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BEWARE THE DOTTED LINE: FORECLOSURE RESCUE FRAUD IN MARYLAND AND THE GROWING EFFORT TO COMBAT IT

I. INTRODUCTION

If you are reading this, chances are that freedom of contract is a principle that plays a central role in your life.

There is a very basic reason for this. You are a practitioner of the law. To contract one must communicate, and for that one needs language. Human language, in all its flexibility and pliability, is what makes it possible for our contractual relationships to manifest the same balance between determinacy and adaptability that our ever-changing circumstances exhibit. This mutability is also what makes lawyers essential to any free society. To paraphrase Reinhold Niebuhr, interpretation of words makes advocacy possible, and its potential for abuse makes advocacy necessary.¹

Those who would abuse freedom of contract, it stands to reason, seek out situations where an imbalance of the ability to use this freedom can work to their advantage.² So it is with the growing phenomenon known generally as foreclosure rescue fraud (FRF).³

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1. Reinhold Niebuhr, a theologian by training, was one of the twentieth century's leading political thinkers. Arthur Schlesinger, Jr., *Reinhold Niebuhr's Role in American Political Thought and Life*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT 125 (Charles W. Kegley & Robert W. Bretail eds., 1956). In a book Niebuhr wrote against the backdrop of both communism and fascism, *id.* at 137, 139, 145, he penned the line, "[m]an's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary." REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* xi (1944).
 2. 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.4, at 393 (rev. ed. 2002).
 3. MARYLAND CONSUMER RIGHTS COALITION, PROTECTING HOMEOWNERSHIP: THE CHALLENGE OF PREVENTING ABUSIVE LENDING AND FORECLOSURE PRACTICES 22 (2006) [hereinafter PROTECTING HOMEOWNERSHIP]. Foreclosure Rescue Fraud (FRF) refers to a variety of scams that target homeowners facing foreclosure. The foreclosure consultant convinces the homeowner that he can help the homeowner rescue the home from foreclosure. There are several variations of FRF. For example, the foreclosure consultant may induce the homeowner to sign confusing paperwork that enables the scammer to drain the equity from the house or to transfer ownership of the property and may evict the unsuspecting homeowner. *Id.*

While FRF takes several different forms⁴ and, like any genuinely malignant thing, tends to mutate in response to changing conditions,⁵ an example at this point should be helpful.

Consider the hypothetical situation of Linda. She is forty-five years old and owns a two-bedroom house in a lower-middle-class community. She has been divorced for the past seven years; her two children are both in their early twenties, and independent. Three years ago, Linda was diagnosed with breast cancer. A secretary by trade and training, she had to leave her job for a part-time position that was more compatible with the demands of her chemotherapy schedule.

Fortunately for Linda, her cancer has gone into remission. Her financial health, however, has taken a turn for the worse. Her weakened physical state has made full-time employment an unrealistic option and her current employer's health insurance package requires hefty co-payments. Having drained the relatively small amount of money she had saved, Linda finds that she is essentially insolvent. Unless she chooses not to eat, her regular income simply does not equal her monthly expenses.

As a result, she has fallen several months behind in her mortgage payments. Feeling that she has little hope of bringing her mortgage current anytime soon, Linda has not contacted her lender. What would she tell them—that she cannot afford her bills? She figures they already know that.⁶ Having neither heard nor received payment from Linda in several months, her lender decides to foreclose on her home.

On October 10th, Linda receives a notice in the mail from her lender informing her that her home will be auctioned off at a foreclosure sale on October 20th.⁷ Needless to say, this comes as a

4. STEVE TRIPOLI & ELIZABETH RENUART, NAT'L CONSUMER LAW CTR., DREAMS FORECLOSED: THE RAMPANT THEFT OF AMERICANS' HOMES THROUGH EQUITY-STRIPPING FORECLOSURE "RESCUE" SCAMS 8 (2005). See *infra* Part II.D. for an in-depth discussion of the three basic types of FRF.

5. TRIPOLI & RENUART, *supra* note 4, at 9.

6. A mistake that many homeowners in distress make is not contacting their lender as soon as it becomes apparent that they are going to fall behind on their payments. Reputable lenders are often willing to work with such mortgagors in fashioning solutions to cash flow problems. For example, some lenders will extend the term of a mortgage, thus lowering the monthly payments. Such steps are often less expensive for the lender than the foreclosure process is. Ellen Simon, Assoc. Press, *Allies Against Foreclosure*, STAR LEDGER (Newark, NJ), Apr. 6, 2007, at 23.

7. See *infra* Part II.E for a description of foreclosure procedures in Maryland. Section 7-105(a-1)(3)(i) of the Maryland Real Property Code made this procedure marginally less onerous by requiring lenders to inform distressed borrowers within two days of

rude shock. While she knew she was behind on her payments, Linda had hoped that if she could scrape together at least a partial payment over the next month or so, she might at least buy herself some time. In any event, she had not received any notice from a court of law that the foreclosure process had even begun. Unbeknownst to her, Maryland law does not mandate that a homeowner be informed by the court of record that a foreclosure petition has been filed.⁸

In fact, a few days before Linda received the bad news in the mail, Jim, an ethically deficient entrepreneur (EDE), had already learned of her plight.⁹ He did not learn of it by accident. One way that EDEs find potential prey is by scanning public records for homes that are in foreclosure. Upon seeing Linda's property among those slated for the "chopping block," Jim immediately highlighted it as a likely target. Linda's home is in an area with a relatively stable population. This indicates to Jim that there is a good chance Linda has built up a significant amount of equity in her home.¹⁰

Equity is the difference between what a homeowner owes on her house and the house's fair market value.¹¹ Linda bought her home fifteen years ago with her then-husband. The home cost them \$100,000. After a down payment of \$10,000, Linda and her husband took out a loan for the remaining \$90,000. Today, the home is in Linda's name pursuant to her divorce, and only \$15,000 remains to be paid on her mortgage. The fair-market value of her house has risen from \$100,000 fifteen years ago to \$190,000 today.

Therefore, although Linda is cash poor, she has \$175,000 in equity in her home. This is what Jim is going to target. Figuring that Linda will learn of the scheduled foreclosure sale about ten days before it is to take place,¹² Jim decides to approach her in person on October 11th, nine days before the sale is slated to occur. He picks this date for several reasons.

filing a petition for foreclosure with the circuit court in which the property at issue is located. *See* MD. CODE ANN., REAL PROP. § 7-105(a-1)(3)(i) (LexisNexis 2003 & Supp. 2006); *see also infra* Part III. In practice, this would alter Linda's scenario by giving her sixteen, rather than ten days notice.

8. *See infra* Part II.E.

9. Present writer will, for the most part, refer to those who practice FRF as ethically deficient entrepreneurs (EDEs).

10. For a more comprehensive account of the role equity plays in FRF, *see infra* Part II.B.

11. BLACK'S LAW DICTIONARY 580 (8th ed. 2004).

12. REAL PROP. § 7-105(b)(2)(ii). The statute states "[t]he notice [of foreclosure sale] shall state the time, place, and terms of the sale and shall be sent not earlier than 30 days and not later than 10 days before the date of sale." *Id.*

First, he is reasonably certain Linda will have received the foreclosure sale notice by then. This is crucial to him, because he wants Linda to be truly desperate when he approaches her. Second, Jim does not want to wait too long before making his initial move. He knows that the number of EDEs operating on a regular basis in Maryland has reached the triple digits and appears to be growing.¹³ Finally, Jim likes contacting potential marks about nine days before a scheduled foreclosure sale because the short time window works to his advantage.¹⁴

When Linda answers the knock on her door, she sees a man who appears clean-cut, well-dressed in a business suit, and possessing an empathetic manner. Jim informs her that he owns a small firm that specializes in helping homeowners who are in precisely her situation. He tells Linda that his friend who works for the local circuit court helped put him in touch with her. Linda is neither stupid nor naïve, but she is terrified at the prospect of losing her home. Simply hearing that there is hope that this might not happen elevates her mood, and she invites Jim into her house.

Jim initiates a discussion of Linda's general financial situation, but what he really wants to know is how much equity she has in the house. When he learns that Linda does in fact have quite a bit of equity in the home, he knows she is just the sort of target he likes. He has her fill out an application that he fully intends to throw out once he gets back to his office. The point of this step is to delay the process for a few days. If Jim can convince Linda that it will take, say, four days to determine whether his firm can help her, then time will truly be on his side when the time comes to get Linda's signature on some documents he plans to present to her. The greater the stress she is under, the lesser the chance she will examine or even read them before signing.

Linda is very relieved when Jim calls to tell her that he can help her. She agrees to meet him the following day at his office. It is now October 16th, four days before Linda is due to lose her home. While Jim's tone still seems to reflect concern about Linda's situation, he exudes a greater sense of urgency than he did during their initial meeting.

The first thing Jim tells Linda is that time is absolutely of the essence. He is willing to help, but the firm's resources are limited. If

13. Interview with Mike Morin, Attorney, in Severn, Maryland (Nov. 27, 2006) [hereinafter Morin Interview]. In fact, as Morin points out, the FRF scam has become sufficiently popular in Maryland that some EDEs are actively teaching it to others. *Id.*

14. See PROTECTING HOMEOWNERSHIP, *supra* note 3, at 20–21.

Linda does not act quickly, there are two other homeowners in similar situations who could take Linda's place. Jim explains that Linda will sign a quitclaim deed¹⁵ on the house over to his firm, New Beginnings, Inc. (NB). Using his firm's solid credit history, he will obtain a loan that will enable Linda to bring her mortgage current and thereby avoid foreclosure. While the home will "technically," as Jim puts it, be in NB's name, Linda will remain in the home and continue to make monthly mortgage payments.

As Jim explains this to Linda, he flips through a large stack of documents he has placed in front of her. Most of the documents contain terms that are entirely superfluous and worded in a deliberately confusing way.¹⁶ The bigger the stack, Jim knows, the less likely it is that Linda will take on the daunting challenge of actually reading it. Buried in the volume of verbiage which Linda affixes her signature is a clause stating that in order to repurchase her home from NB, she must pay the full amount remaining on her mortgage within nine months of the date that NB acquired the deed from her.

What Jim actually tells Linda is that she will pay NB an amount roughly equal to what she used to pay her original mortgage lender. This money will be applied to pay down her mortgage and will also count toward an eventual repurchase of her home. He will also stress to her that if she does not sign the relevant documents today, there might not be sufficient time to secure the loan necessary to bring her mortgage current. Feeling she has no real choice at this point, Linda signs where she is told.

For three months Linda is able to make her monthly payments to Jim, sometimes skipping meals in order to do so. Not surprisingly, though, she begins to fall behind in her payments. Five months after she signed away her home to NB, Linda learns that Jim, acting as NB's "agent,"¹⁷ has begun eviction proceedings against her.¹⁸ She

15. A quitclaim deed is a deed that "conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid." BLACK'S LAW DICTIONARY, *supra* note 11, at 446. In this situation, Linda gives up her claim of title to her home by signing the quitclaim deed. The quitclaim deed effectively conveys ownership of Linda's home to NB without any warranty that the title is valid. *See* 26A C.J.S. *Deeds* § 17 (2001).

16. *See* TRIPOLI & RENUART, *supra* note 4, at 10.

17. Agency is a "fiduciary relationship created . . . [where] one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions." BLACK'S LAW DICTIONARY, *supra* note 11, at 67. As NB's "agent" Jim is able to bring eviction proceedings on behalf of NB, the "principal." *See id.*

appears at her county's district court on the appointed date and attempts to inform the judge that she is not really renting the home but, rather, is in the process of repurchasing it. The judge responds that Maryland law limits a district court's jurisdiction to landlord-tenant disputes.¹⁹ Therefore, any issues involving ownership of Linda's home fall outside his court's jurisdiction.²⁰

After Jim presents the judge with a copy of Linda's lease and the judge quickly looks over the terms contained within it, the court sets an eviction date.²¹ Unable to redeem her "lease" before the eviction date, Linda is evicted from her home by a group of constables from the local sheriff's office.²² Had she been able to make her payments to Jim for the full nine months, he would have evicted her at that point. Once Linda agreed to accept his "help," her fate was sealed.

Jim sells the home for \$175,000. In the end, the only money he had to spend in order to gain title to Linda's home was the \$3,000 it took to bring her mortgage current. His profit thus comes to \$172,000.

As for Linda, she remains liable for the unpaid balance on her mortgage, which at this point is around \$13,500. NB took title to her house, but buried in the stack of documents she signed was a clause providing that the original mortgage would still be her responsibility.

This is one form that FRF has taken in Maryland and across the country.²³ While the exact scope of the problem remains unknown, attorneys general, enforcement officials, and lawyers representing

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18. Now that NB owns Linda's home, she is no longer a homeowner, but a tenant who can be evicted for failure to pay rent. See MD. CODE ANN., REAL PROP. § 8-401(a) (LexisNexis 2003 & Supp. 2006). NB, now Linda's landlord, begins eviction proceedings by filing a written complaint in the district court of the county where Linda's home is located. *Id.* § 8-301(b)(1). The district court then notifies Linda that the trial will be held five business days after the filing of NB's complaint. *Id.* § 8-401(b)(3).
 19. MD. CODE ANN., CTS. & JUD. PROC. § 4-401(4) (LexisNexis 2006).
 20. *Id.* § 4-402(b) ("Except as provided in § 4-401 . . . , the District Court does not have jurisdiction to decide the ownership of real property or of an interest in real property.").
 21. If Linda cannot pay the rent and late fees she owes, the court will order that possession of the premises be given to NB within four days after the trial. MD. CODE ANN., REAL PROP. § 8-401(c)(3) (LexisNexis 2003 & Supp. 2006).
 22. REAL PROP. § 8-402.1(b)(1) (LexisNexis 2003) ("If the court determines that the tenant breached the terms of the lease . . . the court shall . . . issue its warrant to the sheriff . . . commanding the tenant to deliver possession to the landlord . . .").
 23. TRIPOLI & RENUART, *supra* note 4, at 8-9. "The predominant foreclosure 'rescue' scams appear to come in three varieties": phantom help, bailout, and bait-and-switch. *Id.* Examples of these rescue scams have been reported in several states and the District of Columbia. *Id.*

injured parties all agree that the practice of FRF is widespread and growing.²⁴ In a June 2005 report, the National Consumer Law Center stated that nationwide “thousands upon thousands” of vulnerable homeowners had fallen victim to FRF.²⁵ According to Mike Morin, an attorney who has represented several victims of FRF, the problem is “rife” in Maryland, particularly in the Washington, D.C.-Baltimore corridor.²⁶ In fact, he states that the problem has become so common that there are “hobby con artists” perpetrating FRF in their spare time.²⁷

Advocates and government officials in Maryland echo Morin’s view.²⁸ It was reported that as of September 2006 there were more than 30,000 households delinquent on their mortgages.²⁹ Of course, not all of these people will end up in foreclosure.³⁰ However, it is highly likely that as middle-class incomes continue to stagnate and holders of sub-prime home loans encounter interest rate increases and balloon payments, many of them will in fact become prime targets for EDEs.³¹

The drive to put an end to FRF picked up momentum in May 2005 when Governor Ehrlich signed into law emergency legislation aimed squarely at EDEs and their fraudulent activities.³² The Maryland Protection of Homeowners in Foreclosure Act (PHFA)³³ is an essential first step in eventually, one hopes, wiping out FRF in Maryland. Before its enactment, the most skilled EDEs were able to strip distressed homeowners of their equity in ways that arguably were legal. For example, under the PHFA, Jim’s hypothetical swindling of Linda would be illegal, whereas before its passage he may well have been able to achieve a similar result using means that could have withstood judicial scrutiny.³⁴

24. *See id.* at 15.

25. *Id.* at 7.

26. Jamie Smith Hopkins, *State Warns of Foreclosure ‘Consultants,’* BALT. SUN, Sept. 26, 2006, at 1C.

27. *See id.*

28. *See id.*

29. *See id.*

30. *Id.*

31. *See id.*; *see also infra* Part II.C (discussing predatory lending).

32. DOYLE NIEMANN, *NEW PROTECTIONS FOR HOMEOWNERS IN FORECLOSURE 1* (n.d.).

33. MD. CODE ANN., REAL PROP. §§ 7-301 to -302, 7-305 to -308, 7-310 to -311, 7-314 to -315, 7-318 to -321 (LexisNexis Supp. 2006).

34. He might have done this by softening the repayment terms such that while a court would be unlikely to find them substantively unconscionable, Linda would still have been all but assured of eventually losing her home. *See* TRIPOLI & RENUART, *supra* note 4, at 45. He also could have inoculated himself against claims of procedural

An excellent first step, though, is just that—a first step. While the PHFA makes it much more difficult for EDEs to ply their pernicious trade without breaking the law, there are potential loopholes in the statute that should be closed.³⁵ Present writer will argue in this Comment that violation of PHFA should be a felony rather than a misdemeanor.³⁶ He will also argue that provisions in PHFA exempting several classes of professionals, including real estate and mortgage brokers, bankers, and attorneys, should be modified.³⁷ In addition, this Comment will recommend alteration of language in the PHFA that, as is, leaves open the possibility that lenders who, directly or indirectly, do business with EDEs may enjoy the legal protections afforded to bona fide purchasers (BFP) of real property.³⁸

This Comment is intended to be a resource for litigators and a primer for advocates, legislators, and government officials who seek to prevent FRF from happening in the first place. In furtherance of these goals, the Comment addresses the problem of FRF in Maryland from a number of perspectives. Section II describes the confluence of factors that has helped spawn the growing perpetration of FRF in recent years as well as the different forms the scam tends to take. Section III analyzes the newly created PHFA.³⁹ Section IV will examine what appear to be the most significant legal issues that litigators representing victims of FRF are likely to encounter. In Section V, present writer will recommend a series of steps aimed both at strengthening efforts to enforce the PHFA and, more importantly, preventing FRF from occurring in the first place.

unconscionability by cutting down on the number of documents he presented to Linda and containing within them the required disclosures. *Id.* His assertions, that someone at the court had alerted him to Linda's situation and that he needed Linda to sign the documents immediately so that he could take out a loan in order to bring her mortgage current were not necessary. *Id.* at 10. He could have gotten her to sign the deed without resorting to them. *Id.* at 11.

35. *See infra* Part III.

36. *See infra* Part V.B.

37. *See infra* Part V.A.

38. *See infra* Part V.C.

39. *See* NIEMANN, *supra* note 32, at 3.

II. THE CURRENT CONTEXT: CASH POOR BUT EQUITY RICH HOMEOWNERS AND THE PERILS OF CREATIVE FINANCING

A. *FRF: The Exploitation of Educational Deficiencies and Emotional Stressors*

People who possess the cleverness to exploit emerging circumstances but lack the character to harness this talent for aboveboard purposes prey upon those who, for any number of reasons, are unable to safeguard their own interests.

The victims of FRF come in all shapes and sizes, they are disproportionately poor and undereducated,⁴⁰ which reduces the chances that a potential victim will understand the stack of paperwork he is given by an EDE.⁴¹ EDEs target people who are in danger of losing their homes, often scanning public records for foreclosure notices, because potential victims are often at an emotional as well as an educational disadvantage.⁴² The stress attendant upon the prospect of imminent homelessness is not conducive to rigorous and thorough analysis of proffered contractual terms.⁴³

Any effort to combat FRF must ultimately reckon with the fact that the freedom to contract, without which our polity would be unrecognizable to us, necessarily entails the risk that certain parties will exploit superior analytical, tactical, and emotional resources at the expense of others.⁴⁴ Moving beyond the bringing of EDEs to penal and pecuniary justice and toward the prevention of FRF altogether will, in certain limited ways, require us to alter the process by which some types of real estate transactions are conducted in Maryland.⁴⁵

However, there is arguably a difference between one investor presciently selling a stock to a somewhat less astute party in a timely manner, and the sharp dealing that characterizes FRF. The latter

40. See TRIPOLI & RENUART, *supra* note 4, at 18.

41. See *id.* at 16.

42. This last point should not be taken to mean that present writer believes EDEs are, by and large, a well educated lot. The point is simply that any party who lacks formal schooling and intellectual confidence is at least reasonably likely to sign documents without fully understanding them and is by definition at an educational disadvantage.

43. TRIPOLI & RENUART, *supra* note 4, at 51–52.

44. PERILLO, *supra* note 2, at 393.

45. See *infra* Part V.C. The recommendations contained in Part V are designed not to burden Maryland's real estate community with onerous restrictions, but rather to provide a limited number of workable ideas that, if implemented, could greatly reduce the incidence of FRF in Maryland.

activity does little or nothing to advance economic growth in Maryland or any other state. Present writer strongly believes that the law can provide basic protection and recourse to vulnerable classes without spawning anything remotely resembling undue restriction upon market freedom.⁴⁶

B. *The Centrality of Home Equity*

EDEs feast on homeowners who are short on cash flow but rich in home equity.⁴⁷ As previously explained in the Linda/Jim hypothetical scenario, equity is the difference between the amount of any outstanding debt that is secured by a piece of real property and the fair-market value of that property.⁴⁸ Another illustration of equity might be helpful at this point.

Let us say that Joe bought a home fifteen years ago. He paid \$200,000 for it, \$20,000 of which constituted the down payment. To pay the remaining \$180,000, he took out a loan secured by a deed of trust.⁴⁹ Five years ago, he decided to take out a second mortgage (which, for our purposes, is synonymous with the term “deed of trust”) on his home in order to finance a venture he intended to launch.⁵⁰ How did Joe’s bank decide how much money it could safely loan him? It determined the equity he had built up in his home. First, his bank looked at the amount of money Joe still owed on his initial loan of \$180,000. He had paid off \$115,000, so he had a remaining balance of \$65,000. The bank’s next step was to appraise the fair-market value of Joe’s house. After ten years, the value of Joe’s home had risen to \$300,000. From there the bank subtracted the figure outstanding on Joe’s original loan, \$65,000, from the fair-market value, \$300,000. Therefore, Joe had \$235,000 of equity in his home when he took out his second mortgage five years ago. Had Joe asked his bank for a loan of \$100,000, his bank would almost certainly have agreed.

46. The three sentences immediately preceding this note are, admittedly, present writer’s own opinion. This comment is emphatically intended for intellectual consumption by legal practitioners on both sides of the proverbial left-right dividing line.

47. TRIPOLI & RENUART, *supra* note 4, at 7–8, 41–42.

48. *See supra* Part I.

49. MD. CODE ANN., REAL PROP. § 1-101(d) (LexisNexis 2003 & Supp. 2006) (“‘Deed of trust’ means only a deed of trust which secures a debt or the performance of an obligation, and does not include a voluntary grant unrelated to security purposes.”).

50. Mortgages and deeds of trust are loans secured by real property. The difference between them mainly concerns the procedural manner in which each is redeemed in the event of foreclosure. ALEXANDER GORDON, IV, GORDON ON MARYLAND FORECLOSURES § 3.2, at 28–29 (4th ed. 2004).

To further illustrate the significance of equity, let us look at what might have happened if Joe's venture had failed and he had become personally insolvent, thus triggering foreclosure on his home. Suppose that the foreclosure happened three years after Joe took out his second mortgage for \$100,000. At this point, Joe had a remaining balance of \$32,000 on the original loan with which he bought his house, and a balance of \$70,000 on the second loan he needed to begin his ill-fated business.

Meanwhile, in the three years since his bank appraised his home's fair-market value at \$300,000, a booming local real estate market has inflated this figure to \$340,000. Thus, we have a piece of real property valued at \$340,000 about to be liquidated at a foreclosure sale in order to redeem the total balance of the two loans, which comes to \$102,000. With \$238,000 of equity in Joe's soon-to-be former house, his two lenders are in an excellent position. They are going to get their money back without a sweat, and the equity Joe had accumulated in his home is the primary reason.⁵¹

C. *Predatory Lending—A Boon to the Scammers*

There are a number of reasons why a person may become temporarily or even permanently cash-poor despite having amassed significant home equity. Health crises, layoffs, and retirement are among the more common ones.⁵² More broadly, the stagnation of middle- and lower-middle-class incomes over the past twenty years, often termed the "middle class squeeze,"⁵³ has helped to create fertile ground for EDEs.⁵⁴ In many parts of the country, including Maryland, the curious confluence of stagnating incomes and rising real estate values has produced a spike in just the sort of equity-rich, yet cash-deficient households, that foreclosure scam artists target.⁵⁵

However, no account of distressed homeownership in America today would be adequate without a description of the role subprime

51. TRIPOLI & RENUART, *supra* note 4, at 42.

52. *Id.* at 7; see also Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 IND. L. REV. 103, 141 (2005) ("[U]nemployment, death, illness, and spousal abandonment are major reasons why homeowners lose their homes through default and foreclosure.").

53. TRIPOLI & RENUART, *supra* note 4, at 5; see also Elizabeth Warren, *The Middle Class on the Precipice*, HARV. MAG. Jan./Feb. 2006, at 28, available at <http://www.harvardmagazine.com/on-line/010682.htm> (providing a broad discussion of the economic pressures on the middle class).

54. TRIPOLI & RENUART, *supra* note 4, at 3.

55. *Id.* at 7–8.

lending plays in placing vulnerable households at risk of foreclosure.⁵⁶ A subprime loan (SPL) is one that carries a higher interest rate and often higher fees than a traditional prime loan.⁵⁷ SPLs are typically extended to borrowers whose income and credit status would have rendered them ineligible for prime rate credit, although it should be noted that some subprime lenders target people who mistakenly believe they are ineligible for prime loans.⁵⁸

In 1993, SPLs accounted for 1% of new loan originations.⁵⁹ By 2004, this figure had risen to over 20%.⁶⁰ It is estimated that between 10% and 20% of SPLs are used for home purchases.⁶¹ The other 80% to 90% are typically backed by the borrower's existing home equity and are generally used for consumer credit purposes.⁶² The majority of SPLs are not used for home purchases because the increased risk of default they entail requires, from the lender's standpoint, that a borrower already have earned a significant amount of home equity as security for the loan.⁶³ A typical first-time homebuyer, especially one who is unable to obtain a prime loan, is unlikely to be in a position to make a large down payment on a new home and will not accrue much equity for at least a few years.⁶⁴

From an EDE's perspective, SPLs are attractive because they carry a higher risk of eventual default than prime loans.⁶⁵ Whether or not a potential victim bought her house using an SPL, uncured delinquency equates to eventual foreclosure because most of these loans are secured by the borrower's home.⁶⁶ That risk of foreclosure is

56. *Id.* at 7.

57. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 723 (2006) ("Conversely, sub-prime loans generally rely more heavily on the equity in the home and up-front fees, in addition to higher interest rates, to cover higher origination, servicing, and default risk costs than do prime loans.").

58. *Id.* at 726–27. According to Willis, a significant number of minority, lower-middle-income borrowers believe they would not qualify for prime market loans when in fact they possess excellent credit and need not resort to SPLs. *Id.* at 771, 773–74, 776. Willis notes that some subprime creditors are all too willing to cater to the misperceptions of these borrowers. *Id.* at 730.

59. *Id.* at 722.

60. *Id.*

61. *Id.* at 723.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See id.*

66. *Id.*

heightened by the practices of many SPL lenders.⁶⁷ Dramatic advances in data processing and computer networking that took hold during the 1990s have made it possible for lenders to tailor loans on an individual basis.⁶⁸

In theory, a greater variety of financing options should go hand in hand with increased competition for borrower business and thus expand consumer choice.⁶⁹ The reality, however, is that many SPL lenders pack their loans with excessive up-front charges and interest rates disproportionate to the level of risk entailed.⁷⁰ A major reason why market competition among lenders does not prevent these types of practices is that the customization made possible by present-day processing technology has yielded a dauntingly complex array of loans and loan terms.⁷¹ Therefore, people who are in the market for SPLs do not typically have the option of price shopping for credit in a manner that is even remotely straightforward and comprehensible.⁷²

Further, the nature of the SPL lending process undercuts the consumer's opportunity to price-shop. Because purveyors of SPLs can craft loans on a per-customer basis, the only way for potential borrowers to compare terms would be to actually apply with several different lenders.⁷³ Subprime borrowers are unlikely to do this for a number of reasons.⁷⁴ People with subpar credit, or whose experiences have led them to believe their credit is poor, often lack the funds necessary to pay application fees to a multiplicity of lenders.⁷⁵ In addition, consumers of SPLs are disproportionately undereducated in relation to those who borrow from prime lenders.⁷⁶ Even if most could afford to submit applications to three or four or even five different lenders, the complexity of the terms contained in

67. See generally *id.* at 724–28. Industry practices such as complicated price structuring, exaggerated original costs, and a lack of transparency impact loan selection and ability to repay. *Id.*

68. *Id.* at 719, 724. Willis suggests that the dramatic increase in SPLs from 1993 to 2004 occurred in significant part because of lenders' increased ability to fashion loans to match individual financial profiles. *Id.* at 719–20. This practice is commonly referred to as "price nichification." *Id.* at 724.

69. See *id.* at 726.

70. *Id.* at 725. Lenders may include junk fees such as underwriting or escrow analysis fees or inflate the costs of credit insurance. *Id.*

71. *Id.* at 724–27. Price nichification makes advertising and price-shopping incredibly difficult. *Id.*

72. *Id.* at 727–28.

73. *Id.*

74. *Id.* at 762. The specific issues are time and money.

75. *Id.* at 763–64. See generally TRIPOLI & RENUART, *supra* note 4, at 7.

76. Willis, *supra* note 57, at 763–64.

any offer would severely limit the odds of the applicants using these competing offers to arrive at a decision in line with their economic self-interest.⁷⁷

Finally, the process of applying for home-based credit can be emotionally taxing for people who are at risk of being denied.⁷⁸ Some writers have likened it to a “financial strip search.”⁷⁹ All of these factors work to the disadvantage of subprime borrowers by effectively curtailing competitive pressure on lenders to offer favorable, or at least fair, terms.⁸⁰ Abuses of the advantages bestowed upon lenders by these market imperfections have become commonplace to the point where “predatory lending” is a household term.⁸¹

Many SPLs contain high risk, unduly costly terms that might not be clear to the homeowners who agree to them until it is too late.⁸² For example, it is not uncommon for SPLs to contain a sharp increase in the monthly amount due as a loan matures.⁸³ Sometimes called balloon payments, these hikes often leave homeowners with little choice but to refinance at terms that are still more unfavorable.⁸⁴ Other SPLs, particularly those with adjustable interest rates, begin with relatively low monthly payments that rise over time to levels that may or may not be within the borrower’s reach.⁸⁵ The common thread among the different varieties of predatory loans is that they put

77. *Id.* at 727. For example, the total cost of a loan is often far from clear to many subprime borrowers. Many of these borrowers decide whether to take on a home-equity loan based primarily upon the monthly amount due. *Id.* at 788. The required monthly payment, however, by itself, tells a prospective borrower very little about the total cost of the loan. *Id.* In order to calculate the latter, one would have to first figure out the principal, often inflated by up-front fees, then extrapolate several years into the future based on the percentage rate, with the added uncertainty presented by adjustable rates often a part of the mix. *Id.* at 724–25, 727. Acceleration clauses and prepayment penalties would further complicate any attempt to estimate the total cost of many subprime loans. *Id.* at 726. Present writer asserts that a mathematical morass that would be daunting to a typical Ph.D. candidate in the humanities is likely to prove beyond the grasp of many sub-prime consumers.

78. *Id.* at 772.

79. *Id.* at 775.

80. *Id.* at 723–30.

81. *Id.* at 736, 740.

82. *See generally id.* at 766. (Most subprime borrowers “will take the first loan offer that comes in below their maximum monthly payment limit. . . . [T]hey assess feasibility by looking at the near-term monthly payments only.”).

83. *See generally id.* at 724–25 (noting that subprime adjustable rate mortgages can increase each year).

84. *See id.* at 738.

85. *See generally id.* at 778.

homeowners at an increased risk of foreclosure.⁸⁶ As such, the recent proliferation of SPLs has been a boon for EDEs.⁸⁷

D. The Basic Types of FRF

There are three primary ways in which distressed homeowners may be swindled out of all or part of the equity they have earned over the years.⁸⁸ EDEs profit from (1) offering illusory assistance, sometimes called “phantom help”;⁸⁹ (2) acquiring title to homes in foreclosure by promising homeowners the opportunity eventually to reacquire ownership;⁹⁰ and (3) gaining title by fraudulent means such as leading their clients to believe they are signing loan documents or, even in some cases, forging homeowners’ signatures.⁹¹

In the first type of scam, an EDE will approach a homeowner who has just received notice that her house has been scheduled for a foreclosure sale.⁹² The EDE will offer to negotiate with her lender, as long as she pays a significant up-front fee, sometimes in the thousands of dollars.⁹³ While the scam artist might make a phone call or two on the homeowner’s behalf, any actual work performed is at best a token effort.⁹⁴ A particularly ironic aspect of this form of FRF is that the victim often loses her home when earlier, cost-free intervention by a reputable non-profit organization might have saved it from foreclosure.⁹⁵

The second type of FRF is likely, in light of the PHFA’s various disclosure requirements,⁹⁶ to become the preferred choice of Maryland’s most sophisticated EDEs, if it is not already.⁹⁷ The hypothetical scenario described in the introduction is an example of

86. *Id.* at 736, 740.

87. *See, e.g.*, TRIPOLI & RENUART, *supra* note 4, at 7.

88. *See id.* at 8.

89. *Id.*

90. *Id.*

91. *Id.* at 8–9.

92. *Id.* at 9.

93. *See generally id.* at 8.

94. *See id.* at 8, 29 (“[P]eople [are charged] an exorbitant amount of money for a couple of futile phone calls to their mortgage company or referral to a bankruptcy attorney—all phone calls the clients could have made themselves.”).

95. *See generally id.* at 8.

96. *See supra* Part III.

97. Morin Interview, *supra* note 13; *see also* Interview with Phillip Robinson, Executive Director, Civil Justice Network, in Baltimore, Maryland (Oct. 20, 2006) [hereinafter Robinson Interview]. Morin and Robinson are FRF attorneys in Maryland. Morin Interview, *supra* note 13.

this type of scam, sometimes referred to as a faulty “bailout.”⁹⁸ The EDE approaches a homeowner facing imminent foreclosure and offers to bring the mortgage current in exchange for title to the property.⁹⁹ The victim is led to believe that while remaining in the home as a renter, he will eventually be able to regain legal ownership of his house.¹⁰⁰ In fact, the terms by which any reconveyance to the homeowner may occur are normally so restrictive or onerous that the EDE almost always ends up retaining title to the property and, with it, the equity the homeowner spent years accumulating.¹⁰¹

An important way in which the “bailout” form of FRF has evolved in Maryland involves the use of third-party “investors.”¹⁰² An EDE will approach a homeowner in foreclosure and propose to assume title to the property in exchange for immediate help in bringing the delinquent loan current, with an option for the homeowner ultimately to reacquire title.¹⁰³ In these respects, it is similar to the scam described immediately above. However, instead of acquiring the property in his own name, the EDE will enlist the assistance of a third party.¹⁰⁴ The victim will then be directed to sign over a deed to this third party, whom the EDE will typically refer to as an “investor.”¹⁰⁵

The so-called investor does not actually invest anything.¹⁰⁶ In fact, he is sometimes paid as much as \$15,000 by the EDE.¹⁰⁷ In return, the EDE skims off the equity without taking on any liability in his own name or that of his firm.¹⁰⁸ The quickest way to do this is to take out a new mortgage secured by the equity in the property at issue.¹⁰⁹ This new loan will actually be in the third party’s name, although the implications of this might not always be clear to the third party.¹¹⁰ If the victim, for example, has accrued \$90,000 in

98. See *supra* Part I; see also TRIPOLI & RENUART, *supra* note 4, at 8.

99. Morin Interview, *supra* note 13; see also Robinson Interview, *supra* note 97.

100. TRIPOLI & RENUART, *supra* note 4, at 8.

101. *Id.*

102. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97.

103. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97.

104. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97.

105. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97.

106. Morin Interview, *supra* note 13. Morin related to present writer an anecdote in which one of these third parties was asked during a court proceeding how much he had “invested” in the property at issue. To the judge’s bemusement, the “investor,” without any apparent sense of irony, gave a response along the lines of “I don’t pay anything. They pay me. I’m an investor.” *Id.*

107. *Id.*; see also Robinson Interview, *supra* note 97.

108. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97.

109. Morin Interview, *supra* note 13.

110. *Id.*

equity, the EDE might take out a new loan for \$70,000 in the third party's name.

On the one hand, because the EDE is not liable for this loan and has no legal obligation to repay it, he has already profited handsomely without having to concern himself with evicting the homeowner and reselling the property.¹¹¹ On the other hand, if the EDE anticipates a significant rise in the property's value over the next year or so, he could use the proceeds from the new loan to keep both it and the victim's original loan current. When the property's market value has risen sufficiently to render it profitable for the EDE to do so, he could then evict the homeowner, sell the house to a BFP, and, if he wants to avoid litigation, pay off both the homeowner's mortgage and the third-party "investor's" loan.¹¹² Once again, the profitability of such a maneuver would depend upon how much the property had appreciated in value since the original contract between the EDE and the victim. However, putting the loan in the third party's name and not his own gives the EDE the option of either making off with the proceeds of this loan (the one in the third party's name) or executing the gambit just described.¹¹³

The third form of FRF differs from the second in that the homeowner does not realize he is transferring legal title to his property to the EDE.¹¹⁴ Given the level of stress a cash-poor

111. *Id.* Of course, to say that the EDE has no legal obligation to repay the loan is merely to say that the loan is the third party's responsibility. This does not mean that what the EDE has done here is legal. Certainly, on the face of it, it appears that the EDE has committed a common law fraud against the third party. *See* *Sass v. Andrew*, 152 Md. App. 406, 492, 832 A.2d 246, 260 (2003) (articulating five elements of common law fraud). Given both the third party's lack of clean hands in these sorts of situations and the likelihood that the EDE would not choose a third party who appeared astute to begin with, it seems reasonable that the risk of facing litigation initiated by the third party is a risk the more incorrigible EDEs would be willing to take. Morin Interview, *supra* note 13.

112. *See* MD. CODE ANN., REAL PROP. § 8-401(a)-(b) (LexisNexis 2003 & Supp. 2006); *see also* TRIPOLI & RENUART, *supra* note 4, at 19, 26 (stating that the former homeowner is now acting as a tenant and the EDE is the landlord); *see also* Morin Interview, *supra* note 13.

113. The scenario just described is in fact a product of present writer's own thinking. It does not mirror any particular account in the sources cited herein nor is it directly derived from any of the cases Morin or Robinson are currently litigating. The scenario, however, is useful in illustrating the inherent versatility of the FRF scam. As Parts III-V will demonstrate, in order to actually put an end to FRF, as opposed to simply adding to the ways in which it is illegal, one must endeavor to think like an EDE and thus anticipate possible variations of FRF before they have a chance to occur.

114. TRIPOLI & RENUART, *supra* note 4, at 8-9.

homeowner facing foreclosure is likely experiencing, it is not surprising that EDEs have been able to trick their victims into signing over title to their homes.¹¹⁵ A familiar tactic is to lead the homeowner to believe that what she is signing is actually an agreement to refinance her original mortgage.¹¹⁶ Another method employed by EDEs is what might be called the “cut and paste” approach.¹¹⁷ Here, the scammer has his victim sign documents that contain blank spaces and later inserts language purporting to convey title to the EDE.¹¹⁸ In fact, it appears that at least one of Maryland’s EDEs has actually engaged in the forgery of a victim’s signature.¹¹⁹

While there is no way of knowing with exactitude the proportional significance of each type of FRF in Maryland, the opinion of two Maryland attorneys in the field is that the second and third kinds of FRF described represent the most serious threat to vulnerable homeowners.¹²⁰ The attorneys most active in litigating FRF have focused their energies on cases involving transfers of title.¹²¹ This is not surprising, because the amounts of money involved are generally greatest when transfer of title is involved.¹²² The analysis and suggested steps to follow, therefore, deal primarily with forms of FRF that include transfer of legal title to the victim’s home.

E. Maryland’s Summary Foreclosure Process

The EDE’s job is made easier by Maryland foreclosure law. A mortgagee (lender) must provide notice to the mortgagor (homeowner) no sooner than thirty days and no later than ten days before the scheduled date of the foreclosure sale.¹²³ Although the statute requires that this notice be sent both by first-class mail and certified mail (return receipt requested), it does not require that any judicial notice be served upon the mortgagor pursuant to the foreclosure sale.¹²⁴

115. Morin Interview, *supra* note 13.

116. Nathaniel C. Nichols, *Home Alone: Home Mortgage Foreclosure Rescue Scams and the Theft of Equity*, 11 J. AFFORDABLE HOUS. & CMTY. DEV. L. 280, 282 (2002).

117. Morin Interview, *supra* note 13.

118. *Id.*

119. *Id.*

120. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97.

121. Robinson Interview, *supra* note 97.

122. This is so because with “phantom help” a victim might lose a few thousand dollars but is not stripped of most or all of the equity she has earned in her home, as is the case when the EDE’s take title to the properties involved. TRIPOLI & RENUART, *supra* note 4, at 8–9.

123. MD. CODE ANN., REAL PROP. § 7-105(b)(2)(ii) (LexisNexis 2003 & Supp. 2006).

124. *See id.* § 7-105(b)(1)(ii); *see* GORDON, *supra* note 50, at 59.

The great majority of home loans in Maryland contain either an assent to a decree clause or a power of sale clause.¹²⁵ The two clauses differ mainly in the degree to which each provides for judicial involvement in the foreclosure sale process.¹²⁶ Under an assent decree, the circuit court of the county in which the property at issue is located empowers the lender, or a trustee of the lender, to carry out a foreclosure sale upon adequate documentation of the loan's delinquency.¹²⁷ Power of sale foreclosures, on the other hand, are more directly managed by the court.¹²⁸ For a homeowner without the funds to redeem her mortgage before the date of sale, it is a distinction without a difference. Neither type of foreclosure sale requires service of process upon the homeowner.¹²⁹

The procedural options for someone facing foreclosure are quite limited. In order to petition the court for an injunction to stop the sale, the petitioner must deposit with the court the full amount required to redeem the delinquent mortgage.¹³⁰ The grounds upon which an injunction may be granted are limited,¹³¹ but for homeowners in this situation the point is moot.¹³² If this homeowner had the funds to deposit with the court, she would probably not be the customary target of EDEs. This is all the more true given that by the time a foreclosure sale has been scheduled, attorney's fees and other costs (such as auctioneer's fees) have typically been added to the amount required to bring the mortgage current.¹³³

The only other procedural avenue available to Maryland homeowners who face foreclosure is to file objections to the sale after it has occurred or objections to the accounting process by which the past due amount was calculated.¹³⁴ Both options require highly technical arguments, and neither provides a distressed homeowner

125. GORDON, *supra* note 50, at 17–18.

126. *Id.* at 20.

127. *Id.* at 18, 244.

128. *Id.* at 301.

129. *Id.* at 59.

130. See PROTECTING HOMEOWNERSHIP, *supra* note 3, at 20–21.

131. See GORDON, *supra* note 50, at 23–24.

132. See *id.* at 22.

133. PROTECTING HOMEOWNERSHIP, *supra* note 3, at 120.

134. GORDON, *supra* note 50, at 23–24. In a sharply worded opinion that bordered on the dismissive, the Court of Special Appeals of Maryland, in *Billingsley v. Lawson*, 43 Md. App. 713, 725, 406 A.2d 946, 954 (1979), upheld the constitutionality of Maryland's foreclosure laws against a challenge on both federal and state due process grounds.

with the thing she really needs—additional time.¹³⁵ The state legislature has addressed this in a small way by requiring a person authorized to make a foreclosure sale to notify the mortgagor within two days of filing with the court.¹³⁶ In practice, this means that a homeowner facing foreclosure will receive notice fifteen to twenty days before the date of sale, rather than ten days.¹³⁷ It does not seem likely that this extra time will hinder the EDEs; however, because fifteen to twenty days is still a sufficient period to exploit a homeowner's emotional distress.

However, the PHFA does make life harder, or at least more complicated, for the EDEs in a number of ways. The following analysis of the PHFA illustrates this point.

III. THE MARYLAND PROTECTION OF HOMEOWNERS IN FORECLOSURE ACT

On May 26, 2005, former Maryland Governor Robert Ehrlich, Jr. signed the Protection of Homeowners in Foreclosure Act,¹³⁸ an “emergency” statute aimed squarely at the perpetrators of FRF.¹³⁹ Partially based on a similar statute in Minnesota,¹⁴⁰ the PHFA is, on balance, a good law in several respects.¹⁴¹ It provides a direct way for litigators to prove the illegality of the more sophisticated forms of FRF.¹⁴² While the Maryland Consumer Protection Act¹⁴³ (CPA) and common-law doctrines including fraud, breach of fiduciary duty, and unconscionability provide grounds for arguing the illegality of FRF practices, the PHFA makes it much easier to contend with this in a manner that will prevail in court.¹⁴⁴

135. PROTECTING HOMEOWNERSHIP, *supra* note 3, at 20.

136. MD. CODE ANN., REAL PROP. §§ 7-105(a-1)(1) to (a-1)(3)(i) (LexisNexis 2003 & Supp. 2006).

137. GORDON, *supra* note 50, at 23.

138. MD. CODE ANN., REAL PROP. §§ 7-301 to -321 (LexisNexis Supp. 2006) (subtitled “Protection of Homeowners in Foreclosure.”); *see also* TRIPOLI & RENUART, *supra* note 4, at 24.

139. REAL PROP. §§ 7-301 to -321.

140. MINN. STAT. ANN. § 325N.01(b)(9) (West 2004 & Supp. 2007). While Maryland adopted the same basic premise as Minnesota, a few differences are notable. The statutes clearly differ on whom they regulate, and exempt, and the amount of damages that can be recovered. *See also* TRIPOLI & RENUART, *supra* note 4, at 24.

141. Interview with Alexander Gordon, IV, Author, in Baltimore, Maryland (Nov. 29, 2006) [hereinafter Gordon Interview].

142. *See generally* TRIPOLI & RENUART, *supra* note 4, at 64 (including provisions that cover all three types of foreclosure specialists: foreclosure consultants, foreclosure or equity property purchasers, and foreclosure or equity surplus purchasers).

143. MD. CODE ANN., COM. LAW §§ 13-101 to -501 (LexisNexis 2005).

144. TRIPOLI & RENUART, *supra* note 4, at 45–46.

The PHFA defines “foreclosure consultant” in broad terms. Under the statute’s language, anyone who in any way represents to a person that he can delay or prevent foreclosure of that person’s home qualifies as a foreclosure consultant and thereby is covered under the PHFA.¹⁴⁵ The relevant language is in the singular tense (“contacts a homeowner”); thus it appears that an EDE need only have had contact with a single victim in order to fall under the PHFA’s authority.¹⁴⁶ Assistance in securing a loan or other source of funds is listed among the activities that designate a party as a foreclosure consultant under PHFA, as is any assistance in preventing or limiting damage to the credit rating of a homeowner facing foreclosure.¹⁴⁷ The PHFA also covers oral, written, in-person, and electronic means of representation as well as contacts made through telecommunications.¹⁴⁸ The PHFA is comprehensive in defining a foreclosure consultant. There seems to be no way that an EDE could propose to render any form of assistance of interest to a homeowner facing foreclosure that would not subject that EDE to the PHFA’s authority.¹⁴⁹

The PHFA, however, does exempt several classes of professionals.¹⁵⁰ The statute does not apply to attorneys or anyone whose “normal business activities” fall under the authority of either Maryland or United States law “regulating banks, trust companies, savings and loan associations, credit unions, or insurance companies.”¹⁵¹ Similarly, the PHFA does not apply to title insurers and title insurance producers authorized or licensed to conduct business in Maryland, and mortgage brokers and lenders whose authority derives from Title 11, Subtitle 5 of the Financial Institutions Article.¹⁵² The statute also exempts real estate brokers, associate real estate brokers, and real estate salespeople licensed under Title 17 of the Business Occupations and Professions Article.¹⁵³ Additionally, the PHFA excludes any non-profit organization that deals exclusively with homeowners in loan default or facing foreclosure, so long as the organization does not have any direct, indirect, or privity relationship

145. MD. CODE ANN., REAL PROP. § 7-301(b)(1)(i) (LexisNexis Supp. 2006).

146. *See id.* § 7-301(b)(1).

147. *See id.* §§ 7-301(b)(1)(vi)–(vii).

148. *See id.* § 7-301(b)(1).

149. *See generally id.* § 7-301(b).

150. *See id.* § 7-302(a).

151. *Id.* §§ 7-302(a)(1), (a)(3)(i).

152. *Id.* §§ 7-302(a)(5)–(a)(7).

153. *Id.* § 7-302(a)(8).

with for-profit lenders or foreclosure purchasers.¹⁵⁴ Finally, the PHFA exempts any creditors of the homeowner, so long as the homeowner's obligation to the creditor did not arise from a foreclosure reconveyance.¹⁵⁵

Language in the PHFA provides, however, that even parties who fall into an exempted class lose this exemption if they engage in activities "intended to transfer title to a residence in foreclosure directly or indirectly to that individual, or an agent or affiliate of that individual."¹⁵⁶ The statute does not define affiliate for the purposes of determining whether an otherwise exempted party shall be subject to its coverage. In Part V, this Comment will argue that the lack of a clear and inclusive definition of affiliate opens a potential loophole that should be closed.¹⁵⁷

The PHFA also defines "foreclosure consulting contract" and "foreclosure consulting service."¹⁵⁸ It defines the former as an oral, written, or equitable agreement by which a foreclosure consultant agrees to provide any foreclosure consulting service to a homeowner.¹⁵⁹ The scope of the former definition, therefore, depends upon the substance of the latter. In broad, exhaustive terms, the PHFA states that the term "foreclosure consulting service" includes any efforts to contact or negotiate with creditors on the homeowner's behalf as well as any efforts to prevent or delay foreclosure.¹⁶⁰

The PHFA's definition of "foreclosure consulting service" also encompasses any efforts to effect an arrangement by which a homeowner will transfer title to another party as an alternative to foreclosure; remain in the home as a renter, tenant, or lessee; or convey title with an option to reacquire ownership of the home.¹⁶¹ Given the PHFA's language, only a willfully restrictive reading of the statute would fail to include any plausible form of FRF from its coverage. The addition, however, of language expressly providing that the PHFA should be construed liberally for coverage and enforcement purposes would be a welcome addition.

154. *Id.* § 7-302(a)(9).

155. *See id.* §§ 7-302(a)(4), 7-105(b).

156. *Id.* § 7-302(b).

157. *See infra* Part V.A.

158. REAL PROP. §§ 7-301(c)–(d).

159. *Id.* § 7-301(c).

160. *See generally id.* § 7-301(d).

161. *See id.* §§ 7-301(d)(7)–(d)(10).

The PHFA gives homeowners the right to “[r]escind a foreclosure consulting contract at any time.”¹⁶² In addition, it provides that a homeowner may “[r]escind a foreclosure reconveyance at any time before midnight of the [third] business day after any conveyance or transfer in any manner of legal or equitable title to a residence in foreclosure.”¹⁶³ The statute defines rescission in appropriately inclusive terms, stating that it may occur by writing, facsimile, or electronic mail, provided it is sent to an address identified either in the contract or in any other materials that the foreclosure consultant provided to the homeowner.¹⁶⁴ A rescission is effective, regardless of whether its form mirrors that of the contract, as long as it makes clear the homeowner’s intent to rescind either the contract or the reconveyance.¹⁶⁵ Finally, the PHFA expressly states that “[t]he right to rescind may not be conditioned on the repayment of any funds.”¹⁶⁶

While the PHFA’s rescission provisions appear to be properly tailored to the protection of vulnerable homeowners, the provisions might not go far enough. Extending the three-day period for rescission of foreclosure reconveyances to ten days, for instance, would provide potential FRF victims with added time to digest the terms of any agreement which they have signed. It is worth restating here that time constraints,¹⁶⁷ limitations set by the courts,¹⁶⁸ and psychological pressures from EDEs¹⁶⁹ all lessen the likelihood of a homeowner actually understanding and reflecting upon the terms of an agreement to convey title in her home to another party. While the three-day rescission window affords some protection, it would be better for the legislature to err on the side of caution and provide more time. If a ten-day period is too long for some Maryland lawmakers, perhaps they could craft a compromise in the five-to-seven day range.

The PHFA also attempts to render the terms of foreclosure consulting contracts and reconveyances a bit more clear to potential

162. *Id.* § 7-305(a)(1).

163. *Id.* § 7-305(a)(2). The Maryland Protection of Homeowners in Foreclosure Act (“PHFA”) defines “foreclosure reconveyance” as a transaction in which a homeowner facing foreclosure transfers title of the property to another party with the understanding that the homeowner will reacquire title to the home following the completion of the foreclosure proceeding. *See id.* §§ 7-301(f)(1)–(2).

164. *See id.* § 7-305(b).

165. *Id.* § 7-305(d).

166. *Id.* § 7-305(f).

167. *See supra* notes 123–24 and accompanying text.

168. *See supra* notes 125–37 and accompanying text.

169. *See supra* notes 40–43 and accompanying text.

victims. It requires that any contract be printed in at least 12 point type and written in the language typically spoken by the homeowner.¹⁷⁰ Perhaps more significantly, the PHFA mandates that foreclosure consulting contracts specify the exact nature of the services to be provided, including any reconveyances.¹⁷¹ Finally, the contract must “[f]ully disclose . . . the total amount and terms of any compensation” that the foreclosure consultant, “or anyone working in association with the consultant” will receive.¹⁷²

The PHFA does not attempt to define the terms exact nature or in association.¹⁷³ It is, therefore, not clear if the latter term is synonymous with the above-discussed term affiliate.¹⁷⁴ Regardless, nature and association tend to be concepts of degree rather than precision,¹⁷⁵ and may lend themselves more readily to judicial interpretation than to any attempt at statutory definition.¹⁷⁶ As noted above, present writer recommended that the Maryland legislature add language to the PHFA expressly prescribing that its provisions be liberally interpreted.¹⁷⁷ This recommendation bears repeating here. The legislature might also consider including a statement such as: “Any potentially ambiguous terms in the PHFA, such as ‘exact nature,’ ‘affiliate,’ or ‘in association,’ are to be construed in a manner consistent with the PHFA’s overarching goal of protecting vulnerable homeowners facing foreclosure.”

In keeping with the aforesaid attempt to hold foreclosure consultants to a certain standard of contractual clarity, the PHFA requires that all foreclosure consulting contracts include, in at least 15-point type, notice of the homeowner’s right to rescind.¹⁷⁸ The statute also states that all foreclosure consulting contracts must include, in at least 14-point boldface type, notice of the homeowner’s right to rescind a foreclosure reconveyance as well as an admonition

170. REAL PROP. § 7-306(a)(2).

171. *Id.* § 7-306(a)(3).

172. *Id.*

173. *See id.* §§ 7-301, 7-306.

174. *See supra* notes 156–57 and accompanying text.

175. *Cf.* John Harlee, *The Protection of the Unpublished Application Protocol Interface Under Copyright Law*, 4 VA. J.L. & TECH. 6, ¶ 34 (1999), <http://www.vjolt.net/vol4/issue/v4i2a6-harlee.html> (stating that “the meaning of ‘nature’ is statutorily quite ambiguous”); Jenny Dionne Dennis, *The California Legislature Decided That Unincorporated Businesses are People Too*, 38 MCGEORGE L. REV. 247, 253 (2007) (characterizing “association” as an ambiguous term open to judicial interpretation).

176. *See, e.g.,* Harlee, *supra* note 175, at ¶ 34; *see also* Dennis, *supra* note 175, at 253.

177. *See supra* notes 161–62 and accompanying text.

178. REAL PROP. § 7-306(c)(2)(iii).

that the homeowner should “contact an attorney before signing.”¹⁷⁹ While these provisions are necessary, it is still easy enough to imagine an EDE burying a homeowner beneath an intimidating hill of paperwork that many victims would likely regard as incomprehensible.

The PHFA dictates the terms of foreclosure reconveyances in several ways. It requires that the homeowner receive at least 82% of the net proceeds from any resale of the property that occurs within eighteen months of the date the homeowner entered into the reconveyance.¹⁸⁰ The statute also mandates that a foreclosure purchaser (the party obtaining title from the original homeowner) ascertain that the homeowner have the reasonable ability to reacquire title to the property.¹⁸¹ Further, the PHFA defines reasonable ability in this context by stating that if the homeowner’s “primary housing expenses,” plus any other payments resulting from personal debt, do not exceed 60% of her monthly gross income, there is a rebuttable presumption of reasonable ability to pay.¹⁸²

These provisions are useful primarily because they present a black-letter line that would-be EDEs may not cross if they are to avoid liability. In addition, the PHFA prohibits any foreclosure consultant from acquiring, either “directly or indirectly, or by means of a subsidiary, affiliate, or corporation” an interest in the property of a homeowner with whom the consultant has entered into a foreclosure consulting contract.¹⁸³ Thus, the PHFA draws a line between foreclosure consultants and foreclosure purchasers. Consistent with this, the statute prohibits foreclosure purchasers from representing to homeowners in any way that they are helping to save the house or otherwise acting in an advisory capacity.¹⁸⁴

While the PHFA makes it nearly impossible for an EDE to legally strip equity from homeowners facing foreclosure, this is not the statute’s primary significance. Under common-law doctrines such as fraud, breach of fiduciary duty, and unconscionability, some EDEs’ practices were illegal before the PHFA’s enactment.¹⁸⁵ Keeping that

179. *Id.* §§ 7-306(a)(5), 7-306(c)(2), 7-310(c).

180. *Id.* § 7-311(b)(2)(ii).

181. *Id.* § 7-311(b)(1)(i).

182. *Id.* § 7-311(c)(1).

183. *Id.* § 7-307(5).

184. *Id.* §§ 7-311(b)(4)(i), (b)(4)(iii).

185. Professor Lauren E. Willis eschews traditional approaches to defining “foreclosure rescue scams” as either complete fraud or by referencing unwieldy “lists of specific predatory practices.” Willis, *supra* note 57, at 735–36, 738–40. Instead, she propounds a new definition of “predatory lending” as “noncompetitively overpriced

in mind, the PHFA therefore makes it much easier to prove that FRF—in just about any conceivable form—is, in fact, illegal.¹⁸⁶

Perhaps more importantly, the PHFA effectively increases the availability of legal representation to victims of FRF.¹⁸⁷ The impact is rooted in the language of section 7-320(c), which provides that, in civil actions against parties subject to the PHFA's authority, the court may award "damages equal to three times the amount of actual damages" if it finds that "the defendant willfully or knowingly" violated the statute.¹⁸⁸ The PHFA also includes misdemeanor criminal penalties for guilty EDEs,¹⁸⁹ however, in Part V, this Comment will address the need for harsher penalties in order to further deter EDEs from engaging in predatory lending practices.¹⁹⁰

Finally, the PHFA contains a provision stating that a "bona fide purchaser . . . or lender for value who enters into a transaction with a homeowner or a foreclosure purchaser when a foreclosure consulting contract is in effect or during the period when a foreclosure reconveyance may be rescinded . . . receives good title to the property."¹⁹¹ This good title is free and clear of any interest that *any* party to the reconveyance or foreclosure consulting contract, including the homeowner, may have had.¹⁹² This language opens a

and overly risky home loans." *Id.* at 735–36, 740. While Maryland's General Assembly has attempted to curb certain practices that are subsumed under Willis' concept of "predatory lending" by enacting the PHFA, other jurisdictions have strived to extend homeowners similar protections by employing common law doctrines of fraud, breach of fiduciary duty, and unconscionability. *See, e.g.,* *Barker v. Altegra Credit Co.*, 251 B.R. 250, 257–60 (Bankr. E.D. Pa. 2000) (holding that a mortgage broker committed fraud and breached her fiduciary duty to use her best efforts to find a loan in the best interests of the borrower).

186. The language of the PHFA provides bright-line, substantive protections for homeowners. For example, under the PHFA, a contract must be given to the homeowner that specifies the terms of the foreclosure consulting agreement, must give notice of rescission rights and must include warnings that the homeowner should confer with an attorney before signing. REAL PROP. § 7-306.

187. *See id.* § 7-320.

188. *Id.* § 7-320(c). The possibility of being awarded damages beyond those actually sustained, in the form of punitive damages, encourages citizens to serve as prosecutors and thereby act as "private attorneys general." David Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1287–88 (1976). The same concept can be applied to claims for treble damages as such claims permit the litigation of claims that might otherwise be too expensive for an individual plaintiff to initiate. Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 69 (1986).

189. REAL PROP. § 7-321.

190. *See infra* notes 273–85 and accompanying text.

191. REAL PROP. § 7-311(e).

192. *Id.*

potentially exploitable loophole in the PHFA. While the provision does not enable EDEs to strip equity without breaking the law, it nevertheless comes dangerously close to enabling lenders to do business with EDEs and their affiliates and claim BFP protection, since these lenders typically are not parties to FRF scams.¹⁹³

If such a lender were afforded BFP protection, then even a homeowner who successfully obtains judgment against an EDE could lose her home, since the lender would retain title to it.¹⁹⁴ The PHFA's BFP loophole has enabled the more clever EDEs to profit by taking out new mortgage loans secured by properties to which they have fraudulently acquired title.¹⁹⁵ As long as lenders have a good chance of benefiting from BFP protections, even respectable, mainstream lenders have little economic incentive to closely examine just how a borrower has gained title to the secured property.¹⁹⁶

The question of whether Maryland's courts will judge institutions that lend, unwittingly or otherwise, to EDEs and their affiliates to be BFPs therefore looms large for attorneys who represent FRF victims. The following section addresses this issue.

IV. LITIGATING FROM THE PLAINTIFF'S SIDE

A. *BFP Law and Inquiry Notice*

Presumably, one of the goals of an attorney representing the victim of an FRF scheme will be to enable the client to keep his or her home. As previously noted, language in the PHFA purporting to protect "bona fide purchaser[s] . . . or . . . lender[s] for value" presents a potential obstacle.¹⁹⁷ If Maryland's courts ultimately decide that a party who has made a mortgage loan to an EDE's third party, based on the equity in that home, is a BFP lender, title to the

193. See U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL & STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING, GAO-04-280, at 6, 72-73, 76 (2004) [hereinafter CONSUMER PROTECTION] (While the secondary market for mortgage loans may benefit borrowers by increasing access to credit, it may also facilitate predatory lending by both "providing a source of funds for unscrupulous originators to quickly sell off loans with predatory terms" and "reducing incentives for these originators to ensure that borrowers can repay their loans.").

194. REAL PROP. § 7-311(e). See *infra* notes 201-10 and accompanying text for a discussion of the liability of a lender claiming BFP protection.

195. CONSUMER PROTECTION, *supra* note 193, at 72, 76.

196. *Id.* at 76-77.

197. REAL PROP. § 7-311(e).

home ultimately passes to the lender.¹⁹⁸ In such a case, the mortgage owed to this lender by either the EDE or the EDE's third party agent (in whose name the loan would likely be) would have to be paid off before the victimized homeowner could recover good title to the home.¹⁹⁹

While, in theory, a court may hold an EDE liable for any money owed to a BFP lender, it seems unlikely that a plaintiff's attorney, not to mention his or her client, would want the restoration of title in the home to depend upon the solvency of a scam artist. Similarly, if a party who entered into a contract to buy the property from the EDE, or a third party agent thereof, were judged by the courts to be a BFP purchaser, the victim might come away from litigation with plenty of cash but no title to her home.²⁰⁰ Clearly, under the PHFA's existing language, it will be in a plaintiff's interest to argue that any non-EDE affiliated party claiming title to or a security interest in her home is not a BFP.

A purchaser of real property is considered a BFP if he enters into the conveyance without notice of any existing claims to the property to which such claims could cloud his title.²⁰¹ A purchaser may be charged with actual or constructive notice of extant or competing claims to his title.²⁰² In the case of the former, the vendee has been expressly informed of any potentially problematic claims, encumbrances, or interests.²⁰³ Constructive notice generally takes two different forms. Buyers of real property are responsible for knowledge of any interests that have been properly recorded in the applicable jurisdiction's land records.²⁰⁴ This legal mandate is known as record notice.²⁰⁵

In addition, the law presumes that a vendee of real property has made a proper examination of any circumstances that would alert a person of average vigilance to the possibility of existing unresolved claims to the property.²⁰⁶ Along with this, the purchaser is also

198. *Id.*

199. *See supra* notes 40–137 and accompanying text for an account of how EDEs use third parties to secure mortgage financing for their own gain.

200. *See REAL PROP. § 7-311(e).* For a description of the PHFA's treble damages provision see *supra* notes 187–88, and accompanying text.

201. *Frederick Ward Assocs. v. Venture, Inc.*, 99 Md. App. 251, 256, 636 A.2d 496, 498 (1994).

202. *Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 390 Md. 211, 247, 888 A.2d 297, 319 (2005).

203. *Grayson v. Buffington*, 233 Md. 340, 343–44, 196 A.2d 893, 895–96 (1964).

204. *Greenpoint Mortgage*, 390 Md. at 229, 231, 888 A.2d at 308, 310.

205. *Id.* at 230, 888 A.2d at 308.

206. *Blondell v. Turover*, 195 Md. 251, 257, 72 A.2d 697, 699 (1950).

charged with knowledge of any facts that such an investigation would have revealed.²⁰⁷

This second form of constructive notice is referred to as inquiry notice.²⁰⁸ It is this form of notice that is likely to be of primary interest to an attorney representing the victim of an FRF scheme, as an EDE is certainly not going to inform a lender or buyer that his title to the property at issue was fraudulently obtained.²⁰⁹ Thus, a lender or purchaser seeking BFP protection is not liable to be charged with actual notice of the victim's claim to the property.²¹⁰ On the other hand, a title search of the home will reveal both the original mortgage loan and the foreclosure filing that prompted the victim to enter into a privity relationship with the EDE.²¹¹

A party who actually seeks to buy the victim's home from the EDE or an agent thereof will have record notice that the property was recently in foreclosure and that the property remains subject to the original mortgage (the one in the victim homeowner's name).²¹² If the prospective buyer nonetheless goes ahead with the transaction and "buys" the property from the EDE, it seems likely that the buyer would thus be charged with record notice of, at least, the existing mortgage.²¹³ While an EDE might be able to fool certain people into thinking that this existing mortgage is somehow no longer a problem, this is not the sort of transaction that presents the biggest threat to the distressed homeowner's hope of quieting title via litigation.²¹⁴

Rather, as we saw earlier, EDEs are using the existing equity on the homes to which they have fraudulently obtained title as a means of obtaining additional mortgage funding—which they then pocket—knowing that someone else's name (typically the third party's) is on the paperwork.²¹⁵ Although the parties making these loans will be charged with the same record notice attributed to a would-be purchaser of the property, in the case of a lender this would be beside the point.

A prudent financial institution will likely only loan a purported title-holder, be it an EDE or anyone else, an amount of money that is

207. *Id.*

208. *Id.*

209. *Id.*

210. *See supra* notes 191–96 and accompanying text.

211. J. PAUL RIEGER, JR., EXAMINING TITLES TO REAL ESTATE IN MARYLAND 5 (1997).

212. *See GORDON, supra* note 50, at 330–31.

213. *Kramer v. Emche*, 64 Md. App. 27, 43–44, 494 A.2d 225, 234 (1985).

214. *See Morin Interview, supra* note 13; *see also Robinson Interview, supra* note 97.

215. *See supra* notes 104–13 and accompanying text.

reasonably secured by the property backing the loan.²¹⁶ The lender will ascertain the existing liability on the original mortgage in the distressed homeowner's name before extending any credit to the EDE.²¹⁷ When the EDE takes the money and runs off to Tahiti, the institution that has lent the EDE this money will presumably foreclose on the property.²¹⁸ The value of the home will, if the second lender correctly ascertained the existing equity upon extending credit, cover the amounts owed to both the original creditor (who loaned money to the victim homeowner) and the second lender (who disbursed funds to the EDE or an agent).²¹⁹ The presence of the original mortgage, therefore, would lack the decisive significance for the second lender that it would have for an actual purchaser.²²⁰ The second lender (lending to the EDE's third party agent) would not ultimately be harmed, at least in theory, even if the holder of the first mortgage was given priority; the eventual sale of the property would make both parties whole.²²¹

B. Maryland BFP Precedent

A quick recap of the significance of the PHFA's BFP provision might be helpful at this point. Because the more sophisticated EDEs are choosing to profit from their victims' equity by taking out mortgage loans based upon this equity, the institutions making these loans may well be judged by the courts to be BFP lenders.²²² If they in fact are so judged, their claim to the victim's property could prevent successful plaintiffs from regaining clear title to their homes.²²³ Plaintiffs' attorneys, therefore, will want to argue that these lenders are not BFPs. The most plausible theory upon which such an argument can be built is that the circumstances incident to the extension of credit by the lender at issue to the EDE (or her agent) should have put the lender on inquiry notice as to a possible defect in the EDE's title to the property.²²⁴

216. See generally Willis, *supra* note 57, at 723.

217. Dale A. Whitman, *Mortgage Drafting: Lessons from the Restatement of Mortgages*, 33 REAL PROP. PROB. & TR. J. 415, 447 (1998).

218. GORDON, *supra* note 50, at 48.

219. See David B. Simpson, *Real Property Foreclosures: The Fallacy of Durrett*, 19 REAL PROP. PROB. & TR. J. 73, 79-80 (1984).

220. See *id.*

221. See *id.*

222. See *supra* notes 191-96 and accompanying text.

223. MD. CODE ANN., REAL PROP. § 7-311(a) (LexisNexis Supp. 2006).

224. See, e.g., *Blondell v. Turover*, 195 Md. 251, 72 A.2d 697 (1950).

In the 1950 case *Blondell v. Turover*,²²⁵ the Court of Appeals of Maryland established the standard for inquiry notice that remains the rule today. The court stated:

In determining whether a purchaser had notice of any prior equities or unrecorded interests, so as to preclude him from being entitled to protection as a *bona fide* purchaser, the rule is that if he had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, he will be presumed to have made such inquiry and will be charged with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.²²⁶

Blondell involved a situation in which a real estate broker sought to purchase a tract of land before another party's option to buy the same land had expired.²²⁷ The broker, in effect, willfully ignored indications of the option holder's existing rights to the property and entered into a contract with the vendor to acquire the land.²²⁸ The Court of Appeals of Maryland, applying the inquiry notice rule cited above, held that the real estate broker was not a BFP.²²⁹ The court reasoned that had the broker, in response to indications that another party retained an option to purchase the property in question, undertaken a reasonably diligent inquiry to determine whether this was in fact the case, the broker would have learned that it indeed was true.²³⁰ The broker was thus charged with this knowledge and hence not entitled to protection as a BFP.²³¹

Blondell has been followed by Maryland courts several times since its issuance, most notably, for our purposes, in the 1985 case *Kramer v. Emche*.²³² In *Kramer*, a lender, in the course of examining title to a residential property to which it had gained two deeds of trust as security for a pair of loans, discovered that the deed to the property was not in the borrower's name.²³³ The lender then confronted the borrower with this information.²³⁴ The borrower explained to the

225. *Id.*

226. *Id.* at 257, 72 A.2d at 699.

227. *Id.* at 254–56, 72 A.2d at 698–99.

228. *Id.* at 256, 72 A.2d at 699.

229. *Id.* at 257–58, 72 A.2d at 699–700.

230. *Id.* at 258, 72 A.2d at 700.

231. *Id.*

232. 64 Md. App. 27, 494 A.2d 225 (1985).

233. *Id.* at 33, 494 A.2d at 229.

234. *Id.* at 33–34, 494 A.2d at 229.

lender that upon acquiring the property, he (the borrower) had lacked the funds to pay the applicable taxes, which, in turn, prevented him from being able to secure a deed in his name.²³⁵ Accepting this explanation, the lender thereupon paid the aforesaid taxes.²³⁶ After doing this, the lender went forward with the two loans to the borrower, who in turn recorded a deed to the property in his name.²³⁷

The excuse given to the lender by the borrower for initially lacking record title in his name was, as it turns out, the truth.²³⁸ It was not, however, the whole truth.²³⁹ Unbeknownst to the lending party, the borrower still owed the bulk of the purchase price for the home to the initial vendor.²⁴⁰ In addition, this debt was, as one would expect, secured by a deed of trust.²⁴¹ Why did the lender here go forward with the transaction knowing that, in fact, there was virtually no equity in the home to protect its interests in the event of default? It did so because it did not, in fact, know this. The lender failed to perform a title search of the securing property which would have revealed any outstanding mortgages or liens.²⁴²

Owing to an attorney's negligence, the mortgage backing the outstanding debt for the purchase price of the home had never been recorded.²⁴³ The lending party, therefore, had not been placed on record notice that any such debt existed.²⁴⁴ When the borrower ultimately defaulted on all three loans (the one owed to the vendor and the two owed to the subsequent lender), foreclosure proceedings followed.²⁴⁵ At issue in the resulting litigation, of course, was which creditor's mortgage would take priority.²⁴⁶ The Court of Special Appeals of Maryland ruled that, the aforementioned gap in the land records notwithstanding, the overall circumstances of the transaction between the lending and borrowing parties here had put the lender on inquiry notice of the already existing mortgage.²⁴⁷ As such, the lender was not entitled to BFP protection, and its claim to the home

235. *Id.* at 34, 494 A.2d at 229.

236. *Id.*

237. *Id.*

238. *Id.* at 31–44, 494 A.2d at 228–34.

239. *Id.* at 34, 494 A.2d at 229.

240. *Id.* at 42, 494 A.2d at 231.

241. *Id.* at 32, 494 A.2d at 228.

242. *Id.* at 33–34, 494 A.2d at 229.

243. *Id.* at 32, 494 A.2d at 228.

244. *Id.*

245. *Id.* at 35, 494 A.2d at 230.

246. *Id.* at 36, 494 A.2d at 230.

247. *Id.* at 44, 494 A.2d at 234.

was subordinated to that of holder of the original mortgage (the one backing the purchase price of the home).²⁴⁸

In some respects, the *Kramer* precedent bodes well for attorneys who are, or will soon be, arguing that an institution lending to an EDE should, by virtue of the “totality of the circumstances” surrounding the transaction, be charged with inquiry notice of the fraud underlying the process by which the EDE has obtained title to the securing property.²⁴⁹ In *Kramer*, the court in effect reasoned that a borrower who had not been able to pay the taxes on property he had purchased should not simply be assumed to have already paid for this property in full.²⁵⁰ The simple lack of a recorded mortgage, therefore, should not have put the lender at ease. Rather, the odd and unlikely juxtaposition of unpaid taxes and the complete lack of any recorded lien should, as the line of reasoning concludes, have aroused the lender’s suspicions and led to further inquiry. In turn, such further inquiry would have revealed the existence of the unrecorded mortgage.²⁵¹

Kramer is on point for our purposes in that it deals with lenders, rather than purchasers, seeking and being denied BFP protection. At the same time, however, there is plenty to distinguish the facts of *Kramer* from those of a case involving possible BFP status for an EDE’s creditor. Any halfway-competent EDE will have ensured that title to the victim’s home is in his agent third party’s name before seeking out financing based on the home’s equity.²⁵² An attorney for a lender seeking clear title to the victim’s property on the grounds of BFP status would certainly stress this in seeking to distinguish *Kramer*. On the other hand, a plaintiff’s attorney seeking to save the victim’s claim to her home, might point out that the inevitable presence of a recent foreclosure filing in an FRF scenario presents a compelling reason why any subsequent lender should be charged with inquiry notice.²⁵³

C. *First Impression*

While *Kramer* merits the treatment it has received here because it appears to be the only Maryland inquiry notice case involving a lender for value, the truth is that the question of whether a party who

248. *Id.* at 43, 494 A.2d at 234.

249. *Id.* at 44, 494 A.2d at 234.

250. *See id.* at 34, 43, 494 A.2d at 229, 234.

251. *Id.* at 44, 494 A.2d at 234.

252. TRIPOLI & RENUART, *supra* note 4, at 8, 33.

253. GORDON, *supra* note 50, at 330–31.

lends to an EDE's third party agent merits BFP status will be one of first impression in Maryland.²⁵⁴ The confluence of evolving methods of FRF, the newness of the PHFA, the potential loophole created by the PHFA's BFP language, and the likelihood of increased FRF litigation born of the opportunity for treble damages has placed the BFP doctrine on a collision course with an almost inevitable challenge to its scope.²⁵⁵

A lack of precedent does not, by itself, leave us without clues as to how the issue will play out when it eventually reaches Maryland's appellate courts. Certain basic factors are likely to shape the arguments presented by both sides. Any party that has lent to an EDE and subsequently seeks BFP protection will have had record notice of both the existence of an outstanding mortgage in another person's name and a recent foreclosure filing on the property in question.²⁵⁶ An attorney seeking to quiet title in an FRF victim's name could argue that these facts should have aroused the suspicions of any reasonably prudent lender. From this, a plaintiff's advocate could reason that a properly diligent investigation conducted by the lender to discover the reasons for both the outstanding mortgage and the recent foreclosure filing would have revealed that the EDE acquired title through fraudulent means.²⁵⁷ In effect, a lawyer on this side of the issue would contend that the lender ought not be rewarded with BFP protection for turning a blind eye to a facially dubious set of circumstances.

While this reasoning might prevail when all is said and done on this issue, we cannot be certain of it. Confession and avoidance may well be a viable strategy for a lender facing an inquiry-notice-based challenge to its title.²⁵⁸ A bona fide lender for value can argue that so long as it has ascertained that the party to whom it has lent money

254. See *Baltrotsky v. Kugler*, 395 Md. 468, 474–75, 910 A.2d 1089, 1093–94 (2006); see also *Pizza v. Walter*, 345 Md. 664, 674–75, 694 A.2d 93, 98 (1996).

255. According to Morin and Robinson, the question of whether lenders to EDEs merit BFP status will likely reach Maryland's appellate courts in the next two to three years. Morin Interview, *supra* note 13; Robinson Interview, *supra* note 97. If the changes to the PHFA recommended in Part V of this comment were to be adopted, however, BFP doctrine could be preserved as it is—with no need for judicial intervention.

256. See *supra* notes 212–16 and accompanying text.

257. See *supra* notes 102–13 and accompanying text.

258. BLACK'S LAW DICTIONARY, *supra* note 11, at 317. Confession and avoidance is a form of pleading in which a defendant files an answer admitting the plaintiff's factual allegations but arguing that these facts, when combined with additional facts adduced by the defendant, are insufficient to prove that the plaintiff has a valid legal claim against the defendant. See generally 61A AM. JUR. 20 PLEADING § 296 (1999).

does in fact hold title to the home in question, it has fulfilled its obligation to properly safeguard its own interests.²⁵⁹ Once again, the strong likelihood that any institution lending (albeit, unwittingly) to an EDE or affiliate thereof will only lend within existing equity looms large. It enables a lender for value to plausibly argue that the existence of an outstanding mortgage on the securing property need not elicit any further inquiry on its part because it does not pose any threat to its interests. If there is sufficient equity to cover the loans extended by both the first mortgagee and the subsequent one (the one unknowingly lending to the EDE), then the latter lender can in fact contend that once it ascertains through a record search that the party to whom it has lent funds does possess title to the securing property, its inquiry duties have been fulfilled.²⁶⁰

The foregoing argument is not, at first glance, ethically edifying. In effect, the lender would be arguing that facial suspiciousness aside, so long as it has effectively looked after its own interests, it has done what it must in order to earn protection as a BFP. In fact, the traditional void title versus voidable title²⁶¹ distinction provides some support for this position. When title to real property has been fraudulently acquired in a manner that the victim could have prevented, the swindler gets “voidable title” which is ratified or “annulled” once it passes for value to a party without knowledge of the fraud.²⁶² The party without knowledge is then protected as a BFP because whereas the initial victim did have some power to prevent the fraud, the BFP may have had only limited ability to even discover the fraud.²⁶³

A victim homeowner’s attorney seeking to quiet title could aver that notice of an outstanding mortgage gives a subsequent lender constructive notice of an at best questionable transfer of ownership from the victim to the EDE. The lender’s advocate could counter this by pointing out that the victim homeowner nonetheless had the ability

259. GORDON, *supra* note 50, at 1126.

260. MD. CODE ANN., REAL PROP. § 7-311(e) (LexisNexis Supp. 2006).

261. “Void title” carries with it neither remedy nor a duty to perform, as the transaction in question is not legally binding from the start. Examples of transactions that are void include ones that contradict statute, violate public policy, run afoul of laws, or contain uncertain or indefinite terms. A “voidable title” is one where a party has the power to avoid the legal relations created by a contract. Specific reasons to avoid a contract include infancy, fraud, mistake, duress, and some kinds of illegality. 1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 1:20 (Richard A. Lord ed., Thomson West 4th ed. 2007).

262. BLACK’S LAW DICTIONARY, *supra* note 11, at 1605.

263. See *Fertitta v. Bay Shore Dev. Corp.*, 252 Md. 393, 404, 250 A.2d 69, 76 (1969).

to prevent the fraud and failed to do so and must, therefore, bear the burden traditionally assigned by voidable title doctrine. Further, the lender could reason that the only thing a still-outstanding mortgage really demonstrates is that the original homeowner failed to convey title on favorable terms. Surely, the lender could conclude, it is not the lender's job to ensure a good deal for some homeowner with whom it has no privity relationship.

The legal battle will be intricate, interesting, and quite uncertain in its outcome until Maryland's highest appellate court issues a precedent-making decision. Part V.C of this Comment, however, will suggest a change to the PHFA that would, if adopted, render the foregoing discussion moot in a manner favorable to victimized homeowners seeking clear title to their homes.

V. RECOMMENDATIONS

A. *Exemptions in the PHFA*

The PHFA does not explicitly define the term affiliate; thus the reach of its exemptions of several different classes of professionals opens the door to possible abuse.²⁶⁴ This opening may be somewhat narrow, but it is an opening nonetheless.

For example, let us say that a real estate broker, operating as an EDE, facilitates the transfer of title to a number of properties in foreclosure to several different parties. Most or all of these parties eventually sell the properties they have acquired at a handsome profit. In doing so, they employ the real estate broker in question and pay him generous commissions. Are these third party purchasers affiliates of the broker? Should the EDE be estopped from claiming that they are not affiliates? To answer the latter question, we would presumably have to examine the terms of the contracts by which title was transferred, as well as any opportunities the distressed homeowners had to reacquire title under these contracts. We would also need to look at the totality of the dealings between the broker and the third parties. At the same time, however, it would seem that if the terms under which the third parties gained title to the properties in foreclosure were substantively unconscionable, this would strongly suggest that these third parties should at least be considered affiliates of the broker; if they were not, the PHFA would not apply.

The above scenario suggests that there might be an area of legal wiggle in which exempted parties may profit from dealings with

264. MD. CODE ANN., REAL PROP. §§ 7-301, 7-302(a)(3)(ii) (LexisNexis Supp. 2006); see also *supra* note 156 and accompanying text.

homeowners in foreclosure, so long as any terms they convince the distressed homeowners to accept do not meet the standard of substantive unconscionability. One could argue that this is not, in itself, a bad thing. The PHFA's very lack of specificity in defining "affiliate" might be seen as opening a potentially salubrious space of contractual freedom within which experienced professionals, like real estate brokers and attorneys, can work with homeowners in foreclosure towards potential solutions that are mutually beneficial, including ones involving transfer of title. If any such professionals step over the line of propriety, the argument might conclude; then, common law remedies such as fraud, breach of fiduciary duty, and unconscionability would provide legal recourse to any injured parties.

Any merits of conceptual or ideological elegance that such an argument might present are more than offset by the actual circumstances in response to which the PHFA was drafted and ultimately enacted.²⁶⁵ The proliferation of FRF, both in Maryland and across the United States, should serve as compelling evidence that when interested parties approach homeowners in foreclosure purporting to offer assistance, the likelihood of these homeowners losing not only their homes but also most or all of the equity they have earned over time is far too high.²⁶⁶ The number of victims that have fallen prey to EDEs across the country is far too high to accord with the implicit standards of equity of any society that subscribes to the rule of law.²⁶⁷ Freedom of contract in cases involving distressed homeowners has, in practice, amounted to the freedom to profit inequitably at their expense. Given the disparities between many of these homeowners and the EDEs in terms of financial and legal literacy, psychological circumstances, and resources, any other outcome would be surprising. Law exists to ensure equity where its absence might threaten it.²⁶⁸ It does not exist for the purpose of giving aid to those who would abuse the freedoms it secures.²⁶⁹ The

265. Alexander Gordon, IV, who helped draft the PHFA, expressed to present writer that the primary reason the aforementioned exemptions are in the statute in the first place is the pressure applied by interested industry lobbyists. While present writer does not know exactly which arguments they presented, it seems reasonable to suppose that the free market "opposing argument" presented above would be agreeable to them. See Gordon Interview, *supra* note 141.

266. See TRIPOLI & RENUALT, *supra* note 4, at 17, 51.

267. "Equity" is defined as "[t]he body of principles constituting what is fair and right; natural law." BLACK'S LAW DICTIONARY, *supra* note 11, at 579.

268. See FREDERIC BASTIAT, THE LAW 7 (Dean Russell trans., The Found. for Econ. Educ., Inc. 1950) (1853).

269. See *id.* at 12.

PHFA's language limiting the exemptions it contains should, therefore, be strengthened.

The only reason present writer recommends that this language be augmented, rather than recommending that the exemptions be eliminated altogether, is the belief that the latter option might not be politically viable.²⁷⁰ If legislative will could, in fact, be mustered to eliminate these exemptions, this would be the better alternative. Apart from making inchoate intellectual grunts about the sanctity of freedom of contract, those who would argue to maintain exemptions are charged with the task of demonstrating that, if engaged in by someone in an exempted group, the actions proscribed by the PHFA are more likely to be beneficial to a distressed homeowner than they are to be harmful. Otherwise, why exempt anyone from the PHFA's authority?

Such a contention would be a non-starter. It could be viewed that certain prohibited practices, such as accepting compensation for foreclosure consulting services before their performance has been completed, are not facially fraudulent.²⁷¹ Perhaps the exemption could be limited such that it applies only to these particular practices; potentially, this limitation could greatly reduce the chances of a vulnerable homeowner's being treated inequitably as a result of the statute's exceptions.

If, however, the exemptions remain, the language limiting those exemptions should be strengthened. One way to do this would be to replace the current clause with one providing that any services that fall under the statute's definition of foreclosure consulting service.²⁷² Any exempted party would then lose its status if it violated the rules binding non-profit organizations that deal solely with homeowners in foreclosure or loan default. In effect, such a clause would require those in exempted classes who purport to assist homeowners facing foreclosure to operate as non-profit entities when proffering and rendering this assistance.

B. Felony Status

Under Maryland law, a person who is convicted of theft of property or services valued at \$500 or more is guilty of a felony.²⁷³ As we have seen, the PHFA provides that any person convicted of violating any of the statute's provisions is guilty of a misdemeanor and is

270. See, e.g., *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002).

271. See MD. CODE ANN., REAL PROP. § 7-307(1) (LexisNexis Supp. 2006).

272. *Id.* § 7-301(a).

273. MD. CODE ANN., CRIM. LAW § 7-104(g)(1) (LexisNexis 2002 & Supp. 2006).

subject to a prison sentence of no longer than three years.²⁷⁴ As of this writing, it is not entirely clear how the PHFA's criminal penalties provision would be applied in the case of an EDE accused of violating multiple clauses. Consider a scenario in which the state prosecutes an EDE for: (1) failing to adequately verify that a homeowner agreeing to a reconveyance possessed the means to meet its terms; (2) presenting to the homeowner a contract printed in 10-point rather than 12-point type; (3) neglecting to provide a notice of rescission with the contract; (4) engaging in conduct intended to mislead the victim homeowner; and (5) retaining more than 18% of the proceeds from a subsequent sale of the victim's home that occurred within 18 months of the date on which she entered into the reconveyance agreement.

Under such a scenario, would the EDE, upon conviction of all five violations, face a possible three-year sentence for each? Fifteen years in prison for someone who has willfully committed FRF seems facially just, but misdemeanor penalties, by and large, do not lend themselves to such lengthy incarcerations.²⁷⁵ If, on the other hand, violations of the PHFA were prosecuted on a single-count basis with one three-year sentence for a person found guilty of violating multiple provisions, an EDE guilty of robbing a vulnerable homeowner of, say, \$100,000 in hard earned equity could conceivably come away with a misdemeanor conviction and a particularly short prison sentence.

The solution to this potential shortcoming of the PHFA is not simply to substitute the term felony for misdemeanor in the PHFA's criminal penalty provision. If violating any clause of the PHFA were a felony, any number of possibly innocent mistakes could then result in non-EDEs being branded as felons.²⁷⁶ We do not want strict felony liability for someone who, in the course of a sincere attempt to help a distressed homeowner, accidentally uses 11-point type or forgets to provide a notice of rescission. At the same time, given how potentially destructive FRF can be to its victims, it does not appear that softening the PHFA's penalty section to remove the implication of strict liability would be a good idea. An EDE savvy enough to ply his pernicious trade could conceivably trick a jury into believing he did not really "intend" to violate the PHFA. As it is

274. REAL PROP. § 7-321(a).

275. A misdemeanor is a crime characterized by a penalty of a short term of confinement "in a place other than prison (such as a county jail)." BLACK'S LAW DICTIONARY, *supra* note 11, at 1020.

276. REAL PROP. § 7-321(a).

already included in the PHFA,²⁷⁷ the strict liability provision should therefore remain therein.

Present writer's recommended solution is to incorporate Maryland's theft statute²⁷⁸ into the PHFA by reference. This could be done in terms of particular clauses that are already in the theft statute. For example, section 7-104 of the Criminal Article of the Maryland Code specifies unauthorized control over property by means of deception as one form of theft.²⁷⁹ The definition includes: (1) obtaining control over the property of another by means of deception with the intent to deprive the owner of the property; and (2) using the property of another with the knowledge that such use will "probably" deprive the owner of the property.²⁸⁰ These are not the only acts included in the aforesaid definition, but for our purposes they are the most germane.

As it is currently written, Maryland's theft statute arguably could be used to prosecute perpetrators of FRF at the felony level. Any title to the property that an EDE might have obtained has, as we have seen, almost certainly been gained by deceptive means.²⁸¹ It is, therefore, of little or no defense to theft for an EDE to claim that he cannot be accused of stealing what is, by contract, no longer owned by the victim homeowner. The use of a third party is also not a strong shield for an EDE. Even if a scam artist convinces someone to obtain title to the property at issue and then takes out a new mortgage on the remaining equity, the EDE remains a primary actor in the scheme.²⁸²

Under this scenario, the EDE has: (1) used deception in order to gain effective control over the victim's property because the third party is merely acting as the EDE's agent; and (2) used the property in a way that is almost certain to deprive the distressed homeowner of it. In taking out a new loan secured by the house in question for the sole purpose of making off with the proceeds from that loan, the EDE has made use of that house for his own purposes. Further, this use is almost certain to eventually deprive the victim of her home because the EDE has no intention of ever paying off the loan. Why should he, since it is in the third party's name?²⁸³

277. *See id.*

278. CRIM. LAW § 7-104.

279. *Id.* § 7-104(b).

280. *See id.* § 7-104(c)(1)(iii).

281. *See supra* notes 37–137 and accompanying text.

282. *See supra* notes 104–13 and accompanying text.

283. *See supra* notes 40–133 and accompanying text.

Based on the foregoing, it is no stretch to suggest that the following language could be inserted into the PHFA's criminal penalty section:

Any continuing course of conduct intended to deprive a homeowner in foreclosure, or one who has been in foreclosure at any point within six months prior to entering into a foreclosure consulting and/or reconveyance agreement, of any amount of the value of that person's home, will be considered "Unauthorized control over property--By Deception," pursuant to Maryland Criminal Code section 7-104.²⁸⁴

Such language would, in effect, treat any instance of FRF that accrues to the direct or indirect financial benefit of an EDE, or conversely, the financial detriment of the victim, as an act of theft. As such, if the amount of the deprivation reaches \$500 or greater, it will be considered a felony.²⁸⁵

There is no need for the existing language in the PHFA providing for misdemeanor penalties to be stricken. Rather, the language can be applied to violations of the PHFA that do not redound to the monetary detriment of the homeowner in question. A foreclosure consultant who fails, for example, to include a notice of rescission in a proffered contract, but does not otherwise harm the homeowner with whom he is dealing, ought not be branded a felon. Of course, any violation of the PHFA that is, by itself, a misdemeanor may ripen into a felony under the framework recommended herein.

If, say, a foreclosure consultant/EDE were to innocently forget to include a notice of rescission in a reconveyance agreement presented to and signed by a homeowner facing foreclosure, this would, standing alone, constitute a misdemeanor. If, however, the homeowner later learns of his rescission rights under the PHFA and demands that the conveyance to the EDE or agent thereof be voided, only to be rebuffed by the EDE, a potential felony develops. If the EDE's conduct under this set of facts eventually causes the homeowner to lose \$500 or more of the value of his home, then the initial misdemeanor has, in fact, mutated into a felony. Such a manner of criminal classification would be wholly consistent with extant language in Maryland's theft statute providing that in determining the monetary degree of the victim's deprivation, any

284. MD. CODE ANN., CRIM. LAW § 7-104(b) (LexisNexis 2002 & Supp. 2006).

285. *See id.* § 7-104(g)(1).

separate losses resulting from “one scheme” or “continuing course of conduct” will be “aggregated.”²⁸⁶

The revisions recommended in this subsection are intended to provide investigators and prosecutors who deal with FRF added enforcement potency and a measure of flexibility. Someone who rips off a desperate person for tens of thousands of dollars clearly merits the legal condemnation only felony sanctions can provide. At the same time, for reasons already discussed, not every violation of the PHFA needs to carry this degree of sanction.

C. *Voiding What Is Now Merely Voidable*

Strong enforcement of the PHFA will go only so far in preventing FRF from occurring. The likelihood that a significant number of victims will not seek legal recourse will continue to attract certain people to the ranks of the EDEs. Ending FRF in Maryland once and for all will require that we make it unprofitable. A powerful and simple change to the PHFA’s BFP provision could achieve this. Instead of explicitly holding out the possibility that a buyer of, or lender on, an EDE-acquired property may be a BFP, the statute could state in clear and unambiguous terms that any foreclosure consulting contract or reconveyance agreement that in any way fails to conform to the PHFA breaks the chain of title to the property. In addition, the PHFA could include a provision that any violation of an otherwise valid foreclosure consulting contract or reconveyance agreement also breaks the chain of title.

In other words, present writer recommends that any violation of the PHFA renders title to property conveyed pursuant to any activity covered by the statute void, rather than voidable. The last sentence of the preceding paragraph means exactly what it says. *Any* violation of the PHFA, even one that occurs *after* a financial institution has already lent money to an EDE or affiliate thereof, will break the chain of title. The title search that the bank or other lender undertook prior to the violation of the PHFA would thus be rendered useless. As counterintuitive as this might appear, it is necessary.

Violations of the PHFA are likely to occur after—rather than before—the EDE has already secured loan proceeds on the existing equity.²⁸⁷ If, for example, an EDE persuades a victimized homeowner to agree to a foreclosure reconveyance agreement and *then* takes out a loan secured by the property, the lender could argue that the EDE had not violated the PHFA until after the loan had been

286. *See id.* § 7-103(f).

287. MD. CODE ANN., REAL PROP. §§ 7-318 to -321 (LexisNexis Supp. 2006).

made.²⁸⁸ The PHFA has only been violated, the lender could contend, when the EDE pockets the loan proceeds and leaves the victim to his fate. If this argument were to prevail in court, then the lender would be able to gain clear title to the victim's property as a BFP. This would defeat much of the purpose of the PHFA.

The only way to ensure that no party who lends to an EDE or EDE-affiliate gains BFP status, therefore, is to adopt the rule that any violation of the PHFA, by operation of law, voids any title transferred as part of a foreclosure consulting contract or foreclosure reconveyance. If the state legislature were to adopt this provision as part of the PHFA, it seems safe to say that the monetary well from which the EDEs have begun to drink would quickly become a desert. No lender is going to extend even a penny that is secured by a mortgage or deed of trust that could be rendered void at any time, by any violation of a statute that holds foreclosure "consultants" to very exacting and particular standards. Legitimate lenders would thus be taken out of the nefarious FRF equation altogether.

While the foregoing proposal might be controversial, it would do far more good than harm. Even vigilant enforcement of the PHFA, as it is now written, will not deter all who would be EDEs.²⁸⁹ It seems reasonable to say that there are plenty of scam artists who to this day remain ignorant of the PHFA and thus undeterred by it. Similarly, while the PHFA's treble damages provision makes legal representation much more available to victim homeowners than it was before the PHFA's enactment,²⁹⁰ many victims will remain too depressed, desperate, fatigued, and uninformed to wage a legal battle against the EDEs. The best way to fight FRF is to prevent it from happening in the first place. Denying EDEs the option of stripping equity through mortgage loans would be a giant step in this direction.

VI. CONCLUSION

In an important way, the PHFA's principal strength is also a potential weakness. Its comprehensiveness, particularly in defining the extent of its scope, makes it terribly difficult for any EDE (except those in the exempted classes) to escape its coverage. The PHFA's substantive protections are similarly broad and thorough (except, of course, its BFP provision). One hopes that our success in combating FRF, or for that matter, any other significant form of fraud, is not

288. *See id.* §§ 7-307(1)-(7).

289. *See id.* § 7-319.

290. *See supra* notes 187-90 and accompanying text; *see also, e.g.*, REAL PROP. § 7-320(c).

dependent upon our ability to heap clause upon clause and term upon term in an unceasing effort to match the criminals as they continue to find new paths around law and equity.

A small number of simple, yet forceful, measures of the sort advocated in this Comment could go a long way toward stamping out FRF in the state of Maryland. One could argue that declaring an EDE's title void rather than voidable presents the risk of innocent parties being harmed. In fact, innocent parties are being harmed as you read this. The likelihood of anyone acquiring title in good faith from an EDE *after* this Comment's suggestions are enacted is much, much smaller than the chance that EDEs will continue to steal home equity from desperate people if the PHFA is not strengthened.

One could also argue that this Comment does conceptual violence to the "void vs. voidable" distinction. Such a charge would be spurious. It is true the Comment advocates treating as void what is, strictly speaking, voidable title. The definitions of void and voidable, however, remain for the law to use as its purposes dictate. The law's task is to employ its concepts in the manner most conducive to fairness and equity. There is no legal or ethical justification for the law to willfully remain straitjacketed within abstractions of its own making.

In sum, this Comment stresses conceptually economical preventive measures over elaborate enforcement mechanisms. Hopefully, those who object to the suggested means on free market grounds will recognize that the very simplicity of these means is, itself, market-friendly. It will hopefully be fitting to end this Comment where it began—with an allusion to freedom of contract. The best, *and* most economically sensible way, to combat FRF in Maryland may well be to alter the rules of the BFP game slightly and let the marketplace do the rest.

Seth Yaffo