PREDATION, EXPLOITATION, AND HISTORY REPEATING: REFORMING THE MODERN CONTRACT FOR DEED OF SALE[*]

I. INTRODUCTION

Consider, in the wake of calamitous economic collapse, a family in need of a home. In this family, there might be an adult enduring chronic health issues or young children requiring care and supervision, at the tail end of a decade in which median out-of-pocket health care and childcare costs increased—at three and two times, respectively—faster than the rate of inflation.[1] The wage earners may have credit scores vexed by bankruptcy, so the family faces the specter of homelessness, job loss, and children growing up unmoored from a home. Unable to purchase one, the family lives with perpetual housing insecurity.

And then—a representative of a legitimate company offers the family an opportunity to purchase a home at what seems to be a fair price with a reasonable down payment that is unaffected by a low credit score. The house is nearby, in the neighborhood, and perhaps even on the same block as the current rental. A signature on the contract's dotted line, an obligation to send monthly payments for a fixed period, and then one balloon payment several decades down the line allows a renter to become a homeowner—but not until those decades pass.

The family has no ownership—no equity—until it has paid off the entire price of the home.[2] This contract is not a mortgage: one missed payment could result in the purchaser being evicted without a foreclosure process.[3] In some cases, the family may suffer this dire consequence as a result of an oversight that was not its own. For example, if the company to which the family sends its payments fails to separate out and pay property taxes, the resident family remains liable to the government.[4] Not to mention that

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1. David A. Super, *Acute Poverty: The Fatal Flaw in U.S. Anti-Poverty Law,* 10 U.C. IRVINE L. REV. 1273, 1277–78 (2020). This decade refers to the ten years preceding the 2008 financial crisis known as the Great Recession.

2. JEREMIAH BATTLE, JR., SARAH MANCINI, MARGOT SAUNDERS & ODETTE WILLIAMSON, NAT'L CONSUMER LAW CTR., TOXIC TRANSACTIONS: HOW LAND INSTALLMENT CONTRACTS ONCE AGAIN THREATEN COMMUNITIES OF COLOR 1 (2016).

3. *See* Alexandra Stevenson & Matthew Goldstein, *Wall Street Veterans Bet on Low-Income Homebuyers*, N.Y. TIMES (Apr. 17, 2016), http://www.nytimes.com/2016/04/18/business/dealbook/wall-street-veterans-bet-on-low-income-homebuyers.html [https://perma.cc/F3KF-VXRY] [hereinafter Stevenson & Goldstein, *Wall Street Veterans*].

4. *See* James Leggate, *'Predatory' Property Investors Agree To Pay Cincinnati, Change Practices to Settle Lawsuit*, WCPO CINCINNATI (Mar. 28, 2018, 6:00 AM), http://www.wcpo.com/longform/predatory-property-investors-agree-to-pay-cincinnati-change-practices-to-settle-lawsuit [https://perma.cc/CPW3-9QXJ] [hereinafter Leggate, *'Predatory' Property Investors*].

the family is often contractually responsible for adherence to municipal codes and, in the event of noncompliance, is liable for failing to invest—perhaps "sink" is a better word—thousands of dollars into necessary repairs.[5]

As such, the cycle of housing insecurity has not ended. The seller has simply reached into the past and retrieved a predatory lending practice so blatantly racist and discriminatory that it helped expose redlining and hasten its demise.[6] The contract for deed of sale "is a contract for the purchase and sale of real estate under which the purchaser acquires the immediate right to possession . . . and the vendor defers delivery of a deed until a later time to secure all or part of the purchase price."[7] The vendee makes monthly payments to the vendor, and the vendor retains title until the vendee has paid the purchase price in its entirety, with interest.[8] Once the purchase price is paid in full, the vendor transfers the deed.[9] The opportunity for predation stems from the fact that these are contractual agreements that do not involve the extension of credit.[10] Therefore, absent legislative or judicial intervention, a contract for deed of sale does not extend to the vendee any of the legal protections of an equitable mortgage.[11]

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5. *See* Matthew Goldstein & Alexandra Stevenson, *How a Home Bargain Became a 'Pain in the Butt,' and Worse*, N.Y. TIMES (July 7, 2017), http://www.nytimes.com/2017/07/07/business/dealbook/how-a-home-bargain-became-a-pain-in-the-butt-and-worse.html [https://perma.cc/R4DZ-CTHC] [hereinafter Goldstein & Stevenson, '*A Pain in the Butt*'].

6. *See* Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 97, 106–07 (2016); *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 96 (2017). See *infra* notes 24–30 for a discussion of redlining.

7. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 3.4 (AM. LAW INST. 1997).

8. Joel Rebecca Donelson, Comment, *The Bond for Title: A Modern Look at Alabama's Land Installment Contract*, 46 ALA. L. REV. 137, 138 (1994).

9. *Id.*

10. *See infra* note 11.

11. Absent such intervention, contracts for deed of sale are just that: contracts, entered into freely by private parties, without the protections of land conveyance instruments such as mortgages. *See, e.g.*, Bell v. Coots, 451 So. 2d 268, 269–70 (Ala. 1984) (explaining that unless the vendor has waived her rights under the contract for deed of sale, "she was entitled to the strict enforcement of the terms of the agreement . . . without giving prior notice to the [vendee]"); Sitek v. Striker, 764 N.W.2d 585, 594–95 (Minn. Ct. App. 2009) (holding that where the language of and circumstances surrounding the signing of a contract for deed of sale did not demonstrate that all parties intended it to be an equitable mortgage at the time of conveyance, it was not a mortgage and was therefore rightly cancelled by the vendor upon vendee default); Bryant v. Cady, 445 S.W.3d 815, 819, 823 (Tex. Ct. App. 2014) ("A contract for deed differs from a mortgage in that it allows the seller to retain title to the property until the purchaser has made all the purchase payments. . . . Under [a contract for deed of sale], the buyer has the right, but no obligation, to complete the purchase. But, in a typical real estate contract, the buyer must complete the purchase." (citations omitted)). In states where courts have intervened, such as Alaska and Arkansas, they have carved out exceptions to the vendor's ability to dispossess the vendee of the property for reason of nonpayment where the vendee is able to pay in full within a reasonable amount of time. *See, e.g.*, Cozzetti v. Madrid, No. S-15117, 2017 WL 6395736, at *6 (Alaska Dec. 13, 2017); Humke v. Taylor, 666 S.W.2d 394, 395–96 (Ark. 1984). The Nebraska Supreme Court has even held that "it is generally accepted that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name," such as a land installment contract, "it is in equity a mortgage." Wintroub v. Nationstar Mrtg. LLC, 927 N.W.2d 19, 24 (Neb. 2019). Other states, like Arizona, have passed statutes mandating certain eviction procedures and granting vendees additional rights. ARIZ. REV. STAT. §§ 33-741 to 33-750 (2020). See *infra* Part II.B for a discussion of the legal landscape of enforcement of contracts for deed of sale.

This Comment proceeds with an overview of the contracts themselves: the bargaining process, including the parties (who tend to have remarkably consistent profiles);[12] the terms and consequences the contracts present for purchasers;[13] and the limited circumstances under which contracts for deed of sale are arguably beneficial.[14] This Comment then provides an overview of common stances state legislatures and courts have taken with regard to the enforcement of contracts for deed of sale.[15] Next, it describes the ways in which municipalities, states, and the federal government are attempting to or could potentially challenge them.[16]

This Comment concludes by arguing that in order to extend adequate protections to potential homeowners with limited access to credit—but not dismiss creative forms of investment or stifle the individual right to freely enter into contracts—courts must recognize the inherent unconscionability of most contracts for deed of sale. Further, state legislatures should treat these contracts as mortgages with the requisite foreclosure protections.[17] At the very least, states should recognize that these contracts require additional safeguards regarding formation to mitigate issues of unequal bargaining power and regulate the circumstances under which sellers can force purchasers to forfeit property.[18]

II. OVERVIEW

Purchasing property using a contract for deed of sale is attractive to vendees who are unable to secure credit.[19] Currently, they are most popular among minority homeowners—Hispanic people in particular[20]—though they have their roots in anti-Black housing policy.[21] Leading up to the civil rights era, banks and the Federal Housing Administration (FHA) refused to extend and insure credit to Black Americans.[22] This refusal was justified and perpetuated by the FHA's classification of Black neighborhoods as "too risky" for mortgage credit, and thus the contract for deed of sale—a seller-backed alternative to the mortgage—was often the only way buyers in majority-Black neighborhoods could purchase homes.[23] The process of redlining—so called because of the red lines that marked the borders of these neighborhoods on FHA

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12. See *infra* Part II.A.1 for an explanation of why the profiles of parties to these contracts are so consistent.

13. See *infra* Part II.A.2 for a summary of common contract terms and how they interact with extrinsic factors to impact purchasers.

14. *See infra* Part II.A.3.

15. *See infra* Part II.B.

16. *See infra* Part II.C.

17. *See infra* Section III.

18. *See infra* Section III.

19. Crystal Myslajek, *Risks and Realities of the Contract for Deed*, FED. RES. BANK MINNEAPOLIS (Jan. 1, 2009), http://www.minneapolisfed.org/publications/community-dividend/risks-and-realities-of-the-contract-for-deed [https://perma.cc/5Y43-TVRU].

20. *Id.* See *infra* notes 117–122 for a discussion of communities along the Texas-Mexico border in which a limited banking infrastructure has induced seller-backed land conveyances.

21. ROTHSTEIN, *supra* note 6, at 96.

22. *See* Wright, *supra* note 6, at 104 & n.49.

23. *Id.* at 104.

maps, as opposed to the green or yellow lines that showed less "risky" areas—allowed contracts for deed of sale to proliferate.[24]

Thus, Black people who were systematically cut off from accessing mortgages turned to contracts for deed of sale, under which they accumulated no equity, and a single missed payment could result in eviction.[25] These contracts proliferated under a system in which sellers and their agents could exploit racist obstruction from mortgage creditors to shift the responsibilities of home ownership (such as insurance, upkeep, and taxes) to Black homebuyers, while preventing them from reaping the security of equity.[26] For example, in Black Chicago neighborhoods during the 1950s and 1960s, contract sellers flipped homes at a price that averaged eighty-four percent higher than the price they paid.[27] They repeated this practice on the same properties as purchasers defaulted because of the prices and judges' subsequent willingness to evict Black residents.[28]

Researchers from Duke University estimate that in Chicago alone the Black community lost between $3.2 billion and $4 billion through contract for deed of sale forfeitures.[29] This was one of many unfair and racist consumer practices that galvanized civil rights activists to eventually pressure the FHA into ending its practice of redlining nonmajority white neighborhoods.[30] These activists hoped equal access to housing and credit would render contracts for deed of sale obsolete.[31]

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24. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/PF2Z-88GC] ("The FHA had adopted a system of maps that rated neighborhoods according to their perceived stability. On the maps, green areas, rated 'A,' indicated 'in demand' neighborhoods that, as one appraiser put it, lacked 'a single foreigner or Negro.' These neighborhoods were considered excellent prospects for insurance. Neighborhoods where black people lived were rated 'D' and were usually considered ineligible for FHA backing. They were colored in red. . . . Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding black people from most legitimate means of obtaining a mortgage.").

25. ROTHSTEIN, *supra* note 6, at 96.

26. *See id.* See also *supra* notes 2–5 and accompanying text for a discussion of these shifting responsibilities.

27. SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY AT DUKE UNIV., THE PLUNDER OF BLACK WEALTH IN CHICAGO: NEW FINDINGS ON THE LASTING TOLL OF PREDATORY HOUSING CONTRACTS 6, 8 (Sharon McCloskey & Bruce Orenstein eds., 2019).

28. *Id.* at 2.

29. *Id.* at 9.

30. Wright, *supra* note 6, at 107. "Redlining" refers to the "practice of refusing to offer credit or insurance in a particular community on a discriminatory basis (as because of the race or ethnicity of its residents)." *Redlining*, MERRIAM-WEBSTER, http://www.merriam-webster.com/legal/redlining [https://perma.cc/YK92-HNG7] (last visited Sep. 19, 2019). The U.S. government, faced with a mounting housing shortage in the aftermath of the Great Depression, undertook expansive suburban housing projects with the requirement that only white people be allowed to live there. *See* Wright, *supra* note 6, at 104. Wielding explicitly segregationist policies, the FHA systematically denied credit and housing to Black Americans, while investing heavily in white private property ownership. ROTHSTEIN, *supra* note 6, at 96.

31. *Cf.* BATTLE, JR. ET AL., *supra* note 2, at 1 ("Land contracts are marketed as an alternative path to homeownership in credit-starved communities. The homebuyers entering into these transactions are disproportionately . . . people of color and living on limited income.").

Throughout the twentieth century, these contracts, also known as "installment land contract[s]," "installment sale contract[s]," or "long-term land contract[s],"[32] usually involved individual sellers with a small number of investment properties.[33] However, institutional sellers reemerged in the aftermath of the 2008 recession, when floundering financial institutions like Fannie Mae offloaded thousands of properties in the midst of the mortgage crisis.[34] Investment firms scooped up homes across the country, often for less than five figures each, before turning around and offering individual homebuyers contracts for deed of sale at a markup of up to five times the price they paid for it.[35] Because Fannie Mae and its partner institution Freddie Mac are both chartered by the government,[36] federal policy has essentially contributed to the rise of these contracts among primarily Black and low-income populations not once, but twice, in recent memory.

The credit landscape has remained bleak for many low-income families, fueling "an informal pathway to homeownership in which the law, limited access to legal resources, and little third party oversight leave many of the nation's most vulnerable homeowners—largely poor Black, Latino, and immigrant families—with reduced legal protections and insecure, unmarketable title[s] for their homes."[37] The supply of vacant, available homes, demand from buyers ineligible for credit financing, and few legal limits on the terms of contracts for deed of sale provide fertile soil for this form of exploitation to flourish once again.[38]

This Comment acknowledges the benefits that the low entry costs and accessibility of these contracts can have for individuals or entities seeking to overcome poor or nonexistent credit histories.[39] These benefits undercut the notion that contracts for deed of sale are inherently exploitative; rather, institutional investors have usurped this credit instrument and systematically prey on low-income, primarily nonwhite homebuyers.

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32. Grant S. Nelson, *The Contract for Deed as a Mortgage: The Case for the* Restatement *Approach*, 1998 BYU L. REV. 1111, 1112 (1998).

33. Sarah Mancini & Margot Saunders, *Land Installment Contracts: The Newest Wave of Predatory Home Lending Threatening Communities of Color*, COMMUNITIES & BANKING, Apr. 13, 2017, at 9–10.

34. *Id.*; *see also* Stevenson & Goldstein, *Wall Street Veterans*, *supra* note 3. The United States Federal Reserve pins the Great Recession's exact dates as December 2007–June 2009, making it the longest recession since World War II. Robert Rich, *The Great Recession*, FED. RES. HIST. (Nov. 23, 2013), http://www.federalreservehistory.org/essays/great_recession_of_200709 [https://perma.cc/LE72-BRDW]. The International Monetary Fund called it "the deepest global recession since the Great Depression." INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK, APRIL 2009: CRISIS AND RECOVERY 9 (2009).

35. Matthew Goldstein & Alexandra Stevenson, *Cincinnati Sues Seller of Foreclosed Homes, Claiming Predatory Behavior*, N.Y. TIMES (Apr. 20, 2017), http://www.nytimes.com/2017/04/20/business/dealbook/cincinnati-sues-harbour-seller-foreclosed-homes.html [https://perma.cc/MP9S-QYFW] [hereinafter Goldstein & Stevenson, *Cincinnati Sues*].

36. *Fannie Mae and Freddie Mac*, FED. HOUSING & FIN. AGENCY, http://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae---Freddie-Mac.aspx [https://perma.cc/Y2X9-2A5H] (last visited Nov. 1, 2020).

37. Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 116–17 (2009).

38. *See id.* at 129.

39. Way, *supra* note 37, at 133, 163 ("Informal transactions can offer important benefits to homebuyers in the form of low entry costs and open access. . . . The low entry costs—such as no credit requirements, minimal closing costs, and lower down payments—make informal homeownership appealing to these families.").

Necessary solutions that mitigate or eliminate exploitation would not negatively impact the outcomes in situations where contracts for deed of sale are used to both parties' advantage.[40]

This Section begins with an evaluation of the modern contract for deed of sale—that is, the use of the instrument in the years since the 2008 mortgage crisis.[41] It will describe how the parties' respective positions during the formation of the contracts leads not only to terms that some courts have found legally unconscionable[42] but also to unclear consumer expectations regarding each of the parties' responsibilities in upholding their obligations.[43] The terms place similar financial burdens on the purchasers as traditional mortgages, but without the benefits of building equity.[44] Like mortgagors, purchasers under contracts for deed of sale are responsible for various insurance, upkeep, and tax payments;[45] unlike mortgagors, their monthly payments for the homes themselves do not incrementally increase their ownership to protect the investments they have made thus far.[46]

The fact that the seller retains full ownership of the property until the terms of the contract have been completed—that is, until the purchaser has paid off the entire principal price with interest as laid out in the contract for deed of sale—means that the seller also retains attendant rights.[47] These rights are ultimately entrenched in the contract's forfeiture clause—the "*raison d'etre* . . . of the contract for deed [of sale]"[48]—which allows the vendor to retake possession and keep the purchaser's prior payments as damages upon the purchaser's failure to comply with the contract.[49]

This Section then proceeds to an overview of the current regulation of contracts for deed of sale in home purchases and what actions states and municipalities have taken to

40. *See infra* Part II.A.3.

41. *See infra* Part II.A.1.

42. *See, e.g.*, Huckins v. Ritter, 661 P.2d 52, 54 (N.M. 1983) ("An exception [to the general enforceability of contract for deed of sale] is recognized when the enforcement of the literal terms of the contract would result in a forfeiture or in unfairness which shocks the conscience of the court.").

43. *See infra* Part II.A.2.

44. Ellis v. Butterfield, 570 P.2d 1334, 1336 (Idaho 1977) ("The contract [for deed of sale] is frequently called a 'poor man's mortgage' because the vendor, as with a mortgage, finances the purchaser's acquisition of the property by accepting installment payments on the purchase price over a period of years, but the purchaser does not receive the benefit of those remedial statutes protecting the rights of mortgagors.").

45. Way, *supra* note 37, at 129; *see, e.g.*, Matthew Goldstein & Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, N.Y. TIMES (Feb. 20, 2016), http://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html [https://perma.cc/CPB5-WJ67] [hereinafter Goldstein & Stevenson, *Market for Fixer-Uppers*].

46. *See* Nelson, *supra* note 32, at 1113 ("[T]he contract for deed enables the vendor to avoid the purchaser's equity of redemption, the foreclosure process, and other traditional protections afforded to debtors under the law of mortgages.").

47. *See infra* Part II.A.2.

48. Nelson, *supra* note 32, at 1116.

49. *Id.* at 1113 ("[W]hen a purchaser fails to comply with the terms of the contract, the vendor has the option to declare it terminated, to retake possession of the premises, and to retain the purchaser's prior payments as liquidated damages.").

protect consumers.[50] These actions vary across jurisdictions, a necessary outcome of the fact that the regulations vary as well.[51]

A. Contract Formation

Modern contracts for deed of sale begin, for the most part, with targeted local advertising.[52] Investment firms that have purchased homes in low-income neighborhoods advertise to members of the local community.[53] In the first few years after the mortgage crisis, this practice was dominated by a few key players who had purchased the homes directly from failing financial institutions.[54]

The predatory terms of the contract, however, have remained largely unchanged since the 1950s and 1960s.[55] Purchasers continue to have responsibility for maintenance costs and upkeep, along with interest rates that tend to be higher than those attached to traditional mortgages.[56] Sellers retain title but are not required by law to disclose any material information about the home because contracts for deed of sale are governed by contract law rather than laws that govern more traditional real estate instruments.[57] Title issues are common as well, because even if a purchaser fulfills his end of the contract and completes payment, the original seller may have sold the home, taken out another mortgage, or been foreclosed upon, unbeknownst to the resident.[58]

This Part first explains how unequal bargaining power between private equity-backed institutional sellers and individual purchasers results in contract terms favorable to the former.[59] This Part then describes how the consequences of these terms radiate beyond the contractual relationship between the two parties to local governments.[60] Finally, it provides examples of instances in which contracts for deed of sale have benefitted purchasers though, in each case, their alternative option was not purchasing property at all rather than purchasing property using a traditional real estate instrument, such as a mortgage.[61]

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50. *See infra* Part II.B.

51. BATTLE, JR. ET AL., *supra* note 2, at 9.

52. *See id.* at 4.

53. *Id.* at 4–5.

54. *Id.* at 2–3.

55. See *infra* Part II.A.2 for an overview of the modern terms of contracts for deed of sale.

56. *See* Way, *supra* note 37, at 129 ("[T]he buyer is typically responsible for property maintenance, taxes, and insurance. The buyer is also typically responsible for interest on the sales price. The interest rates in installment transactions involving low-income buyers are significantly higher than the rates of conventional financing.").

57. *See* Myslajek, *supra* note 19.

58. *See* Way, *supra* note 37, at 138 ("For mortgages, after the deed has been executed and recorded, the law provides clear protections to the buyer from the seller's creditors. In contrast, the law extends far inferior protections to buyers in installment contracts.").

59. *See infra* Part II.A.1.

60. *See infra* Part II.A.2.

61. *See infra* Part II.A.3.

1. The Players and the Bargain

In the aftermath of the 2008 financial crisis, moribund banks, mortgage investors, and other financial institutions struggled to sell thousands of homes they owned because of constrained consumer demand.[62] The recession had proven disastrous for a wide swath of individual citizens, and homeownership through standard mortgages decreased dramatically.[63] Institutional investors stepped in where individual homeowners could not afford to and purchased homes across the country at what amounted to wholesale prices.[64] These investment firms, backed by private equity, could afford to purchase at such a scale that, despite the discounts on individual homes, former titans of the mortgage marketplace readily unloaded their properties.[65]

One of the most significant investment firms participating in these transactions was Harbour Portfolio Advisors, which raised over $60 million from private equity.[66] Between 2010 and 2014, the firm purchased more homes from Fannie Mae's bulk sale program than any other single buyer.[67] These homes were located primarily in Florida, Georgia, Illinois, Michigan, Ohio, and Pennsylvania.[68] Between 2010 and 2016, Harbour purchased over six thousand seven hundred single-family homes,[69] for an average price of just $8,000 each.[70] Apollo Global Management, another bulk purchaser, invested over $40 million into single-family homes through a network of real estate investment trusts.[71]

62. *See* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

63. *See* Kathleen Scanlon, Jens Lunde & Christine Whitehead, *Responding to the Housing and Financial Crises: Mortgage Lending, Mortgage Products and Government Policies*, 11 INT'L J. HOUSING POL'Y 23, 29–31 (2011).

64. *See* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

65. *See id.*

66. *Id.*

67. *Id.*; BATTLE, JR. ET AL., *supra* note 2, at 2. Fannie Mae, also known as the Federal National Mortgage Association, is a public company under government charter whose objective is to stimulate private homeownership. *See* Wendy Connett, *Fannie Mae: What it is and How it Operates*, INVESTOPEDIA, http://www.investopedia.com/articles/investing/091814/fannie-mae-what-it-does-and-how-it-operates.asp [https://perma.cc/Y7VW-TQV9] (last updated Mar. 18, 2020). It does this through significant investment in the secondary mortgage market; that is, it purchases mortgages from their original holders, such as banks or other direct lenders, thereby providing those lenders with sufficient cash to underwrite more mortgages. *Id.*; *see also Fannie Mae and Freddie Mac*, *supra* note 36. As a government-chartered company, Fannie Mae enjoyed less restrictive regulations than other secondary mortgage market participants, leading to what some critics claimed resembled a monopoly over the market. *See* Jean Folger, *Fannie Mae, Freddie Mac: An Overview*, INVESTOPEDIA (Sept. 2, 2020), http://www.investopedia.com/articles/economics/08/fannie-mae-freddie-mac-credit-crisis.asp [https://perma.cc/F6YK-3YTX]. Though this claim is far from settled fact, the charter did allow Fannie Mae to become one of the largest players in the secondary mortgage market. As a result, its debt obligations became insurmountable as the home foreclosure epidemic swept through the United States beginning in 2007. *See id.* It was under these circumstances, in which Fannie Mae held millions of mortgages that would not be repaid at all, that it accepted below-market prices from investment firms such as Harbour to mitigate its losses. *See* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

68. Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45; *see also* BATTLE, JR. ET AL., *supra* note 2, at 2.

69. Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

70. *Id.*

71. BATTLE, JR. ET AL., *supra* note 2, at 3.

In the early years following the 2008 financial crisis, individual citizens entered into contracts for deed of sale with investment firms like Harbour and Apollo that had purchased homes directly from struggling financial institutions like Fannie Mae.[72] The investment firms gained a clear financial incentive: sell the properties for up to five times what they paid; charge interest rates double those of a traditional mortgage; and offload responsibility for taxes, upkeep, and insurance.[73] For low-income purchasers with limited access to credit, these contracts offered a low financial barrier to entry—eliminating the need for a credit check or exorbitant down payment—and expedience.[74]

As the decade wore on, though, private and public pressure mounted against these early private equity-backed entrants. For instance, Harbour alone appeared as a creditor in approximately one hundred personal bankruptcy cases[75] and faced particular judicial scrutiny in Ohio, one of its primary places of business.[76] The original investment firms began to sell their properties, and the corresponding contracts, to a more diffuse array of firms, which often did the same in turn.[77] The property residents were not always notified of these sales, which left them unable to coordinate their responsibilities and payments with the actual property owner.[78]

The firms' inadequate disclosure to purchasers was a recurring problem not just after the contracts were signed but leading up to the agreements as well.[79] Sellers often declined to disclose municipal building code violations, and in conjunction with the terms that placed responsibility for these codes on the purchasers, the result could be ruinous.[80] Purchasers would find themselves responsible for thousands of dollars' worth of repairs of which they had been previously unaware.[81]

Even a savvy purchaser under a contract for deed of sale would face high transaction costs in pursuit of uncovering material information about the home. Typical mortgage statutes require that the seller provide basic information about the state of the property,[82] and even the most relaxed state laws require that the seller or real estate agent disclose known defects;[83] no such rules cover a contract for deed of sale. To guarantee

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72. *Id.*

73. *See* Alana Semuels, *A House You Can Buy, But Never Own*, ATLANTIC (Apr. 10, 2018), http://www.theatlantic.com/business/archive/2018/04/rent-to-own-redlining/557588/ [https://perma.cc/5TRR-R2E7].

74. Way, *supra* note 37, at 133–34.

75. Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

76. See *infra* Part II.C.1 for an overview of the City of Cincinnati's lawsuit against Harbour, alleging predatory and unconscionable practices.

77. *See* Goldstein & Stevenson, *'A Pain in the Butt,' supra* note 5.

78. *See id.*

79. *See* Complaint for Injunctive and Declaratory Relief ¶¶ 31–32, 158–59, City of Cincinnati v. Harbour Portfolio Advisors, LLC, No. A 1702044 (Ohio Ct. Com. Pl. Apr. 11, 2017) [hereinafter Cincinnati Complaint].

80. *See* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

81. *See id.*

82. *E.g.*, COLO. REV. STAT. ANN. § 38-35.7-101 (West 2020); Property Condition Disclosure Act, N.Y. REAL PROP. LAW §§ 460–63 (McKinney 2020); 68 PA. STAT. AND CONS. STAT. ANN. § 7304 (West 2020); TEX. PROP. CODE ANN. § 5.008 (West 2019).

83. *E.g.*, MO. ANN. STAT. § 339.730 (West 2020) (requiring that licensees representing homeowners in Missouri, a caveat emptor state, disclose "all adverse material facts actually known or that should have been

the home is up to "mortgage-able" standards, a purchaser under a contract for deed of sale would have to pay for her own independent appraisal, rather than be provided one in the home purchasing process.[84] These rules nullify the low entry costs that are one of the primary attractions to low-income buyers.

2. The Four Corners and Extrinsic Considerations

The most controversial term of the contract for deed of sale is its defining feature: the owner retains full ownership of the property until 100% of the purchase price is received.[85] Property owners are able to remove a resident for nonpayment.[86] This right is reinforced in nearly every contract for deed of sale, in the form of a forfeiture clause that explicitly states the owner's right to retake possession of the home and retain the purchaser's prior payments.[87] Bolstering the forfeiture clause is often a "time is of the essence" provision, which ensures that an owner's one-time or occasional acceptance of late payments does not translate to a waiver of the right to retake possession.[88]

Owners maximize their profits by extracting as many payments—tax, insurance, and otherwise—and as much labor for repairs as possible before evicting the resident purchaser and entering into a similar contract with a new buyer.[89] The property owners are able to extract labor as well as monetary payments because most contracts for deed of sale uniformly vest the responsibility for major repairs in the residents.[90] While reasonable in theory—a resident expecting to eventually own a home could seemingly decide to undertake the burden of upkeep—this practice enables "[l]and contract sellers . . . to operate as slumlords without the landlord's legal burden of providing habitable dwellings."[91] If the resident falls behind on monthly contract payments, she loses not only the agreed-upon price of the home, plus interest, but also her entire investment in maintenance and repairs.[92]

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known by the licensee"). Beyond just a few exceptions relating to the manufacture of methamphetamine and abuse of minor children, caveat emptor clauses in purchase contracts are normally enforced by Missouri courts. Under these clauses, buyers are responsible for verifying defects in a property. Typically, a seller will not be held liable unless they directly lied about the property or tried to prevent the buyer from conducting an inspection. *See* Joshua Stockstill, *Seller Disclosure Requirements in Missouri*, NARRATIVE (June 4, 2020), http://www.narrativerealty.com/blog/seller_disclosure_requirements_in_missouri/21246 [https://perma.cc/8AKZ-9SK8].

84. Myslajek, *supra* note 19.

85. *See* BATTLE, JR. ET AL., *supra* note 2, at 1. "Controversial," as it is used here, means that it gives rise to the bulk of public disagreement surrounding these contracts.

86. *See* Way, *supra* note 37, at 129 (explaining that property owners are able to remove residents for nonpayment as a result of forfeiture clauses, which prevent purchasers from gaining equity in the property prior to full payment).

87. Nelson, *supra* note 32, at 1113.

88. Hewett v. Rogers, No. CA 87-441, 1988 WL 56817, at *1 (Ark. Ct. App. June 1, 1988) ("[W]here time is specifically declared to be of the essence of an installment land contract, it may be declared null and void upon failure of a vendee to comply with its terms, and all rights of the vendee forfeited. Although equity abhors a forfeiture, it will not relieve against one where time has been made of the essence.").

89. BATTLE, JR. ET AL., *supra* note 2, at 8.

90. *Id.*

91. *Id.*

92. *Id.*

Further, according to a lawsuit the City of Cincinnati filed against Harbour, its contracts—at least within the State of Ohio—contained a provision that allowed it to convert the contract for deed of sale into a mortgage and deed, effectively shielding itself against liability for housing code violations in particular.[93] If the city pursued fines or other enforcement efforts against Harbour (the property owner), then Harbour could simply transfer the deed to the purchaser.[94] The purchaser thus inherited liability for violations she had been unaware of because of Harbour's failure to disclose them earlier in the contract formation process.[95] Not only could residents be forced to forfeit their homes to the investment firm owners, but they also could find themselves vulnerable to losing their homes to banks in traditional mortgage foreclosures if penalties for code violations were so steep that the investment firm owner transferred the deeds to the residents and left them on the hook.[96]

Shifting the burden of major repairs is not the only way in which sellers inflate the purchase price of a home. Third-party financed sales, including traditional bank mortgages, are often subject to lender requirements such as title examination, title insurance, and independent appraisal.[97] However, most purchasers using contracts for deed of sale lack knowledge of or access to independent appraisers and are not entitled to title protection because they will not own the home until completion of the contract.[98] As a result, they sign these contracts with only a vague idea of how much their stake is actually worth.[99] Purchasers may calculate that a price is fair if it resembles market rent price for nearby properties without realizing the additional, hidden costs of repairs, for which renters are not responsible.[100]

Further, while mortgage interest rates are grounded in standard metrics such as the length of the loan, the type of mortgage, the down payment, and the purchaser's credit score,[101] interest rates on contracts for deed of sale lack a similar grounding and are simply one among many ostensibly negotiable contract terms. As a result, the interest

93. Cincinnati Complaint, *supra* note 79, ¶¶ 33–35.

94. *Id.* ¶ 35.

95. James Leggate, *Cincinnati Sues Company over 'Predatory' Land Sale Contracts, Blighted Properties*, WCPO CINCINNATI (Apr. 14, 2017, 7:41 AM), http://www.wcpo.com/news/local-news/hamilton-county/cincinnati/cincinnati-files-lawsuit-against-predatory-land-investor [https://perma.cc/J7J4-F8U8] [hereinafter Leggate, *Cincinnati Sues Company*].

96. *See* Cincinnati Complaint, *supra* note 79, ¶¶ 35, 37–39.

97. Myslajek, *supra* note 19; *see, e.g.*, N.J. HOUS. & MORTG. FIN. AGENCY, MORTGAGE PROGRAM POLICY AND PROCEDURES FOR PARTICIPATING LENDERS §§ 7–3, 8–2 (2019) (stating that the New Jersey Housing and Mortgage Finance Agency will only approve mortgages for homes that have been, *inter alia*, independently appraised, shown to be hospitable with all deficiencies corrected prior to closing date, and on which the lender carries title insurance); PA. HOUS. FIN. AGENCY, HOMEOWNERSHIP PROGRAMS: SELLER'S GUIDE, 32–34 (2019) (explaining the requirements for lenders to be eligible for Pennsylvania Housing Finance Agency participation, including procedures for appraisal submission and private mortgage insurance).

98. BATTLE, JR. ET AL., *supra* note 2, at 8.

99. *Id.*

100. *Id.*

101. Nicole Shea, *Seven Factors That Determine Your Mortgage Interest Rate*, CONSUMER FIN. PROT. BUREAU (Sep. 29, 2017), http://www.consumerfinance.gov/about-us/blog/7-factors-determine-your-mortgage-interest-rate/ [https://perma.cc/X43Q-XRPP].

rates on already inflated purchase prices tend to be much higher—in many cases, including Harbour's, by almost double—than those attached to traditional mortgages.[102]

Persistent title issues plague these contracts as well.[103] The resident has a restricted possessory interest in the property and does not earn equity through her payments, so the seller retains title until the contract has been paid in full.[104] Thus, a property owner may take out a mortgage loan on the property at any time, including after entering into the contract, without notifying the resident.[105] If a mortgage exists, the bank may foreclose on the property of an unscrupulous owner, regardless of the scruples of the resident.[106] The land contracts themselves are rarely entered into public records—there is not always a requirement to do so—thereby weakening a resident's legal claim should the owner lose the home.[107] "Too often a buyer gets to the end of a 20- or 30-year payment term only to find that the seller cannot convey good title."[108] Attempting recourse is necessarily more complicated if the buyer does not know or cannot find the current owner of her home, and the fact that these contracts can be freely sold and yet remain binding on the buyer further disadvantages her.[109]

3. Potential Benefits

The lopsided terms and treatment of possessory interests over the home can largely be attributed to unequal bargaining power and access to information between a private equity-backed investment firm and a consumer whose credit is on such shaky ground that a mortgage is unattainable.[110] When these issues are addressed before or during contract formation, a contract for deed of sale can be a tool for building credit, facilitating homeownership, and building investment in struggling neighborhoods.[111]

Nonprofit organizations such as the Minneapolis-based Greater Metropolitan Housing Corporation (GMHC), which works to preserve, improve, and increase affordable housing for low- and moderate-income people, have piloted programs that conceive of contracts for deed of sale as transitional mechanisms to build credit before refinancing to traditional mortgages and receiving their attendant benefits.[112] Beginning in 2008, GMHC operated Bridge to Success, a contract for deed of sale program that

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102. *Compare* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45 (revealing that all of over a dozen Harbour contracts for deed of sale, examined by the *New York Times*, ran for thirty years and carried a 9.9% interest rate), *with Mortgage Rates*, FREDDIE MAC, (http://www.freddiemac.com/pmms [https://perma.cc/VX9L-J86T] (last visited Sept. 21, 2020) (showing an average thirty-year fixed-rate mortgage rate of 4.19% from 2010–2014, a time period comparable to the Harbour contracts discussed here).

103. BATTLE, JR. ET AL., *supra* note 2, at 8.

104. *See* Way, *supra* note 37, at 128–29.

105. BATTLE, JR. ET AL., *supra* note 2, at 8.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See, e.g.*, Goldstein & Stevenson, *'A Pain in the Butt,' supra* note 5.

110. *See* BATTLE, JR. ET AL., *supra* note 2, at 8.

111. Myslajek, *supra* note 19 (discussing how some buyers hope to build credit through contracts for deed of sale by asking the seller for a letter "stating that he or she makes the contract payments on time").

112. Jacob Wascalus, *Contract for Deed Emerges as a Tool for Affordable Housing Organizations*, FED. RES. BANK MINNEAPOLIS (Apr. 1, 2013), http://www.minneapolisfed.org/article/2013/contract-for-deed-emerges-as-a-tool-for-affordable-housing-organizations [https://perma.cc/8L5Y-U7NK].

required homebuyer education classes, financial counseling, and semiannual meetings with GMHC representatives to ensure that contract for deed of sale purchasers were able to rehabilitate their credit to a point where they could obtain traditional mortgages.[113] Unlike investment firms such as Harbour, GMHC's objective was not to profit; instead, GMHC aimed to increase access to traditional mortgages.[114] Rather than pursue forfeiture due to late payments, Bridge to Success mandated education and counseling and was flexible in renegotiating payment terms in the event of default.[115] This program, however, was discontinued within ten years of its inception.[116]

Contracts for deed of sale are also common in low-income immigrant communities.[117] In informal, unincorporated neighborhoods—primarily "colonias"[118] along the Texas-Mexico border, but also in other rural and peri-urban areas—traditional mortgage lending is unavailable for most residents, and so the contract for deed of sale is the most efficient mechanism for the secured sale of real property.[119] They are also the most attractive of the limited paths to home ownership for undocumented immigrants.[120] In contrast to predatory, private equity-backed institutions' dominance in urban and suburban contract for deed of sale conveyances, almost half of contracts for deed of sale in colonias involve consumer-to-consumer sales, inheritances, or gifts from family members or friends, where parties have similar bargaining power.[121]

However, the continued growth and development of low-income colonias can itself be traced to "[t]he lack of affordable housing in cities and municipalities"; in other words, contracts for deed of sale are popular in settlements that exist, in part, because of limited

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113. *Id.* GMHC did this by taking over the original seller's role in the contract for deed of sale: once a home purchaser and a seller negotiated the terms of sale, the buyer signed a purchase agreement assigning the seller's rights to GMHC, and the title was placed in GMHC's name. *Id.* The seller, typically a firm that rehabilitated foreclosed properties, was paid according to the terms of the purchase agreement. *Id.*

114. *Id.*

115. *Id.*

116. Wade Rathke, *Contract for Deed as a Non-Profit Affordable Housing Tool*, CHIEF ORGANIZER: BLOG (Apr. 23, 2018), http://chieforganizer.org/2018/04/23/contract-for-deed-as-a-non-profit-affordable-housing-tool [https://perma.cc/U32U-CXBX].

117. Way, *supra* note 37, at 130.

118. The Merriam-Webster Dictionary defines "colonia" as "an unincorporated settlement (as of Mexican-Americans or Mexicans) in the U.S. usually near the Mexican border that typically has poor services and squalid conditions." *Colonia*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/colonia [https://perma.cc/E43B-QRK9] (last visited Nov. 1, 2020).

119. Way, *supra* note 37, at 130–32.

120. *Id.* at 130 n.83 (quoting ALVARO CORTES, ERIN WILSON, CHRISTOPHER E. HERBERT & PEDRAM MAHDAVI, U.S. DEP'T OF HOUS. & URBAN DEV., EFFORTS TO IMPROVE HOMEOWNERSHIP OPPORTUNITIES FOR HISPANICS 50 (2006), http://www.huduser.gov/portal//Publications/PDF/hisp_homeown2.pdf [https://perma.cc/7G6Y-AAR6]).

121. *See* PETER M. WARD, HEATHER K. WAY & LUCILLE WOOD, UNIV. OF TEX. AT AUSTIN, THE CONTRACT FOR DEED PREVALENCE PROJECT: A FINAL REPORT TO THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS (2012), http://law.utexas.edu/faculty/hway/stand-alone-executive-summary.pdf [https://perma.cc/GF6D-FDEU].

access to housing in other areas of the country.[122] Contracts for deed of sale are a band-aid, not a cure in these communities.

B. Governing Law

Contracts for deed of sale—given their legacy as standard contracts governable by state law—receive a wide variety of treatment across the country.[123] States that regulate contracts for deed of sale do so by (1) treating them as mortgage equivalents that require sellers who wish to evict purchasers to go through formal foreclosure channels[124] or (2) curtailing the seller's ability to evict the purchaser from the property.[125] Jurisdictions that do not enforce contracts for deed of sale as mortgages by statute have also recognized the ease of evicting purchasers from their residences as a central concern.[126] The three main considerations courts have used to protect purchasers from eviction are the enforceability of forfeiture clauses, the seller's (effective) waiver of right to prompt payment, and notice requirements.[127]

The forfeiture clause is the term in a contract for deed of sale that compels the purchaser to evacuate the property upon breach of the contract, which almost always manifests as nonpayment to the seller.[128] Some courts have relied on principles of equity to render these clauses unenforceable in two ways. First, such clauses may be rendered unenforceable due to the inequity caused by the resident being forced to forfeit residency

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122. Patrick Strickland, *Living on the Edges: Life in the Colonias of Texas*, AL JAZEERA (Nov. 5, 2016), http://www.aljazeera.com/indepth/features/2016/11/living-edges-life-colonias-texas-161103082854630.html [https://perma.cc/4WL8-ZQA7] (quoting Josue Ramirez of Texas Low-Income Housing Services).

123. Statutory regulation has been largely at the state level, because while the Consumer Financial Protection Bureau (CFPB) could theoretically assert standing to federally regulate contracts for deed of sale, political factors and the recent Supreme Court ruling that the CFPB's structure is unconstitutional render such action unlikely in the short term. See *infra* Part II.C.3 for a discussion of prospective strategies the CFPB could take to regulate predatory contracts for deed of sale.

124. *See infra* Part II.B.1.

125. *See infra* Part II.B.2.

126. *See* Juliet M. Moringiello, *A Mortgage by Any Other Name: A Plea for the Uniform Treatment of Installment Land Contracts and Mortgages Under the Bankruptcy Code*, 100 DICK. L. REV. 733, 741–42 (1996) ("Various states have, by statute, attempted to make the remedy of forfeiture less severe. . . . In other states, the courts, rather than the legislatures, have lessened the impact of the remedy of forfeiture.").

127. *See, e.g.*, Hicks v. Dunn, 622 So. 2d 914, 917 (Ala. 1993) (considering waiver of payments and notice in determining whether a forfeiture provision should be enforced); Smith v. MRCC P'ship, 792 S.W.2d 301, 304–05 (Ark. 1990) (discussing whether a forfeiture provision applies to a "bond for title"); Grombone v. Krekel, 754 P.2d 777, 778–79 (Colo. App. 1988) (allowing enforcement of a forfeiture provision because defendants had "defaulted on virtually of their contract obligations . . . despite plaintiffs' repeated demands"); Long v. Smith, 776 S.W.2d 409, 413–14 (Mo. Ct. App. 1989) (asserting, first, that proper notice was not given prior to forfeiture, then challenging the enforceability of forfeiture clauses under Missouri law, and finally, arguing the seller waived the forfeiture provision by accepting late and partial payments); Burgess v. Shiplet, 750 P.2d 460, 462 (Mont. 1988) (considering whether an anti-forfeiture statute applied where buyers had not offered the entire remaining balance as contract compensation); Russell v. Richards, 702 P.2d 993, 995–96 (N.M. 1985) (discussing a buyer's failure to remedy a default payment as justification for the enforceability of a forfeiture provision); White v. Hughes, 867 S.W.2d 846, 850–51 (Tex. App. 1993) (raising an issue of whether the cancellation complied with statutory notice requirements); Wilson v. Witt, 952 P.2d 214, 215–16 (Wyo. 1998) (discussing the buyers' receipt of notice, whether the acceptance of a late payment constituted waiver of the forfeiture clause, and whether the forfeiture clause should be enforced as equitable relief).

128. BATTLE, JR. ET AL., *supra* note 2, at 1.

or possessory interest in the home without the seller being forced to forfeit any payment made up to that point or reimburse for maintenance or labor expenses.[129] Second, courts have declined to enforce the forfeiture clause where the purchaser has the ability to make payments the court views as adequate as an alternative remedy to the seller.[130] In either case, key considerations include "the length and number of defaults, the amount of forfeiture, the speed in which equity is sought, and the amount of money the purchaser would forfeit in relation to the purchase price of the property."[131]

Additionally, some courts have held that a seller has waived her right to prompt payment by accepting a number of late payments, which in turn grants the purchaser more time to make payment without having to leave the home.[132] The last consideration, notice requirements, is governed by statute, because unless the seller has waived her rights to strict enforcement of the contract for deed of sale, she is entitled to such enforcement without additional notice to the purchaser under standard contract law.[133]

First, this Part provides a representative overview of statutory schemes under which certain states have categorized the contract for deed of sale as a mortgage entitled to its protections.[134] Oklahoma treats contracts for deed of sale as constructive mortgages, and the state's highest court has confirmed that contract sellers cannot evict purchasers from their properties except through the formal foreclosure process.[135] Texas offers similar protections for recorded conveyances of real property but does not require recording, therefore somewhat weakening these protections.[136] Next, this Part describes various statutory and common law schemes that regulate contracts using the aforementioned considerations.[137]

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129. *E.g.*, Root v. Johnson, 10 So. 293, 293 (Ala. 1891) ("Forfeitures are not favorites in equity, and, unless the penalty is fairly proportionate to the damage suffered by the breach, relief will be granted when the court can give by way of compensation all that could be reasonably expected."); Lewis v. Premium Inv. Corp., 568 S.E.2d 361, 364 (S.C. 2002) ("[W]e hold courts of equity can relieve a defaulting purchaser from the strict forfeiture provision in an installment land contract and provide the opportunity for redemption when equity so demands."). Alaska has gone so far as to say that by virtue of maintaining residence, a purchaser may achieve equity in the appreciated value of the home for the time before the contract was breached. Kopanuk v. AVCP Reg'l Hous. Auth., 902 P.2d 813, 817 (Alaska 1995).

130. Cozzetti v. Madrid, No. S-15117, 2017 WL 6395736, at *6 (Alaska Dec. 13, 2017); Strack v. Miller, 645 P.2d 184, 187 (Alaska 1982).

131. Cody Disc., Inc. v. Merritt, 629 S.E.2d 697, 700 (S.C. Ct. App. 2006) (citing *Lewis*, 568 S.E.2d at 364 n.5).

132. *Cf.* Moore v. Lovelace, 413 So. 2d 1100, 1102 (Ala. 1982) ("It is an axiom of equity that as a general rule time is not of the essence of a contract. However, the parties might make time essential by 'clear manifestation of the intent of the parties . . . .'" (citation omitted) (quoting Isom v. Johnson, 87 So. 543, 544 (Ala. 1921))). *But see* Bell v. Coots, 451 So.2d 268, 269 n.1 (Ala. 1984) ("[T]he vendor's acceptance of one or more payments subsequent to the time specified in the agreement does not necessarily waive his right to object to the vendee's delinquency as to future payments, or preclude him from insisting on strict performance in the future and declaring a forfeiture for the vendee's default as to future payments." (quoting 77 AM. JUR. 2D *Vendor and Purchaser* § 81 (1975))).

133. *Bell*, 451 So. 2d at 269–70 (citing AM. JUR. 2D, *supra* note 132, § 81).

134. *See infra* Part II.B.1.

135. *See infra* Part II.B.1.

136. *See infra* Part II.B.1.

137. *See infra* Part II.B.2.

1. The Contract for Deed of Sale as a Mortgage Equivalent

Nebraska, Oklahoma, and Texas, among others, have statutes in place that circumvent the harshness of forfeiture clauses (and complications arising from other contract for deed of sale-specific characteristics, like lack of disclosure). By statute, Nebraska explicitly categorizes all land conveyances accompanied by an instrument acting as a security as mortgages.[138] The Nebraska Supreme Court has reasoned that this approach honors the principle that "equity regards substance and not form."[139] Similarly, Oklahoma has labeled contracts for deed of sale as constructive mortgages, "subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."[140] The Oklahoma Supreme Court has repeatedly upheld the rights of both sellers and purchasers under contracts for deed of sale as equivalent to those of mortgage holders and that forfeiture procedures—i.e., how and whether the resident is removed from the home—must meet the same standards as foreclosures.[141]

In *McGinnity v. Kirk*,[142] the court explained that contracts for deed of sale are mortgages under Oklahoma state law and that sellers and buyers are entitled to the protections and remedies available to mortgagors and mortgagees.[143] The Kirks entered into a contract for deed of sale as purchasers in 1987.[144] Eleven years later, the sellers under that contract sold the property to the McGinnitys and assigned to them the Kirks' contract for deed of sale.[145] The contract mandated, among other things, that the Kirks maintain insurance on the property for the benefit of the property owners, now the McGinnitys.[146] However, by 2005, the property had deteriorated to such an extent that the insurer sent a letter to the Kirks notifying them that their insurance would expire and not be renewed in June of that year.[147] The Kirks stated they were never told the reasons for the nonrenewal, and rather than address the issue or find another insurer, they voluntarily moved from the property.[148]

The McGinnitys, in light of the ongoing waste to their property, brought a foreclosure suit against the Kirks, which was granted by the trial court.[149] In response to the Kirks' appeal, the McGinnitys additionally claimed that the Kirks breached their

138. NEB. REV. STAT. ANN. § 76-251 (West 2020) ("Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage.").

139. Campbell v. Ohio Nat'l Life Ins. Co., 74 N.W.2d 546, 552 (Neb. 1956).

140. OKLA. STAT. ANN. tit. 16, § 11A (2020).

141. *E.g.*, McGinnity v. Kirk, 362 P.3d 186, 190 (Okla. 2015); Lucas v. Bishop, 956 P.2d 871, 873 (Okla. 1998).

142. 362 P.3d 186 (Okla. 2015).

143. *McGinnity*, 362 P.3d at 197.

144. *Id.* at 188.

145. *Id.* at 188–89.

146. *Id.* at 193.

147. *Id.*

148. *Id.* at 194. At trial, the insurance agent who had investigated the home testified that the nonrenewal "was not based upon the condition of the structure itself, but because of the trees, fences, grass, and cars surrounding the structure." *Id.* at 193.

149. *Id.* at 189.

contractual obligation to maintain insurance during the initial foreclosure proceedings.[150] The contract for deed of sale required that the Kirks insure the property for its full value, an obligation that continued even after they vacated the premises.[151] The Kirks proffered arguments that they had not breached because they were unaware of the reasons for nonrenewal and in any case had moved away; but the court rejected that argument as having no legal basis and explicitly tied their contract for deed of sale to existing state mortgage laws, which controlled:

> [W]hen the insurance was not renewed, the Kirks' and the McGinnitys' rights to possess the property during legal proceedings based upon a breach of the contract for deed were governed by 16 O.S. 2011 § 11A: contracts for deed "made for the purpose of establishing an immediate and continuing right of possession . . . shall to that extent be deemed and held mortgages." Because the contract for deed is considered as a mortgage for the purpose of possession, the right of the seller to possess the property based upon a breach of the contract is similar to the general provisions for liens with the right of possession being based upon a foreclosure of the lien.[152]

Under Oklahoma law, the effective mortgagees, the McGinnitys, would place a lien on the property during legal proceedings, while the mortgagors, the Kirks, would retain possessory rights and other incident rights of ownership.[153] The mere breach of the contract was not enough for the McGinnitys to obtain control of the property.[154] Rather, Oklahoma mortgage law has required that the mortgagee take another action to gain possession of the property.[155] Here, the McGinnitys appropriately began foreclosure proceedings "as if the McGinnitys were mortgagees and the Kirks were mortgagors."[156] The court ultimately ruled in favor of the McGinnitys, finding that they had properly attempted to regain possession from the Kirks by using foreclosure proceedings.[157]

Texas regulates contracts for deed of sale under statutes governing "executory contract[s] for conveyance of real property used or to be used as the purchaser's residence."[158] These laws offer a somewhat tempered version of the protections offered by Oklahoma. If a contract for deed of sale in Texas has been recorded, state law recognizes it as a deed with a vendor's lien for the unpaid contract price.[159] Like a mortgage, the lien is enforceable only by a foreclosure sale or judicial foreclosure.[160]

However, if the contract has not been recorded in the county in which the property is located, contract sellers in Texas may take possession of the property in the event of a

150. *Id.* at 193.

151. *Id.* at 195 ("The contract for deed does not expressly condition the Kirks' obligation to maintain insurance upon their continued physical possession of the property.").

152. *Id.* at 197 (omission in original) (emphasis omitted) (quoting OKLA. STAT. tit. 16 § 11A (West 2020)).

153. *Id.*

154. *See id.*

155. *Id.* (quoting Teachers Ins. & Annuity Ass'n of Am. v. Okla. Tower Assocs. Ltd. P'ship, 798 P.2d 618, 619–20 (Okla. 1990)).

156. *Id.*

157. *Id.* at 204–05.

158. TEX. PROP. CODE ANN. § 5.062(a) (West 2019).

159. *Id.* § 5.079(a).

160. *Id.*

purchaser default as long as (1) the seller has provided statutorily adequate notice, (2) the purchaser has failed to remedy the default within thirty days, and (3) certain requirements triggering an extended period to remedy the default for purchasers who have paid a significant amount on the property have not been met.[161]

2. Targeting Specific Terms in the Contract for Deed of Sale

For the majority of states that maintain a distinction between protections for mortgagors and contracts for deed of sale purchasers, both statutory and common law aim to regulate forfeiture using the levers of the enforceability of the forfeiture clause, a seller's waiver of right to prompt payment, and notice requirements. The policy of avoiding the unfairness of forfeiture may manifest in highly technical statutes, as in Arizona and Ohio,[162] or be pushed by judges acting under standard contract law principles of equity.[163]

Arizona and Ohio are among a small number of states that enforce forfeiture clauses subject to certain statutory requirements.[164] Ohio law is similar to Texas law that governs unrecorded contracts for deed of sale in default, but without the extended notice requirement: forfeiture may only be enforced after thirty days have passed since default, and the purchaser may avoid forfeiture by remedying the default within that time.[165] However, Ohio requires sellers to use the foreclosure process if the purchaser has paid "in accordance with the terms of the contract" for at least five years from the date of the first payment or has paid at least twenty percent of the total purchase price.[166] Ohio appellate courts have described these as "essentially a consumer protection law. The statute is intended to prevent a windfall to a vendor who has previously collected substantial sums under a land contract and/or has actually recovered the property."[167]

Arizona, taking a slightly different approach, phases the lengths of mandatory cure periods before forfeiture clauses may be enforced.[168] A seller may enforce a forfeiture clause only after an amount of time since default, determined by the amount paid, has elapsed.[169] At a minimum, if less than twenty percent of the purchase price has been paid

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161. *Id.* § 5.064. A purchaser gains the right to an extended cure period if she defaults after paying forty percent or more of the total amount due or the equivalent of forty-eight monthly payments under the contract for deed of sale. *Id.* § 5.066(a). The purchaser then has sixty days to cure the default. *Id.* § 5.066(b).

162. *See* ARIZ. REV. STAT. ANN. §§ 33-741 to -751 (2020); OHIO REV. CODE ANN. §§ 5313.01–.10 (West 2020).

163. *See, e.g.*, Petersen v. Hartell, 707 P.2d 232, 242 (Cal. 1985) (holding that in California, forfeiture can only be effected after the seller returns to the purchaser any amount paid in excess of the seller's damages); White v. Brousseau, 566 So. 2d 832, 835–36 (Fla. Dist. Ct. App. 1990) (holding that a purchaser may avoid forfeiture by paying the balance due on the contract).

164. *See* ARIZ. REV. STAT. ANN § 33-742; OHIO REV. CODE ANN. §§ 5313.05–.08.

165. *Compare* OHIO REV. CODE ANN. § 5313.05, *with* TEX. PROP. CODE ANN. § 5.066. Then, once the thirty days have passed, the seller must give notice to the purchaser that if the latter does not remedy the default within ten days, the former will retake possession. OHIO REV. CODE ANN. § 5313.06.

166. OHIO REV. CODE ANN. § 5313.07.

167. Anna Holdings, LLC v. McClanahan, 148 N.E.3d 1255, 1258 (Ohio Ct. App. 2019) (first quoting Kossoudji v. Stamps, 65 N.E.3d 815, 824 (Ohio Ct. App. 2016); and then quoting Howard v. Temple, 872 N.E.2d 1260, 1262 (Ohio Ct. App. 2007)) (internal quotation marks omitted).

168. *See* ARIZ. REV. STAT. ANN. § 33-742(D).

169. *Id.*

the seller may not evict the resident until thirty days after default; if the purchaser has paid fifty percent or more of the purchase price the seller may not evict the resident until nine months after default.[170]

Arizona statutory law also addresses a seller's waiver of the right to prompt payment as laid out in the contract.[171] A waiver of a "time is of the essence" provision occurs if the seller accepts less than the amount due on the contract at the time of the payment, but the provision may be reinstated with written notice at any time.[172] In practice though, Arizona courts have been hesitant to delineate at what point acceptance of insufficient payments constitutes a waiver.[173] This indicates that the courts are wary of setting a precedent that a mere delay in exercising any remedy granted to the seller in the event of a breach could constitute a waiver of that right.[174]

In *Sturm v. Heim*,[175] the Arizona Supreme Court upheld a forfeiture with no damages awarded to the purchasers even where they had paid eighty-four percent of the purchase price, rejecting their argument that the sellers had waived their right to prompt payment.[176] The Sturms entered into a contract for deed of sale to purchase land from the Heims, which included a time is of the essence provision.[177] The Sturms built a home on land they believed was part of the plot, but it was in fact owned by a third party.[178] The Heims purchased the land and delivered the deed to the Sturms as a gift, but the Sturms were concerned that the land was not contiguous with the original plot and ceased making monthly payments.[179] Seven years after the default, the Sturms sued for specific performance of the contract—specifically, that title be transferred to them.[180]

The court disagreed with the Sturms' argument that the sellers had waived the time is of the essence provision by their conduct in not seeking a remedy during those intervening years, holding instead that "[w]here time is of the essence of the contract, a default in payments entitles the sellers to treat the contract as at an end."[181] Therefore, the Sturms' nonpayment terminated the contract and alone triggered the forfeiture.[182]

Repeated acceptance of late payment, however, can alternatively be characterized as a waiver, even in states without Arizona's statutory control. The Arkansas Supreme

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170. *Id.* ("Forfeiture of the interest of a purchaser in the property for failure to pay monies due under the contract may be enforced only after expiration of the following periods after the date such monies were due: 1. If there has been paid less than twenty per cent of the purchase price, thirty days. 2. If there has been paid twenty per cent, or more, but less than thirty per cent of the purchase price, sixty days. 3. If there has been paid thirty per cent, or more, but less than fifty per cent of the purchase price, one hundred and twenty days. 4. If there has been paid fifty per cent, or more, of the purchase price, nine months.").

171. *See id.* § 33-742(C).

172. *Id.*

173. *See infra* notes 175–182.

174. *See* ARIZ. REV. STAT. ANN. § 33-742(C).

175. 389 P.2d 702 (Ariz. 1964).

176. *Sturm*, 389 P.2d at 704–05.

177. *Id.* at 703–04.

178. *Id.* at 704.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

Court, in *Humke v. Taylor*,[183] reasoned that an automatic forfeiture violated principles of equity where the sellers accepted late payments over a period of six years despite the existence of a time is of the essence provision.[184]

This case is distinguishable from *Sturm* in that the Taylors accepted multiple late payments, while the Heims merely waited to exercise their right to repossess the property for over seven years. The supreme courts of each of these states have revealed the underlying policy considerations guiding these holdings. The Arizona Supreme Court justified its upholding the Sturms' forfeiture—despite the apparent injustice of doing so because they had paid over eighty percent of the purchase price—by concluding, "[t]his is not a case where equity is enforcing a forfeiture, but rather declining to relieve against one where no equitable grounds for relief exist."[185] The Arkansas Supreme Court, on the other hand, has opined, "[i]t is a well-known equitable principle that equity abhors a forfeiture and will seize upon slight circumstances that indicate a waiver in order to prevent forfeiture."[186]

C. Government Efforts To Challenge the Predatory Contract for Deed of Sale and Prospective Regulation

States and municipalities have taken varied approaches to addressing the predatory contracts for deed of sale that have emerged since the Great Recession.[187] This Part first discusses how municipalities and states have challenged big investment firms like Harbour in state court, arguing that the contract terms violated state law.[188] Next, it describes how states are targeting predatory contracts for deed of sale in particular through the legislative process.[189] In the interim, however, cities and municipalities are burdened with short-term action to provide actual recourse for home purchasers.[190] The City of Cincinnati's court victory against Harbour for their "predatory" contracts for deed of sale is an illuminating example.[191]

Lastly, this Part explains how, at a national level, the Consumer Financial Protection Bureau (CFPB) could ostensibly regulate these contracts under its authority to prevent unfair and deceptive practices in the consumer mortgage marketplace.[192] However, efforts have focused largely on specific firms, rather than the issue as a

183. 666 S.W.2d 394 (Ark. 1984).

184. *Humke*, 666 S.W.2d at 396.

185. *Sturm*, 389 P.2d at 705.

186. Triplett v. Davis, 385 S.W.2d 33, 34 (Ark. 1964).

187. *See supra* Part II.B.

188. *See, e.g.*, Cincinnati Complaint, *supra* note 79; Complaint, Commonwealth v. Harbour Portfolio Capital, LLC, No. GD-18-9176 (Pa. Ct. Com. Pl. July 18, 2018) [hereinafter Pennsylvania Complaint].

189. *See infra* Part II.C.2.

190. *See infra* Part II.C.1.

191. *See infra* Part II.C.1.

192. BATTLE, JR. ET AL., *supra* note 2, at 12.

whole.[193] Further, the Supreme Court ruled that the structure of the CFPB is unconstitutional, though it did not dismantle the bureau altogether.[194]

1. Challenges Under Existing State Law

In states that extend no additional protections to homebuyers that purchase homes under these contracts, the lack of regulation threatens to drain the resources not only of individuals but also of cities and municipalities that find themselves suing investment firms in court for unfair lending practices. The City of Cincinnati, for example, secured a low six-figure settlement against Harbour in 2018.[195] As part of the settlement, Harbour agreed not to enter any contracts for deed of sale within Cincinnati unless the city deemed the property "habitable," among other restrictions on its business dealings in the city.[196] The alleged illegal activity hinged on the uninhabitability of "nuisance properties" and misleading failure to disclose code violations to the potential buyers under state landlord-tenant laws, rather than a deed of sale-specific framework.[197]

In 2018, Pennsylvania's attorney general filed suit against Harbour on behalf of the state, alleging that, in addition to misrepresenting the condition of the homes, Harbour's "usurious" interest rates violated Pennsylvania mortgage law.[198] The next year, the court of common pleas granted partial judgment on the pleadings, finding that the contract for deed of sale's 9.9% interest rate exceeded that state's maximum allowable interest rate on mortgages.[199] These cases are instructive in how municipalities may curtail predatory sales practices by individual entities under state consumer protection laws but do not address the underlying problem of private equity-backed institutions intentionally entering into contracts with significantly more information and bargaining power than individual homebuyers who, for the most part, lack access to credit.

2. State Law Targeting Predatory Contracts for Deed of Sale

Ohio State Representative Michele Lepore-Hagan introduced a bill that would make these contracts more consumer friendly, force sellers to correct outstanding code violations, and require sellers to pay fines for failure to meet municipal codes, but it languished in committee and was never passed.[200] Meanwhile, places like Cincinnati and the Commonwealth of Pennsylvania are left to their own devices, alleging code

193. *See, e.g.*, Consumer Fin. Prot. Bureau v. Harbour Portfolio Advisors, LLC, No. 16-14183, 2017 WL 631914, at *1 (E.D. Mich. Feb. 16, 2017).

194. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) ("We therefore hold that the structure of the CFPB violates the separation of powers.").

195. Settlement Agreement and Release at 1, City of Cincinnati v. Harbour Portfolio Advisors, LLC, No. A 1702044 (Ohio Ct. Com. Pl. Mar. 21, 2018).

196. *Id.* at 2–3.

197. *See* Leggate, *Cincinnati Sues Company*, *supra* note 95.

198. Pennsylvania Complaint, *supra* note 188, at 1. The complaint also alleged that the contracts themselves violated the state's installment land contract law provisions relating to, *inter alia*, notice, recovery for damages, and marketable title. *Id.* ¶ 1. No decision has yet been issued on these counts.

199. Order, Pennsylvania v. Harbour Portfolio Capital, LLC, No. GD 18-9176 (Pa. Ct. Com. Pl. Nov. 21, 2019).

200. *See* H.B. 368, 132nd Gen. Assemb., Reg. Sess. § 5313.021(D) (Ohio 2017).

violations, inadequate disclosures, or exorbitant interest rates under existing laws,[201] while the underlying process itself remains perfectly legal in each state.[202]

The outlook for lawmakers outside of Ohio pursuing such legislation is similarly discordant. Texas and Oklahoma, for example, protect deed contract buyers at a level equivalent to mortgagors.[203] Other states have implemented solutions such as focusing on minimum required contents of the contract,[204] requiring public title recording,[205] easing the process to convert installment contracts to mortgages,[206] or capping interest rates.[207] Such piecemeal regulation cannot fully alleviate consumer risk.[208]

3. At the Federal Level

In 2016, the CFPB, in the midst of an unforgiving *New York Times* series of investigatory articles relating to Harbour, opened an investigation into Harbour's contracts for deed of sale.[209] In the summer of 2020, the CFPB settled with Harbour, levying a total civil penalty of $35,000 against the firm and its agents for deceptive acts and practices in violation of the Consumer Financial Protection Act.[210] The CFPB based its findings on the fact that two agents of Harbour provided homebuyers with inaccurate or deceptive information regarding contracts for deed of sale terms, payments, and disputes.[211] The consent order did not address the contents of the contracts themselves, except to note that they constituted "credit" under the Consumer Financial Protection Act, granting the CFPB jurisdiction to investigate Harbour as a "covered person" under the Act.[212]

The penalty is lower than the cost of many individual homes that Harbour sold using contracts for deed of sale,[213] and the terms of the settlement requiring its agents to bring themselves into compliance with the Consumer Financial Protection Act or face further penalties are temporary, expiring after five years.[214] As with state and city efforts to protect homebuyers against predatory contracts for deed of sale, the CFPB enforcement

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201. *See supra* Part II.C.1.

202. *See* OHIO REV. CODE ANN. §§ 5301.01–.99 (West 2020); 68 PA. STAT. AND CONS. STAT. ANN. §§ 901–11 (West 2020).

203. *See supra* Part II.B.1.

204. *See, e.g.*, ME. REV. STAT. ANN. tit. 33, § 482 (2019); N.C. GEN. STAT. ANN. § 47H-2 (West 2020).

205. *See, e.g.*, IOWA CODE ANN. § 558.46 (West 2020); ME. REV. STAT. ANN. tit. 33, § 482; N.C. GEN. STAT. ANN. § 47H-2.

206. *See, e.g.*, MD. CODE ANN., REAL PROP. § 10-105(a) (West 2020).

207. *See, e.g.*, MINN. STAT. ANN. § 47.20 subdiv. 4a (West 2020).

208. BATTLE, JR. ET AL., *supra* note 2, at 9.

209. Matthew Goldstein & Alexandra Stevenson, *Consumer Agency Sues for Files on Home Installment Contracts*, N.Y. TIMES (Dec. 2, 2016), http://www.nytimes.com/2016/12/02/business/dealbook/consumer-agency-sues-for-files-on-home-installment-contracts.html [https://perma.cc/BA9C-BJ35].

210. *See* Consent Order ¶¶ 35–36, Harbour Portfolio Advisors, LLC, CFPB No. 2020-BCFP-0004 (June 19, 2020).

211. *Id.* ¶¶ 10–20.

212. *Id.* ¶ 4.

213. *See, e.g.*, Pennsylvania Complaint, *supra* note 188, ¶ 30.

214. Consent Order, *supra* note 210, ¶ 65.

action targeted a single firm.[215] Its findings related to Harbour's agents' misrepresentations to purchasers rather than Harbour's predatory actions or contracts.[216]

The CFPB faces a rocky road to implementing any sort of nationwide regulatory action aimed at predatory contracts for deed of sale. In 2020, the Supreme Court held that the structure of the CFPB was unconstitutional.[217] The CFPB director, who had sweeping executive powers, could not be removed from office without cause, violating the separation of powers doctrine by interfering with executive authority.[218]

Notwithstanding the CFPB's constitutionality, the Residential Rent to Own Protection Act, which would explicitly grant the CFPB the authority to regulate land contracts, is unlikely to pass.[219] The bill, which was introduced by Senators Jeff Merkley (D-OR) and Tina Smith (D-MN), would provide consumer protections by

> [e]stablishing minimum habitability and safety standards for residential rent-to-own contracts by requiring sellers to ensure homes meet state or local rental habitability requirements; [p]rotecting tenants from arbitrary evictions; [a]llowing tenants to seek damages should the landlord violate the contract; [c]reating an exemption for non-profit organizations that offer residential rent-to-own contracts with wrap around housing counseling services; [d]irecting the Consumer Financial Protection Bureau to regulate residential rent-to-own contracts; and [d]irecting the Government Accountability Office to study the market conditions, prevalence, and outcomes of residential rent-to-own contracts.[220]

The CFPB may have grounds for asserting control over these contracts under existing regulation. The CFPB recognizes contracts for deed of sale as "mortgages,"[221] and has the power to regulate "mortgage loans that the Bureau finds to be unfair, deceptive, or designed to evade the provisions of this section" and the "refinancing of mortgage loans that the Bureau finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower."[222] However, the CFPB's investigation into Harbour hinged on its agents' misrepresentations to customers regarding the terms of the contracts and disputes, making no finding relating to the contracts themselves.[223] Whether the CFPB will assert such control in the aftermath of the Court's decision regarding its constitutionality remains to be seen.

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215. *See id.*; *see also* Pennsylvania Complaint, *supra* note 188; Cincinnati Complaint, *supra* note 79.

216. Consent Order, *supra* note 210, ¶¶ 10–20.

217. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) ("We therefore hold that the structure of the CFPB violates the separation of powers.").

218. *Id.*; *see also* Alison Frankel, *CFPB Just Told SCOTUS It's Unconstitutional. What Does That Mean for Its Mission?*, REUTERS (Sept. 18, 2019, 5:00 PM), http://www.reuters.com/article/us-cfpb-standing-lawsuit/cfpb-just-told-scotus-its-unconstitutional-what-does-that-mean-for-its-mission-idUSKBN1W32UJ [https://perma.cc/69LN-4JGR].

219. *See* Residential Rent to Own Protection Act, S. 571, 116th Cong. (2019).

220. Press Release, Jeff Merkley, U.S. Senator, Merkley, Smith Introduce Bill To Protect Rent-to-Own Tenants, (Feb. 26, 2019), http://www.merkley.senate.gov/news/press-releases/merkley-smith-introduce-bill-to-protect-rent-to-own-tenants [https://perma.cc/SQU5-SSSU].

221. *See* 12 C.F.R. § 1026.2(a)(24) (2020) (defining "[r]esidential mortgage transaction").

222. 15 U.S.C. § 1639(p)(2)(A)–(B) (2018).

223. *See supra* notes 209–216 and accompanying text.

III. DISCUSSION

Contracts for deed of sale render low-income or unsophisticated homebuyers vulnerable to eviction and forfeiture as a result of seller nondisclosure, hidden or understated real costs, and a lack of traditional protections.[224] However, they are often the only accessible route to homeownership among populations that lack access to credit, particularly low-income people of color who were legally excluded from the traditional mortgage market well into the twentieth century.[225] Any judicial imposition on the right to freely enter into a contract must recognize this reality or risk perpetuating racial disparities in home ownership.

Notwithstanding the presence of statutory regulation, judicial treatment of contracts for deed of sale turns on forfeiture clauses, waiver of the right to prompt payment, and notice requirements.[226] Courts have relied on principles of equity to allow purchasers a grace period to realize payment,[227] but the factual circumstances of such cases are distinguishable from situations in which low-income homebuyers purchase real estate from large investment firms using contracts for deed of sale. The latter category of homebuyer is unlikely to breach the contract for nonpayment except for in cases when they truly cannot pay, so the principles of equity relied on by past courts would not apply.[228] Any regulation targeting either the formation or the enforcement of these contracts should rely on a policy of protecting individual parties from predatory targeting, selling, and enforcement practices.

This Section argues that regulation must target specific predatory practices that institutional sellers have used to exploit homebuyers under contracts for deed of sale, such as required disclosures and appraisal, maximum interest rates, and obfuscation and unfair dealings with purchasers.[229] It further argues that the courts should recognize the unconscionability of predatory contracts for deed of sale and legislatures must restrict the seller's right to enforce forfeiture clauses to protect vulnerable purchasers from homelessness.[230]

A. *Regulation Should Target Specific Contracts for Deed of Sale Terms*

Without sweeping federal action, contracts for deed of sale will remain a feature of homeownership in at least some states, given existing trends in state regulation.

224. *See supra* Part II.A.

225. See *supra* notes 19–31 for a discussion of racist housing policies during the 1950s and 1960s.

226. *See supra* Part II.B.

227. See *supra* Part II.B for a discussion on the statutory protections states provide homeowners who enter into contracts for deed of sale.

228. *Compare, e.g.*, Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45 (explaining that "some investment firms aim at residents who do not have the financial ability to comply" with their payment obligations under contracts for deed of sale (quoting city housing administrator Duane Groeger) (internal quotation mark omitted)), *with* Cozzetti v. Madrid, No. S-15117, 2017 WL 6395736, at *6 (Alaska Dec. 13, 2017) ("Enforcing the forfeiture would deprive [the purchaser] of his equity in the home; in contrast permitting him to pay the remaining balance has the virtue of putting the parties in the positions they bargained for at the outset.").

229. *See infra* Part III.A.

230. *See infra* Part III.B.

However, the challenges presented to purchasers are untenable.[231] The publicity surrounding these types of sales are drawing more attention to the unfavorable terms for purchasers and the sellers' unfair advantage of retaining all nonpossessory property rights.[232]

The lack of purchaser protection under traditional mortgage laws and the terms that make purchasers responsible for insurance, upkeep, and tax payments work hand-in-hand to ensure that purchasers expend money and labor to improve and maintain the homes while sellers retain ownership of the entire output of that expenditure.[233] Investment firms selling homes under these contracts have institutional backing to increase the perception of legitimacy.[234] The perception provides additional power over individual, private homeowners who, in the case of predatory contracts for deed of sale, have limited resources with which to gain knowledge of property law requirements.[235] When sellers mislead consumers about the habitability of the home, the latter only has recourse as provided by statute or at the discretion of the judiciary.[236] States should require that sellers under contracts for deed of sale disclose known defects.

During the Great Recession, private equity-backed firms were able to purchase cheap foreclosed homes in bulk and sell them under contracts for deed of sale at an incredible markup.[237] These firms targeted low-income individuals in the housing market and offered homes with relatively affordable, nominal prices.[238] However, these sticker prices exceeded the real value of the property, concealed hidden costs of upkeep, and did not always reflect any existing taxes or liens owed on the property.[239] Purchasers accepted the firms' prices, often with little negotiation, because they did not know the actual value of the home.[240] Requiring an independent appraisal for residential land conveyances—such as the contract for deed of sale—and disclosure of any taxes owed or liens on the property is necessary to protect unsophisticated or inexperienced homebuyers from signing contracts against their own interests.[241]

There is little oversight into the formation of contracts for deed of sale, which are often entered into by predatory institutional sellers and low-income purchasers who lack the sophistication of traditional mortgage lenders.[242] The resulting unequal bargaining power means that the terms are, of course, highly favorable to the homeowners rather

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231. See *supra* Part II.A for a discussion of these contracts and the consequences their various characteristics have on home purchasers.

232. *See, e.g.*, Goldstein & Stevenson, *Cincinnati Sues, supra* note 35; Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45; Stevenson & Goldstein, *Wall Street Veterans supra* note 3.

233. *See supra* Part II.A.

234. *See* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

235. See *supra* Section II for an overview of how these contracts proliferated in the aftermath of the Great Recession.

236. *See supra* Part II.B.

237. *See supra* Part II.A.1.

238. BATTLE, JR. ET AL., *supra* note 2, at 4, 8.

239. *See id.* at 8.

240. *Id.*

241. *See* Myslajek, *supra* note 19.

242. *See supra* Part II.A.

than to the residents who hope (often futilely) to eventually hold the title in the future.[243] Pennsylvania has already ruled that interest rates double the national average are usurious.[244] As such, it and other states should codify maximum allowable interest rates on contracts for deed of sale, as they do for mortgages.

While terms written by and favorable to institutional sellers may not be unenforceable in and of themselves—indeed, several courts have confirmed that these are standard contracts, ostensibly freely entered *sans* coercive pressure in the legal sense[245]—the sheer volume of challenged contracts gives rise to the inference of unfair practices.[246]

Possible scenarios are numerous. The owner may sell the house and the contract to another owner without ever informing the resident.[247] The owner may fall behind on its mortgage payments and face foreclosure, which generally means automatic eviction for the resident with no recourse.[248] Remedying some of the allowances given to the property owners in these situations could go a long way to ensuring that the contract for deed of sale moves forward as a tool for people and institutions with low to no credit to improve their capital structures through sensible loans.[249] The contract for deed of sale is not inherently exploitative; rather, the circumstances under which institutions and individuals enter into them incentivize predatory business practices on the part of the former group.[250] Firms that prioritize profits over individuals' basic need for housing will always choose to remove people from their residencies at a high volume as soon as legally possible.[251] The firms behave as rational economic actors given their priorities, because it is more profitable to the firms to extract all of the contract value than to find solutions that distribute utility among all parties involved.[252]

Successful contracts for deed of sale have allowed generations of peri-urban settlement along the Texas-Mexico border where the traditional banking system has no foothold.[253] They have accommodated homeownership in neighborhoods where it is more common to have poor or no credit, making it difficult for residents to secure a mortgage.[254] However, activists emphasize that the housing landscape in colonias is borne out of necessity rather than choice: it is "the market that is available for individuals

243. *See supra* Part II.A.2.

244. *See supra* notes 198–199 and accompanying text.

245. *See supra* note 11.

246. See *supra* Section II for an overview of the scale of the contract issue. Indeed, even in states that do not have protective statutes that recognize contracts for deed of sale as standard contracts, courts look to extrinsic contract law theories of inequity, unconscionability, and waiver to render contracts unenforceable when enforcement would clearly result in injustice against the spirit of state contract law. See *supra* Parts II.B and II.C for further discussion of how courts have ruled in cases involving residents' forced forfeiture of land under contracts for deed of sale for nonpayment.

247. *See supra* notes 103–109 and accompanying text.

248. *See supra* notes 103–109 and accompanying text.

249. See *supra* notes 112–116 for representative efforts to use the contract for deed of sale as a tool to improve individual consumers' credit to a point where they can transition to traditional mortgages.

250. *See* Goldstein & Stevenson, *Cincinnati Sues*, *supra* note 35.

251. See *supra* Section II.

252. *See supra* Section II.

253. *See* Way, *supra* note 37, at 130–31, 134–35.

254. *See id.*

who cannot access the ordinary housing market."[255] The goal of reform should not be "to fix individual issues but to point to larger systemic problems . . . and to demand from the counties to be more accountable and provide services to colonias."[256] One such service could be to provide legal support for buyers under contracts for deed of sale, which would protect the investments in their land and homes.

While contracts for deed of sale in colonias or other settlements may not have been predatory per se at their formation, they became common because of unaffordable housing in other areas.[257] Housing is unaffordable in other areas partially because of the legacy of racist housing practices and exploitative contracts for deed of sale with institutional sellers.[258] A legal regime that would enforce contracts for deed of sale as mortgages would mitigate the unaffordability of housing, unequal access to housing, and the need for contracts for deed of sale both in urban and peri-urban or rural areas.

Additionally, the colonia communities that have had the most positive outcomes are among the most exploited in the United States overall, including undocumented residents. Providing mortgage-like protections to parties in contracts for deed of sale would allow vulnerable communities to enter into contracts that could result in home ownership, while providing a legal remedy against immediate eviction should a breach occur.

B. States Should Refuse To Honor Predatory Contracts for Deed of Sale

Current judicial treatment of contracts for deed of sale turns on forfeiture clauses, waiver of right to prompt payment, and notice requirements.[259] These considerations are useful when regulating purchases in which nonpayment was caused by factors other than the purchasers' inability to pay, such as in the cases of the Kirks, who had an insurance dispute and subsequently abandoned the property;[260] the Sturms, who sought confirmation of what land they were purchasing;[261] and the Humkes, who paid late over the course of several years but were still consistently able to provide payment.[262] The type of low-income purchaser targeted by Harbour does not fit this profile.[263] In fact, they were targeted precisely because Harbour bet on their total inability to pay at a certain point.[264]

A legislative solution that would require eviction or forfeiture to follow mortgage laws would improve residents' likelihood of procuring the funds to remedy the nonpayment. The added time and expense of multiple foreclosure proceedings would make mass purchases and evictions less profitable and therefore less attractive to predatory investment firms.

255. Strickland, *supra* note 122.

256. *Id.* (omission in original) (quoting Josue Ramirez of Texas Low-Income Housing Services).

257. *See supra* Part II.A.3.

258. *See* ROTHSTEIN, *supra* note 6, at 95–96.

259. *See supra* Part II.B.

260. McGinnity v. Kirk, 362 P.3d 186, 196 (Okla. 2015); *see also supra* notes 142–157.

261. Sturm v. Heim, 389 P.2d 702, 704 (Ariz. 1964); *see also supra* notes 175–182.

262. Humke v. Taylor, 666 S.W.2d 394, 395 (Ark. 1984); *see also supra* notes 183–184.

263. *See* Goldstein & Stevenson, *Cincinnati Sues*, *supra* note 35.

264. *See id.*

The type of equitable nonenforcement underlying previous court decisions on forfeiture clauses is usually paired with contracts for deed of sale involving private parties.[265] Such protective levers are less relevant to instances in which an individual low-income homebuyer purchases a house using a contract for deed of sale from a large investment firm, because homebuyers are unlikely to breach contracts for nonpayment except for in cases when they truly cannot pay.[266]

Waivers, too, tend to be less relevant in cases involving sellers like Harbour who are unlikely to accept late payment.[267] Their entire business model hinges on waiting for nonpayment and then removing the resident as quickly as possible, in order to begin the process again.[268] Even in states that regulate contracts for deed of sale, such as Alabama, waivers by the seller are only found to exist where the purchaser can show that she is "ready, willing and able to pay, and offers the balance of the purchase price, with interest."[269]

Where notice requirements exist, they at the very least give the purchaser more time to procure funds for payment and therefore may be more useful to investment firms than equitable nonenforcement of forfeiture clauses or equitable findings of seller waiver.[270] Rather than forcing the resident to challenge an established decision—that is, forcing low-income home purchasers to take investment firms to court while facing removal from their residences—a notice requirement could warn a resident of impending removal and give her time to possibly bring herself into compliance with the contract or find alternative residence prior to being evicted.

Many statutes, too, seem to have been designed with a presumptively fair contract in mind. The Texas statute granting mortgage protections where the contract for deed of sale has been recorded is not very helpful to low-income buyers because predatory sellers have no incentive to record, and low-income purchasers often lack the knowledge or expertise to do so.[271]

Courts should recognize that purchasers under contracts for deed of sale generally lack other options to purchase their homes. This Part puts forth two arguments: the resultant contract terms are unreasonably favorable to institutional sellers, and therefore the contracts meet the doctrinal definition of unconscionability.[272] Moreover, in enforcing contracts for deed of sale, legislatures should guarantee that sellers cannot evict purchasers in the event of their nonpayment without a formal foreclosure process.[273]

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265. See *supra* Part II.B.2 for an examination of how courts use equitable nonenforcement for forfeiture clauses to protect private purchasers.

266. *See* Goldstein & Stevenson, *Market for Fixer-Uppers*, *supra* note 45.

267. *But see id.* (providing examples both of an instance in which forfeiture occurred due to late payments and an instance in which Harbour provided the buyer with a grace period to make up missed payments).

268. BATTLE, JR. ET AL., *supra* note 2, at 2.

269. Gay v. Tompkins, 385 So. 2d 973, 981 (Ala. 1980).

270. *See supra* Part II.B.2.

271. See *supra* Part II.B.1 for a detailed discussion of Texas's notice requirements.

272. *See infra* Part III.B.1.

273. *See infra* Part III.B.2.

1. Courts Should Presume that Contracts for Deed of Sale are Unconscionable

Several state courts have found that forfeiture clauses and waivers are enforceable under certain circumstances.[274] They have relied primarily on principles of equity and are unlikely to rule against forfeiture where a purchaser has defaulted and remains unlikely to pay in the future, as is the case in contracts that are the subject of this discussion.[275] Courts wary of incentivizing this type of institutional behavior should look not only to the content of the contract but to the circumstances of its formation.

Examination of the unequal bargaining power between the parties, and the potentially bad faith conduct in targeting individuals with the intent that they become unable to uphold their end of the bargain, would allow courts to differentiate between predatory and nonpredatory contracts for deed of sale. Homebuyers could proffer evidence demonstrating their lack of alternative home purchase financing. The majority of contracts for deed of sale are the result of unequal bargaining power, particularly where homebuyers lack other options for financing, and are thus unconscionable.[276] Placing the burden on the seller—as opposed to the purchaser—to prove that the terms, such as interest rates, are fair would incentivize institutional sellers to offer terms that are less potentially ruinous to low-income buyers with poor credit.

However, determinations of unconscionability are case specific; even apparently lopsided contracts may be valid. In such cases, it is the role of the legislature to protect its most vulnerable constituents from housing insecurity.

2. States Should Protect Homebuyers from Immediate Forfeiture upon Nonpayment

Statutes such as Oklahoma's provide predictability and a framework under which all resident removals from the property must occur.[277] Such safeguards would have prevented many forfeitures of investment firm-owned properties by resident buyers in other states that have no procedural safeguards in place. Providing mortgage-level protections to all home purchasers would serve the objective of protecting possessory interests in one's actual residence, a goal aligned with government policy, as evidenced by the existence of an extensive body of state and federal law governing home ownership and transfer.

There is a reason why contracts for deed of sale are not regulated as mortgages: no extension of credit is involved, so the seller's only security is that she retains title.[278] However, the predatory behavior of Harbour and other investment firms is not the type that consumer statutes are designed to protect, and low-income, often uninformed purchasers under installment contracts are the ones who should be afforded protection by the government.

274. *See supra* note 127.

275. *See supra* Part II.B.

276. *See* BATTLE, JR. ET AL., *supra* note 2, at 8.

277. *See supra* Part II.B.1.

278. *See supra* Section I.

Additionally, it is unlikely that regulating these contracts as de facto mortgages would disincentivize their use in informal settings such as colonias.[279] In these areas, lack of access to credit has been a barrier to obtaining mortgages, so contracts for deed of sale are a necessity, rather than a choice.[280] Sellers do not retain title to the land because they prefer to secure the transaction themselves and retain the right to retake possession immediately (subject to local law); they do it because there is no independent credit infrastructure where they live.[281]

It is true that the process of enforcing a contract for deed of sale as a mortgage could draw unwanted scrutiny where one of the parties is an undocumented resident of the United States. This status could understandably discourage that party from pursuing the enforcement of its rights on either the seller or purchaser side. However, the same logic already applies when enforcing contracts for deed of sale as is: undocumented sellers and purchasers use contracts for deed of sale for ease of *entrance* into the housing market, but must still seek remedy for injury in the courts.[282] Enforcing contracts for deed of sale as de facto mortgages likely would not confer additional benefits to purchasers in colonias as it would in areas where such contracts are nearly uniformly predatory. However, it does not reduce their usefulness among the vulnerable undocumented population, either, whose choice whether to utilize or avoid the court system is unlikely to depend on how contracts for deed of sale are enforced.

A more conservative approach is based in the belief that the ultimate source of purchasers' difficulties is the fact that, because they have no equity in the home, they can be forced to vacate and forfeit any payments already made.[283] Arizona's law requiring incremental notice and cure periods tied to the amount the purchaser has already paid provides a middle ground between providing equity by payment—as a mortgage does—and protecting a seller who has not been paid in full, as a (fair) contract for deed of sale would do.[284] An individual seller who enters into a contract for deed of sale in good faith does so with the expectation that, over the executory period, she will reap the benefits of prompt payment in the expected amount.[285] Therefore, notice periods will not disincentivize such sellers except on the margins.[286] Mandatory notice and cure periods fundamentally disrupt the business model of predatory contract for deed of sale vendors through compulsory cure periods during which they will extract no profit.[287] Although no law would be able to completely halt predatory sales practices, the lowered profits make the entire enterprise far less attractive to a profit-maximizing entity.[288]

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279. See *supra* Part II.A.3 for an examination of why contracts for deed of sale are popular and widespread in low-income communities.

280. *See supra* Part II.A.3.

281. *See supra* Part II.A.3.

282. *See* Way, *supra* note 37, at 130–31.

283. *See supra* Part II.A.2.

284. *See supra* Part II.B.2.

285. *See supra* Part II.B.

286. *See supra* Part II.B.

287. *See supra* Part II.B.

288. *Cf.* BATTLE, JR. ET AL., *supra* note 2, at 1–2 (explaining how the nature of contracts for deed of sale incentivize abusive profit-maximizing practices).

IV. CONCLUSION

Contracts for deed of sale have a racist legacy. They began as a tool to circumvent racist exclusion from credit markets and evolved into a method to perpetuate predatory practices against low-income and mostly minority homebuyers. The prospect of federal regulation of contracts for deed of sale is distant, leaving states and municipalities to contend with predatory investment firms. State courts have issued enforceability decisions on both sides using case-by-case analysis, but they should recognize that oftentimes these contracts are unconscionable and therefore void. To protect the vulnerable people targeted by predatory institutional sellers, state legislatures should place parameters around acceptable terms for land conveyances such as contracts for deed of sale and formalize the forfeiture process. Uniformly enforcing forfeiture for breach of contracts for deed of sale as if they were mortgages would disincentivize widespread predation while providing necessary protection to individuals, families, and other groups sharing homes from the very real danger of housing insecurity.