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Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.

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VENDOR AND PURCHASER—Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*

I. INTRODUCTION

A real estate contract is a device for financing the unpaid portion of the purchase price of real estate.¹ Real estate contracts are commonly used as substitutes for mortgage financing because they allow buyers to purchase property with small down payments.² Under the contract, the purchaser makes periodic installment payments of principal and interest until the principal balance is fully paid.³ The vendor retains legal title to the property until the final payment is made, at which time full title is conveyed to the purchaser.⁴ When the original purchaser wishes to convey the property to a third person before the principal balance is fully paid, a second real estate contract is frequently used, creating a multiple contract or "pyramid purchase" situation.⁵

In *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*,⁶ the New Mexico Supreme Court held that, because a purchaser's assignee failed to make an installment payment, both the original purchaser of real estate and the purchaser's assignee had forfeited all rights under a real estate contract.⁷ The court's decision revested the property in the vendor.⁸ The *Albuquerque Ranch Estates* decision is based in large part on the court's rejection of defenses of lack of proper notice of default and unjust enrichment.⁹

The court's refusal to enforce a contractual notice provision results in

1. G. E. Osborne, G. S. Nelson, & D. A. Whitman, *Real Estate Finance Law* § 3.25, at 79 (1979).

2. *Bishop v. Beecher*, 67 N.M. 339, 342, 355 P.2d 277, 279 (1960). See *infra* note 121.

3. G. E. Osborne, *supra* note 1, § 3.25, at 79.

4. *Id.*

5. "Pyramid purchase" situations, also referred to as "contract-on-contract" situations, involve conveyance of the right to take title to the property by the purchaser to a third party. The conveyance is accomplished either through assignment of the original contract or through a second real estate contract between the original purchaser and the third party. In the case of an assignment, the third party acquires the right to receive the original vendor's deed. With a second contract, the third party is only entitled to the deed of the original purchaser. See generally M. Friedman, *Contracts and Conveyances of Real Property* §§ 2.1, 2.4 (4th ed. 1984). *Albuquerque Ranch Estates* involved both the assignment of the original contract and a second contract between the purchaser and the assignee. 99 N.M. 95, 98, 655 P.2d 548, 551 (1982). See *infra* notes 16, 17.

6. 99 N.M. 95, 654 P.2d 548 (1982).

7. *Id.*

8. *Id.* at 98, 654 P.2d at 551.

9. *Id.*

a new position on the rights and obligations of parties to real estate contracts. This new position directly contradicts prior New Mexico case law.¹⁰ The court's treatment of the unjust enrichment defense reflects a trend toward strict enforcement of contractual forfeiture provisions and away from consideration of fairness and equity. This Note will examine the impact of the court's resolution of the notice and unjust enrichment issues on: (1) the use of real estate contracts in New Mexico, particularly in multiple contract situations;¹¹ and (2) the ability of attorneys to avoid malpractice and to protect adequately the interests of their real estate clients.¹²

II. STATEMENT OF THE CASE

In 1974, Albuquerque Ranch Estates, Inc. ("Ranch Estates") sold approximately 7.5 acres of unimproved land to Tract C, a partnership, pursuant to a written real estate contract.¹³ The contract was placed in escrow with Albuquerque National Bank.¹⁴ The contract stipulated that time was of the essence and provided for forfeiture if default under the contract continued for ninety days after mailing of a written demand for payment.¹⁵

In 1979, Tract C sold the property to KAC, Inc. ("KAC") pursuant to a second real estate contract.¹⁶ Tract C also assigned its rights under

10. See *infra* notes 76-79 and accompanying text.

11. See *infra* notes 109-21 and accompanying text.

12. See *infra* notes 122-25 and accompanying text. The *Albuquerque Ranch Estates* court's decision to permit forfeiture without enforcing the original purchaser's contractual right to notice of default has already resulted in one suit against an attorney for professional negligence. See *Tract C, A New Mexico General Partnership v. John Doe*, No. CV 83-05672 (N.M. Dist. Ct., Second Jud. Dist. 1983).

13. 99 N.M. at 98, 654 P.2d at 551. The contract, dated April 15, 1974, was a Valiant #103 form of real estate contract which provided for yearly payment of interest through April 15, 1979. Transcript of Record on Appeal at 22 [hereinafter cited as Record]. (The Record is available at the University of New Mexico Law School Library.) The principal amount was payable in annual installments from 1980 through 1983, with the remaining balance due on April 15, 1984. *Id.*

14. 99 N.M. at 98, 654 P.2d at 551.

15. *Id.* The forfeiture provision, clause 8 of the contract, stated:

Should the Purchaser fail to make any of the payments at the respective times herein specified . . . and continue in default for ninety (90) days after written demand for such payments . . . then the Owner may, at his option, either declare the whole amount remaining unpaid to be then due . . . or he may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises. . . .

Record at 22.

16. 99 N.M. at 98, 654 P.2d at 551. The real estate contract between Tract C and KAC provided that KAC would assume the balance of payments due under the Ranch Estates/Tract C contract and would pay additional amounts to Tract C. Record at 11. The final payment under the KAC/Tract C contract was also due April 15, 1984. *Id.* The contract also contained a forfeiture clause which required KAC to cure any default within 30 days of written demand for payment by Tract C. *Id.*

the original real estate contract with Ranch Estates to KAC.¹⁷ Ranch Estates consented to the assignment.¹⁸

The first payment of principal under the contract with Ranch Estates became due in April 1980.¹⁹ During that month, an agent for KAC contacted Ranch Estates, verbally requested an extension of time within which to make the payment, and offered to pay for the extension.²⁰ Ranch Estates indicated that it would consider only a written request for an extension.²¹

On May 14, 1980, KAC sent to Ranch Estates a written request offering to pay 15% interest on the \$32,672.42 installment payment due in April in return for Ranch Estates' consent to defer payment of the installment until July 31, 1980.²² Ranch Estates responded with a letter indicating that it understood KAC to have offered to pay \$4,900 (15% of the installment payment) and that it would agree to the extension only upon immediate payment of that sum.²³ Ranch Estates' letter also demanded payment of the installment and stated that the letter was not to be considered an extension of time within which to make the contract payments.²⁴

By letter dated May 27, 1980, KAC advised Ranch Estates that it had not intended to offer \$4,900 and tendered a check in the amount of \$3,132.²⁵ The letter also indicated that the check was tendered subject to

17. 99 N.M. at 98, 654 P.2d at 551. The assignment stated that Tract C assigned to KAC "all rights, title, interest and equity in and to that certain Real Estate contract dated April 15, 1974." Record at 6. The assignment was also placed in escrow with Albuquerque National Bank. Record at 26.

18. 99 N.M. at 98, 654 P.2d at 551. The consent stated:

I, We the undersigned, Owners of the property described in the foregoing contract, hereby consent to the foregoing Assignment and agree to mail a copy of any notice of default and/or demand for payments . . . which I/We may cause to be sent to the Purchaser under the terms of said Real Estate Contract, to the said Assignee. . . .

Record at 8. Based on the language of Ranch Estates' consent, the intent of the parties was that Tract C, the purchaser, would receive the original notice of default and KAC, the assignee, would receive a copy of the notice.

19. 99 N.M. at 99, 654 P.2d at 552.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* Ranch Estates' May 19 letter stated, in part:

This letter is not to be considered as an extension of time within which the contract payments are required to be made. Further, this letter is to be considered as written demand for such payment and failure to pay the same within the time required by the contract will result in either a declaration that the whole amount remaining shall be due or a termination of this contract. . . .

Id.

25. *Id.* at 99, 654 P.2d at 552. The misunderstanding arose from confusion between "15% interest on the payment" and "15% of the payment." KAC originally offered to pay 15% interest on the \$32,672.42 installment, $\$32,672.42 \times 15\% / 365 \text{ days} \times 107 \text{ days}$ (from April 15 to July 31) or \$1,437.01. Record at 63-75. Ranch Estates responded that it understood KAC to have offered 15% of the

the conditions that: (1) collection of the check constituted Ranch Estates' agreement to an extension of the time within which to make the payment; (2) KAC was relieved of any default by reason of its failure to make the April installment payment; and (3) Ranch Estates' notice of default was withdrawn.²⁶ Following receipt of KAC's May 27 tender letter, Ranch Estates made no attempt to deposit the check for collection.²⁷ Moreover, Ranch Estates neither expressly approved an extension nor withdrew its notice of default.²⁸

In June, Ranch Estates verbally advised Tract C that a notice of default had been sent to KAC.²⁹ Tract C then sent KAC a demand letter advising KAC that if all payments under the contract with Ranch Estates were not made current within thirty days, Tract C would exercise its rights under the forfeiture provision of its contract with KAC.³⁰ KAC did not reply to Tract C's demand letter.³¹

On August 19, 1980, KAC still had not paid the April installment.³² Ranch Estates notified Albuquerque National Bank that it was electing to exercise its right of forfeiture under the contract.³³ Upon learning of Ranch Estates' termination of the contract, KAC tendered a check to the bank in payment of the past-due installment.³⁴ When Ranch Estates refused to accept the payment, the bank instituted an interpleader action, requesting the court to adjudicate the rights of each party under the contract.³⁵

The trial court ruled that both KAC and Tract C had forfeited their rights under the real estate contract and held that the property had reverted

\$32,672.42 installment ($\$32,672.24 \times 15\% = \4900). *Id.* KAC's May 27 letter advised Ranch Estates that Ranch Estates had misunderstood the offer and that KAC was willing to "split the difference" between the two amounts. *Id.* Accordingly, KAC tendered its check in the amount of \$3,132. *Id.*

26. 99 N.M. at 99, 654 P.2d at 552.

27. *Id.* at 99-100, 654 P.2d at 552-53. It is important to note that, although Ranch Estates made no attempt to cash the check, Ranch Estates continued to retain the check without notifying KAC that it was not granting the requested extension of time. *Id.* at 100, 654 P.2d at 553.

28. *Id.* at 99, 654 P.2d at 552.

29. *Id.* The court found that Tract C, based on a conversation with KAC, contacted Ranch Estates to inquire if Ranch Estates had sent KAC notice of default. In response to Tract C's inquiry, Ranch Estates verbally acknowledged having sent notice of default to KAC, but refused to provide Tract C with information concerning the date on which notice had been sent or the amount of default. Record at 358-59.

30. 99 N.M. at 99, 654 P.2d at 552. See *supra* note 15.

31. 99 N.M. at 99, 654 P.2d at 552.

32. *Id.* at 100, 654 P.2d at 553.

33. *Id.*

34. *Id.*

35. *Id.* The bank, as escrow agent, brought the interpleader action pursuant to N.M. R. Civ. P. 22, which permits a plaintiff that may be exposed to multiple liability to join, as defendants, all parties having claims to the property held by the plaintiff.

in Ranch Estates.³⁶ KAC and Tract C appealed.³⁷ Numerous issues were raised on appeal, including the court's determination of the defenses of lack of proper notice and unjust enrichment.³⁸ The New Mexico Supreme Court affirmed the decision of the trial court.³⁹ The Supreme Court held that Ranch Estates had provided adequate notice of default⁴⁰ and that the trial court did not err in failing to adopt the notice and unjust enrichment defenses.⁴¹

III. ANALYSIS AND DISCUSSION

The *Albuquerque Ranch Estates* decision is an example of the recent tendency in the New Mexico courts to enforce contractual forfeiture provisions strictly. In marked contrast to strict enforcement of a forfeiture provision, however, the *Albuquerque Ranch Estates* court refused to enforce a provision requiring the vendor to provide written notice of default to the original purchaser following assignment of the contract.

The uncertainty resulting from the court's resolution of the notice issue, coupled with the trend toward strict judicial enforcement of forfeiture provisions, significantly increases the risk associated with the use of multiple real estate contracts.⁴² First, as a result of the decision, a vendor may now act to forfeit an original purchaser's rights without providing the original purchaser with either notice of default by the assignee or an

36. 99 N.M. at 98, 654 P.2d at 551.

37. *Id.* The appeal was taken directly from the trial court to the New Mexico Supreme Court. The supreme court has appellate jurisdiction in all cases unless jurisdiction is specifically granted to the court of appeals by law. N.M. Const. art. VI, § 2; N.M. Stat. Ann. § 34-5-14 (Repl. Pamp. 1981). Jurisdiction over appeals of cases involving property rights is not specifically granted to the court of appeals. *See* N.M. Const. art. VI, § 29; N.M. Stat. Ann. § 34-5-8 (Cum. Supp. 1984).

38. 99 N.M. at 98, 654 P.2d at 551. In addition to the notice and unjust enrichment issues, KAC and Tract C challenged the trial court's rulings on the defenses of accord and satisfaction, estoppel, waiver, laches, and mistake of fact. *Id.* at 100-02, 654 P.2d at 553-55. KAC also argued that the trial court erred in refusing to grant KAC's motion for continuance. *Id.* at 104, 654 P.2d at 557. A discussion of these issues is beyond the scope of this Note.

39. *Id.* at 98, 654 P.2d at 551. The court affirmed the trial court's rulings on each of the challenged points.

The supreme court's decision in *Albuquerque Ranch Estates*, however, did not finally resolve the dispute between the parties. Instead, the decision has resulted in ongoing litigation among Ranch Estates, KAC, Tract C and their officers, agents, and attorneys. *See, e.g.,* *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*, ___ N.M. ___, 687 P.2d 91 (1984), and *Tract C, A New Mexico General Partnership v. John Doe*, No. CV 83-05672 (N.M. Dist. Ct., Second Jud. Dist. 1983).

40. 99 N.M. at 103, 105, 654 P.2d at 556, 558.

41. *Id.* at 102, 106, 654 P.2d at 555, 559.

42. The risk to purchasers using real estate contracts is the risk of extra-judicial forfeiture without a right of redemption. *Martinez v. Martinez*, 101 N.M. 88, 92, 678 P.2d 1163, 1167 (1984). By eliminating a traditional means for protecting the original purchaser's rights, the *Albuquerque Ranch Estates* court has significantly increased this risk. *See infra* notes 111-15 and accompanying text.

opportunity to cure any such default. Second, in light of prior New Mexico law,⁴³ it is no longer clear whether a vendor has an obligation to provide any notice of default in multiple contract situations.⁴⁴ Finally, the apparent intent of the courts to uphold forfeiture provisions with little consideration for the equities of the parties renders forfeiture an almost certain result of any default. This increased risk of forfeiture will ultimately serve to limit the use of multiple contracts as devices for financing real estate transactions in New Mexico.

The inconsistency between the strict enforcement of forfeiture clauses and the failure to enforce notice provisions also increases the risk to attorneys of committing malpractice when structuring real estate transactions. The written notice provision has been the primary means of protecting purchasers from unwarranted forfeiture. Any client whose rights are forfeited without notice is likely to seek recourse against the attorney who rendered advice on, or who drafted the contract.⁴⁵

A. Notice of Default

Tract C contended that the forfeiture provision should not be enforced because Ranch Estates had failed to provide Tract C with adequate notice of default.⁴⁶ The court rejected Tract C's argument, concluding that: (1) by assignment of its contract with Ranch Estates to KAC, Tract C was relieved of any further obligation under the contract;⁴⁷ (2) following the assignment, Tract C retained no further interest in the property;⁴⁸ and (3) because Tract C had no interest that could be affected by forfeiture, Tract C was not entitled to any notice of default.⁴⁹ In reaching these conclusions, the court adopted a new position that contradicts not only the law in the majority of jurisdictions,⁵⁰ but also prior New Mexico case law.⁵¹

1. Assignment Relieves the Assignor of Further Obligation

In rejecting Tract C's notice argument, the court relied on a 1918 California decision, *Drips v. Moore*.⁵² *Drips* held that an assignment of

43. See *Campbell v. Kerr*, 95 N.M. 73, 618 P.2d 1237 (1980); *infra* notes 76-79 and accompanying text.

44. See *infra* notes 80-81 and accompanying text.

45. See *supra* note 12.

46. 99 N.M. at 105, 654 P.2d at 558.

47. *Id.* at 104, 654 P.2d at 557.

48. *Id.* at 105, 654 P.2d at 558.

49. *Id.*

50. See *infra* notes 54-65 and accompanying text.

51. See *infra* notes 76-79 and accompanying text.

52. 179 Cal. 249, 176 P. 159 (1918). The factual situation presented in *Drips* was similar in many respects to the *Albuquerque Ranch Estates* fact pattern. The defendant purchaser assigned all right, title, and interest in the real estate contract between the purchaser and the plaintiff vendor. *Id.* at ___, 176 P. at 159. The assignee failed to make a payment of interest due under the contract. *Id.* at ___, 176 P. at 159. The court determined that the purchaser was not entitled to notice of

all right, title, and interest in a real estate contract relieves the original purchaser of any further obligation under the contract.⁵³ By following the *Drips* decision, the *Albuquerque Ranch Estates* court adopted a position on the effect of assignment of contracts which is contrary to that of the majority of jurisdictions.

Under the majority rule, the assignment of all right, title, and interest in a real estate contract passes only an equitable interest in the property to the assignee.⁵⁴ The assignment, by itself, does not release the original purchaser (the assignor) from its obligations under the contract.⁵⁵ Instead, it conveys the original purchaser's right to receive the vendor's title and delegates the original purchaser's duty to pay the purchase price.⁵⁶ The delegation of the duty to pay, however, does not relieve the original purchaser of its contractual liability to the original vendor.⁵⁷ Under the majority rule, the original purchaser may still be liable on the contract in the event of default by the assignee.⁵⁸

Courts generally hold that in order for a purchaser to be relieved of any further obligation under a contract, the vendor must clearly and expressly release the original purchaser and substitute the assignee as debtor.⁵⁹ The original purchaser and its assignee cannot affect, by the act

forfeiture because the purchaser no longer had any interest to which the act of forfeiture could apply. *Id.* at —, 176 P. at 160. The *Albuquerque Ranch Estates* situation is distinguishable, however, based on the existence of the second real estate contract between Tract C and KAC. *See infra* notes 69–71 and accompanying text.

53. 179 Cal. at —, 176 P. at 160.

54. *See generally* M. Friedman, *supra* note 5, at §§ 2.1, 2.4. The assignee is only entitled to receive the vendor's deed after completion of performance of the contract. *Id.* § 2.1.

55. *See, e.g.*, *Foster v. Cross*, 650 P.2d 406, 410 (Alaska 1982); *Boswell v. Lyon*, 401 N.E.2d 735, 738 (Ind. Ct. App. 1980); *Smith v. Werhe*, 199 Neb. 753, 261 N.W.2d 620, 625 (1978); *Greenbrier Homes v. Cook*, 1 Mich. App. 326, 136 N.W.2d 27, 29 (1965); *Centisco, Inc. v. Sales Realty Corp.*, 52 Misc. 2d 331, 275 N.Y.S. 2d 457, 461 (Ct. Civ. App. 1966); *Carluccio v. 607 Hudson Street Holding Co.*, 139 N.J. Eq. 481, 52 A.2d 56, 59 (1947); *Barnard v. Huff*, 252 Minn. 258, 233 N.W. 213, 214–15 (1930). *See generally* 3 S. Williston, *Treatise on the Law of Contracts* § 411 (3d ed. 1960); M. Friedman, *supra* note 5, § 2.1, at 120.

56. M. Friedman, *supra* note 5, § 2.1, at 120; 4 A. L. Corbin, *Corbin on Contracts* § 867, at 463 (1951).

57. 4 A. L. Corbin, *supra* note 56, at 463.

In *Boswell v. Lyon*, 401 N.E.2d 735 (Ind. Ct. App. 1980), which involved a fact situation similar to *Albuquerque Ranch Estates*, the court ruled that the assignment of a real estate contract does not work to relieve the purchaser of all further obligation under the contract. *Id.* at 743. The *Boswell* decision is in accord with the majority of jurisdictions. *See* cases cited *supra* note 55.

58. 4 A. L. Corbin, *supra* note 56, at 463.

59. Restatement (Second) of Contracts § 318(3) (1981). This process is known as novation. Novation is the express extinguishment of the original contract, the substitution of another party as debtor, and the creation of a new contract. 6 A. L. Corbin, *Corbin on Contracts* § 1297, at 213–23 (1962).

Assignment, on the other hand, is the transfer of the contractual rights by the owner to another party. The original contract, however, remains in full force and effect, and under the majority rule, there is no substitution of the other party as debtor. Restatement (Second) of Contracts § 317 (1981). Friedman suggests that novation is a preferable alternative to assignment where the parties wish to

of assignment, the original purchaser's obligations to the vendor.⁶⁰ The vendor's consent to the assignment does not constitute an agreement to discharge the original purchaser's obligation.⁶¹ Instead, all parties must expressly agree that: (1) the original contract is extinguished; (2) the original purchaser is released from all further obligation; and (3) a new contract exists between the vendor and the assignee.⁶²

Under the majority rule, Tract C's assignment of the original contract in *Albuquerque Ranch Estates* would not constitute a release of Tract C. Ranch Estates was not a party to the assignment.⁶³ Moreover, nothing in the language of Ranch Estates' consent to the assignment purported to release Tract C from its obligations.⁶⁴ Under the majority rule, therefore, Tract C's obligations under the contract with Ranch Estates were not extinguished by the assignment to KAC. The *Albuquerque Ranch Estates* court, however, adopted the minority view, as enumerated in *Drips v.*

avoid questions concerning the continued liability of the original purchaser. M. Friedman, *supra* note 5, at 163.

Finally, an assumption arises when a party to the contract delegates the duty to perform contractual obligations to another party and the other party undertakes to perform those obligations. Restatement (Second) of Contracts § 318 (1981). An assumption of contractual obligations often occurs in conjunction with an assignment of rights, as it did in *Albuquerque Ranch Estates*, 99 N.M. at 98, 654 P.2d at 551. Even with an assumption, however, the assignor remains liable on the contract, occupying in essence the position of a surety. 3 S. Williston, *supra* note 55, at § 418, at 96-98.

60. 4 A. L. Corbin, *supra* note 56, § 866, at 458.

61. See, e.g., *Boswell v. Lyon*, 401 N.W.2d 735, 742 (Ind. Ct. App. 1980). In *Boswell*, the vendor consented to the assignment of the original real estate contract. The court held that the vendor's consent to the assignment did not release the purchaser from contractual liability. *Id.* at 742. See also *Ingalls Iron Works Co. v. Fruehauf*, 518 F.2d 966, 969 (5th Cir. 1975) (although consent to assignment was not sufficient to constitute a release of a construction contract, a material issue of fact existed as to whether parties intended novation); *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620, 625-26 (1978) (vendor's consent to purchaser's assignment of a contract for sale of taxi cab company did not release the purchaser); *Moring v. Miller*, 330 So. 2d 93, 95 (Fla. Ct. App. 1976) (inventor's knowledge of assignment of contract for payment of patent royalties by patent owner to a third party did not release the patent owner from the obligation to pay royalties).

62. New Mexico law recognizes novation as a means for releasing a party from its contractual obligations. Under New Mexico law, in order for a novation to exist: (1) there must be a valid, existing contract; (2) all parties must agree to a new contract; (3) the original contract must be extinguished by the new contract; and (4) the new contract must be valid. See, e.g., *Sims v. Craig*, 96 N.M. 33, 35, 627 P.2d 875, 877 (1981) (court held that novation had not occurred when parties entered into a second real estate contract because the original contract had been void and unenforceable).

63. Record at 6.

64. Record at 8. See *supra* note 18 for the language of the consent. Ranch Estates claimed that it had no knowledge of the second real estate contract between Tract C and KAC and that its understanding was that Tract C had given up any interest in the property by the assignment. Record at 31. It generally has been held, however, that a vendor's knowledge of a second real estate contract is unnecessary because the second contract does not affect the rights and obligations between the vendor and purchaser under the original contract. See M. Friedman, *supra* note 5, § 2.1, at 158 n.14.

Moore,⁶⁵ that an assignment releases the assignor from further obligation.⁶⁶

2. The Assignor Retains No Interest Following Assignment

In addition to its determination that assignment relieved Tract C of any further obligation under the original contract, the *Albuquerque Ranch Estates* court concluded that Tract C retained no further interest in the property following the assignment.⁶⁷ The *Albuquerque Ranch Estates* decision ignores any interest of the original purchaser under a second contract with the assignee.

The *Drips* decision, followed by the *Albuquerque Ranch Estates* court, found that a purchaser had assigned all of his rights under the contract and, therefore, retained no interest in the property to which the act of forfeiture would apply.⁶⁸ Unlike the *Albuquerque Ranch Estates* court, however, the *Drips* court was not faced with the existence of a second contract between the purchaser and the assignee.⁶⁹ In its contract with KAC, Tract C explicitly retained both the right of forfeiture against the property and the right to hold KAC responsible for payments under the second contract.⁷⁰ Unlike the *Drips* defendant, Tract C clearly retained

65. 179 Cal. at ___, 176 P. at 160.

66. 99 N.M. at 104-05, 654 P.2d at 557-58. It should be noted that although *Drips*, on which the New Mexico court relied, has never been overruled, it had never previously been cited for the proposition that assignment relieves the assignor of any further obligation under the contract.

The author has been unable to find any authority from any other jurisdiction which adopts the position that assignment of the contract relieves the assignor of all obligation. Even California, subsequent to *Drips*, has adopted the majority view. See *Nelson v. Fernando Nelson & Sons*, 5 Cal. 2d 511, 55 P.2d 859 (1936). The *Nelson* court stated, "The effect of the assignment was to transfer all of [the assignor's] rights under the contract to plaintiff . . . although the burdens of the contract remained with [the assignor]." *Id.* at ___, 55 P.2d at 862.

The *Albuquerque Ranch Estates* ruling on the effect of the assignment is also inconsistent with a prior holding in *Commercial Standard Ins. Co. v. Hitson*, 73 N.M. 328, 388 P.2d 56 (1953). In *Hitson*, which dealt with a mortgage rather than a real estate contract, the court held that the assumption of a mortgage by a third party did not release the original maker from its obligations on the underlying promissory note. 73 N.M. at 331, 388 P.2d at 57-58.

67. 99 N.M. at 105, 654 P.2d at 558.

68. 179 Cal. at ___, 176 P. at 160.

69. The facts in *Drips* show that the vendor and the original purchaser entered into a contract for the sale of property. *Id.* at ___, 176 P. at 159. The original purchaser then assigned the contract to the assignee. *Id.* The assignee took possession of the property and assumed the original purchaser's obligation to make the contractual payments. *Id.* Nothing in the *Drips* opinion, however, indicates that a second contract existed between the original purchaser and the assignee such as existed between Tract C and KAC.

70. Record at 47. Paragraph 8 of the contract between Tract C and KAC was similar to the provision in the original contract between Tract C and Ranch Estates. The second real estate contract, however, provided for a right of forfeiture 30 days after written demand for payment, rather than the 90-day cure period provided for in the original contract. See *supra* note 16.

an interest which an act of forfeiture by Ranch Estates would affect.⁷¹ In light of the second real estate contract between Tract C and KAC, the reliance on *Drips* by the *Albuquerque Ranch Estates* court appears to be misplaced.⁷²

The court's decision to enforce forfeiture without regard to the second real estate contract effectively nullifies the second contract. It is impossible for the original purchaser to perform its obligations under the second contract after the property has reverted in the vendor.⁷³ The assignee's purpose, to purchase the property, is frustrated by the impossibility of the original purchaser's performance.⁷⁴ The *Albuquerque Ranch Estates* court's decision to enforce Ranch Estates' right of forfeiture under the original contract, therefore, left Tract C and KAC as parties to a meaningless second contract.⁷⁵

71. An act of forfeiture by Ranch Estates against KAC would revert possession of the property in Ranch Estates, thereby preventing Tract C from exercising its right of forfeiture.

72. The trial court's finding that, by assigning the contract, Tract C retained no further interest in the property also appears to be clearly erroneous in light of the fact that the assignment was placed in escrow. See *supra* note 17. When a document is delivered in escrow, it is delivered to a third party to be held until the obligee has performed some condition. 1A A. L. Corbin, *supra* note 59, § 247, at 413-14. The document delivered in escrow does not become operative until the condition has been performed. *Id.* § 249, at 424. In addition, until the condition is performed, the grantor retains its property interest. *Id.* § 249, at 418.

In *Albuquerque Ranch Estates*, the condition was KAC's full performance of its obligations to Tract C under the second contract, including payment of the installments under the original contract with Ranch Estates and the additional amounts due Tract C. See *supra* note 16. By placing the assignment in escrow, Tract C's assignment of its interest in the contract with Ranch Estates would not have become operative until KAC made the final contract payments on April 15, 1984. See *supra* notes 16, 17. Tract C, therefore, still retained an interest when Ranch Estates acted to forfeit the property on August 19, 1980. See *supra* text accompanying notes 32-33.

Although the trial court received the original assignment as one of the escrowed documents from Albuquerque National Bank, Record at 26, there is nothing in the Record which indicates that the trial court addressed the effect of delivery in escrow in reaching its decision. Unfortunately, none of the parties raised this issue in the appeal to the supreme court.

73. Performance under a contract becomes impossible when the subject matter of the contract is eliminated. A. L. Corbin, *supra* note 59, § 1321, at 324. The *Albuquerque Ranch Estates* decision eliminates the subject matter of the second contract, the property, by permitting the property to revert in the vendor (who is not a party to the second contract). The original purchaser's right to receive title to the property from the vendor is extinguished following forfeiture of the property under the original contract. See M. Friedman, *supra* note 5, §§ 2.1, 2.4. As a result, even if the assignee made all payments under the second contract, the original purchaser would never be able to fulfill its obligation to the assignee to convey title to the property. *Id.* Ordinarily, however, the impossibility of performance by the original purchaser would discharge the assignee's obligation to make the contract payments. A. L. Corbin, *supra*, note 59, § 1321, at 325.

74. The assignee will never receive title to the property. See *supra* note 73. Performance by the assignee under the second contract is still possible because the assignee can continue to fulfill its obligation to make payments. However, because the original purchaser cannot convey title, the assignee's purpose in entering into the second contract is frustrated. A. L. Corbin, *supra* note 59, § 1322, at 325-26.

75. This result seems unfair to the original purchaser, but not to the assignee. Because forfeiture of the property is the result of default by the assignee, see *supra* notes 32-33 and accompanying text, there does not seem to be anything inequitable about eliminating the assignee's right to receive

3. The Assignor Is Not Entitled to Notice of Default

The *Albuquerque Ranch Estates* holding that a vendor has no obligation to provide notice of the assignee's default to the original purchaser directly contradicts prior New Mexico law as articulated in *Campbell v. Kerr*.⁷⁶ *Campbell* also involved multiple real estate contracts where the assignee assumed performance under the original purchaser's contract with the vendor.⁷⁷ The *Campbell* court determined that the original purchaser was entitled to notice of demand for payment in the event the assignee defaulted.⁷⁸ The court held, however, that the vendor was under no obligation to provide notice of default to the assignee who had undertaken payment of amounts due under the original contract.⁷⁹

Taken to its logical extreme, the union of the *Albuquerque Ranch Estates* court's holding that the vendor is not obligated to provide notice of default to the original purchaser and the *Campbell* court's conclusion that the vendor is not required to provide notice to an assignee leads to a conclusion that the vendor has no obligation to provide notice of default to anyone. Such a result is inconsistent with the language in most standard real estate contracts that the right of forfeiture accrues within a certain period of time following the vendor's notice of default.⁸⁰ Such a result also is inequitable because it permits the vendor to act unilaterally to forfeit the property without providing the original purchaser with an opportunity to protect its interest by curing the assignee's default.⁸¹

B. Unjust Enrichment

Tract C and KAC contended that forfeiture of their rights under the contract would result in unjust enrichment to Ranch Estates.⁸² The claim of unjust enrichment was based on two separate grounds. First, the defendants claimed that, because of the substantial appreciation in value of the property, Ranch Estates would be unjustly enriched if the court ren-

title under the second contract. The original purchaser, on the other hand, has neither defaulted, nor been provided with an opportunity to cure the assignee's default. See *infra* notes 111-15 and accompanying text. Under these circumstances, it seems inequitable to permit the vendor to eliminate unilaterally the original purchaser's rights to receive title to the property under the original contract, to retake the property in the event the assignee defaults under the second contract, and to receive the contractual payments from the assignee. See *supra* notes 71, 73 and accompanying text. A more equitable result could have been achieved in *Albuquerque Ranch Estates* by affording Tract C an equitable right to redeem the property. See *infra* note 108.

76. 95 N.M. 73, 618 P.2d 1237 (1980).

77. *Id.* at 75, 618 P.2d at 1239.

78. *Id.* at 79, 618 P.2d at 1243.

79. *Id.*

80. The language in paragraph 8 of the contract between Tract C and Ranch Estates is typical. See *supra* note 15.

81. See *infra* notes 111-15 and accompanying text.

82. 99 N.M. at 102, 105, 654 P.2d at 555, 558.

dered judgment revesting the property in Ranch Estates.⁸³ Second, Tract C and KAC argued that Ranch Estates should not be permitted to regain possession of the land and to retain all payments made under the contract because the payments were not a reasonable approximation of the fair rental value for the property.⁸⁴ The trial court found that these arguments were without merit because, based on the evidence, forfeiture would not "shock the conscience" of the court.⁸⁵ The Supreme Court affirmed the trial court's disposition of the unjust enrichment claim.⁸⁶

Albuquerque Ranch Estates is one of several recent decisions in which the New Mexico courts have been unpersuaded by arguments based on unjust enrichment.⁸⁷ Although the opinions continue to reiterate the adage that "equity abhors forfeiture," the New Mexico courts have generally elected to enforce contractual forfeiture provisions strictly.⁸⁸ The forfeiture cases seem to reflect a policy choice which favors requiring parties to abide by the terms of their contracts at the expense of a fair and equitable result in real estate cases.⁸⁹

In a line of decisions beginning with *Bishop v. Beecher*,⁹⁰ New Mexico courts have consistently stated that, absent unfairness which shocks the conscience of the court, vendors are entitled to enforce contractual forfeiture provisions.⁹¹ The presence of unfairness which shocks the court's conscience will depend on the facts and circumstances of each case.⁹²

83. *Id.* at 105, 654 P.2d at 558.

84. *Id.* at 102, 654 P.2d at 555; Record at 123.

85. Record at 155.

86. 99 N.M. at 106, 654 P.2d at 559.

87. See, e.g., *First National Bank in Alamogordo v. Cape*, 100 N.M. 525, 673 P.2d 502 (1983). In *Cape*, an interpleader action, the court held that forfeiture of the property after payments under the contract had been in arrears for eight months did not result in unfairness which shocked the conscience of the court. *Id.* at 528, 673 P.2d at 505.

88. See *Albuquerque Ranch Estates*, 99 N.M. at 102, 654 P.2d at 555; *Martinez v. Martinez*, 101 N.M. 88, 91, 678 P.2d 1163, 1166 (1984); *Poorbaugh v. Mullen*, 96 N.M. 598, 602, 633 P.2d 706, 710 (Ct. App. 1981); *Hale v. Whitlock*, 92 N.M. 657, 658, 593 P.2d 754, 755 (1979).

89. See generally Note, *Contracts—Exculpatory Provisions—A Bank's Liability for Ordinary Negligence*: *Lynch v. Santa Fe National Bank*, 12 N.M.L. Rev. 821, 831 (1982).

90. 67 N.M. 339, 355 P.2d 277 (1960). *Bishop* was an action by the purchasers of real estate asking the court to declare a real estate contract to be an equitable mortgage and to grant them a right of redemption. *Id.* at 341, 355 P.2d at 277-78. The court held that the contract was not an equitable mortgage, that the vendors had a right to terminate the contract upon default, and that absent unfairness which shocks the conscience, the purchasers had no right of redemption. *Id.* at 343, 355 P.2d at 279-80.

91. *Id.* at 342, 355 P.2d at 280. See also *Martinez v. Martinez*, 101 N.M. 88, 678 P.2d 1163 (1984); *Huckins v. Ritter*, 99 N.M. 560, 561 P.2d 52 (1983); *Eiferle v. Toppino*, 90 N.M. 469, 565 P.2d 340 (1977); Note, *The Future of the Real Estate Contract in New Mexico*: *Huckins v. Ritter*, 14 N.M.L. Rev. 531 (1984).

92. See, e.g., *Eiferle v. Toppino*, 90 N.M. 469, 565 P.2d 340 (1977). In *Eiferle*, the court articulated its analysis as follows:

Bearing in mind the specific facts in this case . . . we feel that to permit the defendant to cancel the agreement, regain title to the property, and retain all payments made, would result in an "unfairness which shocks the conscience of the court."

Id. at 470, 565 P.2d at 341 (emphasis added). See also Note, *supra* note 91, at 538.

The New Mexico courts have previously considered a number of factors in determining whether there is sufficient unfairness present in a case so as to preclude enforcement of the forfeiture provision.⁹³ First, the courts have examined the nature of the property and have been less inclined to enforce forfeiture clauses strictly when the property is being used by the defendant as a residence.⁹⁴ Second, the courts have considered the result intended by the contracting parties.⁹⁵ Third, the New Mexico courts have examined whether the amounts paid under the contract prior to default approximate fair rental value for the property.⁹⁶ KAC and Tract C's arguments centered on two factors which they contended were indicative of the presence of unfairness sufficient to preclude enforcement of the forfeiture provision: fair rental value and appreciation in value of the property.⁹⁷

1. Fair Rental Value

KAC and Tract C first argued that, because the property was undeveloped property, it had no rental value.⁹⁸ The amounts paid under the

93. Courts in various jurisdictions consider a number of factors in determining whether unfairness sufficient to preclude the enforcement of a forfeiture provision exists in a given transaction. In *Rothenberg v. Follman*, 19 Mich. App. 383, 172 N.W.2d 845, 848 (1969), the Michigan court stated that relevant factors included: (1) the reason for delay in making payments; (2) the amount and length of default; (3) the amount of the buyer's forfeiture, such as sums paid to the seller and appreciation in value of the property; and (4) the speed with which equitable relief is sought by the buyer. *Id.* The court in *Will Rogers Farm Agency v. Stafford*, 4 Wash. App. 500, 482 P.2d 336 (1971), weighed the equities between the parties, taking into consideration the financial loss to the buyer resulting from forfeiture as compared to the seller's loss should forfeiture be relieved and the current status of the hardship (whether the problem causing the default still remained). 4 Wash. App. at ___, 482 P.2d at 337-38.

94. See, e.g., *Huckins v. Ritter*, 99 N.M. 560, 561-62, 661 P.2d 52, 53-54 (1983); *Eiferle v. Toppino*, 90 N.M. 469, 470, 565 P.2d 340, 341 (1977); *Ott v. Keller*, 90 N.M. 1, 3-4, 558 P.2d 613, 615-16 (1976).

95. See, e.g., *Hale v. Whitlock*, 92 N.M. 657, 658, 593 P.2d 754, 755 (1979). *Hale* involved a declaratory judgment action by the purchaser. *Id.* at 657, 593 P.2d at 754. The vendor had not objected to the purchaser's failure to make payments in a timely manner. *Id.* The vendor subsequently assigned the contract, and the assignee demanded that past due installments be brought current. *Id.* The court held that the purchasers had been led to expect that timely payment would not be insisted upon and, therefore, granted the purchasers additional time to pay the amounts due under the contract. *Id.* at 657-58, 593 P.2d at 754-55.

The *Albuquerque Ranch Estates* trial court found that, like the *Hale* purchaser, Tract C and KAC had been consistently late in making payments to Ranch Estates. Record at 159. Unlike *Hale*, however, where the court treated acceptance of late payments as a waiver of the timeliness requirement, the trial court in *Albuquerque Ranch Estates* used the pattern of late payments to support its conclusion that immediate forfeiture was appropriate. *Id.* The supreme court found that this conclusion was supported by substantial evidence. 99 N.M. at 105, 654 P.2d at 558.

96. See, e.g., *Davies v. Boyd*, 73 N.M. 85, 88, 385 P.2d 950, 953 (1963). The *Davies* purchaser had made five monthly installment payments of \$100 per month prior to the default. *Id.* at 87-88, 385 P.2d at 952-53. The court held that parties to a contract may provide for forfeiture of installment payments which approximate rent and which were made prior to default, provided reasonable notice of default is required by the contract. *Id.* at 88-89, 385 P.2d at 953-54. The *Albuquerque Ranch Estates* court upheld forfeiture of the installment payments made by Tract C despite Ranch Estates' failure to provide Tract C with notice of default. See *infra* notes 98-104 and accompanying text.

97. 99 N.M. at 102, 105, 654 P.2d at 555, 558.

98. Record at 123. The property was unimproved, commercially zoned, vacant land without

contract, therefore, could not approximate fair rental value. To permit Ranch Estates to retake possession of the property would unjustly enrich Ranch Estates.⁹⁹ The Supreme Court rejected this argument on the ground that the parties had explicitly agreed to treat payments previously made as rent in the event of default.¹⁰⁰

The court's resolution of the rental value argument follows prior decisions involving similar provisions for forfeiture of payments.¹⁰¹ The New Mexico courts have consistently demonstrated a willingness to uphold forfeiture of installment payments made prior to default where the contract provides that the payments are to be considered rent for use of the property.¹⁰² Previous decisions, however, have invariably required that the contract provide for reasonable notice of default. Only then have the courts enforced provisions for forfeiture of the contract payments.¹⁰³ The *Albuquerque Ranch Estates* court's holding that the vendor is not required to give notice of default to an original purchaser is inconsistent with these previous decisions. The *Albuquerque Ranch Estates* decision implicitly eliminates notice of default as a requirement for enforcement of provisions mandating that payments are to be forfeited as rent in the event of default.¹⁰⁴

sewage connection. KAC and Tract C argued that the property, in its unimproved state, had no significant rental value. *Id.*

99. At the date of trial, Ranch Estates had received a total of \$94,247 under the contract. *Id.*

100. 99 N.M. at 103, 654 P.2d at 556. The forfeiture clause provided that the vendor "may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises." *Id.* at 99, 654 P.2d at 552.

101. *See, e.g.,* Bishop v. Beecher, 67 N.M. 339, 355 P.2d 277 (1960); Davies v. Boyd, 73 N.M. 85, 385 P.2d 950 (1963).

The analysis of the enforcement of provisions for forfeiture of installment payments which approximate rent is analogous to the treatment of liquidated damages provisions in contracts under § 2-718 of the Uniform Commercial Code. Under § 2-718, the parties may agree to the amount of damages for breach by either party, but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach. *Bishop* and *Davies* indicated that the New Mexico court was willing to permit the parties to a real estate contract to liquidate damages for default, but only in an amount which approximates a reasonable rent for use of the property. *Compare Bishop*, 67 N.M. at 343, 355 P.2d at 279 (court determined that the amounts paid under the contract amounted to around \$60 per month and held that forfeiture of the payments in those circumstances would not result in any inequity), *with* *Huckins v. Ritter*, 99 N.M. 560, 562, 661 P.2d 52, 54 (1983) (court found that, because the purchaser had been in possession of the property for less than one year and had made total payments of \$45,000, allowing the vendor to retain all payments made would constitute an unwarranted forfeiture).

In a departure from previous decisions, neither the trial court nor the supreme court in *Albuquerque Ranch Estates* appear to have made any determination that the amounts paid prior to default did, in fact, approximate a fair and reasonable rent for use of the property. *See* 99 N.M. at 103, 654 P.2d at 556.

102. *See supra* note 101.

103. *See* *Davies v. Boyd*, 73 N.M. 85, 385 P.2d 950, 951 (1963); *Hale v. Whitlock*, 92 N.M. 657, 593 P.2d 754 (1979).

104. *See* 99 N.M. at 105, 654 P.2d at 558. The *Albuquerque Ranch Estates* court did reiterate the requirement of reasonable notice prior to forfeiture of installment payments in its opinion. *Id.* at 103, 654 P.2d at 556. The court's decision to permit forfeiture of the payments made by Tract C prior to default is inconsistent, however, with its decision not to enforce the clear language of the original real estate contract and the language of the consent to the assignment, both of which stated that Ranch Estates would provide notice of default to Tract C. *See supra* notes 15, 18.

2. Appreciation in Value

The second factor pointed to by Tract C and KAC as evidence of unjust enrichment related to the appreciation in value of the property. KAC and Tract C presented evidence at trial that the property's current value was four times greater at the time of trial than it had been when Ranch Estates and Tract C entered into the original real estate contract.¹⁰⁵ The supreme court stated that appreciation in the value of the property was not sufficient grounds for the court to alter the terms of the contract.¹⁰⁶ The court then held that, considering the evidence and the equities of the respective parties, the trial court had not abused its discretion in declining to set aside the forfeiture provision.¹⁰⁷

The rejection of the unjust enrichment defense in *Albuquerque Ranch Estates* is typical of cases involving forfeiture provisions in real estate contracts. The court's willingness to enforce forfeiture provisions strictly reflects a policy choice favoring freedom of contract over a fair and equitable result in real estate cases.¹⁰⁸ Parties entering into real estate contracts, therefore, should be aware of the likelihood that the vendor's right of forfeiture will be strictly enforced in the event of any default in payments under a real estate contract in New Mexico.

C. Ramifications of *Albuquerque Ranch Estates*

The *Albuquerque Ranch Estates* court's decision that the contractual notice requirement would not be enforced following assignment of the contract increases the risks associated with real estate transactions, both for purchasers of real estate and for attorneys practicing in the real estate area. Non-enforcement of the notice provision, coupled with strict enforcement of the forfeiture provision, significantly increases the risk that purchasers will suffer forfeiture without an opportunity to cure the default.

105. 99 N.M. at 105, 654 P.2d at 558. The original price under the contract between Ranch Estates and Tract C was \$224,398.50. Record at 22. KAC and Tract C presented evidence that the fair market value of the property was \$980,000 at the time of trial. *Id.* at 133.

106. 99 N.M. at 105, 654 P.2d at 558.

107. *Id.* at 106, 654 P.2d at 559.

108. Unlike New Mexico, many jurisdictions have recognized the inequitable result of strict judicial enforcement of forfeiture provisions, particularly when the purchaser has made a substantial investment at the time of forfeiture. G. E. Osborne, *supra* note 1, § 3.26. These jurisdictions have adopted various judicial and statutory limitations to mitigate this harshness, including: (1) statutory notification requirements and grace periods for payments, *id.* at § 3.27; (2) recognition of an equitable right of redemption such as exists with mortgages, *id.* at § 3.28, at 87 (New Mexico has rejected giving purchasers an equitable right of redemption with real estate contracts, *see supra* note 90); (3) requiring foreclosure as a mortgage; and (4) restitution to the purchaser of payments made prior to forfeiture, G. E. Osborne, *supra* note 1, § 3.28, at 90, 95.

A more equitable result might have been achieved in *Albuquerque Ranch Estates* by affording Tract C an equitable right of redemption. *See, e.g.*, Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969). In *Springer*, a case involving multiple mortgages, the court held that one mortgagee's rights, including the right of redemption, were not impaired by foreclosure of another mortgage on the same property. 80 N.M. at 210, 453 P.2d at 381. The court also could have required restitution of all payments made under the original contract between Ranch Estates and Tract C.

Non-enforcement of the notice requirement also increases the risk to attorneys of committing malpractice.

1. Risks to the Real Estate Purchaser

In multiple contract situations, the *Albuquerque Ranch Estates* decision can affect an original purchaser's rights against both the vendor and the assignee. First, the decision permits the vendor to recover the property and to retain any payments made by the original purchaser under the first contract without affording the original purchaser notice of an assignee's default or an opportunity to cure such default.¹⁰⁹ Second, the decision allows the original purchaser's right of recovery against the assignee under the second contract to be extinguished without the original purchaser's knowledge.¹¹⁰

The written notice requirement is a primary means of protecting the purchaser's rights in pyramid purchase situations.¹¹¹ The notice provision is designed to provide the original purchaser with both knowledge of the assignee's default and an opportunity to cure that default.¹¹² Without notice, the original purchaser may be unaware that the assignee is in default or may be uncertain of the date or the amount of the default.¹¹³ As a result, the vendor may act to forfeit both the property and any previous payments before the original purchaser becomes aware of the default or has an opportunity to cure the default to prevent forfeiture.¹¹⁴ By adopting the minority position on the effect of assignments,¹¹⁵ the court has increased the likelihood that purchasers in New Mexico will have their rights under the original contract forfeited without ever being afforded the opportunity to prevent forfeiture.

The court's ruling that the purchaser is not entitled to notice of the assignee's default also ignores any right of recovery the purchaser might have under a second contract with the assignee.¹¹⁶ Without notice of default, the purchaser may be unaware of the accrual of its right to recover

109. See *infra* notes 111–15 and accompanying text.

110. See *infra* notes 116–19 and accompanying text.

111. New Mexico law has required that notice be clear and sufficiently articulated so as to place the purchaser on notice of an unmistakable intent to claim a forfeiture. *Martinez v. Martinez*, 101 N.M. 88, 91–92, 678 P.2d 1163, 1166–67 (1984); *Albuquerque Ranch Estates*, 99 N.M. at 103, 654 P.2d at 556.

112. *Boswell v. Lyon*, 401 N.E.2d 735, 738 (Ind. Ct. App. 1980); A. L. Corbin, *supra* note 56, at § 867.

113. In *Albuquerque Ranch Estates*, Tract C had knowledge that Ranch Estates had sent notice of default to KAC. Ranch Estates refused, however, to advise Tract C of the date on which the notice had been sent. Record at 358–59. Consequently, Tract C was unable to determine when the 90-day cure period, see *supra* note 15, began to run.

114. *Martinez v. Martinez*, 101 N.M. 88, 92–93, 678 P.2d 1163, 1167–68 (1984).

115. 99 N.M. at 105, 654 P.2d at 558. See *supra* notes 52–66 and accompanying text.

116. See *supra* notes 67–81 and accompanying text.

the property under the second contract.¹¹⁷ The purchaser will thus be precluded from acting to exercise that right prior to reversion of the property in the vendor.¹¹⁸ Following the *Albuquerque Ranch Estates* decision, New Mexico law clearly permits the original purchaser's right of recovery against an assignee to be extinguished without notice of the assignee's default under the original contract.¹¹⁹

A purchaser's lack of knowledge of the necessity to cure the default, coupled with the judicial willingness to enforce forfeiture provisions strictly, will render forfeiture an almost inevitable result of any default by an assignee.¹²⁰ This risk to purchasers ultimately will diminish the usefulness of real estate contracts as devices for financing the purchase of real estate in New Mexico.¹²¹

2. Risks to the Real Estate Attorney

The *Albuquerque Ranch Estates* court's decision not to enforce the contractual notice provision also increases the likelihood that attorneys in New Mexico will fail to protect adequately the interests of their clients when advising those clients concerning pyramid purchases of real estate.

117. See *supra* note 113.

118. See *supra* note 113. The court's decision in *Albuquerque Ranch Estates* that forfeiture was proper seems to rest on the finding that Tract C had sent KAC notice of default under the second real estate contract after learning of Ranch Estates' demand for payment. 99 N.M. at 99-100, 654 P.2d at 552-53. Tract C's right of forfeiture under the second contract thus accrued approximately one month prior to the end of the 90-day cure period under the original contract. Tract C, after receiving KAC's payment under the second contract, did not act to declare that the property was forfeited at the end of the 30-day period provided for in its contract with KAC. *Id.* at 105, 654 P.2d at 558. At trial, Tract C provided testimony that it had been advised by KAC that an extension of time to make the payment to Ranch Estates had been granted by Ranch Estates and that KAC was no longer in default. Record at 358.

119. The *Albuquerque Ranch Estates* court's ruling which permits the extinguishment of the purchaser's rights under the original and second contracts without notice of default also raises constitutional concerns regarding deprivation of rights without due process. See U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18. A comprehensive treatment of those issues is beyond the scope of this Note.

120. See *supra* notes 87-108 and accompanying text.

121. The usefulness of real estate contracts as devices to allow purchases of property with very small down payments has been recognized by the court. See *Bishop v. Beecher*, 67 N.M. 339, 355 P.2d 277 (1960):

Admittedly, there may be some disadvantages to this type of contract, but it is felt that the advantages far outweigh them when the benefits, which are derived by thousands of people who have been enabled to purchase property by merely paying for it over many years in a manner likened to rent, are considered.

Id. at 342, 355 P.2d at 279. The risk of forfeiture without a right of redemption, such as exists with mortgages, is considered to be the trade-off for the benefit of buying property with small installments. *Martinez v. Martinez*, 101 N.M. 88, 92, 678 P.2d 1163, 1167 (1984). When the likelihood of forfeiture is increased, the risk of losing both the property and any money already invested in the property begins to outweigh the benefits of real estate contracts; the use of the contracts may then decline. *Id.*

Attorneys will suffer an increased risk of committing malpractice, either by continued reliance on written notice to protect the client's rights or by failure to provide for an alternate means of protection when structuring real estate transactions. Attorneys who represent purchasers and who are unaware of the court's unwillingness to enforce the notice requirement may continue to follow the traditional (and now inadequate) practice of incorporating provisions for notice of default to protect their client's rights.¹²² These attorneys are likely to find themselves defending malpractice suits brought by clients who have had their rights forfeited without notice in accordance with the *Albuquerque Ranch Estates* ruling.¹²³

There appear to be few alternatives to notice that attorneys can employ to protect a purchaser's rights in multiple contract situations.¹²⁴ The *Albuquerque Ranch Estates* decision, by effectively eliminating notice as a reliable means of protecting their clients, renders it necessary for attorneys to develop new devices. The inconsistent positions of the court in choosing to enforce contractual forfeiture provisions while declining to uphold contractual notice requirements, however, renders the effectiveness of any new device unpredictable. Even without relying on notice provisions, attorneys may still find that they have failed to protect adequately their client's rights in multiple contract transactions.

IV. CONCLUSION

In order for real estate contracts to continue to provide a means of financing real estate purchases in New Mexico, some action by the supreme court or the legislature will be necessary to diminish the risks to purchasers and attorneys resulting from *Albuquerque Ranch Estates*.¹²⁵ In the absence of legislative or judicial action, continued enforcement of forfeiture without notice will allow vendors to extinguish purchasers'

122. Notice provisions are routinely included in standard forms of real estate contracts such as the Valiant #103 involved in the *Albuquerque Ranch Estates* case. See *supra* note 13.

123. See *supra* note 12. This does not mean that provisions requiring notice of default should not be included in real estate contracts following *Albuquerque Ranch Estates*. Where the parties in multiple contract situations are willing to abide by the terms of the contract, notice of default may still be an effective means of protecting the purchaser's rights. Because of the unpredictability of judicial enforcement, however, attorneys should not rely on the parties to provide notice of default.

124. One possible means is the use of a device similar to a wrap around mortgage, where payment would be made to an escrow agent by the assignee, and the escrow agent would then disburse the payment to the vendor and the purchaser.

125. Strict judicial enforcement of all provisions in real estate contracts, including the notice provisions, would seem to be the most appropriate means of assuring that the expectations of the parties to real estate contracts will be given effect.

As a possible alternative to strict enforcement by the courts, the legislature could enact legislation mandating notice of default, restitution, or an equitable right of redemption, such as exists with mortgage transactions. See *supra* note 108. See also *Bishop v. Beecher*, 67 N.M. 339, 355 P.2d 277 (1960).

rights without allowing those purchasers an opportunity to act to protect their interests.¹²⁶ The inconsistent judicial treatment of different contractual provisions will render it difficult for attorneys to devise alternative methods for preventing such unilateral forfeitures.¹²⁷ Until the decision is clarified or overruled, however, attorneys should be aware of the pitfalls created by *Albuquerque Ranch Estates* and advise their clients of the significant risk of forfeiture in multiple contract situations.

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126. See *supra* notes 111–19 and accompanying text.

127. See *supra* notes 122–24 and accompanying text.