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RECENT DEVELOPMENTS

ARE LAND CONTRACTS PREYING ON LOW-INCOME BUYERS OR DO THEY OFFER A DIFFERENT AVENUE FOR HOME OWNERSHIP?

Christopher Barron

I. INTRODUCTION

As of May 2016, the Consumer Financial Protection Bureau (CFPB) has announced an investigation into the practice of land contracts and compliance with federal truth and lending laws.¹ The CFPB's investigation is in response to the increasing number of reports from organizations, such as the National Consumer Law Center (NCLC), condemning land contracts for their predatory nature and disparate impact on low-income buyers, specifically those of color.² Furthermore, land contracts have been labeled as "Wall Street's Toxic Transactions" because of large wall street investment groups utilizing them for their own capital gain.³ Land contracts have been vilified for luring unsuspecting homebuyers into vastly inequitable, seller friendly deals with the promise of future home ownership.⁴

While in some instances land contracts afford unscrupulous sellers the opportunity to take advantage of prospective homebuyers, they also provide an alternative avenue for home ownership.⁵ Low-income buyers, who might

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1. Matthew Goldstein & Alexandra Stevenson, "Contract for Deed" Lending Gets Federal Scrutiny, DEALBOOK, May 11, 2016, <http://www.nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news&r=1>.
 2. Jeremiah Battle et al., *Toxic Transactions: How Land Installment Contracts Once Again Threaten Communities of Color*, National Consumer Law Center (last visited Sep 8, 2016). <http://www.nclc.org/images/pdf/pr-reports/report-land-contracts.pdf>.
 3. David Reiss, *Wall Street's New Toxic Transactions*, LinkedIn (Jul. 22, 2016), <https://www.linkedin.com/pulse/wall-streets-new-toxic-transactions-david-reiss>.
 4. Goldstein & Stevenson, *supra* note 1.
 5. 15-84D Powell on Real Property § 84D.01 LEXIS NEXIS (2015).

not otherwise receive conventional bank financing for purchasing a home, can receive seller financing and can have more influence in negotiating the terms of the agreement.⁶ The question still remains, are land contracts a viable route to homeownership or are they a risky venture that needs federal oversight to prohibit nontraditional buyers from being taken advantage of?

II. BACKGROUND/HISTORICAL DEVELOPMENT

A. What is a land contract?

Land contracts (a.k.a. land installment contracts or contract for deed) are contracts financed by the owner of a house without involvement of a 3rd party, such as a lending institution.⁷ Generally, a land contract will include a small initial down payment that is stretched out over an agreed upon number of years at, and for, an agreed upon interest rate.⁸ Typically, the buyer will pay a monthly payment with interest and a balloon payment near the conclusion of the contract.⁹ Once the terms of the contract have been negotiated, the buyer will take possession of the house and the seller will retain title of the house until all purchase obligations are complete.¹⁰

Cases involving land contracts date back to the 1800s.¹¹ The holdings in these cases illustrate that the legal principles governing land contracts have remained largely unchanged.¹² However, the purpose behind land contracts has changed. In the past, land contracts were utilized primarily for seller financing, because many buyers could not afford the full purchase price of a piece of property up front.¹³ Presently, sellers are utilizing land contracts to put the burden of home repair on prospective buyers.¹⁴ This practice emerged after the housing crisis in 2008, and many believe that land contracts are now predatory in nature.¹⁵ According to the U.S. Census, 3.5 million people purchased a home through a land contract in 2009, largely in the

6. *Id.* (stating a positive outcome of utilizing land contracts).

7. *Id.* (defining a land contract).

8. *Id.* (explaining the use of a land contract).

9. *Id.*

10. *Id.*

11. *See* *Bean v. Atwater*, 4 Conn. 3 (1821); *see also* *Crane v. O'Reiley*, 8 Mich. 312 (1860).

12. *Cent. P. R. Co. v. Mudd*, 59 Cal. 585 (1881); *see also* *Clarke v. Curtis*, 38 Va. 559 (1841).

13. *Roberts v. Morsell*, 10 Md. 32 (1856); *see also* *Wall v. Simpson*, 29 Ky. 155 (1831).

14. Goldstein, *supra* note 1.

15. *Id.*

midwestern and southern states.¹⁶ Following the housing crisis, large investment groups from Wall Street, such as Harbour Portfolio, have amassed more than 6,700 foreclosed houses and they have sold hundreds of these houses using land contracts.¹⁷ The number of land contracts on the real estate market are on the rise and do not appear to be slowing down anytime soon.

B. How Land Contracts Are Governed

Since state law governs land contracts, there is a general lack of uniformity.¹⁸ There are states that heavily regulate land contracts and offer stronger buyer protection. On the other hand, there are states that have minimal statutory regulations governing land contracts and these states favor the interests of the seller. Two states that represent opposite ends of the regulation spectrum governing land contracts are Ohio and New Hampshire. Ohio has a multitude of laws governing land contracts and offers remedies for both buyer and seller in case of breach of contract.¹⁹ Moreover, New Hampshire has almost no statutory laws governing land contracts and its common law appears to favor sellers in land contracts.²⁰

For example, the state of Ohio has statutes governing the minimum contents of land contracts.²¹ Ohio mandates that land contracts must include all costs, fees, and taxes associated with the property and stipulate when they are due.²² Furthermore, the interest rate must be provided in the contract as well as notification of any encumbrances on the property.²³ Ohio law requires a provision for the seller to provide a general warranty deed upon completion of the contract, meaning that the seller must provide evidence of title.²⁴ Most importantly, land contracts must be recorded and sellers may not take on a mortgage greater than the balance due on the contract.²⁵ A seller also owes a duty to the buyer to give an annual statement, indicating

16. Battle, *supra* note 2, at 2.

17. Goldstein, *supra* note 1.

18. Battle, *supra* note 2, at 9 (indicating general lack of uniformity among state laws governing land contracts).

19. OHIO REV. CODE ANN. §§ 5313.01-09 (West 2016).

20. N.H. REV. STAT. ANN. §§ 479-B:1-B:3 (2011); Parks v. Eames Realty Co. 94 N.H. 454, 55 A.2d 312 (1947); Randall v. Riel 123 N.H. 757 465 A.2d 505 (1983).

21. R.C. § 5313.02 (West) (minimum requirements for land contracts).

22. *Id.*; see also Robert M. Curry & James Geoffrey Durham, *Ohio Land Contract Law*, 19 U. DAYTON L. REV. 563, 566-67 (1994).

23. R.C. § 5313.02 (West); see also Curry, *supra* note 22.

24. R.C. § 5313.02 (West); see also Curry, *supra* note 22, at 567.

25. R.C. § 5313.02 (West); see also Curry, *supra* note 22, at 568.

how much has been paid and the balanced owed.²⁶ Finally, Ohio law also stipulates remedies for buyer and seller default.²⁷ The buyer may enforce any breach of contract against the seller in court.²⁸ The seller also may file for forfeiture, giving the buyer 30 days to pay all delinquent fees under the contract.²⁹ If the buyer does not pay the delinquent fees in thirty days, the buyer will put them on a 10-day notice to leave the property, and through the courts cancel the contract and possibly sue for restitution.³⁰ Land contracts are well-defined in the state of Ohio.

However, there are states such as New Hampshire that have a limited number of statutes governing land contracts.³¹ In New Hampshire, there are only four statutes that include land contracts.³² Furthermore, New Hampshire common law utilizes two cases, *Parks v. Eames Realty Co.* and *Randall v. Riel*, as legal precedent for enforcing land contracts.³³ In *Parks v. Eames*, Mr. Parks was behind on payments for his land contract and was in default.³⁴ The defendant notified him of forfeiture and the Supreme Court of New Hampshire found in favor of the defendant.³⁵ The land contract was canceled; the defendant was permitted to keep the down payment and was granted repossession of the property.³⁶ Land contracts are not well-defined by New Hampshire law. The common law in New Hampshire is strongly in favor of the seller and offers few protections for a buyer.³⁷ The lack of uniformity in state laws governing land contracts has undoubtedly contributed to the advocacy federal oversight and coordination.

26. R.C. § 5313.03 (West).

27. *Id.* § 5313.04-05.

28. *Id.* § 5313.04.

29. *Id.* § 5313.05.

30. *See* OHIO REV. CODE ANN. § 5313.06 (West 2016); *See also* OHIO REV. CODE ANN. § 5313.08 (West 2016); *See also* OHIO REV. CODE ANN. § 5313.09 (West 2016).

31. N.H. REV. STAT. ANN. § 479-B:1 (2016).

32. *Id.*

33. *See Parks v. Eames Realty Co.*, *supra* note 20.

34. *Id.* at 455, 55 A.2d at 313 (defaulting on a land contract).

35. *Id.* at 455, 55 A.2d at 313.

36. *Id.* at 455, 55 A.2d at 313.

37. *Id.* at 455, 55 A.2d at 313; *see also Randall v. Riel*, *supra* note 20 (defaulting on a land contract and seller was not permitted to keep all of the down payment and monthly interest payments because the court viewed this an equitable under the liquidated damages of the land contract).

III. ANALYSIS

A. Predatory Nature of Land Contracts

The major criticism concerning land contracts is that they target and take advantage of low-income minority buyers.³⁸ Following the housing crisis, thousands of Americans lost their homes and this severely impacted their credit ratings.³⁹ Thus, people with poor credit history were left unable to secure traditional financing from a lending institution.⁴⁰ From 2010–2014, Harbour Portfolio was able to purchase about 6,700 homes through bulk sales of foreclosed homes by Fannie Mae, a government sponsored mortgage lender.⁴¹ The foreclosure crisis of 2008, flooded the housing market with a multitude of foreclosed homes.⁴² Thus, many mortgage entities like Fannie Mae had an abundance of foreclosed homes with no market to sell them in.⁴³ Thus, many of these homes were sold in bulk sales to large private equity backed portfolios like Harbor.⁴⁴ Institutes such as the NCLC believe Wall Street investor backed portfolios, such as Harbour, are preying upon the vulnerability of those with damaged credit under the guise of prospective home ownership.⁴⁵

According to the New York Times, “Before the housing crisis, low-income buyers got too much of a house that they couldn’t afford.⁴⁶ Now, they are getting too little of a house that they can’t afford to repair.”⁴⁷ Investment portfolios such as Harbour avoid repairing the homes they pur-

38. See *supra* note 2; see also Buying a Home on a Land Contract, RURAL LAW CENTER OF NEW YORK, INC. [HTTP://www.rurallawcenter.org/docs/Buying%20a%20Home%20on%20a%20Land%20Contract.pdf](http://www.rurallawcenter.org/docs/Buying%20a%20Home%20on%20a%20Land%20Contract.pdf) (last visited Sept 8, 2016).

39. Goldstein & Stevenson, *supra* note 1 (highlighting the resurgence of land contracts in the housing market).

40. Powell on Real Property, *supra* note 5 (indicating the consequences of the Housing Crisis in 2008).

41. Battle, *supra* note 2; see also Matthew Goldstein & Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, DealBook, (Feb 20, 2016), <http://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html>

42. Battle, *supra* note 2 (highlighting the consequence of the Foreclosure Crisis 2008).

43. *Id.*

44. *Id.*

45. Battle, *supra* note 2; see also Heather Helberg, *Apollo’s Push Into Business That Other’s call Predatory*, BLOOMBERG (Apr. 7, 2016), <http://www.bloomberg.com/news/articles/2016-04-07/apollo-s-push-into-a-lending-business-that-others-call-predatory>

46. Goldstein & Stevenson, *supra* note 41.

47. *Id.*

chased by shifting the burden of property upkeep onto the buyer.⁴⁸ Thus, Harbor can evict a buyer and resell their home shortly after they default on their monthly interest payments.⁴⁹ Many potential homebuyers often realize they cannot afford their monthly interest payments when coupled with the additional burden of home maintenance.⁵⁰ The New York Times has offered numerous examples of the pro-seller agenda stipulated in these contracts. For example, Kevin Franklyn of Detroit had to forfeit his house because he fell behind on his payments under his land contract.⁵¹ He purchased the home from Harbour for \$44,925 and could not make the monthly payments because the house required significant repairs to the roof, plumbing, electrical system, and drywall.⁵² In Detroit alone, 300 homes have received notices for delinquent property taxes.⁵³ Furthermore, ten of the 50 homes purchased by Harbour have been condemned due to their dilapidated appearance in Ohio.⁵⁴ Many of the homes purchased by Harbour required significant work and upkeep, and many buyers did not factor the expense of home maintenance into their decision to purchase under a land contract.⁵⁵ As a result of these poorly negotiated contracts, homebuyers quickly realize that they cannot pay the monthly interest payment in addition to necessary repairs and property taxes.⁵⁶ Moreover, some sellers often fail to provide good title upon the fulfillment of all of the housing payments due to outstanding liens or mortgages on the property.⁵⁷ There exists the potential for unscrupulous sellers to structure contracts heavily in their favor.

The sellers construct these inequitable deals for two primary reasons.

48. *Id.*

49. Battle, *supra* note 2, at 8.

50. *Id.*

51. Goldstein & Stevenson, *supra* note 46 (providing an example of forfeiture under land contracts).

52. *Id.* See also Joel Kurth, *Land Contracts Trip Up Would-Be Homeowners*, THE DETROIT NEWS (Feb. 29, 2016, 12:04 AM), <http://www.detroitnews.com/story/news/local/detroit-city/2016/02/29/land-contracts-detroit-tax-foreclosure-joel-kurth/81081186/>.

53. Goldstein & Stevenson, *supra* note 46 (explaining that Buyers are responsible for property taxes and repairs in addition to monthly payments under a land contract).

54. *Id.*

55. *Id.*

56. *Id.* See also Jeffrey Meitrodt, *Contract for Deed can be House of Horror for Buyers*, STARTRIBUNE (Jul. 5, 2013, 5:27 AM), <http://www.startribune.com/jan-14-contract-for-deed-can-be-house-of-horror-for-buyers/185756982/> (noting the Vadym Klyatsky example).

57. Battle, *supra* note 2. See also Heather Way, *Informal Homeownership in the United States and the Law*, St. Louis U. Pub. L. Rev. Vol. 29 No. 1, 138-139 (2009).

First, they can shift the burden of upkeep and improvement on the property to the buyer, which increases the property value.⁵⁸ Second, if the buyer defaults, the title still remains in the hands of the seller.⁵⁹ Depending on the state, it may be very easy for the seller to regain possession through forfeiture or foreclosure.⁶⁰ Thus, the seller is able to keep the down payment coupled with all of the interest payments paid, and then relist the house for sale because they still hold title to the property.⁶¹

B. How to Prevent Inequitable Land Contracts

In order to avoid entering into a poorly negotiated land contract, buyers should be afforded certain standard truth and lending disclosures. This would allow them to determine what they can afford and allow them to create a solid financial plan for making all obligatory payments on time.⁶² A land contract affords buyers the ability to negotiate with the sellers with potentially more influence than applying for a loan with a lending institution.⁶³ Buyers should be informed regarding purchasing protocols, including a house appraisal and inspection by an independent third party, as well as a title search to ensure that the property has marketable title.⁶⁴ Additionally, buyers should also safeguard their own interests by including negotiable terms such as property tax and home repair responsibility in their land contract.⁶⁵ Balancing the interests of the buyer and seller are essential to avoid an inequitable land contract.

Another means of preventing inequity in the use of land contracts would be greater uniformity among the states. Currently, there is no concurrent view of land contracts amongst the states.⁶⁶ Some states like Ohio offer remedies for both buyer and seller in case of a breach of contract.⁶⁷ On the other hand, there are states like New Hampshire that have minimal statutes

58. Kurth, *supra* note 52 (“It’s better than having a squatter,” ... “It relieves us of rehabbing and the maintenance of these homes and puts that all on the tenant. It gives them the chance to buy a home if they put in enough sweat equity.”).

59. Powell, *supra* note 5 (explaining buyer default).

60. Battle, *supra* note 2 (noting a different jurisdictional approach).

61. *See Parks v. Eames Realty Co.*, *supra* note 20.

62. MICHIGAN LAND CONTRACT GUIDE, MICHIGAN FORECLOSURE TASK FORCE, available at <http://miforeclosureresponse.org/wp-content/uploads/2012/09/land-contract-guide-final.pdf> (last visited Sep 8, 2016).

63. Powell, *supra* note 5.

64. MICHIGAN LAND CONTRACT GUIDE, *supra* note 62. *See Battle*, *supra* note 2.

65. *See supra* note 2.

66. Battle, *supra* note 2.

67. OHIO. REV. CODE. Ann. § 5313.02 Minimum contents of land installment contract; mortgage on land installment contract property; duty of vendor to record; formalities (West 2016).

governing land contracts and the common law is largely in favor of sellers of land contracts.⁶⁸ If all of the states utilized the Ohio statutory minimum requirements for land contracts, they would help prevent inequitable dealing.⁶⁹ This could be achieved either through federal oversight by the CFPB, or reformed state statutory and common law across the country.⁷⁰ A standard form contract coupled with adherence to purchasing protocols would ensure the protection of a buyer's interests in a land contract.

There is also no compelling force for a prospective buyer to purchase a home. Not everyone needs to own a home. The alternative to home ownership is renting a house or apartment. One can save money for a house in the future and also take time to improve their credit, and eventually seek bank financing.

C. Benefits of Land Contracts

Land contracts represent an alternative path towards home ownership available to individuals who might not otherwise qualify for traditional financing.⁷¹ For example, Bridge to Success, a Minnesota nonprofit, uses land contracts to finance the sale of their houses and has made a positive impact on the lives of low income buyers and the community at large.⁷² One such success story involves Betty Jo Zepeda, whose life was transformed through this organization.⁷³ After a divorce, she was left homeless, and through Bridge to Success, was able to eventually buy a \$180,000 house.⁷⁴ Through her monthly interest payments, Betty was able to use her equity in her home to qualify for a mortgage from a bank.⁷⁵ Prospective homebuyers utilizing a land contract can use their equity derived from monthly interest payments as collateral for bank financing in the future.⁷⁶ Without the land

68. N.H. REV. STAT. Ann. § 479-B:1 (2011); Parks v. Eames Realty Co., *supra* note 20; Randall v. Riel, *supra* note 20.

69. OHIO. REV. CODE. Ann § 5313.02. (providing an example of equitable statutory regulations for a land contract).

70. Battle, *supra* note 2, at 9-12.

71. Goldstein & Stevenson, *supra* note 42.

72. *Id.*; See also Jeffrey Meitrody, *Contract for Deed can be House of Horror for Buyers*, STARTRIBUNE (Jul. 5, 2013) <http://www.startribune.com/jan-14-contract-for-deed-can-be-house-of-horror-for-buyers/185756982/> (reporting greater metropolitan housing corporations utilizing land contracts to stabilize troubled neighborhoods).

73. *Id.* (referencing land contracts improving the livelihood of Betty Jo Zepeda).

74. *Id.*

75. *Id.* (representing that land contracts can be the first step to improving one's credit).

76. *Id.* (highlighting that without the alternative option of land contracts Betty Jo would still be homeless and have damaged credit).

contract a traditional bank mortgage would have required at least a 10% down payment in addition to collateral.⁷⁷ The land contract permitted a small down payment with a monthly interest payment that she could afford.⁷⁸ Land contracts can be useful vehicles for traditionally unqualified buyers to acquire home ownership and improve their credit ratings.

D. Proposed Federal Oversight

While the CFPB is still investigating the inequities of land contracts, the NCLC has suggested several recommendations that address these problems.⁷⁹ 1) Requiring an independent home inspection to prevent the selling of dilapidated homes.⁸⁰ 2) Requiring a third party appraisal to ensure the home is being sold at fair market value.⁸¹ 3) Requiring a standard form contract.⁸² 4) Ensuring good title at the time of sale and if this is not possible then the price should be reduced.⁸³ 5) Requiring recordation ensures a marketable title.⁸⁴ 6) Seller should provide transparency in the form of annual billing statement, which includes payments made and payments owed.⁸⁵ 7) Allowing the buyer a right to cure or prepay over a reasonable period of time.⁸⁶ 8) Providing protection for buyer or seller default.⁸⁷ For example, if the buyer defaults, the seller should receive fair market rent for the time the buyer spent in the house and the buyer should be credited with all payments made in accordance with the contract, as well any payments made for repairs or taxes.⁸⁸ If the seller defaults by not delivering good title, not disclosing liens, or not recording the contract, buyers should receive all payments made under the land contract.⁸⁹ The NCLC proposed regulations for the CFPB closely mirror Ohio's minimum requirements for land contracts.

It is evident that federal oversight could bring greater uniformity to gov-

77. Kevin Pratt, *Learn More About How Mortgages Work*, MONEY SUPER MARKET (Mar. 21, 2016), <https://www.moneysupermarket.com/mortgages/how-does-mortgage-interest-work/>.

78. Battle, *supra* note 2.

79. Battle, *supra* note 2 (resolving inequities in land contracts); *see also* OHIO. REV. CODE. ANN § 5313.02 (2016).

80. *Id.* *See also* Buying a Home on a Land Contract, *supra* note 38.

81. Battle, *supra* note 2.

82. *Id.* *See also* R.C. § 5313.02.

83. Battle, *supra* note 2; MICHIGAN LAND CONTRACT GUIDE, *supra* note 62; *see also* R.C. § 5313.02.

84. Battle, *supra* note 2; *see also* R.C. § 5313.02.

85. Battle, *supra* note 2; *see also* R.C. § 5313.03.

86. Battle, *supra* note 2; *see also* R.C. § 5313.05.

87. Battle, *supra* note 2; *see also* R.C. § 5313.02.

88. Battle, *supra* note 2; *see also* R.C. § 5313.02.

89. Battle, *supra* note 2.

ernance of land contracts.⁹⁰ Additionally, the CFPB could enact new regulations to ensure that large investment portfolios like Harbour are not preying upon buyers through the practice of land contracts.⁹¹ However, it is uncertain what kind of negative impact federal oversight could have on land contracts. While federal oversight could bring uniformity to land contracts, onerous federal regulations could create a disincentive for sellers to sell to unqualified buyers.⁹² Increased federal regulations could make land contracts more difficult and costly to comply with federal statutes.⁹³ For example, since its inception, the CFPB has proposed rules governing consumer friendly mortgages in a total of 1,099 pages.⁹⁴ The compliance headache alone would be enough to make sellers reconsider using land contracts. Furthermore, Diane Katz, a contributor to the Heritage foundation, asserts, “the new regulatory strictures will increase consumers costs and reduce consumers’ choices of financial products and services.”⁹⁵ Thus, federal regulations could ultimately take away this alternative avenue for home ownership for low-income buyers.

IV. CONCLUSION

In conclusion, though land contracts can provide opportunity for home ownership for those who do not qualify for a conventional mortgage, they can also be a means for unscrupulous owners to take advantage of unsuspecting prospective buyers. It is unclear whether the CFPB will move to regulate these contracts under federal law. Furthermore, it is unclear whether the CFPB regulations would protect homebuyers or hurt them. Moving forward, regardless of whether the CFPD asserts federal jurisdiction over land contracts, changes must be made to protect the interests of both the buyers and sellers and to continue providing nontraditional buyers with an alternative avenue to home ownership.

90. Battle, *supra* note 2.

91. *Id.*

92. Diane Katz, *The CFPB in Action: Consumer Bureau Harms Those It Claims to Protect*, THE HERITAGE FOUNDATION, (Jan 22, 2013) <http://www.heritage.org/research/reports/2013/01/the-cfpb-in-action-consumer-bureau-harms-those-it-claims-to-protect>.

93. *Id.* (highlighting the negative impact of CFPB regulations on land contracts).

94. *Id.* (providing an example of the compliance burden associated with CFPB regulation).

95. *Id.* (remarking that CFPB regulations could extinguish the use of land contracts altogether).