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Texas's Attempt to Mitigate the Risks of Contracts for Deed - Too Much for Sellers - Too Little for Buyers Recent Development.

Shelayne Clemmer

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RECENT DEVELOPMENT

TEXAS'S ATTEMPT TO MITIGATE THE RISKS OF CONTRACTS FOR DEED—TOO MUCH FOR SELLERS— TOO LITTLE FOR BUYERS

SHELAYNE CLEMMER

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I. INTRODUCTION

If you have ever purchased a home, there are certain things that you can expect as a purchaser. You probably have a good idea of the legal boundaries of the land on which your home is located. For example, you may know that you live in the Westwood subdivision of Anycity, Texas on lot number ten at 123 Pecan Street. Even if you are not aware of the specific boundaries of your property, you have a deed or deed of trust you can refer to for such information. You have water and power utilities. You know what your payments are and approximately what you have paid or still owe. You might even have taken advantage of a home improvement loan by using the principal paid (your equity) as security for a loan. This is not the case for an estimated 200,000 Texas residents who have purchased property under a contract for deed.¹

1. FAQs, Border Low Income Housing Coalition, <http://www.bordercoalition.org/page2/page2.html> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*). The Border Low Income Housing Coalition estimates that 350,000 residents currently live in colonias, with an average family size of between five and six people. *Id.* Dividing the total colonias population (350,000) by the average colonia family size (5.5), indicates that roughly 63,600 contracts for deed can be attributed to colonias residents, with the remaining estimated 136,400 contracts for deed attributable to the rest of the state. *Id.*; see also Judon Fambrough, *New Rules Govern Contracts for Deed*, 9-1 TIERRA GRANDE, Jan. 2002, at 24-25, available at <http://recenter.tamu.edu/tgrande/vol9-1/1547.html> (revised Sept. 2003) (indicating that for many years, lenders and sellers preferred contracts for deed and it “was used frequently with seller financing”); Colonias FAQ’s, Texas Secretary of State Roger Williams, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Feb. 24, 2007) (estimating 400,000 Texans live in colonias) (on file with the *St. Mary's Law Journal*). This estimate is likely to be conservative considering contracts for deed have been used for many years in all parts of the state. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007). A contract for deed, also termed an installment contract, a land sales contract, or a land contract, is a “conditional sales contract” for real property. BLACK’S LAW DICTIONARY 320 (7th ed. 1999). A conditional sales contract is a type of installment contract “under which the buyer makes periodic payments and the seller retains title to or a security interest” in the property. *Id.* at 319; *Graves v. Diehl*, 958 S.W.2d 468, 470-71 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (stating that although

A contract for deed is a type of financing arrangement.² Because most purchasers do not have enough cash available to pay in full for a home or land, they finance a portion of the purchase price.³ Although there are other ways to finance property purchases, many people simply have so little capital that they are forced to buy “on contract.”⁴ The rights of purchasers of real property under these contracts for deed, historically, have been precarious at best.⁵ Also known as executory contracts or contracts of sale, these types of contracts are conditional and remain wholly unperformed until the final payment is made by the purchaser.⁶ Therefore, the purchaser is at great risk to lose everything he has invested under a contract for deed.⁷ Unlike most Texas homebuyers, very low-income purchasers often experience the daily anxiety this type of contract creates.⁸

the purchaser gets immediate possession of the property, the legal title remains in the seller until all installments are paid in full).

2. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989).

3. *Id.* at 169.

4. *Id.* at 171. In some ways, a contract for deed is not a bad alternative for low-income buyers. See 27 STEPHEN COCHRAN, *TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES* § 7.12 (3d ed. 2002) (dispelling the notion that contracts for deed are all bad). The purchaser may “move into the house immediately, and it requires no payment of closing costs and, usually, only a very low down payment, if any.” *Id.* Additionally, the payments are more equal to rent payments but, unlike rent payments, do not fluctuate over time. *Id.* A contract for deed is also known as a “poor man’s mortgage.” Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007).

5. *De La Cruz v. Brown*, 109 S.W.3d 73, 79 (Tex. App.—El Paso 2003) (indicating that a purchaser has few rights or remedies and is the subject of abuse under a contract for deed), *rev’d on other grounds*, 156 S.W.3d 560 (Tex. 2004). See generally *Rosewood Corp. v. Fisher*, 263 N.E.2d 833 (Ill. 1970) (discussing the rights of black contract for deed purchasers in Illinois who united to fight abusive practices and harsh contract terms).

6. *In re Waldron*, 65 B.R. 169, 170 (Bankr. N.D. Tex. 1986).

7. *Dickey v. McComb Dev. Co.*, 115 S.W.3d 42, 47 (Tex. App.—San Antonio 2003, no pet.) (Stone, J., concurring) (opining that families may pay on a property for years and then lose it because they missed one payment under contract for deed); see *Rosewood Corp. v. Fisher*, 263 N.E.2d 833, 836 (Ill. 1970) (stating that disgruntled black purchasers who stopped making payments nevertheless subjected themselves to forfeiture of their property and payments).

8. David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm>. “Legitimate [contract for deed] sellers often work with buyers faced with default. Predatory sellers, however, actually look for violations—or even fabricate them—in hope that the buyer has failed to keep good records. When the buyer ‘defaults’ . . . , the seller gets the home back, and the buyer is left with nothing.” *Id.*; see *Dickey*, 115 S.W.3d at 47 (Stone, J., concurring) (discussing the harsh penalty to families who miss one payment under contract for deed); Judon Fam-

The use of contracts for deed in the Mexican border regions of the United States is very common.⁹ The developers in those areas have had few guidelines to follow and have taken advantage of the poor, ignorant, and often sporadically employed immigrants from Mexico and other very low-income purchasers.¹⁰ The proliferation of this abuse recently prompted legislatures in border-surrounding states, such as Texas, to pass legislation to curb the exploitation of these types of instruments of conveyance.¹¹ Beginning in 1995 and expanding through 2003, the Texas Legislature made several changes to the Texas Property Code (Property Code) to mitigate the risks of contracts for deed.¹²

With the enactment of Texas House Bill 1823 (HB 1823) on September 1, 2005, Texas's border residents, as well as all contract for deed purchasers in the remainder of the state, felt the effects of the latest legislation concerning contracts for deed.¹³ Texas House Bill 1823¹⁴ addresses the use of contracts for deed and adds the requirement that property sold

brought, *New Rules Govern Contracts for Deed*, 9-1 TIERRA GRANDE, Jan. 2002, at 24-26, available at <http://recenter.tamu.edu/tgrande/vol9-1/1547.html> (revised Sept. 2003) (stating that if the buyer defaults, the seller may terminate the contract, retake possession of the property, and keep any payments).

9. David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 883 (1996) (stating that colonias land developers usually sell their land under contracts for deed to minimize risk and maximize profits); David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm>.

10. David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm>.

11. *Id.* at 1. See generally NANCY L. SIMMONS, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico*, 27 N.M. L. REV. 33 (1997) (describing Texas and New Mexico legislation aimed at slowing colonias' growth through the regulation of subdivision development and methods of conveyance).

12. See Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1236-47 (2005) (giving a thorough discussion of the various amendments to the Texas Property Code (Property Code)); David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm> (emphasizing that the "exploitation of contracts for deed became so widespread that the Texas Property Code was changed . . . in an effort to stem the predatory tide").

13. *Texas Law Allows Buyers to Convert Contracts for Deeds to Mortgages*, 33 No. CD-16 HDR CURRENT DEVS. 22 (2005) (listing the recent changes to the Property Code).

14. Act of May 24, 2005, 79th Leg., R.S., ch. 978, §§ 1-8, 2005 Tex. Gen. Laws 3280, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill).

under these contracts be legally subdivided and platted, and also requires sellers to keep the property free of liens (with few exceptions).¹⁵ More importantly, a purchaser is now entitled at any time, without penalty, to convert the contract into a recorded legal title if the purchaser can pay off the balance owed through cash or financing.¹⁶ With the influx of 400,000 hurricane evacuees from Louisiana and Mississippi to Texas, this legislation may prove to be a timely protection for those very low-income families moving into the already scarce low-income housing resources in the state.¹⁷

Three key issues are implicated in HB 1823: (1) purchasers may convert their contracts for deed into standard mortgages and sellers must convey legal title within thirty days or be severely fined; (2) sellers with active contracts for deed are required to plat their property or the purchaser may rescind the contract; and (3) purchasers who own this unplatted land are not retroactively protected from liens against the property.¹⁸ Even though the legislature has periodically amended the Property Code in order to lessen the adverse effects of contracts for deed, the outcome of these changes may be harsh to the seller, while not completely protecting the purchaser.¹⁹ Some commentators, as well as recent case law, have even questioned the constitutionality of these changes.²⁰ The ultimate result may be yet another endeavor by the 2007 Texas Legislature to ren-

15. *Id.* (requiring land sold under contracts for deed to be properly platted and recorded).

16. *Id.* (allowing contract for deed purchasers to convert their contracts for deed to mortgages).

17. *Meeting the Long-term Housing Needs of Hurricane Evacuees in Texas*, HOUSING MATTERS (Tex. Low Income Hous. Info. Serv.), Nov. 2005, at 1, 4.

18. *See* Act of May 24, 2005, 79th Leg., R.S., ch. 978, §§ 1-8, 2005 Tex. Gen. Laws 3280, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill) (listing the various changes to the Property Code concerning contracts for deed).

19. Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1232-33 (2005).

20. *See, e.g., Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435 (Tex. 2005) (Wainwright, J., concurring) (concluding that when the court addresses the issue of limits on civil penalties allowed by section 5.077 of the Property Code, it will be bound by precedents of the United States Supreme Court); *Henderson v. Love*, 181 S.W.3d 810, 812 (Tex. App.—Texarkana 2005, no. pet.) (holding that retroactively applying section 5.077 of the Property Code does not violate the Texas Constitution even though the section standing alone is "constitutionally suspect"); Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1251-54 (2005) (suggesting that section 5.077 of the Property Code violates the excessive fines clause of the Texas and United States Constitutions).

ovate the existing Property Code²¹ (although as of publication of this piece, no such bills have been filed).²²

This Recent Development will first address the historical circumstances that led to the use and abuse of contracts for deed. After discussing the development of the contract for deed, Part II will also discuss the issues with contracts for deed and the Texas and federal governments' reactions to these issues. Part III will provide a historical sketch of the resulting legislation beginning in 1991 and building up to 2005. Part IV will examine the 2005 legislative changes in detail and analyze their impact on both the rights of low-income purchasers and those of sellers. Part V will summarize concerns with the current state of the Property Code's contract for deed provisions, especially as they impact constitutional issues. It will address the practical application of the latest version of the applicable Property Code sections and discuss methods courts may use to address the constitutionality of those suspect sections. Finally, Part VI will conclude by suggesting alternative and divergent solutions: (1) the elimination of contracts for deed as a viable financing option; or, alternatively, (2) the preservation of contracts for deed through the prohibition of exorbitant interest rates and the replacement of forfeiture with foreclosure.

II. BACKGROUND

To understand the perpetuation of the use and abuse of contracts for deed in Texas, one must understand how a contract for deed differs from other property financing options. One must also know a little about the background of the communities known as "colonias," in which contracts for deed are so prevalent.²³ Recognizing the conditions that led to the expansion of the colonias will help one identify why purchasers were will-

21. See *Henderson*, 181 S.W.3d at 814 (noting that the legislature amended Property Code section 5.077 again in 2005 to cap the penalties, but did not make the changes retroactive); cf. Press Release, Tex. Low Income Hous. Info. Serv., Ceremonial Signing of Act Providing Colonia and Low Income Residents Rights Under Contracts for Deed Law (June 28, 2005), available at <http://www.dallasownerfinance.com> (quoting John Henneberger, co-director of the Texas Low Income Housing Information Service, as saying, ironically, "[a]fter more than [forty] years of abuse, the contracts-for-deed system has been finally fixed once and for all") (on file with the *St. Mary's Law Journal*).

22. Texas Legislature Online, Bills By . . . Reports, Legislature: 80(R) – 2007, <http://www.capitol.state.tx.us/Reports/BillsBy.aspx> (last visited Feb. 22, 2007) (listing the bills filed by subject and date) (on file with the *St. Mary's Law Journal*).

23. See generally, David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871 (1996) (discussing the development of the colonias and the legislature's failed attempts at curbing their growth); Roderick R. Williams, Note, *Cardboard to Concrete: Reconstructing the Texas Colonias Threshold*, 53 HASTINGS L.J. 705 (2002) (discussing the conditions of the colonias and Texas's colonias-related legislation).

ing to accept an inferior contract for deed instead of insisting upon a deed with a regular mortgage, commonly called a deed of trust mortgage.²⁴

A. *Contracts for Deed Versus Other Financing Options*

Contracts for deed, known in Texas as executory contracts and generally known as contracts for sale or installment land contracts, are an alternative financing option for low-capital and low-income purchasers to buy real estate.²⁵ The three most common real estate financing methods are: (1) a personal (vendor's) mortgage; (2) a third-party mortgage or "deed of trust"; and (3) a contract for deed or installment contract.²⁶ Under a personal mortgage, the purchaser pays the seller as much as he or she can afford up front and then gives the seller a lien note and mortgage for the rest of the purchase price.²⁷ In return, the seller delivers to the purchaser the deed to the land.²⁸ Using a third-party mortgage, the purchaser obtains the funds for the real estate purchase from a bank or similar financial institution.²⁹ The seller is paid in full and delivers a deed to the purchaser who uses the deeded property as collateral for the bank loan.³⁰ A third-party trustee holds the deed of trust until the purchaser repays the loan.³¹ Under a contract for deed, the purchaser pays the seller as much as he or she can afford but the seller retains title to the property.³² "[T]he purchaser goes into possession and pays installments to the [seller]

24. See *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435 (Tex. 2005) (Wainwright, J., concurring) (opining that "[a]lthough the [l]egislature considered a prohibition of contract-for-deed conveyances to end these abuses, it determined that many residents building homes in these areas need this method of financing because they do not have access to traditional mortgage financing") (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)). Contracts for deed allow many low-income persons to obtain land and build homes where they could not otherwise. *Flores*, 185 S.W.3d at 435 (Wainwright, J., concurring) (citing Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 1, 1995 Tex. Gen. Laws 4982).

25. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989).

26. *Id.* at 170.

27. *Id.*

28. *Id.*

29. *Id.* at 170-71.

30. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989).

31. JOHN E. CRIBBET, CORWIN W. JOHNSON, ROGER W. FINDLEY & ERNEST E. SMITH, *PROPERTY, CASES AND MATERIALS* 910 (8th ed. 2002).

32. *In re Waldron*, 65 B.R. 169, 170 (Bankr. N.D. Tex. 1986); JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989).

over so long a period as necessary to complete the purchase price.”³³ Once the last payment is made and the purchase price paid, the seller delivers the deed to the purchaser.³⁴

Even though all three methods involve the purchaser effectively borrowing money to pay for real estate, “the fundamental difference occurs on default.”³⁵ Before either type of mortgage may be foreclosed, there are requirements of notice, cure periods, and other protections granted to the purchaser by the legislature and the courts.³⁶ Mortgages are more protected in Texas than contracts for deed.³⁷ Conversely, the contract for deed has historically had few protections³⁸ and the purchaser is ex-

33. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989); *see also Waldron*, 65 B.R. at 170 (noting that payment on a contract for deed may extend “over a matter of years”).

34. *Waldron*, 65 B.R. at 170; JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989).

35. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989).

36. *Id.*

37. *See id.* (stating that buyers have “less legal protection in an installment land contract”).

38. *See Waldron*, 65 B.R. at 170 (explaining that once the purchaser defaults, the seller is not required to use the court or other public proceedings to rescind the contract and terminate the purchaser’s possession of the property). However, many contract for deed defaults are handled through forcible detainer suits. *See Tressider v. Rhyme*, No. 13-03-422-CV, 2004 WL 1902747, at *2 (Tex. App.—Corpus Christi Aug. 26, 2004, no pet.) (mem. op.) (stating that a forcible detainer action requires a landlord-tenant relationship via the contract for deed); *Tex. Best Mortgage, Inc. v. Nieves*, No. 04-03-00097-CV, 2003 WL 22489727, at *3 (Tex. App.—San Antonio Nov. 5, 2003, no pet.) (mem. op.) (deciding that the justice court lacked jurisdiction over the forcible detainer suit because there was no landlord-tenant relationship upon default of the contract for deed); *Ward v. Malone*, 115 S.W.3d 267, 269 (Tex. App.—Corpus Christi 2003, pet. denied) (concluding that because the contract for deed did not provide for a landlord-tenant relationship upon default, the trial court lacked jurisdiction over the forcible detainer suit). A forcible detainer action determines the right to immediate possession of real property. *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.). Because these proceedings were developed to provide Texas citizens with a quick and inexpensive resolution to possessory questions regarding real property, justice courts have exclusive original jurisdiction over forcible entry and detainer suits, and title disputes must not be adjudicated. TEX. PROP. CODE ANN. § 24.004 (Vernon 2004); *Ward*, 115 S.W.3d at 269-70; *Aguilar v. Weber*, 72 S.W.3d 729, 731-32 (Tex. App.—Waco 2002, no pet.); *Rice*, 51 S.W.3d at 707-09. “In most situations, the parties in a forcible detainer suit are in a landlord-tenant relationship.” *Ward*, 115 S.W.3d at 270. This relationship eliminates the need to adjudicate title to the property. *See id.* at 271 (explaining that a justice court exceeds its jurisdiction if title must be adjudicated). If a contract for deed provides for a landlord-tenant relationship upon default, the seller may file a forcible detainer action against the defaulting purchaser in justice court to regain possession of the property. *See id.* (holding that the contract for deed in this case did not create a landlord-tenant relationship upon default).

posed to losing all payments *and* the property if he or she defaults in any way.³⁹

Lest we broadly condemn sellers using contracts for deed as exploiters of low-income purchasers, it is important to understand the sellers' impetus for such a financing instrument.⁴⁰ Because the purchaser is able to pay very little down on the property, the seller needs protection as well.⁴¹ Unlike mortgages, where the typical down payment in Texas over the past ten years has been from fifteen to over twenty-five percent of the purchase price,⁴² a contract for deed may require little or no down payment.⁴³ In many cases the payments are "roughly the equivalent of rent, and the amount forfeited may therefore square rather well with" the actual value of the possession period.⁴⁴ In any event, it would be unfair for the purchaser, who has paid relatively little to be able to maintain title to the property, while the seller spends time and money to rescind the contract and regain possession.⁴⁵

B. *Development of the Colonias*

Beginning in the 1950s, very low-income residents, who were typically Mexican immigrants, began to purchase land and erect dwellings along the Texas-Mexico border.⁴⁶ Over time, these communal developments

39. *Dickey v. McComb Dev. Co.*, 115 S.W.3d 42, 47 (Tex. App.—San Antonio 2003, no pet.) (Stone, J., concurring) (opining that families can pay on a property for years and then lose it because they missed one payment under contract for deed); JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989); see *Pease v. Baxter*, 41 P. 899 (Wash. 1895) (enforcing a contract for deed that provided for the forfeiture of all payments and improvements made on the property at the option of the vendor).

40. See Judon Fambrough, *New Rules Govern Contracts for Deed*, 9-1 TIERRA GRANDE, Jan. 2002, at 24-26, available at <http://recenter.tamu.edu/tgrande/vol9-1/1547.html> (revised Sept. 2003) (pointing out that sellers prefer contracts for deed because it protects their interests in case of a purchaser default).

41. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171-72 (3d ed. 1989).

42. See Federal Housing Finance Board, <http://www.fhfb.gov/Default.aspx?Page=53&Top=4> (select "Annual by State" table) (last visited Feb. 24, 2007) (listing the loan-to-price ratio for each state from 1978 through 2003) (on file with the *St. Mary's Law Journal*).

43. See 27 STEPHEN G. COCHRAN, *TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES* § 7.12 (3d ed. 2002) (stating that a contract of sale may require "only a very low down payment, if any").

44. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 173 (3d ed. 1989).

45. See *id.* at 172 (noting that a vendor who has recorded the contract for deed must expend time and resources to remove the cloud on the merchantability of the title if the purchaser defaults).

46. David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 881 (1996) (discussing the

became known as “colonias.”⁴⁷ These border neighborhoods developed without the proper infrastructure or city planning, leaving residents in unsafe and unsanitary conditions.⁴⁸ Additionally, the land upon which the residents settled was not properly granted to them under good land title, thereby creating a risk of loss to any improvements they may have added.⁴⁹

The reasons why people settled in these areas are simple: (1) the purchasers had very low income and could not afford anything but the cheapest land;⁵⁰ (2) the purchasers had poor or non-existent credit to

historic development of the colonias); see Colonias FAQ's, Texas Secretary of State Roger Williams, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Feb. 24, 2007) (summarizing the development of the colonias) (on file with the *St. Mary's Law Journal*).

47. See NANCY L. SIMMONS, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico*, 27 N.M. L. REV. 33, 39-40 (1997) (recognizing that the term “colonia” was used as long ago as 1977 to describe the impoverished rural housing settlements along the Texas-Mexico border). “Colonia,” loosely translated, is the Spanish word for a neighborhood or community. *Id.* at 33; see Colonias: Glossary of Terms & Abbreviations Related to Colonias-Prevention Laws, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/glossary.shtml> (last visited Feb. 24, 2007) (describing the linguistic origin of the term colonia) (on file with the *St. Mary's Law Journal*).

48. See *De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003) (describing the poor living conditions in the colonias), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004); see also David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 879-85 (1996) (attributing the magnified health risks facing colonia residents to the impoverished nature of the colonias).

49. See Colonias FAQ's, Texas Secretary of State Roger Williams, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Feb. 24, 2007) (opining that historically colonias developers did not have to record a deed of trust and could claim improvements on repossessed property if a purchaser defaulted) (on file with the *St. Mary's Law Journal*).

50. *De La Cruz*, 109 S.W.3d at 76 (indicating low-income purchasers have no property financing alternatives, other than contracts for deed). The demographic profile of the colonias, based on the 1990 census, is “young, predominately Hispanic, low to very low income,” and employed in unskilled, and therefore, low paying sectors. Background on the Colonias: Resident Profile, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*). Approximately 27% of colonias residents speak Spanish primarily and approximately 70% have never graduated from high school. *Id.* Thirty-six and a half percent are children, compared to a statewide percentage of 29%. *Id.* Surprisingly, however, 85% of the residents are United States citizens and more than 75% are natives of the United States. *Id.* “According to a random survey in June 2000 by the Texas Department of Health, [of ninety-six] colonias in six border counties (Cameron, El Paso, Hidalgo, Maverick, Val Verde and Webb), almost half of the colonia households make less than \$834 a month.” *Id.* Indications are that the population of the colonias may be as high as 700,000 residents by 2010. Background on the Colonias: Resident Profile, Texas Department of

qualify for a standard mortgage;⁵¹ (3) the sellers in these areas bought cheap land and made no improvements allowing it to be resold cheaply;⁵² and (4) the sellers were willing to sell the land under a contract for deed which typically required no money down (although the interest rates were often exorbitant).⁵³ Unfortunately, the very circumstances that allowed the sellers to buy and resell the land cheaply were the same circumstances that provided little incentive to eliminate the unsafe and unsanitary conditions.⁵⁴

In legal terms, the colonia growth in the 1980s and early 1990s reflected a failure of Texas lawmakers to regulate subdivision growth. In response to the post civil war reconstruction era, the Texas Constitution was designed to minimize the powers of state government.⁵⁵ Counties, as subdi-

Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

51. See *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435 (Tex. 2005) (Wainwright, J., concurring) (admitting contracts for deed are an ugly, but needed alternative to traditional mortgage financing) (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)); *De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003) (indicating low-income purchasers have no alternatives, other than contracts for deed, for purchasing even the cheapest “substandard” tracts), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004).

52. David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 882-84 (1996) (discussing the economic origins of the colonias); see also Colonias FAQ's, Texas Secretary of State Roger Williams, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Feb. 24, 2007) (identifying the financial realities of the very low-income residents of the colonias which led to their proliferation) (on file with the *St. Mary's Law Journal*).

53. Pamela Brown, *Lawyers Team Up to Help in Colonia*, 63 TEX. B.J. 462, 462 (2000) (opining that contracts for deed are almost impossible to pay off because of the high interest rates); see Roderick R. Williams, Note, *Cardboard to Concrete: Reconstructing the Texas Colonias Threshold*, 53 HASTINGS L.J. 705, 712 (2002) (reporting some sellers “have taken advantage of a language barrier and their stronger bargaining position, and . . . have charged an illegally high rate of interest”).

54. See *Flores*, 185 S.W.3d at 435 (Wainwright, J., concurring) (portraying the land in the colonias as often located in a flood plain or otherwise unsuitable for habitation) (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)). Because the colonias land was unsuitable for other uses, the “developers” could sell it cheaply. *Id.* On the other hand, these habitability issues also diminished any incentives for the developers to spend money to improve the property. David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 882-84 (1996) (discussing the economic origins of the colonias).

55. Background on the Colonias, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (explaining that Texans reacted to the reconstruction era by reducing the power of county government in areas outside city limits) (on file with the *St. Mary's Law Journal*); FAQs, Border Low Income Housing Coalition, <http://www.bordercoalition.org/page2/page2.html> (last visited

visions of the state, had no power to act on their own initiative without approval of the state's electorate.⁵⁶ According to Texas law, all regulatory powers rest with the cities or the state.⁵⁷ Therefore, areas that fall outside a city's limits are not regulated by the city.⁵⁸ Consequently, the regulation of these areas falls to the state, which will only regulate development problems that become too serious to ignore.⁵⁹

Hence, for years, the growing numbers of colonia community residents have endured living conditions often compared to third-world countries.⁶⁰ These residents frequently lack access to safe, sanitary drinking water, adequate sewage systems, adequate utilities, adequate plumbing, proper drainage, and paved roadways.⁶¹ Even the dwellings themselves are typically constructed with inferior materials and below general building standards.⁶² As in many impoverished countries, a colonia land pur-

Feb. 24, 2007) (outlining a brief history of why Texas counties had no authority over the rural areas outside Texas's cities) (on file with the *St. Mary's Law Journal*).

56. Background on the Colonias, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (opining that county authority must be mandated by the voters) (on file with the *St. Mary's Law Journal*); FAQs, Border Low Income Housing Coalition, <http://www.bordercoalition.org/page2/page2.html> (last visited Feb. 24, 2007) (commenting that lack of county authority has created "regulation free zones") (on file with the *St. Mary's Law Journal*).

57. Background on the Colonias, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (explaining that "in Texas, all regulatory powers originate with the cities and the state") (on file with the *St. Mary's Law Journal*).

58. *Id.* (opining that county authority must be mandated by the voters).

59. *Id.* (discussing the fact that issues in these unregulated areas tend to be no one's problem until they are everyone's problem).

60. David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 872-73 (1996) (comparing the slums of urban America to the colonias and determining that the border communities' "third world" conditions . . . make the slums of urban America look like upscale neighborhoods"); Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico*, 27 N.M. L. REV. 33, 33 (1997) (summarizing the 1995 Texas Legislature's historical notes concluding that "Third World illnesses" in the border communities could severely impact other parts of the state).

61. See 42 U.S.C. § 1479(f)(8) (1992) (defining colonia as lacking "potable water supply, . . . adequate sewage systems, and . . . decent, safe, and sanitary housing"); Texas Department of Human Services, *The Colonias Factbook: A Survey of Living Conditions in Rural Areas of South and West Texas Border Counties* 1-3 (1988) (describing the dire poverty of the colonias including lack of potable water and sewage systems).

62. Guadalupe T. Luna, *On Holding the Line and Retrogressive Zeitgeist: A Tribute to Judge Theodore McMillan*, 52 WASH. U. J. URB. & CONTEMP. L. 59, 74 (1997) (stating that after buyers start with a trailer home, their building materials consist of "discarded lumber, cereal boxes, cinder blocks, pallets, and other inferior construction materials").

chaser may make improvements to the land only as finances allow.⁶³ Therefore, dwellings are built one room at a time with makeshift materials and little structural integrity.⁶⁴ The lack of planning in the construction of the dwelling makes it very difficult to remedy the issues of inadequate electrical, plumbing, and sewage systems, let alone the lack of protection from natural disasters such as hurricanes and floods.⁶⁵ Unfortunately, the lack of subdivision regulation coupled with the nature of colonia construction allowed many “developers” to create substandard subdivision land parcels that were sold to residents under contracts for deed.⁶⁶

C. *The Issues with Contracts for Deed*

As dreadful as the colonias' living conditions were, the ultimate issue was the fact that unscrupulous sellers took advantage of many colonia residents through the use of contracts for deed.⁶⁷ Historically, contracts for deed did not provide many of the safeguards found in a deed of trust financing transaction.⁶⁸ For example, the majority of contracts for deed are for unimproved land, whereas deeds of trust often convey title to real estate accompanied by structural improvements.⁶⁹ Contracts for deed do

63. Background on the Colonias: Resident Profile, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

64. *See id.* (stating that residents, rather than professional builders, construct the makeshift dwellings); *see also* Guadalupe T. Luna, *On Holding the Line and Retrogressive Zeitgeist: A Tribute to Judge Theodore McMillan*, 52 WASH. U.J. URB. & CONTEMP. L. 59, 74 (1997) (indicating that many of the households have only one bedroom).

65. *See* Background on the Colonias, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (reporting that professional builders are seldom used and at least half of the rural colonias lack plumbing) (on file with the *St. Mary's Law Journal*).

66. *See* David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 882-83 (1996) (acknowledging that a combination of factors led to colonia subdivision development including a lack of regulations and minimized risks). As a “matter of economics,” it was easier and more profitable for landowners to subdivide and sell virtually useless land instead of farming it. *Id.*

67. *See* *De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003) (indicating the lack of remedies led to abusive practices), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004).

68. *See id.* (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (stating “virtually none of the state and federal protections afforded conventional home buyers apply to a purchaser under a contract for deed”).

69. *See id.* (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (noting that contracts for deed seldom convey improvements).

not allow the purchaser to accrue equity in the property and a deed conveying legal title is not delivered until complete payment is made.⁷⁰ Contracts for deed are not afforded the typical state and federal protections provided to conventional home buyers such as required platting, recording, freedom from liens, and statutory default and foreclosure procedures.⁷¹ Finally, buyers under contracts for deed may be subjected to predatory interest rates by unethical sellers.⁷²

This lack of regulation and remedies has resulted in: (1) tracts being sold simultaneously to two or more purchasers; (2) tracts being subject to liens unbeknownst to the purchaser; (3) tracts being sold by unenforceable oral contracts; (4) purchasers paying on the land well beyond the full payment of the purchase price; (5) failure of the sellers to transfer title; and (6) misrepresentation of flood plain issues and the availability of utilities.⁷³ Not only were the purchasers subject to insecure title, they could not gain the benefit of home equity loans for improvements⁷⁴ and could

70. See *id.* (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (stating that under a typical contract for deed, "legal title does not transfer until all payments are made, and the purchaser may not accrue any equity in a tract even though substantial payments have been tendered").

71. *Id.* (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (stating "virtually none of the state and federal protections afforded conventional home buyers apply to a purchaser under a contract for deed").

72. Act of May 28, 1995, 74th Leg., R.S., ch. 979, § 1, 1995 Tex. Gen. Laws 4895, 4895, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "74(R) - 1995" for "Legislature" and enter "HB 1001" for "Bill Number" to display enrolled version of the bill) (finding that the colonias conditions "allow[ed] unscrupulous individuals, through the use of executory contracts, to take advantage of the residents of economically distressed subdivisions by charging usurious rates of interest"); Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (indicating that the worst issue with contracts for deed may be the predatory lending practices associated with them); see also TEX. FIN. CODE ANN. § 303.009 (Vernon 2006) (placing the interest rate ceiling on certain contracts, including contracts for deed, at 18% per year). Contracts for deed are not considered consumer loans or retail installment contracts and are not governed by the same rules as consumer credit. Cf. *Cain v. Tex. Bldg. & Loan Ass'n*, 21 Tex. Civ. App. 61, 51 S.W. 879, 882 (Dallas 1899, writ ref'd) (stating that an installment contract to build a house was not a contract to loan money and therefore not subject to usury laws).

73. SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995) (reporting the predatory practices of many property sellers in the colonias). This report has been cited extensively in case law vis-à-vis contracts for deed. See, for example, *De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004) and *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435 (Tex. 2005), both of which cite the Texas Senate study.

74. See Colonias FAQ's, Texas Secretary of State Roger Williams, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Feb. 24, 2007) (recognizing that because contract for deed purchasers do not have legal title to their property until it is paid off, many

lose the real estate if they missed a single payment.⁷⁵ Even though these problems “led some parties to call for an outright prohibition” of contracts for deed,⁷⁶ the fact remained that many low-income families had no other alternatives for affordable housing.⁷⁷

Problems with contracts for deed have not been limited to the colonias.⁷⁸ Wherever contracts for deed were used, they created the possibility of onerous results for purchasers who fell behind on payments or failed to pay associated attorney’s fees.⁷⁹ In *Harbert v. Owen*,⁸⁰ Owen, the purchaser under a contract for deed, fell behind on her installment payments.⁸¹ The sellers hired an attorney to enforce acceleration and forfeiture.⁸² As required by Texas Property Code section 5.062, the attorney gave notice to Owen of the past due payments, the outstanding attorney’s fee for collection, and the intent to enforce forfeiture of payments made on the contract and cancellation of the contract.⁸³ The Beaumont Court of Appeals stated “[n]otwithstanding an agreement to the contrary, a purchaser in default under an executory contract . . . for . . . real property used as the purchaser’s residence may avoid forfeiture of interest by complying with the terms of the contract within the time provided by statute.”⁸⁴ The statute cited by the court was the 1984 Texas Property Code section 5.063.⁸⁵

“financial institutions are reluctant to lend money to improve the property”) (on file with the *St. Mary’s Law Journal*).

75. See *Dickey v. McComb Dev. Co.*, 115 S.W.3d 42, 47 (Tex. App.—San Antonio 2003, no pet.) (Stone, J., concurring) (opining that families can pay on the property for years and then lose it because they missed one payment under contract for deed).

76. *De La Cruz*, 109 S.W.3d at 76 (citing SENATE COMM. ON INT’L RELATIONS, TRADE & TECH., BILL ANALYSIS, TEX. S.B. 336, 74th Leg., R.S. (1995)) (describing how the contract for deed contributed to the overall problems of the colonias).

77. *Id.* (citing SENATE COMM. ON INT’L RELATIONS, TRADE & TECH., BILL ANALYSIS, TEX. S.B. 336, 74th Leg., R.S. (1995) (indicating contracts for deed were not banned because low-income purchasers had no other alternative form of financing)).

78. See generally *Harbert v. Owen*, 791 S.W.2d 627 (Tex. App.—Beaumont 1990, no writ) (illustrating the problems with contracts for deed in a non-colonia setting).

79. See generally *id.* (demonstrating the problems with contracts for deed in a non-colonia setting).

80. 791 S.W.2d 627 (Tex. App.—Beaumont 1990, no writ).

81. *Harbert v. Owen*, 791 S.W.2d 627, 628 (Tex. App.—Beaumont, no writ) (providing that the seller hired an attorney to enforce the forfeiture and acceleration clauses of the contract for deed).

82. *Id.* (indicating that the attorney gave the purchaser the statutory notice required for defaults).

83. TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 2006); *Harbert*, 791 S.W.2d at 628 (impairing the court’s decision that Owen could avoid forfeiture by paying the past due payments and the attorney’s fees).

84. *Harbert*, 791 S.W.2d at 628 (citing TEX. PROP. CODE ANN. § 5.063 (Vernon 1984)).

85. *Id.* (citing TEX. PROP. CODE ANN. § 5.063 (Vernon 1984)).

Owen paid the past due payments but refused to pay the \$500 attorney's fees.⁸⁶ The court of appeals remanded the case to the trial court because it determined that the contract provided for forfeiture if Owen failed "to make any of the payments or to perform any of the covenants."⁸⁷ Because the sellers had contracted to charge attorney's fees for collection if Owen defaulted, Owen "failed to cure her default within the statutory period and the [sellers] were entitled to . . . judgment for *possession of the property and recovery of their attorney[']s fees*."⁸⁸ Thus, Owen forfeited her residence and any payments made because she failed to pay the attorney's \$500 fee.⁸⁹

Other issues with contracts for deed involve the proper vesting of title to the property.⁹⁰ For example, in *Gibson v. Bostick Roofing & Sheet Metal Co.*,⁹¹ a property owner under a contract for deed contracted for a roofing job and then failed to pay the invoices.⁹² The court found that the roofing contractor could not establish a valid constitutional lien against the purchaser's interest because the contracting party was only the equitable owner of the property.⁹³

On the other hand, in *Graves v. Diehl*,⁹⁴ a contract for deed landowner sued the owner of a neighboring property for nuisance concerning the use of an airstrip.⁹⁵ Although the Diehls had acquired only an equitable interest in the property, the court of appeals found that it was sufficient to maintain a nuisance action.⁹⁶ The court noted that "while the interest of

86. *Id.* (remanding the case to the trial court to determine if Owen had performed all of the covenants of the contract).

87. *Id.* (applying the terms of the contract for deed in the case of Owen's default).

88. *Id.* (emphasis added) (finding in favor of the seller and requiring Owen to give up her property and all payments made to the seller).

89. *Harbert*, 791 S.W.2d at 628 (illustrating the harshness of contracts for deed).

90. *Compare* *Gibson v. Bostick Roofing & Sheet Metal Co.*, 148 S.W.3d 482, 494 (Tex. App.—El Paso 2004, no pet.) (holding that a workman's lien required the party to a contract for deed to have legal title to the property), *with* *Graves v. Diehl*, 958 S.W.2d 468, 470-72 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (holding that a contract for deed holder's equitable interest in the property was enough to maintain a private nuisance claim).

91. 148 S.W.3d 482 (Tex. App.—El Paso 2004, no pet.).

92. *Gibson*, 148 S.W.3d at 487-88 (providing that a contract for deed purchaser contracted for roofing work then failed to pay).

93. *Id.* at 493-94 (holding that a workman's lien required the party to a contract for deed to have legal title to the property).

94. 958 S.W.2d 468 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

95. *Graves v. Diehl*, 958 S.W.2d 468, 469-70 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (finding that the Graveses' equitable interest was enough to maintain a nuisance action).

96. *Id.* at 470 (concluding that a private nuisance claim was available to the contract for deed holder due to their equitable interest in the property).

a purchaser under a contract for deed is insufficient to allow claims against the seller for trespass, the interest is sufficient for claims against third parties.”⁹⁷ These issues and others led to the legislature’s eventual response.

D. *Government Reaction to the Colonias and the Associated Deceptive Sales Practices*

The growing issue of impoverished communities in Texas prompted the legislature to begin adopting legislation to remediate and prevent colonia-type conditions along the Texas-Mexico border.⁹⁸ Based on resources such as the 1988 Texas Department of Human Services Colonias Factbook,⁹⁹ the initial legislation focused on the third-world living conditions as opposed to the onerous sales contracts’ terms.¹⁰⁰ Beginning in 1987, the Texas Legislature expanded the extraterritorial jurisdiction of cities to regulate subdivision development and required public utility services to be limited to platted tracts.¹⁰¹ Also in the 1987-88 congressional session, Texas congressmen in Washington introduced several bills to establish the United States-Mexico Border Regional Commission and to obtain millions of dollars in federal financial support through loans and grants.¹⁰² In 1989, the 71st Texas Legislature passed the first major legislation addressing the colonias.¹⁰³ The Texas Congress decided that the

97. *Id.* at 472 (declaring that a contract for deed holder’s equitable interest in the property is insufficient to maintain claims against the seller for trespass).

98. *See De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003) (citing SENATE COMM. ON INT’L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (indicating that the legislature’s response through Texas Senate Bill 336 was due to the magnitude of problems in the colonias), *rev’d on other grounds*, 156 S.W.3d 560 (Tex. 2004).

99. *See* Texas Department of Human Services, *The Colonias Factbook: A Survey of Living Conditions in Rural Areas of South and West Texas Border Counties* 1-3 (1988) (describing the dire poverty of the colonias including lack of potable water and sewage systems).

100. Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (showing that in 1987, the Texas Legislature adopted laws to consolidate and strengthen subdivision platting) (on file with the *St. Mary’s Law Journal*).

101. *Id.* (reporting that the legislature attempted to consolidate and strengthen subdivision platting by amending the Property Code in 1987).

102. Search Bill Summary & Status for the 100th Congress, The Library of Congress, Thomas, <http://thomas.loc.gov/bss/100search.html> (enter search term “colonias” and select “SEARCH”) (last visited Feb. 24, 2007) (on file with the *St. Mary’s Law Journal*).

103. Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (showing that in 1989, the Texas

state “would spend millions of dollars to address the water and sewer infrastructure issues” but, in doing so, would also require compliance with strict laws and rules to prevent new colonias.¹⁰⁴ That same legislature, for the first time, granted authority to the Office of the Attorney General to enforce those laws.¹⁰⁵ In Washington during 1989, the 101st Congress, again led by Texas congressmen, introduced several bills focused on affordable and safe housing for the residents of impoverished communities in Texas and other United States-Mexico border areas.¹⁰⁶

In 1991, the United States Congress, in section 1479(f)(8) of title 42 of the United States Code, coined the term colonia as:

[A]ny identifiable community that—

- (A) is in the State of Arizona, California, New Mexico, or Texas;
- (B) is in the area of the United States within 150 miles of the border between the United States and Mexico, except that the term does not include any standard metropolitan statistical area that has a population exceeding 1,000,000;
- (C) is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and
- (D) was in existence as a colonia before November 28, 1990.¹⁰⁷

This federal legislative attention gave more focus to the colonias, and the Texas Legislature soon conducted its own study of the impoverished

Legislature adopted laws directly aimed at the colonias) (on file with the *St. Mary's Law Journal*).

104. *Id.* (describing the new legislation directed at remediating and preventing colonias from forming); *see also* Colonias: Thumbnails: Thumbnail Sketches of Major Colonias-Prevention Laws, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/thumbnail.shtml> (last visited Feb. 24, 2007) (describing the Economically Distressed Areas Program (EDAP) created to address water and sewage issues) (on file with the *St. Mary's Law Journal*).

105. Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (giving the Texas Attorney General enforcement authority over certain colonias-directed legislation) (on file with the *St. Mary's Law Journal*).

106. Search Bill Summary & Status for the 101st Congress, The Library of Congress, Thomas, <http://thomas.loc.gov/bss/101search.html> (enter search term “colonias” and select “SEARCH”) (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

107. 42 U.S.C. § 1479(f)(8) (1992) (statutorily defining colonia as an impoverished area within 150 miles of the United States-Mexico border lacking “potable water supply, . . . adequate sewage systems, and . . . decent, safe, and sanitary housing”).

border communities.¹⁰⁸ The 1994 study conducted by the Texas Senate identified several immediate areas of concern, including the methods of contracting.¹⁰⁹ For the first time, the Texas Legislature focused on the pressing quality of life issues as well as the tool used to perpetuate them—the contract for deed.¹¹⁰

In 1995, the Texas Legislature passed the first laws regulating the primary method of conveyance in the colonias: the contract for deed.¹¹¹ The Colonias Fair Land Sales Act (Texas Senate Bill 336) required developers to record contracts with the county and to provide annual statements to the purchasers including amount paid, amount owed, the number of payments remaining, and the amount paid to taxing authorities on the purchaser's behalf.¹¹² These contractual requirements, along with the infrastructure requirements, represented major strides toward improving the quality of life for residents of the colonias.¹¹³

E. *Development of Other Impoverished Communities*

The Texas Legislature's study also revealed that although there was a great concentration of colonias along the Texas-Mexico border, "similarly substandard subdivisions" existed in virtually every area of Texas.¹¹⁴ Al-

108. SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995) (reporting findings from the Texas Senate's study of the colonias).

109. *Id.* (outlining the magnitude of the problems in the colonias).

110. Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (discussing the revamping of the regulation of county platting as well as the changing of the Property Code to address default procedures) (on file with the *St. Mary's Law Journal*).

111. *De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003) (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (stating that contracts for deed are "almost always" the method of financing and conveyance used by residents of colonias), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004). Texas Senate Bill 336 (1995) provided for a penalty if the seller failed to transfer title within thirty days after receipt of final payment from the purchaser. *Id.*

112. Texas Legislature Online, Bill Status, <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (enter "SB 336" for "Bill Number" and select "74(R) - 1995" for "Legislation") (last visited Feb. 24, 2007) (displaying the enrolled version of the bill) (on file with the *St. Mary's Law Journal*).

113. *See* Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (enhancing "notification requirements . . . before a seller may enforce . . . rescission or . . . forfeiture") (on file with the *St. Mary's Law Journal*).

114. *De La Cruz*, 109 S.W.3d at 76 (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (declaring that poverty stricken areas exist in all parts of Texas, not just along the border).

though impoverished urban communities are recognized as an ongoing problem in the United States and Texas, impoverished rural communities in Texas, while less obvious, are just as appalling.¹¹⁵ New areas of growth in rural poverty tend to be found in regions surrounding tiny, dying farm communities where impoverished residents find work as menial laborers on local farms and ranches.¹¹⁶ While perhaps living in slightly better conditions than those of border residents, many of the same issues involving inadequate water, electrical, and wastewater systems plague these Texans as well.¹¹⁷ Moreover, non-border residents also deal with the issues concerning contracts for deed and some sellers' abusive lending practices.¹¹⁸

III. HISTORICAL SKETCH OF TEXAS LAWS RELATED TO CONTRACT FOR DEED REFORMATION

The Texas Legislature has led the nation in addressing the issues of the colonias, including those concerning contracts for deed.¹¹⁹ Although the response is thought by many to be "too little, too late," many residents of the colonias have been thankful to finally receive title to their lands.¹²⁰

115. See Martha Mendoza, *Poverty: America's Ongoing Disaster*, MIAMI HERALD, Sept. 25, 2005, at A1 (describing the widespread problem of poverty in both urban and rural America).

116. See Guadalupe T. Luna, *On Holding the Line and Retrogressive Zeitgeist: A Tribute to Judge Theodore McMillan*, 52 WASH. U. J. URB. & CONTEMP. L. 59, 73 (1997) (explaining that one of the reasons new colonias are appearing in different parts of the country is that low-wage city residents are leaving to find cheaper housing); Mona Koener, *Colonias in New Mexico: Rethinking Policy Approaches to Substandard Housing Problems 2* (Apr. 6, 2002) (unpublished paper presented at the Spring 2002 Urban Issues Colloquium at LBJ School of Public Affairs, University of Texas, Austin) (stating that "the exodus of residents from the rural areas results in the deterioration of small town infrastructure and residences") (on file with the *St. Mary's Law Journal*); TexasHousing.org, *Texas Colonias*, <http://www.texashousing.org/issues/page15/page15.html> (last visited Mar. 7, 2007) (comparing photographs of a border colonia with a non-border, rural colonia).

117. Mona Koener, *Colonias in New Mexico: Rethinking Policy Approaches to Substandard Housing Problems 11* (Apr. 6, 2002) (unpublished paper presented at the Spring 2002 Urban Issues Colloquium at LBJ School of Public Affairs, University of Texas, Austin) (describing the differences between older rural colonias and typical Texas border colonias) (on file with the *St. Mary's Law Journal*). Some of the communities are very diverse with expensive custom homes as well as older substandard homes. *Id.*

118. *Id.* at 16 (asserting that although contracts for deed can be a problem for the rural colonia, in the majority of these communities, they are not viewed as a significant issue).

119. *Id.* at 1 (recognizing Texas as the leader in addressing colonia issues). Because the greatest concentrations of colonias are in Texas, it is fitting that Texas has led the charge "in framing issues, defining the problem, and crafting solutions." *Id.*

120. Pamela Brown, *Lawyers Team Up to Help in Colonia*, 63 TEX. B.J. 462, 463 (2000) (recognizing that "some [colonia residents] were just ecstatic, [while] others were

The contract for deed legislation leading up to the current state of affairs is outlined below.

A. *The Initial Legislative Years (1991–1995)*

Due to the rapid expansion of the Texas colonias during the 1980s, in 1991, the Texas Legislature passed a bill adding subsection (f) to Texas Local Government Code (Local Code) section 232.001, requiring platting for all subdivisions in border counties, regardless of the size of the county or the intended use of the plat.¹²¹ Subdivision regulation laws have historically addressed two areas: platting (roads and boundaries) and infrastructure (water, sewer, and topography).¹²² Specifically, platting is important to help guarantee clear title for residents, to help counties monitor growth, to assure the provision of good roads, and to guarantee legal access to property.¹²³

In 1995, the legislature repealed subsection (f) of Local Code section 232.001 and replaced it with a set of comprehensive statutes in the Local Code and Property Code addressing the platting and infrastructure issues of the colonias.¹²⁴ This piece of legislation included strict and detailed platting requirements prior to sale, the prohibition of contracts for deed or other similar conveyances to evade compliance, and was applicable to all sales (including oral contracts).¹²⁵ Further, the 1995 legislation also

understandably frustrated that it had taken so long to get these [land title] issues resolved”).

121. See Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (explaining that the 1991 legislation closed some loopholes in previous laws regarding colonias prevention) (on file with the *St. Mary's Law Journal*).

122. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 433 (3d ed. 1989) (stating that the prime function of subdivision regulation is to coordinate streets and utility facilities).

123. Department Trend, *TYLA Tackles Land Title Project in Colonias*, 64 TEX. B.J. 346, 346 (2001) (reporting that the colonia residents' land title issues were caused by the developer violating land subdivision laws).

124. See Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (indicating that the 1995 legislation closed another loophole by adding enhanced platting requirements which included a requirement to either “build or bond” water and sewer services) (on file with the *St. Mary's Law Journal*).

125. Act of May 28, 1995, 74th Leg., R.S., ch. 979, § 4, 1995 Tex. Gen. Laws 4895, 4897-98, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “74(R) - 1995” for “Legislature” and enter “HB 1001” for “Bill Number” to display enrolled version of the bill) (listing the Texas Local Government Code platting requirements and the applicability of those requirements); cf. Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3,

added harsh monetary penalties for sellers who do not transfer title to the purchaser within thirty days of the final payment.¹²⁶ Likewise, the legislature added penalties for failure of the seller to provide the purchaser with an annual accounting statement.¹²⁷ Once the purchaser informed the seller that he had not received an annual statement, the purchaser could deduct 15% of each monthly payment until the seller complied.¹²⁸

However, even the 1995 statutory changes did not solve every issue. For example: (1) the law only applied to land that was subdivided into four or more lots and intended primarily for residential use; (2) it did not cover land more than 50 miles from the border; and (3) it only partially addressed the abuse of contracts for deed.¹²⁹ Consequently, in 2001, the Texas Legislature made numerous changes to both the Local Code and the Property Code to address these issues.¹³⁰

B. *The 2001 Legislation*

The 2001 legislation was sweeping vis-à-vis its impact on the remainder of the state's contracts for deed, as well as on those sellers who used con-

1995 Tex. Gen. Laws 4982, 4984-85, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "74(R) - 1995" for "Legislature" and enter "SB 336" for "Bill Number" to display enrolled version of the bill) (listing the various changes to the Property Code for executory contracts such as the requirement that the seller disclose the plat to the purchaser).

126. Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4988, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "74(R) - 1995" for "Legislature" and enter "SB 336" for "Bill Number" to display enrolled version of the bill) (describing the unlimited monetary penalty for a seller failing to transfer title to a purchaser in a timely manner).

127. Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4987, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "74(R) - 1995" for "Legislature" and enter "SB 336" for "Bill Number" to display enrolled version of the bill) (allowing the purchaser to deduct 15% of each monthly payment until the annual statement is received).

128. TEX. PROP. CODE ANN. § 5.100 (renumbered as TEX. PROP. CODE ANN. § 5.077 (Vernon 2004)).

129. See generally Act of May 28, 1995, 74th Leg., R.S., ch. 979, § 1, 1995 Tex. Gen. Laws 4895, 4896-97, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "74(R) - 1995" for "Legislature" and enter "HB 1001" for "Bill Number" to display enrolled version of the bill) (indicating what constitutes an affected county and applicable residential land); Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4983-84, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "74(R) - 1995" for "Legislature" and enter "SB 336" for "Bill Number" to display enrolled version of the bill) (describing how the applicability of the statute will be determined).

130. See Colonias: History: Historical Sketch of Texas Laws Related to Colonias Remediation and Prevention, Attorney General of Texas Greg Abbott, <http://www.oag.state.tx.us/border/history.shtml> (last visited Feb. 24, 2007) (listing the highlights of the various 2001 legislative bills) (on file with the *St. Mary's Law Journal*).

tracts for deed.¹³¹ The Texas Legislature strengthened and extended the contract for deed safeguards on a statewide level.¹³² Under chapter 5, subchapter D of the Texas Property Code, the legislature enhanced many of the provisions formerly found in chapter 5, subchapter E of the Property Code.¹³³ Subchapter E applied only to counties within 200 miles of the Texas-Mexico border comprised mainly of colonia communities and was repealed by these changes.¹³⁴

Property Code sections 5.061 through 5.080, enacted by Senate Bill 198, addressed issues such as notices and disclosures before the sale, the translation of documents used in negotiations into foreign languages, a fourteen-day grace period for cancellation of the contract without penalty, prohibited contract terms, procedures for remedying defaults, protection of the purchaser's equity, the recording of contracts, annual accounting statements from the seller, disclosure and allocation of insurance benefits, and the timely transfer of title upon final payment.¹³⁵

All of the sections in subchapter D are limited to contracts for land to be used as the residence of the purchaser or a close relative of the purchaser.¹³⁶ If the land is for a relative of the purchaser, the relative must be within the second degree by consanguinity or affinity, such as a

131. *See id.* (reporting that “[Senate Bill] 198 strengthened . . . contract for deed safeguards and made them applicable statewide”).

132. *Id.*

133. *See id.* (reporting that “[Senate Bill] 873 granted broad powers to [county] courts to regulate subdivisions . . . outside city limits . . . [which were] codified in [s]ubchapter E of [c]hapter 232” of the Texas Local Government Code).

134. *See* Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1319 (current version at TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (deleting the language restricting the applicability of the executory contracts legislation to certain affected counties “within 200 miles of an international border”).

135. *See* Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1319-27 (current version at TEX. PROP. CODE ANN. §§ 5.062-.079 (Vernon 2004 & Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (renumbering sections of the Property Code and extending the coverage of those sections statewide); Texas Legislature Online, Bill Status, <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (last visited Feb. 24, 2007) (listing the various executory contract safeguards added to the Property Code in the enrolled version of the bill) (on file with the *St. Mary's Law Journal*).

136. *See* Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1319 (current version at TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (renumbering and strengthening statutes governing contracts for deed).

spouse, parent, child, sister, brother, grandparent, or grandchild.¹³⁷ For purposes of subchapter D, a lot measuring an acre or less is presumed to be residential.¹³⁸ However, Senate Bill 198 created statutory exceptions for contracts that provide for the deed to be delivered within 180 days, and for sales of state land.¹³⁹

Subchapter D requires that a seller must provide, in advance of the purchaser signing the contract for deed, a current survey or plat,¹⁴⁰ a copy of every document describing any easement or restrictive covenant or other encumbrance affecting title,¹⁴¹ a tax certificate,¹⁴² information about insurance on the property,¹⁴³ a statement specifying the finance

137. See Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1319 (current version at TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (describing consanguinity (blood relatives) and affinity (relatives by marriage)).

138. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1319 (current version at TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (limiting the size of contract for deed property governed by these statutes).

139. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1320 (current version at TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (listing statutory exceptions to contract for deed property governed by these statutes).

140. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1322 (current version at TEX. PROP. CODE ANN. § 5.069(a)(1) (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (requiring the seller to give the purchaser the property platting information).

141. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1322 (current version at TEX. PROP. CODE ANN. § 5.069(a)(2) (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (requiring the seller to disclose any easement or restrictive covenant or other encumbrance affecting title).

142. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1323 (current version at TEX. PROP. CODE ANN. § 5.070(a)(1) (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (requiring seller to disclose all property tax information).

143. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1323 (current version at TEX. PROP. CODE ANN. § 5.070(a)(2) (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (requiring seller to disclose all insurance terms).

terms,¹⁴⁴ and if the land is not in a recorded subdivision, a separate disclosure stating that “utilities may not be available” until the subdivision is properly recorded.¹⁴⁵ Furthermore, the seller must provide a statement explaining that the written document is controlling regardless of any prior oral statements.¹⁴⁶ Finally, a seller’s failure to provide the required information is the basis for a purchaser suit under the Deceptive Trade Practices-Consumer Protection Act and entitles the purchaser to cancel the contract for a full refund.¹⁴⁷

Subchapter D also prohibits some specific contract terms that are particularly burdensome for the purchaser, such as pre-payment penalties, excessive late-payment fees, and restrictions on pledging equity for certain loans.¹⁴⁸ Under the 2001 provisions, the purchaser may accept a lien for the value of the property improvements to finance utility service, even if the contract forbids it.¹⁴⁹ Additionally, the insurer must be notified of

144. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1324 (current version at TEX. PROP. CODE ANN. § 5.071 (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (requiring seller to disclose all financing terms).

145. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1322 (current version at TEX. PROP. CODE ANN. § 5.069(b) (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (requiring seller to disclose that unplatted property may not have utilities until properly platted).

146. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1324 (current version at TEX. PROP. CODE ANN. § 5.072 (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (requiring the seller to disclose that the written statement governs over any oral statement).

147. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1323 (current version at TEX. PROP. CODE ANN. §§ 5.069(d), .070(b), and .072(e) (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (protecting the purchaser through contract cancellation and rescission if the seller does not provide the required disclosures).

148. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1325 (current version at TEX. PROP. CODE ANN. § 5.073 (Vernon Supp. 2006)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (forbidding certain contract terms in contracts for deed).

149. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1322 (current version at TEX. PROP. CODE ANN. § 5.075 (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (allowing the purchaser to place a lien on the property for the value of the improvements even if the contract forbids it).

the names and addresses of all parties to a contract for deed, and the insurance proceeds must be spent on the insured property.¹⁵⁰

Once the contract for deed is executed, the purchaser has the right to cancel the contract without cause within fourteen days of signing and receive a refund.¹⁵¹ The seller is obligated to inform the purchaser of this right.¹⁵² When the contract is completely paid off, the seller must transfer the property title within thirty days or be subject to increasing liquidated damages over time.¹⁵³ Moreover, failure to provide a timely annual accounting statement makes the seller liable for attorney's fees plus \$250 per day in "liquidated damages," without notice, according to section 5.077.¹⁵⁴ The prior version of this section provided for proportionate sanctions and required that the purchaser give the seller notice before exacting them.¹⁵⁵ This change, allowing liquidated damages without notice, has proven to be the subject of much of the litigation questioning the constitutionality of section 5.077.¹⁵⁶

150. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1323, 27 (current version at TEX. PROP. CODE ANN. §§ 5.070(a)(2), .078 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (requiring insurance proceeds for the contracted property to be spent on that property).

151. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1325-26 (current version at TEX. PROP. CODE ANN. § 5.074 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (allowing a fourteen-day grace period for purchaser cancellation).

152. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1325 (current version at TEX. PROP. CODE ANN. § 5.074 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill).

153. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1327 (current version at TEX. PROP. CODE ANN. § 5.079 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (commanding the seller to transfer property title to the purchaser within thirty days of payment in full).

154. Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4987 (formerly TEX. PROP. CODE ANN. § 5.100), amended by Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1326-27 (codified as TEX. PROP. CODE ANN. § 5.077 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (changing the remedy from a 15% deduction from the monthly payment to "liquidated damages" and adding a provision for attorney's fees).

155. See *Henderson v. Love*, 181 S.W.3d 810, 813-14 (Tex. App.—Texarkana 2005, no pet.) (stating that the 2001 amendments "drastically changed" the prior version of the section).

156. See *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 437 (Tex. 2005) (Wainwright, J., concurring) (concluding that when the court addresses the issue of limits on civil

In 2001, former Property Code section 5.102 was amended and renumbered as Property Code section 5.079.¹⁵⁷ This section allows liquidated damages if the seller does not timely transfer title to the purchaser after the property is paid off.¹⁵⁸ The wording from the previous version was changed from “penalty” to “liquidated damages” but the calculation remained the same.¹⁵⁹ A provision for attorney’s fees was also added.¹⁶⁰ According to the Texas Supreme Court in *Brown v. De La Cruz*,¹⁶¹ the change to liquidated damages created a private action for purchasers to recover monetary damages from sellers who did not transfer title within thirty days.¹⁶² If the seller fails to convey the deed of title in a timely manner, he or she will be liable to the purchaser in the amount of \$250 per day from the thirty-first day after tendering payment to the ninetieth

penalties allowed by section 5.077 of the Property Code, it will be bound by precedents of the United States Supreme Court); *Henderson*, 181 S.W.3d at 812 (holding that retroactively applying section 5.077 of the Property Code did not violate the Texas Constitution even though the section standing alone is “constitutionally suspect”).

157. See Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4988 (formerly TEX. PROP. CODE ANN. § 5.102), amended by Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1327 (codified as TEX. PROP. CODE ANN. § 5.079 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (changing “penalty” to “liquidated damages” and adding a provision for attorney’s fees).

158. TEX. PROP. CODE ANN. § 5.079 (Vernon 2004).

159. See Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4988 (formerly TEX. PROP. CODE ANN. § 5.102), amended by Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1327 (codified as TEX. PROP. CODE ANN. § 5.079 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (changing “penalty” to “liquidated damages” and adding a provision for attorney’s fees); see also *Flores*, 185 S.W.3d at 432 (describing the 2001 Property Code changes); *Brown v. De La Cruz*, 156 S.W.3d 560, 564-66 (Tex. 2004) (analyzing the 2001 Property Code changes).

160. See Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4988 (formerly TEX. PROP. CODE ANN. § 5.102), amended by Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1327 (codified as TEX. PROP. CODE ANN. § 5.079 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (changing “penalty” to “liquidated damages” and adding a provision for attorney’s fees); see also *Flores*, 185 S.W.3d at 432 (describing the 2001 Legislature’s changes to the Property Code); *Brown*, 156 S.W.3d at 564-66 (analyzing the changes to the Property Code made by the 77th Legislature).

161. 156 S.W.3d 560 (Tex. 2004).

162. *Brown*, 156 S.W.3d at 562 (finding that “a private cause of action was not created until 2001”); *Flores*, 185 S.W.3d at 464-66 (concluding that in *Brown*, a private cause of action right could not be inferred from the 1995 Property Code but was later created in 2001).

day, and \$500 per day thereafter plus reasonable attorney's fees.¹⁶³ The 2001 legislation suggested no limit on the accumulated damages for either section 5.079 (title transfer) or section 5.077 (annual accounting statement), mentioned above.¹⁶⁴

C. *The 2003 Legislation*

The Texas Legislature in 2003, through Senate Bill 1527, amended sections 5.064 and 5.065 of the Property Code to *decrease* the cure period allowed to a purchaser in default of a contract for deed.¹⁶⁵ This step only exacerbated the potential abuse of the contract for deed by reducing the amount of time the affected purchaser has to cure default before forfeiture.¹⁶⁶

For contracts for deed signed on or after September 1, 2003, the seller must provide thirty days to the buyer to cure the default after notice is given.¹⁶⁷ For older contracts, the cure period is whatever was required when the contract was signed.¹⁶⁸ Under laws effective from September 1,

163. TEX. PROP. CODE ANN. § 5.079(b) (Vernon 2004). The calculation of liquidated damages in this section is very similar to the calculation of liquidated damages in section 5.077(c) for failure to send an annual statement. *See Flores*, 185 S.W.3d at 432 (indicating *Brown* is instructive in determining whether section 5.077 damages are penal).

164. TEX. PROP. CODE ANN. § 5.077(c) (Vernon Supp. 2006), § .079(b)(1)-(2) (Vernon 2004); *see also Flores*, 185 S.W.3d at 435 (Wainwright, J., concurring) (stating section 5.077(c) "is deafeningly silent on the limits of the penalty").

165. Act of May 23, 2003, 78th Leg., R.S., ch. 959, § 1, 2003 Tex. Gen. Laws 2835, 2835 (codified as TEX. PROP. CODE ANN. §§ 5.064-.065 (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "78(R) - 2003" for "Legislature" and enter "SB 1527" for "Bill Number" to display enrolled version of the bill) (changing the time allowed from notice of default to contract termination).

166. *See Dickey v. McComb Dev. Co.*, 115 S.W.3d 42, 47 (Tex. App.—San Antonio 2003, no pet.) (Stone, J., concurring) (stating that even though the defaulting party tendered the appropriate sum to cure the default, it was one day late so the defaulting party lost everything); David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, *available at* <http://www.tlta.com/publications/downdate/downdate122104p2.htm> (inferring that unscrupulous sellers will use every opportunity, including time constraints, to repossess the property after many payments have been made). "Legitimate [contract for deed] sellers often work with buyers faced with default. Predatory sellers, however, actually look for violations—or even fabricate them—in hope that the buyer has failed to keep good records. When the buyer 'defaults' . . . , the seller gets the home back, and the buyer is left with nothing." *Id.*

167. Act of May 23, 2003, 78th Leg., R.S., ch. 959, §§ 1-3, 2003 Tex. Gen. Laws 2835, 2835-36 (codified as TEX. PROP. CODE ANN. §§ 5.064-.065 (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "78(R) - 2003" for "Legislature" and enter "SB 1527" for "Bill Number" to display enrolled version of the bill) (changing the time allowed from notice of default to contract termination).

168. Act of May 23, 2003, 78th Leg., R.S., ch. 959, § 3, 2003 Tex. Gen. Laws 2835, 2835-36 (codified as TEX. PROP. CODE ANN. §§ 5.064-.065 (Vernon 2004)), *available at*

1969 through August 31, 2001, the cure periods are from fifteen to sixty days.¹⁶⁹ Prior to Senate Bill 1527, the cure periods had been increased to sixty days under a law in effect from September 1, 2001 through August 31, 2003.¹⁷⁰

Fortunately, Senate Bill 1527 did not change Property Code section 5.066 regarding an extended cure period for purchasers who had paid a significant amount on the property.¹⁷¹ Section 5.066 provides that when the purchaser has paid forty percent or more of the amount due or the equivalent of forty-eight monthly payments, the purchaser is entitled to a sixty-day period to cure a default followed by a foreclosure-like sale if unable to cure.¹⁷² These sections apply when the contract involves real property used or to be used as the residence of the purchaser or a close relative (within the second degree by consanguinity or affinity) of the purchaser.¹⁷³

IV. THE 2005 LEGISLATION

A. Overview

The Texas Legislature, through Texas House Bill 1823, amended several sections of the Texas Property Code and directly aimed the changes at making contracts for deed more stable and more flexible for purchasers.¹⁷⁴ The main provisions can be broken into five categories: (1) certain

<http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "78(R) - 2003" for "Legislature" and enter "SB 1527" for "Bill Number" to display enrolled version of the bill) (changing the time allowed from notice of default to contract termination).

169. See Act of June 12, 1969, 61st Leg., R.S., ch. 680, 1969 Tex. Gen. Laws 1991 (codified as TEX. CIV. STAT. ANN. art. 1301b, § 1), *repealed by* Act of June 19, 1983, 68th Leg., R.S., ch. 576, § 6 Tex. Gen. Laws 3729 (current version codified at TEX. PROP. CODE ANN. § 5.064 (Vernon 2004)) (establishing the time frames for acceleration and default).

170. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1321 (codified as TEX. PROP. CODE ANN. § 5.064 (Vernon 2004)), *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (allowing for a sixty day cure period upon default).

171. See TEX. PROP. CODE ANN. § 5.066 (Vernon 2004) (establishing a threshold for payments paid after which the forfeiture process is much like a traditional foreclosure proceeding).

172. See *id.* (indicating that the legislature desired to protect a purchaser's equity once it reached a certain threshold).

173. See *id.* § 5.062(a) (applying the same residential requirement as other sections of subchapter D of the Property Code).

174. Act of May 24, 2005, 79th Leg., R.S., ch. 978, §§ 1-8, 2005 Tex. Gen. Laws 3280, 3280-85, *available at* <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill) (listing the various changes to the Property Code concerning contracts for deed).

waivers prohibited; (2) purchaser's right to convert contract; (3) purchaser's right to cancel contract; (4) purchaser's right to offset amounts due against amounts owed; and (5) seller's requirement to maintain fee simple title.¹⁷⁵ These changes are a positive step for contract purchasers and, except for the waiver prohibition and the fee simple requirement, the changes are retroactive to existing contracts for deed.¹⁷⁶

From the seller's perspective, these new and arduous requirements may put the seller at risk of losing existing contracts and payments that have already been received.¹⁷⁷ For example, a seller could have a contract rescinded for failure to plat, and thereby wind up owing the purchaser his payments on the contract, plus any taxes, plus the value of any improvements made.¹⁷⁸ While this might not seem overwhelmingly severe on an individual basis, consider the fact that "[o]ne developer in Houston has more than 500 active contracts for deed . . . on urban property that has

175. Act of May 24, 2005, 79th Leg., R.S., ch. 978, §§ 4-7, 2005 Tex. Gen. Laws 3280, 3281-85, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill) (prohibiting late fee waivers, option fee forfeitures, increases in purchase price; allowing the purchaser, without penalty, to convert his contract for deed to legal title, or cancel the contract for improper platting; and requiring the seller to maintain fee simple title during the term of the contract).

176. Act of May 24, 2005, 79th Leg., R.S., ch. 978, § 7, 2005 Tex. Gen. Laws 3280, 3285, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill) (identifying the effective dates of the various provisions of the new sections).

177. Act of May 24, 2005, 79th Leg., R.S., ch. 978, §§ 5-6, 2005 Tex. Gen. Laws 3280, 3282-85, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill) (providing the purchaser with protection in the form of refunded payments and reimbursement for improvements if he cancels, and setting penalties against the seller if the seller fails to meet certain statutory requirements); see also Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1232-33 (2005) (asserting that the 2001 and 2005 Property Code amendments may be overly broad and excessively harsh when applied to sellers outside the colonias).

178. See TEX. PROP. CODE ANN. § 5.083 (Vernon Supp. 2006) (creating a purchaser's right to cancel the contract for deed if seller does not properly subdivide or plat the property); Act of May 24, 2005, 79th Leg., R.S., ch. 978, § 6, 2005 Tex. Gen. Laws 3280, 3283-84, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "79(R) - 2005" for "Legislature" and enter "HB 1823" for "Bill Number" to display enrolled version of the bill) (amending various sections of the Property Code to increase protections for homebuyers under contracts for deed); Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1232-33 (2005) (noting the possibility of excessively harsh results under the 2001 and 2005 Property Code revisions).

not been platted.”¹⁷⁹ If nothing else, the new provisions will require certain sellers with contracts for deed to spend several hundred dollars per contract to meet the platting and reporting requirements.¹⁸⁰

B. *Detailed Discussion of the New Provisions and Their Impact*

The following discussion addresses the 2005 Property Code changes based on whether they impact existing contracts for deed (Retroactive Provisions) or whether they impact contracts for deed entered into on or after September 1, 2005 (Provisions Effective After September 1, 2005).

1. Retroactive Provisions

Three of the five main provisions will impact contracts for deed already in existence as of the September 1st effective date of the changes.¹⁸¹ The purchaser’s right to convert his or her contract for deed into either a deed transferring clear title or a deed with a deed of trust is probably the most significant change for purchasers.¹⁸² Section 5.081 requires the purchaser to tender either enough funds to pay off the balance of the purchase price or offer a promissory note to cover the balance.¹⁸³ If the purchaser pays the balance in cash, the seller must, without penalizing the purchaser, transfer recorded, legal title to the real estate under the contract.¹⁸⁴ If the purchaser offers a promissory note for the balance, the seller must “execute a deed containing any warranties required by the contract and

179. *Texas Law Allows Buyers to Convert Contracts for Deeds to Mortgages*, 33 No. CD-16 HDR CURRENT DEVS. 22 (2005) (stating that one Houston developer has over 500 active contracts for deed with immigrant families that have not been platted).

180. See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 433-34 (3d ed. 1989) (indicating that the platting process required by subdivision regulation is often costly, and the planning commission has the discretion to deny approval of a plat even if it meets the platting standards).

181. See Act of May 24, 2005, 79th Leg., R.S., ch. 978, §§ 7-8, 2005 Tex. Gen. Laws 3280, 3285, available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “79(R) - 2005” for “Legislature” and enter “HB 1823” for “Bill Number” to display enrolled version of the bill) (creating retroactive application of Property Code sections 5.081 through 5.084); see also TEX. PROP. CODE ANN. §§ 5.081-.084 (Vernon Supp. 2006) (applying these sections retroactively).

182. See TEX. PROP. CODE ANN. § 5.081 (Vernon Supp. 2006) (describing the right to convert contract for deed without penalty); *Texas Law Allows Buyers to Convert Contracts for Deeds to Mortgages*, 33 No. CD-16 HDR CURRENT DEVS. 22 (2005) (highlighting the right to convert contracts for deed as a significant development).

183. TEX. PROP. CODE ANN. § 5.081(b)-(c) (Vernon Supp. 2006).

184. *Id.* § 5.081(a)-(b).

convey[] to the purchaser recorded, legal title of the property; and . . . the purchaser shall simultaneously execute a deed of trust.”¹⁸⁵

This new deed of trust is like any other third-party mortgage arrangement and offers the standard protections to the purchaser upon default.¹⁸⁶ Once the purchaser tenders payment or the promissory note and the seller has conveyed title, the contract for deed is complete.¹⁸⁷ If the seller, however, fails to meet the requirements of section 5.081, he or she will be liable to the purchaser in the amount of \$250 per day from the thirty-first day after tendering payment or the promissory note to the ninetieth day, and \$500 per day thereafter, plus reasonable attorney's fees.¹⁸⁸ There is no limit to this penalty (found in section 5.079) even though the 2005 Texas Legislature limited a similar penalty section regarding annual statements (section 5.077).¹⁸⁹

At the rates of \$250 and \$500 per day, penalties could approach the value of the property quickly.¹⁹⁰ Because title to the property cannot be deeded without a plat, the effect could be devastating for a seller, such as

185. *Id.* § 5.081(c)(1)-(2).

186. *See id.* § 5.081(c)(2)(A)-(C) (creating a deed of trust that is conveyed to a trustee); JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171 (3d ed. 1989) (stating that third-party mortgage foreclosures are “accompanied by all of the safeguards that the legislatures and courts have established to protect the [purchaser]”).

187. *Id.* § 5.081(f)(1)-(2).

188. TEX. PROP. CODE ANN. § 5.079(b)(1)-(2) (Vernon 2004), § .081(e) (Vernon Supp. 2006).

189. *Compare* TEX. PROP. CODE ANN. § 5.077(d) (Vernon Supp. 2006) (placing a limit of fair market value), *with* TEX. PROP. CODE ANN. § 5.079(b)(1)-(2) (Vernon 2004), §§ .077(d), .081(e) (Vernon Supp. 2006) (indicating no limit on liquidated damages for failure to timely convert a contract for deed or for failure to deliver clear title within thirty days of final payment even though there is now a limit on liquidated damages for failure to comply with the annual statement requirement). One likely reason that the legislature addressed the section 5.077 limitation issue concerning annual statements is that this section had created a great deal of controversy over its constitutionality when viewed from an excessive fines perspective. *See Henderson v. Love*, 181 S.W.3d 810, 812-13 (Tex. App.—Texarkana 2005, no pet.) (holding that retroactively applying section 5.077 of the Property Code did not violate the Texas Constitution even though the section standing alone is “constitutionally suspect”); *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 437 (Tex. 2005) (Wainwright, J., concurring) (concluding that when the court addresses the issue of limits on civil penalties allowed by section 5.077 of the Property Code, it will be bound by precedents of the United States Supreme Court).

190. *See Henderson*, 181 S.W.3d at 815 (indicating that the 2001 version of section 5.077 (which is identical to the 2005 version of section 5.079) could quickly create “liquidated damages” in excess of \$750,000 for a contract worth only \$38,500).

the Houston developer above, who is faced with hundreds of conversion requests of unplatted property.¹⁹¹

The developer is often at the mercy of the city or county planning board for approval of the plat.¹⁹² If the developer submits an unacceptable plat to the planning board, the subsequent revision and approval process could take at least sixty days.¹⁹³ Although no limit exists on the monetary penalty against a seller that fails to deliver title to a “paid-in-full” property, the legislature did add a conspicuous subsection that allows the seller “on or before the 10th day after the date the seller receives a promissory note under [s]ubsection (c)” either to give a written legal justification for not converting the contract to legal title or to schedule a time to convey the title.¹⁹⁴ The question is: What is a reason that “legally justifies” the seller’s failure to convert the contract for deed?¹⁹⁵ The only clear justification for the seller’s failure to convert would be if the purchaser were in default on the terms of the promissory note or the deed of trust.¹⁹⁶ Hence, unless the purchaser requests conversion of the contract while in default (which would not likely happen), there appears to be no limit on the penalty against a seller that fails to deliver title to a deed of trust property.¹⁹⁷

The second retroactive change is the purchaser’s right to cancel a contract for deed for improper platting.¹⁹⁸ This provision, located in section

191. See TEX. PROP. CODE ANN. § 5.079(b)(1)-(2) (Vernon 2004), § .081(e) (Vernon Supp. 2006) (listing the dollar amount of daily liquidated damages). If the Houston developer was delinquent in converting even five contracts for deed for six months, the total liquidated damages he would owe would be approximately \$300,000. See TEX. PROP. CODE ANN. § 5.079(b) (Vernon 2004) (using the statutory provisions to calculate the liquidated damages for five violations over six months).

192. See JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 433-34 (3d ed. 1989) (discussing the costly platting process required by subdivision regulation and that the planning commission has the discretion to deny approval of a plat even if it meets the platting standards).

193. See TEX. LOC. GOV'T CODE ANN. § 232.0025 (Vernon 2005) (indicating that the commissioners court must take final action on a plat, including appeals, within sixty days of receiving the plat, but that under certain circumstances this deadline may be extended).

194. See TEX. PROP. CODE ANN. § 5.081(d)(1)-(2) (Vernon Supp. 2006) (indicating some leniency may be available for the seller where a valid excuse is found for not converting the contract for deed).

195. See *id.* § 5.081(d)(1) (creating an uncertainty regarding what constitutes a “legal justification” for not converting a contract for deed until the issue is adjudicated).

196. See *id.* § 5.081(c)(2)(C), (d)(2) (giving the trustee the right to sell the property if the purchaser defaults).

197. See *id.* § 5.081 (failing to create any limits on liquidated damages for failure of the seller to convert a contract for deed to deed of trust).

198. See *id.* § 5.083 (describing the right of a purchaser to cancel and rescind a contract for deed at any time if the contracted property is not properly platted).

5.083, works hand-in-hand with the 2001 provision in section 5.069 that requires proper platting before the contract is signed or a warning that the property is not properly subdivided.¹⁹⁹ Although the 2001 change applied only to contracts after September 1, 2001, section 5.083 allows a purchaser to cancel a contract for improperly platted land regardless of when the contract was entered into.²⁰⁰

Much like the conversion provision above, the rescission section can be harsh to the seller.²⁰¹ Once the seller is given proper notice by the purchaser of the intent to cancel, he or she has ninety days to divide and plat the property properly and provide evidence of compliance to the purchaser.²⁰² If the purchaser notifies the seller of his intent to cancel the contract, within ten days of receiving the purchaser's notice, the seller must refund the purchaser's payments on the contract, plus any taxes, plus the value of any improvements made.²⁰³ Additionally, the seller may not eject the purchaser from the premises until this refund is made.²⁰⁴ After all is said and done, the purchaser may walk away from the contract having resided for "free" for several years while the seller has lost the value of the opportunity costs of the property.

The last retroactive provision of the 2005 Property Code changes is the right of the purchaser to offset any amounts owed by the seller to the purchaser against any payments the purchaser owes to the seller. This provision can be found in section 5.084 of the Property Code.²⁰⁵ While on its face this provision seems fair to both parties, the purchaser may do this without any judicial action even if the contract itself prohibits offsets.²⁰⁶ This may result in the seller receiving no payment or a reduced payment if the purchaser believes the seller owes him money. From a

199. See TEX. PROP. CODE ANN. § 5.069 (Vernon 2004) (limiting the disclosure of property conditions listed in this section to contracts for deed entered into on or after September 1, 2001).

200. Compare *id.* § 5.069 (limiting the disclosure of property conditions listed in this section to contracts for deed entered into on or after September 1, 2001), with TEX. PROP. CODE ANN. § 5.083 (Vernon Supp. 2006) (indicating the section applies regardless of the date of contract).

201. See TEX. PROP. CODE ANN. § 5.083(b)(2) (Vernon Supp. 2006) (requiring the seller to "return to the purchaser all payments of any kind" and to reimburse the purchaser for taxes paid and improvements).

202. *Id.* § 5.083(b)-(c) (granting the seller a ninety-day period to cure the platting issue).

203. *Id.* § 5.083(b) (providing protections to the purchaser in the event the seller does not properly plat the property).

204. *Id.* § 5.083(d).

205. See *id.* § 5.084 (outlining the purchaser's right to offset amounts owed by the seller against amounts owed to the seller).

206. See TEX. PROP. CODE ANN. § 5.084 (Vernon Supp. 2006) (allowing the purchaser to offset amounts owed against amounts owing without judicial intervention).

contract law perspective, this provision seems to correspond with the trend towards making real estate contract promises dependent upon one another.²⁰⁷ However, in a standard real estate *lease* contract, one party's breach (i.e., failing to make or pay for repairs) does not permit the other party to breach the contract (i.e., non-payment of rent).²⁰⁸ Because payments made on a contract for deed are "roughly the equivalent of rent,"²⁰⁹ it can be argued that section 5.084 does not comport with established real estate contract precepts because it allows the purchaser to not "pay rent" or offset the "rent" against an amount the purchaser feels the seller should have paid.

2. Provisions Effective After September 1, 2005

There are two provisions that are effective only for contracts for deed entered into on or after September 1, 2005.²¹⁰ The first provision, section 5.073, prohibits a seller and purchaser from agreeing to waive certain contract terms and rights.²¹¹ This section protects late fee limits and purchaser security pledges of property.²¹² It prohibits prepayment penalties, forfeitures of option payments, increases in purchase price, and contracts that exempt either party from liability under this section.²¹³

The second provision is very important to the success of the other legislative changes.²¹⁴ Section 5.085 essentially requires that the seller own the property in fee simple, free from liens or encumbrances before contracting to sell it under a contract for deed.²¹⁵ Once the property is under contract, the seller must maintain the property's fee simple and unencumbered status for the duration of the contract.²¹⁶ Upon violation of this

207. See STEVEN L. EMANUEL, *CONTRACTS 205-06* (7th ed. 2003) (stating that normal bilateral contracts contain mutually dependent promises and that "the law regarding the independence of real estate covenants is changing").

208. See *id.* at 206 (asserting that real estate lease contracts contain promises that are typically independent of each other).

209. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 172 (3d ed. 1989).

210. See TEX. PROP. CODE ANN. §§ 5.073, .085 (Vernon Supp. 2006) (establishing that both sections are applicable only to contracts for deed entered into after September 1, 2005).

211. *Id.* § 5.073.

212. *Id.* § 5.073(a)(1)-(2).

213. *Id.* § 5.073(a)(3)-(5), (b).

214. See *id.* § 5.085(a) (mandating that a seller must own the contract for deed property in fee simple before and during the contract period, adding yet another protection to purchasers under contract for deed).

215. TEX. PROP. CODE ANN. § 5.085(a) (Vernon Supp. 2006). In addition, section 5.085(a) provides for the placement of liens that are due to or on behalf of the purchaser. *Id.*

216. *Id.* § 5.085(b).

section by the seller, the purchaser is entitled to rescind the contract and receive reimbursement for the purchaser's payments on the contract, plus any taxes, plus the value of any improvements made.²¹⁷ In lieu of cancellation, the purchaser has the option to cure any deficiency owed by the seller directly with the lienholder.²¹⁸ Both of these provisions seem fairly situated between the seller's and the purchaser's interests.

V. SUMMARY OF THE IMPACT OF THE 2005 CHANGES

A. *Main Concerns with the Texas Property Code Provisions*

There are several major concerns with the Property Code provisions that became effective as of September 1, 2005. First, even though the provisions are designed to give notice of the law to both sellers and purchasers under contracts for deed, the rapidly morphing nature of the provisions has created confusing and fact-sensitive rules.²¹⁹ Furthermore, because the legislation is fairly recent, there is little case law to enlighten practitioners, so these inconsistencies are further exacerbated.²²⁰ Second, the provisions contain sections that may be "constitutionally suspect" depending upon their interpretation.²²¹ Third, the biggest issue with contracts for deed is not addressed—predatory lending.²²²

217. *Id.* § 5.085(c).

218. *Id.* § 5.085(b)(3)(D)(iii).

219. *See Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 433 (Tex. 2005) (exposing the issues with the ever changing statutes by revealing that the financial service company Millennium hired to service its loans "was apparently unaware of recently enacted disclosure requirements specifically applicable to executory contracts").

220. *See id.* at 439 (concluding that no actual harm must be proven for liquidated damages); *Henderson v. Love*, 181 S.W.3d 810, 815, 817 n.7 (Tex. App.—Texarkana 2005, no pet.) (declaring that even though the Texas Supreme Court had announced that no actual harm must be proven for liquidated damages, it decided actual harm was required because it applied chapter 41 of the Texas Civil Practice and Remedies Code). Obviously, these two cases are in conflict, and it will require more litigation and more case law before the discrepancies are eliminated. *See Henderson*, 181 S.W.3d at 817 n.7 (acknowledging the potential conflict).

221. *Henderson*, 181 S.W.3d at 817 n.7 (concluding that the 2001 version of section 5.077 of the Property Code—which mirrors current section 5.079—is constitutionally suspect).

222. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (reporting that recent feedback from the Texas Department of Housing and Community Affairs colonias self-help centers indicate current interest rates to be at 12-14%).

B. *Example of the Confusion: Failure to Transfer Legal Title Within Thirty Days of Payoff*

The penalty that may be assessed against a seller for failing to transfer title depends upon the date of the final payment (or potential violation date).²²³ In 1995, Property Code section 5.102(b) was added to allow a \$250 per day penalty for each day the seller did not transfer title from day thirty-one to day ninety.²²⁴ Thereafter, the penalty increased to \$500 per day with no ceiling until the title was transferred. In 2001, however, the word “penalty” was changed to “liquidated damages” and was made retroactive for contract for deed violations that occurred on or after September 1, 2001.

Pundits of the title transfer legislation fear that is too broad and gives unnecessary power to the savvy purchaser to enforce unlimited statutory penalties.²²⁵ These commentators fear the worst for “sellers across the state when buyers realize the windfall that awaits.”²²⁶ This may be true in some circumstances, but it will depend on when the violation occurred.²²⁷

For example, in 2004, the Texas Supreme Court in *Brown v. De La Cruz*, determined that unless the legislature explicitly provided for a private cause of action, these statutory penalties and fines are not payable to a private litigant under the 1995 version of the statute.²²⁸ In reversing the court of appeals’s decision, the supreme court considered the case of a purchaser in the El Paso area who made payments for approximately thirteen years on a piece of land for which the total purchase price with interest was \$26,084.²²⁹ After making the final payment, the seller failed to convey the title for almost four years.²³⁰ The purchaser filed suit to collect statutory penalties of \$664,500—nearly fifty times the sales price.²³¹ By the time the suit was filed, the legislature had already

223. See TEX. PROP. CODE ANN. § 5.079 (Vernon 2004) (indicating that violations occurring between September 1, 1995 and August 31, 2001 are covered by the 1995 statute).

224. *Id.*

225. See Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1250 (2005) (worrying that unsuspecting sellers will be harshly penalized through section 5.079 and its sister statute section 5.077).

226. *Id.*

227. See generally *Brown v. De La Cruz*, 156 S.W.3d 560, 565 (Tex. 2004) (holding that a private cause of action for liquidated damages did not arise until after September 1, 2001).

228. *Brown*, 156 S.W.3d at 564 (affirming that private litigants “must bring [themselves] clearly within the terms of the statute” to collect statutory penalties).

229. *Id.* at 562 (reciting that the purchaser had made payments for thirteen years).

230. *Id.* (indicating the seller failed to transfer title to the property after almost four years).

231. *Id.* (stating that the purchaser filed suit against the seller including penalties of \$664,500).

changed the language of the statute to reflect liquidated damages payable to the purchaser as opposed to penalties.²³² However, since the triggering event was the final payment made on June 9, 1997 and the 1995 legislation was still in effect for this time period, the court had to interpret the meaning of the 1995 legislation regarding penalties.²³³ The court determined that although the 2001 legislation explicitly allowed for a private cause of action for identical “liquidated damages” plus attorney’s fees, the 1995 legislation did not.²³⁴ Actions under the 1995 statute would have to be taken by the Texas Attorney General under the Texas Deceptive Trade Practices-Consumer Protection Act, if at all.²³⁵ In essence, this means the 1995 legislation covering violations from September 1, 1995 through August 31, 2001 gives little practical protection for purchasers.²³⁶ However, as the statute of limitations runs on those violations, this will become a moot point.

While section 5.079 neglects to limit such liquidated damages for failure to transfer title, as of 2005 section 5.077—concerning the failure to send an annual accounting statement—does. Even though this major inconsistency between section 5.077 and section 5.079 was apparent, no changes were made to section 5.079 of the Property Code during the 2005 legislative session.²³⁷ Therefore, the issue of excessive damages still exists because there is no cap on liquidated damages.²³⁸ On the other hand, while section 5.077 of the Property Code was changed in 2005 to cap the amount of liquidated damages to the fair market value of the property, the change was not made retroactive.²³⁹ This means sellers could be subject to unlimited damages under both sections 5.077 and 5.079 for viola-

232. TEX. PROP. CODE ANN. § 5.079 (Vernon 2004) (designating section 5.102 as new section 5.079 and changing “penalty” to “liquidated damages”).

233. *Brown*, 156 S.W.3d at 562-63 (reviewing the court of appeals’s determination that if De La Cruz could not enforce the statute, then it became a nullity).

234. *Id.* at 563-64 (reversing the court of appeals’s judgment and finding no private cause of action).

235. *Id.* at 566 (discussing without holding that the Texas Attorney General has enforcement powers over previous section 5.102 of the Property Code).

236. *Id.* (failing to decide whether the Texas Attorney General could assist purchasers by enforcing the regulation).

237. *See* TEX. PROP. CODE ANN. § 5.079 (Vernon 2004) (reflecting no changes from the 79th Legislature).

238. *See id.* (reflecting no changes from the 79th Legislature and still no cap on liquidated damages).

239. *See Henderson v. Love*, 181 S.W.3d 810, 814 n.4 (Tex. App.—Texarkana 2005, no pet.) (noting that the 2005 amendments to the Property Code again altered the penalties for failure of the seller to provide the purchaser with an annual statement, and recognizing that such changes are not “retroactive in nature”).

tions from September 1, 2001 through August 31, 2005.²⁴⁰ They could also be subject to limited liquidated damages under section 5.077 for violations beginning on or after September 1, 2005.²⁴¹ For sellers who have outstanding contracts for deed, it will be imperative to know which statutes govern each contract for deed. Otherwise, sellers might be subject to the type of harsh penalties some commentators fear.

Even though section 5.079's penalty provision can be onerous to sellers, the likelihood that sellers will face such a penalty is unlikely. According to feedback from the Texas Department of Housing and Community Affairs colonias self-help centers,²⁴² developers with multiple contracts for deed are voluntarily converting their contracts to warranty deeds.²⁴³ A reason why sellers are amiable to convert their contracts to warranty deeds is that, in this way, they will dissuade their buyers from acquiring alternative low interest financing.²⁴⁴ The longer a seller can maintain an interest-bearing relationship with his buyer, the greater the seller's profits.

C. *Constitutional Frailties of the Current Provisions*

Beginning in 1995, the Texas Legislature saw fit to create statutory sanctions against sellers for failing to timely transfer legal title after final payment was received or for failing to send an annual statement to the purchaser.²⁴⁵ In 2001, the legislature expanded the use of "daily" penal-

240. See TEX. PROP. CODE ANN. § 5.077 (Vernon Supp. 2006), § .079 (Vernon 2004) (reflecting no limits on liquidated damages from September 1, 2001 through August 31, 2005).

241. See *id.* § 5.077 (capping the amount of liquidated damages after September 1, 2005).

242. See Office of Colonia Initiatives: Colonias Self-Help Centers Programs, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/index.jsp> (last visited Feb. 24, 2007) (describing the function of colonia self-help centers) (on file with the *St. Mary's Law Journal*).

243. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (indicating that many developers are avoiding the effects of the recent contract for deed conversion legislation by converting the contracts for deed to warranty deeds before the purchasers pay off their contracts).

244. *Id.*

245. See Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4987-88 (formerly TEX. PROP. CODE ANN. §§ 5.100, .102), amended by Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1326-27 (codified as TEX. PROP. CODE ANN. § 5.077 (Vernon Supp. 2006), § .079 (Vernon 2004)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select "77(R) - 2001" for "Legislature" and enter "SB 198" for "Bill Number" to display enrolled version of the bill) (creating statutory penalties for failing to send an annual statement in section 5.100 and for failing to timely transfer legal title in section 5.102).

ties to the accounting statement violation and made the change retroactive.²⁴⁶ The legislature, however, placed no limits on the total amount of liquidated damages.²⁴⁷

These liquidated damages sections have been viewed with suspicion by sellers who find themselves being sued for damages and also by courts that have heard the cases.²⁴⁸ Because courts generally attempt to avoid deciding constitutional issues,²⁴⁹ the resulting construction of the statutes has been strained and inconsistent.²⁵⁰ The 2005 legislature addressed the liquidated damages for annual statements under section 5.077 by capping the damages amount at the fair market value of the property.²⁵¹ Nevertheless, they did not make the changes retroactive, so any pending litigation vis-à-vis section 5.077 will likely question the constitutionality of the statute.²⁵² Regardless, section 5.079 still allows unlimited liquidated damages for failing to transfer title in a timely manner, so the issues of “obli-

246. Act of May 24, 1995, 74th Leg., R.S., ch. 994, § 3, 1995 Tex. Gen. Laws 4982, 4987 (formerly TEX. PROP. CODE ANN. § 5.100), amended by Act of May 18, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1326-27 (codified as TEX. PROP. CODE ANN. § 5.077 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill) (creating retroactive daily statutory penalties in section 5.077, formerly section 5.100).

247. Act of May 11, 2001, 77th Leg., R.S., ch. 693, § 1, 2001 Tex. Gen. Laws 1319, 1326-27 (codified as TEX. PROP. CODE ANN. § 5.077 (Vernon Supp. 2006)), available at <http://www.legis.state.tx.us/billLookup/billNumber.aspx> (select “77(R) - 2001” for “Legislature” and enter “SB 198” for “Bill Number” to display enrolled version of the bill).

248. See *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435-37 (Tex. 2005) (Wainwright, J., concurring) (discussing the potential constitutional issues of the statute); *Brown v. De La Cruz*, 156 S.W.3d 560, 563 (Tex. 2004) (comparing the statute at issue to a takings clause that implied a private action); *Henderson v. Love*, 181 S.W.3d 810, 813-15 (Tex. App.—Texarkana 2005, no pet.) (analyzing section 5.077 for contract impairment).

249. See *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002) (stating that the Texas Supreme Court avoids constitutional issues when construing statutes); *Henderson*, 181 S.W.3d at 816 (stating that courts of appeal avoid constitutional issues when construing statutes).

250. See *Flores*, 185 S.W.3d at 437 (Brister, J., dissenting) (suggesting that the court was not strict in its construction of the statute). The court determined that even though the wording of the statute used “shall” and not “may,” the seven items required for the annual accounting statement were not mandatory and a good faith effort to produce the report was sufficient to meet the requirement. *Id.* (Brister, J., dissenting). This construction of the statute kept the court from having to address potential constitutionality issues. *Id.* at 430-34.

251. See TEX. PROP. CODE ANN. § 5.077 (Vernon Supp. 2006) (capping the amount of liquidated damages after September 1, 2005).

252. See *Henderson*, 181 S.W.3d at 813-14 n.4 (discussing section 5.077 and the 2005 changes which capped the penalty at the fair market value of the property).

gation of contract” and “excessive fines” are still concerns.²⁵³ If the courts do address the constitutionality issues, the following arguments against the provisions will likely be made: (1) impairment of contract; (2) excessive fines; and (3) due process.²⁵⁴ However, the courts begin under the presumption that the statute is constitutional.²⁵⁵ For example, the Sixth Court of Appeals in Texarkana recently addressed the impairment of contract issue in *Henderson v. Love*.²⁵⁶

At the trial court level, Henderson, a purchaser under contract for deed, sued the seller for failing to provide the statutorily mandated annual accounting statement.²⁵⁷

In 1999, Deborah Hix Henderson agreed to purchase from Michael R. Love a house . . . under . . . a contract for deed, which financed the principal sum of \$38,500.00. At the time of the contract, neither the contract nor any law required an annual accounting statement by Love. In 2001, changes to [s]ection 5.077 of the Texas Property Code became effective which required Love, beginning in January 2002, to provide Henderson with an annual report, briefing her on certain financial details of the contract and imposing “liquidated damages” of \$250.00 per day after January 31 for each year such report was not provided. Apparently, Love failed to provide such a report. In 2004, Henderson sued Love and his co-owner, Sylvia Allison, alleging they were “jointly and severely [sic]” liable for the daily “liquidated damages” because of that failure. The trial court determined that, as applied in this case, the section was unconstitutional. Henderson appeal[ed] the resulting summary judgment that she take nothing from Love.²⁵⁸

253. See TEX. PROP. CODE ANN. § 5.079 (Vernon 2004) (reflecting no changes from the 2005 Texas Legislature).

254. See *Flores*, 185 S.W.3d at 436 (Wainwright, J., concurring) (discussing the potential constitutional issues of the statute); *Henderson*, 181 S.W.3d 810, 813-15 (analyzing section 5.077 for contract impairment).

255. See *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002) (stating the Texas Supreme Court avoids constitutional issues when construing statutes by determining the intent of the legislature and attempting to avoid constitutional infirmities); *Henderson*, 181 S.W.3d at 814 (stating the court presumes retroactive statutes are constitutional).

256. *Henderson*, 181 S.W.3d at 812 (holding that the retroactive section 5.077 did not violate the prohibition against impairing contractual obligations due to chapter 41 of the Texas Civil Practice and Remedies Code).

257. See *id.* (explaining the basis of the original suit).

258. *Id.*

Love argued that the 2001 retroactive changes to section 5.077 impaired his contract by changing the obligation of his contract for deed.²⁵⁹ The issue of an impaired obligation of contract occurs when the law which binds the parties to their obligations, and is in effect at the execution of the contract, is retroactively changed by the legislature in a way that changes the obligations.²⁶⁰ Because the changes to section 5.077 of the Property Code significantly changed the seller's obligations and the purchaser's rights, the court found section 5.077 is "constitutionally suspect" and reversed and remanded the case.²⁶¹

Additionally, the *Henderson* Court addressed the excessive fines question.²⁶² Article I, section 13 of the Texas Constitution and the Eighth Amendment of the United States Constitution prohibit civil fines that "shock the sense[s]."²⁶³ The *Henderson* Court determined that the liquidated damages were constitutionally suspect because they bore no relation to the violation.²⁶⁴ While this may be true, one could argue that the Texas and United States Constitutions only pertain to fines payable to the government,²⁶⁵ or that, in any case, the court should defer to the legislature's mandate.²⁶⁶

259. *Id.* at 813.

260. *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 353-54 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

261. *See Henderson*, 181 S.W.3d at 812 (suggesting that potential liquidated damages of approximately *twenty times* the contract amount are possible under the retroactive changes).

262. *See id.* at 813 (contending that liquidated damages should be rationally related to the violation).

263. U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13; *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980) (quoting *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S.W. 951, 953 (1903)).

264. *See Henderson*, 181 S.W.3d at 813 (contending that liquidated damages should be rationally related to the violation); *Pennington*, 606 S.W.2d at 691 (noting there was some reasonable relationship between the recovery and the offense).

265. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989) (stating that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded"); *State v. Galveston, H. & S.A. Ry. Co.*, 100 Tex. 153, 97 S.W. 71, 78-79 (1906) (deciding that the penalty for non-payment of taxes to the state was excessive and also violated the "obligation of contract" clause of the Texas Constitution), *rev'd on other grounds*, 210 U.S. 217 (1908); *Apache Corp. v. Moore*, 891 S.W.2d 671, 687 (Tex. App.—Amarillo 1994, writ denied) (concluding that excessive fines did not apply to exemplary damages between private parties), *vacated on other grounds*, 517 U.S. 1217 (1996).

266. *See Laredo Ice Co.*, 96 Tex. 461, 73 S.W. at 953 (stating "[t]he imposition and regulations of fines belong to the [l]egislature, and to its discretion and judgment the widest latitude must be conceded"); *City of Houston v. Jackson*, 135 S.W.3d 891, 900 (Tex. App.—Houston [1st Dist.] 2004) (deciding that "as with the treble damage provisions of

As for the due process claim, those opposing the penalties will likely rely on the argument that the constitution limits the state's police power over monetary penalties that "are so grossly excessive as to amount to a deprivation of property without due process of law."²⁶⁷ These arguments against high penalties can be buttressed by recently overturned punitive damages cases where the awards were from private lawsuits.²⁶⁸ Conversely, one could argue that the overturned cases are based on the lack of notice of the penalty²⁶⁹ and not on the unlimited discretion of the jury to impose the award.²⁷⁰ Regarding the contract for deed statutes, affected sellers have every opportunity to know the penalties, and ignorance of the law is no excuse.²⁷¹

On this analysis, the "obligation of contracts" issue is the most difficult to defend due to the retroactive provisions of the Property Code. Therefore, it will be important for the 2007 Texas Legislature to carefully construct changes that minimize the risk of exposure to constitutional scrutiny.

D. *Predatory Lending—Still an Issue*

Although the sum of the 1995-2005 changes has had a positive impact upon purchasers under contracts for deed, the resulting statutes have not solved all of the pressing issues. Even with the extensive changes made to the Property Code in 2005, the issue of predatory lending has yet to be

the DTPA, deterrence of wrongful conduct is a legitimate purpose of the statutory penalty"), *rev'd on other grounds*, 192 S.W.3d 764 (Tex. 2006).

267. See *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909) (upholding Texas anti-trust law fines).

268. See generally *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (reversing the Oregon Supreme Court's upholding of a \$79.5 million punitive damages award that reflected the jury's "desire to *punish* the defendant for harming persons who [were] not before the court [as parties to the lawsuit]"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 429 (2003) (overturning a large punitive damages award and declaring that punitive damages should generally be capped at nine times those of actual damages); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586 (1996) (overturning an award of punitive damages and finding that a 500 to 1 ratio of punitive damages to compensatory damages was unreasonable).

269. See *Campbell*, 538 U.S. at 417 (declaring that our "'constitutional jurisprudence dictate[s] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a [s]tate may impose'" (quoting *Gore*, 517 U.S. at 574)).

270. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7, 10 (1991) (concluding that due process was not violated by the jury's award of punitive damages).

271. See *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (applying the principle that ignorance of the law is no excuse); *Myers v. Pickett*, 81 Tex. 53, 16 S.W. 643, 644 (1891) (stating ignorance of the law is no excuse).

addressed.²⁷² One of the reasons buyers accept contracts for deed in lieu of a traditional mortgage is that they have poor or non-existent credit histories.²⁷³ They may also face other issues such as incomplete or inaccurate immigration papers.²⁷⁴ Many have sporadic work histories due to the seasonal labor they provide.²⁷⁵ Without question, the sellers who use contracts for deed are taking a risk on these purchasers and are entitled to consideration for that risk.²⁷⁶ Unfortunately, the trend, especially in the colonias, has been to charge excessive interest rates under contracts for deed.²⁷⁷ Even with the current contract for deed conversion program, sellers are converting those contracts for deed into warranty deeds with mortgages having similar interest rates.²⁷⁸ This proactivity by the sellers, coupled with excessive interest rates, is undermining the intent of the conversion process from contract to deed.

272. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (stating that high interest rates continue to plague colonia residents).

273. See David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm> (describing contract for deed financing as “appropriate for sales to buyers with no or bad credit histories”).

274. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (commenting that colonia buyers or their spouses often have incomplete immigration papers).

275. See Background on the Colonias: Resident Profile, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/background.jsp> (last visited Feb. 24, 2007) (describing the workforce in the colonias as “young and unskilled”) (on file with the *St. Mary's Law Journal*).

276. See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 171-72 (3d ed. 1989) (expressing the seller's desire to protect his investment under contracts for deed).

277. See Pamela Brown, *Lawyers Team Up to Help in Colonia*, 63 TEX. B.J. 462, 462 (2000) (bemoaning that contracts for deed are almost impossible to pay off because of the high interest rates); Roderick R. Williams, Note, *Cardboard to Concrete: Reconstructing the Texas Colonias Threshold*, 53 HASTINGS L.J. 705, 712 (2002) (reporting some sellers “have taken advantage of a language barrier and their stronger bargaining position, and . . . have charged an illegally high rate of interest”); see also David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm> (condemning the predatory lending practices of contract for deed sellers who charge high interest and inflate property prices).

278. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (reporting that recent feedback from the Texas Department of Housing and Community Affairs colonias self-help centers indicate current interest rates to be at 12-14% on the converted warranty deeds).

The issue is that interest rates in contracts for deed have not been addressed by the legislature. For example, there are currently specialized provisions in the Texas Finance Code for consumer loans,²⁷⁹ traditional home loans,²⁸⁰ retail installment sales,²⁸¹ and manufactured home transactions.²⁸² Comparatively, there is no similar specialized treatment of contracts for deed, even though there has been documented abuse of these instruments for years.²⁸³ Currently, contracts for deed, and the warranty deeds they are being converted to, are covered by Texas Finance Code section 303, "Optional Interest Rate Ceilings."²⁸⁴ The rate provisions in section 303.009 permit a rate as high as 18% for certain contracts.²⁸⁵

Nevertheless, most consumers would not consider paying more than 8% for a typical fixed rate mortgage. We certainly would not consider paying the average 12-14% interest rates charged by developers in the colonia areas today.²⁸⁶ For example, a property priced at \$20,000 with a \$250 per month payment will take twenty years to pay off at an interest rate of 14%.²⁸⁷ At this rate of interest, the buyer would pay approximately \$40,000 in interest—*twice* the price of the property.²⁸⁸ The same property with the same \$250 payment will take less than ten years to pay off at an interest rate of 8%.²⁸⁹ At these predatory rates, colonia residents have reported paying more than twenty years on contract for deed

279. See generally TEX. FIN. CODE ANN. § 342 (Vernon 2006) (prescribing the statutory requirements relating to consumer loans).

280. See generally *id.* § 343 (prescribing the statutory requirements relating to home loans).

281. See generally *id.* § 345 (prescribing the statutory requirements relating to retail installment sales).

282. See generally *id.* § 347 (prescribing the statutory requirements relating to manufactured home credit transactions).

283. SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, TEX. S.B. 336, 74th Leg., R.S. (1995).

284. TEX. FIN. CODE ANN. § 303 (Vernon 2006).

285. *Id.* § 303.009.

286. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007) (reporting that recent feedback from the Texas Department of Housing and Community Affairs colonias self-help centers indicate current interest rates to be at 12-14%).

287. Move, Mortgage Payment Calculator, http://www.homefair.com/mortgage_and_finance/calculators/paymentcalc/ (enter loan factors and select "Submit") (calculating loan payment at 14% interest rate and twenty year amortization length) (on file with the *St. Mary's Law Journal*).

288. *Id.*

289. *Id.*

land and never receiving title.²⁹⁰ Due to these high interest rates, even purchasers with strong earnings find it very difficult to pay off their contracts.²⁹¹ This issue must be addressed, lest the rest of the contract for deed legislation be in vain.

VI. CONCLUSION

Though the Texas Legislature has spent much time and effort over the last ten years attempting to eradicate the harshness of contracts for deed on purchasers, the resulting laws have created the potential for the abuse of unknowledgeable but scrupulous sellers.²⁹² The issue stems from the piecemeal approach to the legislation. Although some Texans have called for the wholesale elimination of contracts for deed, the reasonable answer requires a much less invasive approach. In fairness to the parties who have been adversely affected by contracts for deed, the elimination of contracts for deed over a designated period of time may be attainable as long as very low-income purchasers are given a viable financing alternative. Short of this, however, this comprehensive abolishment “solution” only substitutes one problem for another—certain very low-income citizens simply will never be able to purchase and own a home of their own.

A less drastic solution can eliminate the remaining issues with contracts for deed while still allowing contracts for deed to remain a viable financing option for buyers who prefer this simple alternative. Two issues must be addressed by the legislature to cure the remaining ills of contracts for deed. First, the legislature must address and establish an interest rate cap for real estate installment contracts including contracts for deed. Second, the existing rules on forfeiture should be changed to require foreclosure regardless of how much or how long the purchaser has paid on the contract. The alternative solutions of eliminating contracts for deed and retaining contracts for deed will be discussed in detail below.

290. Telephone Interview with Robert Stevenson, Program Coordinator, Texas Department of Housing and Community Affairs, Office of Colonia Initiatives, in Austin, Tex. (Feb. 2, 2007).

291. Pamela Brown, *Lawyers Team Up to Help in Colonia*, 63 TEX. B.J. 462, 462 (2000) (opining that contracts for deed are almost impossible to pay off because of the high interest rates).

292. See *Henderson v. Love*, 181 S.W.3d 810, 815 (Tex. App.—Texarkana 2005, no pet.) (suggesting that potential liquidated damages of approximately *twenty times* the contract amount are possible for failing to send an annual statement).

A. *Alternative One—Eliminate Contracts for Deed*

1. Create a Standard Mortgage Alternative

The first step towards permanent improvement, under either alternative solution, is the creation of a standard mortgage alternative for very low-income purchasers. The Texas Bootstrap Loan Program (Bootstrap Program) is one example of a program that the state has already created to provide loan funds to very low-income purchasers in all parts of the state.²⁹³ The enabling legislation requires the Texas Department of Housing & Community Affairs (TDHCA) to establish a loan program in conjunction with nonprofit organizations, such as Habitat for Humanity, which allows individuals “to purchase real estate, construct a home, or renovate a home; and to solicit gifts and grants to fund the program.”²⁹⁴ The Bootstrap Program is funded under subchapter FF, chapter 2306 of the Texas Government Code.²⁹⁵ Chapter 2306 requires \$3 million per year to be made available for mortgage loans for very low-income families.²⁹⁶ The loan limit is \$30,000 per household and total loans from TDHCA and other organizations may not exceed \$60,000.²⁹⁷ Because these loans are made available to persons who have very little income or capital, the mortgagors’ “skin in the game” comes from sweat equity donated by the families themselves.²⁹⁸ The Bootstrap Program requires a minimum contribution from the homeowner of 60% of the labor needed to construct the home.²⁹⁹

The expansion of the Bootstrap Program would be a viable mechanism to replace contracts for deed as a financing option.³⁰⁰ One way to further expand the program could be to entice more private lending institutions

293. Texas Bootstrap Loan Program, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/bootstrap.jsp> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

294. *Id.*

295. TEX. GOV'T CODE ANN. § 2306 (Vernon 2004).

296. Texas Bootstrap Loan Program, Texas Department of Housing and Community Affairs, <http://www.tdhca.state.tx.us/oci/bootstrap.jsp> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

297. *Id.*

298. *Id.*

299. *Id.*

300. See Accomplishments Timeline, Border Low Income Housing Coalition, <http://www.bordercoalition.org/page5/page5.html> (last visited Feb. 24, 2007) (indicating that the Bootstrap Program is not permanent) (on file with the *St. Mary's Law Journal*). In 2005, “Border Coalition members, as well as other social justice and housing organizations such as Habitat for Humanity Texas, [came] together to successfully halt legislation that would [have] eliminate[d] the Bootstrap Program.” *Id.*

to participate.³⁰¹ The incentives could come in the form of federal interest rate reductions for the amount of money loaned in the Bootstrap Program.³⁰²

2. Moratorium on New Contracts for Deed

The next step is to pass a moratorium on the use of contracts for deed. If a viable financing option which creates a standard mortgage deed of trust is readily available for very low-income purchasers, most purchasers will want to use such an option.³⁰³ Using a standard deed of trust will eliminate the need for special platting rules and regulations, because deeds of trust already require the property to be properly subdivided.³⁰⁴

Given the current state of the Property Code provisions regarding contracts for deed, the elimination of contracts for deed may also be a better option for sellers.³⁰⁵ The sellers will have more flexibility regarding annual statements and will not be subject to onerous penalty provisions for minor errors or oversights.³⁰⁶

301. See *The Affordable Homeownership Program: Partnership for the American Dream*, Ameriquest Soaring Dreams Programs, http://www.soaringdreams.org/sdprojects_home.html (last visited Feb. 24, 2007) (announcing that Ameriquest has committed \$100 million to help low-income Texas families through the Affordable Homeownership Program) (on file with the *St. Mary's Law Journal*). Ameriquest is one of several private lending institutions working through the federal Affordable Housing Program. Federal Home Loan Bank Programs: Affordable Housing Program, Resources for Affordable Housing, <http://www.nahro.org/home/resource/afford.html> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

302. Federal Home Loan Bank Programs: Affordable Housing Program, Resources for Affordable Housing, <http://www.nahro.org/home/resource/afford.html> (last visited Feb. 24, 2007) (subsidizing the loans through the Federal Home Loan Bank's participation) (on file with the *St. Mary's Law Journal*).

303. See *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435 (Tex. 2005) (Wainwright, J., concurring) (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (admitting contracts for deed are an ugly, but needed alternative to traditional mortgage financing); *De La Cruz v. Brown*, 109 S.W.3d 73, 76 (Tex. App.—El Paso 2003) (indicating low-income purchasers have no alternatives, other than contracts for deed, for purchasing even the cheapest "substandard" tracts), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004).

304. See *Flores*, 185 S.W.3d at 435 (Wainwright, J., concurring) (citing SENATE COMM. ON INT'L RELATIONS, TRADE & TECH., BILL ANALYSIS, Tex. S.B. 336, 74th Leg., R.S. (1995)) (asserting that unlike other standard financing arrangements, purchasers of contracts for deed have no statutory rights to critical information such as platting information).

305. See Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1248-49 (2005) (discussing sellers' additional duties associated with contracts for deed).

306. See *id.* (discussing additional seller's duties associated with contracts for deed).

3. Sunsetting of Contracts for Deed

The final step will require the elimination of grandfathered contracts for deed. The key legislation that will allow this transformation to occur is the 2005 contract conversion provision.³⁰⁷ A sunset statute will be required to set a date in the future at which time any existing contracts for deed will be subject to the most current contract for deed statutes. This interim step to the complete abolition of contracts for deed will allow the existing legislation to provide a method of conversion to those purchasers who can pay the contract balance or who can obtain a loan and tender a promissory note for the balance.³⁰⁸ With a new mortgage alternative already in place as set forth above, the ability of the low-income purchaser to obtain a loan should be almost guaranteed.

After an adequate period of time has passed to allow the statutory conversion of the existing contracts for deed, a final deadline must be issued, at which point all remaining contracts for deed will convert to deeds of trust, with the seller acting as the trustee. These deeds of trust will operate under current Texas law for such instruments.³⁰⁹ The legislature should create a standard terms sheet for the resulting trust deeds. For example, the new deeds of trust should automatically inherit a “power of sale” clause which will eliminate the need for judicial intervention in the case of a foreclosure sale for default.³¹⁰ They should require the same statutory notice, acceleration, and cure period as existing deeds of trust.³¹¹ And finally, these protections should be available to the purchaser regardless of the length of time or percentage paid on the mortgage.³¹²

307. *See* TEX. PROP. CODE ANN. § 5.081 (Vernon Supp. 2006) (describing the right to convert contracts for deed without penalty).

308. *See id.* (describing the right to convert contracts for deed without penalty).

309. *See id.* tit. 2, ch. 5 (Vernon 2004 & Supp. 2006) (listing the requirements for all types of conveyances).

310. *See* RESTATEMENT (THIRD) OF PROPERTY § 3.4 cmt. d (1996) (discussing “power of sale” clauses for non-judicial foreclosures).

311. *See* TEX. PROP. CODE ANN. tit. 2, ch. 5 (Vernon 2004 & Supp. 2006) (listing the requirements for all types of conveyances of different types of property).

312. *See* TEX. PROP. CODE ANN. § 5.066 (Vernon 2004) (establishing a threshold for payments paid after which the forfeiture process is much like a traditional foreclosure proceeding).

B. *Alternative Two—Retain Contacts for Deed*

For many Texans, contracts for deed are a good and proper method of financing.³¹³ They provide sellers with a simple and inexpensive alternative to standard mortgages. Because they are essentially standard contracts, sellers may use their own forms and avoid the expense of legal counsel.³¹⁴ They may also use self-help procedures for forfeiture and property reclamation upon purchaser default.³¹⁵

For purchasers, especially in the colonias, contracts for deed provide their only access to home ownership.³¹⁶ This is because much of the property in the colonias is “comprised of substandard housing for which traditional lenders [will] not provide loans.”³¹⁷ Even if the property is not substandard, purchasers in the colonias often have poor or non-existent credit, preventing them from obtaining traditional financing.³¹⁸ Outside the colonias, contracts for deed provide an economical method of financing and conveyance of property between trusted friends and relatives.³¹⁹ For these and other reasons, contracts for deed should be preserved as an alternative for private owners to sell to private buyers.

1. Interest Rate Cap for Contracts for Deed

To preserve contracts for deed as a simple and inexpensive alternative to standard mortgages, the legislature must address the issue of predatory lending with regards to these executory contracts. Just as the legislature has addressed interest rates vis-à-vis manufactured home and retail in-

313. See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 174 (3d ed. 1989) (acknowledging contracts for deed as “a widely employed and generally accepted method of commerce in real estate” in Indiana).

314. See 22 TEX. ADMIN. CODE § 537.11 (2006) (requiring real estate licensees involved in typical mortgage transactions to use only contract forms promulgated by the Texas Real Estate Commission or those prepared by an attorney); TEX. OCC. CODE ANN. § 1101.155 (Vernon 2004) (allowing use of contracts form “prepared by the Texas Real Estate Broker-Lawyer Committee and adopted by the commission,” the property owner or an attorney and required by the owner of the property).

315. See TEX. PROP. CODE ANN. §§ 5.063-.065 (Vernon 2004) (providing for the seller’s remedy of non-judicial rescission or forfeiture and acceleration after notice to the defaulting purchaser).

316. SENATE COMM. ON INT’L RELATIONS, TRADE & TECH., *BILL ANALYSIS*, TEX. S.B. 336, 74th Leg., R.S. (1995).

317. Mary Alice Robbins, *Good Deeds: New Law Will Curb Executory Contract Abuses*, 21 TEX. LAW., Aug. 15, 2005, at 1.

318. See David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.ilta.com/publications/downdate/downdate122104p2.htm> (describing contract for deed financing as “appropriate for sales to buyers with no or bad credit histories”).

319. See *id.* (asserting that contracts for deed are commonly used to sell undeveloped tracts under installment payments).

stallment transactions,³²⁰ it should specifically address the interest rates for contracts for deed and the resulting warranty deed mortgages. This step is imperative to ensure the legislature's intended protection of contract for deed purchasers.

Nonetheless, the legislature must consider the constitutional ramifications of its changes. While the liquidated damages sections of the Property Code have raised concerns of impairment of contract,³²¹ any cap on interest rates must be prospective, lest it interfere with existing contract terms. Although a forthcoming change will not eliminate the onerous interest of existing contracts for deed, it may regulate the interest rates that result from the contract for deed conversion process enacted in 2005.

2. Forfeiture Versus Foreclosure

According to case law and many commentators, the harshness of the forfeiture provision was thought to be the most inequitable aspect of contracts for deed.³²² Upon default, a contract for deed purchaser has had little protection from forfeiture,³²³ and until recently, these purchasers have not shared the safeguards provided to mortgage purchasers, such as an opportunity to cure.³²⁴ After missing even a single payment, the property and all of their payments and improvements could be lost.³²⁵ Since 1995, contract for deed purchasers have been entitled to notice and a cure period once they make timely payments for forty-eight months or totaling

320. See generally TEX. FIN. CODE ANN. §§ 345, 347 (Vernon 2006) (establishing the rules for retail installment and manufactured homes sales).

321. See *Henderson v. Love*, 181 S.W.3d 810, 812 (Tex. App.—Texarkana 2005, no pet.) (challenging the retroactivity of section 5.077 as impairing contractual obligations).

322. See *Hill v. Still*, 19 Tex. 76, 84 (1857) (indicating the court's disfavor of forfeitures); *Dickey v. McComb Dev. Co.*, 115 S.W.3d 42, 47 (Tex. App.—San Antonio 2003, no pet.) (Stone, J., concurring) (opining that families can pay on a property for years and then lose it because they missed one payment under contract for deed); *Beck v. Monsell*, 502 S.W.2d 880, 882-83 (Tex. Civ. App.—Waco 1973, no writ) (indicating the law's disfavor of forfeitures); David S. Jones, *Beware of Predators Bearing Contracts for Deed*, REAL ESTATE CENTER AT TEXAS A&M UNIVERSITY, Sept. 2004, at 1, available at <http://www.tlta.com/publications/downdate/downdate122104p2.htm> (acknowledging that predatory sellers took advantage of the forfeiture provision).

323. *De La Cruz v. Brown*, 109 S.W.3d 73, 79 (Tex. App.—El Paso 2003) (indicating a purchaser had few rights or remedies and was the subject of abuse under a contract for deed), *rev'd on other grounds*, 156 S.W.3d 560 (Tex. 2004).

324. See TEX. PROP. CODE ANN. §§ 5.063-.065 (Vernon 2004) (protecting contract for deed purchasers with notice and a cure period since 1995).

325. *Dickey*, 115 S.W.3d at 47 (Stone, J., concurring) (emphasizing the unfairness of contract for deed provisions wherein purchasers pay on a property for an extended period of time and then lose that property simply for missing one payment).

40% of the purchase price.³²⁶ These changes protect purchasers without harming sellers because they do not require expensive and time consuming judicial intervention, as is required for some foreclosures such as mechanic's liens.³²⁷

Because sellers are already familiar with the "48/40 rule," the legislature should extend this foreclosure process to all contract for deed purchasers. Under the "Equity Protection" provision of section 5.066 of the Property Code, sellers are "granted the power to sell [the property] through a trustee designated by the seller . . . [and] may not enforce the remedy of rescission or of forfeiture and acceleration."³²⁸ Additionally, this provision extends the cure period for purchasers to sixty days and provides for any sales proceeds exceeding the debt to be returned to the seller.³²⁹ There is no good reason why this "equity protection" should be only available to purchasers who have paid forty-eight months of payments or 40% of the purchase price. Under a traditional mortgage, purchasers are entitled to this protection no matter how much or how little they have paid. It is counterintuitive that those contract for deed purchasers who are struggling to own their own home should not be given at least as much equity protection as a traditional mortgagor.

C. Summary

Although the contract for deed is not of itself a dangerous financing instrument, the fact that there were better alternatives for the wealthier and wiser led to its undetected abuse, especially in the colonias. Some commentators argue that but for the abuse in the colonias, no legislative changes to contracts for deed would have been necessary.³³⁰ One has only to look at the courts' historical attitude toward harsh contract for

326. TEX. PROP. CODE ANN. § 5.066 (Vernon 2004) (stating that if a defaulting purchaser has paid 40% or more on the contract or the equivalent of forty-eight monthly payments, the seller is granted a power to sell and no longer has the right to rescind the contract, and may not enforce acceleration and forfeiture).

327. See TEX. PROP. CODE ANN. § 53.154 (Vernon 1995) (instructing that "[a] mechanic's lien may be foreclosed only on judgment of a court of competent jurisdiction foreclosing the lien and ordering the sale of the property subject to the lien").

328. TEX. PROP. CODE ANN. § 5.066 (Vernon 2004).

329. *Id.* § 5.066(b), (e) (using a sixty-day cure period that was formerly available to all contract for deed purchasers until the 2003 changes to section 5.065).

330. See Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH L. REV. 1231, 1261 (2005) (suggesting that the legislation for contracts for deed was intended to protect a narrow group of purchasers in the colonias and that its expansion is harmful).

deed results to see that this is not the case.³³¹ Even though the legislature has made great strides in safeguarding the use of contracts for deed in all parts of the state, it is not enough. For the sellers, the legislature must address the Property Code's constitutional issues with regards to liquidated damages. For the buyers, the legislature must address the predatory lending practices associated with contracts for deed and substitute a milder foreclosure procedure for the current forfeiture provisions. With these issues addressed, contracts for deed can maintain their historic place as a simple and inexpensive financing option.

331. See *Hill v. Still*, 19 Tex. 76, 84 (1857) (indicating the court's disfavor of forfeitures); *Beck v. Monsell*, 502 S.W.2d 880, 882-83 (Tex. Civ. App.—Waco 1973, no writ) (discussing the law's aversion to forfeitures).

