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The New Illinois Mortgage Foreclosure Law and Installment Sales Contracts

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Development

The New Illinois Mortgage Foreclosure Law and Installment Sales Contracts

I. INTRODUCTION

Ever since the English chancery courts began to allow redemption of mortgaged property after default, creditors have looked for ways to have real property serve as security free from any right in the debtor to redeem it.¹ These methods of financing real estate have been referred to as "creative financing" or "alternative financing."²

Statutory law in Illinois (or the lack thereof) has aided creditors in this quest for non-redeemable security devices.³ Although Illinois did not lack a statutory process under which a debtor could effect a redemption after a default of a mortgage,⁴ there was not a clear or concise definition of the instruments that were considered mortgages and thus covered under the redemption provision.⁵ The determination of which instruments were covered was, therefore, left almost entirely up to the courts.⁶ Courts often reached conflicting results regarding very similar security devices.⁷ Additionally, these decisions often were based more upon the practical realities of a particular case than upon a rational characterization of the property interests in question.⁸ In this atmosphere of court-created rules and exceptions to rules, alternative financing methods, such as the installment sales contract, flourished.⁹

1. Cunningham & Tischler, *Disguised Real Estate Security Transactions as Mortgages in Substance*, 26 RUTGERS L. REV. 1 (1972) [hereinafter Cunningham & Tischler].

2. R. KRATOVIL, REAL ESTATE LAW § 16.01 (3th ed. 1983) [hereinafter KRATOVIL]. As one writer stated: "[T]he big idea is to find a form of transaction that will have the practical effect of security, yet will be held not to be a security but to belong to a wholly different jural species and so be held immune from security law." Cunningham and Tischler, *supra* note 1, at 1 (quoting DURFEE, CASES ON SECURITY, 4 (1951)).

3. See *infra* notes 65-88.

4. See ILL. REV. STAT. ch. 95, para. 57, ch. 110, para. 12-119 (1985). See also *infra* note 66 and accompanying text.

5. See *infra* notes 67-79 and accompanying text.

6. *Id.*

7. *Id.*

8. See *infra* notes 80-99 and accompanying text.

9. *Id.*

The new Illinois Mortgage Foreclosure Law (the "IMFL")¹⁰ was drafted, in part, as a response to this problem.¹¹ The IMFL is a total rewriting of Illinois statutes concerning financing, foreclosure, and redemption of real property.¹² This article will focus only upon one of these changes: the IMFL's treatment of installment sales contracts for land as mortgages. This article will not address the many other changes which will occur under this new statute.¹³

This article will begin with a brief discussion of the historical and conceptual sources of mortgage law in general.¹⁴ The traditional installment sales contract will then be discussed; its uses, operation, purposes, advantages, disadvantages, and theoretical underpinnings will be addressed.¹⁵ This article will then analyze Illinois mortgage law and its treatment of installment sales contracts prior to implementation of the IMFL.¹⁶ The body of the article will focus on the IMFL's treatment of installment sales contracts and its effect on future installment sales contracts in Illinois.¹⁷ The article will conclude with an analysis of some of the shortcomings of the IMFL and some suggestions for possible resolutions of these problems.¹⁸

II. BACKGROUND

A. *The Mortgage*

The term "mortgage," as it is used today, describes a transfer of an interest in real estate from a debtor-mortgagor to a creditor-mortgagee to be held as security for the performance of an obligation.¹⁹ This obligation is usually the payment of a debt and is evi-

10. PUBLIC ACT 84-1462, ILL. REV. STAT. ch. 110, paras. 15-1101 to 15-1706 (Supp. 1987) (effective July 1, 1987).

11. See *infra* notes 105-06 and accompanying text.

12. Liss, *Introduction to the Proposed Illinois Mortgage Foreclosure Act*, 9 ILLINOIS FUND CONCEPT 13 (1985) [hereinafter Liss]. See also *infra* notes 106-08. A comprehensive discussion of all aspects of the IMFL is beyond the scope of this article. See Liss *supra* (contains a summary of major changes under IMFL); Lindberg & Bender, *The Illinois Mortgage Foreclosure Law*, 76 ILL. B.J. 800 (1987).

13. See *supra* note 12.

14. See *infra* notes 19-42 and accompanying text. These concepts are essential for an understanding of the theoretical distinctions that courts have drawn between mortgages and installment sales contracts.

15. See *infra* notes 43-64 and accompanying text.

16. See *infra* notes 65-100 and accompanying text.

17. See *infra* notes 101-35 and accompanying text.

18. See *infra* notes 135-81 and accompanying text.

19. G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 1.1 (2d ed. 1985) [hereinafter NELSON & WHITMAN]. "A mortgage may be defined as a conveyance of land

denced by a promissory note executed by the mortgagor.²⁰ A mortgage is similar to a deed in that it effects a conveyance of land.²¹ Unlike a deed, however, the modern mortgage does not effect a sale of the land but only serves as security for the payment of the debt.²² This was not always the case.

Most commentators acknowledge that the common law mortgage, as it is known today, originated in fourteenth-century England.²³ During this period, a land owner wishing to borrow money (the mortgagor) executed a deed conveying legal title in fee simple to the individual lending him the money (the mortgagee).²⁴ This deed was subject to a condition subsequent. Upon execution of the deed, the mortgagee had an immediate right to possession of the property.²⁵ If the mortgagor repaid the mortgage on a specified day, known as the "law day," he had the right to re-enter the property and terminate the mortgagee's estate.²⁶ If, on the law day, the mortgagor failed to repay his obligation, the mortgagee's estate became absolute and the mortgagor had no further recourse.²⁷

Although under the law the mortgagee had the right to possession of the mortgaged property, it became common practice to allow the mortgagor to remain in possession, with the mortgagee taking possession only upon the mortgagor's default.²⁸ Under these

given as security for the payment of a debt." R. KRATOVIL, REAL ESTATE LAW § 369 (6th ed. 1974) [hereinafter KRATOVIL].

20. KRATOVIL, *supra* note 19, at § 369.

21. *Id.*

22. *Id.*

23. G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 8 (2d ed. 1970) [hereinafter OSBORNE]. See Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1 (1890) for a good discussion of the precursors to the modern mortgage.

24. OSBORNE, *supra* note 23, at 8.

25. The mortgagee in possession was entitled to use the land and collect rents. Any rents so collected, however, were required to be applied by the mortgagee to the outstanding mortgage debt. KRATOVIL, *supra* note 19, at § 370.

26. OSBORNE, *supra* note 23, at 12; NELSON & WHITMAN, *supra* note 19, at § 1.2.

27. OSBORNE, *supra* note 23, at 12. It is unclear whether such mortgage deeds conveyed a fee simple determinable, see KRATOVIL *supra* note 19, at § 370, or fee simple subject to a right of reentry, see NELSON & WHITMAN, *supra* note 19, at § 7. In any event, it is safe to say that these transactions vested in the mortgagee all the incidents of legal title to the mortgaged property. OSBORNE, *supra* note 23, at 9; NELSON & WHITMAN, *supra* note 19, at § 7.

28. OSBORNE, *supra* note 23, at 12. See R. TURNER, THE EQUITY OF REDEMPTION ch. 5 (1931) (discussion of the origin and probable reasons for this practice) [hereinafter TURNER]. The custom of allowing the mortgagor to retain possession laid the ground work for the modern "purchase money mortgage." A purchase money mortgage is created when a mortgagor's acquisition of the mortgaged property is financed by the mortgagee-lender. The mortgagee may be the vendor of the property or he may be a third party to the transaction. NELSON & WHITMAN, *supra* note 19, at § 1.1. In a purchase-money mortgage, a mortgagee-vendor will execute a deed to the mortgagor-purchaser and the

early mortgages, default provisions were applied very strictly and formalistically.²⁹ If the mortgagor did not perform his obligation in a timely manner, the mortgagee became absolutely entitled to the property and the courts would enforce this right without hesitation.³⁰

By the middle of the seventeenth century, however, the English chancery courts began granting limited forms of relief to mortgagors in default. This relief was known as "equity of redemption."³¹ The mortgagor's equity of redemption was premised upon the theory that the mortgagor retains an equitable estate in the mortgaged property.³² The court's recognition of this property interest is attributable to its acknowledgement of the mortgagor's actual interest in entering a mortgage transaction. Specifically, the mortgagor's intention upon entering a mortgage transaction was not to convey fee simple interest to the mortgagee, but simply to provide security for the repayment of a debt.³³ Thus, although the mortgagee had legal title to the property, and the mortgagor had defaulted on his obligation, courts of equity would allow the mortgagor to redeem the property if he could later repay the debt.³⁴

Although the imposition of the equity of redemption provided relief from the often inequitable results of early mortgages, this right of redemption was not subject to any time limit within which it could be exercised. Thus, the mortgagee constantly faced the threat that the mortgaged property might someday be redeemed.³⁵ In response, the courts of equity created "foreclosure."³⁶ Upon a

mortgagor-purchaser will assume possession. The mortgagee-vendor simultaneously takes back a mortgage for the outstanding purchase price. OSBORNE, *supra* note 23, at 387.

29. L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 12 (8th ed. 1928) [hereinafter JONES].

30. *Id.* at § 9.

31. TURNER, *supra* note 28, at 55-56. This treatise contains an extremely detailed discussion of the nature and history of the equity of redemption and is acknowledged as an ultimate authority on the subject.

32. TURNER, *supra* note 28, at 62. "At first the mortgagor's interest was looked upon as a purely in personam right against the mortgagee, soon was perceived to be in rem, and finally was regarded as an equitable estate." OSBORNE, *supra* note 23, at 16.

33. TURNER, *supra* note 28, at 63; OSBORNE, *supra* note 23, at 16.

34. TURNER, *supra* note 28, at 62. This right was recognized, although not widely, as early as the mid-12th century: "When a man pledges tenements his intention is not to grant an estate of inheritance, but to give security for the repayment of the money he has borrowed and to redeem the tenements; and in such a case if he repay the money he can enter." OSBORNE, *supra* note 23, at 14 (quoting Spigurnel, J. in *Anon. v. Anon.*, 1314, 3 Eyre of Kent, 29 Seld. Soc. 85).

35. OSBORNE, *supra* note 23, at 20.

36. *Id.*

mortgagee's application to the courts in which he alleged the default of a mortgagor, the court would order the mortgagor to pay the outstanding debt, interests, and costs within a specified time period or be barred forever from redeeming the property.³⁷

Over time, the practice of foreclosure and fixed redemption periods became engrained in the law of mortgages.³⁸ A general rule, known as the prohibition against "clogging the equity of redemption," also evolved which prohibited parties from contracting away the mortgagor's equity of redemption.³⁹ A mortgagee wishing to terminate a defaulting mortgagor's interest in a mortgaged parcel of property, therefore, was compelled to bring a foreclosure action against the mortgagor. The mortgagee could not terminate the mortgagor's equity of redemption through agreements contained in the mortgage or created contemporaneously with it.⁴⁰ With the exception of the installment contract, the courts' high regard for the equity of redemption has continued until the present.

As the above discussion evidences, the mortgage, as it exists today, is the product of hundreds of years of tension between the interests of the mortgagors and the interests of the mortgagees.⁴¹ The features of the modern mortgage are: its conveyance of an interest in land for security purposes, the mortgagor's entitlement to possession of the mortgaged property, the equitable redemption of the mortgaged property after default, and the termination of the mortgagor's interest in the property only through foreclosure proceedings.⁴²

37. NELSON & WHITMAN, *supra* note 19, at § 1.3. The practice of "strict foreclosure" entitled the mortgagee to clear title of the mortgaged property after the foreclosure period ended. The actual value of the property in relation to the debt owed was irrelevant. Because the amount owed was far less than the value of the property mortgaged in almost all cases, this process worked, in essence, as a forfeiture. See OSBORNE, *supra* note 23, at 20-21.

Strict foreclosure is relatively rare today and has been replaced by foreclosure by sale. In a foreclosure by sale, the mortgagee is entitled to proceeds from the sale of the mortgaged property equal to the amount of the debt owed. Any excess sale proceeds will go to the mortgagor. If the sale produces less than the debt owed, the mortgagee may get a deficiency judgment against the mortgagor. NELSON & WHITMAN, *supra* note 19, at § 1.3.

38. These statutes, of course, vary from state to state. See JONES, *supra* note 29, at §§ 19-68. For a discussion of Illinois law, see generally *Mortgages & Foreclosures* ILL. INST. FOR CLE, 1980.

39. NELSON & WHITMAN, *supra* note 19, at § 3.1; TURNER, *supra* note 28, at 175.

40. NELSON & WHITMAN, *supra* note 19, at § 3.1.

41. KRATOVIL, *supra* note 19, at § 370.

42. The nature of the respective property interests of the mortgagor and mortgagee is still a matter of some controversy. THOMPSON, *REAL PROPERTY* § 4861 (1958).

B. *Installment Sales Contracts*

To avoid the equity of redemption and foreclosure laws to which mortgages were subject, sellers and lenders attempted to create security arrangements that would not be treated by the courts as mortgages but would accomplish identical purposes. The most successful of these creations has been the installment sales contract.⁴³ Courts have tended to look beyond the form of many types of transactions to find a mortgage in substance.⁴⁴ Until quite recently, however, installment contracts have been immune from such scrutiny.⁴⁵

1. Elements of an Installment Sales Contract

The installment sales contract is the most popular form of alternative financing.⁴⁶ The installment sales contract has been characterized as an executory agreement⁴⁷ for the sale of real estate.⁴⁸ The parties to this agreement are almost always the purchaser and the owner of the real estate to be sold. In essence, it is an absolute contract to convey real estate at a future time, combined with a financing and security agreement.⁴⁹ Therefore, it serves a purpose similar to a typical purchase-money mortgage.⁵⁰

The down payment required in an installment sales contract is

43. There are, of course, many other types of alternative financing methods including: the absolute deed as a mortgage, the conditional sale, the sale-lease back-option to buy-back arrangement, and the tri-partite consensual security transaction. Courts, however, have often looked beyond these forms to find equitable mortgages and have foreclosed them as such. Therefore, their status is much more settled. See generally Cunningham & Tischler, *supra* note 1. See also OSBORNE, *supra* note 23, at 22-48; NELSON & WHITMAN, *supra* note 19, at §§ 3.4-3.25.

44. Lewis & Reeves, *How the Doctrine of Equitable Conversion Affects Land Sale Contract Forfeitures*, 3 REAL EST. L.J. 249, 250 (1975) [hereinafter Lewis & Reeves].

45. *Id.* at 250.

46. KRATOVIL, *supra* note 2, at § 22.01. The installment contract is also known as a "contract for deed," an "agreement for deed," a "land sale contract," or "articles of agreement for warranty deed." NELSON & WHITMAN, *supra* note 19, at § 3.26; Hess, *Terminating Installment Contracts in Real Estate Litigation*, § 12-1 ILL. INST. FOR CLE 1984 [hereinafter Hess].

47. *In re Estate of Martinek*, 140 Ill. App. 3d 621, 627, 488 N.E.2d 1332, 1335 (2d Dist. 1986).

48. *Id.* The contract is executory because some performance is due by both parties before (legal) title passes. Hess, *supra* note 46, at § 12-2.

49. Power, *Land Contracts as Security Devices*, 12 WAYNE L. REV. 391, 394 (1966) [hereinafter Power]. This arrangement is a "two party" transaction (i.e., it involves only the purchaser and the vendor; no other parties, such as banks, are involved). *Id.* See also ILL. REV. STAT. ch. 29, paras. 8.21 (e) and 8.31, (1985) (these sections give the previous Illinois definitions of installment sales contracts); see also *infra* notes 121 and 131 (definitions of installment sales contracts under IMFL).

50. Power, *supra* note 49, at 395. See also *supra* note 28.

usually much lower than that required for the typical mortgage.⁵¹ Ordinarily under the contract, the purchaser will take possession of the property and make monthly installment payments of principal and interest until the purchase price is paid.⁵² Generally, the purchaser also will agree to pay real estate taxes, to properly insure the property, and to keep the property in good repair.⁵³ The vendor retains legal title to the property until the final payment is made, at which time full title must be conveyed to the purchaser.⁵⁴

The most distinctive element of the installment sales contract is the forfeiture clause. This clause mandates that if the purchaser defaults on his obligations under the contract, then all of the purchaser's interest in the property will be terminated. The vendor is entitled then to retake possession of the property and retain all previous payments that the purchaser has made.⁵⁵ Forfeiture has been characterized as a drastic remedy because if a purchaser misses a single payment under the terms of the contract, he will lose all rights to the property and all previous payments with no right to recoupment.⁵⁶ Forfeiture is a right that must be expressly given in the contract itself.⁵⁷ If the contract does not contain a forfeiture

51. Power, *supra* note 49, at 399, 407.

52. NELSON & WHITMAN, *supra* note 19, at § 3.26. The down payment is nominal and the monthly installments are probably the equivalent of rent for the premises, although the installments represent payments on the unpaid balance of the purchase price like an amortized mortgage. Henson, *Installment Contracts in Illinois: A Suggested Approach to Forfeiture*, 7 DEPAUL L. REV. 1, 2 (1957) [hereinafter Henson].

53. Henson, *supra* note 52, at 2; Hess, *supra* note 46, at 12-2. See, e.g., Vogel v. Dawdy, 123 Ill. App. 3d 356, 462 N.E.2d 804 (4th Dist. 1984), *aff'd* 107 Ill. 2d 68, 481 N.E.2d 679 (1985) (If purchaser does not insure the property, as per the contract, vendor may declare a forfeiture).

54. NELSON & WHITMAN, *supra* note 19, at § 3.26. It is not uncommon to provide that when the purchaser has paid a certain amount he will then be entitled to a conveyance and the seller will take back a conventional purchaser money mortgage. Hess, *supra* note 46, § 12-2.

55. Kratovil, *Forfeiture of Installment Contracts in Illinois*, 53 ILL. B.J. 188 (1964) [hereinafter *Forfeiture*]. "Forfeiture of an installment contract involves several things: 1) It involves terminating the buyer's interest in the land acquired by the contract . . . ; 2) . . . a termination of a buyer's right to enforce the contract; 3) . . . [and] doing these things in such a manner that it will enable the seller to retain all payments the buyer has made." *Id.* at 189. See also Hess, *supra* note 46. See *infra* notes 68-95 and accompanying text for a discussion of Illinois courts' treatment of these provisions.

56. *Forfeiture supra* note 55, at 190.

57. Realty Security Corporation v. Johnson, 93 Fla. 46, 111 So. 532 (1927). For a more detailed discussion of the forfeiture of installment contracts in Illinois, see *Forfeiture supra* note 55; Hess, *supra* note 46; Rooney, *Installment Contracts: The Illinois Perspective*, 26 REAL PROPERTY 1 (October, 1980) (Published by I.S.B.A. section on Real Estate Law) [hereinafter Rooney]; Gultitz, *Buyer and Seller Protection in Residential Contracts for Deed (Illinois)* 69 ILL. B.J. 310 (1981); Jones, *Drafting The Installment Contract*, 62 CHI. B. REC. 97 (1980).

provision, the vendor is entitled only to rescission.⁵⁸ A provision in the contract stating that "time is of the essence" is also included in almost all installment sales contracts.⁵⁹

2. Historical Background of Installment Sales Contracts

From their inception until the late eighteenth century, the installment sales contracts have been treated just like any other type of mortgage by the English courts of equity.⁶⁰ Thus, if the contract purchaser defaulted, he was entitled to the equity of redemption and foreclosure proceedings.⁶¹ This equitable treatment of the installment contract came to a complete halt by the mid-nineteenth century.⁶² At this point, courts began to allow forfeiture without any equitable redemption period. Several theories have been advanced to explain this phenomenon.⁶³ Regardless of the reasons

58. *People ex rel Smith v. Mersinger*, 18 Ill. 2d 486, 165 N.E.2d 308 (1960); *Heterman v. Weingart*, 120 Ill. App. 3d 683, 485 N.E.2d 616 (2d Dist. 1983). The seller who rescinds must refund to the buyer the payments he made less the fair rental value of the premises. *Forfeiture*, *supra* note 55, at 190.

By the insertion of certain magic phrases, the vendor can secure himself an inordinate amount of protection and a position that is unique in the law. The following provisions may be put into a contract (in fact, most of them are printed on all contracts of this type), and the vendee will be completely hamstrung.

- (1) Time is of the essence of this contract.
- (2) In the event of default by the vendee, the vendor shall immediately, upon such default, have the right to declare the contract void and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises and may take immediate possession of the premises and remove the vendee.
- (3) Any default shall cause all subsequent payments to become due immediately, and vendor shall have the right to compel the continued performance of the contract by the vendee.
- (4) Upon any default by the vendee, the vendor shall have the right to foreclose the contract.
- (5) The vendor shall have the right to use any and all of the above-mentioned remedies.
- (6) Waiver of any breach of this contract resulting from default on the part of the vendee, shall not be deemed to be a waiver of any other branch.

Levin, *Maryland Rule on Forfeiture Under Land Installment Contracts*. . . *A Suggested Reform*, 9 MD. L. REV. 99, 104 (1949) [hereinafter Levin].

59. Hess, *supra* note 46, at § 12-4.

60. Levin, *supra* note 58, at 108.

61. *Id.* At this time, "it was impossible for contracting parties to make 'time of the essence' in executory contracts for the sale of land." Such provisions would automatically be deemed void by the courts and the equity of redemption would control. *Id.*

62. OSBORNE, *supra* note 23, at 13.

63. One theory suggests that this change was premised upon a policy pronouncement by Lord Eldon stating that "notwithstanding what was said in earlier cases, time might be made of the essence of a [land] contract." English courts have since relied upon this statement in their enforcement of installment contracts. Another explanation for the re-

explaining the change in treatment, nearly all jurisdictions, including Illinois, have treated the installment sales contract with a forfeiture provision as an instrument distinct from a mortgage and as exempt from the equity of redemption or foreclosure proceedings.⁶⁴

3. Treatment of Installment Contracts under Previous Illinois Law

a. *Installment Contracts as Non-Mortgage Transactions*

Before the IMFL became effective, mortgage foreclosure was governed by Article XV of the Illinois Code of Civil Procedure, entitled "Mortgage Foreclosure."⁶⁵ Statutory redemption in Illinois was covered by Article XII of the Illinois Code of Civil Procedure in a subsection entitled "Redemption."⁶⁶ These statutes defined "mortgage" as "every mortgage or trust deed in the nature of a mortgage or other instrument in the nature of a mortgage upon real estate."⁶⁷

newal enforcement of forfeitures was that it was an out growth of the economic climate prevalent in that era. As one commentator explained:

The doctrine that equity will enforce forfeiture provisions in land contracts where time is expressly made of the essence developed in this country during the latter half of the nineteenth century, at a time when extreme ideas as to "freedom of contract" were influencing American judicial decisions in every field. It was a time when equity was decadent, when laissez faire was almost an article of judicial faith, and when the courts were thinking in terms of free-willing individuals entirely able to look after themselves rather than in terms either of classical equity or of a socialized law taking a realistic account of inequalities of economic position and bargaining power. In such an atmosphere, it was easy enough to put aside the tradition that equity would not enforce a forfeiture except insofar as that tradition had been embalmed in direct precedents, and to develop a line of decisions holding that contracts for the sale of land, which expressly made time of the essence and provided for the forfeiture of all payments theretofore made in the event of default would be enforced according to their literal terms, especially where prompt payment of all installments was made an express "condition precedent" to the purchaser's rights under the contract.

Simpson, *Legislative Changes in the Law of Equitable Conversion: II*, 44 YALE L.J. 754 (1935).

64. Nelson & Whitman, *The Installment Land Contract — A National Viewpoint*, 1977 B.Y.U.L. REV. 541, 542 [hereinafter *The Installment Land Contract*].

65. ILL. REV. STAT. ch. 110, paras. 15-101 to 15-311 (1985) (repealed 1987). The procedures under this article have been described as complex, cumbersome and expensive. Olsen, *The 1985 Illinois Mortgage Foreclosure Act*, 30 REAL PROPERTY 3 (1985) (Published by I.S.B.A. Section on Real Estate Law) [hereinafter Olsen]. See also Liss, *supra* note 12, at 14. For a discussion of pre-IMFA foreclosure law see Seigan & Helfgot, *A Guide to Mortgage Foreclosures*, 65 CHI. B. REC. 8 (1983); *Real Estate Litigation* chapters 6-8 ILL. INST. FOR CLE 1984.

66. ILL. REV. STAT. ch. 110, para. 12-122 (1985) (amended 1987).

67. *Id.* at para. 15-103(a). Paragraph 15-101 stated that all mortgages were to be foreclosed pursuant to the article:

Because installment sales contracts were used as substitutes for mortgages, it seems apparent that they should have been treated as such under the statute.⁶⁸ However, this was not the case. In *Kelly v. Germania Savings and Loan Association*,⁶⁹ the Illinois Supreme Court specifically held that, absent a showing of fraud or overreaching, an installment contract does not constitute an equitable mortgage⁷⁰ and, as such, is not subject to foreclosure proceedings or equitable redemption.⁷¹ This approach, which Illinois courts have frequently adopted,⁷² was inconsistent with Illinois courts' otherwise liberal construction of the mortgage statute and imposition of equitable mortgages.⁷³

The Illinois courts' general approach to installment contracts appears even more inconsistent when construed with its pronouncements regarding the nature of the property interest conveyed to the purchaser upon the execution of an installment contract. Until 1962, the Illinois courts held that no equitable conversion⁷⁴ occurred upon the execution of an installment sales con-

No real estate within this State may be sold by virtue of any power of sale contained in any mortgage, trust deed or other conveyance in the nature of a mortgage, but all such mortgages, trust deeds or other conveyances in the nature of a mortgage, may only be foreclosed, in the manner provided for foreclosing mortgages contained no power of sale; and no real estate shall be sold to satisfy any such mortgage, trust deed or other conveyance in the nature of a mortgage, except in pursuance of a judgment of a court of competent jurisdiction."

Id.

68. *The Installment Land Contract*, *supra* note 64, at 542.

69. 28 Ill. 2d 591, 192 N.E.2d 815 (1963).

70. The doctrine of equitable mortgage is based upon the principle that equity will interpret an agreement according to the actual intent of the parties even though the instrument does not meet the technical requirements of the law. *Trustees of Zion Methodist Church v. Smith*, 335 Ill. App. 233, 81 N.E.2d 649 (1948). See also 4 POMEROY, EQUITY JURISPRUDENCE § 1161 (5th ed. 1941) [hereinafter POMEROY].

71. 28 Ill. 2d at 594, 192 N.E.2d at 815 (1963).

72. See, e.g., *Burns v. Epstein*, 413 Ill. 476, 109 N.E.2d 774 (1952).

73. See, e.g., *Landino v. American Nat'l Bank*, 120 Ill. App. 3d 740, 743, 458 N.E.2d 1070, 1077 (1st Dist. 1983) (Substance and not the form of a transaction determines whether an assignment of beneficial interest in a land trust is really a mortgage); *First Federal Sav. and Loan Ass'n v. Pogue*, 72 Ill. App. 3d 54, 57 389 N.E.2d 52, 55 (2d Dist. 1979) (Substance, not the form of the transaction determines whether a conveyance absolute is in reality a mortgage). See also *DeVoigne v. Chicago Title and Trust Co.*, 304 Ill. 177, 136 N.E. 448 (1922); *Havana Nat'l Bank v. Wiemer*, 32 Ill. App. 3d 578, 335 N.E.2d 506 (3d Dist. 1975).

74. Pomeroy has described equitable conversion as follows:

A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate for the purchaser and the purchaser a trustee of the purchase-money for the vendor. In order to work a conversion, the contract must be valid and binding, free from equitable

tract.⁷⁵ In the 1962 case of *Shay v. Penrose*,⁷⁶ however, the Illinois Supreme Court overruled the previous line of cases and held that equitable conversion does occur upon the execution of an installment sales contract.⁷⁷ In Illinois, therefore, the installment purchaser is deemed to take equitable title to the real estate, whereas the vendor retains bare legal title. This characterization of the transaction has continued until the present.⁷⁸ Although the equitable conversion that occurs upon the execution of an installment contract is theoretically similar to the relationship that exists between a mortgagor and a mortgagee, the Illinois courts, unlike other states, have ignored the mortgage-like nature of the transaction and have denied contract purchasers the equity of redemption which is accorded to defaulting mortgagors.⁷⁹

b. The Enforcement of Installment Contracts by the Courts

Illinois courts have relied heavily on the constitutional and legal ideal of the "freedom to contract" in the cases upholding forfeitures in installment contracts.⁸⁰ One of the earliest pronouncements of Illinois policy regarding installment sales contracts and the enforceability of forfeiture provisions appeared in *Heckard v.*

imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.

4 POMEROY, *supra* note 70, at § 1161. *Fletcher v. Ashburner*, 1 Brown, ch. 499, gives the following definition of equitable conversion which has been quoted often and used:

Nothing is better established than this principle that money directed to be employed in the purchase of land and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage article, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed.

Cited in *Lewis & Reeves, supra* note 44, at 256 (1975). For a detailed discussion of equitable conversion and its relation to installment contracts see *Lee, The Interests Created by Installment Land Contracts*, 19 U. MIAMI L. REV. 367 (1965) [hereinafter *Lee*].

75. See, e.g., *Capps v. National Union Fire Ins. Co.*, 318 Ill. 350, 149 N.E. 247 (1925); *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N.E. 314 (1900); *Chappell v. McKnight*, 108 Ill. 570 (1884); see also *Lee, supra* note 74, at 373.

76. 25 Ill. 2d 447, 185 N.E.2d 218 (1962).

77. *Id.* at 449, 185 N.E.2d at 219-20.

78. See, e.g., *In re Estate of Martinek*, 140 Ill. App. 3d 621, 488 N.E.2d 1332 (2d Dist. 1986); *Life Sav. and Loan Ass'n of America v. Bryant*, 125 Ill. App. 3d 1012, 467 N.E.2d 277 (1st Dist. 1984).

79. See *Lee, supra* note 74, at 373; *Lewis and Reeves, supra* note 44, at 252, 257-58. See also *H & L Land Co. v. Warner*, 258 So. 2d 293 (Fla. 2d Dist. Ct. App. 1972); *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *appeal after remand*, 264 Ind. 77, 339 N.E.2d 57 (1975); *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979).

80. See *Aden v. Alwardt*, 76 Ill. App. 3d 54, 394 N.E.2d 716 (3d Dist. 1979).

Sayre.⁸¹ In *Heckard*, the court upheld a forfeiture provision of an installment contract stating that, although a court of equity would not imply a "time is of the essence" provision and declare a forfeiture in a contract for the sale of land, if such provisions were contained in the agreement the court nevertheless would enforce them.⁸² Therefore, although "equity abhors a forfeiture,"⁸³ Illinois courts will enforce a forfeiture provision if the parties agreed to it in their contract.⁸⁴

Although committed to the freedom of contract ideal, Illinois courts have gone to great lengths to relieve the contract purchaser of the harsh realities of forfeiture.⁸⁵ For example, courts will not find a forfeiture if no forfeiture provision is present in the installment contract.⁸⁶ Furthermore, courts will not enforce a forfeiture provision if the party attempting to enforce it does not follow the procedure provided for in the contract.⁸⁷ The courts also will construe strictly the terms of the contract against the party who is attempting to enforce the forfeiture provision.⁸⁸

Additionally, the courts have attempted to find waivers of both the forfeiture and "time is of the essence" provisions by vendors. In one case, the Illinois Supreme Court held that repeated acceptances of past late payments by the vendor preclude a valid forfeiture.⁸⁹ In several instances, a court has found that the "time is of the essence" provision had been waived by the contract vendor and that he could not declare a forfeiture without first "reviving" the provision.⁹⁰

81. 34 Ill. 142 (1864). *Heckard* concerned a defaulting vendee under an installment sales contract. The vendee attempted to tender a late payment and compel specific performance. The court denied the vendee's request and upheld the forfeiture provision. *Id.* at 144.

82. *Id.* at 150. In reaching its decision, the court stated, "A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time in a contract of this nature where no fraud, accident or mistake has intervened." *Id.*

83. See *Aden*, 76 Ill. App. 3d at 56, 394 N.E.2d at 719.

84. *Heckard*, 34 Ill. at 150. See also *Eade v. Brownlee*, 29 Ill. 2d 214, 193 N.E.2d 786 (1963); *Lang v. Hendenberg*, 277 Ill. 368, 115 N.E. 566 (1917); *Dahm v. Jarnagin*, 133 Ill. App. 3d 14, 478 N.E.2d 641 (3d Dist. 1985).

85. *Forfeiture*, *supra* note 55, at 189.

86. *People ex rel. v. Mersinger*, 18 Ill. 2d at 489, 165 N.E.2d 308, 310 (1960).

87. *Bocchetta v. McCourt*, 115 Ill. App. 3d 297, 456 N.E.2d 907 (1st Dist. 1983); *Alabastro v. Wheaton National Bank*, 77 Ill. App. 3d 359, 395 N.E.2d 212 (2d Dist. 1979).

88. *Alabastro*, 77 Ill. App. 3d at 364, 395 N.E.2d at 214.

89. *Kingsley v. Roeder*, 2 Ill. 2d 131, 117 N.E.2d 82 (1954); see also *Aden*, 76 Ill. App. 3d at 56, 394 N.E.2d at 719.

90. *Fox v. Grange*, 261 Ill. 116, 103 N.E. 576 (1913). "Such a provision, once waived

Another way that courts have attempted to mitigate the impact of forfeiture clauses in installment contracts is to strictly construe the applicable provisions of the Illinois' forcible entry and detainer law⁹¹ and service of process requirements.⁹² For example, under Illinois' forcible entry and detainer law, a contractor-vendor is required to give the contract purchaser thirty days to cure his default before he files a "forcible" action.⁹³ Courts have held that if a vendor accepts even partial performance during this time, the default will be cured and the vendor will not be entitled to pursue a forfeiture.⁹⁴ A final way in which the courts have attempted to deter forfeiture is to hold that forfeiture is a mutually exclusive remedy.⁹⁵ In other words, if the vendor seeks forfeiture, he cannot seek any other remedy or damages.⁹⁶ Other remedies that a vendor might seek, exclusive of forfeiture, are contract damages,⁹⁷ foreclosure of the purchaser's interest,⁹⁸ and rescission.⁹⁹

The foregoing discussion illustrates the general disparity that exists in the treatment of installment sales contracts by the Illinois courts. On the one hand, they seem bound to the precedents which hold that installment contracts are not inequitable. On the other hand, the courts seem quite reluctant to enforce forfeiture provisions and, therefore, have created many exceptions that preclude or prevent the enforcement of forfeiture provisions.¹⁰⁰

must be revived by giving a reasonable warning of the vendor's intent to the seller." *Chrisman v. Miller*, 21 Ill. 226, 236 (1859). See also *Aden v. Alwardt*, 76 Ill. App. 3d at 56, 394 N.E.2d at 719.

91. ILL. REV. STAT. ch. 110, paras. 9-101 to 9-312 (1985); *Forfeiture, supra* note 55, at 191. See also *infra* note 102.

92. *Craft v. Culmeyer*, 274 Ill. App. 296 (1st Dist. 1934); *Hinterberger v. Weindler*, 2 Ill. App. 407 (1st Dist. 1879). See also *Forest Preserve Real Estate Improvement Co. v. Miller*, 379 Ill. 375, 30 N.E.2d 126 (1942).

93. ILL. REV. STAT. ch. 110, para. 9-104.1 (1985).

94. *Ferrara v. Collins*, 119 Ill. App. 3d 819, 457 N.E.2d 109 (2d Dist. 1983). See also *Benjamin v. Allison*, 201 Ill. App. 3d 34 (3d Dist. 1915); *Eddy v. Kerr*, 96 Ill. App. 3d 680, 422 N.E.2d 176 (2d Dist. 1981).

95. *Allen v. Borlin*, 336 Ill. App. 460, 84 N.E.2d 575 (4th Dist. 1949); *Dahm, Inc. v. Jarnagin*, 133 Ill. App. 3d 14, 478 N.E.2d 641 (3d Dist. 1985); *1st National Security Bank v. Ward*, 275 Ill. App. 521 (1st Dist. 1934).

96. See, e.g., *Allen v. Borlin, supra* note 95.

97. *Hooven v. Woodiel*, 27 Ill. App. 3d 467, 327 N.E.2d 270 (5th Dist. 1975) (contract vendor allowed to sue for each payment as it came due under the contract); *Anderson v. Long Grove Country Club*, 111 Ill. App. 2d 123, 249 N.E.2d 343 (4th Dist. 1969) (contract vendor may recover damages sustained).

98. See *infra* note 123.

99. *People ex rel v. Mersinger*, 18 Ill. 2d 486, 165 N.E.2d 308 (1960).

100. A complete discussion of Illinois courts' past treatment of installment contracts is beyond the scope of this article. For an extensive history of the judicial approach to

III. DISCUSSION

A. *The IMFL*

The IMFL was signed into law on January 12, 1987¹⁰¹ and its effective date was July 1, 1987.¹⁰² Unlike previous Illinois mortgage law, the IMFL¹⁰³ was primarily created and drafted by practitioners active in the field of real estate law.¹⁰⁴ Prior Illinois mortgage law consisted of piece-meal legislation scattered throughout various chapters and spanning well over 100 years.¹⁰⁵ The IMFL was intended as a total revision of Illinois mortgage law seeking to integrate and consolidate as much of the applicable law as possible.¹⁰⁶

All pre-existing mortgage foreclosure regulations were repealed and replaced by the IMFL.¹⁰⁷ The Act is divided into seven paragraphs roughly corresponding to the steps that a mortgagor would follow in effecting a foreclosure.¹⁰⁸ This discussion will focus on the "General Provisions"¹⁰⁹ and "Definitions"¹¹⁰ sections of

installment contracts in Illinois, see Note, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, 1986 U. ILL. L. F. 91 (1986).

101. Telephone interview with Illinois State Bar Association Legislative Office (Feb., 1987).

102. ILL. ANN. STAT. ch. 110, para. 15-1101 (Smith-Hurd Supp. 1987).

103. Public Act 84-1462, codified at ILL. REV. STAT. ch. 110, paras. 15-1101 to 15-1706 (Supp. 1987).

104. Liss, *supra* note 12, at 13. The Real Estate Law Section Council of the Illinois State Bar Association organized various committees which worked for over four years on drafts of the IMFL. *Id.* Exposure drafts were then sent out to over one hundred Illinois real estate attorneys whose comments and suggestions were then integrated into the final draft. *Id.* These lawyers included representatives of borrowers, lenders, title insurers, mortgage bankers, the secondary mortgage industry, general practice, and law professors. *Id.* The final draft of the IMFL was then passed by the state legislature without significant change. *Id.*

105. See, e.g., ILL. REV. STAT. ch. 110, paras. 15-101 to 15-311 (1985) (repealed 1987), 12-101 to 12-1401 (1985); *Id.* at ch. 29, para. 8.31; *Id.* at ch. 30, paras. 1-367.

106. Liss, *supra* note 12, at 14. The IMFL was drafted in response to a perception by many that the existing foreclosure procedures were inequitable, expensive, unduly complex and "scattered among numerous statutes and case law." See also *supra* note 75.

107. "Sections 12-117, 12-118, 12-123 through 12-130, 12-151, 12-402 and 15-101 through 15-311 of the 'Code of Civil Procedure' approved August 19, 1981, as amended, are repealed." Illinois Mortgage Foreclosure Act, P.A. 84-1462, § 7, 1986 Ill. Laws 4408.

108. Part 1 - General Provisions ch. 110, paras. 15-1101 to 15-1107; Part 2 - Definitions *id.* at paras. 15-1201 to 15-1222; Part 3 - Mortgage Lien Priorities *id.* at paras. 15-1301 to 15-1302; Part 4 - Methods of Terminating Mortgagor's Interest in real Estate *id.* at paras. 15-1401 to 15-1405; Part 5 - Judicial Foreclosure Procedure *id.* at paras. 15-1501 to 15-1512; Part 6 - Restatement and Redemption *id.* at paras. 15-1601 to 1605; Part 7 - Possession During Foreclosure *id.* at paras. 15-1701 to 15-1706.

109. ILL. REV. STAT. ch. 110, paras. 15-1101 to 15-1107.

110. *Id.* at paras. 15-1201 to 15-1222 (Supp. 1987).

the Act.¹¹¹ These sections address the types of instruments that are deemed to be mortgages under the Act and the types of non-mortgage instruments that must be foreclosed pursuant to the Act.¹¹²

Section 15-1106, entitled "Applicability of Article," provides a specific list of the instruments that *must* be foreclosed under the IMFL.¹¹³ First, mortgages¹¹⁴ created prior to or after July 1, 1987

111. For an overview of all of the revisions that IMFL will effect see Liss, *supra* note 12; Olson, *supra* note 64.

112. See ILL. REV. STAT. ch. 110, para. 15-1106 (Supp. 1987).

113. The section states:

Applicability of Article (a) Exclusive Procedure. From and after the effective date of this amendatory Act of 1986, the following shall be foreclosed in a foreclosure pursuant to this Article:

(1) any mortgage created prior to or after the effective date of this amendatory Act of 1986;

(2) any real estate installment contract for residential real estate entered into on or after the effective date of this amendatory Act of 1986 and under which (i) the purchase price is to be paid in installments over a period in excess of five years and (ii) the amount unpaid under the terms of the contract at the time of the filing of the foreclosure complaint, including principal and due and unpaid interest, at the rate prior to default, is less than 80% of the original purchase price of the real estate as stated in the contract;

(3) any collateral assignment of beneficial interest made on or after the effective date of this amendatory Act of 1986 (i) which is made with respect to a land trust which was created contemporaneously with the collateral assignment of beneficial interest (ii) which is made pursuant to a requirement of the holder of the obligation to secure the payment of money or performance of other obligations and (iii) as to which the security agreement or other writing creating the collateral assignment permits the real estate which is the subject of the land trust to be sold to satisfy the obligations.

(b) Uniform Commercial Code. A secured party, as defined in Article 9 of the Uniform Commercial Code may at its election enforce its security interest in a foreclosure under this Article if its security interest was created on or after the effective date of this amendatory Act of 1986 and is created by (i) a collateral assignment of beneficial interest in a land trust or (ii) an assignment for security of a buyer's interest in a real estate installment contract. Such election shall be made by filing a complaint stating that it is brought under this Article, in which event the provisions of this Article shall be exclusive in such foreclosure.

(c) Real Estate Installment Contracts. A contract seller may at its election enforce in a foreclosure under this Article any real estate installment contract entered into on or after the effective date of this Amendatory Act of 1986 and not required to be foreclosed under this Article. Such election shall be made by filing a complaint stating that it is brought under this Article, in which event the provisions of this Article shall be exclusive in such foreclosure. A contract seller must enforce its contract under this Article if the real estate installment contract is one described in paragraph (2) of subsection (a) of Section 15-1106.

(d) Effect of Election. An election made pursuant to subsection (b) or (c) of Section 15-1106 shall be binding only in the foreclosure and shall be void if the foreclosure is terminated prior to entry of judgment.

(e) Supplementary General Principles of Law. General principles of law and equity, such as those relating to capacity to contract, principal and agent, marshalling of assets, priority, subrogation, estoppel, fraud, misrepresentations, du-

are now subject to the IMFL.¹¹⁵ Second, real estate installment contracts meeting certain prerequisites must be foreclosed pursuant to the IMFL.¹¹⁶ Finally, certain types of collateral assignments of beneficial interests in land trusts, made on or after July 1, 1987 will be foreclosed under the IMFL.¹¹⁷ Section 15-1106 also provides that two other instruments *may* be foreclosed under IMFL procedures.¹¹⁸ First, certain security agreements which would otherwise be covered under Article 9 of the Uniform Commercial Code may be foreclosed.¹¹⁹ Second, 15-1106(c) allows a contract seller to foreclose *any* installment sales contract entered into on or after July 1, 1987.¹²⁰

B. *The IMFL and Installment Sales Contracts*

The IMFL defines "Real Estate Installment Sales Contracts" in language that is similar to previous definitions existing under Illinois law.¹²¹ A contract will be construed as an installment contract if the purchase price is to be paid in installments, excluding

ress, collusion, mistake, bankruptcy, or other validating or invalidating cause, supplement this Article unless displaced by a particular provision of it. Section 9-110 of the Code of Civil Procedure shall not be applicable to any real estate installment contract which is foreclosed under this Article.

Id.

114. "Mortgages" are defined by the Act as "any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation . . . [including] . . . 'reverse mortgages' . . . mortgages securing 'revolving credit' loans . . . absolute deeds [in the nature of mortgages] . . . and equitable mortgages." *Id.* at para. 15-1207. Compare this definition with the former, less detailed, mortgage statute ILL. REV. STAT. ch. 110, para. 15-103(a) (1985) (repealed 1987).

115. ILL. REV. STAT. ch. 110, para. 15-1106(a)(1) (Supp. 1987).

116. *Id.* at para. 15-1106(a)(2).

117. *Id.* at para. 15-110(a)(3). This section appears to codify existing Illinois case law regarding collateral assignments of beneficial interests. *See Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E.2d 94 (1957); *Quinn v. Pullman Trust & Sav. Bank*, 98 Ill. App. 2d 402, 240 N.E.2d 791 (1st Dist. 1968) (both cases set requirements which are identical to those under the IMFL). *But see Melrose Park National Bank v. Melrose Park National Bank*, 123 Ill. App. 3d 282, 462 N.E.2d 741 (1st Dist. 1984) (departure from the requirements listed in *Horney* and adoption of a case-by-case analysis). *See generally*, Lindberg, *Assignments of Beneficial Interests in Illinois Land Trusts As Security for a Debt*, 70 ILL. B.J. 576 (1982); Levine, *The New Mortgage Foreclosure Act and Its Possible Effect on the Judicial System* (paper published for seminar on IMFL given by the Chicago Bar Association, February 24, 1987) [hereinafter Levine]; M. Kenoe, *Kenoe on Land Trusts* ILL. INST. FOR CLE 1978.

118. ILL. REV. STAT. ch. 110, para. 15-1106(b), (c) (Supp. 1987).

119. *Id.* at para. 15-1106(b). *See supra* note 113 for exact language.

120. *Id.* at para. 15-1106(c). *See supra* note 113 for exact language.

121. *Id.* at para. 15-1214. This paragraph states:

Real Estate Installment Contract. "Real estate installment contract" means any agreement or contract for a deed under which the purchase price is to be paid in installments with title to the real estate to be conveyed to the buyer upon

earnest money deposits, and title to the real estate is to be conveyed to the purchaser after the purchase price, or a specified portion thereof, is paid.¹²²

There are two ways in which an installment sales contract may be subject to the IMFL. The first is if a contract seller elects to foreclose any installment contract under the Act. This is, of course, not a mandatory provision and does not depart from the existing case law.¹²³ The second, and more important, provision requires that an installment sales contract be foreclosed under the IMFL if it meets the following four prerequisites: 1) the contract was entered into on or after July 1, 1987; 2) for residential real estate; 3) the purchase price of which is to be paid over a five-year period; and 4) the unpaid amount under the contract is less than eighty percent of the original purchase price.¹²⁴ Each of these standards are discussed in detail below with an emphasis on the possible sources and rationales for each of the respective requirements.

1. Contracts Entered Into On or After July 1, 1987

The Act states that only installment sales contracts entered into on or after the effective date (July 1, 1987) will be mandatorily subject to the IMFL.¹²⁵ Any installment sales contracts in existence prior to July 1, 1987 are unaffected by the IMFL and are subject to forfeiture under pre-existing Illinois law. The IMFL's prospective treatment of installment sales contracts contrasts with the IMFL's retroactive treatment of mortgages.¹²⁶ Under the IMFL, both mortgages created "prior to" and "after" the effective

payment of the purchase price or a specified portion thereof. For the purpose of this definition, an earnest money deposit shall not be considered an installment.

Id.

122. *Id.*

123. *Id.* at para. 15-1106(c). A contract vendor has always been permitted to bring foreclosure proceedings against a defaulting contract purchaser. *First Fed. Sav. and Loan Ass'n. of Ottawa v. Chapman, et al.*, 116 Ill. App. 3d 950, 452 N.E.2d 600 (3d Dist. 1983); *666 North Orleans, Inc. v. Kors*, 11 Ill. App. 3d 676, 297 N.E.2d 372 (1st Dist. Dist. 1973); *See KRATOVIL, supra* note 2, at § 22.21(f).

This provision was instituted by the drafters because the IMFL foreclosure procedure was viewed as fair to all concerned parties and allowing the contract vendor to foreclose would avoid the additional issue of whether a certain instrument is or is not a "mortgage" under the IMFL. Liss, *Major Elements of the New Illinois Mortgage Foreclosure Law* (paper published for seminar on IMFL given by Chicago Bar Association, February 24, 1987). Note, however, that a literal reading of this provision would preclude any pre-July 1, 1987 installment sales contract from being foreclosed under the IMFL. *See supra* note 123.

124. ILL. REV. STAT. ch. 110, para. 15-1106(a)(2) (Supp. 1987).

125. *Id.*

126. *See id.* para. 15-1106(a)(1).

date are subject to foreclosure pursuant to the IMFL.¹²⁷

2. Contracts for Residential Real Estate

Unlike previous Illinois statutes on the subject, the IMFL draws a distinction between residential and non-residential real estate.¹²⁸ The prerequisite requiring foreclosure for only residential installment contracts thus implies that all non-residential installment contracts will be unaffected by the IMFL. The basic language of the definition of residential real estate has been adopted from a previous Illinois statute although it has been expanded to a certain degree.¹²⁹

3. Purchase Price to be Paid Over a Period in Excess of Five Years

The IMFL will be applicable only to those installment contracts under which "the purchase price is to be paid in installments over a period in excess of five years."¹³⁰ This provision was included to distinguish short term real estate contracts from long term installment sales contracts.¹³¹ It is unclear how the drafters settled on

127. *Id.* One might wonder how mortgages entered into on July 1, 1987 should be treated. There is, however, legislation pending that would amend the statute to read "prior to, on or after . . .". H.B. -0474, 85th Illinois General Assembly, 1st Sess. (1987). This legislation also provides that foreclosures on file as of July 1, 1987 shall be accorded pre-IMFL treatment. *Id.*

128. ILL. REV. STAT. ch. 110, para. 15-1219 (Supp. 1987). This paragraph states:

Residential Real Estate. "Residential real estate" means any real estate, except a single tract of agricultural real estate consisting of more than 40 acres, which is improved with a single family residence or residential condominium units or a multiple dwelling structure containing single family dwelling units for six or fewer families living independently of each other, which residence, or at least one of which condominium or dwelling units, is occupied as a principal residence at the time the foreclosure is filed either (i) if a mortgagor is an individual, by that mortgagor, that mortgagor's spouse or that mortgagor's descendants, or (ii) if a mortgagor is a trustee of a trust or an executor or administrator of an estate, by a beneficiary of that trust or estate or by such beneficiary's spouse or descendants, or (iii) if a mortgagor is a corporation, by persons owning collectively at least 50 percent of the shares of voting stock of such corporation or by a spouse or descendants of such persons. The use of a portion of residential real estate for non-residential purposes shall not affect the characterization of such real estate as residential real estate.

Id. cf. ILL. REV. STAT. ch. 110, para. 12-124 (1986). "The IMFA disregards artificial distinctions based on whether the mortgagor is an individual, corporation or trust and instead implements, more broadly than existing statutes, the public policy that homeowners are to be protected regardless of the entity signing the mortgage." Liss, *supra* note 12 at 18.

129. See ILL. REV. STAT. ch. 29, para. 8.31 (1985).

130. ILL. REV. STAT. ch. 110, para. 1106(a)(2) (Supp. 1987).

131. Telephone interview with Jeffrey A. Liss, Vice President of IMFL Drafting

the period of five years. A previous Illinois statute, however, contains a similar provision,¹³² and Ohio's installment sales contract statute also includes a five-year period.¹³³

4. Unpaid Amount Under Contract is Less Than 80% of Original Purchase Price

Before an installment sales contract is subject to the IMFL, "the amount unpaid under the terms of the contract at the time of filing the foreclosure complaint, including principal due and unpaid interest at the rate prior to default [must be] less than 80% of the original purchase price of the real estate as stated in the contract."¹³⁴ This prerequisite forms the basis of the IMFL's installment contract coverage.

IV. ANALYSIS AND IMPACT

On its face, the IMFL is a responsive piece of legislation that addresses and puts to rest many of the long-litigated issues regarding installment sales contracts and their status as mortgages. A

Committee (July, 1987). Short term land contracts, also known as binder or earnest money contracts, are mainly used to hold the parties to an agreement for short periods while they arrange for the closings. These agreements usually last from a few days to a few years. See NELSON & WHITMAN, *supra* note 19, at § 7.21.

132. ILL. REV. STAT. ch. 29, para. 8.31 (1986).

133. OHIO REV. CODE ANN. § 5313.07 (Anderson 1981). The statute states in part:

If the vendee of a land installment contract has paid in accordance with the terms of the contract for a period of five years or more from the date of the first payment or has paid toward the purchase price a total sum equal to or in excess of twenty percent thereof, the vendor may recover possession of his property only by use of a proceeding for foreclosure and judicial sale of the foreclosed property as provided in section 2323.07 of the Revised Code. Such action may be commenced after expiration of the period of time prescribed by sections 5313.05 and 5313.06 of the Revised Code. In such an action, as between the vendor and vendee, the vendor shall be entitled to proceeds of the sale up to and including the unpaid balance due on the land installment contract. . . .

Id. Note that the five year period in Ohio is measured by the time over which a vendee has been making payments under an installment contract, rather than the entire contemplated time span of the installment contract, as in the IMFL. Additionally, in Ohio, the five year period is used as one of two disjunctive prerequisites for the imposition of foreclosure procedures, i.e. foreclosure is mandated if the vendee has been making payments for a period of five years or more *or* if the vendee has paid more than twenty percent of the purchase price. A conjunctive prerequisite would be when the purchase price is paid in excess of five years *and* the amount unpaid under the contract is less than eighty percent of the original purchase price. Therefore, the five year period in Ohio appears to provide a certain amount of protection for the low-equity/long-term vendee unlike the five year period under IMFL which provides no type of comparable protection. Durham, *Forfeiture of Residential Land Contracts in Ohio*, 16 AKRON L. REV. 397, 400 (1983) [hereinafter Durham].

134. ILL. REV. STAT. ch. 110, para. 15-1106(a)(2) (Supp. 1987).

closer analysis, however, reveals various practical ambiguities and unresolved issues within the statute that will most certainly be resolved through litigation or amendatory legislation. Additionally, the IMFL's installment sales contract provisions perpetuate the theoretical inconsistencies that have plagued previous Illinois case law on installment sales contracts.

A. *Practical Problems with the IMFL*

The practical problems posed by the IMFL and installment contracts arise from the language of the statute itself and from the factual situations existing under most installment sales contracts. These problems, if not remedied, are sure to greatly impede smooth and consistent application of the IMFL to installment sales contracts in the future.

1. Calculation of Cut-Off Point

The first problem with the IMFL is its method for determining which installment contracts are mandatorily subject to the IMFL. As discussed earlier, all installment sales contracts in which less than eighty percent of the purchase price remains unpaid must be foreclosed pursuant to the IMFL.¹³⁵ This calculation is made "at the time of filing the foreclosure complaint."¹³⁶ A contract vendor, however, would not know whether to file a foreclosure complaint until it is first determined whether the particular installment sales contract involved is mandatorily subject to the IMFL. No clear solution to this problem can be discovered within the IMFL. A contract vendor may avoid the issue of whether a foreclosure is mandatory under the IMFL and simply elect to file a foreclosure complaint and carry out an IMFL foreclosure.¹³⁷ This approach, however, simply ignores the problem and widespread adoption of this practice would, de facto, make some installment contracts mortgages.¹³⁸

Another possible approach for vendors under the current IMFL would be to file a foreclosure complaint and then voluntarily dismiss it if it is determined that the vendee has not obtained the req-

135. See *supra* note 134, *infra* notes 162-70 and accompanying text.

136. ILL. REV. STAT. ch. 110, para. 15-1106(a)(2) (Supp. 1987).

137. See *supra* note 123.

138. Title insurers are very worried about forfeiture and if the IMFL installment contract provision remains unchanged they may become more conservative in dealing with land "previously" under installment contracts and require foreclosure to terminate contract vendees' interest in all cases. See Hess, *supra* note 46, § 12.7; see also Note, *supra* note 100, at 114, 119.

uisite percentage. This date of filing would then establish a concrete point at which the percentages previously paid by the vendee may be assessed.¹³⁹ The IMFL provides that a foreclosure complaint made pursuant to an election "shall be void if terminated prior to entry of judgment."¹⁴⁰ Therefore, the initial filing of a complaint would not raise any estoppel issues if the complaint was subsequently dismissed.

There are, however, problems with this approach. First, the IMFL is silent about who makes the determination regarding the percentage paid by the vendee.¹⁴¹ Secondly, various time limits for redemption and reinstatement rights are keyed to the commencement of foreclosure proceedings.¹⁴² Thus, although a foreclosure complaint is later voluntarily dismissed by the vendor, the vendee might still be entitled to the statutory redemption and reinstatement rights before a vendor could pursue further action. Accordingly, it seems clear that the best solution to this problem would be legislative action.¹⁴³

2. Non-Retroactive Effect

Another problem with the IMFL relates to the applicability of its foreclosure procedures to only installment sales contracts that were entered into on or after the effective date of the law, July 1, 1987. As discussed previously, this non-retroactive approach to installment sales contracts contrasts with the retroactive treatment accorded mortgages under the IMFL.¹⁴⁴ The treatment accorded these instruments is indicative of several different intentions and concerns on the part of the drafters. First, the drafters may have been concerned that retroactively subjecting pre-July 1, 1987 installment sales contracts to the IMFL would invite litigation concerning the alleged impairment of contractual obligations in violation of the contract clauses of the state and federal constitu-

139. Thus, the vendor would be complying with the letter of ILL. REV. STAT. ch. 110, para. 15-1106(a)(2) (Supp. 1987).

140. ILL. REV. STAT. ch. 110, para. 15-1106(d) (Supp. 1987).

141. *See id.* at para. 15-1106. Presumably, it would be the court. If this is the case then substantial delay might occur before the court renders a decision. Thus, a vendor's expectation of a quick resolution, through forfeiture, is thwarted.

142. *See id.* at para. 15-1502, 15-1603.

143. Such an amendment might take the following form: ". . . the amount unpaid under the terms of the contract at the *time of a default occurring under the terms of the contract* including principal. . . ." *cf. id.* at para. 15-1106(a)(2).

144. *Id.* at para. 15-1106(a)2. This non-retroactive treatment conflicts with the IMFL's treatment of other "mortgages." *See supra* notes 127-28 and accompanying text.

tions.¹⁴⁵ The retroactive treatment of mortgages, however, would also raise the same problems.¹⁴⁶ A second reason that the IMFL does not apply retroactively to installment sales contracts is that its drafters may have considered such a change to be too sudden in light of Illinois' past conservative treatment of installment sales contracts.¹⁴⁷ The solely prospective application of the IMFL would thus provide for a transition period.

Although this prospective approach is arguably desirable for installment contracts that are mandatorily foreclosed under the IMFL, the drafters also proscribed retroactive implementation in connection with the optional foreclosure procedures of the IMFL.¹⁴⁸ This limitation on the application of the IMFL foreclosure procedures to post-July 1st 1987 installment sales contracts is unnecessary. There appears to be no reason why the statute's foreclosure provisions should not be available to contract vendors who voluntarily choose to follow the IMFL procedures. Because this new system is viewed by the drafters as "balanced" and "fair to all parties,"¹⁴⁹ it seems quite inequitable to condemn parties wishing to foreclose pre-IMFL installment contracts to a system that is believed by the drafters to be "cumbersome," "expensive," and "difficult."¹⁵⁰

3. Residential Limitation

As previously discussed, only installment contracts for residential real estate will be subject to the mandatory provision of the IMFL.¹⁵¹ The application of the residential distinction to installment sales contracts is a legislative attempt to accomplish two goals simultaneously. The legislature is attempting to furnish a certain measure of consumer protection for transactions involving small purchases of real estate. The legislature is also attempting to maintain a certain degree of contractual freedom for parties in-

145. See, e.g., *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 483 N.E.2d 226 (1985); see also *Levine*, *supra* note 117, at 1.

146. See *Levine*, *supra* note 117, at 2.

147. See *supra* notes 66-100 and accompanying text. An Oklahoma statute draws no distinction between residential and non-residential installment sales contracts. This statute has been cited as the cause of a rapid decline in the use of installment sales contracts in Oklahoma. By creating the residential/non-residential dichotomy, therefore, the Illinois drafters may have been attempting to avoid a fate similar to that of Oklahoma for installment contracts.

148. See *supra* note 126.

149. *Liss*, *supra* note 123, at 2.

150. *Olsen*, *supra* note 65, at 2.

151. See *supra* note 129 and accompanying text.

volved in larger transactions. Several states that have adopted installment contract statutes also draw similar distinctions between residential and non-residential contracts for similar reasons.¹⁵²

The requirement that the land must be residential property poses a potential problem for farms that are purchased under an installment contract.¹⁵³ Farms are one of the major types of property likely to be purchased under an installment sales contract.¹⁵⁴ Although "residential property" includes in its definition tracts of agricultural property of less than forty acres improved with a single family residence, any tract which contains more than forty acres is excluded.¹⁵⁵ In this day and age, there are very few operating farms of forty acres or less. The drafters claim that the IMFL makes allowances for the "family farm" and would treat the farmhouse and forty acres of land as residential property and treat the rest of the land as agricultural.¹⁵⁶ The statute, however, makes this distinction only if the farmhouse and a forty acre tract of land were purchased under one contract and any property in excess of this amount was purchased under a separate contract.¹⁵⁷ In other words, a farmer would need to set up two separate "mortgage" transactions to cover a family farm of over forty acres.¹⁵⁸

There are two solutions to this problem. The first would be to include "agricultural real estate"¹⁵⁹ under the mandatory IMFL foreclosure. A second solution would be to rewrite the definition of "residential" to include family farms of a certain size and exclude any excess from coverage.¹⁶⁰

4. Coverage for Installment Contracts in Excess of Five Years

The legislature intended the IMFL to cover only installment contracts spanning in excess of five years in an effort to exclude

152. See e.g., OHIO REV. CODE ANN. § 5313.01(B) (Page 1981); MD. REAL PROPERTY CODE ANN. § 10-101 to 10-112 (1981) (Both of these statutes draw a distinction between residential or "non-corporate" property and other property. See Durham, *supra* note 133, at 425 (discussing Ohio statute).

153. See *supra* notes 128-29 and accompanying text.

154. Power, *supra* note 49, at 403-08. See also Beuscher, *Buying Farms on Installment Land Contracts—A Preface*, 1960 WIS. L. REV. 379 (1960).

155. ILL. REV. STAT. ch. 110, para. 15-1219 (Supp. 1987).

156. Liss, *supra* note 12, at 18.

157. *Id.*

158. *Id.*

159. ILL. REV. STAT. ch. 110, para. 15-1201 (Supp. 1987). This solution might not be favored by large agricultural interests who do business on a much larger scale with "agricultural" property.

160. As the statute now reads, the entire property ("tract") is excluded from coverage under the definition of residential. See *id.* para. 15-1210 (Supp. 1987).

short-term binder contracts.¹⁶¹ Although this restriction will almost certainly exclude any short-term contracts from the IMFL, the period is relatively long in comparison to the duration of the average binder contract.¹⁶² In addition, there appear to be alternative ways to preclude short-term contracts from exclusion under the IMFL.¹⁶³ The best approach to this problem would be the adoption of new legislation that would include a provision specifically excluding short-term binder contracts. As the statute now exists, vendors could "draft around" mandatory IMFL coverage,¹⁶⁴ and true installment contracts that are under five years would be excluded.¹⁶⁵

5. "80% Unpaid" Cut-Off Point

The drafters' adoption of an "80% unpaid" cut-off point in the IMFL¹⁶⁶ was an attempt to strike a balance between two competing concerns. The drafters attempted to assure installment sales contracts a continued place in Illinois real estate finance and yet mitigate the harshest results of their use.¹⁶⁷ The drafters did not want to create a statute that would make all installment sales contracts the functional equivalent of mortgages.¹⁶⁸ Such statutes have been said to cause the decline of installment sales contracts in other states.¹⁶⁹ The drafters also intended that installment sales contracts used as "normal" mortgages would be foreclosed pursuant to the IMFL.¹⁷⁰

The "less than 80% unpaid principal and interest" cut-off point is the amount, according to the drafters, which is usually given as a down payment with a normal mortgage (i.e., usually twenty per-

161. See *supra* note 130 and accompanying text.

162. NELSON & WHITMAN, *supra* note 19, at § 7.21.

163. See, e.g. MD. REAL PROP. CODE ANN. 10-101(b) (1981).

164. See Durham, *supra* note 133, at 434.

165. See Durham, *supra* note 133, at 435 (arguing that a five-year requirement in the context of an Ohio installment contract statute is "senseless").

166. Durham, *supra* note 133, at 435.

167. See Note, *supra* note 100, at 113.

168. See, e.g. OKLA. STAT. TIT. 16 11A (Supp. 1978) which provides:

All contracts for deed for purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property, whether such instruments be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall to that extent be deemed and held mortgages

Id.

169. See Note, *The Decline of the Contract for Deed in Oklahoma*, 14 TULSA L.J. 557 (1979); Ming, *Contract for Deed—A Practical Prohibition*, 55 OKLA. B.J. 3001 (1983).

170. Liss, *supra* note 123, at 2.

cent of the purchase price is paid down).¹⁷¹ The Ohio installment sales contract statute contains an almost identical cut-off of "20% of purchase price paid."¹⁷² This figure was chosen in Ohio for the same reasons as in Illinois.¹⁷³ Similar cut-off points, employing different percentages, also exist in other states as a result of case law.¹⁷⁴ Despite the adoption of such an approach by a number of states, the drafters' assessment of the nature and amount of a "normal mortgage" is, and has been, a subject of debate.¹⁷⁵ Furthermore, the eighty percent figure is unrealistic in light of the recent studies showing that the average down payment under a typical installment contract is far below this amount.¹⁷⁶

B. Theoretical Problems Under the IMFL

As discussed previously, Illinois has historically recognized that, upon execution of an installment sales contract, an equitable conversion occurs.¹⁷⁷ Although such a conversion places the vendor and vendee in an almost identical position to that of a mortgagee and a mortgagor under a mortgage transaction, the courts have denied contract vendees the right to equitable redemption accorded to all mortgagors.¹⁷⁸ This theoretical inconsistency was a perfect target for the IMFL. The IMFL could have resolved this inconsistency by making all installment sales contracts "mortgages."¹⁷⁹ Rather than resolving this problem, however, the IMFL appears to further frustrate it.

Installment contracts that fall under the mandatory provision of the IMFL are not converted to "mortgages" despite their potential foreclosure as mortgages.¹⁸⁰ Thus, the IMFL perpetuates the view

171. *Id.*

172. *See supra* note 133.

173. Durham, *supra* note 133, at 399.

174. *Id.* *See* ILL. REV. STAT. ch. 29, paras. 8.21(e), 8.31, (1985) (these sections give the previous Illinois definitions of installment sales contracts). *See also supra* notes 121 and 131 and accompanying text.

175. Durham, *supra* note 133, at 435.

176. Durham, *supra* note 133, at 406.

177. *See supra* notes 74-79 and accompanying text.

178. *See supra* note 79.

179. *See, e.g.* OKLA. STAT. ANN. tit. 16 § 11A (West 1986). *See also supra* note 163. The major drawback to such an approach such as Oklahoma's is that it denies parties a quick and easy way of terminating a defaulting, high risk, purchaser's interest in property. *See supra* note 169. Under the IMFL, however, termination of a defaulting party's interest has been streamlined. *See supra* notes 106, 111. Compare this problem with Oklahoma's rather complex and time consuming foreclosure process. OKLA. STAT. ANN. tit. 12 § 686 (West 1960); *see also* Note, *supra* note 100, at 110.

180. *See* ILL. REV. STAT. ch. 110, para. 15-1207 (Supp. 1987). *cf. id.* at para. 15-1107(c) (Although installment contracts are said to be "deemed as mortgages," this is

that installment contracts are distinct from mortgages and continues to favor form over function. In addition, by putting forth an "80% unpaid" cut-off point, the drafters have created a second "point of equitable conversion." There now exists equitable conversion when an installment contract is first executed and when an installment contract reaches the "less than 80% unpaid" point. This treatment appears to be totally contradictory to the theory behind equitable conversion. One has either equitable title or not; there cannot be degrees of equitable title.¹⁸¹

V. CONCLUSION

After assessing both the positive and negative aspects of the IMFL, it must be concluded that the IMFL may do more harm than good in the area of Illinois installment sales contracts. On the positive side, the IMFL has made some progress in recognizing that at least certain types of installment contracts should be treated as mortgages. The IMFL also provides a basic framework which may be amended to resolve various inequities as they become more apparent.

The negative aspects of the IMFL include the IMFL's confusing installment contract language. Additionally, the standards that distinguish installment contracts which must be foreclosed under the IMFL from those which may be foreclosed are not deeply rooted in either practical realities or theoretical rationales. Finally, the legislature's pronouncement as to which installment contracts should be treated as mortgages may affect the courts' continued use of equitable principles to mitigate installment contract forfeitures under contracts not subject to the IMFL.

The best solution to these problems would be legislative amendments to the IMFL. Absent such action, the IMFL will in all likelihood give rise to a patchwork of legislative acts and case law decisions very similar to those that preceded the IMFL and which it was enacted to eliminate.

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only for "the purpose of proceeding under the [IMFL] Article," and this provision appears to be included only for the sake of terminology.)

181. See Lee, *supra* note 74, at 375; Lewis & Reeves, *supra* note 44, at 258.

