

The National Agricultural
Law Center



University of Arkansas · System Division of Agriculture
NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

Contracts for Deed in Oklahoma: Obsolete but not Forgotten

by

Drew L. Kershen

Originally published in OKLAHOMA CITY UNIVERSITY LAW REVIEW
15 OK. CITY UNIV. L. REV. 716 (1990)

www.NationalAgLawCenter.org

CONTRACTS FOR DEED IN OKLAHOMA: OBSOLETE, BUT NOT FORGOTTEN

DREW L. KERSHEN*

I. INTRODUCTION

Historically, the contract for deed has been a distinct legal device by which land is bought and sold. Indeed, contracts for deed have likely been the most common substitute to a mortgage or deed of trust for financing the sale of land. Contracts for deed differed from mortgages or deeds of trust, however, in several important ways.¹

- Title to the land did not pass in any way or for any purpose to the contract-for-deed purchaser until the final payment was made under the contract.
- The contract-for-deed purchaser only had contract rights in the land and contract claims against the contract-for-deed seller during the term of the contract.
- The contract-for-deed purchaser could not affect the title to the land; the contract-for-deed purchaser did not have an interest in the land which could be recorded; the contract-for-deed purchaser did not have an interest in the land which could be mortgaged; the contract-for-deed purchaser

* Professor of Law, University of Oklahoma. B.A. Notre Dame University, J.D. University of Texas, LL.M. Harvard. I especially thank the members of the Oklahoma City Title Attorneys Association and the Oklahoma County Bar Association. This article began as a continuing legal education presentation to these organizations. Members' questions and comments gave me much greater insight into this topic. I thank Frederick Miller and Joyce Palomar (University of Oklahoma) and Marjorie Downing (Oklahoma City University). They read and critiqued this article carefully.

1. The author purposefully expresses the differences between contracts for deed and mortgages/deeds of trust starkly. From the earliest cases on contracts for deed, however, courts blurred the distinction between contracts for deed and mortgages/deeds of trust because as a matter of economic function the contract for deed is a financing device just as the mortgage and the deed of trust are financing devices. Moreover, courts were often moved to invoke equitable doctrines (such as equitable conversion) to reach results the courts considered fair and just between buyers and sellers under contracts for deed. Lawyers create; courts interpret.

did not have an interest in the land against which a judgment creditor could execute and levy.

- As title owner of the land, the contract-for-deed seller could regain the land upon breach by implementing a forfeiture clause enforceable through an ejectment action.
- The contract-for-deed seller was entitled also to retain all payments prior to forfeiture as liquidated damages.

In light of the attributes of contracts for deed as compared to mortgages or deeds of trust, land sellers and land financiers considered contracts for deed as favorable to their interests. Sellers and financiers were especially attracted to contracts for deed in states, such as Oklahoma, where historically mortgages could only be enforced by the remedy of judicial foreclosure.²

In 1976, however, the Oklahoma Legislature passed the following statute, adding the last sentence in 1983:

All contracts for deed for purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property, whether such instruments be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages. No foreclosure shall be initiated, nor shall the court allow such proceedings, unless the documents have been filed of record in the county clerk's office, and mortgage tax paid thereon, in the amount required for regular mortgage transactions.³ Provided, however, mutual help and occupancy agreements executed by an Indian housing authority created pursuant to Section 1057 of Title 63 of the Oklahoma Statutes shall not be considered to be mortgages or contracts for deed under the provisions of this section.⁴

2. For the best treatise comparison of contracts for deed with mortgages/deeds of trust, see G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* §§ 3.26-3.37 (2d ed. 1985).

3. Act of April 26, 1976, ch. 70, 1976 Okla. Sess. Laws 85 (codified as OKLA. STAT. tit. 16, § 11A (1981)).

4. The Legislature added this last sentence in 1983. See Act of May 12, 1983, ch. 108, 1983 Okla. Sess. Laws 331.

Despite the adoption of section 11A, many Oklahomans, including Oklahoma lawyers advising clients, continue to use a contract for deed as the legal means for transferring real estate from a seller to a buyer.⁵ In light of this continued use of contracts for deed in Oklahoma, this article addresses two main questions. First, what is the meaning and impact of this statute upon the doctrine of contracts for deed in Oklahoma? Second, why do Oklahomans continue to use contracts for deed?

II. MEANING AND IMPACT OF SECTION 11A

A. *Three Possible Interpretations*

Ignoring for the moment the final sentence of section 11A, the statute is open to three possible interpretations. First, the statute can be read as completely abrogating contracts for deed in Oklahoma. In accordance with this first interpretation, contracts for deed in Oklahoma are simply obsolete legal devices because the statute has prohibited their use.⁶ If this first interpretation is correct, contracts for deed should never be used in Oklahoma.

Second, the statute can be read as only affecting the remedies available to sellers when their buyers default under a contract for deed. Previously in Oklahoma, when the contract-for-deed buyer defaulted, as shown by *Crowell v. Whitmire*,⁷ the seller was entitled to immediate repossession of the real estate, to retention of all monies paid as liquidated damages,

5. Over my past three years as a law professor at the University of Oklahoma, John Myles (petroleum landman/law student), Carolyn Smith (legal intern/law student), and Patrick Pate (real estate broker/law student) have related their experiences to me that contracts for deed are still widely used in Oklahoma. Each of these students has encountered, litigated, or used contracts for deed while in law school.

When earlier drafts of this article were presented as continuing legal education talks to two Oklahoma county bar associations, the attorney members confirmed that contracts for deed are still widely used. Oklahoma City Title Attorneys Association (June 8, 1990); Oklahoma County Bar Association (August 21, 1990).

6. Professors Grant Nelson and Dale Whitman, two leading academic commentators about real estate law, seemingly adopt this first interpretation of OKLA. STAT. tit. 16, § 11A (1981). Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. REV. 541, 546-47.

7. 548 P.2d 221 (Okla. 1976). See also *Barker v. Hutton*, 109 Okla. 197, 235 P. 170 (1925).

and (if needed) to a quieted title. Moreover, prior to 1976, if a contract-for-deed purchaser refused to give up possession of the real estate, the contract-for-deed seller could use the relatively speedy remedy of ejectment to regain possession.⁸ In accordance with this second interpretation, by adopting section 11A, the Legislature meant only to overturn decisions like *Crowell* and to change the remedies available to contract-for-deed sellers. Under this second interpretation, with the passage of section 11A, contract-for-deed sellers thereafter must use the mortgage remedy of foreclosure when a buyer defaults under a contract for deed. However, while the remedies available to contract-for-deed sellers change under this second interpretation, the second interpretation otherwise leaves the prior substantive law about contracts for deed unchanged.

Third, section 11A can be read as changing the substantive law of contracts for deed but only with respect to those specific transactions covered by the statutory language. If this third interpretation is adopted, section 11A, when applicable by its language, does much more than just change the remedies available to contract-for-deed sellers when their buyers default. Under this third interpretation, section 11A changes the basic relationship between sellers and buyers of land because section 11A changes the substantive property law of contracts for deed. In accordance with this third interpretation, lawyers and judges must distinguish between those factual patterns to which section 11A applies and those factual patterns to which section 11A is inapplicable. If section 11A applies, the substantive property law relationship between sellers and buyers using contracts for deed differs after 1976 from what it was prior to 1976. If section 11A does not apply, then the substantive law governing contracts for deed remains the same as it was prior to 1976 as interpreted by cases like *Crowell*.⁹ This third interpretation makes contracts for deed

8. 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE 206 (1987).

9. 548 P.2d 221 (Okla. 1976). See also Comment, *The Decline of the Contract for Deed in Oklahoma*, 14 TULSA L.J. 557, 558-59 (1979). The student author, G. Booker Schmidt, argues persuasively for adopting this third interpretation of OKLA. STAT. tit. 16, § 11A (1981).

obsolete in many transactions, depending upon section 11A's coverage.

B. Authoritative Decisions Interpreting Section 11A

Fourteen years since the passage of section 11A in its original form, Oklahoma legal authorities have clearly and unanimously rejected the second possible interpretation of section 11A.¹⁰ While section 11A does make contract-for-deed real estate sellers use the mortgage remedy of foreclosure, these authorities make it clear that section 11A does much more than just affect sellers' remedies. When section 11A applies, the authorities hold that it changes the substantive law of contracts for deed. A review of these legal authorities evidences the substantive impact of section 11A.

Prior to 1976, a person who occupied a home under a contract for deed could not claim a homestead exemption for property taxes on the residence. This was true because homestead exemptions were available only to those who had record title and record title was construed to exclude contract-for-deed claims to the property.¹¹ With the passage of section 11A, persons occupying a home under a contract for deed are entitled to a homestead exemption from property taxes. Section 11A makes the purchaser under a contract for deed eligible for a homestead exemption because it deems the contract for deed a mortgage. A person who owns a home subject to a mortgage qualifies as a person who has record title and, therefore, is entitled to claim a homestead exemption.¹² Consequently, the contract for deed serves simultaneously as evidence of ownership of the real estate by the purchaser and as evidence of a lien (purchase money mortgage) against the property for the seller.

10. *In re Kampman Farms, Inc.*, 6 Bankr. 653 (Bankr. W.D. Okla. 1980); *Conner v. Northwestern Nat'l Casualty Co.*, 774 P.2d 1055 (Okla. 1989); *Smith v. Frontier Fed. Sav. and Loan Ass'n*, 649 P.2d 536 (Okla. 1982); *Oklahoma ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980); *Panama Timber Co. v. Barsanti*, 633 P.2d 1258 (Okla. Ct. App. 1980); *Puckett v. Southeast Plaza Bank*, 620 P.2d 461 (Okla. Ct. App. 1980); 19 Op. Att'y Gen. 103 (Okla. 1988). These authorities are more fully explained in the remainder of the article.

11. 4 Op. Att'y Gen. 271 (Okla. 1971).

12. 19 Op. Att'y Gen. 103 (Okla. 1988).

Prior to 1976, the owner of a home who sold the home using a contract for deed may not have triggered a due-on-sale clause contained in the contract-for-deed seller's mortgage. The authorities were inconclusive.¹³ With the passage of section 11A, the Supreme Court of Oklahoma conclusively ruled in *Smith v. Frontier Federal Savings and Loan Association*¹⁴ that a contract for deed does trigger a due-on-sale clause in the seller's mortgage. In the *Smith* opinion, Justice Doolin relied directly upon section 11A to find that the contract for deed was equivalent to evidence of title for the contract-for-deed purchaser and evidence of a purchase money mortgage for the contract-for-deed seller. As Justice Doolin opined for a unanimous court: "The effect of the appellants' contract is that the Smiths have sold the property in question to the Valentines, retaining only a security interest; and that is the type of situation in which the due on sale clause may be invoked."¹⁵

After the passage of section 11A, it is now beyond dispute that the contract-for-deed seller is a mortgagee loss payee under a fire insurance policy on the home sold. Hence, if a fire insurance company pays the insurance proceeds to the contract-for-deed purchaser without adequately protecting the

13. See *Chopan v. Klinkman*, 330 So. 2d 154 (Fla. Dist. Ct. App. 1976); see also *Simmons. The Agreement for Deed As a Creative Financing Technique*, 55 FLA. B.J. 395 (1981).

Prior to 1976 and until the present, the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC) approved mortgage forms contained a due-on-sale clause which is triggered if the borrower transfers or sells all or any part of the property or any interest in it. See 2 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE, Form 3.2.2.2, cl. 17 at 446 (1987). By drafting the due-on-sale clause to be triggered by the sale or transfer of any interest in the property, FNMA and FHLMC meant for the clause to be triggered when borrowers sold their homes under contracts for deed.

14. 649 P.2d 536 (Okla. 1982). See also Ming, *Contract for Deed—A Practical Prohibition*, 54 OKLA. B.J. 3001 (1983).

15. *Smith v. Frontier Fed. Sav. and Loan Ass'n*, 649 P.2d 536, 538 (Okla. 1982).

Prior to 1976, Oklahoma had long followed the doctrine of equitable conversion between buyers and sellers of real estate who had entered into a binding land sale contract. See, e.g., *Fouts v. Foudray*, 31 Okla. 221, 120 P. 960 (1912). Using the doctrine of equitable conversion, the Supreme Court of Oklahoma might have held, even before the passage of section 11A, that the contract-for-deed transaction triggered a due-on-sale clause in a first mortgage. However, with the passage of section 11A, Justice Doolin had no need to rely upon, and did not even mention, the doctrine of equitable conversion in the *Smith* opinion.

interests of the seller, the insurance company is liable to the seller, as mortgagee loss payee, for the amount remaining to be paid under the contract for deed up to the limits of the policy.¹⁶ Moreover, if section 11A makes the contract-for-deed seller a mortgagee loss payee under a fire insurance policy, then the contract-for-deed purchaser is clearly the owner of the property who has an insurable interest in the property, who will suffer any fire loss that is not insured, and who will be entitled to any fire insurance proceeds once the mortgage debt has been satisfied.¹⁷ These legal consequences flow from section 11A without the need for the Supreme Court of Oklahoma to rely upon the doctrine of equitable conversion to assign the risk of fire loss between buyers and sellers of real estate when the fire occurs prior to the delivery of the deed.¹⁸

In light of section 11A, the Bankruptcy Court for the Western District of Oklahoma has ruled that decisional law of Oklahoma prior to 1976, holding that contracts for deed were executory contracts, has been statutorily overruled. Hence, if a contract-for-deed purchaser files bankruptcy, the bankruptcy court treats the purchaser's interest in the property as a legal title subject to a mortgage. Therefore, the real estate covered by the contract for deed is part of the purchaser's estate in bankruptcy, and the bankruptcy court will deny any motion by the contract-for-deed seller to remove the property from the bankruptcy and return it to the seller.¹⁹

As the foregoing post-1976 authorities show, section 11A substantively changes contracts for deeds into evidence of title for the contract-for-deed purchaser and into mortgages for the contract-for-deed seller. After the passage of section 11A, all that the contract-for-deed seller of real estate retains is bare legal title as security interest against the property sold.

While section 11A changes the substantive law of contracts for deed, section 11A also changes the remedies availa-

16. *Conner v. Northwestern Nat'l Casualty Co.*, 774 P.2d 1055 (Okla. 1989). See also *Puckett v. Southeast Plaza Bank*, 620 P.2d 461 (Okla. Ct. App. 1980).

17. *Conner*, 774 P.2d at 1058.

18. Compare the cases cited in notes 14 & 15 with *Acree v. Hanover Ins. Co.*, 561 F.2d 216 (10th Cir. 1977) and *Fouts v. Foudray*, 31 Okla. 221, 120 P. 960 (1912). See also OKLA. STAT. tit. 16, §§ 201-03 (1981).

19. *In re Kampman Farms, Inc.*, 6 Bankr. 653 (Bankr. W.D. Okla. 1980).

ble to contract-for-deed sellers. Because contract-for-deed sellers after 1976 are mortgagees, section 11A also imposes upon sellers the obligation to use the mortgage remedy of foreclosure if purchasers default under the contract for deed. Moreover, in accordance with section 11A's specific language, the seller is prohibited from using foreclosure unless the contract for deed has been recorded in the county clerk's office and the mortgage taxes have been paid.²⁰ Section 11A thus put an end to prior behavior under contract-for-deed transactions whereby the contract for deed went unrecorded and the seller brought an action for ejectment if the defaulting purchaser refused to leave the real estate.²¹

The legislative history of section 11A supports the conclusion reached by the Oklahoma courts and the attorney general that section 11A changes the substantive law relating to contracts for deed. Senator Frank Keating sponsored the bill which became section 11A.²² When Senator Keating first thought of the contract-for-deed topic, he requested the assistance of the State Legislative Council to help draft a bill which would accomplish two objectives. First, Senator Keating asked that the bill change contract-for-deed law so that contract-for-deed purchasers would receive a warranty deed after twenty-five per cent of the principal was paid with the seller automatically receiving a mortgage.²³ Second, Senator Keating also asked that the bill allow contract-for-deed sellers to keep the amount paid under the contract as liquidated damages, but then prohibit the seller from seeking a deficiency judgment.²⁴ These requests show that Senator Keating's objectives were initially limited to changing contract-for-deed remedies.

By the time the bill was drafted as Senate Bill No. 339, however, the language in the filed bill was not limited to rem-

20. *Panama Timber Co. v. Barsanti*, 633 P.2d 1258 (Okla. Ct. App. 1980), *aff'd*, 619 P.2d 872 (Okla. 1980).

21. *Crowell v. Whitmire*, 548 P.2d 221 (Okla. 1976); *Asher v. Hull*, 207 Okla. 478, 250 P.2d 866 (1952).

22. S. 339, 35th Okla. Legis., 1st Sess. (1975).

23. Okla. State Legis. Council, Legal Serv. Div., Staff Assignment Request No. 345 (Dec. 5, 1974).

24. Okla. State Legis. Council, Legal Serv. Div., Staff Assignment Request No. 346 (Dec. 5, 1974).

edies. Rather, the language in the filed bill was expansive language substantially similar to the present language of section 11A. Moreover, as Senate Bill No. 339 passed through the legislative process, amendments to its language only reinforced the expansive language, thereby emphasizing the substantive changes being made to Oklahoma contract-for-deed law.²⁵ The end result of this legislative process was section 11A, which two prominent commentators on real estate law called the "most sweeping and decisive statutory regulation" of contracts for deed.²⁶

C. Section 11A's Coverage

By its own terms, section 11A applies to "all contracts for deed for purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property." The final sentence of section 11A then sets forth one exclusion from its coverage. Section 11A does not apply to "mutual help and occupancy agreements executed by an Indian housing authority created pursuant to Section 1057 of Title 63 of the Oklahoma Statutes." Both the general statement of coverage and the specific exclusion from coverage must be analyzed carefully to understand section 11A's impact on the use of contracts for deed.

1. Immediate and Continuing Right of Possession

In the vast majority of instances, contracts for deed transfer homes, farms, or pasture lands to purchasers who intend to occupy the homes, to cultivate the farms, or to graze livestock on the pasture lands. In each of these instances, the purchasers clearly intend to actually possess the real estate sold under the contract for deed. In each of these instances section 11A unequivocally applies to change the contract for

25. Compare S. 339, 35th Okla. Legis., 1st Sess. (1975) with Sen. Judiciary Comm. Rep. on S. 339, 35th Okla. Legis., 1st Sess. (1975) and Engrossed S. 339, 35th Okla. Legis., 2nd Sess. (1976).

26. Nelson & Whitman, *supra* note 6, at 546.

deed into a purchase money mortgage for the seller and evidence of title for the purchaser.

Similarly, even if the purchaser uses the home, farm, or pasture land purchased under a contract for deed as rental real estate, the purchaser has taken possession of the real estate through the actions of the tenant. Courts have ordinarily not distinguished between possession personally by the owner and possession of an owner through the actions of tenants.²⁷ Moreover, section 11A contains no statutory language which should lead a court to distinguish between possession personally by the purchaser and possession by the purchaser through the actions of a tenant. Hence, in these purchaser/tenant situations too, section 11A operates to change the contract for deed into a purchase money mortgage for the seller and evidence of title for the purchaser.

What if the contract for deed is used in a situation where the seller is transferring unimproved real estate (such as a wild, wooded parcel) to a purchaser who intends to hold the land either for later development or for investment purposes? In this instance, the purchaser neither takes actual possession personally nor takes possession through the actions of a tenant. Does this transaction come within the coverage of section 11A which requires that the contract for deed be made for the "purpose of establishing an immediate and continuing right of possession" of the real property? To answer this question requires that a court look carefully at the terms of the contract for deed itself.

If the contract for deed in the unimproved, future development or investment real estate situation specifically states that the purchaser of the real estate is not entitled to possession until the final payment is made under the contract, then section 11A does not apply. By its terms, whereby possession does not transfer until the final payment is made, the contract for deed is not for the purpose of establishing an immediate and continuing right of possession.²⁸ Hence, in this instance,

27. *E.g.*, *Dillard v. Ceaser*, 206 Okla. 304, 243 P.2d 356 (1952); *Bell v. Protheroe*, 199 Okla. 562, 188 P.2d 868 (1948); *Wade v. Burkhardt*, 196 Okla. 615, 167 P.2d 357 (1946).

28. In Florida, it is apparently a common practice for real estate developers to insert a clause into contracts for deed for undeveloped land that the purchaser has a

contracts for deed even after the passage of section 11A continue to be legally distinct from mortgages. In this instance, sellers and purchasers using contracts for deed relate to one another as defined by case law prior to 1976, cases like *Crowell v. Whitmire*.²⁹

By contrast, if the contract for deed is silent about whether the purchaser of unimproved, future development or investment real estate is entitled to possession, the courts should interpret section 11A to apply. Three reasons exist for the application of section 11A to unimproved, future development or investment real estate when the contract is silent about possessory rights.

First, contracts for deed are meant to transfer ownership of the real estate from the sellers to purchasers. All that the seller retains is a bare legal title as security for the purchase price.³⁰ A primary attribute of ownership is the right of possession.³¹ Unless the contract for deed specifically denies purchasers a possessory right, contracts for deed should be interpreted to transfer an immediate possessory right.

Second, by its statutory language, section 11A applies to contracts for deed made for the purpose of establishing a right of possession. Section 11A does not insist that contract-for-deed purchasers take actual possession either themselves or through tenants. Contracts for deed should be presumed to give the purchaser a right of possession unless explicit language in the contract for deed states otherwise.

Third, if the purchaser of unimproved, future development or investment real estate was not protected by section 11A, then many persons buying real estate for retirement purposes would still be at risk of losing their entire investment in the land any time they are late in making a payment. Section

possessory right to the undeveloped lot only after all payments have been made. Comment, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 168 n.58 (1975).

29. 548 P.2d 221 (Okla. 1976). For a full discussion of the traditional Oklahoma law concerning contracts for deed prior to the passage of OKLA. STAT. tit. 16, § 11A (1981), see Comment, *supra* note 9, at 559-71.

30. 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE 1003-05 (1987).

31. 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE 206 (1987).

11A was specifically passed to end the harsh consequences of forfeiture that prior Oklahoma case law³² permitted under contracts for deed. Hence, to interpret section 11A to exclude unimproved, future development or investment real estate from its coverage is to undermine the remedial purposes the Legislature intended when section 11A was passed.

For these three reasons, section 11A should be interpreted to apply to contract-for-deed purchases of unimproved, future development or investment real estate when the contract for deed is silent about possessory rights. Once held applicable, section 11A turns these contracts for deed into purchase money mortgages for sellers and evidence of title for purchasers.³³

By requiring that contracts for deed be deemed mortgages only when the purpose is to establish an immediate and continuing right of possession, section 11A clearly is not meant to apply to earnest money contracts. Earnest money contracts are short term contracts under which the purchaser of the real estate does not gain an immediate and continuing right of possession. Earnest money contracts give the purchaser an equitable title to the property, but a right of possession normally does not pass until the real estate closing.³⁴ If the purchaser refuses to close, the earnest money contract usually allows the seller the option of either keeping the earnest money deposit as liquidated damages or suing for specific performance.³⁵ Earnest money contract purchasers sometimes do gain possession of the property being purchased prior to closing, but preclosing possession is transferred in accordance

32. See *Crowell v. Whitmire*, 548 P.2d 221 (Okla. 1976). See generally Comment, *supra* note 9, at 559-71.

33. See Comment, *supra* note 29, at 572-88.

34. It is to earnest money contracts, as opposed to contracts for deed, that the doctrine of equitable conversion most clearly and sensibly applies. See *Acree v. Hanover Ins. Co.*, 561 F.2d 216 (10th Cir. 1977); *Fouts v. Foudray*, 31 Okla. 221, 120 P. 960 (1912). Both the *Acree* and the *Fouts* cases involved questions about rights under insurance policies after a fire destroyed the structures on the real estate during the time between the signing of the earnest money contract and the closing date. See also OKLA. STAT. tit. 16, §§ 201-203 (1981).

35. 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE, FORM 1.2.1.1, cl. 10, at 11-12 (1987).

with a lease that is separately negotiated and signed by the parties to the earnest money contract.³⁶

In light of the foregoing discussion, section 11A does not make contracts for deed totally obsolete nor prohibit them as unique legal devices. However, section 11A does apply in the great majority of situations for which contracts for deed were used prior to 1976. Hence, Oklahomans can continue to use contracts for deed but, when they do so, they must realize that section 11A almost always converts the contract for deed into a purchase money mortgage for the seller and evidence of title for the purchaser. Contracts for deed as a practical matter have lost their distinctiveness as legal devices in Oklahoma.

2. Indian Housing Authority Mutual Help and Occupancy Agreements

Mutual help and occupancy agreements work in two ways.³⁷ First, tribal members give a long-term lease of their real estate to a tribal housing authority in return for the housing authority agreeing to build a home on the land. When the house is completed, the housing authority subleases the real estate back to the tribal member with rental payments amortized to pay for the construction costs of the house. After the tribal member has fully repaid the construction costs through the rental payments, the sublease expires by its own terms and the housing authority releases its long-term lease. The tribal member once again has complete ownership and control of the real estate.

Second, tribal members can deed their property to the housing authority in return for a promise to build a house upon the property.³⁸ Once the house is completed, the housing authority sells the house back to the tribal member under a contract for deed. The contract-for-deed purchase price is the

36. *Cf. Id.* 92-93 and Form 1.2.9, at 94.

37. *See Housing Auth. v. Harjo*, 790 P.2d 1098 (Okla. 1990); *Ahboah v. Housing Auth.*, 660 P.2d 625 (Okla. 1983).

38. If the tribal member and the housing authority entered into no further agreements concerning the real estate, the deed from the tribal member to the housing authority would likely be a deed absolute covered by OKLA. STAT. tit. 46, § 1 (Supp. 1989).

construction cost of the house amortized over the life of the contract for deed. Once the contract for deed has been fully paid, the housing authority gives the deed promised in the contract to the tribal member. With the acquisition of the promised deed, the tribal member once again owns the real estate free and clear of any claims against it by the housing authority. The last sentence of section 11A refers to this use of contracts for deed between tribal members and tribal housing authorities.

In light of the factual circumstances generating mutual help and occupancy agreements, it is not clear that section 11A applied as originally worded. Mutual help and occupancy agreements are not really for the "purchase and sale of real property" as required by section 11A. Tribal members already had rights to possession or ownership of the real estate prior to their agreements with tribal housing authorities. What tribal members needed was a new house to be built on their real estate. These housing authority agreements are, therefore, sources of construction financing on the real estate rather than purchase financing for the real estate.

Whether section 11A as originally passed in 1976 applied to mutual help and occupancy agreements became moot, however, in 1983 when the Legislature specifically excluded such agreements from section 11A.³⁹ As a result of this exclusion, tribal housing authorities using contracts for deed gained the right to oust a tribal member who fell behind on contract payments by relying upon a forfeiture clause in the contract for deed, just as could have been done under contracts for deed prior to 1976.⁴⁰ Moreover, the 1983 amendment freed tribal housing authorities from having to use mortgage foreclosure remedies when enforcing construction security interests against the real estate upon which the home had been built. With the 1983 amendment to section 11A, housing authorities can use once again the much quicker remedy of ejectment when the tribal member refuses to leave the real estate after falling behind on the contract-for-deed payments.

39. Act of May 12, 1983, ch. 108, 1983 Okla. Sess. Laws 331.

40. See *Crowell v. Whitmire*, 548 P.2d 221 (Okla. 1976); *Asher v. Hull*, 207 Okla. 478, 250 P.2d 866 (1952).

Whether the 1983 legislative amendment can constitutionally allow tribal housing authorities to seize a tribal member's land through a forfeiture clause in a contract for deed is subject to grave doubt. Tribal housing authorities exist because of an Oklahoma statute which declares them to be "a public body corporate and politic" and "an agency of the State of Oklahoma."⁴¹ Moreover, these tribal housing authorities are clearly entities of the tribal government.⁴² Hence, tribal housing authorities are governmental agencies.

Governmental agencies are not allowed to deprive a citizen of property without due process of law. Whether a housing authority enforcing a forfeiture clause in a contract for deed deprives a tribal member of property without due process of law is an unresolved question.⁴³ Indeed, any nonjudicial foreclosure, including Oklahoma's Power of Sale Mortgage Foreclosure Act, raises difficult constitutional challenges on due process grounds.⁴⁴

Furthermore, the Oklahoma Supreme Court has twice ruled that Oklahoma state courts have no jurisdiction over forcible entry and detainer actions by tribal housing authorities against tribal members who have fallen behind on payments under mutual help and occupancy agreements.⁴⁵ Hence, tribal housing authorities attempting to enforce a forfeiture clause in a contract for deed against a tribal member must do

41. OKLA. STAT. tit. 63, § 1057 (1981).

42. OKLA. STAT. tit. 63, § 1057 (1981) states in part: "The Chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointing and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority." See also *Ware v. Richardson*, 347 F. Supp. 344 (W.D. Okla. 1972).

43. See *Nelson & Whitman*, *supra* note 6, at 562-65.

44. OKLA. STAT. tit. 46, §§ 40-49 (Supp. 1989). See *Miller & Jeffery, Foreclosure By Power of Sale in Oklahoma*, 57 OKLA. B.J. 2584, 2585-86 (1986); see also *Durbin, Current Litigation Affecting Oklahoma's Power of Sale Mortgage Foreclosure Act* (remarks to the Oklahoma City Title Attorneys Assoc., May 11, 1990).

45. *Housing Auth. v. Harjo*, 790 P.2d 1098 (Okla. 1990); *Ahboah v. Housing Auth.*, 660 P.2d 625 (Okla. 1983). By contrast, the Oklahoma courts have accepted jurisdiction over tribal housing authority litigation in four other cases. *Housing Auth. v. Craytor*, 600 P.2d 314 (Okla. 1979); *Housing Auth. v. Langley*, 555 P.2d 1025 (Okla. 1976); *Eaves v. State*, 795 P.2d 1060 (Okla. Crim. App. 1990); *DeLaune v. State*, 569 P.2d 463 (Okla. Crim. App. 1977).

so in either federal court⁴⁶ or a tribal court that may be more receptive to constitutional attacks on forfeiture clauses under the due process clause.

Finally, even if a court were to rule that due process of law is not violated when a tribal housing authority enforces a forfeiture clause in a contract for deed, the tribal member may well argue that the 1983 amendment to section 11A deprives the tribal member of equal protection of the law. All other citizens covered by the Oklahoma law are protected by section 11A from forfeiture clauses because the contract for deed is deemed to be a mortgage, thereby requiring mortgage foreclosure. The tribal member can claim that constitutionally justifiable reasons do not exist for allowing forfeiture, as opposed to foreclosure, solely for tribal members.⁴⁷

Even though section 11A by its own statutory language does not deem mutual help and occupancy agreements to be mortgages, the unresolved constitutional issues concerning forfeiture clauses in contracts for deed between tribal housing authorities and tribal members mean that contracts for deed are questionable legal devices to use even in the tribal housing authority context.⁴⁸

3. Coverage Conclusion

In light of the discussion about section 11A's coverage, the conclusion follows that the correct interpretation of section 11A is the third alternative interpretation.⁴⁹ Section 11A does not make contracts for deed as unique legal devices totally obsolete. In two limited situations, when the contract for deed expressly reserves the right of possession to the seller

46. *But see* *Ware v. Richardson*, 347 F. Supp. 344 (W.D. Okla. 1972) (denying federal jurisdiction over a dispute involving the Kiowa Housing Authority).

47. This constitutional claim of denial of the equal protection of the laws was apparently raised in *Housing Auth. v. Harjo*, 790 P.2d 1098 (Okla. 1990). The Supreme Court did not resolve the issue because it ruled that the Oklahoma courts did not have jurisdiction over the dispute. *Id.*

48. Although the author has not researched the issue, those litigating mutual help and occupancy agreements should also consider whether any federal statutes or regulations concerning Indian lands or tribal housing authorities pre-empt section 11A. Even when the state has jurisdiction over Indian lands, state law cannot conflict with federal law or federal regulations.

49. *See supra* note 7 and accompanying text.

until all payments are made and when used in conjunction with mutual help and occupancy agreements, contracts for deed retain their legal distinctiveness from mortgages. In all other instances, however, section 11A converts contracts for deed into purchase money mortgages for the seller and evidence of title for the purchaser.

D. Impact of Section 11A on Oklahoma Real Estate Transactions

As previously shown, section 11A changes almost all Oklahoma contracts for deed into purchase money mortgages for sellers and evidence of title for purchasers. However, section 11A does not forbid the use of contracts for deed as the legal means through which sellers transfer real estate to buyers. In fact, contracts for deed continue to be used in Oklahoma.⁵⁰ Consequently, attorneys who practice real estate law must be aware of the legal ramifications of using contracts for deed after 1976. This article discusses nine such legal ramifications in the following paragraphs. Other legal ramifications assuredly exist. Hopefully, this article alerts the reader to be vigilant for such other legal ramifications and provides an adequate conceptual framework for thinking about them.

1. Location of Title

When contracts for deed covered by section 11A are used to transfer real estate, the seller retains nothing more than a bare legal title as security for the purchase money debt. In this respect, section 11A changes contracts for deed into transfer documents equivalent to deeds of trust.⁵¹ Hence, even though the seller remains of record as the legal owner of the

50. See *supra* note 3.

51. OKLA. STAT. tit. 46, § 1.1 (1981) states: "Every deed of trust on real property, intended as security, shall be subject to all statutory provisions and laws relating to mortgages."

Because deeds of trust and contracts for deed are deemed mortgages in Oklahoma, deeds of trust and contracts for deed should also be interpreted in accordance with the lien theory of mortgages. Oklahoma has always followed the lien theory of mortgages in contrast to the title theory of mortgages. *E.g.*, *Hart v. Bingman*, 171 Okla. 429, 43 P.2d 447 (1935); see also OKLA. STAT. tit. 42, § 10 (1981).

property, the seller is best visualized as a trustee who holds the bare legal title of record on behalf of the contract-for-deed purchaser. The contract-for-deed purchaser is equivalent to the grantor of the deed of trust.

Recognizing that section 11A changes contracts for deed into the equivalent of deeds of trust, contract-for-deed purchasers are the owners of the real estate and must be recognized as owners by those who read the land records. When contract-for-deed purchasers have completed the payments, contract-for-deed sellers have the obligation to file a release of the contract for deed so that the land records reflect that the seller's lien no longer exists. Visualizing the contract for deed as a deed of trust means that the contract-for-deed seller should file a release of deed of trust.⁵² If the contract-for-deed seller fails to file the release of deed of trust within fifty days from the final payment and the purchaser then gives the seller a written request to file the release, the contract-for-deed seller can become liable for up to \$100 per day until the release is recorded.⁵³

If a contract for deed is of record, but no release of the contract for deed appears of record, the contract-for-deed purchaser is the full record title holder of the real estate after the passage of ten years from the date of the last maturing obligation secured by such contract for deed.⁵⁴ Once these ten years have passed, the contract-for-deed purchaser has a marketable title even if a release of the contract for deed does not exist or has not been recorded.⁵⁵

In Oklahoma, deeds of trust have not been widely used. Thus, releases of deeds of trust are not familiar documents to Oklahoma attorneys.⁵⁶ Moreover, the textual discussion flows from the fact that the parties to the land transaction choose

52. See 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE Form 3.9.2, at 1111 and Form 3.9.4, at 1114 (1987).

53. OKLA. STAT. tit. 46, § 1.1 (1981); OKLA. STAT. tit. 46, § 15 (Supp. 1989). See also 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE 1107-08 (1987).

54. OKLA. STAT. tit. 46, § 301 (1981).

55. *Id.* at § 301(D). See also OKLAHOMA TITLE EXAMINATION STANDARD 13.8 in OKLA. STAT. tit. 16, app. ch. 1 (Supp. 1989).

56. OKLA. STAT. tit. 46, §§ 31-39 (1971) ("Deeds of Trust"), repealed by 1980 Okla. Sess. Laws ch. 53 (effective Oct. 1, 1980).

to use an instrument labeled a "contract for deed." Consequently, Oklahoma title examiners for subsequent purchasers or subsequent financiers of the contract-for-deed purchaser's title may insist that the land records reflect a warranty deed from the contract-for-deed seller before the examiner will opine that the contract-for-deed purchaser has a clear record title which can be sold or mortgaged free and clear of any claims by the contract-for-deed seller.

While this behavioral response of title examiners is understandable, the author takes the position that section 11A makes a release of the contract for deed just like a mortgage release and is sufficient to show clear record title in the contract-for-deed purchaser. Title examiners who continue to insist that the contract-for-deed seller file a warranty deed have not understood section 11A's substantive impact. Under section 11A, the contract for deed is evidence of title in the contract-for-deed purchaser. The correct question is whether the contract-for-deed purchaser's title is subject to any mortgage or is free and clear of all mortgages.

In summary, after 1976, as to those contracts for deed to which section 11A applies, the contract-for-deed purchaser has all but the bare legal title. For the contract-for-deed purchaser to acquire the bare legal title, the contract-for-deed purchaser needs either a release from the seller or the passage of ten years from the date of the last maturing obligation secured by the contract for deed. For the contract-for-deed purchaser to have full legal title of record, the contract-for-deed purchaser no longer needs a true deed.⁵⁷ Hence, after 1976, there is no special need for contract-for-deed purchasers to insist that a warranty deed be placed in escrow by the seller. Under section 11A, the contract-for-deed purchaser needs the seller's release, not the seller's deed from an escrow. This is in major contrast with contracts for deed prior to 1976.⁵⁸

57. Of course, a quitclaim deed can serve as a release. OKLAHOMA TITLE EXAMINATION STANDARD 13.1 in OKLA. STAT. tit. 16, app. ch. 1 (Supp. 1989).

58. In light of the comments made in the text, the author believes that the practice consideration ¶(4) and its accompanying Form 3.5.3.3 in 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE 1005, 1030 (1987) are ordinarily not needed.

2. Purchaser Rights in the Real Estate

Once section 11A converts a contract for deed into a mortgage, the contract-for-deed purchaser, as mortgagor, is the true owner of the real estate. As the true owner of the property, the contract-for-deed purchaser obviously has sufficient rights in the real estate to encumber the property.⁵⁹ So long as the contract for deed is recorded, any purchaser encumbrance of the real estate should be subordinate to the purchase money mortgage of the contract-for-deed seller. Moreover, the contract-for-deed purchaser has sufficient rights in the real estate that a judgment against the purchaser can attach as a lien on the real estate.⁶⁰

Clauses in a contract for deed which constrain the contract-for-deed purchaser's rights to lease the property, to use the property as collateral for a second mortgage, or to sell or transfer the property (subject to the contract-for-deed seller's purchaser money mortgage) are very possibly invalid as excessive restraints on alienation.⁶¹ After 1976, contract-for-deed purchasers are the true owners of the real estate and as true owners can encumber or alienate the property as the purchaser sees fit so long as the contract-for-deed seller's first mortgage is appropriately respected.

As the true owner of the property, the contract-for-deed purchaser is the person who has insurable rights in the property. The contract-for-deed purchaser's insurable rights, therefore, are not dependent upon a special grant of insurable rights to the purchaser through a clause in the contract for deed itself. Furthermore, the contract-for-deed purchaser's insurable rights are not dependent upon the doctrine of equitable conversion.⁶² The contract-for-deed purchaser has insura-

59. See Comment, *supra* note 9, at 566.

60. Under a contract for deed that has not been converted into a mortgage, the purchaser cannot encumber the property nor can a judgment against the purchaser attach as a lien against the property. See Comment, *supra* note 9, at 560-62, 565-66.

61. *Lohmann v. Adams*, 540 P.2d 552 (Okla. 1975); *Crookum v. Ketchum*, 174 Okla. 468, 50 P.2d 710 (1935); *Stone v. Easter*, 93 Okla. 68, 219 P. 653 (1923).

In light of these authorities, cl. 6.4, 6.8, and 16 of Form 1.5 in 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE 206 (1987) are of doubtful validity as excessive restraints on alienation.

62. In light of the comments in the text, the author disagrees with the commentary set forth in 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE

ble rights in the property because the contract-for-deed purchaser is the true owner of the property. By contrast, the contract-for-deed seller has no independent insurable rights in the property. The seller can protect the seller's mortgage interest, however, through a loss payee clause in the insurance policy.⁶³

3. Acknowledgement and Recordation

Contracts for deed that are within section 11A's coverage are conveyances of the real estate. Contracts for deed are purchase money mortgages for sellers and evidence of title for purchasers. As conveyances, contracts for deed cannot be recorded unless properly acknowledged.⁶⁴

Under the express statutory language of section 11A, a seller cannot foreclose a contract for deed against real estate unless it has been recorded and the mortgage tax paid. Hence, after 1976, if a seller transfers real estate by contract for deed without obtaining an acknowledgment to the contract, the seller will be unable to record and therefore unable to pursue a foreclosure remedy. Moreover, because section 11A only allows the contract-for-deed seller to use foreclosure, and prohibits forfeiture clauses in contracts for deed, sellers who do not record have recourse only by suing for recovery of the debt owed if the contract-for-deed purchaser defaults.

Under section 11A, contract-for-deed sellers only have purchase money mortgages in the real estate sold under the contracts for deed. If sellers do not record their mortgages, they are at risk that a subsequent mortgagee or other lienholder will gain priority over the unrecorded purchase money mortgages.⁶⁵ Due to section 11A, Oklahoma sellers who use contracts for deed, unlike contract-for-deed sellers in other states and sellers in Oklahoma prior to 1976, must have

Form 3.5.3 at 1004.1 (Supp. 1988). Whether the doctrine of equitable conversion applies to contracts for deed is doubtful. See Comment, *supra* note 9, at 561-62. Compare the comments concerning insurable rights and earnest money contracts made in note 34 *supra* where the doctrine of equitable conversion does apply.

63. Conner v. Northwestern Nat'l Casualty Co., 774 P.2d 1055 (Okla. 1989); Puckett v. Southeast Plaza Bank, 620 P.2d 461 (Okla. Ct. App. 1980).

64. OKLA. STAT. tit. 16, §§ 15, 16, 26, 33 (1981).

65. *Id.* at §§ 15, 16, 26.

acknowledgments appended to the contracts and must record the contracts for deed.⁶⁶ Moreover, sellers must record the contracts for deed in the mortgage records. Failure to record in the mortgage records, even if the contract for deed is recorded in the deed records, puts the seller at risk of the lien being unprotected.⁶⁷ Of course, when the seller records the contract for deed as a purchase money mortgage, the seller must pay the mortgage tax.

So long as the contract for deed is recorded, a strong argument exists that no one purchasing or taking the land as security (either through a mortgage or by operation of law through a lien) from the contract-for-deed purchaser could ever qualify as a purchaser in good faith who would have priority over the contract-for-deed seller's mortgage, unless ten years had passed from the date of the last maturing obligation secured by the contract for deed.⁶⁸ The argument is that the contract for deed, once recorded, is both evidence of title for the contract-for-deed purchaser and simultaneously a purchase money mortgage for the seller. Hence, the same document counts both as the deed and the mortgage and, because it has been recorded, the contract-for-deed seller's mortgage is of record to give constructive notice to the world. In Oklahoma, the deed and mortgage records are consolidated into the same books,⁶⁹ and a tract index is mandatory.⁷⁰ Hence, there are no separate deed and mortgage books which would require the same contract-for-deed document to be filed twice.

The counterargument to the argument in the preceding paragraph is that the seller must provide the county clerk sufficient information to allow the clerk to index the document

66. Under contracts for deed that are not converted into mortgages, sellers often omitted the acknowledgment from the contract for deed purposefully to prevent the purchaser from being able to record the contract. Sellers did not want the contract recorded because such recordation placed a cloud on the title which had to be removed when the seller enforced the forfeiture clause of the contract for deed. Nelson & Whitman, *supra* note 6, at 570-72.

67. *Mills v. Reneau*, 411 P.2d 516 (Okla. 1965). See OKLA. STAT. tit. 46, § 8 (1981).

68. OKLA. STAT. tit. 46, § 301 (1981).

69. OKLA. STAT. tit. 19, § 287 (1981).

70. OKLA. STAT. tit. 19, § 291 (Supp. 1989).

correctly.⁷¹ Hence, if the seller does not clearly inform the clerk that the contract for deed is a purchase money mortgage so the tract index can show the instrument as a mortgage, the county clerk has no authority to record the contract for deed as a mortgage. If that occurs, the seller runs the risk that the contract for deed will be an indefinite reference to the seller's mortgage.⁷² Consequently, after the contract for deed has been recorded for one year, the contract for deed would no longer give "notice of any rights of the mortgagee under such mortgage, nor put any person on inquiry with respect thereto"⁷³ If this counterargument is adopted, contract-for-deed sellers are at risk that future purchasers, mortgagees, or lien claimants can qualify as good faith purchasers who gain priority over the contract-for-deed seller's purchase money mortgage.

4. Acceleration Clause

When a real estate seller sues a purchaser for defaulting on a mortgage, the seller is allowed to declare a foreclosure for the total amount due under the mortgage only if the mortgage contains an acceleration clause. If the mortgage does not contain an acceleration clause, the seller is limited to suing the purchaser to collect past due payments.⁷⁴

Contracts for deed have not traditionally contained acceleration clauses because the seller's preferred remedy was the purchaser's forfeiture of the real estate. Under section 11A, however, contracts for deed are deemed mortgages thereby requiring the seller to use the remedy of foreclosure. Hence, after 1976, sellers can declare all payments due and payable only if the contract for deed contains an acceleration clause. If the purchaser is unable to pay the accelerated debt, sellers can immediately seek foreclosure. Without an acceleration clause, however, the seller is forced first to sue for the past due payments. After a judgment is obtained for the past due

71. *Id.* at § 298.

72. OKLA. STAT. tit. 46, §§ 201-04 (1981).

73. *Id.* at § 202 (1981). *But see* OKLAHOMA TITLE EXAMINATION STANDARD 13.7 "Caveat" in OKLA. STAT. tit. 16, app. ch. 1 (Supp. 1989).

74. Comment, *supra* note 9, at 564 n.49.

payments, only then can the seller execute against the real estate to satisfy the judgment.

Correspondingly, without an acceleration clause, the defaulting purchaser only owes the past due payments. If the purchaser can pay the past due amount, the purchaser restores the contract for deed to a nondefault status and thereby retains the right to possession of the real estate. Purchasers can more easily bring the contract for deed into a nondefault status by paying past due amounts than they can make the contract for deed current by paying the accelerated full debt.

5. Contemporaneously Executed Quitclaim Deeds

Prior to 1976, sellers commonly insisted that purchasers also execute a quitclaim deed to the seller at the time the contract for deed was signed. If the purchaser recorded the contract for deed, the seller used the contemporaneously executed quitclaim deed to clear the purchaser's contract-for-deed interest in the real estate from the record if and when the purchaser defaulted on payments under the contract for deed. The simultaneously executed quitclaim deed served as an inexpensive and quick method of quieting title in the seller. Sellers were entitled to use quitclaim deeds in this manner because contract-for-deed purchasers had no right of redemption in the real estate if they defaulted on the contract payments.

Section 11A converts contracts for deed into mortgages and specifically subjects these converted contracts for deed to the same rules of foreclosure as are prescribed for mortgages. Therefore, under section 11A, contract-for-deed purchasers are entitled to the rights of foreclosure. These rights include the right to possession of the real estate until judicially foreclosed, the right to the rents and profits of the real estate until judicially foreclosed, and the right to any surplus money (once the property is sold) above the amount required to pay valid liens against the property. Most importantly, contract-for-deed purchasers are now entitled to rights of redemption.⁷⁵

75. OKLA. STAT. tit. 12, § 686 (1981). See also Comment, *supra* note 9, at 565-68.

Consequently, after 1976, if a contract-for-deed seller attempts to evade the foreclosure rights of contract-for-deed purchasers through the use of a contemporaneously executed quitclaim deed, the courts should rule that the quitclaim deed violates public policy and is void.⁷⁶ After 1976, contract-for-deed purchasers have a substantive property right in the foreclosure remedy that section 11A mandates just as mortgagors had prior to 1976. Through the use of the contemporaneously executed quitclaim deed, the contract-for-deed seller is creating a clog on the contract-for-deed purchaser's right of redemption.⁷⁷ Quitclaim deeds should be viewed differently, however, if the purchaser executes the quitclaim deed after default on the contract for deed and with knowledge and understanding of the purchaser's foreclosure rights. Depending upon the circumstances, the quitclaim deed executed after default can be a deed in lieu of foreclosure that validly waives the purchaser's foreclosure rights.⁷⁸

If the quitclaim deed is void as a clog on the right of redemption, the contract-for-deed purchaser remains the true owner of the property despite the quitclaim deed being recorded. Hence, when an attorney examining title sees in the chain of title a post-1976 quitclaim deed, executed contemporaneously with the contract for deed, which attempts to terminate the rights of a contract-for-deed purchaser, the attorney should refuse to give legal recognition to this quitclaim deed. Until the seller has properly foreclosed, the contract-for-deed purchaser remains the owner of the real estate.⁷⁹ Under these circumstances, the examining attorney should declare title to reside in the purchaser under the contract for deed, not in the

76. *Coursey v. Fairchild*, 436 P.2d 35 (Okla. 1967); *Hart v. Bingman*, 171 Okla. 429, 43 P.2d 447 (1935). See also OKLA. STAT. tit. 42, §§ 11, 18, 20 (1981).

77. See *Lincoln Mortgage Investors v. Cook*, 659 P.2d 925, 927-28 (Okla. 1982); cf. *Republic Fin. Corp. v. Mize*, 682 P.2d 207 (Okla. 1983); *Mills v. Reneau*, 411 P.2d 516 (Okla. 1965).

78. Compare *Moore v. Beverlin*, 186 Okla. 620, 99 P.2d 886 (1939) (warranty deed determined to be a deed in lieu of foreclosure rather than a mortgage) with *Republic Fin. Corp. v. Mize*, 682 P.2d 207 (Okla. 1983) (quitclaim deed determined to be a mortgage rather than a deed in lieu of foreclosure). See also OKLAHOMA TITLE EXAMINATION STANDARD 13.6 in OKLA. STAT. tit. 16, app. ch. 1 (Supp. 1989).

79. Cf. OKLA. STAT. tit. 46, § 301 (1981) (limitations period for bringing a foreclosure action).

seller under the quitclaim deed.⁸⁰ Of course, so long as the contract-for-deed seller has not been fully paid for the real estate, the purchaser's title to the real estate remains subject to the seller's lien against it.

Sellers who record quitclaim deeds contemporaneously executed with the contract for deed may also be liable to the contract-for-deed purchaser in a slander of title action. If the quitclaim deed is void, a seller's act of recording the void deed may be a malicious action that slanders the purchaser's title under the contract for deed.⁸¹

6. Power of Sale Foreclosure

From the seller's perspective, the major incentive for using a contract for deed was the forfeiture remedy. Forfeiture gave the seller a quick, effective, nonjudicial remedy.

Section 11A deems contracts for deed to be mortgages and states that contracts for deed "shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages." Hence, even though section 11A was passed in 1976, contracts for deed as mortgages can now be foreclosed, if the requirements are met, through the Power of Sale Mortgage Foreclosure Act.⁸²

Under this act, however, a mortgagee can use power of sale foreclosure only if the power is specifically included in the mortgage and set forth in bold and underlined language.⁸³ In light of this act, if a seller using a contract for deed fails to include the mandatory power of sale language in the docu-

80. See also Ming, *Contract for Deed—A Practical Prohibition*, 54 OKLA. B.J. 3001, 3004 (1983).

81. See *Misco Leasing, Inc. v. Keller*, 490 F.2d 545 (10th Cir. 1974); *Cronkhite v. Chaplin*, 282 F. 579 (8th Cir. 1922); *Kingkade v. Plummer*, 111 Okla. 197, 239 P. 628 (1925); *Zehner v. Post Oak Oil Co.*, 640 P.2d 991 (Okla. Ct. App. 1981).

82. Oklahoma Power of Sale Mortgage Foreclosure Act, ch. 319, 1986 Okla. Sess. Laws 1557 (1986) (codified at OKLA. STAT. tit. 46, §§ 40-49 (Supp. 1989)).

83. OKLA. STAT. tit. 46, § 43(A)(2) (1981). Mortgagees desiring to use a power of sale foreclosure must include the following (or substantially similar) language in the mortgage: "A power of sale has been granted in this mortgage. A power of sale may allow the mortgagee to take the mortgaged property and sell it without going to court in a foreclosure action upon default by the mortgagor under this mortgage." OKLA. STAT. tit. 46, § 43(A)(2)(a) (Supp. 1989).

ment, the seller cannot use the power of sale foreclosure technique. Sellers foreclosing contracts for deed without a power of sale clause automatically restrict themselves to the remedy of judicial foreclosure.

Even with a power of sale clause in contracts for deed, sellers must realize that they often will not be able to use the power of sale foreclosure technique. The scope of the Power of Sale Mortgage Foreclosure Act excludes mortgages securing extensions of credit made primarily for an agricultural purpose.⁸⁴ In addition, for mortgages on homesteads, the mortgagee can invoke the power of sale clause but the mortgagor can then elect judicial foreclosure.⁸⁵ Traditionally, contracts for deed have been heavily used in agricultural and homestead real estate transactions. Thus, under section 11A, sellers using contracts for deed in Oklahoma very often will not have available a quick, effective, nonjudicial remedy. Instead, in Oklahoma, most contracts for deed will require judicial foreclosure.⁸⁶

7. Good Title, Marketable Title, and Covenants of Title

Prior to 1976, sellers transferring real estate by contracts for deed had to provide good title only when the purchaser made the final payment. Prior to the final payment, sellers had not transferred title and therefore could not breach the good title obligation.⁸⁷ With contracts for deed deemed mortgages after 1976, sellers must provide good title at the time the contract is signed. It is at the time of the signing of the contract for deed that section 11A makes the contract for deed evidence of title for the purchaser and a purchase money mortgage for the seller. If the seller does not have good title when the contract is signed, the purchaser likely can sue for breach of deed covenants.⁸⁸

84. *Id.* at § 41(6).

85. *Id.* at §§ 41(7), 43(A)(2)(b).

86. For a commercial real estate contract for deed with power of sale foreclosure warning and clauses, see 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE FORM 3.5.3.1 at 1006 (1987).

87. Comment, *supra* note 9, at 570-71.

88. OKLA. STAT. tit. 16, § 19 (1981).

Because section 11A makes the contract for deed evidence of title for the purchaser and a purchase money mortgage for the seller, the contract for deed is a conveyance document. Hence, if the contract for deed calls for a warranty deed or is silent about the type of deed to be provided, the contract for deed as a conveyance document should be interpreted as giving the purchaser warranty deed covenants of title.⁸⁹ Moreover, if the contract for deed gives the purchaser covenants of title at the time of the execution of the contract for deed, then the normal common law rules about covenants of title also apply. For example, if the seller has not specifically exempted an easement in the contract for deed, the purchaser would have a cause of action for the breach of the present covenant against encumbrances immediately following the signing of the contract. Thus, the often used clause in contracts for deed which allowed the contract-for-deed seller to provide a warranty deed only after all contract payments were completed no longer correctly states the law as given by section 11A.⁹⁰

Contract-for-deed purchasers must clearly understand the consequences of what has been said in the preceding two paragraphs. Because section 11A makes the contract for deed a conveyance document, the contract-for-deed purchaser is bound by limitation periods relating to suits on covenants of title. Ordinarily, present covenants of title are breached when the title passes under the conveyance, and the statute of limitations on the present covenants begins to run immediately from the passage of title. Limitation periods for future covenants of title run from the date of breach in the future, but the breach may occur long before the contract-for-deed term expires.⁹¹ Hence, after section 11A, contract-for-deed purchasers are required to take action under covenants of title much earlier than was true under the pre-1976 Oklahoma law. After 1976, covenants of title arise at the beginning of the contract-

89. *Id.*

90. For such a clause which section 11A makes questionable, see 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE FORM 1.5, cl. 8 at 212 (Supp. 1990).

91. See generally R. CUNNINGHAM, W. STOEBCUK, D. WHITMAN, THE LAW OF PROPERTY § 11.13 "Covenants of Title in Deeds" (1984).

for-deed term rather than at the end of the contract-for-deed term.

In addition, once section 11A converts contracts for deed into conveyance documents, purchasers have likely lost the option to rescind⁹² the contract for deed if the title received from the seller is not a marketable title. Under the doctrine of merger, deed covenants replace any rescission remedies based on unmarketable title that the land purchaser may have had.⁹³ Hence, since section 11A changed contracts for deed into conveyance documents, contract-for-deed purchasers need to have a period of time prior to signing the contract for deed during which the seller's title can be examined to determine its marketability. Normally, the potential purchaser acquires this time to check title by entering into an earnest money contract with the prospective seller.⁹⁴ If the seller's title is not marketable, the prospective purchaser can rescind the land transaction.

8. Third Parties

After 1976, contract-for-deed purchasers are the owners of the real estate. Unless the contract-for-deed seller has expressly reserved real property interests (such as mineral rights) in the real estate, the contract-for-deed purchaser receives a fee simple in the transferred property.⁹⁵ Hence, third parties (such as petroleum landmen or banks) who desire to purchase or lease an interest in the real estate or to take the real estate covered by a contract for deed as collateral for a loan must do so from the contract-for-deed purchaser.

Contract-for-deed purchasers are foolish if they do not record the contract for deed in the land records of the county clerk.⁹⁶ Moreover, for the contract-for-deed purchaser to be protected, the contract for deed must be recorded in the deed records, even if it has already also been recorded in the mort-

92. Cf. OKLA. STAT. tit. 15, § 233 (1981).

93. See R. CUNNINGHAM, W. STOECK, D. WHITMAN, *THE LAW OF PROPERTY* § 11.13 at 810 (1984).

94. For the distinction between an earnest money contract and a contract for deed, see *supra* text accompanying notes 34-36.

95. OKLA. STAT. tit. 16, § 29 (1981).

96. *Id.* at §§ 15, 16 (1981).

gage records.⁹⁷ By recording the contract for deed, the world is put on constructive notice of the purchaser's title to the real estate. If the contract-for-deed purchaser fails to record the contract for deed in the deed records, the purchaser is at risk that the contract-for-deed seller may double-deal to third party innocent purchasers.⁹⁸

The purchaser under a contract for deed converted into a mortgage by section 11A is usually in actual possession of the real estate. Hence, even if the contract-for-deed purchaser has not recorded the contract, the purchaser by possession gives inquiry constructive notice to the world of his ownership claim to the real estate.⁹⁹ Thus, those who purchase or lease real property interests have an obligation to inquire of the possessor as to what interest in the real estate the possessor has. If the possessor is a contract-for-deed purchaser, the inquiring third party must understand that the purchaser has the complete ownership interest granted by the contract for deed except the bare legal title outstanding as a purchase money mortgage in the contract-for-deed seller.

In light of the fact that the contract-for-deed purchaser is the owner of the real estate under section 11A, contract-for-deed sellers have no further interest in the real estate aside from the purchase money mortgage. Hence, once the contract-for-deed relationship exists, the contract-for-deed seller cannot sell the real estate sold under the contract for deed or use it as collateral for a loan.¹⁰⁰ A person cannot sell or encumber another's property; the seller cannot sell or encumber the purchaser's real estate. Any attempt by the seller to sell or en-

97. See *Mills v. Reneau*, 411 P.2d 516 (Okla. 1965).

98. Purchasers should ordinarily record the entire contract for deed. However, recording a memorandum of contract for deed may also be sufficient. 3 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORM—PRACTICE 1005 and Form 3.5.3.2 at 1029 (1987).

99. *E.g.*, *Bell v. Protheroe*, 199 Okla. 562, 188 P.2d 868 (1948); *Wilkinson v. Stone*, 82 Okla. 296, 200 P. 196 (1921).

100. In light of the textual comments, the author takes the position that any clause in the contract for deed which allows the seller to mortgage the property is an invalid clause. For such a clause, see 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE Form 1.5, cl. 7 at 212 (Supp. 1990).

cumber the contract-for-deed purchaser's real estate is at best an assignment of the seller's mortgage.¹⁰¹

For lending institutions, it is crucial that they understand that contract-for-deed sellers have no interest against the real estate aside from a purchase money mortgage. If a person has an interest in real estate, the bank takes the real estate as collateral through a mortgage which is filed in the mortgage records of the county clerk. If a person only has a purchase money mortgage in the real estate, the bank can take an assignment of the purchase money mortgage as collateral for a loan. The bank must then file the assignment in the appropriate land records.¹⁰² Contract-for-deed sellers can, therefore, assign their purchase money mortgages to banks as collateral for a loan. However, if the bank does not take an assignment of the mortgage, the contract-for-deed seller only has either the stream of payments or the promissory note to use as collateral. Stream of payments or promissory note collateral are personal property governed by Article 9 of the Uniform Commercial Code. Hence, banks lending money to contract-for-deed sellers and taking the stream of payments or the promissory note as collateral must perfect in accordance with Article 9 requirements.¹⁰³

Third parties who deal with a contract-for-deed seller have dealt with the wrong party when the purchaser has recorded the contract for deed or when the purchaser's possession of the real estate gives inquiry constructive notice. Contract-for-deed sellers have no power to sell or encumber real estate interests they do not own.

101. *Gooch v. Phillips*, 46 Okla. 145, 148 P. 135 (1915); *Williams v. Purcell*, 45 Okla. 489, 145 P. 1151 (1915).

102. OKLA. STAT. tit. 46, §§ 12, 13 (1981).

103. *In re Maryville Sav. & Loan Corp.*, 760 F.2d 119 (6th Cir. 1985); *In re Maryville Sav. & Loan Corp.*, 743 F.2d 413 (6th Cir. 1984); *In re Northern Acres, Inc.*, 52 Bankr. 641 (Bankr. E.D. Mich. 1985); *In re Anselmi*, 52 Bankr. 479 (Bankr. D. Wyo. 1985); *In re Himlie Properties, Inc.*, 36 Bankr. 32 (Bankr. W.D. Wash. 1983); *In re Southworth*, 22 Bankr. 376 (Bankr. D. Kan. 1982). See also *In re Freeborn*, 94 Wash. 2d 336, 617 P.2d 424 (1980). But see *In re Shuster*, 784 F.2d 883 (8th Cir. 1986); *In re Hoepfner*, 49 Bankr. 124 (Bankr. E.D. Wisc. 1985). See generally G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 3.37 (2d ed. 1985).

9. Bankruptcy

Prior to 1976, Oklahoma law treated contracts for deed substantively different from mortgages. As a consequence of this substantive difference, prior to 1976 Oklahoma contracts for deed were executory contracts in bankruptcy.¹⁰⁴ Hence, prior to 1976, if a contract-for-deed purchaser filed bankruptcy, the bankruptcy trustee was required to assume or reject the contract for deed. If the trustee assumed the contract for deed, the trustee was obligated to cure previous defaults, compensate the seller for actual pecuniary loss resulting from such default, and provide adequate assurance of future performance. The trustee could not, however, modify the assumed contract for deed. If the trustee rejected the contract for deed, the contract-for-deed seller could proceed to enforce the forfeiture clause of the contract for deed and regain possession of the real estate.¹⁰⁵ Categorizing contracts for deed as executory contracts favored contract-for-deed sellers.

With the passage of section 11A, contracts for deed are deemed mortgages. Hence, after 1976, Oklahoma contracts for deed are mortgages in bankruptcy court.¹⁰⁶ As mortgages, Oklahoma contracts for deed are subject to modification by the contract-for-deed purchaser who has filed for bankruptcy. The contract-for-deed purchaser can divide the contract-for-deed debt into secured and unsecured debt. The contract-for-deed purchaser can cramdown a plan of confirmation upon a contract-for-deed seller.¹⁰⁷ Categorizing contracts for deed as mortgages favors the contract-for-deed purchasers.

In addition, since the passage of section 11A, if sellers fail to record the contract for deed in the mortgage records of the appropriate county clerk, the contract-for-deed sellers have not properly protected the mortgage against bona fide purchasers from the contract-for-deed purchaser. Consequently,

104. 11 U.S.C. § 365 (1986).

105. *E.g.*, *In re Terrell*, 892 F.2d 469 (6th Cir. 1989); *In re Rancho Chamberino*, 77 Bankr. 555 (Bankr. W.D. Tex. 1987); *In re Buchert*, 69 Bankr. 816 (Bankr. N.D. Ill. 1987).

106. *In re Kampman Farms, Inc.*, 6 Bankr. 653 (W.D. Okla. 1980).

107. *In re Streets & Beard Farm Partnership*, 882 F.2d 233 (7th Cir. 1989); *In re Bertelsen*, 65 Bankr. 654 (Bankr. C.D. Ill. 1986); *In re Booth*, 19 Bankr. 53 (Bankr. D. Utah 1982).

the bankruptcy trustee can avoid the contract-for-deed obligation.¹⁰⁸ By failing to record the contract for deed in the mortgage records, the bankruptcy trustee reduces sellers to the bankruptcy status of unsecured creditors. If contract-for-deed sellers properly record, they gain the bankruptcy status of secured creditors.¹⁰⁹ After 1976, the status of secured creditor is the best status in bankruptcy for which Oklahoma contract-for-deed sellers can aspire.

III. REASONS FOR CONTINUED USE OF CONTRACTS FOR DEED

A. *Ignorance of Section 11A*

Contracts for deed have been a popular way to transfer real estate from sellers to buyers since the middle 1800s. Thus, many Oklahomans (real estate brokers, individual landowners, and attorneys) have continued to use contracts for deed out of habit without realizing that section 11A rendered contracts for deed obsolete, except in a very few situations, as a distinctive and unique legal device. For many Oklahomans, failure to stay abreast of the current legal status of contracts for deed carries no particular legal liability. For attorneys, however, failure to know and understand section 11A subjects the attorney to potential liability claims based on incompetence.¹¹⁰

If an attorney advises a seller in Oklahoma to use or assists a seller to use a contract for deed without advising the seller that a contract for deed is deemed a purchase money mortgage, the seller very likely has a malpractice claim against the attorney if the seller suffers unexpected losses or expenses with respect to the transferred real estate.¹¹¹ Moreover, whether or not the seller suffers a harm cognizable in malpractice, the seller surprised to learn the correct legal sta-

108. 11 U.S.C. §§ 544(a)(3), 545 (1986).

109. *Id.* at § 546.

110. Rule 1.1, RULES OF PROFESSIONAL CONDUCT in OKLA. STAT. tit. 5, app. 3 ch. 1 (Supp. 1989).

111. *Cf. Olfe v. Gordon*, 93 Wis. 2d 173, 286 N.W.2d 573 (1980).

tus of contracts for deed also has a legitimate complaint that could result in professional discipline.¹¹²

B. *Effective and Expeditious Nonjudicial Remedy*

Some sellers may continue to use contracts for deed, however, with full knowledge and understanding that section 11A deems contracts for deed to be mortgages. Despite this fact, sellers may use a contract for deed containing a forfeiture clause in the hope that their purchasers are ignorant of section 11A. If the purchasers are ignorant, the purchasers will be unaware that section 11A makes the forfeiture clause unenforceable. Acting in ignorance of section 11A, purchasers thus may allow sellers to regain the real estate quickly and cheaply without complying with section 11A's foreclosure requirement. For example, upon being told to leave the real estate by a seller who points to the forfeiture clause in the contract for deed, the purchaser may simply comply while totally unaware that the forfeiture clause is unenforceable.¹¹³

If sellers have regained real estate through unenforceable contract-for-deed forfeiture clauses, sellers are at substantial risk. First, if and when a purchaser learns of section 11A, a purchaser in many instances can reclaim the real estate because the right to redeem does not end until foreclosure occurs.¹¹⁴ Second, even if a purchaser cannot reclaim the real estate (e.g., third party innocent purchasers have claims), a newly knowledgeable purchaser probably has a claim in tort against the seller for fraudulently depriving the purchaser of the right to redeem. The Oklahoma Supreme Court has held

112. *E.g.*, *Oklahoma ex rel. Oklahoma Bar Ass'n v. Whiteley*, 61 OKLA. B.J. 1274 (May 8, 1990) (attorney publicly censured for conduct including failure to provide competent representation).

113. For another example of a void method through which the seller may attempt to regain the real estate, see Part II(D)(5) of this paper, "Contemporaneously executed quitclaim deeds," *supra*.

Twenty-eight years ago, another commentator explained the continued use of contracts for deed as follows: "[T]he vendor continues to use the instalment sale contract despite its deficiencies with regard to remedies because he is willing to gamble that the vendee's rights under this device will never be asserted and his own contractual advantages will not be challenged." Warren, *California Instalment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608, 633 (1962).

114. OKLA. STAT. tit. 42, § 18 (1981).

that the right to redeem is a substantive property right.¹¹⁵ Depriving the purchaser of this substantive property right is fraud because the seller specifically included an unenforceable forfeiture clause in the contract for deed with the purpose of deceiving the purchaser about the rights of redemption. A purchaser suing a seller in tort for fraud can probably claim both compensatory damages for the value of the lost real estate and punitive damages from the seller for intentionally causing the loss. Third, a seller who reclaims the property by filing an unenforceable quitclaim deed in the deed records may have committed slander of title.¹¹⁶

Attorneys who counsel or assist sellers to use contracts for deed with the hope that the purchaser will be ignorant of section 11A are also at risk. First, if the seller can be sued in tort for such conduct, the attorney has aided and abetted the tort. As an aider and abetter of the tort, the attorney may be liable for compensatory and punitive damages along with the seller.¹¹⁷ Second, a lawyer who counsels or assists a client in fraudulent conduct is subject to professional discipline.¹¹⁸ Thus, if the use of forfeiture clauses is fraudulent conduct, attorneys cannot counsel or assist sellers to use contracts for deed containing forfeiture clauses.

While sellers' desire for an effective and expeditious non-judicial remedy is understandable, sellers are entitled to such a remedy only in compliance with the statutory law of Oklahoma. Thus, as explained earlier,¹¹⁹ sellers cannot use a

115. *Coursey v. Fairchild*, 436 P.2d 35 (Okla. 1967).

116. See *Misco Leasing, Inc. v. Keller*, 490 F.2d 545 (10th Cir. 1974); *Cronkhite v. Chaplin*, 282 F. 579 (8th Cir. 1922); *Kingkade v. Plummer*, 111 Okla. 197, 239 P. 628 (1925); *Zehner v. Post Oak Oil Co.*, 640 P.2d 991 (Okla. Ct. App. 1981).

117. Cf. *Thomas Fruit Co. v. Levergood*, 135 Okla. 105, 274 P. 471 (1929); *Anderson v. Canaday*, 37 Okla. 171, 131 P. 697 (1913); 1 R. MALLEN & J. SMITH, *LEGAL MALPRACTICE* §§ 6.1, 10.21 (3d ed. 1989); D. MEISELMAN, *ATTORNEY MALPRACTICE: LAW AND PROCEDURE* § 6:4 (Cum. Supp. 1989).

118. Rule 1.2(c), *RULES OF PROFESSIONAL CONDUCT* in OKLA. STAT. tit. 5, app. 3 ch. 1 (Supp. 1989). Fraud is defined in the Terminology Section of the Rules of Professional Conduct as follows: "'Fraud' or 'Fraudulent' denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." J. MAUTE, *A PRACTITIONER'S GUIDE TO THE RULES OF PROFESSIONAL CONDUCT* 177 (1989).

119. See Parts II(D)(5), "Contemporaneously Executed Quitclaim Deed," and II(D)(6), "Power of Sale Foreclosure," of this article, *supra*.

presigned and escrowed quitclaim deed nor, in most instances, a power of sale mortgage foreclosure clause to obtain an effective and expeditious nonjudicial remedy in contract-for-deed real estate transactions. Therefore, attorneys must honestly advise real estate sellers that in most instances section 11A mandates that they must use the mortgage remedy of foreclosure against defaulting contract-for-deed purchasers. Moreover, attorneys who are tempted to advise clients to sidestep section 11A by using a long-term lease containing an option to purchase must be aware that this stratagem also is likely to fail.¹²⁰ In *Oklahoma ex rel. Cartwright v. Dunbar*,¹²¹ the Supreme Court held that lease/purchase agreements between the Garfield County Industrial Authority and Dunbar were equivalent to contracts for deed. Consequently, section 11A converted the lease/purchase agreements into mortgages.¹²² Once converted into mortgages, Dunbar was the record owner of the real estate and liable for real estate property taxes.¹²³

C. *Contracts for Deed and Federal Law*

As explained in this article, section 11A makes contracts for deed obsolete legal devices in the great majority of Oklahoma real estate transactions. As a practical matter, section 11A makes contracts for deed as extinct in Oklahoma as is the transfer of land through livery of seisin.

Contracts for deed, however, can still be used in Oklahoma. If used, the bare legal title remains in the seller as

120. Compare Part II(C)(2), "Indian Housing Authority Mutual Help and Occupancy Agreements," *supra*.

121. 618 P.2d 900 (Okla. 1980).

122. *Id.* at 907.

123. The *Dunbar* case should not be read to say that all lease/purchase agreements are equivalent to contracts for deed and therefore governed by section 11A. While the Oklahoma Supreme Court has not specifically addressed when a real estate lease/purchase is a true lease as opposed to a contract for deed, the Supreme Court is likely to distinguish between a true lease and a sale in real estate situations. This distinction is likely to be similar to the one between a true lease and a sale under the Uniform Commercial Code. *E.g.*, *Percival Constr. Co. v. Miller & Miller Auctioneers, Inc.*, 532 F.2d 166 (10th Cir. 1976); *Consolidated Equip. Sales, Inc. v. First State Bank & Trust Co.*, 627 P.2d 432 (Okla. 1981); see OKLA. STAT. tit. 12A, § 1-201(37) (Supp. 1989).

For a lease with an option to purchase, see 1 A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS—PRACTICE Form 1.2.9 at 92 (1987).

security for the purchase money owed and the purchaser is the owner of the property. Due to section 11A, except for a very few situations, using a contract for deed has no unique legal consequences different from Oklahoma's deed and mortgage law.

If we step outside Oklahoma law, however, into federal law, there might be instances where using a contract for deed has distinctive consequences. For example, prior to 1981, under federal tax laws relating to wrap-around real estate financing, the fact that the legal title resided in the seller arguably meant different tax consequences for the parties than was true if they used a deed and mortgage.¹²⁴ In recent years, however, federal tax cases¹²⁵ and federal statutory tax changes¹²⁶ have given the same tax consequences to wrap-around real estate financing regardless of whether the real estate was sold through a mortgage and deed or through a contract for deed.¹²⁷

Other examples may exist where federal law, as opposed to Oklahoma law, draws a distinction between contracts for deed and mortgages. If contracts for deed have distinctive legal consequences from mortgages under federal law, this is true only when federal law itself creates the distinction. If the federal law defers to Oklahoma property law or adopts Oklahoma property law as the content of federal law, then Oklahoma contracts for deed should not be legally distinct. Section 11A converts contracts for deed into purchase money mortgages for sellers and evidence of title for purchasers.

124. Durbin, *The Contract for Deed in Oklahoma: A Continued Application* (remarks to the Oklahoma City Title Attorneys Assoc., May 8, 1980) (argued that using a contract for deed, rather than a mortgage, could have different tax consequences under I.R.C. § 453 as worded in 1980).

125. *Professional Equities, Inc. v. Commissioner*, 89 T.C. 165 (1987); *Webb v. Commissioner*, 54 T.C.M. (CCH) 443 (1987).

126. I.R.C. § 453 as amended by Installment Sales Revision Act of 1980, P.L. 96-471, 96th Cong., 2nd Sess. (1980) (removed the 30% limitation on proceeds received in the year of sale).

127. 3 A. DURBIN & C. BIXLER, *OKLAHOMA REAL ESTATE FORMS—PRACTICE* 1003-05 (1987).

IV. CONCLUSION

In light of the broad meaning and significant impact of section 11A, wise attorneys consider contracts for deed obsolete in Oklahoma. In transferring Oklahoma real estate from a seller to a buyer, wise attorneys use a deed and mortgage. If attorneys use contracts for deed to transfer Oklahoma real estate, they have not accomplished legally anything different, under Oklahoma law, than if they had used a deed and mortgage. By using a contract for deed, however, attorneys have likely created confusion in the land records, misunderstanding for the parties to the contract for deed, and misunderstanding for those who deal with the contract-for-deed parties thereafter.

Except when section 11A does not apply or when federal law distinguishes contracts for deed from mortgages, Oklahomans need to learn that contracts for deed are obsolete. Attorneys, especially, must know and understand that contracts for deed are obsolete. Attorneys who do not know and understand section 11A are at significant risk for malpractice, tort, and disciplinary liability. Facing these significant risks, sensible attorneys, not just wise attorneys, use a deed and mortgage in Oklahoma land transactions.