

04269-3

04269-3

No. 64269-3-1

IN THE COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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SERGEY SAVCHUK,

Appellant,

v.

STEVEN G. JERDE and DARLYCE J. JERDE,  
husband and wife

Respondents.

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APPELLANT'S REPLY BRIEF

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DIVISION ONE  
STATE OF WASHINGTON  
BELLINGHAM, WA

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## I. INTRODUCTION

Through his Opening Brief, Appellant Sergey Savchuk established that the \$500,000 windfall granted to Respondents Steven and Darlyce Jerde, through the trial court's entry of summary judgment, should be reversed based on several errors. These errors included: 1) the purported purchase and sale "agreement" violated the Statute of Frauds; 2) the record contains genuine issues of material fact making summary judgment improper; 3) the Jerdes failed to establish any breach by Savchuk; and 4) the \$500,000 forfeiture is not a remedy cognizable under Washington law, because it is an impermissible penalty and would embrace substantively unconscionable contractual provisions.

The Jerdes' Brief: 1) failed to address, or even acknowledge, the most pertinent provisions of the applicable purchase and sale "agreement" (the "PSA"), relating to seller financing; 2) ignored the binding precedent cited in Savchuk's brief establishing invalidity of the PSA under the Statute of Frauds; 3) failed to address, and accordingly conceded, that as established in Savchuk's Brief, reversal is required because disputed issues of material fact remain regarding pertinent provisions of the PSA and the Jerdes failed in their obligation to tender performance; 4) failed to address binding

precedent establishing that the \$500,000 deposit constituted an impermissible penalty; and 5) failed to adequately contradict Savchuk's position that provisions in the PSA , purporting to grant a \$500,000 forfeiture, are unenforceable as substantively unconscionable. To address misconceptions that might be engendered by the Jerdes' Brief and clarify the bases in support of reversal, Savchuk submits his Reply Brief.

**II. THE JERDES' STATEMENT OF "FACTS" FAILS TO ADDRESS PERTINENT PSA PROVISIONS.**

In an apparent attempt to induce this Court to rule on some contract other than the actual PSA at issue in this case, the Jerdes' "statement of facts" does not deal with, nor even acknowledge, the pertinent PSA terms related to seller financing.<sup>1</sup> Yet, as detailed in Savchuk's brief, the Initial PSA, including the Payment Terms and Addendum, clearly calls for Savchuk to pay a portion of the purchase price through the execution of a largely undefined promissory note and deed of trust.<sup>2</sup> Significantly, the PSA refers to

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<sup>1</sup> See Jerdes' Brief at 2-4.

<sup>2</sup> Savchuk's Brief at 6-8; CP 25-36.

a promissory note and deed of trust “which must be attached to this Agreement”,<sup>3</sup> but which were never appended.<sup>4</sup>

Similarly, the Jerdes Brief does not address the fact that, even with the additional installments incorporated into the Extension Addendum, an unpaid balance of approximately \$200,000 would have remained as of Closing. Nothing contained in the Addendum addressed or negated the seller financing provisions referenced in the Initial PSA.<sup>5</sup>

The materiality of the seller financing provision in the PSA cannot be overstated. This provision forms the basis for reversal based on violation of the Statute of Frauds, facial contractual ambiguity, together with the resulting disputed issues of material fact, and the Jerdes’ failure to adequately tender performance. By failing to address or acknowledge these PSA provisions, the Jerdes, correspondingly, simply ignore three of the most pertinent issues in this case.

Not surprisingly, the Jerdes’ statement of facts also fails to address any of the facts relating to the Jerdes’ failure to tender

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<sup>3</sup> CP 31

<sup>4</sup> See Savchuk’s Brief at 7; CP 31-34.

<sup>5</sup> See Savchuk’s Brief at 8; CP 36.

performance at closing. This omission conveniently corresponds with the Jerdes' failure to address the tender issue raised in Savchuk's Brief.<sup>6</sup>

### III. **ARGUMENT**

#### A. **The PSA Remains Invalid under the Statute of Frauds.**

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On its face, the PSA unequivocally calls for payment of the purchase price through Savchuk's execution and delivery of a note and deed of trust.<sup>7</sup> As established in Savchuk's Brief and through direct application of binding precedent, since the material terms of the note and deed of trust to which the PSA refers were neither attached to, nor otherwise incorporated into, the "agreement", the PSA is invalid under the applicable Statute of Frauds.<sup>8</sup>

Nothing in the Jerdes' Brief plausibly challenges the invalidity of the PSA under the Statute of Frauds. Rather than directly addressing the seller financing provisions in the PSA giving rise to the Statute of Frauds violation, the Jerdes seek to

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<sup>6</sup> See Savchuk's Brief at 9, 20-23; CP 64, 66-67, 73-85, 99-100.

<sup>7</sup> *Supra* at 2-3; Savchuk's Brief at 5-8.

<sup>8</sup> See Savchuk's Brief at 13-16; *Sea-Van Investments Assoc. v. Hamilton*, 125 Wn. 2d 120, 129, 881 P.2d 1035 (1994) ("*Sea-Van*"); *Setterlund v. Firestone*, 104 Wn. 2d 24, 26, 700 P.2d 745 (1985) ("*Setterlund*").

circumvent the issue by invoking the “doctrine of part performance.” In a vain attempt to support their strained positions, the Jerdes cite two decisions that pre-date the controlling *Sea-Van* and *Setterlund* cases, are factually inapplicable and do not apply the doctrine of part performance, at any rate.

The first of these, *Wagers v. Associated Mortgage Investors*,<sup>9</sup> held that a buyer’s representation that he had obtained purchase price financing did not take a unilaterally executed PSA, together with an exchange of equivocal attorney’s letters, out of the operation of the Statute of Frauds. Obviously, neither the holding nor the result in *Wagers* supports the Jerdes’ position.<sup>10</sup>

The Jerdes’ citation to *Granquist v. McKean*, 29 Wn. 2d 440, 187 P.2d 623 (1947) is similarly unavailing. *Granquist* simply held that a tenant in possession could not enforce an alleged oral

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<sup>9</sup> 19 Wn. App. 758, 577 P.2d 622 (1978)

<sup>10</sup> Moreover, the extent to which *dicta* in *Wagers* supports the notion that oral representations, along with a series of unsigned writings, might suffice to establish a part performance exception to the statute of frauds applicable to real estate transactions has been aptly questioned in *Commercial Dev. Co. v. Abitibi-Consolidated, Inc.*, 2008 WL 2063557 at 5 (W.D. Wa. 2008), in which the court observed that:

Notably, the Court in *Wagers* cited **no** authority for the above proposition. *Wagers* at 764. Moreover, no court has cited this case for the proposition in 30 years of its existence. *Id.* Additionally, the *Wagers* Court fails, in this recitation, to include a critical component of the Statute of Frauds: that there must be a *signed* written writing pursuant to the statute.

contract to purchase that property under the statute of frauds, by asserting as “part performance” the payment of alleged installments, coupled with the planting of some fruit trees on the property. Thus *Granquist*, like *Wagers*, does not provide a basis for circumventing the clear application of the Statute of Frauds with respect to this PSA.

Rather, *Sea-Van*, *Sutterland*, and other applicable authorities all confirm that where, as here, a PSA refers to a note and deed of trust, without supplying the terms for those instruments, the Statute of Frauds prohibits introduction of extrinsic evidence to “supply” the missing terms, whether in the form of a partial payment deposit or an oral representation. In the absence of those material written terms, the purported “agreement” is invalid under the Statute of Frauds. As a consequence, this Court should reverse and remand for entry of judgment in favor of Savchuk and order the Jerdes to refund Savchuk’s \$500,000 deposit.

**B. The Jerdes’ Brief Concedes that the Trial Court Erred in Granting Summary Judgment, Because the Jerdes Failed to Establish Savchuk’s Breach.**

Among other things, Savchuk’s Brief established that the PSA is, at best, facially ambiguous regarding the terms by which

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Savchuk was to pay the remaining purchase price balance. The record, correspondingly, disclosed a genuine factual dispute with respect to this material fact.<sup>11</sup> Without resolving the issue regarding the terms by which Savchuk was to pay the remaining purchase price, the Jerdes cannot establish, as a matter of law, that Savchuk breached the PSA.

As a corollary, Savchuk's Brief also demonstrated that the Jerdes did not present evidence that they tendered performance at closing. This failure to tender supplies an additional basis for concluding that the Jerdes have not established Savchuk's breach of the PSA.<sup>12</sup>

These two deficiencies independently mandate reversal of summary judgment. Since the Jerdes' brief did not address these issues, the Jerdes apparently concede error below requiring reversal and remand.

**C. The \$500,000 "Forfeiture" Is an Impermissible Penalty.**

As demonstrated in Savchuk's Brief, the \$500,000 deposit that the Jerdes seek to retain as a "forfeiture" constitutes an

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<sup>11</sup> Savchuk's Brief at 13-20.

<sup>12</sup> Savchuk's Brief at 15-16, 20-23.

impermissible penalty under well-established Washington law.<sup>13</sup> Indeed, liquidated damages are only permitted where the amount specified “is a reasonable forecast of the compensation necessary to make the seller whole should the buyer breach.”<sup>14</sup> Understandably, the Jerdes have not argued below, or on appeal, that retention of all of Savchuk’s deposits could plausibly be considered liquidated damages.

Rather, the Jerdes seek to circumvent the issue by simply calling the phenomenon by which an instrument sets a predetermined damage award a “forfeiture” rather than “liquidated damages” or a “penalty.” However, the Jerdes cannot turn an impermissible penalty into a permissible award by engaging in this linguist sleight-of-hand. Whether one labels it as “liquidated damages”, a “penalty”, or a “forfeiture”, the Jerdes are still attempting to retain a fixed, pre-determined damage award that is not reasonably related to their foreseeable damages.

Thus, consistent with *Wallace* and *Watson*, a “penalty”, by any other name, remains an impermissible penalty, and the Jerdes

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<sup>13</sup> Savchuk’s Brief at 23-27.

<sup>14</sup> *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn. 2d 881, 894, 881 P.2d 1010 (1994). See Savchuk’s Brief at 26-27; *Watson v. Ingram*, 124 Wn. 2d 845, 881 P.2d 247 (1994).

must return at least \$480,000 of Savchuk's deposit. If anything, the cases cited in the Jerdes' Brief support this conclusion.<sup>15</sup>

**D. Any PSA Provisions Deemed to Authorize a \$500,000 Forfeiture Are Substantively Unconscionable.**

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Savchuk's Brief established that any PSA provision(s) deemed to authorize Savchuk's forfeiture of most or all of his \$500,000 deposit would be unenforceable as substantively unconscionable.<sup>16</sup> To the extent that the Jerdes limit the focus of their brief to the substantive unconscionability issue, the Parties agree on the applicable standard.<sup>17</sup> Correspondingly, the \$500,000 payment to the Jerdes, while they also retain possession and title to the real estate and Savchuk obtained nothing in return, satisfies the substantive unconscionability standard by being one-

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<sup>15</sup> See *Walter Implement v. Focht*, 107 Wn. 2d 553, 730 P.2d 1340 (1987) [liquidated damages clause not enforceable as impermissible penalty utilizing pre-*Wallace-Watson* test]; *Management, Inc. v. Schassberg*, 39 Wn. 2d 321, 235 P.2d 293 (1951) [same, with respect to \$10,000 liquidated damages provision for breach of non-compete deemed an excessive penalty]; *Reichenbach v. Sage*, 13 Wn. 364, 43 P. 354 (1896) [\$10 per day delayed damages in construction contract deemed a permissible liquidated damages provision].

<sup>16</sup> Savchuk Brief at 27-29.

<sup>17</sup> Compare, Savchuk Brief at 27-29 with, Jerdes' Brief at 17-18.

sided, overly harsh, shocking to the conscience and exceedingly callous.<sup>18</sup>

The Jerdes' attempt to avoid application of substantive unconscionability by referring to Savchuk's alleged sophistication as a real estate developer is both legally and factually flawed. While an inquiry into the relative sophistication of contracting parties would have a bearing on any claim of procedural unconscionability, it has no relevance to a determination of substantive unconscionability.<sup>19</sup> Moreover, the Jerdes' Brief offers no factual support for their bald assertions regarding Savchuk's alleged sophistication with respect to real estate transactions.<sup>20</sup>

All of the cases cited by the Jerdes are distinguishable since they focus on facts relating to, and legal principles applicable to, procedural unconscionability. Thus, nothing in the Jerdes' Brief

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<sup>18</sup> See Savchuk's Brief at 27-29.

<sup>19</sup> See Savchuk's Brief at 28; *Torgerson v. One Lincoln Tower, LLC*, 166 Wn. 2d 510, 518, 210 P.3d 318 (2009).

<sup>20</sup> The Jerdes' Brief mentioned these allegations at pages 18 and 19 without any citation to the record. Had the Jerdes bothered to cite to the record, at most, the admissible evidence would reveal a factual conflict on this issue, which could not be resolved through summary judgment. See Savchuk Brief at 28, n. 57. Compare, unsubstantiated conclusions in the Supplement Declaration of Anne Inman Declaration, CP 54-55 with, Affidavit of Sergey in Opposition of Motion for Summary Judgment, establishing his lack of sophistication with respect to real estate transactions and understanding of the English language, CP 65.

alters the conclusion that provisions in the PSA, purporting to permit a \$500,000 forfeiture, are substantively unconscionable.

**E. The Jerdes' Reliance on Real Estate Contract Forfeiture Proceedings Is Misplaced.**

In a futile attempt to breathe life into the Jerdes' moribund claim for relief, they cite a number of cases in which a vendor in a traditional real estate contract sought forfeiture of the vendee's interest. The Jerdes' argument improperly blurs the sharp distinction between an earnest money agreement, such as the PSA in this case, and a real estate contract.

Unlike a buyer in a PSA, who obtains a mere promise from the seller to transfer the subject property, the vendee in a real estate contract acquires equitable title, and virtually all of the other incidents of ownership, including possession. These rights generally include making full economic use of the subject real estate, including farming, timber harvesting, extraction of minerals, developing, encumbering the property and transferring rights.<sup>21</sup> A real estate contract essentially is a form of seller financing, comparable to a mortgage or deed of trust. Since 1986, real estate

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<sup>21</sup> See, 27 WA. PRAC. § 3.81; RCW 61.30.010(1). See, e.g., *Sea-Van*, 125 Wn. 2d at 128-29; *Tomlinson v. Clarke*, 118 Wn. 2d 498, 825 P.2d 706 (1992) ("*Tomlinson*"); *Kruger v. Horton*, 106 Wn. 2d 738, 725 P.2d 417 (1986) ("*Kruger*").

contract forfeitures have been governed by the Real Estate Contract Forfeiture Act.<sup>22</sup> This statute sets forth procedures relating to notice, cure and an opportunity to raise objections, comparable to those applicable to a non-judicial deed of trust foreclosure.

The forfeiture proceedings and the corresponding cases, cited by the Jerdes, relate only to vendees who have obtained equitable title and the corresponding incidents of property ownership under a real estate contract. They have no application to the completely distinct interest of a buyer under an earnest money agreement or a PSA.<sup>23</sup> By contrast, the cases cited in Savchuk's Brief and in this Reply Brief directly apply to issues such as the application of the Statute of Frauds and liquidated damages in the context of an earnest money agreement, like the PSA here.

Not only are the real estate contract forfeiture cases, cited by the Jerdes, doctrinally inapplicable, most of their holdings

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<sup>22</sup> RCW, Ch. 61.30.

<sup>23</sup> See, e.g. *Sea-Van; Tomlinson*; RCW 61.30.010(1): "'Contract' or 'real estate contract' means a written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price. 'Contract' or 'real estate contract' does not include earnest money agreements or options to purchase."

paradoxically fail to support the Jerdes' position. Indeed, virtually all of them decline to forfeit the vendee's interest.<sup>24</sup>

Finally, the Jerdes' vague and unsupported references to a supposed ancient form of hybrid escrow agreement-real estate contract fails to justify their retention of the \$500,000 windfall. Although the Jerdes' Brief makes two separate bald assertions that such instruments existed in olden times, this effort to transport us to a mythical time before mortgages is unsupported by any citation to authority.<sup>25</sup> At page 13 of their Brief, the Jerdes finally cite *Jennings v. Dexter Horton & Co.*, 43 Wn. 301, 86 P.2d 576 (1906) as a case they maintain addresses this supposed hybrid instrument. Ultimately, however, *Jennings* fails to support the Jerdes position. Among other deficiencies, *Jennings* does not make clear whether the instrument at issue is an escrow agreement, under which the Seller retained title and the other

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<sup>24</sup> See *State ex. rel. Foley v. Superior Court of King County*, 57 Wn. 2d 571, 358 P.2d 550 (1961) [immediate forfeiture denied]; *Dill v. Zilke*, 26 Wn. 2d 246, 173 P.2d 977 (1946) [same]; *John R. Hansen, Inc. v. Pacific International Corp.*, 76 Wn. 2d 220, 455 P.2d 946 (1969) [forfeiture not enforced]; *Jones v. Brandt*, 2 Wn. App. 936, 471 P.2d 696 (1970) [forfeiture denied due to lack of tender]; *Sisson v. Durrant*, 152 Wn. 382, 278 P. 174 (1929) [no forfeiture ordered]. Two other cited cases do not directly address real estate contract forfeiture. See *Estate of Bachmeier v. Bachmeier*, 147 Wn. 2d 60, 52 P.3d 22 (2002) [interpretation of community property agreement]; *Kruger* [vendee's timber removal right].

<sup>25</sup> See Jerdes' Brief at 3, 11.

incidents of ownership, or a more traditional real estate contract, under which the vendee obtained possessory and ownership rights.

Even if one assumes that *Jennings* is factually based on an escrow/purchase and sale agreement, it properly characterized the relief granted as “liquidated damages.”<sup>26</sup> As such, *Jennings* is subject to the current rules relating to liquidated damages/penalties, articulated in *Wallace* and *Watson*. As established above, and in Savchuk’s Brief, the principle emerging from those modern precedents clearly condemn the Jerdes’ retention of the \$500,000 windfall as an impermissible penalty.

In the alternative, should one view *Jennings* as simply a traditional real estate contract case, then as established above, it has no application to the PSA here. Moreover, any attempt by the Jerdes to enforce a forfeiture would require invoking the protections and provisions set forth in the Real Estate Contractor Forfeiture Act with which the Jerdes have not complied. As a consequence, neither *Jennings*, nor the other real estate contract cases cited by the Jerdes, provides any support for the Jerdes’ position.

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<sup>26</sup> 43 Wn. at 306.

**III. CONCLUSION**

Savchuk is entitled to the relief set forth in his Brief, including its Conclusion. As established above, nothing in the Jerdes' Brief undermines the grounds for reversal set forth in Savchuk's Brief. As a consequence, this Court should reverse the judgment below and order the relief set forth in Savchuk's Brief and summarized in its Conclusion.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of March, 2010.

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**APPELLANT'S REPLY BRIEF  
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Westlaw

Not Reported in F.Supp.2d  
 Not Reported in F.Supp.2d, 2008 WL 2063557 (W.D.Wash.)  
 (Cite as: 2008 WL 2063557 (W.D.Wash.))

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,  
 at Tacoma.  
 COMMERCIAL DEVELOPMENT COMPANY, a  
 Missouri corporation; Environmental Liability  
 Transfer Inc., a Missouri corporation; and Wash Pa-  
 per LLC, a Missouri  
 Washington limited liability company as assign,  
 Plaintiffs,  
 v.  
 ABITIBI-CONSOLIDATED INC., a foreign cor-  
 poration, and Vanessa Herzog,  
 individually and her marital community, Defend-  
 ants.  
 Vanessa Herzog, individually and her marital com-  
 munity, Intervenor Plaintiff,  
 v.  
 Commercial Development Company, a Missouri  
 corporation; Environmental Liability  
 Transfer Inc., a Missouri corporation; and Wash Pa-  
 per LLC, a Missouri  
 Washington limited liability company as assign,  
 Defendants in Intervention.  
**No. C07-5172RJB.**

May 13, 2008.

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 venor Plaintiff.

Bradley P. Thoreson, Christopher Robert Osborn,  
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ORDER ON ABITIBI'S MOTION FOR PARTIAL  
 SUMMARY JUDGMENT DISMISSING  
 PLAINTIFFS'  
 FIRST CLAIM FOR RELIEF AND THIRD  
 CLAIM FOR RELIEF  
 ROBERT J. BRYAN, District Judge.

\*1 This matter comes before the Court on Abitibi-  
 Consolidated Inc.'s ("Abitibi") Motion for Partial  
 Summary Judgment Dismissing Plaintiffs' First  
 Claim for Relief and Third Claim for Relief. Dkt.  
 142. The Court has considered the pleadings filed  
 in support of and in opposition to the motion and  
 the file herein.

**I. FACTS AND PROCEDURAL BACKGROUND**  
 Plaintiffs originally filed this action on March 21,  
 2007, in Pierce County, Washington Superior  
 Court, alleging that Abitibi wrongfully refused to  
 sell Plaintiffs commercial real property located in  
 Steilacoom, Washington. Dkt. 1; Dkt. 25, at 10-11.  
 The subject property is approximately 84 acres and  
 was a former paper and pulp mill site. *Id.*

**A. RELEVANT EVENTS**

The relevant events are recounted at length in the  
 Order on Abitibi's Motion for Partial Summary  
 Judgment Dismissing Specific Performance Claims  
 (Dkt.130), and are incorporated herein by this refer-  
 ence with a few noted additions:

As an addition to the prior Order on Abitibi's Mo-  
 tion for Partial Summary Judgment Dismissing  
 Specific Performance Claims, the Court notes that  
 there is evidence in the record that Plaintiffs sub-  
 mitted a letters of intent to Abitibi on October, 25,  
 2005, and February 6, 2006 regarding the subject  
 property. Dkt. 174, at 7-8, and 12-13. Abitibi re-  
 sponded with a letter, dated April 5, 2006 and  
 signed by Vanessa Herzog, it's real estate agent,

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which indicated that Abitibi had "selected two potential purchasers to move forward with." Dkt. 174, at 17. The letter then stated that Abitibi's goal was to put the "property under contract with one purchaser, based on a nonnegotiable price with non-refundable earnest money." *Id.* The letter indicated that Abitibi would provide certain documents and an opportunity for Plaintiffs to have access to the property. *Id.* The letter stated that by May 15, 2006, Abitibi wanted Plaintiffs to resubmit their offer. *Id.*

The Court notes that for the purposes of this motion. Plaintiffs additionally point to an email from Ms. Minville, dated October 18, 2006, which according to Plaintiffs, "informed Defendant's environmental counsel that Plaintiffs had been identified as the purchasers for the property," as evidence that they had a deal. Dkt. 173, at 7, (*citing* Dkt. 97, at 17). That email references a meeting with the Washington State Department of Ecology and states that she "copied Mike McCartney, who is legal counsel for ELT, our purchaser for the West Tacoma site, who should also participate." Dkt. 97, at 17.

#### **B. ALLEGATIONS IN THE COMPLAINT AND PROCEDURAL HISTORY**

The Second Amended Complaint alleges that Abitibi, through its real estate agent, Vanessa Herzog, listed the subject property for sale. Dkt. 97, at 2. Plaintiffs allege that, on June 1, 2006, as a result of "substantial negotiations," Plaintiffs submitted an executed Letter of Intent to Abitibi. *Id.* at 4. Plaintiffs allege that the Letter of Intent was "legally binding upon Purchaser and Seller subject only to negotiation and execution of a mutually acceptable Purchase and Sale Agreement." *Id.* at 9. Plaintiffs allege that Herzog represented in the July 27, 2006 email that Plaintiff had been "selected as the purchaser of the Abitibi property." *Id.* at 5. Plaintiffs allege that on February 16, 2007, Defendants demanded additional compensation for the property. *Id.* at 6. Plaintiffs allege that Abitibi and Herzog had been showing the property to other prospective purchasers without informing Plaintiffs or

the other purchasers. *Id.* Plaintiffs allege that on February 27, 2007, Herzog forwarded an email containing Mr. Paul Brain's (her husband and a Washington attorney) legal opinion of the enforceability of the Letter of Intent to Abitibi. *Id.* at 7. Plaintiffs allege that Herzog forwarded the email to persuade Abitibi to breach its contractual obligations to Plaintiff under the color of a legal opinion. *Id.*

\*2 Plaintiffs make claims for breach of contract, promissory estoppel, violations of the implied covenants of good faith and fair dealing, fraud, and injunctive relief against Abitibi. *Id.* at 8-12. Plaintiffs' claim for violations of the Sarbanes Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745, was dismissed with prejudice upon Defendant Abitibi's Motion for Partial Summary Judgment. Dkt. 77. On May 2, 2008, the Court was notified that Plaintiffs' fraud claim against Herzog was resolved. Dkt. 172. Plaintiffs sought specific performance of the parties' alleged real estate contract, and still seek injunctive relief, and monetary damages. Dkt. 97 at 13-14. Plaintiffs' claims for specific performance were dismissed on April 1, 2008. Dkt. 130. The Motion for Reconsideration on the Order dismissing the specific performance claims was denied on April 16, 2008. Dkt. 152. The instant motion seeks to have Plaintiffs' first claim for breach of contract and third claim for breach of the implied covenant of good faith and fair dealing dismissed. Dkt. 142.

Plaintiffs filed a Notice of Lis Pendens in Pierce County Superior Court and recorded the Notice of Lis Pendens in the county real property records on March 23, 2007. Dkt. 1-2, at 8-15. On April 4, 2007, Abitibi removed the case to this Court. Dkts. 1 and 2.

On October 1, 2007, Ms. Herzog and her marital community's Motion to Intervene in this matter was granted. Dkt. 37. The Court was informed that claims as between Plaintiffs and Intervenors were resolved in a pleading filed on May 2, 2008. Dkt. 172.

#### **C. PENDING MOTION FOR SUMMARY**

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## JUDGMENT

Abitibi moves for summary dismissal, with prejudice, of Plaintiffs' claims for breach of contract and breach of the duty of good faith and fair dealing. Dkt. 142. Abitibi argues that: 1) the parties did not form an enforceable agreement based on the drafts of the Purchase and Sale Agreements, 2) the Letter of Intent is not enforceable because it fails to comply with the Statute of Frauds and expired without being accepted, 3) the Letter of Intent is not enforceable because it does not constitute any form of preliminary agreement to negotiate, and 4) Plaintiffs' third claim for breach of the implied covenant of good faith and fair dealing should be dismissed because the parties did not have an existing contract. Dkt. 142.

Plaintiffs' Respond, arguing that there are genuine issues of material fact in dispute regarding whether the parties had an enforceable agreement for the sale of the property. Dkt. 173. They argue that: 1) there was a meeting of the minds sufficient to create offer and acceptance necessary to form a binding contract; 2) the letter of Intent was signed for the purposes of the Statute of Frauds, 3) the Letter of Intent contains all material terms required to form a valid contract for the cash sale of real property, and 4) Defendants failed to negotiate in good faith after the Letter of Intent. Dkt. 173.

\*3 Abitibi replies, and argues that 1) none of the 40 "facts" identified in Plaintiffs' opposition are sufficient to defeat Abitibi's motion, 2) the Court has already ruled that there was no meeting of the minds sufficient to create a binding contract, 3) the Court has already ruled that neither the Letter of Intent or any other documents satisfies the Statute of Frauds, and 4) in the absence of an enforceable agreement, there is no duty of good faith and fair dealing. Dkt. 178.

## II. DISCUSSION

### A. SUMMARY JUDGMENT STANDARD

Under Fed.R.Civ.P. 56(b) a "party against whom

relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim." Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."); *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial--e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. *Id.* The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*

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*Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

## B. BREACH OF CONTRACT CLAIM

\*4 In deciding whether Plaintiffs' contract claim should be dismissed, the first issue to be decided is whether the parties mutually assented to a contract. "Washington follows the objective manifestation test for contracts. Accordingly, for a contract to form, the parties must objectively manifest their mutual assent. Moreover, the terms assented to must be sufficiently definite." *Keystone Land and Development Co. v. Xerox Corp.*, 152 Wash.2d 171, 177-8, 94 P.3d 945 (2004) (*internal citations omitted*).

The second issue, in deciding whether this claim should be dismissed, is whether the Statute of Frauds is satisfied. In the state of Washington, "[e]very conveyance of real estate, or any interest therein ... shall be by deed." RCW 64.4.010. The deed must be in writing and include the acknowledged signature of the party bound thereby. RCW 64.4.020. This opinion will first examine the drafts of the Purchase and Sale Agreement, and then review the Letter of Intent and the emails Plaintiffs assert support their claim for breach of contract.

### 1. Purchase and Sale Agreement

This Court has already ruled that the draft Purchase and Sale Agreements can not be specifically enforced due to failure to comply with the Washington Statute of Frauds and the failure to agree on several material terms. Dkt. 130. It is undisputed that neither party signed any of the versions of the Purchase and Sale Agreement. Plaintiffs offer no new basis upon which to find that the various versions of the Purchase and Sale Agreement were accepted by either party or that they complied with the Statute of Frauds.

### 2. Letter of Intent

This Court has also held that, assuming the Letter of Intent was an offer to contract, it can not be specifically enforced because the parties did not agree on several material terms and because it did not comply with the Washington Statute of Frauds. Dkt. 130. Plaintiffs again assert that Ms. Herzog's July 27, 2006 email is a written acceptance sufficient to satisfy the statute of frauds. Dkt. 173, at 18. Plaintiffs' state that their "position, as articulated in prior motions, is that Ms. Herzog's July 27, 2006 email also constituted Defendants' acceptance of the binding LOI." Dkt. 173, at 14. The Court has already ruled twice on these issues, once in the Order Granting Abitibi's Motion for Partial Summary Judgment Dismissing Specific Performance Claims (Dkt.130) and in the Order Denying the Motion for Reconsideration (Dkt.154). In order to fully clarify, the Court will once again address these issues.

#### a. Ms. Herzog's Email as Acceptance of the Letter of Intent

On the outset, it is worth while to note that Plaintiffs have not shown that the terms in the Letter of Intent were "sufficiently definite," even if properly accepted, to constitute a contract for the sale of the property in question. *Keystone*, at 177-8, 94 P.3d 945. The Court has already ruled that the parties did not agree on several material terms for this deal. Dkt. 130. Ms. Herzog's email, even if construed as an acceptance, does not supply the additional terms. It is an email to a title company, requesting that they begin the title work, but acknowledging that the details of a contract have not been resolved. Dkt. 11, at 6. That email, sent from Ms. Herzog, stated:

\*5 Environmental Liability Transfer, Inc. has been selected as the purchaser for the Abitibi property. The purchase price is \$4,000,000. I will be forwarding the signed letter of intent and purchase and sale agreement shortly. Mark Hinds is the contact person for the selected purchaser for the Abitibi plant. Please send a copy of the 80% survey and title report to Mark and ELT's General

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Counsel, Mike McCartney.  
 Dkt. 11, at 6.

In any event, Plaintiffs have made no showing that Ms. Herzog had the authority to bind Abitibi. Under Washington law, real estate brokers and agents generally "do not have implied authority to make a contract of sale, or make representations as to the quality, condition, or income of property, but are limited to finding a purchaser, showing the property to him and identifying it or indicating its boundaries." *Larson v. Bear*, 38 Wash.2d 485, 489-90, 230 P.2d 610 (1951); *Sound Built Homes, Inc. v. Windermere Real Estate/South Inc.*, 118 Wash.App. 617, 625-26, 72 P.3d 788 (2003) (holding that, unless otherwise agreed, a real estate agent has authority to procure a willing and able buyer, but not authority to sell the land). Plaintiffs point to no evidence in the record that Ms. Herzog could accept the Letter of Intent or "sign" it on behalf of Abitibi. Even assuming that Ms. Herzog had the authority to bind Abitibi, this Court has already ruled that no "reasonable jury could conclude that this email constitutes a written signature to the Letter of Intent." Dkt. 130.

Contrary to Plaintiffs' assertions, the Court did not rule that a party could not accept a Letter of Intent via email. The ruling was that, even assuming a party could accept via email, no reasonable jury could conclude that July 27, 2006 email, from a real estate agent to a title company, was an acceptance of the Letter of Intent. As stated in the prior order, the email in no manner indicates that it operates as an acceptance of the Letter of Intent. Plaintiffs have failed to show that there is any evidence that accepting the Letter of Intent was the intent of the email.

Even assuming Ms. Herzog had authority to bind Abitibi, and even assuming her 27 July email was a signed document, it can not be construed as an acceptance of any offer made in the Letter of Intent. At most, it was an agreement to continue negotiations. These negotiations did, in fact, continue.

b. *Ms. Herzog's Email and the Statute of Frauds*

Plaintiffs cited *Wagers v. Associated Mortg. Investors*, 577 P.2d 622, 19 Wash.App. 758 (1978) in their Motion for Reconsideration for the following proposition:

**Sales of land to be enforceable must ordinarily be in writing signed by the party to be charged. However, a writing is not always essential to the validity of the contract. An oral agreement can be equally effective and binding as a written one when the terms are reasonably established in writing by a series of documents and/or written memorandum which would establish the subject matter, consideration, identity of the parties and the terms of the agreement.**

\*6 Dkt. 148, at 3. Notably, the Court in *Wagers* cited no authority for the above proposition. *Wagers* at 764. Moreover, no other court has cited this case for this proposition in the 30 years of its existence. *Id.* Additionally, the *Wagers* Court fails, in this recitation, to include a critical component of the Statute of Frauds: that there must be a *signed* writing pursuant to the statute. RCW 64.4.020 (*emphasis added*). In any event, the *Wagers* Court went on to hold that the "buyer's unilaterally executed earnest money agreement, together with the letters exchanged between the buyer's and seller's attorneys, fail[ed] to establish an agreement between the parties on essential contract terms and, therefore, did not constitute a sufficient writing to satisfy the statute of frauds." *Id.* As the Court in *Wagers* found, this Court has already held that there are several material terms upon which the parties did not reach agreement. Dkt. 130. These material terms include: environmental indemnity provisions, payment of the sales tax, issues surrounding earnest money, who pays the real estate brokers' commissions, and others. *Id.* Even if the quote from *Wagers* is good law, in this case, the terms of any agreement were not reasonably established in any writing.

Plaintiffs have a motion pending for certification of

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an order for appeal. Dkt. 171. Plaintiffs argue, in part, that this Court did not properly identify the material terms of a cash sale of real property in the state of Washington. *Id.* Plaintiffs have not shown that the terms identified by the Court in the Order on Abitibi's Motion for Partial Summary Judgment Dismissing Specific Performance Claims were not material in the circumstances here. For example, all parties have acknowledged that the environmental condition of the property was a significant factor and that environmental indemnity was an important component of the deal. The record indicates, and the prior order found that parties did not agree on the environmental indemnity. Dkt. 130. Plaintiffs have not shown that the parties here had a meeting of the minds on all material terms.

The Court acknowledges that the Statute of Frauds may be satisfied by one writing or several writings. *Berg v. Ting*, 125 Wash.2d 544, 569, 886 P.2d 564 (1995); *Hunt v. Great Western Bank*, 774 P.2d 554, 54 Wash.App. 571, 573 (1989); *Wagers v. Associated Mortg. Investors*, 577 P.2d 622, 19 Wash.App. 758 (1978). Under the facts here, however, the email from a real estate agent to a title company, referencing "the signed Letter of Intent," which did not exist, is simply insufficient.

*c. Ms. Minville's Email of October 18, 2006 as Acceptance of the Letter of Intent*

Plaintiffs now argue that Ms. Minville's October 18, 2006 email also constituted an acceptance of the offer in the Letter of Intent and was sufficient to satisfy the Statute of Frauds. Dkt. 173, at 18. Although unclear from the record, the email appears to refer to a proposed meeting between people from Abitibi and the Washington State Department of Ecology. Dkt. 97, at 17. Equally unclear is the identity of M. Pors, or that person's role in this matter. The email states, in relevant part,

\*7 Bonjour M. Pors:

Thank you for your email. We are indeed interested in participating in the meeting via conference call or to a wrap-up meeting after. I will

have limited availabilities tomorrow but will be reachable via email. I've copied Mike McCartney who is legal counsel with ELT, our purchaser for the West Tacoma site, should also participate or [be] able to designate someone else who will.

Regards,

Alice Minville

Dkt. 97, at 17. Like the July 27, 2006 email from Ms. Herzog, no reasonable jury could conclude that Ms. Minville's October 18, 2006 email constituted an acceptance of the Letter of Intent. A question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Keystone Land and Development Co. v. Xerox Corp.*, 152 Wash.2d 171, 178 n. 10, 94 P.3d 945 (2004). It in no manner references the Letter of Intent, and does not state that it operates as an acceptance of the Letter of Intent. Plaintiffs have not pointed to any evidence in the record that Ms. Minville intended to accept the Letter of Intent when she sent the email. It is not an acknowledgment that Abitibi has assented to the terms of the Letter of Intent. In fact, the email apparently references further negotiations, not a final agreement.

*d. Ms. Minville's Email of October 18, 2006 and the Statute of Frauds*

Plaintiffs have failed to show that this email satisfies the Statute of Frauds. There is no evidence that the Letter of Intent is in any manner connected with this email. Ms. Minville's email of October 18, 2006 does not satisfy the Statute of Frauds.

### 3. Conclusion

Plaintiffs have failed to show that the parties objectively manifested their mutual assent to terms which were sufficiently definite. *Keystone* at 177-8, 94 P.3d 945. The requirements of the Statute of Frauds were not met. Plaintiffs' contract claim should be dismissed.

### C. CLAIM FOR VIOLATIONS OF THE IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING

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In Washington, "there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract. The duty exists only 'in relation to performance of a specific contract term.'" *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wash.2d 151, 176 (2004). The Plaintiffs were unable to establish that there were issues of fact as to whether the parties had an existing contract for the sale of the property. Accordingly, Plaintiffs' claim for violation of the implied covenants of good faith and fair dealing should be dismissed.

### III. ORDER

Therefore, it is hereby, **ORDERED** that:

. Abitibi's Motion for Partial Summary Judgment Dismissing Plaintiffs' First Claim for Relief and Third Claim for Relief (Dkt.142) is **GRANTED**;

. Plaintiff's claim for breach of contract and violations of the implied covenants of good faith and fair dealing are **DISMISSED**; and

. The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

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Creditors' Remedies - Debtors' Relief

Marjorie Dick Rombauer[a0], Pocket Part By Contributing Practice Experts

Chapter

3. Realizing on Consensual Security[\*]

C. Forfeiture of Real Estate Contracts

### § 3.81. Real estate contract forfeitures—Background

#### West's Key Number Digest

West's Key Number Digest, Vendor and Purchaser  101West's Key Number Digest, Vendor and Purchaser  299(1) to 299(4)

#### Legal Encyclopedias

C.J.S., Vendor and Purchaser 463

C.J.S., Vendor and Purchaser 466

C.J.S., Vendor and Purchaser 470 to 472

C.J.S., Vendor and Purchaser §§ 139

Real estate contracts have been used in the State of Washington for many years. They are statutorily defined as “any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price.”[1] Earnest money agreements and purchase options are specifically excluded from this definition.

Contracts provide simple documentation of seller financing. The document encompasses the terms of payment, usually found in a promissory note, and sets forth the seller's rights to forfeit the buyer's interest if the buyer fails to meet those terms.

A real estate contract divides the title to the real property into the seller's interest and the buyer's interest. The seller has “bare legal title” which is in the nature of both real and personal property.[2] The buyer has a real property interest.[3] Either party can assign her interest or encumber it, either voluntarily or involuntarily.[4] If the seller's interest is transferred or encumbered, the event should be perfected by recording as for real property and filing as for personal property.[5] The transfer of a buyer's interest need only be recorded.[6]

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The real estate contract has always been used more in the Eastern part of the state given the much greater percentage of land used for agriculture. The real estate contract allows for a one document transaction. In addition, non-judicial foreclosures may not be conducted on agricultural land.[7]. Finally, the Real Estate Contract Forfeiture Act (“RECFA”) is clearly tailored to agricultural land. Unlike the deed of trust statute which never refers to crops, the RECFA makes clear the effect of forfeiture on both timber and crops.[8]

Despite the appeal of the real estate contract to the layman, the relative complexity in legal title created by the contracts is partly the reason for their decreasing popularity in the legal profession, especially in the less agrarian, Western portion of the state. In addition to the pitfalls of correctly documenting and perfecting transfers, the seller's retention of title caused concern. Given that the seller and buyer often had no connection other than the real property, it was possible to find instances in which a buyer had paid her obligation in full and yet had difficulty in locating the seller to obtain title. A seller's death or incompetency could result in such confusion as to require a lawsuit by the buyer to obtain and quiet title.

Finally, the nature of the real estate contract itself has been a question. Is it a contract, or is it really a security device like a mortgage or deed of trust? The latter concept has come to prevail both in case law[9] and the forfeiture statute.

Similarly, the legal profession disliked the confusion inherent in addressing breaches of real estate contracts. While a breach of a real estate contract could (and still can) be treated like a breach of any other contract,[10] its unique remedy is forfeiture. The term refers to the buyer forfeiting title to the property together with any improvements, crops or timber thereon.[11] While objectively not much different from a nonjudicial foreclosure, the procedure has long been viewed as harsh, due to its speed, lack of a redemption period and lack of a neutral trustee, and most of all, due to the potentially huge windfall to the seller who regains the property, its appreciation and improvements and retains the payments already made.

This perception led to the common practice of initiating an action to quiet title after the forfeiture process was completed in order to obtain insurable title. It was customary for the judge to allow the buyer/defendant a “grace period” in which to reinstate the deed of trust.[12] These grace periods generally were about ninety days. The lack of any applicable statute rendered grace periods entirely creatures of equity and their duration often reflected the facts of the case.[13] The uncertainty and variability of this procedure led to the enactment in 1985 of the present Real Estate Contract Forfeiture Statute, RCWA Chapter 61.30.

[FNa0] Professor Emeritus Of Law, University Of Washington School Of Law.

[FN\*] Subchapters A (§§ 3.1 to 3.19), B (§§ 3.30 to 3.73), and C (§§ 3.81 to 3.102) of this chapter were written by Kathleen Kim Coghlan, Esq., of the Washington bar, who is a partner in the Seattle firm of Keller Rohrback L.L.P. By special arrangement with West Group and the author, subchapter A was published as Chapter 18 in Volume 18 of West's Washington Practice Series, Real Estate: Transactions, by Professor William B. Stoebuck, with some alteration by Professor Stoebuck.

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[FN1] RCWA 61.30.010(1).

[FN2] *In re Heide*, 915 F.2d 531, 12 U.C.C. Rep. Serv. 2d 813 (9th Cir. 1990); *Crichton v. Himlie Properties*, 105 Wash. 2d 191, 713 P.2d 108, 42 U.C.C. Rep. Serv. 1023 (1986); *In re Freeborn*, 94 Wash. 2d

336, 617 P.2d 424, 29 U.C.C. Rep. Serv. 1625 (1980).

[FN3] Tomlinson v. Clarke, 118 Wash. 2d 498, 825 P.2d 706 (1992).

Tomlinson v. Clarke, 118 Wash. 2d 498, 825 P.2d 706 (1992), cited previously, first made both these rulings. It did so while holding that the purchaser under a real estate contract can be a bona fide purchaser. In that context it has been cited by both *In re Smith*, 93 Wash. App. 282, 968 P.2d 904 (Div. 3 1998), rev. denied, 137 Wash. 2d 1033, 980 P.2d 1281 (1999), and *United Savings and Loan Bank v. Pallis*, 107 Wash. App. 398, 27 P.3d 629 (Div. 1 2001).

[FN4] RCWA 4.56.190 states that “real estate should not include the vendor's interest under a real estate contract for judgments rendered after [August 23, 1983].” This amendment was intended to protect contract buyers by preventing judgment liens from attaching to the seller's interest. However, judgment liens which had attached to the nonhomestead real property before the sale on contract will remain as a lien prior to the purchaser's interest. *Pumilite Tualatin, Inc. v. Cromb Leasing, Inc.*, 82 Wash. App. 767, 919 P.2d 1256 (Div. 2 1996).

[FN5] See fn.2 *supra*.

[FN6] Tomlinson v. Clarke, 118 Wash. 2d 498, 825 P.2d 706 (1992).

Tomlinson v. Clarke, 118 Wash. 2d 498, 825 P.2d 706 (1992), cited previously, first made both these rulings. It did so while holding that the purchaser under a real estate contract can be a bona fide purchaser. In that context it has been cited by both *In re Smith*, 93 Wash. App. 282, 968 P.2d 904 (Div. 3 1998), rev. denied, 137 Wash. 2d 1033, 980 P.2d 1281 (1999) and *United Savings and Loan Bank v. Pallis*, 107 Wash. App. 398, 27 P.3d 629 (Div. 1 2001).

[FN7] RCWA 61.24.030(2).

[FN8] RCWA 61.30.100(2)(c).

[FN9] *In re McDaniel*, 89 B.R. 861 (Bankr. E.D. Wash. 1988); Tomlinson v. Clarke, 118 Wash. 2d 498, 825 P.2d 706 (1992). *McDaniel* is cited with approval in *Kofmehl v. Steelman*, 80 Wash. App. 279, 908 P.2d 391 (Div. 3 1996). The court held that a real estate contract had two aspects: (1) a personal property lien-type security interest, and (2) a security interest in the real property.

[FN10] RCWA 61.30.020.

[FN11] RCWA 61.30.010(4) (the definition of “forfeit” or “forfeiture”) and RCWA 61.30.100(2)(c).

[FN12] *Ryker v. Stidham*, 17 Wash. App. 83, 561 P.2d 1103 (Div. 2 1977).

[FN13] *Markland v. Wheeldon*, 29 Wash. App. 517, 629 P.2d 921 (Div. 2 1981).

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**C**

West's Revised Code of Washington Annotated Currentness

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs &amp; Annos)

Chapter 61.30. Real Estate Contract Forfeitures

→ **61.30.010. Definitions**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Contract" or "real estate contract" means any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price. "Contract" or "real estate contract" does not include earnest money agreements and options to purchase.

(2) "Cure the default" or "cure" means to perform the obligations under the contract which are described in the notice of intent to forfeit and which are in default, to pay the costs and attorneys' fees prescribed in the contract, and, subject to RCW 61.30.090(1), to make all payments of money required of the purchaser by the contract which first become due after the notice of intent to forfeit is given and are due when cure is tendered.

(3) "Declaration of forfeiture" means the notice described in RCW 61.30.070(2).

(4) "Forfeit" or "forfeiture" means to cancel the purchaser's rights under a real estate contract and to terminate all right, title, and interest in the property of the purchaser and of persons claiming by or through the purchaser, all to the extent provided in this chapter, because of a breach of one or more of the purchaser's obligations under the contract. A judicial foreclosure of a real estate contract as a mortgage shall not be considered a forfeiture under this chapter.

(5) "Notice of intent to forfeit" means the notice described in RCW 61.30.070(1).

(6) "Property" means that portion of the real property which is the subject of a real estate contract, legal title to which has not been conveyed to the purchaser.

(7) "Purchaser" means the person denominated in a real estate contract as the purchaser of the property or an interest therein or, if applicable, the purchaser's successors or assigns in interest to all or any part of the property, whether by voluntary or involuntary transfer or transfer by operation of law. If the purchaser's interest in the property is subject to a proceeding in probate, a receivership, a guardianship, or a proceeding under the federal bankruptcy laws, "purchaser" means the personal representative, the receiver, the guardian, the trustee in bankruptcy, or the debtor in possession, as applicable. However, "purchaser" does not include an assignee or any other person whose only interest or claim is in the nature of a lien or other security interest.

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(8) "Required notices" means the notice of intent to forfeit and the declaration of forfeiture.

(9) "Seller" means the person denominated in a real estate contract as the seller of the property or an interest therein or, if applicable, the seller's successors or assigns in interest to all or any part of the property or the contract, whether by voluntary or involuntary transfer or transfer by operation of law. If the seller's interest in the property is subject to a proceeding in probate, a receivership, a guardianship, or a proceeding under the federal bankruptcy laws, "seller" means the personal representative, the receiver, the guardian, the trustee in bankruptcy, or the debtor in possession, as applicable. However, "seller" does not include an assignee or any other person whose only interest or claim is in the nature of a lien or other security interest and does not include an assignee who has not been conveyed legal title to any portion of the property.

(10) "Time for cure" means the time provided in RCW 61.30.070(1)(e) as it may be extended as provided in this chapter or any longer period agreed to by the seller.

#### CREDIT(S)

[1988 c 86 § 1; 1985 c 237 § 1.]

#### HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 1, in the definition of "forfeit" inserted "or 'forfeiture' "; added the last sentence; and made a nonsubstantive change; in the definition of "purchaser" in the first sentence, following "purchaser's" deleted "personal representative or"; following "interest" added "to all or any part of the property"; in the second sentence, preceding "receivership" added "proceeding in probate, a"; and preceding "receiver" added "personal representative, the"; in the definition of "seller" in the first sentence, following "seller's" deleted "personal representative or"; following "interest" added "to all or any part of the property or the contract"; preceding "receivership" inserted "proceeding in probate, a"; and preceding "receiver" inserted "personal representative, the"; and rewrote the definition of "Time for cure" which previously read:

" 'Time for cure' means the time provided in RCW 61.30.070(1)(e), or as provided by court order under RCW 61.30.110, or any longer period agreed to by the seller".

#### RESEARCH REFERENCES

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Restatement (3d) of Property (Mortgages) § 3.4, a Contract for Deed Creates a Mortgage.

18 Wash. Prac. Series § 21.13, Conveyance and Mortgage by Vendor.

18 Wash. Prac. Series § 21.33, Statutory Forfeiture--Notice of Intent to Forfeit.

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→ **61.30.020. Forfeiture or foreclosure--Notices--Other remedies not limited**

(1) A purchaser's rights under a real estate contract shall not be forfeited except as provided in this chapter. Forfeiture shall be accomplished by giving and recording the required notices as specified in this chapter. This chapter shall not be construed as prohibiting or limiting any remedy which is not governed or restricted by this chapter and which is otherwise available to the seller or the purchaser. At the seller's option, a real estate contract may be foreclosed in the manner and subject to the law applicable to the foreclosure of a mortgage in this state.

(2) The seller's commencement of an action to foreclose the contract as a mortgage shall not constitute an election of remedies so as to bar the seller from forfeiting the contract under this chapter for the same or different breach. Similarly, the seller's commencement of a forfeiture under this chapter shall not constitute an election of remedies so as to bar the seller from foreclosing the contract as a mortgage. However, the seller shall not maintain concurrently an action to foreclose the contract and a forfeiture under this chapter whether for the same or different breaches. If, after giving or recording a notice of intent to forfeit, the seller elects to foreclose the contract as a mortgage, the seller shall record a notice cancelling the notice of intent to forfeit which refers to the notice of intent by its recording number. Not later than ten days after the notice of cancellation is recorded, the seller shall mail or serve copies of the notice of cancellation to each person who was mailed or served the notice of intent to forfeit, and shall post it in a conspicuous place on the property if the notice of intent was posted. The seller need not publish the notice of cancellation.

CREDIT(S)

[1988 c 86 § 2; 1985 c 237 § 2.]

HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 2, designated subsec. (1); then, in subsec. (1), added the last sentence; and added subsec. (2).

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→ **61.30.030. Conditions to forfeiture**

It shall be a condition to forfeiture of a real estate contract that:

- (1) The contract being forfeited, or a memorandum thereof, is recorded in each county in which any of the property is located;
- (2) A breach has occurred in one or more of the purchaser's obligations under the contract and the contract provides that as a result of such breach the seller is entitled to forfeit the contract; and
- (3) Except for petitions for the appointment of a receiver, no arbitration or judicial action is pending on a claim made by the seller against the purchaser on any obligation secured by the contract.

CREDIT(S)

[1988 c 86 § 3; 1985 c 237 § 3.]

HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 3, in subsec. (3), preceding "action" inserted "arbitration or judicial".

CROSS REFERENCES

Appointment of receiver in certain actions under this section, see § 7.60.025.

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Mortgages  402.Vendor and Purchaser  88 to 94.

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C.J.S. Mortgages §§ 102, 506, 509, 510, 512, 519, 521.

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→ **61.30.040. Notices--Persons required to be notified--Recording**

(1) The required notices shall be given to each purchaser last known to the seller or the seller's agent or attorney giving the notice and to each person who, at the time the notice of intent to forfeit is recorded, is the last holder of record of a purchaser's interest. Failure to comply with this subsection in any material respect shall render any purported forfeiture based upon the required notices void.

(2) The required notices shall also be given to each of the following persons whose interest the seller desires to forfeit if the default is not cured:

(a) The holders and claimants of record at the time the notice of intent to forfeit is recorded of any interests in or liens upon all or any portion of the property derived through the purchaser or which are otherwise subordinate to the seller's interest in the property; and

(b) All persons occupying the property at the time the notice of intent to forfeit is recorded and whose identities are reasonably discoverable by the seller.

Any forfeiture based upon the required notices shall be void as to each person described in this subsection (2) to whom the notices are not given in accordance with this chapter in any material respect.

(3) The required notices shall also be given to each person who at the time the notice of intent to forfeit is recorded has recorded in each county in which any of the property is located a request to receive the required notices, which request (a) identifies the contract being forfeited by reference to its date, the original parties thereto, and a legal description of the property; (b) contains the name and address for notice of the person making the request; and (c) is executed and acknowledged by the requesting person.

(4) Except as otherwise provided in the contract or other agreement with the seller and except as otherwise provided in this section, the seller shall not be required to give any required notice to any person whose interest in the property is not of record or if such interest is first acquired after the time the notice of intent to forfeit is recorded. Subject to subsection (5) of this section, all such persons hold their interest subject to the potential forfeiture described in the recorded notice of intent to forfeit and shall be bound by any forfeiture made pursuant thereto as permitted in this chapter as if the required notices were given to them.

(5) Before the commencement of the time for cure, the notice of intent to forfeit shall be recorded in each county in which any of the property is located. The notice of intent to forfeit shall become ineffective for all purposes one year after the expiration of the time for cure stated in such notice or in any recorded extension thereof executed by the seller or the seller's agent or attorney unless, prior to the end of that year, the declaration of forfeiture based on such notice or a lis pendens incident to an action under this chapter is recorded. The time for cure may not be extended in increments of more than one year each, and extensions stated to be for more than one year or for an unstated or indefinite period shall be deemed to be for one year for the purposes of this subsection. Recording a lis pendens when a notice of intent to forfeit is effective shall cause such notice to continue in effect until the later of one year after the expiration of the time for cure or thirty days after final disposition of the action evidenced by the lis pendens.

(6) The declaration of forfeiture shall be recorded in each county in which any of the property is located after the time for cure has expired without the default having been cured.

#### CREDIT(S)

[1988 c 86 § 4; 1985 c 237 § 4.]

#### HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 4, rewrote the section, which formerly read:

“(1) The required notices shall be given to each purchaser last known to the seller or the seller's agent or attorney giving the notice and to each person who, at the time the notice of intent to forfeit is recorded, is the last holder of record of the purchaser's interest. Failure to comply with this subsection shall render any purported forfeiture based upon the required notices void.

“(2) The required notices shall also be given to each of the following persons whose interest the seller desires to forfeit if the default is not cured:

“(a) The holders of record at the time the notice of intent to forfeit is recorded of security interests in or liens against the purchaser's interest in the contract or the purchaser's interest in the property or any portion of either;

“(b) The holders of record at the time the notice of intent to forfeit is recorded of the seller's or the purchaser's interest in any real estate contract affecting the property which is subordinate to the contract being forfeited; and

“(c) All other persons occupying the property at the time the notice of intent to forfeit is recorded and whose identities may be ascertained by reasonable inquiry.

“Any forfeiture based upon the required notices shall be void as to each person described in this subsection to

whom the notices are not given.

“(3) The required notices shall also be given to all persons who at the time the notice of intent to forfeit is recorded have recorded in each county in which any of the property is located a request to receive the required notices, which request (a) identifies the contract being forfeited by reference to its date, the original parties thereto, the property description, and the recording number of the contract or memorandum thereof; (b) contains the name and address for notice of the person making the request; and (c) is executed and acknowledged by the requesting person.

“(4) Except as otherwise provided in the contract or other agreement with the seller and except as otherwise provided in this section, the seller shall not be required to give any required notice to any person whose interest in the purchaser's rights under the contract or the property or any portion of either is not of record or if such interest is first acquired after the time the notice of intent to forfeit is recorded. Subject to subsection (5) of this section, all such persons hold their interest subject to the potential forfeiture described in the recorded notice of intent to forfeit and shall be bound by any forfeiture made pursuant thereto as permitted in this chapter as if the required notices were given to them.

“(5) Before the commencement of the time for cure, the notice of intent to forfeit shall be recorded in each county in which any of the property is located. If, not later than one year after the time for cure stated in a recorded notice of intent to forfeit or any recorded extension thereof, no declaration of forfeiture based upon the recorded notice of intent to forfeit has been recorded, no lis pendens has been filed incident to an action under this chapter, and no extension of the time for cure executed by the seller and the purchaser has been recorded, the notice of intent to forfeit shall not be effective for any purpose under this chapter nor shall it impart any constructive or other notice to third persons acquiring an interest in the purchaser's interest in the contract or the property or any portion of either.

“(6) The declaration of forfeiture shall be recorded in each county in which any of the property is located after the time for cure has expired without the default having been cured.”

#### CROSS REFERENCES

Appointment of receiver in certain actions, see § 7.60.025.

#### LIBRARY REFERENCES

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Mortgages  391.  
 Vendor and Purchaser  101 to 104.  
 Westlaw Topic Nos. 266, 400.  
 C.J.S. Contracts § 452.  
 C.J.S. Mortgages §§ 501, 503, 505.  
 C.J.S. Vendor and Purchaser §§ 162, 163, 206 to 219, 222, 234 to 243.

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→ **61.30.050. Notices--Form--Method of service**

(1) The required notices shall be given in writing. The notice of intent to forfeit shall be signed by the seller or by the seller's agent or attorney. The declaration of forfeiture shall be signed and sworn to by the seller. The seller may execute the declaration of forfeiture through an agent under a power of attorney which is of record at the time the declaration of forfeiture is recorded, but in so doing the seller shall be subject to liability under RCW 61.30.150 to the same extent as if the seller had personally signed and sworn to the declaration.

(2) The required notices shall be given:

(a) In any manner provided in the contract or other agreement with the seller; and

(b) By either personal service in the manner required for civil actions in any county in which any of the property is located or by mailing a copy to the person for whom it is intended, postage prepaid, by certified or registered mail with return receipt requested and by regular first-class mail, addressed to the person at the person's address last known to the seller or the seller's agent or attorney giving the notice. For the purposes of this subsection, the seller or the seller's agent or attorney giving the notice may rely upon the address stated in any recorded document which entitles a person to receive the required notices unless the seller or the seller's agent or attorney giving the notice knows such address to be incorrect.

If the address or identity of a person for whom the required notices are intended is not known to or reasonably discoverable at the time the notice is given by the seller or the seller's agent or attorney giving the notice, the required notices shall be given to such person by posting a copy in a conspicuous place on the property and publishing a copy thereof. The notice shall be directed to the attention of all persons for whom the notice is intended, including the names of the persons, if so known or reasonably discoverable. The publication shall be made in a newspaper approved pursuant to RCW 65.16.040 and published in each county in which any of the property is located or, if no approved newspaper is published in the county, in an adjoining county, and if no approved newspaper is published in the county or adjoining county, then in an approved newspaper published in the capital of the state. The notice of intent to forfeit shall be published once a week for two consecutive weeks. The declaration of forfeiture shall be published once.

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-Chapter 61.30. Real Estate Contract Forfeitures

→ **61.30.060. Notice of intent to forfeit--Declaration of forfeiture--Time limitations**

The notice of intent to forfeit shall be given not later than ten days after it is recorded. The declaration of forfeiture shall be given not later than three days after it is recorded. Either required notice may be given before it is recorded, but the declaration of forfeiture may not be given before the time for cure has expired. Notices which are served or mailed are given for the purposes of this section when served or mailed. Notices which must be posted and published as provided in RCW 61.30.050(2)(b) are given for the purposes of this section when both posted and first published.

CREDIT(S)

[1988 c 86 § 6; 1985 c 237 § 6.]

## HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 6, added the third, fourth, and fifth sentences.

## LIBRARY REFERENCES

2004 Main Volume

Vendor and Purchaser  100 to 102.

Westlaw Topic No. 400.

C.J.S. Contracts § 452.

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18 Wash. Prac. Series § 21.33, Statutory Forfeiture--Notice of Intent to Forfeit.

18 Wash. Prac. Series § 21.34, Statutory Forfeiture--Declaration of Forfeiture.

27 Wash. Prac. Series § 3.87, Service and Recording of the Notice of Intent.

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→ **61.30.070. Notice of intent to forfeit--Declaration of forfeiture--Contents**

- (1) The notice of intent to forfeit shall contain the following:
- (a) The name, address, and telephone number of the seller and, if any, the seller's agent or attorney giving the notice;
  - (b) A description of the contract, including the names of the original parties to the contract, the date of the contract, and the recording number of the contract or memorandum thereof;
  - (c) A legal description of the property;
  - (d) A description of each default under the contract on which the notice is based;
  - (e) A statement that the contract will be forfeited if all defaults are not cured by a date stated in the notice which is not less than ninety days after the notice of intent to forfeit is recorded or any longer period specified in the contract or other agreement with the seller;
  - (f) A statement of the effect of forfeiture, including, to the extent applicable that: (i) All right, title, and interest in the property of the purchaser and, to the extent elected by the seller, of all persons claiming through the purchaser or whose interests are otherwise subordinate to the seller's interest in the property shall be terminated; (ii) the purchaser's rights under the contract shall be canceled; (iii) all sums previously paid under the contract shall belong to and be retained by the seller or other person to whom paid and entitled thereto; (iv) all of the purchaser's rights in all improvements made to the property and in unharvested crops and timber thereon shall belong to the seller; and (v) the purchaser and all other persons occupying the property whose interests are forfeited shall be required to surrender possession of the property, improvements, and unharvested crops and timber to the seller ten days after the declaration of forfeiture is recorded;
  - (g) An itemized statement or, to the extent not known at the time the notice of intent to forfeit is given or recorded, a reasonable estimate of all payments of money in default and, for defaults not involving the failure to pay money, a statement of the action required to cure the default;

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- (h) An itemized statement of all other payments, charges, fees, and costs, if any, or, to the extent not known at the time the notice of intent is given or recorded, a reasonable estimate thereof, that are or may be required to cure the defaults;
- (i) A statement that the person to whom the notice is given may have the right to contest the forfeiture, or to seek an extension of time to cure the default if the default does not involve a failure to pay money, or both, by commencing a court action by filing and serving the summons and complaint before the declaration of forfeiture is recorded;
- (j) A statement that the person to whom the notice is given may have the right to request a court to order a public sale of the property; that such public sale will be ordered only if the court finds that the fair market value of the property substantially exceeds the debt owed under the contract and any other liens having priority over the seller's interest in the property; that the excess, if any, of the highest bid at the sale over the debt owed under the contract will be applied to the liens eliminated by the sale and the balance, if any, paid to the purchaser; that the court will require the person who requests the sale to deposit the anticipated sale costs with the clerk of the court; and that any action to obtain an order for public sale must be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded;
- (k) A statement that the seller is not required to give any person any other notice of default before the declaration which completes the forfeiture is given, or, if the contract or other agreement requires such notice, the identification of such notice and a statement of to whom, when, and how it is required to be given; and
- (l) Any additional information required by the contract or other agreement with the seller.
- (2) If the default is not cured before the time for cure has expired, the seller may forfeit the contract by giving and recording a declaration of forfeiture which contains the following:
- (a) The name, address, and telephone number of the seller;
- (b) A description of the contract, including the names of the original parties to the contract, the date of the contract, and the recording number of the contract or memorandum thereof;
- (c) A legal description of the property;
- (d) To the extent applicable, a statement that all the purchaser's rights under the contract are canceled and all right, title, and interest in the property of the purchaser and of all persons claiming an interest in all or any portion of the property through the purchaser or which is otherwise subordinate to the seller's interest in the property are terminated except to the extent otherwise stated in the declaration of forfeiture as to persons or claims named, identified, or described;

(e) To the extent applicable, a statement that all persons whose rights in the property have been terminated and who are in or come into possession of any portion of the property (including improvements and unharvested crops and timber) are required to surrender such possession to the seller not later than a specified date, which shall not be less than ten days after the declaration of forfeiture is recorded or such longer period provided in the contract or other agreement with the seller;

(f) A statement that the forfeiture was conducted in compliance with all requirements of this chapter in all material respects and applicable provisions of the contract;

(g) A statement that the purchaser and any person claiming any interest in the purchaser's rights under the contract or in the property who are given the notice of intent to forfeit and the declaration of forfeiture have the right to commence a court action to set the forfeiture aside by filing and serving the summons and complaint within sixty days after the date the declaration of forfeiture is recorded if the seller did not have the right to forfeit the contract or fails to comply with this chapter in any material respect; and

(h) Any additional information required by the contract or other agreement with the seller.

(3) The seller may include in either or both required notices any additional information the seller elects to include which is consistent with this chapter and with the contract or other agreement with the seller.

#### CREDIT(S)

[1988 c 86 § 7; 1985 c 237 § 7.]

#### HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 7, rewrote the section, which previously read:

“(1) The notice of intent to forfeit shall contain at least the following:

“(a) The name, address, and telephone number of the seller and, if any, the seller's agent or attorney giving the notice;

“(b) A description of the contract, including the names of the original parties to the contract, the date of the contract, and the recording number of the contract or memorandum thereof;

“(c) A legal description of the property;

“(d) A description of each default under the contract on which the notice is based;

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→ **61.30.080. Failure to give required notices**

(1) If the seller fails to give any required notice within the time required by this chapter, the seller may record and give a subsequent notice of intent to forfeit or declaration of forfeiture, as applicable. Any such subsequent notice shall (a) include revised dates and information to the extent necessary to conform to this chapter as if the superseded notice had not been given or recorded; (b) state that it supersedes the notice being replaced; and (c) render void the previous notice which it replaces.

(2) If the seller fails to give the notice of intent to forfeit to all persons whose interests the seller desires to forfeit or to record such notice as required by this chapter, and if the declaration of forfeiture has not been given or recorded, the seller may give and record a new set of notices as required by this chapter. However, the new notices shall contain a statement that they supersede and replace the earlier notices and shall provide a new time for cure.

(3) If the seller fails to give any required notice to all persons whose interests the seller desires to forfeit or to record such notice as required by this chapter, and if the declaration of forfeiture has been given or recorded, the seller may apply for a court order setting aside the forfeiture previously made, and to the extent such order is entered, the seller may proceed as if no forfeiture had been commenced. However, no such order may be obtained without joinder and service upon the persons who were given the required notices and all other persons whose interests the seller desires to forfeit.

## CREDIT(S)

[1988 c 86 § 8; 1985 c 237 § 8.]

## HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 8, rewrote the section, which previously read:

“(1) If the seller fails to give the notice of intent to forfeit to all persons whose interests the seller desires to forfeit in the manner required by this chapter, the seller may give a new set of notices as required by this chapter. However, the new notices shall contain a statement that they supersede and replace the earlier notices and shall provide a new time for cure.

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**→ 61.30.090. Acceleration of payments--Cure of default**

(1) Even if the contract contains a provision allowing the seller, because of a default in the purchaser's obligations under the contract, to accelerate the due date of some or all payments to be made or other obligations to be performed by the purchaser under the contract, the seller may not require payment of the accelerated payments or performance of the accelerated obligations as a condition to curing the default in order to avoid forfeiture except to the extent the payments or performance would be due without the acceleration. This subsection shall not apply to an acceleration because of a transfer, encumbrance, or conveyance of any or all of the purchaser's interest in any portion or all of the property if the contract being forfeited contains a provision accelerating the unpaid balance because of such transfer, encumbrance, or conveyance and such provision is enforceable under applicable law.

(2) All persons described in RCW 61.30.040 (1) and (2), regardless of whether given the notice of intent to forfeit, and any guarantor of or any surety for the purchaser's performance may cure the default. These persons may cure the default at any time before expiration of the time for cure and may act alone or in any combination. Any person having a lien of record against the property which would be eliminated in whole or in part by the forfeiture and who cures the purchaser's default pursuant to this section shall have included in its lien all payments made to effect such cure, including interest thereon at the rate specified in or otherwise applicable to the obligations secured by such lien.

(3) The seller may, but shall not be required to, accept tender of cure after the expiration of the time for cure and before the declaration of forfeiture is recorded. The seller may accept a partial cure. If the tender of such partial cure to the seller or the seller's agent or attorney is not accompanied by a written statement of the person making the tender acknowledging that such payment or other action does not fully cure the default, the seller shall notify such person in writing of the insufficiency and the amount or character thereof, which notice shall include an offer to refund any partial tender of money paid to the seller or the seller's agent or attorney upon written request. The notice of insufficiency may state that, by statute, such request must be made by a specified date, which date may not be less than ninety days after the notice of insufficiency is served or mailed. The request must be made in writing and delivered or mailed to the seller or the person who gave the notice of insufficiency or the notice of intent to forfeit and, if the notice of insufficiency properly specifies a date by which such request must be made, by the date so specified. The seller shall refund such amount promptly following receipt of such written request, if timely made, and the seller shall be liable to the person to whom such amount is due for that person's reasonable attorneys' fees and other costs incurred in an action brought to recover such amount in which such refund or any portion thereof is found to have been improperly withheld. If the seller's written notice of insufficiency is not given to the person making the tender at least ten days before the expiration of the time for cure,

then regardless of whether the tender is accepted the time for cure shall be extended for ten days from the date the seller's written notice of insufficiency is given. The seller shall not be required to extend the time for cure more than once even though more than one insufficient tender is made.

(4) Except as provided in this subsection, a timely tender of cure shall reinstate the contract. If a default that entitles the seller to forfeit the contract is not described in a notice of intent to forfeit previously given and the seller gives a notice of intent to forfeit concerning that default, timely cure of a default described in a previous notice of intent to forfeit shall not limit the effect of the subsequent notice.

(5) If the default is cured and a fulfillment deed is not given to the purchaser, the seller or the seller's agent or attorney shall sign, acknowledge, record, and deliver or mail to the purchaser and, if different, the person who made the tender a written statement that the contract is no longer subject to forfeiture under the notice of intent to forfeit previously given, referring to the notice of intent to forfeit by its recording number. A seller who fails within thirty days of written demand to give and record the statement required by this subsection, if such demand specifies the penalties in this subsection, is liable to the person who cured the default for the greater of five hundred dollars or actual damages, if any, and for reasonable attorneys' fees and other costs incurred in an action to recover such amount or damages.

(6) Any person curing or intending to cure any default shall have the right to request any court of competent jurisdiction to determine the reasonableness of any attorneys' fees which are included in the amount required to cure, and in making such determination the court may award the prevailing party its reasonable attorneys' fees and other costs incurred in the action. An action under this subsection shall not forestall any forfeiture or affect its validity.

#### CREDIT(S)

[1988 c 86 § 9; 1985 c 237 § 9.]

#### HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 9, in subsec. (1), in the last sentence, in two places, following "transfer," inserted "encumbrance,;" rewrote subsecs. (2), (3), and (5); and added subsec. (6). Subsections (2), (3), and (5), previously read:

"(2) Any person given rights to receive the required notices under RCW 61.30.040(1) and (2) and any guarantor of or any surety for the purchaser's performance may cure the default. These persons may cure the default at any time before expiration of the time for cure and may act alone or in any combination.

"(3) The seller may accept tender of cure after the expiration of the time for cure and prior to the recordation of the declaration of forfeiture. The seller may accept a partial cure. If the tender of such partial cure is not accompanied by a written statement of the person making the tender that such payment or other action does not fully

cure the default, the seller shall notify such person in writing of the insufficiency and the amount or character thereof, which notice shall include an offer to refund any partial tender of money paid to the seller upon request. The seller shall refund such amount promptly following its receipt of such request, and the seller shall be liable to the person to whom such amount is due for that person's reasonable attorneys' fees and court costs incurred in an action brought to recover such amount in which such refund or any portion thereof is found to have been improperly withheld. If the seller's written notice of insufficiency is not given to the person making the tender at least ten days before the expiration of the time for cure, then regardless of whether the tender is accepted the time for cure shall be extended for ten days from the date the seller's written notice of insufficiency is given. The seller shall not be required to extend the time for cure more than once even though more than one insufficient tender is made.

“(5) If the default is cured, the seller shall sign, acknowledge, record, and deliver or mail to the purchaser and, if different, the person who made the tender a written statement that the contract is no longer subject to forfeiture under the notice of intent to forfeit previously given, referring to the notice of intent to forfeit by its recording number. A seller who fails within thirty days of written demand to give and record the statement required by this subsection, if such demand specifies the penalties in this subsection, is liable to the person who cured the default for the greater of five hundred dollars or actual damages, if any, and for reasonable attorneys' fees and costs of the action to recover such amount or damages.”

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Vendor and Purchaser  91 to 93.  
Westlaw Topic No. 400.  
C.J.S. Vendor and Purchaser §§ 186 to 188, 190 to 195.

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18 Wash. Prac. Series § 21.12, Conveyance and Mortgage by Purchaser.

18 Wash. Prac. Series § 21.35, Statutory Forfeiture--Third-Party Requests for Notice.

18 Wash. Prac. Series § 21.36, Statutory Forfeiture--Curing Defaults.

27 Wash. Prac. Series § 3.54, Partial Payments.

27 Wash. Prac. Series § 3.83, Pre-Forfeiture Preparation.

27 Wash. Prac. Series § 3.85, The Notice of Intent.

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Chapter 61.30. Real Estate Contract Forfeitures

→ **61.30.100. Effect of forfeiture**

(1) The recorded and sworn declaration of forfeiture shall be prima facie evidence of the extent of the forfeiture and compliance with this chapter and, except as otherwise provided in RCW 61.30.040 (1) and (2), conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value.

(2) Except as otherwise provided in this chapter or the contract or other agreement with the seller, forfeiture of a contract under this chapter shall have the following effects:

(a) The purchaser, and all persons claiming through the purchaser or whose interests are otherwise subordinate to the seller's interest in the property who were given the required notices pursuant to this chapter, shall have no further rights in the contract or the property and no person shall have any right, by statute or otherwise, to redeem the property;

(b) All sums previously paid under the contract by or on behalf of the purchaser shall belong to and be retained by the seller or other person to whom paid; and

(c) All of the purchaser's rights in all improvements made to the property and in unharvested crops and timber thereon at the time the declaration of forfeiture is recorded shall be forfeited to the seller.

(3) The seller shall be entitled to possession of the property ten days after the declaration of forfeiture is recorded or any longer period provided in the contract or any other agreement with the seller. The seller may proceed under chapter 59.12 RCW to obtain such possession. Any person in possession who fails to surrender possession when required shall be liable to the seller for actual damages caused by such failure and for reasonable attorneys' fees and costs of the action.

(4) After the declaration of forfeiture is recorded, the seller shall have no claim against and the purchaser shall not be liable to the seller for any portion of the purchase price unpaid or for any other breach of the purchaser's obligations under the contract, except for damages caused by waste to the property to the extent such waste results in the fair market value of the property on the date the declaration of forfeiture is recorded being less than the unpaid monetary obligations under the contract and all liens or contracts having priority over the seller's interest in the property.

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West's RCWA 61.30.110

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→ **61.30.110. Forfeiture may be restrained or enjoined**

(1) The forfeiture may be restrained or enjoined or the time for cure may be extended by court order only as provided in this section. A certified copy of any restraining order or injunction may be recorded in each county in which any part of the property is located.

(2) Any person entitled to cure the default may bring or join in an action under this section. No other person may bring such an action without leave of court first given for good cause shown. Any such action shall be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's agent or attorney, if any, who gave the notice of intent to forfeit. Concurrently with commencement of the action, the person bringing the action shall record a lis pendens in each county in which any part of the property is located. A court may preliminarily enjoin the giving and recording of the declaration of forfeiture upon a prima facie showing of the grounds set forth in this section for a permanent injunction. If the court issues an order restraining or enjoining the forfeiture then until such order expires or is vacated or the court otherwise permits the seller to proceed with the forfeiture, the declaration of forfeiture shall not be given or recorded. However, the commencement of the action shall not of itself extend the time for cure.

(3) The forfeiture may be permanently enjoined only when the person bringing the action proves that there is no default as claimed in the notice of intent to forfeit or that the purchaser has a claim against the seller which releases, discharges, or excuses the default claimed in the notice of intent to forfeit, including by offset, or that there exists any material noncompliance with this chapter. The time for cure may be extended only when the default alleged is other than the failure to pay money, the nature of the default is such that it cannot practically be cured within the time stated in the notice of intent to forfeit, action has been taken and is diligently being pursued which would cure the default, and any person entitled to cure is ready, willing, and able to timely perform all of the purchaser's other contract obligations.

CREDIT(S)

[1988 c 86 § 11; 1985 c 237 § 11.]

HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 11, rewrote subsec. (2), which previously read:

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→ **61.30.120. Sale of property in lieu of forfeiture**

(1) Except for a sale ordered incident to foreclosure of the contract as a mortgage, a public sale of the property in lieu of the forfeiture may be ordered by the court only as provided in this section. Any person entitled to cure the default may bring or join in an action seeking an order of public sale in lieu of forfeiture. No other person may bring such an action without leave of court first given for good cause shown.

(2) An action under this section shall be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's agent or attorney, if any, who gave the notice of intent to forfeit. Concurrently with commencement of the action, the person bringing the action shall record a lis pendens in each county in which any part of the property is located. After the commencement of an action under this section and before its dismissal, the denial of a request for a public sale, or the vacation or expiration of an order for a public sale, the declaration of forfeiture shall not be given or recorded. However, commencement of the action shall not of itself extend the time for cure.

(3) If the court finds the then fair market value of the property substantially exceeds the unpaid and unperformed obligations secured by the contract and any other liens having priority over the seller's interest in the property, the court may require the property to be sold after the expiration of the time for cure in whole or in parcels to pay the costs of the sale and satisfy the amount the seller is entitled to be paid from the sale proceeds. Such sale shall be for cash to the highest bidder at a public sale by the sheriff at a courthouse of the county in which the property or any contiguous or noncontiguous portion thereof is located. The order requiring a public sale of the property shall specify the amount which the seller is entitled to be paid from the sale proceeds, which shall include all sums unpaid under the contract, irrespective of the due dates thereof, and such other costs and expenses to which the seller is entitled as a result of the purchaser's default under the contract, subject to any offsets or damages to which the purchaser is entitled. The order shall require any person requesting the sale to deposit with the clerk of the court, or such other person as the court may direct, the amount the court finds will be necessary to pay all of the costs and expenses of advertising and conducting the sale, including the notices to be given under subsections (4) and (5) of this section. The court shall require such deposit to be made within seven days, and if not so made the court shall vacate its order of sale. Except as provided in subsections (6) and (8) of this section, the sale shall eliminate the interests of the persons given the notice of intent to forfeit to the same extent that such interests would have been eliminated had the seller's forfeiture been effected pursuant to such notice.

(4) The sheriff shall endorse upon the order the time and date when the sheriff receives it and shall forthwith post and publish the notice of sale specified in this subsection and sell the property, or so much thereof as may be necessary to discharge the amount the seller is entitled to be paid as specified in the court's order of sale. The

notice of sale shall be printed or typed and contain the following information:

- (a) A statement that the court has directed the sheriff to sell the property described in the notice of sale and the amount the seller is entitled to be paid from the sale proceeds as specified in the court's order;
- (b) The caption, cause number, and court in which the order was entered;
- (c) A legal description of the property to be sold, including the street address if any;
- (d) The date and recording number of the contract;
- (e) The scheduled date, time, and place of the sale;
- (f) If the time for cure has not expired, the date it will expire and that the purchaser and other persons authorized to cure have the right to avoid the sale ordered by the court by curing the defaults specified in the notice of intent to forfeit before the time for cure expires;
- (g) The right of the purchaser to avoid the sale ordered by the court by paying to the sheriff, at any time before the sale, in cash, the amount which the seller would be entitled to be paid from the proceeds of the sale, as specified in the court's order; and
- (h) A statement that unless otherwise provided in the contract between seller and purchaser or other agreement with the seller, no person shall have any right to redeem the property sold at the sale.

The notice of sale shall be given by posting a copy thereof for a period of not less than four weeks prior to the date of sale in three public places in each county in which the property or any portion thereof is located, one of which shall be at the front door of the courthouse for the superior court of each such county, and one of which shall be placed in a conspicuous place on the property. Additionally, the notice of sale shall be published once a week for two consecutive weeks in the newspaper or newspapers prescribed for published notices in RCW 61.30.050(2)(b). The sale shall be scheduled to be held not more than seven days after the expiration of (i) the periods during which the notice of sale is required to be posted and published or (ii) the time for cure, whichever is later; however, the seller may, but shall not be required to, permit the sale to be scheduled for a later date. Upon the completion of the sale, the sheriff shall deliver a sheriff's deed to the property sold to the successful bidder.

(5) Within seven days following the date the notice of sale is posted on the property, the seller shall, by the means described in RCW 61.30.050(2), give a copy of the notice of sale to all persons who were given the notice of intent to forfeit, except the seller need not post or publish the notice of sale.

(6) Any person may bid at the sale. If the purchaser is the successful bidder, the sale shall not affect any interest in the property which is subordinate to the contract. If the seller is the successful bidder, the seller may offset against the price bid the amount the seller is entitled to be paid as specified in the court's order. Proceeds of such sale shall be first applied to any costs and expenses of sale incurred by the sheriff and the seller in excess of the deposit referred to in subsection (3) of this section, and next to the amount the seller is entitled to be paid as specified in the court's order. Any proceeds in excess of the amount necessary to pay such costs, expenses and amount, less the clerk's filing fee, shall be deposited with the clerk of the superior court of the county in which the sale took place, unless such surplus is less than the clerk's filing fee, in which event such excess shall be paid to the purchaser. The clerk shall index such funds under the name of the purchaser. Interests in or liens or claims of liens against the property eliminated by the sale shall attach to such surplus in the order of priority that they had attached to the property. The clerk shall not disburse the surplus except upon order of the superior court of such county, which order shall not be entered less than ten days following the deposit of the funds with the clerk.

(7) In addition to the right to cure the default within the time for cure, the purchaser shall have the right to satisfy its obligations under the contract and avoid any public sale ordered by the court by paying to the sheriff, at any time before the sale, in cash, the amount which the seller would be entitled to be paid from the proceeds of the sale as specified in the court's order plus the amount of any costs and expenses of the sale incurred by the sheriff and the seller in excess of the deposit referred to in subsection (3) of this section. If the purchaser satisfies its obligations as provided in this subsection, the seller shall deliver its fulfillment deed to the purchaser.

(8) Unless otherwise provided in the contract or other agreement with the seller, after the public sale provided in this section no person shall have any right, by statute or otherwise, to redeem the property and, subject to the rights of persons unaffected by the sale, the purchaser at the public sale shall be entitled to possession of the property ten days after the date of the sale and may proceed under chapter 59.12 RCW to obtain such possession.

(9) A public sale effected under this section shall satisfy the obligations secured by the contract, regardless of the sale price or fair value, and no deficiency decree or other judgment may thereafter be obtained on such obligations.

#### CREDIT(S)

[1988 c 86 § 12; 1985 c 237 § 12.]

#### HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 12, rewrote the section, which previously read:

“(1) A public sale of the property in lieu of the forfeiture may be ordered by the court only as provided in this section. Any person entitled to cure the default may bring an action seeking an order. No other person may bring such an action without leave of court first given for good cause shown.

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→ **61.30.130. Forfeiture may proceed upon expiration of judicial order--Court may award attorneys' fees or impose conditions--Venue**

(1) If an order restraining or enjoining the forfeiture or an order of sale under RCW 61.30.120 expires or is dissolved or vacated at least ten days before expiration of the time for cure, the seller may proceed with the forfeiture under this chapter if the default is not cured at the end of the time for cure. If any such order expires or is dissolved or vacated or such other final disposition is made at any time later than stated in the first sentence of this subsection, the seller may proceed with the forfeiture under this chapter if the default is not cured, except the time for cure shall be extended for ten days after the final disposition or the expiration of, or entry of the order dissolving or vacating, the order.

(2) In actions under RCW 61.30.110 and 61.30.120, the court may award reasonable attorneys' fees and costs of the action to the prevailing party, except for such fees and costs incurred by a person requesting a public sale of the property.

(3) In actions under RCW 61.30.110 and 61.30.120, on the seller's motion the court may (a) require the person commencing the action to provide a bond or other security against all or a portion of the seller's damages and (b) impose other conditions, the failure of which may be cause for entry of an order dismissing the action and dissolving or vacating any restraining order, injunction, or other order previously entered.

(4) Actions under RCW 61.30.110, 61.30.120, or 61.30.140 shall be brought in the superior court of the county where the property is located or, if the property is located in more than one county, then in any of such counties, regardless of whether the property is contiguous or noncontiguous.

CREDIT(S)

[1988 c 86 § 13; 1985 c 237 § 13.]

## HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 13, in subsec. (1), in the first sentence, at the end, substituted "the time for cure" for "that time"; in the second sentence, following "vacated" inserted "or such other final disposition is made"; and preceding "expiration" inserted "final disposition or the"; in subsec. (2), added "except for such fees and costs in-

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→ **61.30.140. Action to set aside forfeiture**

(1) An action to set aside a forfeiture not otherwise void under RCW 61.30.040(1) may be commenced only after the declaration of forfeiture has been recorded and only as provided in this section, and regardless of whether an action was previously commenced under RCW 61.30.110.

(2) An action to set aside the forfeiture permitted by this section may be commenced only by a person entitled to be given the required notices under RCW 61.30.040 (1) and (2). For all persons given the required notices in accordance with this chapter, such an action shall be commenced by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's attorney-in-fact, if any, who signed the declaration of forfeiture. Concurrently with commencement of the action, the person bringing the action shall record a lis pendens in each county in which any part of the property is located.

(3) The court may require that all payments specified in the notice of intent shall be paid to the clerk of the court as a condition to maintaining an action to set aside the forfeiture. All payments falling due during the pendency of the action shall be paid to the clerk of the court when due. These payments shall be calculated without regard to any acceleration provision in the contract (except an acceleration because of a transfer, encumbrance, or conveyance of the purchaser's interest in the property when otherwise enforceable) and without regard to the seller's contention the contract has been duly forfeited and shall not include the seller's costs and fees of the forfeiture. The court may make orders regarding the investment or disbursement of these funds and may authorize payments to third parties instead of the clerk of the court.

(4) The forfeiture shall not be set aside unless (a) the rights of bona fide purchasers for value and of bona fide encumbrancers for value of the property would not thereby be adversely affected and (b) the person bringing the action establishes that the seller was not entitled to forfeit the contract at the time the seller purported to do so or that the seller did not materially comply with the requirements of this chapter.

(5) If the purchaser or other person commencing the action establishes a right to set aside the forfeiture, the court shall award the purchaser or other person commencing the action actual damages, if any, and may award the purchaser or other person its reasonable attorneys' fees and costs of the action. If the court finds that the forfeiture was conducted in compliance with this chapter, the court shall award the seller actual damages, if any, and may award the seller its reasonable attorneys' fees and costs of the action.

(6) The seller is entitled to possession of the property and to the rents, issues, and profits thereof during the pendency of an action to set aside the forfeiture: PROVIDED, That the court may provide that possession of the property be delivered to or retained by the purchaser or some other person and may make other provisions for the rents, issues, and profits.

#### CREDIT(S)

[1988 c 86 § 14; 1985 c 237 § 14.]

#### HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 14, rewrote subsecs. (1) to (3), which previously read:

(1) An action to set aside the forfeiture after the declaration of forfeiture has been recorded may be commenced only as provided in this section and regardless of whether an action was previously commenced under RCW 61.30.110.

“(2) An action to set aside the forfeiture permitted by this section may be commenced only by a person entitled to be given the required notices under RCW 61.30.040(1) and (2). For all persons given the required notices in accordance with this chapter, such an action shall be commenced by filing the summons and complaint and serving the seller or the seller's agent or attorney, if any, giving either of the required notices, not later than sixty days after the declaration of forfeiture is recorded. Concurrently with commencement of the action, the person bringing the action shall record a lis pendens in each county in which any part of the property is located.

“(3) The court may require that all payments specified in the notice of intent shall be paid into the court registry as a condition to maintaining an action to set aside the forfeiture. All payments falling due during the pendency of the action shall be paid into the registry of the court when due. These payments shall be calculated without regard to any acceleration provision in the contract (except an acceleration because of a transfer or conveyance of the purchaser's interest in the property) and without regard to the seller's contention the contract has been duly forfeited and shall not include the seller's costs and fees of the forfeiture. The court may make orders regarding the investment or disbursement of these funds and may authorize payments to third parties instead of the court registry.”

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C.J.S. Vendor and Purchaser §§ 180, 287 to 291.

#### RESEARCH REFERENCES

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→ **61.30.150. False swearing--Penalty--Failure to comply with chapter--Liability**

(1) Whoever knowingly swears falsely to any statement required by this chapter to be sworn is guilty of perjury and shall be liable for the statutory penalties therefor.

(2) A seller who records a declaration of forfeiture with actual knowledge or reason to know of a material failure to comply with any requirement of this chapter is liable to any person whose interest in the property or the contract, or both, has been forfeited without material compliance with this chapter for actual damages and actual attorneys' fees and costs of the action and, in the court's discretion, exemplary damages.

## CREDIT(S)

[1988 c 86 § 15; 1985 c 237 § 15.]

## HISTORICAL AND STATUTORY NOTES

Laws 1988, ch. 86, § 15, in subsec. (2), preceding both "failure" and "compliance" inserted "material".

## RESEARCH REFERENCES

## Treatises and Practice Aids

27 Wash. Prac. Series § 3.82, The Real Estate Contract Forfeiture Act.

27 Wash. Prac. Series § 3.90, Contents of the Declaration of Forfeiture.

West's RCWA 61.30.150, WA ST 61.30.150

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→ **61.30.160. Priority of actions under chapter**

An action brought under RCW 61.30.110, 61.30.120, or 61.30.140 shall take precedence over all other civil actions except those described in RCW 59.12.130.

CREDIT(S)

[1985 c 237 § 16.]

RESEARCH REFERENCES

Treatises and Practice Aids

4 Wash. Prac. Series CR 40, Assignment of Cases.

14 Wash. Prac. Series § 10.1, Trial Date, Case Schedule, Priority for Hearing.

27 Wash. Prac. Series § 3.97, Restraining the Forfeiture.

27 Wash. Prac. Series § 3.99, Sale of Property in Lieu of Forfeiture--The Lawsuit.

27 Wash. Prac. Series § 3.102, Action to Set Aside Forfeiture.

West's RCWA 61.30.160, WA ST 61.30.160

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Chapter 61.30. Real Estate Contract Forfeitures

→ **61.30.900. Short title**

This chapter may be known and cited as the real estate contract forfeiture act.

CREDIT(S)

[1985 c 237 § 17.]

West's RCWA 61.30.900, WA ST 61.30.900

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→ **61.30.905. Severability--1985 c 237**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

CREDIT(S)

[1985 c 237 § 19.]

West's RCWA 61.30.905, WA ST 61.30.905

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→ **61.30.910. Effective date--Application--1985 c 237**

This act shall take effect January 1, 1986, and shall apply to all real estate contract forfeitures initiated on or after that date, regardless of when the real estate contract was made.

CREDIT(S)

[1985 c 237 § 21.]

## RESEARCH REFERENCES

Treatises and Practice Aids

18 Wash. Prac. Series § 21.32, Statutory Forfeiture--Prerequisites to Forfeiture.

27 Wash. Prac. Series § 3.82, The Real Estate Contract Forfeiture Act.

## NOTES OF DECISIONS

Scope of act 1

1. Scope of act

All forfeitures under real estate contracts must comply with Real Estate Contract Forfeiture Act. Tomlinson v. Clarke (1992) 118 Wash.2d 498, 825 P.2d 706. Vendor And Purchaser ↪ 299(1)

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→ 61.30.911. Application--1988 c 86

This act applies to all real estate contract forfeitures initiated on or after June 9, 1988, regardless of when the real estate contract was made.

CREDIT(S)

[1988 c 86 § 16.]

## RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (3d) of Property (Mortgages) § 3.4, a Contract for Deed Creates a Mortgage.

18 Wash. Prac. Series § 21.32, Statutory Forfeiture--Prerequisites to Forfeiture.

27 Wash. Prac. Series § 3.82, The Real Estate Contract Forfeiture Act.

West's RCWA 61.30.911, WA ST 61.30.911

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

SERGEY SAVCHUK,  
Plaintiff/Appellant

v.

STEVEN G. JERDE and  
DARLYCE J. JERDE,  
Defendants

NO. 64269-3-1

(Superior Court  
No. 09-2-00357-9)

**DECLARATION OF  
SERVICE**

I, Emily R. Mowrey, under penalty of perjury under the laws of the State of Washington, hereby certify and declare that on March 19<sup>th</sup>, 2010, I sent via regular U.S. mail, postage pre-paid, a true copy of 1) Appellant's Reply Brief; and 2) this Declaration of Service to Mark Kaiman, at 222 Grand Ave. #A, Bellingham, WA 98225.

Signed this 19<sup>th</sup> day of March, 2010.

  
EMILY R. MOWREY

2010 MAR 22 - AM 11:20

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON