election Doctrine as an Estoppel Rule.* An alternative justification for the election-of-remedies doctrine is that it upholds accepted principles of estoppel.[61] As such, the doctrine has merit in some cases, but its sweep is again excessively wide. An installment purchaser might legitimately want to know whether he faces the prospect of a deficiency judgment when he decides whether to exercise his reinstatement or redemption rights or whether to contest the validity of a forfeiture. If the vendor wants a deficiency, she might properly be required to request it at an early date or be estopped to seek it later. Perhaps more significantly, a purchaser might rely on a vendor's declaration of forfeiture by abandoning the property and giving up all of his rights.[62] Thus, the purchaser

60. *See id.* § 8.3, at 601-02.

61. *See, e.g.*, Kosbau v. Dress, 400 N.W.2d 106, 110 (Minn. Ct. App. 1987) (election doctrine "is a form of estoppel"); Keesee v. Fetzek, 111 Idaho 360, 362-63, 723 P.2d 904, 906-07 (Ct. App. 1986) (where buyer detrimentally relied on seller's default notice that claimed seller would pursue forfeiture of property if default not cured, seller could not later change remedies and seek money damages from buyer).

62. *See* Gruskin v. Fisher, 405 Mich. 51, 273 N.W.2d 893 (1979) (discussing the options a vendor might choose after declaring a forfeiture). The question in *Gruskin* was whether a vendor made an irrevocable decision to pursue forfeiture simply by sending a forfeiture declaration to the purchaser. The court's conclusion was that such a declaration alone did not effect an election, but that the vendor was forced to make an election no later than the time that the purchaser offered to

might undergo the expense of moving and acquiring alternative property. The vendor's later attempt to enforce the contract would unfairly surprise the purchaser who relied on the vendor's declaration of forfeiture. The election-of-remedies doctrine, then, serves the valid function of prohibiting the vendor from shifting to a remedy based on contract continuance after leading the purchaser to believe that the contract had ended.

This estoppel theory, however, also provides only limited support for the election-of-remedies doctrine. The theory rightly prohibits the vendor from declaring a forfeiture and then demanding that the purchaser retain the property and pay for it. The purchaser is *not* frustrated, however, if the vendor is willing to retain the property and credit the purchaser with its full value. Estoppel should not bar the vendor who declares a forfeiture from seizing the property and seeking a deficiency judgment; it should bar only the vendor who declares a forfeiture and then demands completion of the contract.

3. *Exceptions to the Election Doctrine.* The election-of-remedies doctrine has several important exceptions, and it is these exceptions that cause the doctrine's gravest problems. The exceptions, indeed, are so considerable that a vendor who is aware of them can usually escape the doctrine's restrictions. Under one exception, the vendor typically can retain the purchaser's down payment.[63] If the down payment is promised but not paid, the election doctrine bars the vendor from collecting it after declaring a forfeiture.[64] But the vendor can collect on a negotiable promissory note given by the purchaser and accepted by the vendor as the equivalent of a cash payment under the contract.[65] A vendor can thus protect himself against loss by routinely requiring a large down payment in the form of a promissory note. The exception requires only that the vendor structure the transaction so that she accepts the note as pay-

return possession to the vendor. A vendor could switch directions after sending a forfeiture notice and enforce the contract, but not after retaking possession of the property. *Id.* at 59-60, 69, 273 N.W.2d at 897, 901-02.

63. The vendor's ability to keep a down payment, however, can be limited by a duty to make restitution when that payment exceeds the vendor's losses. *See infra* text accompanying notes 74-96.

64. *See, e.g.*, Campbell v. Salman, 384 So. 2d 1331, 1333 (Fla. Dist. Ct. App. 1980). There is support, however, for the vendor's ability to cash a down payment check that he has received. *See* Shulkin v. Dealy, 132 Misc. 2d 371, 373-74, 504 N.Y.S.2d 342, 344 (Sup. Ct. 1986); *cf.* Brecker v. Furman, 508 So.2d 514, 515 (Fla. Dist. Ct. App. 1987) (vendor can collect on promised down payment in the context of a breached earnest money contract).

65. *See, e.g.*, Cala v. Gerami, 137 Ill. App. 3d 936, 940, 484 N.E.2d 1199, 1202-03 (1985) (promissory note may operate as payment on contract if parties so agree, and if so, vendor can collect after forfeiture); Trans West Co. v. Teuscher, 27 Wash. App. 404, 407-08, 618 P.2d 1023, 1025 (1980) (recognizing that vendor may not recover underlying unpaid debt and enforce contract's forfeiture remedy except when note deemed equivalent of cash).

ment under the contract and not simply as further evidence of the contract obligation.[66]

Under a related exception, a vendor can also avoid the election-of-remedies doctrine by arranging for the purchaser, while in default, to execute a negotiable promissory note that covers the arrearages.[67] If the purchaser defaults again, the vendor will have retained her right to sue for the installments covered by the note after declaring a forfeiture.

Other exceptions to the election-of-remedies doctrine can also aid vendors. Generally, a vendor who has declared a forfeiture retains the right to sue a purchaser under an independent tort theory such as fraud or misrepresentation.[68] More importantly, in a growing number of states, a vendor retains the right to recover the fair rental value of the premises from the date the forfeiture takes effect[69] and to sue a purchaser for waste committed on the property.[70] The rule allowing rent recovery encourages the purchaser to leave promptly and protects the vendor from the potentially sizable loss that would occur if the purchaser could litigate the forfeiture for months while making no installment or rent payments. The exception for waste, on the other hand, is difficult to comprehend because its contours are imprecise. Several states allow the vendor to recover if the property declines in value while in the pur-

66. If a note is given simply to embody or evidence the contract obligations rather than to pay part of them, the vendor cannot collect on the note. *See, e.g.,* Earven v. Smith, 127 Ariz. 354, 355, 621 P.2d 41, 42-43 (Ct. App. 1980) (note given to extend closing date and not in lieu of cash to close escrow); Greaser v. Williams, 703 P.2d 327, 333 (Wyo. 1985) (no recovery if note given in exchange for extension of time for performance). A court may presume that a note is not given as a down payment unless the vendor proves otherwise. *See* Neuman v. Demmer, 414 N.W.2d 240, 242 (Minn. Ct. App. 1987).

67. *See Greaser,* 703 P.2d at 333. A vendor, it appears, can also protect herself against the election-of-remedies doctrine by obtaining a third-party guarantee of the purchaser's performance. According to at least one court, such a guarantee remains valid even after forfeiture. *See* Illini Fed. Sav. & Loan Ass'n v. Childers, 88 Ill. App. 3d 1124, 1134, 411 N.E.2d 110, 117 (1980) (contractual provision that guarantor's liability "shall remain notwithstanding any forfeiture").

68. *See, e.g.,* Boeck v. Logan 480 Dairy Farm, 606 F. Supp. 868, 873 (S.D. Iowa 1985); Manson v. Reed, 186 Cal. App. 3d 1493, 1501, 231 Cal. Rptr. 446, 451 (1986). The elements of misrepresentation in the real estate sales context are considered in Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use,* 71 CORNELL L. REV. 1, 5-25 (1985).

69. *See, e.g., Cala,* 137 Ill. App. 3d at 940-41, 484 N.E.2d at 1203 (applying ILL. ANN. STAT. ch. 110, para. 9-201 (Smith-Hurd 1984)); Durda v. Chembar Dev. Corp., 95 Mich. App. 706, 714, 291 N.W.2d 179, 183 (1980). Ohio, by statute, goes further and allows the vendor to recover the amount (if any) by which the fair rental value of the property exceeds what the purchaser has paid. OHIO REV. CODE ANN. § 5313.10 (Anderson 1981); Butler v. Michel, 14 Ohio App. 3d 116, 118, 470 N.E.2d 217, 219 (1984). One court allowing recovery of rental value concluded that the value should be determined without regard for the value of any improvements made to the property by the purchaser. *See In re* Chicago, R.I. & P. R.R., 753 F.2d 56, 60 (7th Cir. 1985) (applying Iowa law).

70. *See, e.g.,* Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985) (neither liquidated damages clause nor forfeiture clause limits vendor's right to bring action to recover for waste caused by vendee).

chaser's hands.[71] It is often unclear, however, whether the vendor can recover for a decline simply due to changed market values or ordinary wear and tear,[72] as opposed to the purchaser's affirmative misuse.

A final confusing exception to the election-of-remedies doctrine is that it does not apply when the purchaser abandons the property in question.[73] A vendor who retakes the property peaceably can retain the property and sue for contract damages. The election doctrine is inapplicable because the vendor never declared a forfeiture. In theory, whether the vendor brings an action to recover the property should be irrelevant in assessing the availability of a deficiency judgment. Nonetheless, so long as the abandonment exception remains in effect, a purchaser who faces a possible deficiency would be well advised to retain possession of his property and force the vendor to declare a forfeiture.

Given these exceptions and limits, the election-of-remedies doctrine provides the purchaser with only an elusive protection; a deficiency judgment remains an uncertain, but threatening possibility.

D. *The Purchaser's Uncertain Right to Restitution.*

In a growing number of states, purchasers enjoy a right to obtain restitution of their installment payments to the extent that those payments exceed the vendor's actual losses from the purchaser's default.[74] When a purchaser, despite his reinstatement and redemption rights, cannot complete the installment contract, the restitution right can be of considerable value, and courts are rightfully adding it to the list of purchaser protections. Although restitution is the most recent purchaser protection, it is a protection that has been, regrettably, already undermined by vagueness. In most states, both the availability and the measure of restitution are governed by standards that defy all predictive efforts.

1. *The Availability of Restitution Under Installment Land Contracts.*

Common law courts have been reluctant to grant restitution of

71. *See, e.g.,* ARIZ. REV. STAT. ANN. § 33-749 (Supp. 1987); *Meyer,* 373 N.W.2d at 396-97 (diminution in value or cost of repair is appropriate measure of damages for waste); *Butler,* 14 Ohio App. 3d at 117-18, 470 N.E.2d at 219 (vendee liable for fair rental value plus deterioration of property resulting from his use if that amount or more not already paid prior to forfeiture); *see also* Kruger v. Horton, 106 Wash. 2d 738, 743-44, 725 P.2d 417, 421 (1986) (where plaintiffs failed to establish that real property decreased in value as result of timber removal, they could not recover on waste theory).

72. *See* Finley v. Chain, 176 Ind. App. 66, 82-83, 374 N.E.2d 67, 78-79 (vendor may recover for waste threatening security interest in property, including passive or permissive waste), *overruled on other grounds sub nom.* Morris v. Weigle, 270 Ind. 121, 383 N.E.2d 341 (1978).

73. *See, e.g.,* Gordon v. Pfab, 246 N.W.2d 283, 287 (Iowa 1976); Turner v. Benson, 672 S.W.2d 752, 754 (Tenn. 1984).

74. *See* 7 POWELL, *supra* note 5, ¶ 938.23[4].

the benefits that any party in breach of a contract has conferred on a nonbreaching party.[75] In the case of installment land contracts, however, restitution is now freely allowed in many states when equity demands.[76] The difficulty is that courts differ considerably, state by state and case by case, in their assessment of the equities of particular forfeitures. And they differ in their proposed solutions as well.

California, the most liberal state, allows restitution to all defaulting purchasers.[77] More commonly, state law permits courts to consider the equities of each situation and to allow restitution only if a purchaser's loss would shock the conscience or amount to an inequitable or unfair recovery for a vendor.[78] In most states, the standard for the availability of restitution is so vague that parties can hardly determine where they stand.[79] Even in states where the law is relatively clear, parties will usually find it impossible to determine their rights without a review of all the relevant decisions, a research task that a vendor would doubtless prefer not to fund.[80] In a few states, the availability of restitution is even more uncertain because courts take into account the willfulness of the purchaser's default.[81]

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75. *See* 1 G. PALMER, THE LAW OF RESTITUTION §§ 5.1, 5.5 (1978).

76. *See* 7 POWELL, *supra* note 5, ¶ 938.23[4]; *cf.* Roseberg v. Steen, 415 N.W.2d 904, 907 (Minn. Ct. App. 1987) (no restitution allowed for value of corn silage, hay bales, and straw bales left on premises absent showing that retention by vendor would be inequitable). *But see* Mid-State Homes, Inc. v. Moore, 515 So. 2d 716, 717-18 (Ala. Civ. App. 1987) (purchaser cannot recover value of any improvements made to property).

77. *See* Honey v. Henry's Franchise Leasing Corp. of Am., 64 Cal. 2d 801, 803, 415 P.2d 833, 834-35, 52 Cal. Rptr. 18, 19-20 (1966) (even willfully defaulting purchaser may recover payments).

78. *See, e.g.*, Jenkins v. Wise, 58 Haw. 592, 597-98, 574 P.2d 1337, 1341-42 (1978); Clampitt v. A.M.R. Corp., 109 Idaho 145, 147-48, 706 P.2d 34, 36-37 (1985); Huckins v. Ritter, 99 N.M. 560, 562, 661 P.2d 52, 54 (1983); Heikkila v. Carver, 378 N.W.2d 214, 219 (S.D. 1985); Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981); *see also* 7 POWELL, *supra* note 5, ¶ 938.23[4] (citing cases).

79. *See, e.g., Jenkins,* 58 Haw. at 597-98, 574 P.2d at 1341-42 (vendor can retain portion of vendee's payments as reasonable liquidated damages, but not as penalty); McFarland v. Joint School Dist. No. 365, 108 Idaho 519, 522, 700 P.2d 141, 144 (Ct. App. 1985) (restitution allowed where amount of purchaser's loss exorbitant and not reasonably related to actual damages caused by breach); *Huckins,* 99 N.M. at 562, 661 P.2d at 54 (restitution allowed where forfeiture would shock conscience); *Heikkila,* 378 N.W.2d at 219 (restitution only if forfeiture would amount to unconscionable penalty); Warner v. Rasmussen, 704 P.2d 559, 561 (Utah 1985) (restitution where forfeiture so grossly excessive that it shocks conscience). Some courts invalidate forfeitures under traditional liquidated damages analysis, which presumably leaves the purchaser with a claim for restitution. *See* Hagan v. Havnvik, 421 N.W.2d 56, 59 (N.D. 1988).

80. In some states, courts turn out a dozen or more installment land contract decisions yearly, and the quantity of relevant cases on the subject is in the hundreds. In addition, as might be expected, the caselaw differs from state to state.

81. *See, e.g.*, Vines v. Orchard Hills, Inc., 181 Conn. 501, 509-10, 435 A.2d 1022, 1027 (1980); 1 G. PALMER, *supra* note 75, § 5.5, at 601; *see also* K.M. Young & Assocs. v. Cieslik, 4 Haw. App. 657, 669, 675 P.2d 793, 802 (1983) (vendor can retain payments in excess of his damages by showing gross negligence or bad faith of purchaser). One court has suggested that restitution is contingent

One consideration does seem to dominate as courts determine the availability of restitution: the amount of the purchaser's payments in relation to the vendor's losses.[82] Many courts conclude that restitution is appropriate if (and only if) the payments exceed the vendor's losses by a *material* amount, although the courts are reluctant to explain how wide the gap must be.[83] Equity seems to rule, and equity is notoriously idiosyncratic. When that gap is too wide, moreover, courts often order restitution for the full amount of the excess, not just an amount sufficient to reduce the vendor's gain to an acceptable level.[84]

2. *Calculating the Vendor's Loss.* In awarding restitution courts must calculate the amount of a vendor's loss, and they have experienced difficulty making this calculation. As explained below,[85] forfeiture law is afflicted by a serious tension between two theories of forfeiture, one based on rescission of contract and the other based on termination of contract. This conflict between theories causes confusion in several areas of forfeiture law, including the process of calculating the vendor's loss.

The rescission-based theory suggests that the vendor suffers two elements of loss when the purchaser breaches the contract and the vendor recovers the property: (1) the rental value of the property while in the hands of the purchaser, and (2) the decline in value of the property brought about by the purchaser, excepting ordinary wear and tear.[86] Rescission, of course, is based on an undoing of the contract, and its elements of recovery return the vendor to her pre-contract position. Rescission also requires, however, that the vendor return to the purchaser any installment payments, as well as the value of any improvements that the purchaser has made to the property.[87]

Under the contract-termination theory, on the other hand, the vendor is entitled to the contract price, less the payments received and the

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upon a showing of some moral fault or wrongdoing on vendor's part. *See* Fort Dodd Partnership v. Trooien, 392 N.W.2d 46, 49 (Minn. Ct. App. 1986).

82. *See, e.g., Vines,* 181 Conn. at 510, 435 A.2d at 1028; *Clampitt,* 109 Idaho at 147-48, 706 P.2d at 36-38; *Heikkila,* 378 N.W.2d at 219-20; *Warner,* 704 P.2d at 561; *see also* 7 POWELL, *supra* note 5, at ¶ 938.23[4] (purchaser's right of restitution is right to obtain payments that exceed vendor's losses.)

83. *See, e.g., Clampitt,* 109 Idaho at 151, 706 P.2d at 40 (no recovery when purchaser's loss $747,100 and vendor's loss $752,874); *Heikkila,* 378 N.W.2d at 217 (substantial disparity between payments plus improvements and vendor's detriment necessary); *Warner,* 704 P.2d at 563 (no recovery when purchaser's loss approximately $14,000 and vendor's loss approximately $10,500).

84. *See, e.g.,* Sidney Fed. Sav. & Loan Ass'n v. Jones, 215 Neb. 225, 227-28, 337 N.W.2d 779, 782 (1983); Huckins v. Ritter, 99 N.M. 560, 562, 661 P.2d 52, 54 (1983); Johnson v. Carman, 572 P.2d 371, 373 (Utah 1977).

85. *See infra* text accompanying notes 128-32.

86. *See generally* 1 G. PALMER, *supra* note 75, § 5.6.

87. *See id.* § 5.9.

value of the property at the time the vendor recovers it. If the payments and property value together exceed the contract price, the purchaser can claim the excess in restitution.[88]

In practice, these two methods of damages computation can yield widely divergent results. California courts have given the most thought to this conflict; they now appear to allow vendors to choose between the two theories.[89] Elsewhere, courts have mixed the two calculation methods in confusing ways.[90] They refer to the rental value of the property and the contract price as if the two figures should somehow be used together. They calculate the vendor's loss and then fallaciously compare it with the purchaser's "equity" in the property. A few courts have shown serious confusion about how to deal with the purchaser's payments of interest,[91] and others, in a move to simplify, have demonstrated a willingness to entertain the crude assumption that interest payments and rental value are equal.[92]

3. *Installment Land Contracts and Earnest Money Contracts.* Courts also distinguish, apparently unknowingly, between installment land contracts and normal earnest money contracts, thus adding further confusion to the restitution issue.[93] In the case of earnest money contracts, courts generally allow the vendor to retain the purchaser's down

88. *Cf. id.* § 5.7 (vendor who does not terminate could have specific performance remedy).

89. *See* Honey v. Henry's Franchise Leasing Corp. of Am., 64 Cal. 2d 801, 804, 415 P.2d 833, 835, 52 Cal. Rptr. 18, 20 (1966) (vendor may elect to rescind or enforce contract); Askari v. R & R Land Co., 179 Cal. App. 3d 1101, 1106, 225 Cal. Rptr. 285, 288 (1986) (vendor can receive contract-termination damages or consequential damages); *see also* Spurgeon v. Drumheller, 174 Cal. App. 3d 659, 665, 220 Cal. Rptr. 195, 198 (1985) (suggesting that vendor can recover on benefit-of-bargain theory only if she mitigates damages by reselling promptly).

90. *See, e.g.*, Clampitt v. A.M.R. Corp., 109 Idaho 145, 149-51, 706 P.2d 34, 38-40 (1985) (court applies rescission-based theory in determining whether liquidated damages provision constitutes unreasonable forfeiture, but applies contract-termination theory if liquidated damages are inapplicable); Lawrence v. Franklin, 113 Idaho 895, 898, 749 P.2d 1020, 1023 (Ct. App. 1988) (vendor entitled to difference between contract price and market value of recovered property *plus* rental value for period of purchaser's possession, with an offset for installment payments and taxes paid by purchaser); Huckins v. Ritter, 99 N.M. 560, 561-62, 661 P.2d 52, 53-54 (1983) (vendor may "terminate," but court will enforce rescission-based remedy); Farmer v. Groves, 276 Or. 563, 566, 555 P.2d 1252, 1255 (1976) (suit for specific performance or to recover installments due on contract consistent with "affirmance" of contract); Johnson v. Carman, 572 P.2d 371, 373-74 (Utah 1977) (fair rental value and loss of advantageous bargain included in calculating vendor's damages).

91. *See, e.g.*, Gomez v. Pagaduan, 1 Haw. App. 70, 76, 613 P.2d 658, 662 (1980) (vendor can retain "amount of interest due during the purchaser's equitable ownership").

92. *See Johnson*, 572 P.2d at 374 (rental value of property should be substituted for interest figure used by trial court).

93. An earnest money contract is a purchase contract that envisions payment of the entire purchase price, other than an initial down payment, at a closing to be held within a relatively short period (a few weeks or months) after the contract execution date. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 10.1 (1984).

payment when the purchaser fails to close a sale.[94] Some states subject the down payment to a liquidated damages analysis, but only a few limit the vendor's recovery to the amount of her actual losses.[95] Down payments average about ten percent of the purchase price, and courts freely allow a vendor to keep this amount, even when the vendor has suffered no losses. When an installment contract is at issue, however, courts that allow restitution often permit the vendor to keep only an amount equal to her actual damages.[96]

Restitution, in sum, provides a valuable right to the purchaser who cannot complete or continue his installment payments. When contract continuance is not feasible, restitution can go far toward mitigating the harsh effects of forfeiture and can do so without sacrificing full recovery for the vendor. The benefits of the right, however, decline significantly when the availability and amount of restitution are uncertain. Between parties who are knowledgeable and fair-minded, fair settlements can be quick. When knowledge and good faith are in short supply, a sound result can be costly if not elusive.

E. *The Difficulties of Mandatory Foreclosure.*

1. *The Convertability Approach.* Several states have undertaken to protect defaulting purchasers by requiring vendors to foreclose[97] installment contracts as if they were mortgages. Oklahoma mandates this by statute;[98] Kentucky does so by judicial decision.[99] Other states pursue

94. *See id.* § 10.4.

95. *See, e.g.,* Wilkins v. Birnbaum, 278 A.2d 829, 831 (Del. 1971) (upon proof, purchaser can recover portion of deposit exceeding actual damages).

96. *See* sources cited *supra* note 84. The existence of two separate lines of precedent on restitution, which courts have inadvertently mixed, creates confusion. Regardless of this confusion, however, the difference in treatment of installment and earnest money contracts is hard to understand. At bottom, the issue that courts consider most closely is whether a given contract's forfeiture clause, which allows a vendor to keep all payments as liquidated damages, gives a fair estimate of the damages that a vendor will suffer from a purchaser's breach. This issue arises with both kinds of contracts.

If any difference in treatment is justified, restitution should be more freely available not in the installment case, but in the earnest money case. *See supra* notes 93-95 and accompanying text. Under a typical earnest money contract, breach will occur within a few weeks or months of contract execution, and the vendor is likely to retain possession of the property. In a typical installment case, however, the breach is likely to occur months or years after contract execution, and the purchaser will have had possession and ample opportunity to harm the property. As between the two situations, damages are more difficult to predict and calculate in the installment contract setting.

97. Foreclosure, a process usually accomplished by the sale of the mortgaged property, ends the mortgagor's right of redemption. *See generally* G. NELSON & D. WHITMAN, *supra* note 8, ch. 7.

98. OKLA. STAT. ANN. tit. 16, § 11A (West 1981) (contract deemed a mortgage); *see* Comment, *The Decline of the Contract for Deed in Oklahoma,* 14 TULSA L.J. 557 (1979) (suggesting interpretations of Oklahoma statute); *see also* MD. REAL PROP. CODE ANN. §§ 10-101 to -108

a similar approach, sometimes referred to as "convertability."[100]

> Under the convertability approach, the installment contract is treated as a contract until some specified point in time, . . . usually defined in terms of the percentage of the purchase price paid . . . or in terms of the length of time that the contract has been in effect. Once the conversion point is reached, the contract is converted into a mortgage, and the purchaser enjoys all of the rights of mortgagors.[101]

The convertability approach gained popularity as a result of the Indiana Supreme Court's decision in *Skendzel v. Marshall.*[102] In *Skendzel,* assignees of a vendor's interest in a land sale contract sought possession of the land through enforcement of the agreement's forfeiture clause.[103] The *Skendzel* court concluded that foreclosure was required unless the purchaser had paid only a minimal amount on the contract while in possession of the property or had abandoned the property and absconded. The court kept the conversion point low so that nearly all contracts would qualify as mortgages.[104] As the test was first announced, it appeared that foreclosure was required only in cases where the purchaser had accumulated enough equity in the property to make forfeiture unfair. But Indiana courts have narrowed the *Skendzel* exceptions to foreclosure. The courts now consider payments of both principal and interest in determining whether the purchaser has paid only a minimal amount.[105] Moreover, some courts say that foreclosure is required even when the purchaser has paid only a minimal amount, unless the purchaser insists on retaining the property or the vendor's security is endangered.[106] In applying the exception for purchasers who abandon, Indiana courts require some evidence of true abandonment, beyond mere departure from the property.[107] One court has suggested that the abandoning purchaser must abscond before forfeiture can be effective.[108]

(1988) (treating contract as mortgage if contract covers residential property and purchaser is not corporation); Note, *supra* note 6, at 110-11 (discussing Oklahoma and Maryland statutes).

99. *See* Sebastian v. Floyd, 585 S.W.2d 381, 383 (Ky. 1979).

100. *See* Note, *supra* note 6, at 111-14.

101. 7 POWELL, *supra* note 5, ¶ 938.22[6], at 84D-62.

102. 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied,* 415 U.S. 921 (1974); *see* Arnold v. Melvin R. Hall, Inc., 496 N.E.2d 63, 64-65 (Ind. 1986).

103. *Skendzel,* 261 Ind. at 228-30, 301 N.E.2d at 643.

104. *Id.* at 240-41, 301 N.E.2d at 650.

105. *See, e.g.,* Looney v. Farmers Home Admin., 794 F.2d 310, 314 (7th Cir. 1986) (applying Indiana law).

106. *See* Morris v. Weigle, 270 Ind. 121, 122-23, 383 N.E.2d 341, 342 (1978); Johnson v. Rutoskey, 472 N.E.2d 620, 626 (Ind. Ct. App. 1984).

107. *See* McLendon v. Safe Realty Corp., 401 N.E.2d 80, 83 (Ind. Ct. App. 1980); *see also* Bill Becom Serv. T.V., Inc. v. Jones, 503 N.E.2d 1246, 1250 (Ind. Ct. App. 1987) (statements in affidavits showed both intent to abandon and conduct indicating relinquishment of rights).

108. *See McLendon,* 401 N.E.2d at 83.

New York courts have adopted a nearly identical approach;[109] Ohio and Illinois have taken similar routes by statute. In Ohio, a vendor must foreclose if the purchaser has paid twenty percent of the contract price *or* if the purchaser has made contract payments for five years or more, regardless of the payments' amount.[110] In Illinois, a vendor must foreclose on a residential contract if the contract calls for payments over more than a five-year period *and* the amount due is less than eighty percent of the original purchase price.[111]

Proponents of the convertability approach note that it seems to balance the conflicting interests of vendors and purchasers.[112] In the early stages of an installment land contract's performance, the contract form is respected and the vendor can enforce a forfeiture clause. It is during this period that the vendor most needs a speedy recovery method: because the outstanding purchase price might only slightly exceed the property's value, the vendor will suffer if recovery is delayed. After the purchaser builds up equity, concern shifts toward the purchaser, and mortgage law applies to protect his growing equity. Given the accumulation of contract payments, the vendor's concerns are reduced, and the property's value is likely to exceed materially the unpaid purchase price.

Commentators, however, have criticized *Skendzel* for its vagueness: under the *Skendzel* approach, vendors have difficulty knowing when foreclosure is required and when forfeiture is permitted.[113] For a vendor, the issue is of great importance. If the vendor misguesses and wrongfully pursues forfeiture, the purchaser will retain an equitable redemption right that he can later assert to reclaim the property. In many cases a vendor will find title to the property unmarketable so long as prospective purchasers know of the installment contract and have any doubt about the need to foreclose.[114] If the vendor does resell without foreclosing, the purchaser could claim that the vendor breached the contract by reselling

109. *See* Duke v. Werbalowsky, 115 A.D.2d 947, 497 N.Y.S.2d 524 (1985) (mem.); Bean v. Walker, 95 A.D.2d 70, 72, 464 N.Y.S.2d 895, 897 (1983); Gerder Servs., Inc. v. Johnson, 109 Misc. 2d 216, 217, 439 N.Y.S.2d 794, 796 (Sup. Ct. 1981).

110. OHIO REV. CODE ANN. § 5313.07 (Anderson 1981); *see* Cuyahoga Metro. Hous. Auth. v. Watkins, 23 Ohio App. 3d 20, 24, 491 N.E.2d 701, 706 (1984); Durham, *Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute,* 16 AKRON L. REV. 397 (1983) (describing impact of Ohio statute).

111. ILL. ANN. STAT. ch. 110, para. 15-1106(2) (Smith-Hurd Supp. 1988).

112. *See, e.g.,* Power, *Land Contracts as Security Devices,* 12 WAYNE L. REV. 391, 408-34 (1966); Note, *supra* note 6, at 91-92, 124; Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts,* 47 S. CAL. L. REV. 191, 216-32 (1973).

113. *See, e.g.,* Note, *supra* note 6, at 114.

114. *See id.* at 97-98.

prematurely and could recover substantial damages for the breach.[115]

2. *Equitable Foreclosure.* Courts in several other states follow an approach that somewhat resembles convertability: they assert an equitable right to force foreclosure whenever fairness seems to demand it.[116] This position is similar to that taken in *Skendzel,* except that these courts are even more reluctant than the Indiana courts to specify when foreclosure is required. Several of these courts, in fact, simply say that foreclosure is required if forfeiture would "shock the conscience" or result in a "penalty" to the purchaser.[117] States that require foreclosure sometimes permit strict foreclosure, at least when the property's value is less than the outstanding debt.[118] Strict foreclosure simply gives the purchaser time to redeem before losing his interest in the property. Other states require foreclosure by sale, a more beneficial procedure for purchasers.[119]

Despite the criticism of *Skendzel* for its vagueness,[120] even greater problems of uncertainty arise under standards phrased in terms of unconscionability, penalties to the purchaser, windfalls to the vendor, or overall unfairness or inequity. States employing such standards seem to assume that litigation will be routine and that a court will properly sort out the equities and decide the purchaser's rights. But litigation is expensive, particularly litigation on the difficult factual issues that arise under installment land contracts. These contracts lose their appeal if the vendor's rights are unpredictable and costly to enforce. Vague standards can

115. *See* Mustard v. Sugar Valley Lakes, 7 Kan. App. 2d 340, 341-42, 642 P.2d 111, 112 (1981); *see also* Upchurch v. Henderson, 505 N.E.2d 455, 456-57 (Ind. Ct. App. 1987) (vendor liable for damages for using self-help remedy to deal with purchaser's breach); Legg v. Allen, 72 Or. App. 351, 355-56, 696 P.2d 9, 12-13 (1985) (purchaser can recover damages when vendor changes locks after giving deficient notice of intent to require strict compliance with contract provisions).

116. *See, e.g.,* Petersen v. Hartell, 40 Cal. 3d 102, 112-15, 707 P.2d 232, 239-41, 219 Cal. Rptr. 170, 177-79 (1985); Ellis v. Butterfield, 98 Idaho 644, 646-49, 570 P.2d 1334, 1336-39 (1977); Ryan v. Kolterman, 215 Neb. 355, 358, 338 N.W.2d 747, 749 (1983).

117. *See, e.g., Petersen,* 40 Cal. 3d at 113-14, 707 P.2d at 240, 219 Cal. Rptr. at 178; Thomas v. Klein, 99 Idaho 105, 110, 577 P.2d 1153, 1155 (1978).

118. Under strict foreclosure, the purchaser must redeem the property prior to the date specified by the court. If payment does not occur, title to the property vests in the vendor or mortgagee, with no sale of the property. *See* G. NELSON & D. WHITMAN, *supra* note 8, §§ 7.09-.10. This approach has been particularly popular in Nebraska. *See, e.g.,* Morgan v. Zoucha, 203 Neb. 119, 122-23, 277 N.W.2d 564, 566 (1979); Riffey v. Schulke, 193 Neb. 317, 319-20, 227 N.W.2d 4, 6 (1975); *see also* Smith v. Hawkins, 84 Or. App. 336, 342, 733 P.2d 929, 932 (1987) (strict foreclosure); Vista Management, Ltd. v. Cooper, 81 Or. App. 660, 663-65, 726 P.2d 974, 976-78 (1986) (same).

119. *See, e.g., Thomas,* 99 Idaho at 107, 577 P.2d at 1155; Chaffin v. Ramsey, 276 Or. 429, 433 n.2, 555 P.2d 459, 461 n.2 (1976).

Foreclosure by sale is a complicated, costly, and time-consuming procedure for the vendor. The purchaser may benefit if the vendor is unwilling to pursue the procedure, and, if the vendor does foreclose, the purchaser may retain the surplus from the sale. *See* G. NELSON & D. WHITMAN, *supra* note 8, §§ 7.11, 7.31.

120. *See supra* notes 113-15 and accompanying text.

encourage settlement and accommodation, to be sure, but all parties are ill served when their rights are so uncertain. Nonetheless, states continue to employ vague standards regularly in deciding when foreclosure is required.[121]

On its face, the more mechanical, statutory approach of Ohio and Illinois seems to serve both parties better by providing a fixed conversion point. Yet this approach also has its drawbacks, at least as Ohio and Illinois have employed it. Neither state seems to consider, in determining the need for foreclosure, the growth of a purchaser's equity either through an increase in prevailing market values or because of the purchaser's own improvements. The vague equitable standard, in contrast, allows courts to consider these other factors. Still, the certainty of a fixed conversion point remains attractive; states would do well, however, if they choose this approach, to craft a mechanical conversion point that better assesses the purchaser's equity.

F. *Uncertainty Compounded.*

As the above survey reveals, states have made good faith efforts to protect installment land contract purchasers. In doing so, however, they have produced standards beset with trouble. A brief hypothetical will help bring into focus the negative effects that this uncertainty can have on vendors and purchasers.

Consider an installment purchaser who has contracted to purchase a home at $500 per month for twenty years. Three years into the contract, the purchaser makes a payment a month behind schedule, and the vendor accepts it without comment. Two months later, the purchaser again misses a payment. This time, after a few weeks of delay, the vendor complains, and the purchaser catches up on the payments two weeks later. Again, a few months later, the purchaser misses a payment, this time going two months without paying. The vendor upon inquiry finds that the purchaser was laid off his job for a few months but now is back at work. The vendor warns against further lateness but accepts the late payments.

Three months later, the purchaser again is laid off and halts payments. Tired of the delays, the vendor seeks to enforce her rights. While in possession of the property, the purchaser has paid for a new roof, has installed insulation, and has added vinyl siding. The installment contract contains the usual forfeiture clause as well as a clause allowing the vendor to accelerate the unpaid indebtedness without notice.

121. *See, e.g.*, Grombone v. Krekel, 754 P.2d 777, 778-79 (Colo. Ct. App. 1988) (whether foreclosure is required or not is subject to equitable discretion of court).

These facts, typical of cases arising daily, give rise to a set of legal issues worthy of a law school classroom discussion. The vendor must first decide whether she has waived her right to declare a forfeiture by accepting late payments. In many states she will have done so on these facts, but the answer is unclear.[122] If a waiver has occurred, the vendor must reinstate her rights by giving the purchaser notice that future compliance with the contract's terms is required, as well as a chance to cure. Only then can she give notice of her intent to declare a forfeiture. Uncertainty also surrounds the length of the required notice period; the vendor takes a risk by using a short notice period. Moreover, the notice will prove ineffective if it states that default has already occurred or that the unpaid purchase price has been accelerated.[123]

Once the vendor has reinstated her right to insist on prompt payment, she can then declare a default if the purchaser has not yet paid. The vendor apparently must send a second notice to the purchaser, declaring a default and stating when forfeiture will occur. She must properly phrase that notice by stating clearly the action needed to cure, and must provide a second cure period, "reasonable" in length.[124] The notice must also state that acceleration of the debt has occurred, unless state law allows a reinstatement period that extends beyond the time when a default is properly declared. Again, the required time periods are vague. If cure does not occur, the vendor can finally declare a forfeiture. This declaration, too, must be properly phrased and communicated to the purchaser.

Many of these steps in the notice process are easy to perform, if the vendor knows of them. But, judging from the cases, mistakes are almost inevitable, and the "standards" create real pitfalls for vendors. If the vendor clears these procedural hurdles, she then faces the possibility that she cannot enforce the forfeiture clause on the ground that, in fairness, the purchaser should have a chance to reinstate after a default is properly declared.[125] The vendor must also determine whether the purchaser has a right to seek restitution of some of his payments and, if so, whether the restitution calculation should somehow cover the purchaser's improvements to the property.[126] If the state follows a rescissionary calculation in determining restitution, the vendor must also determine the fair rental value of the property. Finally, the vendor may have to consider whether

122. *See supra* notes 31-39 and accompanying text.

123. *See supra* note 37 and accompanying text.

124. *See supra* note 36 and accompanying text.

125. *See supra* notes 46-52 and accompanying text.

126. *See supra* notes 75-96 and accompanying text.

she must foreclose.[127]

For a knowledgeable vendor who is willing to move slowly, these forfeiture rules can work, albeit at a cost. But for the average vendor, particularly a vendor who needs to recover property quickly or get money to pay an outstanding mortgage on property, the rules can prove frustrating as well as expensive. In many cases, purchasers will be unaware of their rights or disinclined to assert them. But a determined purchaser can easily stall a forfeiture. After months, if not years, of litigation, vendors are often told that they have waived their rights and must start over, that their notice did not give quite enough time for the purchaser to respond, or that their forfeiture declaration was not properly phrased in the present tense.

A better scheme of legal rules must surely be within reach.

II. THE CONFLICTING THEORIES OF FORFEITURE

Part of the confusion that surrounds installment land contract forfeitures, as noted above, stems from the conflict between two contradictory theories of forfeiture.[128] Under one theory, the forfeiture remedy is based on rescission of a contract. Under the alternative view, forfeiture is a remedy based on termination of a contract and an award of contract damages. Each theory offers a justification for the election-of-remedies doctrine, and each theory offers a method of evaluating a forfeiture's fairness and calculating restitution rights and vendor damages claims.

When a court rescinds an installment land contract, the vendor is entitled to recover the property in its pre-contract condition.[129] If the property has declined in value, the vendor should receive compensation for the decline, but the vendor should have no right to claim entitlement to any valuable improvements added by the purchaser. The vendor is also entitled to the fair rental value of the property while in the purchaser's hands; the purchaser, of course, cannot return the property's use value in kind, and must provide a monetary award. The court similarly must restore the purchaser to his pre-contract position by ordering the vendor to return the purchaser's payments, both principal and interest, and to compensate the purchaser for the value of any improvements added to the land. Under this forfeiture-as-rescission approach, the contract price is irrelevant, as is the purchaser's equity in the property.

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127. *See supra* notes 97-121 and accompanying text.

128. *See supra* notes 86-88 and accompanying text. A good discussion of the confusion between rescission and termination in land sale cases is contained in 1 G. PALMER, *supra* note 75, § 5.6.

129. *Cf.* 12 WILLISTON ON CONTRACTS § 1454A (W. Jaeger 3d ed. 1970) (defining rescission as implying restoration to pre-contract situation).

The competing theory of forfeiture as contract termination involves a much different set of remedial steps. Under this approach, the vendor is entitled to full payment of the contract price. If the vendor recovers the property, she must credit its value against the unpaid contract price.[130] If that credit still fails to pay off the contract, the vendor should receive a deficiency judgment. If the property's value is greater than the unpaid contract balance, however, the purchaser should recover the difference. Under this forfeiture-as-termination theory, the vendor recovers the property not because the contract is being undone, but because the contract has been terminated and the purchaser's equitable interest has come to an end. The purchaser's right of possession, of course, stems from the contract, and that possessory right logically ends when the contract is properly terminated. Thus, under both theories, the vendor has a right to recover the property. Both theories also offer a justification for the election-of-remedies doctrine, although neither theory supports the doctrine with any degree of firmness.[131]

The two competing theories of forfeiture could aid courts in assessing the fairness of particular forfeitures. The theories could also help courts to calculate a vendor's damages and a purchaser's entitlement to restitution. But courts too often fail to distinguish between the theories, slipping into damages discussions that confuse elements from both. This confusion makes the judicial process more unpredictable. The best ap-

130. *See, e.g.*, Askari v. R & R Land Co., 179 Cal. App. 3d 1101, 1111-12, 225 Cal. Rptr. 285, 292-93 (1986); Ogle v. Wright, 172 Ind. App. 309, 319, 360 N.E.2d 240, 246 (1977).

131. Under the rescission theory, at least as commonly espoused, the doctrine makes sense because an award of damages is inconsistent with the notion of rescission. *See, e.g.*, Herrington v. McCoy, 105 Ill. App. 3d 527, 530-31, 434 N.E.2d 67, 69-70 (1982); Farmer v. Groves, 276 Or. 563, 566, 555 P.2d 1252, 1255 (1976); Note, *supra* note 6, at 106-08. A vendor cannot undo the contract and claim damages for its breach. This logic, however, falls far short of justifying the election doctrine as applied in many states. It does not explain why the vendor often cannot recover the rental value of the property, an element of recovery to which she is entitled in rescission. Nor does it explain why the vendor cannot recover for any decline in the value of the property caused by the purchaser. In many instances, the purchaser's installment payments will approximate the property's rental value, and the vendor in rescission will not have a claim for any substantial additional amount. But this will not always be the case, and a vendor in rescission should be able to recover the rental value and compensation for waste if those amounts exceed the purchaser's payments.

Under the forfeiture-as-termination theory, the election-of-remedies doctrine is justified on the much different ground that the forfeiture clause operates as a liquidated damages provision—an agreement by the parties that the vendor will accept the property as full payment of the unpaid contract balance. As a liquidated damages clause, however, a forfeiture provision is exceedingly crude and would likely fail even a rudimentary sereening for reasonableness. As time passes and the purchaser makes more payments, the outstanding contract balance will decline. At some point the balance will approach zero. Yet a forfeiture clause provides that, regardless of the size of the balance, the vendor can retain the property in full satisfaction of the contract. In fact, courts often reject forfeitures when the vendor's recovery is excessive. *See supra* text aecompanying note 44. Using similar logic, courts could grant the vendor contract damages if the property's value fell significantly below the outstanding contract balance.

proach, advocated below,[132] is to use the contract-termination calculation or to give a nondefaulting vendor her choice between rescission or termination. But whatever route courts take, they should settle upon clear rules that parties can apply reliably and consistently, without the need for litigation.

III. THE ALTERNATIVES TO FORFEITURE

The presence of multiple alternative remedies for vendors makes the plight of the defaulting purchaser even more confusing. Several of the alternative remedies are rarely used, and their requirements remain unsettled. But they offer vendors the possibility of obtaining relief while circumventing many of the purchaser-protection provisions that make forfeiture so confusing and unreliable. The alternative remedies thus render the protections of forfeiture law even more precarious, adding yet another layer of complexity to the area.

A. *Rescission and Foreclosure.*

One important vendor remedy is formal rescission.[133] Courts generally seem willing to allow a vendor to rescind a contract and to recover both the property and the property's rental value for the time that the purchaser held it. Rescission can prove particularly attractive for a vendor when property has appreciated in value or the original sale was at a below-market price. Under a rescission theory, at least as courts have applied it, the vendor can recover for herself the property's enhanced value without having to pay the purchaser for the benefit of his bargain.[134] Although the issue is not settled, it appears that the election-of-remedies doctrine does not apply in rescission actions.[135] Thus, a vendor might profitably use rescission if, after considering the purchaser's payments in hand, she will still be entitled to a deficiency judgment for the rental value of the property.

132. *See infra* text accompanying notes 179-80.

133. *See, e.g.*, Earven v. Smith, 127 Ariz. 354, 356, 621 P.2d 41, 43 (Ct. App. 1980); Tromp v. Martinez, 719 P.2d 380, 381 (Colo. Ct. App. 1986); Gordon v. Pfab, 246 N.W.2d 283, 287 (Iowa 1976); Duffin v. Patrick, 216 Kan. 81, 82, 530 P.2d 1230, 1231 (1975); Litz v. Wilson, 208 Neb. 483, 485, 304 N.W.2d 48, 50 (1981).

134. *See* 7 POWELL, *supra* note 5, ¶ 938.24[3].

135. The election doctrine bars only attempts to pursue inconsistent remedies. In rescission, only a single remedy is sought, and the vendor should be able to recover as part of that remedy not only the property, but also the rental value of the property while it was in the purchaser's possession plus the amount of any waste. *See supra* text following note 129. It does seem likely, however, that the purchaser could refuse to pay "rent," at least to the extent that the increased property value enjoyed by the vendor covers her claim for lost rental income. *See, e.g.*, Askari v. R & R Land Co., 179 Cal. App. 3d 1101, 1112, 225 Cal. Rptr. 285, 293 (1986) (property appreciation "should be applied here to offset any consequential damages").

Foreclosure offers a second option for vendors that, despite its costs, is attractive in some settings. A few states allow strict foreclosure, which has the advantages of speed and procedural simplicity.[136] However, the states that most often use strict foreclosure restrict its availability to situations in which the unpaid purchase price exceeds the property's value, and they also deny deficiency judgments.[137] Because of this ban on deficiencies, strict foreclosure is attractive simply as a means of formally terminating the purchaser's interests and removing all clouds on the title.[138] Judicial foreclosure is readily available everywhere and is attractive principally when a deficiency judgment is possible.[139] When a vendor uses judicial foreclosure, states typically treat the action as a mortgage foreclosure and apply the normal mortgagor protections.[140] The election-of-remedies doctrine is inapplicable, and deficiencies are available if allowed under mortgage law.[141]

B. *Breach of Contract.*

A more intriguing remedy for vendors is the straightforward common law action for breach of contract. According to many courts, a vendor can avoid invoking a forfeiture clause, as well as many of the special purchaser protections that arise under forfeiture law, by suing the purchaser for normal contract damages instead.[142]

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136. *See, e.g.,* Arnold v. Fechtel, 279 Or. 411, 414, 568 P.2d 659, 660 (1977); *see also supra* note 118.

137. *See, e.g.,* Riffey v. Schulke, 193 Neb. 317, 319, 227 N.W.2d 4, 6 (1975). *But see* Vista Management, Ltd. v. Cooper, 81 Or. App. 660, 665, 726 P.2d 974, 977 (1986) ("[I]f the vendee has been unreasonably negligent in performing the contract, the vendor may obtain strict foreclosure even when the value of the property has significantly increased.")

138. This benefit of strict foreclosure can be a substantial one if the vendor has no other ready means to clear the land title of the cloud presented by the purchaser's apparent contract interest. In operation, strict foreclosure is little more than a rule requiring notice of forfeiture, although the rule requires judicial involvement and gives courts flexibility in deciding the length of the notice period. After the notice period is set, the purchaser must pay the contract in full or lose everything. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 7.9.

139. *See, e.g.,* Bockover v. Signature Realty, Inc., 490 So. 2d 165, 166 (Fla. Dist. Ct. App. 1986); Ellis v. Butterfield, 98 Idaho 644, 649, 570 P.2d 1334, 1339 (1977); Arnold v. Melvin R. Hall, Inc., 496 N.E.2d 63, 65 (Ind. 1986); Sebastian v. Floyd, 585 S.W.2d 381, 383-84 (Ky. 1979); Carman v. Gibbs, 220 Neb. 603, 605, 371 N.W.2d 283, 285 (1985); Bean v. Walker, 95 A.D.2d 70, 75, 464 N.Y.S.2d 895, 898 (1983); Chaffin v. Ramsey, 276 Or. 429, 432 n.2, 555 P.2d 459, 461 n.2 (1976).

140. *See, e.g.,* ILL. ANN. STAT. ch. 110, para. 15-1106(c) (Smith-Hurd Supp. 1988) ("A contract seller may at its election enforce in a foreclosure under this Article any real estate installment contract . . . ."); *Arnold,* 496 N.E.2d at 64 (judicial foreclosure sales should "be treated . . . in the same manner as mortgage foreclosures").

141. *See, e.g., Arnold,* 496 N.E.2d at 66; *Carman,* 220 Neb. at 606-07, 371 N.W.2d at 285-86; Hagan v. Havnvik, 421 N.W.2d 56, 61 (N.D. 1988) (deficiency allowed when permitted under fair-value statute governing mortgage foreelosures).

142. *See, e.g.,* Van Moorlehem v. Brown Realty Co., 747 F.2d 992, 994 (10th Cir. 1984) (applying New Mexico law); Earven v. Smith, 127 Ariz. 354, 356, 621 P.2d 41, 43 (Ct. App. 1980); Gordon

Vendors have rarely chosen this remedy, however, despite frequent judicial assertions of its availability, and the caselaw on the subject is nearly nonexistent. Consistent with basic contract law, the vendor should be able to terminate the contract upon a material breach by the purchaser.[143] Once the contract is terminated, the purchaser's equitable right to possess and use the property should end, and the property should become the vendor's. Vendors frequently employ the action for contract breach when purchasers fail to close on earnest money contracts.[144] But for reasons that are difficult to discern, other than a simple unfamiliarity on behalf of advising attorneys, vendors turn to forfeiture when a purchaser breaches an installment contract.

When a vendor claims a contract breach, the election-of-remedies doctrine logically should not apply. Courts seem to agree.[145] As explained above,[146] the election doctrine arises from a perceived inconsistency between forfeitures and deficiencies, an inconsistency not present in contract breach actions. One can only guess whether other purchaser protections will apply, but vendors might successfully argue that only the normal rules for breach of contract shonld govern. Declaring a contract termination requires no special notice.[147] In fairness, however, a court should conclude that an installment purchaser has the right to cure his breach after notice, before the harsh remedy of termination can occur.

On balance, a contract breach action appears to offer the vendor nearly all the advantages of a forfeiture action, while avoiding the election-of-remedies doctrine and perhaps some of the tightly drawn rules on waiver and notice. The only apparent drawback of the contract breach remedy is that a vendor might have no right to retain the property if the property's value exceeds the unpaid contract price.[148] But, as courts increasingly require restitution[149] and foreclosure,[150] vendors in forfeiture

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v. Pfab, 246 N.W.2d 283, 287 (Iowa 1976); Duffin v. Patrick, 216 Kan. 81, 82, 530 P.2d 1230, 1231 (1975); Glacier Campgrouud v. Wild Rivers, Inc., 182 Mont. 389, 403, 597 P.2d 689, 696 (1978); Litz v. Wilson, 208 Neb. 483, 485, 304 N.W.2d 48, 50 (1981); Turner v. Benson, 672 S.W.2d 752, 754-55 (Tenn. 1984).

143. *See* E. FARNSWORTH, *supra* note 52, § 8.18.

144. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 93, § 10.3; *see also supra* notes 93-96 and accompanyiug text.

145. *See, e.g.*, McBride v. Hammers, 418 N.W.2d 60, 63 (Iowa 1988) (vendor can terminate contract, keep the land, and sue for damages for breach); *Glacier Campground,* 182 Mont. at 399, 597 P.2d at 694 (same). Some commentators, however, have suggested that the doctrine will apply in this setting. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 3.32, at 116-17. One recent case that applies the doctrine is Herrington v. McCoy, 105 Ill. App. 3d 527, 532, 434 N.E.2d 67, 70-71 (1982).

146. *See supra* text accompanying notes 53-73.

147. Notice seems necessary only if the defaulting party has the right to cure, a right that it does possess in some settings. *See* E. FARNSWORTH, *supra* note 52, §§ 8.17-.18.

148. *Cf. id.* § 8.14 (courts now willing to grant restitution to breaching party).

149. *See supra* notes 74-96 and accompanying text.

actions are rapidly losing their ability to retain windfalls; this drawback of a contract breach remedy will thus usually prove insignificant.

C. *Specific Performance or Action for the Price.*

Two nearly identical remedies provide additional options for the vendor faced with a default. A vendor can sue for specific performance, a remedy equitable in nature but routinely allowed in the real estate context.[151] Alternatively, the vendor can bring a common law action for the purchase price.[152] Both actions require the purchaser to pay the full purchase price and obligate the vendor, once payment occurs, to deliver a deed. They differ, if at all, only in the lack of a jury trial on the equitable action. When this difference is present, a state might require the vendor to style her action as a legal one so as not to deprive the purchaser of his jury trial entitlement.[153]

These two actions are helpful in the unusual case in which a purchaser has the resources to complete his contract. Some vendors have also used a specific performance suit to circumvent the election-of-remedies doctrine. They have done so by asking courts to order specific performance and to direct, in the likely event of continued nonperformance, that the property at issue be sold. Courts have agreed and have allowed vendors to obtain deficiency judgments, despite the usual election-of-remedies ban.[154]

For the vendor, then, rescission, foreclosure, contract breach actions, and specific performance can all prove useful in various settings, and vendors could profitably bring such actions with greater regularity. Because these alternative remedies offer a vendor opportunities to avoid some of the most important purchaser-protection provisions of forfeiture law, they make the protections more unreliable and add further confusion to the law of installment land contracts. In large measure, these inconsistencies among remedies have developed because courts have viewed forfeiture as a discrete, isolated remedy; they have failed to give

150. *See supra* notes 97-121 and accompanying text.

151. *See, e.g.*, Earven v. Smith, 127 Ariz. 354, 356, 621 P.2d 41, 43 (Ct. App. 1980); Gordon v. Pfab, 246 N.W.2d 283, 287 (Iowa 1976); Duffin v. Patrick, 216 Kan. 81, 82, 530 P.2d 1230, 1231 (1975); Litz v. Wilson, 208 Neb. 483, 485, 304 N.W.2d 48, 50 (1981); Gordon v. Schumacher, 83 Or. App. 544, 546, 733 P.2d 35, 36 (1987).

152. *See, e.g.*, Trachtenburg v. Sibarco Stations, Inc., 477 Pa. 517, 523, 384 A.2d 1209, 1212 (1978) ("[A]n assumpsit action at law for the purchase price of the land . . . is a third remedy which has always been available to the seller in our common law courts.").

153. *See id.*, 384 A.2d at 1212.

154. *See, e.g.*, Glacier Campground v. Wild Rivers, Inc., 182 Mont. 389, 406, 597 P.2d 689, 698 (1978) ("statutory prohibition against deficiency judgments in mortgage foreclosures is not a prohibition against awarding specific performance") (quoting Renard v. Allen, 237 Or. 406, 413, 391 P.2d 777, 780 (1964)).

due consideration to the ways in which forfeiture law fits together with other available remedies. The result is that an astute vendor can often circumvent forfeiture law by using other remedies, just as an astute purchaser can frustrate the typical vendor by taking advantage of the complex pitfalls of forfeiture law.

IV. THE COSTS AND BENEFITS OF VAGUENESS

As the above discussion makes plain, installment land contract law is complex, much more so than is necessary given that the typical dispute involves only two parties and an acknowledged failure to pay a set amount of money. Before considering ways to reduce the vagueness and complexity, however, it is perhaps appropriate to consider the purported benefits of legal vagueness. Although vagueness makes planning more difficult, it supposedly gives judges the flexibility to achieve fair results in particular cases. This benefit and its implications, however, need a bit more scrutiny and more careful comparison with the corresponding costs and benefits of a legal scheme centered on clear rules.

A. *Analysis Ex Ante and Ex Post.*

The prime virtue of vagueness is that it gives courts room to tailor justice to the facts of a particular case.[155] When all the evidence is in, a court can draw from its bulky bag of precedents and standards an authoritative-sounding rationale for the result that seems most fair.[156] Vagueness facilitates an ex post examination of the facts by enabling courts to look back and judge the fairness of what has happened.[157] In doing so, however, vagueness frustrates the efforts of those who need to make decisions ex ante. Vendors and purchasers must plan and act, and vagueness renders their ability to do so uncertain and risky. The issue, put starkly, is whether the ex post or ex ante view is more appropriate in this setting.

Clear rules allow people to determine in advance where they and others stand and what the legal consequences of alternative actions are. With this information in hand, they can commit themselves to personal

155. For the leading study of the differences between clear rules and more vague standards, see Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976).

156. The broad discretion of judges, of course, is a cornerstone of the Critical Legal Studies critique of the contemporary legal structure. The critique involves debate over whether any rule is sufficiently clear to remove all judicial discretion. But vague rules certainly expand and legitimate that discretion, particularly for more cautious judges who sincerely attempt to stick close to literal applications. *See, e.g.,* Kairys, *Legal Reasoning,* in THE POLITICS OF LAW 11, 13-15 (D. Kairys ed. 1982).

157. *Cf.* Kennedy, *supra* note 155, at 1771-74 (altruistic perspective permits judge to reach decision, after the fact, as a "person-in-society rather than as an individual").

and market transactions with a relatively secure knowledge of the likely results. This ex ante approach, predictably favored by legal economists,[158] benefits people who seek advice and think rationally, who plan and prepare, and who intend to rely on and fully exercise their legal rights. The approach can prove particularly beneficial to actors who wield great resources and who negotiate from positions of strength.[159]

Ex post analysis focuses on a transaction after it has occurred and then sorts out the rights and obligations of the parties. Vague standards give courts discretion after the fact. Courts can reach an appealing result within the confines of existing law without needing to take the drastic (or at least uncomfortable) step of deviating from a precedent or changing a clear rule. With this flexibility, courts can, if they choose, strike down an unfair bargain exacted by the actor who possesses the greater knowledge and resources. They can protect the needy and dependent against the harsh consequences of an often poorly understood "agreement."[160] They can take unforeseen circumstances into account and can assess all the facts in their quest for justice. More generally, in reaching judgments, they can consider the expectations and dependencies, the entire social relationship, that exists between and around the parties.[161] Over time,

158. *See, e.g.*, Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-11, 19-21 (1984); Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322-26 (1985); *see also* Baird & Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299 (1984) (discussing benefits of legal rules in minimizing conflicts between property owners). The topic of ex ante and ex post viewpoints is considered in Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590-93 (1988).

159. Whether the wealthy and powerful can exert their strength depends on the test used to determine whether a contract is voluntary and therefore enforceable. It is possible to imagine definitions of coercion and duress that strike down any bargain that results from unequal power. But current law defines these terms more narrowly and allows the powerful considerable room in which to exercise control. *See* Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1543-46 (1987) (reviewing H. COLLINS, THE LAW OF CONTRACT (1986)); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1364 (1984); *see also* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (arguing that distributive and paternalist motives explain imposition of compulsory terms in contract law).

A good study of the theories of contract enforcement and their attendant problems is Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271-91 (1986). The consent theory that Barnett proposes posits that individuals have certain entitlements and that a contract results when a person consents to transfer or relinquish an entitlement to another person. *See id.* at 300-04. The consent required for a valid contract is a manifested intention to alienate rights under circumstances that imply a willingness to be legally bound. *Id.* at 304. Meaningful consent is reduced or eliminated when a contracting party has little if any choice.

160. *Cf.* West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (arguing that consent to transactions results not from the recognition of opportunities to maximize wealth but from a desire to submit to authority).

161. For a fine argument for the need to consider expectations, social contexts, and societal norms in contract enforcement actions, see Lightsey, *A Critique of the Promise Model of Contract*, 26

particularly under a long-term contract, these evolving expectations and dependencies can significantly alter the perceived fairness of actions by both parties. When in fairness these expectancies deserve recognition, clear rules can provide a barrier.[162]

The call for particularized justice has gained strength in recent years with the added voices of feminist writers, and ex post jurisprudence cannot be fairly assessed today without due attention to recent forceful feminist writings. Already apparent is the dominant feminist call for justice based more on responsibilities than rights, on human connectedness rather than autonomy, on healing and strengthening human ties rather than proclaiming personal rights.[163] This theme, it seems, has two connected components: calls for a substantive ethic of care, for legal norms under which "connections between people are valued over the freedom of individuals to act as they wish so long as they don't hurt anyone else,"[164] and calls for more particularized justice, for a focus on "[c]oncrete circumstances, the actual situations of people's lives, their relations to

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WM. & MARY L. REV. 45, 48-62 (1984). A more pointed criticism of "freedom" of contract is contained in Kennedy, *supra* note 159. A useful recent study of the expectations and reliances that arise in connection with the joint use of property (specifically manufacturing plants) is Springer, *The Reliance Interest in Property,* 40 STAN. L. REV. 611 (1988).

Consideration of expectations and dependencies is not inconsistent with ex ante analysis. *See infra* notes 174-75 and accompanying text.

162. Perhaps the most powerful call for particularized justice and flexible rules is Judge John Noonan's PERSONS & MASKS OF THE LAW (1976), a work reminiscent in several ways of Roscoe Pound's pointed criticism of excessive adherence to logically derived legal rules. *See, e.g.,* R. POUND, THE SPIRIT OF THE COMMON LAW 58-59 (1921); Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605, 622-23 (1908). Like Pound, Noonan admonishes judges to consider that the legal process involves people judging people, not masked government functionaries blindly applying set rules to faceless parties. J. NOONAN, *supra,* at 17-19. Our legal system, he asserts, emphasizes rules too much and people too little; we must temper rules to achieve justice by considering the particular equitable considerations in individual cases.

Noonan argues, in essence, that rules often treat as irrelevant factors that should bear weight in resolving particular cases; rules are, in other words, regularly and perhaps inevitably simplistic. This concern can be accommodated—although at no small cost—by switching to an ex post jurisprudence with considerable judicial flexibility. But it can be accommodated just as well, and in the installment land contract setting can be accommodated better, by altering the rules to give due weight to the overlooked factors. As explained below, *see infra* text accompanying notes 167-75, factors formerly shortchanged by the objective, free will theory of contracts are easily identified and as easily incorporated into more socially responsive rules. Moreover, once reformulated, these rules offer the additional benefits—largely absent in an ex post jurisprudence—of reducing litigation costs and constraining insensitive judges and zealous, domineering parties. Noonan provides a needed indictment of ill-crafted, mechanistic rules, but he intentionally chooses not to elaborate on his observation that rules are "indispensable." J. NOONAN, *supra,* at 19. Noonan's claim is most persuasive in settings where planning is not done and where potentially relevant factors are so numerous as to render any fair rule intractably vague.

163. *See, e.g.,* Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3, 4-12 (1988).

164. Bartlett, *McKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1569 (1987).

others and their moral characters, rather than abstract principles based on assumed conditions."[165] The feminist call for particularized justice highlights the need to take seriously the possible benefits of ex post analysis. The call for an ethic of care, in contrast, presents a more direct challenge to the substantive legal norms that will govern the vendor-purchaser relationship.[166]

B. *Analysis of Installment Land Contract Law—Ex Ante and Ex Post.*

Property law often reflects a tension between the ex ante and ex post views.[167] In the popular wisdom, flexible standards promote fairness and protect the uninformed and dependent, but at the cost of creating a drag on the smooth functioning of the real estate market.[168] Clear rules, by contrast, promote commercial certainty, but provide the tools that the strong use to dominate.[169] Clear rules, many assume, are particularly inappropriate when one party is poorly informed and economically weak, and thus a suitable target for market exploitation, and when a long-term relationship gives rise to extracontractual expectations and dependencies. Does this received wisdom hold true in the setting of installment land contracts? Is ex post fairness and flexibility more just than ex ante clarity? Can the feminists' ethic of care fit adequately into binding rules laid down in advance?

In many ways, the typical installment setting arguably presents an instance in which ex post fairness should reign. The parties often bargain from unequal positions. Vendors are often better informed and financially stronger. Purchasers lack the cautious presence of an outside lending institution to help look after their interests. The "good" at issue is

165. *Id.* at 1568-69; *see also* C. GILLIGAN, IN A DIFFERENT VOICE 101 (1982) (an "insistence on the particular").

166. Installment land contract law, it hardly needs mention, is low on the list of feminist concerns. Yet it is none too soon to consider in such a setting the implications of these challenges. In applying these two feminist views it is important to understand the links between them, for the call for particularized justice seems more a means than an end and might well have little value as a discrete goal. The feminist ethic of care presents an organic social vision and seeks greater fairness in the substantive responsibilities that join vendor to purchaser in a common undertaking. A new ethic of care can have independent value, however achieved. The call for particularized, presumably ex post, jurisprudence, on the other hand, is a more secondary concern. Particularized justice seems merely a tool to facilitate the growth of organic social bonding, and as a separate end may have, at least in some settings, costs that exceed its benefits. At the risk of simplification, the feminist challenge in this setting can best be framed in a single inquiry: can clear logical rules, established ex ante on "assumed conditions," incorporate the fairness and the human connectedness that feminists so persuasively demand?

167. *See* Rose, *supra* note 158, at 590-93.

168. *See id.; see also* sources cited *supra* note 158.

169. *See* Kennedy, *supra* note 155, at 1767-71.

often a home, one of society's most vital commodities.[170] Finally, the parties envision their contract as a long-term relationship—one that can support reliance and expectations of fair dealing that surpass the precise terms of the contract. As the vendor-purchaser relationship lengthens and strengthens, the factual context becomes more rich and the fairness calculus becomes more complex.

At first glance, then, this setting seems amenable to ex post governance. A more careful look, however, indicates that the costs of flexibility might well exceed their benefits. Moreover, fairness is by no means the exclusive province of the ex post view.[171] On balance, clear rules, properly crafted, can promote fairness and caring every bit as well as a scheme centered on judicial discretion, particularly in light of the wide diversity of settings in which the rules will apply.

The next section of this Article undertakes to recast installment land contract law in a way that recognizes dependencies and stimulates fair dealings. At this stage, several general points can be made about the factors that support a scheme based on clarity. One factor is that vagueness clouds the vendor's obligations, as well as her rights, and thus might stimulate her to act more aggressively. For the purchaser who never seeks legal advice, flexibility offers little protection against an aggressive vendor. A purchaser who does seek advice might be unable to carry out the complex lawsuit needed to protect his rights, and thus would be left unprotected. Even a successful trial takes time and costs dearly. Flexibility in legal rules can harm all purchasers in this position.

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170. *See* Radin, *Property and Personhood,* 34 STAN. L. REV. 957, 987-96 (1982) (arguing that certain property rights, such as right to a home, are necessary to protect individual's sense of autonomy, connection to comimnity, and personhood); Comment, *Community, Home, and the Residential Tenant,* 134 U. PA. L. REV. 627, 627-56 (1986) (arguing that legal system should allow and encourage tenants to become attached to their dwellings and become "true members" of their communities). The psychological and emotional attachments that people gain for particular places are considered in E. WALTER, PLACEWAYS: A THEORY OF THE HUMAN ENVIRONMENT (1988); F. STEELE, THE SENSE OF PLACE (1981).

171. Vague rules often develop when courts seek to add greater fairness to clear rules that operate crudely. *See* Rose, *supra* note 158, at 580-90. This interpretation of legal change, which seems correct, often leads to the assumption that vague standards are inevitably more fair than clear rules. That assnmption, however, is unwarranted. A clear rule that deals unfairly with a particular situation can often be made more fair by redrawing the rule's clear lines, perhaps even in a way that simplifies the statute. The redrawing can occur without adding more vagueness and uncertainty to the process. A vague standard, on the other hand, can leave a court discretion to apply it inconsistently and unfairly. Moreover, vagueness can breed litigation, and high litigation costs can undercut the fairness in application of any legal norm.

It is perhaps also an error to assume that conrts always embrace vagueness out of a drive for fairness. Much vagueness may stem from the reluctance of courts to engage in the type of clear acts of rulemaking that legislatures comfortably employ. The relative benefits of clarity and vagueness are considered at length in Kennedy, *supra* note 155.

A second point is that flexibility offers benefits to the purchaser only if the judge exercising it is sympathetic to the purchaser's plight. Flexibility often stems from the trial court's factual determinations, which carry great weight on appeal. Much of the flexibility, then, lies with the trial judge, who might exercise it to favor the vendor as often as the purchaser. A notice rule requiring "reasonable" notice, for example, might require ninety days' notice in one courtroom and fifteen days' notice in the next.

Third, rules that are clear need not favor the vendor and need not be subject to alteration by the parties. Rules can favor the purchaser,[172] either modestly or greatly, and can be crafted in nonwaivable language.[173]

Finally, the dependencies and expectancies that surround a long-term installment land contract are predictable and can be considered in the rule-drafting stage.[174] The purchaser will expect fair treatment over the course of the contract, particularly as his equity increases. He will expect notice, a chance to cure, and restitution if he must lose the property. But all of these expectations surround his desire to maintain his contract and retain his property. Only the unusual purchaser will develop expectations outside a readily foreseeable range.[175] The "assumed expectations," that is, might in retrospect approximate closely the actual.

On balance, clear rules that are drafted to account for reasonable expectations seem to offer the potential for as much "fairness" as does a system based on vagueness. If this conclusion is correct, and the rules can be so drafted, then the balance strongly tilts in favor of clarity, for clarity offers independent virtues as well. Clarity allows the parties to plan, as some will want to do, particularly (but not exclusively) vendors and commercial purchasers. Clarity will also reduce the cost of legal advice and probably the frequency of litigation, or, in any case, its complexity. In addition, vendors will more likely respect the rights of purchasers if those rights are unambiguous. Thus, for courts, litigants, and nonlitigants alike, clear rules have distinct advantages.

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172. Indeed, many states have, by statute, extended the purchaser's rights. *See, e.g., supra* note 40 and accompanying text (statutory right of redemption).

173. *See generally* Rubin, *Toward a General Theory of Waiver,* 28 UCLA L. REV. 478 (1981) (discussing difficulties with judicial determination of waiver and outlining general theory of waiver of rights by private persons).

174. Joseph Springer's fine study pursues this approach by considering the expected reliances and dependencies in the factory-closing context and proposing standards that give courts the power to accommodate those interests. His proposals fall short of providing clear rules, but are nonetheless clear in identifying, in advance, the types of dependencies that will deserve protection. *See* Springer, *supra* note 161, at 732-44.

175. One unusual expectation might be to reap lottery-sized profits from a vendor's breach, perhaps through statutory liquidated damages.

V. SIMPLIFYING AND CLARIFYING FORFEITURE LAW

A. *The Continuing Viability of Installment Land Contracts.*

Installment land contract law is too vague, too flexible, and too full of rough edges. The rather basic, easily predicted needs of the parties do not justify this vagueness and complexity. Both vendors and purchasers would profit considerably from rules of greater clarity, simplicity, and reliability. With all of the uncertainties surrounding forfeitures and the parties' relative rights, it seems surprising that the installment land contract continues in regular use, at least in states that have not mandated foreclosure. The reasons for its popularity are difficult to determine definitively, but several explanations seem plausible.

One possibility is that vendors, who usually dictate the transaction form, are simply unaware of the confusing and dangerous shoals that await them should they need to exercise their rights. No doubt, parties perform many contracts without a hitch, and handle many breaches and forfeitures without resort to the courts. Only vendors who have experienced the travails of the forfeiture rules are likely to appreciate the rules' ability to confound.

A second, more disturbing possibility is that vendors use the installment contract on the assumption that purchasers who default will simply fail to exercise their rights. The purchaser's rights to redeem, to demand fair notice, to reinstate, and to obtain restitution all require that the purchaser know his rights and assert them. Even the protections of the election-of-remedies doctrine require assertion. The vendor may assume that the typical purchaser will accede to clear contract language that purports to give the vendor the right to reclaim the property and to keep the payments whenever a default occurs.[176] If a vendor can convince a purchaser to give up the property, the vendor can likely avoid any contact with the courts; a purchaser who is not sued will often not seek legal advice to find out his rights.

In some states, lawmakers have reacted to the uncertainties in the installment land contract area by eliminating forfeiture, at least in large part, in favor of foreclosure.[177] But foreclosure is hardly an ideal remedy for anyone, including the purchaser.[178] Moreover, foreclosure largely eliminates the installment contract as a distinct financing option, at least

176. *See* Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms,* 56 U. CIN. L. REV. 845, 845-47 (1988).

177. *See supra* notes 97-121 and accompanying text.

178. The principal problem with foreclosure, of course, is that it requires judicial action in all cases absent a post-default waiver of rights by the purchaser, adding cost and delay to the process. Foreclosure would be a more attractive remedy if it were streamlined and made more predictable. Some commentators have argued that installment contracts could be well handled under foreclosure

so long as purchasers realize their right to demand a foreclosure sale. A better approach is to restructure the current remedies in installment land contract law so that they achieve their goals as simply and effectively as possible.

B. *Revising the Remedies.*

A revamped remedial scheme should include a clear cause of action for breach of an installment land contract. The scheme should discard the notion of a forfeiture and should declare that the presence or absence of a forfeiture clause is unimportant. States should base this revised cause of action on five relatively simple considerations:

- First, a vendor should have the right to obtain the benefit of her contract bargain. A state might fairly allow a vendor to choose the rescission method of calculating damages as an alternative,[179] but the need for such a choice is slight, since contract-termination damages provide a fair measure of recovery. Full compensation is the normal rule in contract breach settings; there is no particular reason to deviate from the rule here. In determining the amount of the vendor's recovery, courts should focus on the proper method of damage calculation. The purchaser's payments, as well as the purchaser's equity, are irrelevant. What is relevant is simply the value of the property (at the date on which the vendor recovers it) and the unpaid contract amount.[180] If the latter is larger, the vendor should obtain a deficiency judgment. The election-of-remedies doctrine should be discarded.

- Second, a purchaser should have the right in all cases to obtain restitution of any benefit that he has conferred on the vendor in excess of the vendor's damages entitlement.[181] Restitution should not be denied because the vendor's excess recovery fails to shock the court's conscience or because the purchaser's breach was willful in some respect. Courts can calculate the restitution amount simply: the purchaser is entitled to the excess of the property's value over the unpaid purchase price. A state, as a policy matter, might allow the vendor to retain some portion of the excess as extra compensation for her

law if appropriate changes were made to the foreclosure process. *See* G. NELSON & D. WHITMAN, *supra* note 8, § 3.29, at 108.

179. *See supra* note 89 and accompanying text.

180. *See supra* notes 130-31 and accompanying text.

181. *See supra* note 74 and accompanying text.

injuries. But the need for this is slight, and legislatures and courts should particularly avoid crafting a flexible rule that preserves judicial discretion at the cost of continued confusion. A clear restitution right can eliminate the need for a foreclosure sale of the property.

- Third, in determining the vendor's damages and the purchaser's entitlement to restitution, a court should assume, absent contrary evidence, that the property is worth the contract price plus the cost of any capital improvements made by the purchaser. If the purchaser believes that the property has increased in value, he can prove it. If the vendor believes the opposite, she too can step forward with proof.[182] This rule provides a convenient method of valuing the property to determine the rights of the parties, and the rule can reduce, if not eliminate, the need for valuation evidence in the typical case.

- Fourth, states should employ simple, precise notice rules that require the vendor to inform the purchaser that a default has occurred and that adverse consequences will follow if cure does not occur. A rule phrased in terms of "reasonable under the circumstances" is fair, but difficult to apply and conducive to dispute. Once a clear rule is developed, realtors and bar associations are likely to step in and prepare form notices that vendors can use. A few states specify the form of notice by statute,[183] and the statutes appear to work well.

- Finally, states should define clear reinstatement and redemption periods. The periods should not be triggered by the filing of a civil action by either party. Illinois, for example, provides an attractive reinstatement right for purchasers, but that right arises only if the vendor files a forcible entry and detainer action.[184] The vendor can circumvent reinstatement by convincing the purchaser to abandon or by bringing a different action.[185] This approach is flawed, as is any approach that

182. Under the proposed rule, each side has the burden of coming forward and proving that the presumed value of the property (that is, its contract price plus the value of any capital improvements made by the purchaser) is incorrect. Since the parties are proving inconsistent positions, both sides cannot succeed. If neither party succeeds in carrying the burden of proof, the presumed value of the property will govern.

183. *See, e.g.*, TEX. PROP. CODE ANN. § 5.062 (Vernon 1984); Kirk v. Barnett, 566 S.W.2d 122, 122 (Tex. Civ. App. 1978).

184. *See* ILL. ANN. STAT. ch. 110, para. 9-110 (Smith-Hurd 1984 & Supp. 1988).

185. *See* Bales v. Nelson, 148 Ill. App. 3d 7, 9-10, 499 N.E.2d 144, 146 (1986) (vendor need not bring action if she can recover property peaceably); Dodge v. Nieman, 150 Ill. App. 3d 857, 860, 502

> mandates the filing of a civil action or that reflects the assumption that a civil action will always result. The goal of lawmakers should be to devise rights and procedures that, in the normal case, require no judicial involvement. The reinstatement right should begin on the date that proper notice is sent and should continue for a specified period, such as thirty or sixty days. Thereafter, for an additional period of equal specificity, purchasers should have the right to redeem. A state might fairly allow a purchaser to invoke his reinstatement right only once every year or two in order to prevent him from taking excessive advantage of the right.[186] When no reinstatement right exists, the state should extend the redemption period so that its length equals that of the normal combined reinstatement and redemption periods. Reinstatement and redemption rights in all cases should be nonwaivable by the purchaser prior to default.

As they apply these rules, courts should eliminate the waiver doctrine as it now exists. That doctrine discourages and penalizes solicitous conduct by vendors. As noted above,[187] courts use the waiver doctrine to give purchasers a chance to cure when vendors have allowed them to pay late. When clear notice and reinstatement rights exist, a purchaser will have adequate opportunity to cure a default after receiving a first notice, even if a waiver has occurred under current law. Clear reinstatement and redemption rights thus largely end the need for that doctrine, and, by eliminating the doctrine, states will do away with one of the most fruitful sources of litigation.

States should apply these rules to all installment land contracts, whether or not the purchaser has abandoned. The vendor should be required to send notice, and the purchaser should enjoy the full range of reinstatement and redemption rights. A difficulty that will sometimes arise is that some vendors will simply recover their property after an abandonment and fail to send notice. In these cases, courts will need to fashion further rules. They might, for example, conclude that purchasers lose their rights if they make no effort to cure within six months of the abandonment, even with no notice. But a state should carefully define abandonment in cases that involve property, such as vacation lots, not occupied by the purchaser at the time of default.

N.E.2d 393, 395 (1986) (vendor may bring action in ejectment to avoid provisions of Forcible Entry and Detainer Act).

186. *Cf.* ILL. ANN. STAT. ch. 110, para. 9-110 (reinstatement allowed only once every five years).

187. *See supra* text accompanying note 38.

Further, the purchaser should have the right to remain in possession of the property during the reinstatement period, unless the vendor can show that waste is occurring and is impairing the security of her property.[188] The same rule could apply during the redemption period, but a state might fairly tilt the balance and conclude that the vendor should have the right to repossess when the reinstatement period ends.

When the vendor repossesses, she should be obligated *at that time* to make any necessary restitution to the purchaser. If judicial repossession is necessary, a court can supervise the process. When no judicial involvement occurs, as will often be the case, many vendors will no doubt refuse restitution on the ground that the property has declined in value. Purchasers will then need to take action themselves to recover the amount they are owed. States can improve purchasers' plight by giving them a fairly generous period in which to seek restitution, such as two years.[189] But ultimately the purchasers will have to act themselves to recover what is owed them, seeking legal advice and perhaps turning to the courts. This rule imposes a burden on the purchaser, to be sure, but it will stimulate far less litigation than a rule that requires the vendor to sue in every case.

Once this new contract breach remedy is in place, states should eliminate all other remedies for vendors except judicial foreclosure by sale and specific performance (or its legal equivalent). Rescission is unneeded, since the contract breach remedy offers the vendor full compensation. Strict foreclosure, too, is superfluous. Specific performance is appropriate when the purchaser can pay, but if payment is not possible, the vendor should be obligated to pursue the normal contract breach remedy. Judicial foreclosure by sale can be retained. It will likely prove necessary only when the vendor owes a large amount to the purchaser by way of restitution and does not want to pay it until the property is sold, and perhaps also when the vendor believes that the property has declined in value and desires, by foreclosing, to avoid a later judicial dispute over the property's value.

Although states should eliminate the waiver rule, they can employ a more narrowly drawn estoppel rule.[190] When a vendor demands possession of the property, the purchaser might relinquish it. Making that de-

188. The comparable rules on possession in the mortgage law context are consdidered in G. NELSON & D. WHITMAN, *supra* note 8, §§ 4.1-.3.

189. When only restitution is sought, title to the property is not at issue, and there is no need to worry about adverse impacts of the purchaser's suit on any third-party transferees of the property. Only money is at issue in the suit, and there is little reason to give a purchaser less time in which to sue than any other person who sues on a contract.

190. *See supra* text accompanying note 61.

mand, then, should estop the vendor from seeking enforcement of the contract, since a switch in remedies would prejudice the purchaser.

This scheme has not yet addressed the vendors' legitimate need to clear the land title of the cloud created by the installment contract.[191] Indeed, few states do address this need.[192] Under the described scheme, though, there is little reason why a vendor could not clear the title by recording an affidavit describing the details of her compliance with the above rules.[193] Judicial involvement seems unneeded. Such an affidavit should state expressly that the purchaser has failed to exercise his reinstatement or redemption rights during the specified periods. The only difficult cases will be those in which the purchaser alleges fraud or lack of notice, or contends either that he was not in default or that he properly exercised his right to reinstate or redeem. Litigation involving only restitution rights would not disturb the land title.

Courts can fairly decide even the difficult land-title cases by upholding the validity of a formally proper affidavit when the property passes into the hands of a bona fide purchaser. This rule would adequately protect an installment purchaser who remains in possession; any later purchaser would have constructive notice of the installment purchaser's interest.[194] In addition, the installment purchaser could gain protection by initiating a civil action against the vendor and filing a lis pendens.[195] These steps will not protect the installment purchaser in all cases, but the exceptions will be rare, and the mistreated purchaser will retain his rights against the vendor. The benefit of this rule in providing a quick means of clearing title should far outweigh the costs to the occasional purchaser who wrongfully loses his property.

One final addition to this remedial scheme is appropriate. Purchasers often grant mortgages in their equitable property interests to lenders, and the holder of such a mortgage stands to lose if an installment land contract is terminated.[196] To protect these mortgagees, states should re-

191. *See* Note, *supra* note 6, at 65-67.

192. One state that does is Iowa. *See* IOWA CODE ANN. § 656.5 (West 1987).

193. *Cf. id.* (party serving default notice may file copy of notice and personal affidavit as constructive notice of forfeiture and cancellation of contract).

194. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 93, at 787-90 (discussing when constructive notice is held to apply).

195. *See id.* at 791-92 (doctrine of lis pendens holds that the commencement of judicial action possibly affecting a specific land title acts as constructive notice).

196. *See, e.g.*, Rush v. Anestos, 104 Idaho 630, 635, 661 P.2d 1229, 1234 (1983); Eade v. Brownlee, 29 Ill. 2d 214, 220, 193 N.E.2d 786, 790 (1963); Petz v. Estate of Petz, 467 N.E.2d 780, 782 (Ind. Ct. App. 1984); Shindledecker v. Savage, 96 N.M. 42, 44, 627 P.2d 1241, 1243 (1981); Jeffs v. Citizens Fin. Co., 7 Utah 2d 106, 107-08, 319 P.2d 858, 858-59 (1958); Sigman v. Stevens-Norton, Inc., 70 Wash. 2d 915, 918, 425 P.2d 891, 894 (1967). A good illustration of the plight of the mortgage lender is presented in Butler v. Wilkinson, 740 P.2d 1244, 1257 (Utah 1987).

quire vendors to provide notice of default to mortgagees at the same time that they provide such notice to purchasers, and mortgagees should have the same reinstatement and redemption rights as purehasers.[197] The mortgagee should also enjoy the same restitution right, and her security interest should attach to any restitutionary recovery by the purchaser. In the event that the vendor makes a voluntary restitution payment, the payment should go to the mortgagee when the vendor has notice of her presence. As many states now require, the vendor should be obligated to check the land title for mortgages and liens when she begins the entire process of asserting her rights.[198]

A remedial scheme drawn along these lines would be quick, clear, and easy to administer. It would fairly balance the rights of the parties and engender little litigation. Properly implemented, the scheme can be almost entirely free from the vagueness and confusion that seem nearly omnipresent today. For the purchaser, the scheme provides fair notice, a chance to cure, and a right of restitution to reduce any unfair loss. For the vendor, the scheme provides a simple remedy that allows her to recover and keep her property within a few months, often without any judicial action. And, by providing an easy title-clearing method, the scheme allows the vendor to resell her property promptly without the costs and restrictions of foreclosure.

On balance this scheme offers substantial advantages over its principal alternative—the convertability approach. It avoids the difficulties that arise when a state adopts a convertability scheme with a vague conversion point. Moreover, it provides fair rules for dealing with the low-equity purchaser, one whose equity is too low under the convertability approach to reach the conversion point. When the conversion point is fairly high, as in Illinois and Ohio,[199] low-equity purchasers will predominate; the convertability option is flawed when it fails to provide fair rules for these purchasers. Finally, this remedial scheme avoids the

197. States today do routinely require that vendors give notice to any mortgagee who they know exists. *See, e.g.,* Lockhart Co. v. B.F.K., Ltd., 107 Idaho 633, 635, 691 P.2d 1248, 1250 (1984); Guider v. Mayco, Inc., 312 Minn. 493, 496-97, 252 N.W.2d 601, 603 (1977); Fincher v. Miles Homes, Inc., 549 S.W.2d 848, 857 (Mo. 1977); Martinez v. Logsdon, 104 N.M. 479, 481, 723 P.2d 248, 250 (1986); Knauss v. Miles Homes, Inc., 173 N.W.2d 896, 899 (N.D. 1969); Chambers v. Cranston, 16 Wash. App. 543, 545, 558 P.2d 271, 273 (1976). *But see* Dirks v. Cornwell, 754 P.2d 946, 948-49 (Utah Ct. App. 1988) (no notice required, apparently without regard to vendor's knowledge).

198. Courts today are split on this issue. *See, e.g., Lockhart,* 107 Idaho at 636, 691 P.2d at 1251 (no notice presumed from recordation); *Guider,* 312 Minn. at 496, 252 N.W.2d at 603; *Shindledecker,* 96 N.M. at 44, 627 P.2d at 1243 (no notice presumed). The no-notice rule is criticized in Note, *Mortgages—Mortgage of a Vendee's Interest in an Installment Land Contract—Mortgagee's Rights Upon Default,* 43 MO. L. REV. 371 (1978).

199. *See supra* notes 110-11 and accompanying text.

costs and delays of foreclosure; it therefore better preserves the installment land contract as a distinct financing option.[200]

CONCLUSION

The typical installment land contract dispute involves a simple set of facts. The facts arise daily, and the resulting litigation produces hundreds of reported appellate decisions every decade. Sadly, installment land contract law in most states remains vague and excessively complex, even with the voluminous guidance that existing caselaw provides. The rights of both vendors and purchasers are couched in language that retains substantial flexibility for the courts. But flexibility breeds uncertainty and litigation, and installment land contract law today is overflowing with both. The money at stake in these cases is usually modest in amount, but vital to the parties involved. Litigation can quickly consume that money and leave both parties dissatisfied.

As explained here, states should replace the existing, mostly common law rules with simpler rules that are easier to apply. States should banish the election-of-remedies doctrine and firmly establish that vendors are entitled to full compensation when a purchaser breaches. The vendor also deserves a simple means to clear her land title of the cloud created by a breached installment contract. On the other side, purchasers should enjoy clear notice of default and should have certain, determinable periods in which to reinstate and redeem. They should also enjoy the right to seek restitution to the extent that the vendor is overcompensated for her losses. With these rules in place, disputes and litigation should decline, and the installment land contract can regain and keep its special place as a fair and attractive alternative to traditional mortgage financing for real estate sales.

200. A state could, of course, retain the convertability approach and require foreclosure in cases of high purchaser equity, while employing the above scheme to deal with all other purchasers.