 Printed in U.S.A.
Vol. 118, No. 1

CONSUMER FRAUD, HOME FINANCING, AND THE EROSION OF TRUST

Linda E. Fisher

ABSTRACT—Consumer fraud is a civil violation of a remedial statute not requiring specific intent to deceive. Most consumer fraud statutes define violations as unconscionable, misleading, or deceptive practices irrespective of intent, in derogation of the principle of caveat emptor. They do not apply to business-to-business transactions. Trust plays a central role in business-to-consumer transactions. Because consumers are individuals, there is often an inherent inequality in consumer transactions. Sophisticated marketing techniques—especially target marketing that follows potential customers all over the internet—hound consumers' online lives and manipulate purchasing decisions. The increasing monetization of almost everything exacerbates these effects. This transactionalism itself erodes trust because commercial trust is less robust than interpersonal trust.

"Consumers" are not a monolithic category and the effects of consumer fraud depend on one's education, business sophistication, and ethnicity. The neoclassical model of a universal, rational, self-interested, decontextualized individual has numerous limitations, and we now know that rationality is bounded in any event—we are unable to incorporate all relevant information in our decision-making. Further, the neoclassical model does not accurately represent the financial situations and daily realities of most American consumers, who are working to middle class, struggling economically, and lacking in financial literacy.

This Essay applies this framework to the phenomenon of home lending fraud, which was the primary cause of the Great Recession and the worldwide financial meltdown of 2008. Home lending fraud of all sorts erodes trust in our system and country. Trust tends to be eroded more in consumers who do not realize the risks taken when entering into these transactions, which is disproportionally the case with lower income consumers. They are hit especially hard because they have fewer resources, and if they own a home, it is generally their only valuable asset. In this Essay, I focus particularly on the example of land contracts—rent-to-own arrangements often accompanied by predatory features—that have looted many millions of dollars of wealth from low- to moderate-income Americans.

The Essay finally turns to the post-Great Recession Dodd–Frank Act and its creation of the Consumer Financial Protection Bureau. The Bureau is the first federal agency with the sole mission to regulate consumer financial products. Dodd–Frank regulations and oversight have helped increase trust in consumer financial markets since the last financial crisis. Supervision of lending institutions—some of which were not previously subject to federal regulation—is a critical tool in resisting forces that continue to undermine trust in our system.

AUTHOR—Emeritus Professor of Law, Seton Hall University School of Law.

> *"Form-adhesive contracts are like termites gnawing away at an old house. No single termite brings the house down. But the aggregate effect slowly reveals itself, perhaps at a rate too slowly to be noticed. So too, with erosion of trust in the rule of law."*
>
> —Zev J. Eigen[†]

INTRODUCTION

Financing a home purchase has been a prominent issue in recent years, particularly since the mortgage market imploded in 2007, causing the Great Recession and extreme volatility in the housing market. Volumes have been written about what went wrong and the ripple effects that ensued.[1] Less has been written about the consequences of the crash, including the further erosion of public trust.[2] Large corporations are snatching up foreclosed homes at huge discounts and then selling them with installment land

[†] Zev J. Eigen, *Norm Shifting by Contract*, 44 SW. L. REV. 231, 236 (2014).

[1] *See, e.g.*, KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2016); BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS (2011); ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED AND WHAT TO DO ABOUT IT (2008).

[2] For an example of scholarship on the consequences of the crash, see LINDA E. FISHER & JUDITH FOX, THE FORECLOSURE ECHO: HOW THE HARDEST HIT HAVE BEEN LEFT OUT OF THE ECONOMIC RECOVERY (2019).

contracts which are essentially rent-to-own arrangements.[3] Many of these contracts are the products of consumer fraud, and they erode public trust in the American economy. Moreover, because the worst abuses are perpetrated on those least able to resist, the inequality gap increases, further eroding trust.

People often assume that consumer fraud is a type of common law or criminal fraud—it is not.[4] Instead, it is a civil violation of a remedial statute not requiring specific intent to deceive. The Federal Trade Commission Act of 1914 provided the first template for these remedial statutes. It prohibits unfair and deceptive acts and practices to buyers in consumer transactions.[5] Today, most consumer fraud statutes define consumer fraud as consisting of unconscionable, misleading, or deceptive practices irrespective of intent, thus encompassing much more conduct than what we usually think of as fraud.[6] These statutes extend beyond common law fraud because the legislatures that enacted them wanted to create a "moral economy"—one that would serve the public interest.[7] As such, these remedial statutes are in

---

3 *See infra* text accompanying notes 74–76.

4 In other words, "consumer fraud" is a bit of a misnomer. Consumer fraud statutes ordinarily prohibit unfair and deceptive acts and practices, which can range far beyond conduct within the ambit of common law fraud. For instance, a specific intent to deceive and reliance ordinarily are not required under a consumer fraud statute. *See* John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1003–04 (2006) ("[T]he private rights of action granted by state consumer protection statutes are somewhat different creatures than the right to sue for common law fraud. . . . [T]hese laws are regulatory in structure and spirit. They define the legal wrong of consumer deception less in the manner of a tort and more in the manner of a regulatory offense or a crime. Thus, the mere undertaking of a deceptive act or practice by the defendant is usually sufficient to complete the wrong. . . . [T]he dominant underlying concern is to protect the public from illicit business practices. . . . [T]here may be reason for courts entertaining actions brought under consumer protection statutes to take a more relaxed approach to reliance and perhaps to deem it not a required element at all.").

5 *See* 15 U.S.C. § 2301; *Id.* § 45(a) ("Unfair methods of competition . . . are hereby declared unlawful."). In addition to the Federal Tort Claims Act (FTCA), all fifty states have adopted statutes to prevent consumer deception in the marketplace, often called "mini-FTC" acts or consumer fraud statutes. *See* CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 9 (2018) ("Every state has a consumer protection law that prohibits deceptive practices, and many prohibit unfair or unconscionable practices as well. These statutes, commonly known as Unfair and Deceptive Acts and Practices or UDAP statutes, provide bedrock protections for consumers.").

6 *Id.* at 14–15.

7 For a broader perspective, see Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 444–45 (2021):

> One cannot understand why a New Deal Congress amended section 5 of the Federal Trade Commission Act to give the FTC authority over "unfair or deceptive acts and practices" without understanding why a Progressive Congress gave it authority over "unfair methods of competition" in the first place. The Federal Trade Commission Act was part of a decades-long struggle to

derogation of the principle of caveat emptor—"let the buyer beware"—and provide broad relief for consumers.

But who are the "consumers" in consumer fraud? Many statutes define the term as covering those who use the good or service for "personal, family, or household" purposes, or similar language.[8] The statutes tend not to apply to business-to-business transactions since merchants are presumed more sophisticated than average consumers.[9]

Consumer fraud statutes are tailored to less sophisticated consumers because these consumers are more vulnerable to manipulation. When everyone understands their role in business interactions, and power disparities and market manipulation do not obliterate rough equality between consumer and merchant, the market can function as intended and without inherent unfairness. But because consumers often lack sophistication, power disparities and information asymmetries can result in market failures which are too frequent to rely on an unimpeded market to self-police. There is something lopsided and often inherently unequal in consumer transactions because consumers are individuals in contrast to sellers, which are generally corporations. For instance, when purchasers are misled about the quality of a consumer good, their ability to make efficient and effective purchases is limited. Producers that do not mislead in their advertisements are handicapped vis-à-vis other producers that have no compunction about false advertising, with the result that inferior goods can outsell better quality products.

Current marketing techniques contribute to the power and information disparities. Ads and sales pitches zero in on our deepest wants, some of them subconscious. Sophisticated online-marketing techniques—especially target marketing that follows potential customers all over the internet—now hound

---

develop institutional infrastructure at the national level to yoke the increasingly nationalized social provisioning process to collectively-arrived-at priorities: the "public interest."

. . . In their original context, these standards were embedded within a "moral economy," a common sense shared among jurists and civilians alike that "the economy [was] inseparable from the basic institutions and public concerns of their daily lives. As such, it was held to the same rigorous controls and legal standards that governed all aspects of life" in a "well-regulated society."

The Populist and Progressive coalitions that borrowed these standards from the past sought to construct an updated moral economy—this time enforced at the national level. They were repudiating the ideology of *laissez faire* and of self-correcting markets, instead insisting that markets were constructed to serve collective interests and should be held accountable through political and legal institutions.

8 CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 19 (10th ed. 2021); *see also* Goldberg et al., *supra* note 4.

9 CARTER, *supra* note 8.

consumers' online lives.[10] The level of manipulation in advertising is exponentially larger than it was in the *Mad Men* era of the 1960s.[11] For instance, ethnically-based affinity-marketing algorithms allow companies to appeal to race in large-scale advertising. Until recently, Facebook "allowed advertisers to exclude audiences by race from housing and employment ads it carried on the platform."[12] Other strategies use salespeople of the same ethnicity as customers to appeal to their common race and create more trust than warranted.[13] Beyond ethnically-based affinity marketing, "countdown timers" and "low stock counters" create a false sense of urgency to buy.[14] Consumers are not as free to choose as they might initially imagine.[15] The

---

10 "'Target marketing' refers to the practice of developing profiles of desired consumers and using those profiles to designate an audience for a product pitch." Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 BROOK. J.L. & POL'Y 121, 123–24 (2009) (explaining that predatory subprime loans employed target marketing to generate business). Target marketing can employ sophisticated demographic analysis differentially, harming low-income and minority consumers who may have less knowledge of their options. *See id.* at 124 ("Employing techniques ranging from sophisticated demographic analyses of defined geographic areas to arrangements with local brokers in low-income urban neighborhoods, these subprime lenders focused on borrowers with little knowledge of mortgage lending in general and their own financial options in particular.").

11 *See, e.g.*, *supra* text accompanying note 10. The television show *Mad Men* generally involved relatively innocuous advertising tactics by today's standards, in part because advertising could not reach every corner of private life. *See* Liz Isenberg, *Tampons, Cigarettes and Automobiles: 'Mad Men's' 10 Best Ad Campaigns*, HOLLYWOOD REP. (Mar. 31, 2015, 7:00 AM), https://www.hollywoodreporter.com/news/general-news/mad-mens-best-advertising-campaigns-784699/ [https://perma.cc/U3LF-L7YZ]. For example, the main character Don Draper used his own family photos to sell the Kodak Carousel slide projector by appealing to viewers' nostalgia and emotions. But the ads were shown on TV stations preinternet, not on social media.

12 *See, e.g.*, Safiya U. Noble & Sarah T. Roberts, *Targeting Race in Ads Is Nothing New, But the Stakes Are High*, USA TODAY (Nov. 12, 2016, 12:12 PM), https://www.usatoday.com/story/tech/columnist/2016/11/12/targeting-race-ads-nothing-new-but-stakes-high/93638386/ [https://perma.cc/52HP-Y6W2] ("Facebook, after great criticism, said it will stop a controversial practice that allowed advertisers to exclude audiences by race from housing and employment ads it carried on the platform . . . . But such racism in advertising is nothing new, and it's just the tip of the iceberg of the power of social media, all of which are advertising sites in disguise, to divide and exclude . . . . For as long as the advertising industry has operated to sell products to consumers, it has employed racist imagery, tactics and market segmentation (read: exclusion) in order to create profits for clients . . . . Facebook's technological, algorithmically-driven, decision-making tool allowed companies wishing to advertise to do just the opposite: to create and disseminate advertising that, once again, actively excludes communities of color from seeing ads.").

13 *Id.*

14 Emily Stewart, *The Psychological Traps of Online Shopping, Explained*, VOX (Dec. 15, 2022, 8:30 AM), https://www.vox.com/the-goods/23505330/online-shopping-ecomerce-tricks-dark-patterns-deceptive-design [https://perma.cc/384V-XPKS]; *see also Dark Patterns: UChicago/Princeton Research Reveals the Dirty Tricks of Online Shopping*, UCHICAGO CS NEWS (Nov. 26, 2019), https://cs.uchicago.edu/news/dark-patterns/ [https://perma.cc/WT72-V2VZ].

15 *See* Fabrice Etilé, *Economic Perspectives on Food Choices, Marketing, and Consumer Welfare*, 50 J.L., MED. & ETHICS 221, 222 (2022). *See generally* Peter O'Loughlin, *Cognitive Foreclosure*, 38 GA. ST. U. L. REV. 1097, 1126–29 (2022) (describing how online transactions are more susceptible to seller manipulation than those transacted in person).

mattress industry provides a good example, as it is notorious for constantly changing models and labels, making them impossible to rate.[16] Use of the term "natural ingredients" in food labeling provides another example, as not all natural ingredients are as healthy as implied.[17] Finally, ads contribute to information disparities because the stories told about products in ads play on consumers' emotions:

> Advertising has changed over the last century. Nowadays, advertisements and marketing campaigns are often designed to convey narratives telling consumers why they must buy a product and not what this product is or costs. Stories are constructed around products, or products are derived from stories. These stories appeal to emotions, implicit associations and cognitive schemes such as the need of belonging to a community of consumers.[18]

Additional power disparities and information asymmetries exist with respect to sales contracts: consumers frequently are pressured to sign complex contracts of adhesion—which bury unfavorable provisions deep in the fine print, using highly opaque language[19]—without an opportunity to read them, particularly in real estate settings or when purchasing a car.[20] Generally, consumer contracts of adhesion contain mandatory arbitration clauses and forum selection clauses.[21] In fact, the use of adhesion contracts

---

[16] *See Why Consumer Reports Doesn't Rate Specific Models of Mattresses*, CONSUMER REPS. NEWS (Jan. 26, 2008, 03:09 AM), https://www.consumerreports.org/cro/news/2008/01/why-consumer-reports-doesn-t-rate-specific-models-of-mattresses/index.htm [https://perma.cc/L9VM-MY9A].

[17] *See Use of the Term Natural on Food Labeling*, FDA (Oct. 22, 2018), https://www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling [https://perma.cc/WF7R-QN7U].

[18] Etilé, *supra* note 15, at 224 (citing Simon P. Anderson & Régis Renault, *Advertising Content*, 96 AM. ECON. REV. 93 (2006)).

[19] *See* Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405, 2406–07 (2021) ("Consumer [contracts of adhesion] typically contain harsh and imbalanced terms that can harm consumers. In a sense, these terms can be compared to viruses. . . . Consumers can easily find themselves agreeing to such terms without being aware of their existence and latent risks. Furthermore, boilerplate terms can often be modified unilaterally by firms and thus may mutate, with consumers unaware as to the nature of the mutation and the risks it might entail. . . . [I]mbalanced boilerplate terms are typically not the result of a transparent economic calculus. Quite often, such terms reflect manipulative strategies and various market failures . . . ." (citations omitted)); *see also* Shmuel I. Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. REV. 753, 773 (2022); Eigen, *supra* note †, at 234–35.

[20] Any consumer lawyer can attest to this. I have been encountering real estate frauds in my clinical practice for over twenty-five years.

[21] *See* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/ [https://perma.cc/S29R-VD34]; David Kevin Duffee, J. Paul Forrester, John Fortune Lawlor, Richard B. Kaskee & James F. Tierney, *Keeping Current: U.S. Supreme Court Reaffirms That Forum-Selection Clauses Are Presumptively Enforceable*, AM. BAR ASS'N (Jan. 23, 2014), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-january/keeping-current-u-s-supreme-court/ [https://perma.cc/R789-Q6NL].

may itself exacerbate the erosion of trust: consumers feel compelled to give up their rights in order to contract while sellers are at greater liberty to exploit them.[22] Moreover, if something goes wrong, consumers assume nothing can be done: "People's intuition is to believe in the validity of the fine print even if it contains illegal, unconscionable, or otherwise unfair terms. Thus, a form contract term that negates an oral statement or otherwise conflicts with a precontractual representation is likely to impact consumers' perceptions of their rights."[23] When disputes occur, consumers cannot afford adequate legal representation while corporations generally retain counsel who litigate fully. Low- to moderate-income consumers do not have the resources to demand fair contracts, unlike their wealthier counterparts. Manisha Padi recently conducted an empirical study of this "contractual inequality" and concluded that, at least in the realm of mortgage loans, "a stark difference exists between creditors' treatment of borrowers in wealthy neighborhoods relative to those in poorer ones."[24]

This contractual inequality and the corresponding erosion of trust it facilitates is important because trust plays a central role in business-to-consumer transactions, as it does in general in society. It is not only the glue of social cohesion but also the grease of social interaction because it facilitates personal, political, legal, and commercial transactions, all necessary for democracy and civil society to exist. Most relevant to consumer fraud is commercial trust applicable to merchant and consumer: to maintain trust, both must adhere to norms of good faith and fair dealing in the marketplace.[25] Parties to a commercial transaction are presumed to act

---

22 Eigen, *supra* note †, at 234 ("[A] primary social cost associated with form-adhesive contracts is the erosion of our collective trust in the rule of law. The more that we normalize to the experience of waiving rights as a necessary condition of taking part in economic exchange, the more cogent the legal argument is that the terms to which we acquiesce are actually enforceable. We have become so accustomed to giving everything up to the corporate entities with whom we contract, that it seems crazy to suggest anything in the alternative. As contract scholar Clayton Gillette writes, 'Where potential losses to any given consumer are small, the likelihood of either reputational or legal redress may be so remote that sellers essentially face little downside risk from efforts to exploit.'").

23 Becher et al., *supra* note 19, at 774–75 ("As noted, experimental and empirical data suggest that laypeople are contract formalists. Consumers generally consider the fine print legally and morally binding."); *see also* Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020) (similarly finding that laypeople believe contracts will be enforced as written, even with the presence of material deception).

24 Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 830 (2022).

25 *See* George G. Brenkert, *Trust, Business and Business Ethics: An Introduction*, 8 BUS. ETHICS Q. 195, 200 (1998); *cf.* Aditi Bagchi, *Lying and Cheating, or Self-Help and Civil Disobedience?*, 85 BROOK. L. REV. 355, 364 (2020) ("Lying to strangers about the product you are selling impairs a particular social institution, the market. It is an institution that is fundamental to most modern societies. Lying to prospective buyers also erodes even that minimalist trust that strangers in large, anonymous societies bear

rationally and honestly within the bounds of permitted puffery. Because familiarity with these norms is assumed, slight exaggeration will not fool the other party and norms of commercial trust are upheld.[26]

Nonetheless, the increasing monetization and commodification of our society operate in the consumer realm as well, exacerbating loss of consumer trust and opportunities for merchants to manipulate consumers. Market economies continually expand[27] into areas previously reserved for private, individual interactions, which transform them into exchanges for profit, enlarging the sphere and influence of the market. Examples include online dating, Instagram, and TikTok. You are a product to be marketed and sold, while simultaneously a consumer of these apps.[28] This transactionalism itself erodes trust because commercial trust is less robust than interpersonal trust and must contain some amount of consumer skepticism to avoid consumer victimization.

This Essay next outlines the methodological approach used. Following that is a brief description of mortgage securitization and the related home lending fraud—a type of consumer fraud—that led to the Great Recession. That recession and the ensuing foreclosure crisis coincided with the sale of an overwhelming number of foreclosed homes, many of which were turned into rentals—the topic of Part III.[29] Large corporations such as Harbour Portfolio swooped in and bought up many of these at bargain-basement prices.[30] Thousands have been sloppily converted to single-family rentals with accompanying poor maintenance, while others were offered for sale via land contracts often in violation of consumer fraud legislation. The Essay analyzes the illegal aspects of these land contracts and links them back to the decline of trust. Finally, it suggests that regulations promulgated in recent

toward one another. The erosion of this trust is especially insidious because the people who encounter each other in exchanges like that described in the starting hypothetical will rarely encounter members of the other group in other settings, let alone cooperative contexts in which trust is implicated. So, the lessons they learn about each other in the course of a simple transaction may endure.").

26 While mores and expectations differ between personal and commercial transactions, the lines between the two can bleed, as in affinity marketing. *See supra* text accompanying note 12.

27 *See generally* Alana Semuels, *Does the Economy Really Need to Keep Growing Quite So Much?*, ATLANTIC (Nov. 4, 2016), https://www.theatlantic.com/business/archive/2016/11/economic-growth/506423/ [https://perma.cc/JHL5-9FUX].

28 *See* Julio Cesar Lemes de Castro, *The Consumer as Agent in Neoliberalism*, 9 MATRIZES 273, 278 (explaining how consumers turn themselves into commodities and market them: "In the neoliberal context, the consumers are regarded as the producers of their own satisfaction . . . . Consumption is part of the construction of identity through the technologies of self . . . . [C]onsumers now choose their models among multiple options.").

29 FISHER & FOX, *supra* note 2, at 135.

30 *See infra* notes 75–77 and accompanying text.

years by the Consumer Financial Protection Bureau may mitigate the trust-eroding aspects of some of these lending methods.

I. METHOD OF ANALYZING CONSUMER FRAUD AND TRUST

"Consumers" are not a monolithic category and the effects of consumer fraud depend on one's education and sophistication, as well as the range of available options. Although the standard economic model presumes that consumers are generally rational actors when making purchases, modern neuroscience demonstrates the opposite—that we frequently act based on subconscious impulses or desires that override conscious rational behavior.[31] The capacity to act rationally is bounded in any event—we are unable to incorporate all relevant information in our decision-making.[32] No single microeconomic model can truly capture the salient elements that explain behavior. Accurate descriptions and predictions must account for real peoples' actual circumstances.

Further, the standard neoclassical model does not accurately represent the financial situations and daily realities of most American consumers. The neoclassical rational person is well educated; informed and affluent; willing and able to spend time researching; familiar with making calculations and estimating risks.[33] They are also likely to have personal or family experience with financial and real estate transactions, a function of having economic resources. Thus, there is a more level playing field for this group than for those with less education.

But this is not the reality of most consumers' lives. As of 2021, fewer than 40% of the U.S. population had a four-year college degree.[34] These consumers frequently do not have sufficient surplus time to make long-term

---

[31] *See* Steve Ayan, *The Brain's Autopilot Mechanism Steers Consciousness*, SCI. AM. (Dec. 19, 2018), https://www.scientificamerican.com/article/the-brains-autopilot-mechanism-steers-consciousness/ [https://perma.cc/46K9-D9FW].

[32] *See* FISHER & FOX, *supra* note 2, at 14–15; O'Loughlin, *supra* note 15, at 1127–28 ("[T]he source of mental biases and heuristics . . . is the bounded cognitive capacity that all humans face."); *see also* Josafat Ivan Hernandez-Cervantes, *Does Behavioral Economics Substitute or Complement Neoclassical Economics? Rethinking the Behavioral Revolution from a Contextualist Approach*, 42 BRAZILIAN J. POL. ECON. 532, 533 (2022) ("Behavioral Economics (BE) has emerged as a critique of Neoclassical Economics (NE). Since the works of Herbert Simon . . . , increasing literature with empirical evidence has shown that agents are not very rational. They misbehave because of their bounded rationality, heuristic reasoning, cognitive biases, and emotions . . . . These cognitive elements do not allow agents to make optimal decisions . . . ." (citations omitted)); Gregory Wheeler, *Bounded Rationality*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), https://plato.stanford.edu/entries/bounded-rationality/ [https://perma.cc/QZ9E-6GYA].

[33] *See* FISHER & FOX, *supra* note 2, at 14.

[34] *See* Katherine Schaeffer, *10 Facts About Today's College Graduates*, PEW RSCH. CTR. (Apr. 12, 2022), https://www.pewresearch.org/fact-tank/2022/04/12/10-facts-about-todays-college-graduates/ [https://perma.cc/39AL-578H].

calculations about financial risks. For instance, people with young children suffer from "time poverty" and often spend virtually all their time either working or caring for their children.[35] The poorer they are, the more likely they cannot afford adequate childcare and may have to work multiple jobs.[36] Further, many Americans do not have broadband internet access, laptops, or a quiet place to work at home, and such conditions undermine consumer self-protection.[37] In fact, most American consumers are working-middle to middle class—a population that is struggling economically, living paycheck to paycheck, and sometimes desperate.[38] Even if they know they should conduct research, they do not have the wherewithal.[39] People of color are more likely to be in this group than the wealthier group and to have fewer available financial options.[40] Combining all that with our bounded rationality, cognitive biases, and emotionally driven reactions, the result is consumer vulnerability.

My method of analysis examines the effects of consumer frauds related to home lending and land contracts through the lenses of both higher and lower income consumers. The effects differ substantially, and it should come as no surprise that the second group often experiences more loss of trust, just as they experienced more harm. This group has fewer resources to begin

---

35 *See* Claire Cain Miller, *Why Unpaid Labor Is More Likely to Hurt Women's Mental Health Than Men's*, N.Y. TIMES (Sept. 30, 2022), https://www.nytimes.com/2022/09/30/upshot/women-mental-health-labor.html [https://perma.cc/2T7E-VP27].

36 *See* Ashley Fetters, *The Working-to-Afford-Child-Care Conundrum*, ATLANTIC (Jan. 18, 2020), https://www.theatlantic.com/family/archive/2020/01/working-afford-child-care-so-you-can-work/605206/ [https://perma.cc/D232-NSRP].

37 *See* Natalie Campisi & Korrena Bailie, *Millions of Americans Are Still Missing Out on Broadband Access and Leaving Money on the Table—Here's Why*, FORBES (Oct. 28, 2022), https://www.forbes.com/advisor/personal-finance/millions-lack-broadband-access/ [https://perma.cc/QYN8-X83Q] ("Currently, some 42 million Americans have no access to broadband . . . .").

38 *See* Alina Selyukh, *Paycheck-to-Paycheck Nation: Why Even Americans with Higher Income Struggle with Bills*, NPR (Dec. 16, 2020), https://www.npr.org/2020/12/16/941292021/paycheck-to-paycheck-nation-how-life-in-america-adds-up#:~:text=In%20fact%2C%20survey%20after%20survey, food%2C%20rent%20or%20car%20payments [https://perma.cc/7ST8-MY5J]; Jessica Dickler, *Amid Inflation, More Middle-Class Americans Struggle to Make Ends Meet*, CNBC (Jan. 18, 2023), https://www.cnbc.com/2023/01/18/amid-inflation-more-middle-class-americans-struggle-to-make-ends-meet.html [https://perma.cc/QTV7-4Q6H]; Rakesh Kochhar & Stella Sechopoulos, *How the American Middle Class Has Changed in the Past Five Decades*, PEW RSCH. CTR. (Apr. 20, 2022), https://www.pewresearch.org/fact-tank/2022/04/20/how-the-american-middle-class-has-changed-in-the-past-five-decades/ [https://perma.cc/TKW7-QWM2].

39 *See Most Americans Are Concerned About the Safety of Many Consumer Products—Yet Few Research Claims*, NSF (May 2019), https://www.nsf.org/news/most-americans-are-concerned-about-the-safety-of-many-consumer-products [https://perma.cc/7ST8-MY5J].

40 *See* Alex Gold, Edward Rodrigue & Richard V. Reeves, *Why Are Black Americans at Greater Risk of Being Poor?*, NEWSWEEK (Aug. 10, 2015, 4:37 PM), https://www.newsweek.com/why-are-black-americans-greater-risk-being-poor-361543 [https://perma.cc/XB6X-XW3X]; Kochhar & Sechopoulos, *supra* note 38.

with, and if they own a home, it is often their only valuable asset,[41] so its loss may be proportionally larger.

II. HOME LENDING FRAUD

The term "lending fraud"—also called predatory lending—encompasses a wide range of lending practices, usually for home purchase or refinance. Home lending fraud has been perpetrated by small, local players—such as mortgage brokers or foreclosure-rescue scammers—as well as by the largest financial institutions in the world. It was a cause of the Great Recession and the worldwide financial meltdown of 2008.[42] False financial information was used to procure large mortgages with high fees going to mortgage brokers and other intermediary agents.[43] A staggering amount of falsification of borrowers' actual creditworthiness and ability to repay their mortgages occurred.[44] Low- and no-documentation mortgages were popular at the time, which made it much easier to falsify or omit information.[45] Mortgage brokers created appraisal and financial information on mortgage applications and often immediately sold the loans to financial institutions, which had an insatiable appetite for new loans because of demand for securitized mortgage bonds.[46]

Other types of lending fraud occurred during this period in tandem with application fraud (and continue to occur), contributing to the financial meltdown. Any potentially lucrative business will attract various opportunistic frauds, and there are myriad means of grifting. These include deed fraud and foreclosure rescue scams executed by players using bait-and-

41 *See* Odeta Kushi, *Homeownership Remains Strongly Linked to Wealth-Building*, FIRST AM. (Nov. 5, 2020), https://blog.firstam.com/economics/homeownership-remains-strongly-linked-to-wealth-building [https://perma.cc/9HSF-SUZ7] ("The lower the income of a homeowning household, the greater the share of its wealth coming from homeownership. This pattern has remained consistent over the last three decades, according to the historical [Federal Reserve Board] Survey of Consumer Finances data."); *see also Homeownership Is the Main Source of Wealth for Americans*, COMPASS (June 6, 2018), https://compasscaliforniablog.com/homeownership-is-the-main-source-of-wealth-for-americans/ [https://perma.cc/FFB5-WVT3]. For the most recent survey conducted by the Federal Reserve Board, see *2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Dec. 9, 2022), https://www.federalreserve.gov/econres/scfindex.htm [https://perma.cc/9VTY-DMCV].

42 *See* Erin Coghlan, Lisa McCorkell & Sara Hinkley, *What Really Caused the Great Recession?*, BERKELEY INST. FOR RSCH. ON LAB. & EMP. (Sept. 19, 2018), https://irle.berkeley.edu/what-really-caused-the-great-recession/ [https://perma.cc/9AFP-8BPC]. *See generally* FISHER & FOX, *supra* note 2, at 18–25.

43 *See* FISHER & FOX, *supra* note 2, at 21–24.

44 *Id.* I have seen this myself in twenty-five years of representing consumers and my experience is typical of those working in the field.

45 *Id.* at 22.

46 *Id.* at 22–24.

switch tactics to deprive homeowners of title to their homes, or even outright deed theft.[47] Often the modus operandi consists of seeking out desperate homeowners in foreclosure, offering them a rent-to-own contract if they temporarily deed over their house to the scammer or a straw buyer, who in turn will take out a new mortgage the original borrower cannot qualify for. The borrower makes monthly "rent" payments to the scammer, who usually then absconds with the proceeds.[48] Buyers are unable to keep the property in habitable condition while paying the mortgage and fall into foreclosure.[49] These frauds are not exclusive to lower income homeowners, who tend to be victimized disproportionately, as do people of color.[50]

The ready availability of credit created by securitization during the housing boom facilitated all of these frauds. As I have described in *The Foreclosure Echo*: "Securitization involves pooling bundles of debt—in our case, mortgages—converting them to financial instruments called 'securities,' and selling the securities to investors who collect the stream of income arising from monthly payments on each of the pooled mortgages."[51] Financial institutions generally sold these securities to institutional investors, such as pension funds.[52] The loans later had extremely high default rates.[53] Yet ratings agencies, such as Standard & Poor's, gave the mortgage-backed securities "A+" ratings, facilitating their sale.[54] Why wouldn't investors want to purchase financial instruments that seemed quite safe and provided a high rate of return?

Although it was apparent from the outset that borrowers would never be able to repay their massive mortgages, risk was sold upstream to larger institutions that would bundle, securitize, and sell them again. Because payment occurred at the time of sale, prior links in the chain had little "skin in the game," and managers turned a blind eye to red flags of illegality and

---

47 *See id.* at 5–6. Property flippers often employed similar tactics, working with predatory mortgage brokers and appraisers to obtain fraudulent loans. *Id.* at 27.

48 *Id.*

49 *Id.*

50 Gillian B. White, *Why Blacks and Hispanics Have Such Expensive Mortgages*, ATLANTIC (Feb. 25, 2016), https://www.theatlantic.com/business/archive/2016/02/blacks-hispanics-mortgages/471024/ [https://perma.cc/Q3JF-5U93]; Nick Carey, *Racial Predatory Loans Fueled U.S. Housing Crisis: Study*, REUTERS (Oct. 3, 2010), https://www.reuters.com/articles/us-usa-foreclosures-race-idUSTRE6930K520101004 [https://perma.cc/N6EA-CHMX].

51 FISHER & FOX, *supra* note 2, at 18.

52 *Id.* at 19.

53 *Id.* at 20.

54 *Id.*

the poor quality of the loans.[55] Moreover, although this type of fraud was often instigated by local players, it was fueled by upstream demand for increased lending from large financial institutions.[56] The result was that the ensuing ripple effects from defaults extended to everyone, including the higher income group.[57] In this fashion, the financial risk of defaulting mortgages was ultimately distributed both to investors—the higher income group—and the original borrowers, predominantly from the lower income group.

The brunt of the harm, however, typically fell on lower income homeowners of color.[58] Through the years, I have represented many in this group and have seen firsthand the devastation that predatory lending has wrought. Altogether, these practices resulted in the foreclosure crisis, which almost brought down the world financial system in 2008. Trust in financial institutions plummeted after the meltdown among all population groups.[59] It still has not completely recovered, nor have we as a country.

---

55 *Id.* at 21–25. While securitization contracts contained representations and warranties that purported to shift the risk of default back to the securitizing parties by making the latter responsible for the quality of the loans, these "reps and warranties" are not self-executing and require enforcement efforts. Numerous lawsuits attempting to do this have been filed, with varying degrees of success. *See* Steven L. Schwarcz, Representations & Warranties, Fraud, and Risk Shifting: An Analytical Framework 6–7 (Oct. 23, 2022) (unpublished manuscript), https://papers.ssrn.com/a=4256322 [https://perma.cc/U4XG-UVBP] ("[I]nvestors and government agencies have filed hundreds of securitization-related lawsuits, alleging extensive R&W breaches. Insurers . . . have similarly filed numerous lawsuits, claiming fraudulent inducement, breach of contract, and other violations . . . . Settlements to date have ranged from a few million dollars to more than $15 billion. The banking industry alone has already incurred $200 billion in aggregate fines, settlements, and related legal costs. Many lawsuits remain ongoing and '[n]ew cases are still being filed . . . .'" (second alteration in original) (quoting Donald Hawthorne, *NY Decision Does Not Mean the End of RMBS Litigation*, LAW360 (June 9, 2022, 6:04 PM), https://www.law360.com/articles/1500620/ny-decision-does-not-mean-the-end-of-rmbs-litigation [https://perma.cc/3N54-UGES])). In my opinion, it is not at all clear that the representations and warranties successfully deterred shifting of risk in the last crisis.

56 FISHER & FOX, *supra* note 2, at 21.

57 *Id.* at 21–25.

58 *Id.* at 2, 133 (highlighting the effects on Black homeowners in particular).

59 David De Cremer, *Why Our Trust in Banks Hasn't Been Restored*, HARVARD BUS. REV. (Mar. 3, 2015), https://hbr.org/2015/03/why-our-trust-in-banks-hasnt-been-restored [https://perma.cc/LC7L-33GK] ("Trust will be built only when clients perceive that benevolence, truly felt, is underlying the decisions and actions of their bank. It is imperative that banks are able to connect with their clients on a personal level."); Stephen J. Dubner, *Mistrust and the Great Recession*, FREAKONOMICS (Mar. 9, 2011), https://freakonomics.com/2011/03/mistrust-and-the-great-recession/ [https://perma.cc/M635-SYTB]; Sarah Feldman, *Trust in Banks Still Recovering After Great Recession*, STATISTA (Sept. 14, 2018), https://www.statista.com/chart/15465/trust-in-banks-still-recovering-after-great-recession/ [https://perma.cc/E9XP-XA9F] ("The biggest economic downturn since the Great Depression has left lasting political and social ripple effects visible in today's world of growing inequality and rising populism. Trust in banks has yet to rebound to its pre-recession levels 10 years after the Great Recession. Roughly 1 in 5 Americans don't trust banking institutions. While mistrust in banks shot up quickly after

While the Great Recession affected everyone across the board, trust tends to be eroded more in consumers who do not realize the risks they are taking when contracting and thus are ill-prepared to deal with the outcome.[60] In general, that is the case with the group of lower income consumers, who are more apt to be victimized, since they often lack the full set of skills required to negotiate equally and fully assess risk. They are also more likely to be financially desperate, which can—and often does—override other considerations.[61] Further, these frauds are often perpetrated by local players who use affinity-marketing techniques to win trust before betraying it. My clients—borrowers in these transactions—have suffered life-altering losses as a result, inevitably decreasing their trust in the American system.

In contrast, many in the higher income group avoided direct victimization by rescue scams. Those of us working in the field have seen only a few higher income consumers driven to desperation by, say, job loss or illness, who were placed in a similar position as the lower income group and victimized. In marked contrast to the widespread harms caused by illegal mortgage securitization practices, low-income homeowners were most impacted by the ancillary opportunistic frauds caused by the foreclosure crisis. As the next Part will demonstrate, installment land contracts have been disproportionately offered to lower income purchasers as well.

III. LAND CONTRACTS

Land contracts—sometimes called contracts for deed or seller-financed contracts—refer to contracts between putative purchasers and home sellers that function similarly to rent-to-own real estate contracts. The potential homeowner begins—at least functionally—as a renter with monthly payments, which are applied to the purchase price.[62] Buyers, however, are generally responsible for maintenance and often taxes, unlike renters.[63] They must make every payment for years—missing even one results in forfeiture of their entire interest, as they have not built up any equity.[64] My coauthor

the recession began, it has been slow and stubborn coming down.”). This decline in trust affected not only lower income homeowners but also higher income workers with retirement accounts, whose pension funds invested in subprime mortgage securities.

60 This point could apply to virtually all of the clients whose stories we tell in *The Foreclosure Echo*. In my experience, people with the fewest resources are often initially the most trusting, partly because of wishful thinking or the need to hope for something.

61 *See generally* JONATHAN MORDUCH & RACHEL SCHNEIDER, THE FINANCIAL DIARIES: HOW AMERICAN FAMILIES COPE IN A WORLD OF UNCERTAINTY (2017) (describing the experience of American families dealing with poverty and risks that they might take out of desperation).

62 FISHER & FOX, *supra* note 2, at 142.

63 *Id.*

64 *Id.* at 142–43.

Judith Fox, in our book *The Foreclosure Echo*, further describes the differences between a standard home sale and a land contract:

> When a prospective homebuyer buys a house by way of a mortgage, she owns the home, subject to the mortgage lien. If she subsequently defaults on the mortgage, she can cure the default. If the homeowner cannot cure the default, the home must be foreclosed on and sold. The homeowner is entitled to any equity in the property above the sale price. In contrast, a land contract purchaser does not own the home until every payment has been made and the owner transfers the title. [With] a land contract, a default results in a forfeiture and summary eviction. The buyer loses the value of any equity and any repairs . . . . Land contracts can be an effective way for a homeowner who is unable to obtain a mortgage to purchase a home. Unfortunately, they are all too often predatory products that do not result in homeownership.[65]

Land contracts were first offered in the United States more than a century ago and have reappeared periodically since then.[66] Land contracts proliferated when the federal government prohibited mortgage lending to Black neighborhoods—a practice called redlining. Its name derives from the red lines drawn around excluded neighborhoods.[67] Chicago in the '50s and '60s provides a good example of racially targeted, large-scale land contracts that were challenged by community groups.[68] Beryl Satter's excellent book, *Family Properties*, tells the saga of her father's involvement with the

[65] *Id.* at 141–42; *see also* Richard Winchester, *Homeownership While Black: A Pathway to Plunder, Compliments of Uncle Sam*, 110 KY. L.J. 611, 636–37 (2021).

[66] *See* Stacy Purcell, Note, *The Current Predatory Nature of Land Contracts and How to Implement Reforms*, 93 NOTRE DAME L. REV. 1771, 1773–74 (2018) ("When land contracts first came into use in the late nineteenth century, they were 'accepted as an innovative and efficient new land financing technique.' At the time, courts favored individuals' freedom to contract and the laissez-faire nature of land contracts, which let buyers and sellers negotiate a purchase without the involvement of third parties. But in recent years, land contracts have become increasingly predatory . . . ." (citations omitted)); *see also* Allison N. Kruschke, Comment, *Challenging Land Contracting on the Basis of Disparate Impact After* Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*: A Viable Option or a Dead End?*, 2020 MICH. ST. L. REV. 547, 551 (describing predatory land contracting that existed from 1940 to 1970 and continued in some form through the 2000s).

[67] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (exploring the redlining phenomenon in depth); Kruschke, *supra* note 66, at 568 ("Land contract lending began as a racially targeted practice in the 1950s when racist federal homeownership programs systematically excluded Black Americans from the legitimate, government-backed housing market. The Federal Housing Administration (FHA), Veterans' Affairs (VA), and Home Owner[s'] Loan Corporation (HOLC) regularly denied financing and mortgage insurance to families trying to purchase homes in predominantly Black neighborhoods, which were identified on zoning maps in red or marked with a 'D,' meaning 'hazardous' or severely in decline.").

[68] Purcell, *supra* note 66, at 1774 ("[I]n Chicago an estimated eighty-five percent of African-American homeowners purchased their home with a land contract [in that time period].").

Contract Buyers League and its efforts to thwart one-sided contract sales.[69] Along with other tactics, the League used rent strikes and litigation to pressure sellers to renegotiate contracts.[70] Ultimately, many of the contracts were successfully renegotiated.[71]

Like the other questionable practices outlined earlier in this piece, land contracts tend to be opportunistic in nature and thus burgeon in periods of greater need.[72] Given our history of segregation and exclusion, the need for flexibility in financing is normally greater in communities of color, making land contracts much more common in these areas.[73] Intentional racial targeting, a byproduct of redlining, has exacerbated this result.

Unsurprisingly, land contracts and related rent-to-own arrangements have become more prevalent since the Great Recession and the foreclosure crisis of 2008.[74] In fact, large corporations specializing in them have sprung

---

69 *See generally* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA (2009); Dwight Garner, *In Chicago, Real Estate and Race as a Volatile Mix*, N.Y. TIMES (Mar. 17, 2009) https://www.nytimes.com/2009/03/18/books/18garn.html [https://perma.cc/383R-YNBN].

70 *See* SATTER, *supra* note 69, at 271–79.

71 FISHER & FOX, *supra* note 2, at 141; *see* Contract Buyers League v. F & F Investment, 300 F. Supp. 210, 216 (N.D. Ill. 1969) (stating a claim that land contracts at issue violate 42 U.S.C. § 1982, which provides a cause of action for housing-related race discrimination); *see also* Rebecca Burns, *The Infamous Practice of Contract Selling Is Back in Chicago*, CHI. READER (Mar. 1, 2017), https://chicagoreader.com/news-politics/the-infamous-practice-of-contract-selling-is-back-in-chicago/ [https://perma.cc/UZ7H-JMD9] (describing the efforts of the Contract Buyers League to renegotiate land contracts).

72 For instance, the proliferation of land contracts in minority communities in Chicago was a consequence of race discrimination that all but prevented Black people from owning homes with standard mortgages. *See* SATTER, *supra* note 69, at 36–37, 39, 41.

73 Kruschke, *supra* note 66, at 566–67 ("Available data shows that more than three million people in the United States live in homes financed by land contracts as of 2018, and most of those homes are concentrated in minority communities.").

74 In 2016, the National Consumer Law Center (NCLC) issued a report on seller-financed land contracts. *See* Alexandra Stevenson & Matthew Goldstein, *Law Center Calls Seller-Financed Home Sales 'Toxic Transactions*,*'* N.Y. TIMES (July 14, 2016) https://www.nytimes.com/2016/07/14/business/dealbook/law-center-calls-seller-financed-home-sales-toxic-transactions.html [https://perma.cc/VU9W-RX62] ("In its report, the [NCLC] said that many of the contracts in such transactions were 'built to fail' and were predatory in nature—benefiting sellers at the expense of lower-income and minority buyers who could not qualify for mortgages . . . . The [NCLC] study describes a shadow housing market that has emerged after the financial crisis. These contracts have flourished in communities where there was a large supply of cheap, foreclosed homes . . . . 'Land installment contracts are popular with investors because defaulting borrowers can be swiftly evicted, and traditional mortgage foreclosure protections do not apply,' the report said. 'This allows investors to reap substantial profits.'"); *see also* Shelby Green, *Non-Debt and Non-Bank Financing for Home Purchase: Promises and Risks*, 10 AM. U. BUS. L. REV. 437, 462 (2022) ("Despite a long history in property law, these devices became very popular after the 2008 crisis, when speculators were buying up properties at foreclosures as an investment strategy."); Kruschke, *supra* note 66, at 552 ("The void left in predominately minority neighborhoods following the foreclosure crisis and Great Recession in 2008 created a ripe environment for predatory land contracts to reappear as a device that disadvantages low-income people of color . . . .").

up; Harbour Portfolio Advisors and Vision Property Management are two of the most prominent.[75] They purchase swaths of foreclosed homes in poorer city neighborhoods and, without needed renovations, offer the homes for sale at inflated prices: "For instance, an unsuspecting Georgia buyer purchased one of these homes for $52,425 only three weeks after Harbour Portfolio had bought it from Fannie Mae for $15,543. Another homeowner was charged $34,500 for a property purchased for $10,467."[76] According to the *Chicago Reader*, in that city:

> [O]ut-of-state investors are reprising an infamous practice that once targeted African-Americans on the city's south and west sides . . . . [T]hree out-of-state companies . . . began selling homes through contract-for-deed agreements in Chicago in the wake of the foreclosure crisis: Harbour Portfolio Advisors, Vision Property Management, and Battery Point Financial . . . [These companies] require customers to purchase property "as is" and make all repairs in addition to paying property taxes and homeowner's insurance . . . .
>
> Meanwhile, the contracts and public records show high interest rates and prices that far exceed what the companies paid for a home. . . . Over the course of one 30-year contract-for-deed agreement we examined, a buyer could pay upwards of 35 times more for a home than the seller paid to acquire it; if successful, [another buyer] would pay more than 200 times more for her home than the seller paid. . . . [M]ore than 90 percent of the properties identified were in majority-nonwhite census tracts. In addition, more than three-quarters were in majority-black census tracts . . . .
>
> One of the biggest problems, say consumer advocates, is that many would-be home buyers . . . don't realize they're entering into a type of transaction that carries few protections. In some cases, this may be the result of intentional deception: "Virtually every person I've talked with who dealt with Harbour thought they were becoming a home owner with a mortgage like any other mortgage," says Sarah Bolling Mancini, another NCLC attorney. "All of Harbour's . . . communications are designed to give that impression."[77]

---

75 *See* Purcell, *supra* note 66, at 1776–77 ("Private investment firms took advantage of the large stock of foreclosed homes after the Great Recession and bought many houses at low prices. The biggest firms in the business have bought thousands of homes in multiple states. For example, Harbour Portfolio Advisors purchased more than 6700 foreclosed homes . . . . Another company, Vision Property Management, 'owns more than 6,000 homes in two dozen states.'" (citations omitted)).

76 FISHER & FOX, *supra* note 2, at 143 (citation omitted); *see also* Stevenson & Goldstein, *supra* note 74 (giving many similar examples from around the country); JEREMIAH BATTLE, SARAH MANCINI, MARGOT SAUNDERS & ODETTE WILLIAMSON, NAT'L CONSUMER L. CTR., TOXIC TRANSACTIONS: HOW LAND INSTALLMENT CONTRACTS ONCE AGAIN THREATEN COMMUNITIES OF COLOR 3–4 (2016).

77 Burns, *supra* note 71.

Despite their significant capacity for misuse, some courts—at least in the last century—have upheld these arrangements.[78] But other courts have refused to enforce the forfeiture clause and instead employ principles of equity to impose an equitable mortgage or similar concept on the transaction.[79] Eric Freyfogle described this principle in 1987; although that was some time ago, this explanation remains entirely accurate:

> [These] courts have ignored installment contract terms largely to protect purchasers from the possibly harsh consequences of forfeiture. When forfeiture occurs, purchasers can lose their property as well as the payments they have made on their contracts. Courts have attacked forfeiture clauses with vigor, most often by granting to purchasers some or all of the protections enjoyed by mortgagors under state mortgage law: the rights to reinstate contracts after default, to redeem property, to seek restitution of excess payments, and, in some cases, even to demand foreclosure. By granting these rights, courts have, in effect, viewed the installment land contract as functionally similar to a mortgage.[80]

The litigated cases challenging land contracts (and related rent-to-own transactions) have brought various contract, fraud, and often applicable state consumer fraud claims.[81] Some states have also enacted statutes specifically governing land contracts.[82] Factually, the claims focus on power disparities between seller and buyer, as well as misrepresentations regarding the state of the property and the terms, such as that the seller will make repairs.[83]

---

78 *See* Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609, 610 ("Courts enforced forfeiture clauses with few questions asked, except perhaps when a forfeiture was shocking in amount or otherwise grossly unfair. A vendor with an enforceable forfeiture clause could declare a default and forfeiture when a purchaser missed a payment. After the declaration, the vendor could recover his property and retain all of the purchaser's payments.").

79 *Id.*

80 Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 295 (1987) (citations omitted) (arguing that equity protections are less helpful than the implied warranty of habitability that normally accompanies residential leases).

81 *See, e.g.*, Rainbow Realty Grp., Inc. v. Carter, 131 N.E.3d 168, 170, 172 (Ind. 2019) (holding that a rent-to-own contract constituted a residential lease with warranty of habitability but denying consumer fraud claim based on landlord's denial of that obligation to tenants); *see also* NAT'L CONF. OF STATE LEGISLATURES, *Land Installment Contract State Statutes*, https://www.ncsl.org/research/financial-services-and-commerce/land-installment-contract-state-statutes.aspx [https://perma.cc/QW8H-S6FH] (June 17, 2022) (providing a list of state legislation governing land contracts).

82 *See* BATTLE ET AL., *supra* note 76, at 9; *see also* NAT'L CONSUMER L. CTR., SUMMARY OF STATE LAND CONTRACT STATUTES 3 (2021).

83 *See, e.g.*, Malooley v. Alice, 621 N.E.2d 265, 269 (Ill. App. Ct. 1993) (holding land contract deal violated Illinois Consumer Fraud Act when seller's false statements regarding condition of house induced sale). For a description of home sale practices that can violate unfair and deceptive acts and practices (i.e., consumer fraud statutes), see CARTER, *supra* note 8, at 538–39:

Omissions such as failure to disclose material defects can also constitute a violation.[84] However, an "as is" clause in the contract often defeats contract, fraud, and consumer fraud claims, and such clauses are common in standard land contracts.[85] They normally occur in contracts that do not provide for the seller to make repairs, putting the onus on the purchaser instead.

Cases such as these may not involve a specific intent to deceive or reliance, which are generally elements of common law fraud or intentional misrepresentation.[86] Yet, depending on the applicable state law, consumer fraud liability can still lie if unconscionable commercial practices or negligent misrepresentations were used.[87] Consumers are frequently misled in circumstances beyond the ambit of the common law—in fact, that is a primary reason why consumer fraud statutes were enacted in the first place.[88]

Notwithstanding their many risks and drawbacks, land contracts sometimes fill a need for home purchase arrangements that allow for a lower down payment or a mortgage from a third-party lender.[89] Because of poor credit history, low-income, discrimination, or other obstacles, some

---

> Misrepresentations regarding the features of a home that is for sale, the condition of the heating system, the state of the septic or sewer system, the existence of water infiltration are UDAP [unfair and deceptive acts and practices/consumer fraud] violations . . . .
>
> Falsely representing that repairs will be made is a UDAP violation . . . . A seller commits a UDAP violation by promoting overpriced, poorly rehabilitated homes, promising but failing to make repairs, steering buyers to affiliated mortgage bankers and attorneys who will not protect them . . . . Falsely claiming not to have knowledge of a home's condition is itself a UDAP violation.

84 CARTER, *supra* note 8, at 539 ("Not only affirmative misrepresentations but also nondisclosure of material defects in houses offered for sale is a UDAP violation. Courts have held real estate brokers and sellers liable for failing to disclose: [d]rainage, sewer system or water problems; [a] bad foundation; . . . [t]hat crimes had occurred in the house; . . . [and] [t]he existence of a nearby detraction, such as a closed toxic landfill, that affects the safety and value of a home . . . .").

85 *See* Kidd v. Benson, 321 So. 3d 676, 680–81 (Ala. 2020) (holding "as is" clause and doctrine of caveat emptor govern claims for failure to disclose hazardous condition in property sale); *cf.* Hubbard Fam. Tr. v. TNT Land Holdings, LLC, 9 N.E.3d 411, 420 (Ohio Ct. App. 2014) ("An 'as is' clause bars an action for 'passive nondisclosure' but does not shield the seller from an 'active' fraud or commission (as opposed to a fraud of omission), i.e., a misrepresentation or fraudulent concealment."). *But see* Griffin v. T.K. Harris Co., Nos. 1998CA00033 & 1997CA00408, 1998 WL 525580, at *5 (Ohio Ct. App. Aug. 3 1998) (holding that despite presence of "as is" clause, seller was liable for nondisclosure of problems with home and fraudulent concealment of its condition).

86 *Fraud*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/fraud [https://perma.cc/9F7N-N4MN] ("For a statement to be an intentional misrepresentation, the person who made it must either have known the statement was false or been reckless as to its truth. The speaker must have also intended that the person to whom the statement was made would rely on it. The hearer must then have reasonably relied on the promise and also been harmed because of that reliance.").

87 *See* CARTER, *supra* note 8, at 244–47. *See, e.g.*, New Jersey Consumer Fraud Act, N.J. Stat. 56:8-2.

88 *See* Goldberg et al., *supra* note 4, at 1016–17.

89 FISHER & FOX, *supra* note 2, at 142; Freyfogle, *supra* note 80, at 305.

prospective purchasers have no other option. Other purchasers may have alternatives but are sophisticated enough to handle their limited rights under a land contract and choose one because it represents a better deal financially than a straight purchase arrangement.[90] Clearly, the erosion of trust is less of an issue when the parties are more equally situated, but this situation seldom occurs.[91]

Consumer fraud arising from misuse of land contracts causes harm that falls disproportionately on lower income consumers, who are devastated by home loss. They have fewer resources to begin with and few opportunities to build wealth.[92] It is much more difficult to inveigle those with greater means into a land contract deal—they have the resources to afford other options—so if they do choose a land contract, it is more likely to be a reasonable choice for a person in their circumstances. This disparate impact of harm also results in a disparate impact of trust, as those who have been severely hurt by land contract fraud are more likely to lose trust in lending and home-buying. In turn, the greater erosion of trust increases the gap between the two classes, as well as racial gaps, with all of this occurring during a period of rising inequality.

The disparity also holds when considering who can hire counsel after they have been a victim of consumer fraud. There is a shortage of legal aid lawyers engaging in this type of litigation.[93] Some private consumer lawyers take individual cases on a contingency, but that is financially risky and small law firms often cannot afford the risk, even if attorney fee awards are ultimately available to prevailing plaintiffs. Private counsel may be available

---

[90] Freyfogle, *supra* note 80, at 304–05 ("The installment contract form is appealing for several reasons to purchasers with little equity to invest in a home. First, closing costs on an installment sale can be kept to a minimum. Purchasers can avoid paying for legal assistance, title reports, title insurance, and the appraisals and inspections that outside lenders usually demand. Most significant, purchasers need not pay the up-front fees or 'points' that lenders often charge. Moreover, installment contracts typically offer the possibility of lower down payments.").

[91] For instance, for several years, I worked on home fraud cases with a lawyer who is currently buying a house using a rent-to-own contract. The arrangement has been successful thus far largely because of his understanding and ability to negotiate relatively favorable terms.

[92] *See supra* text accompanying notes 33–41.

[93] *See, e.g.*, *What Is Legal Aid?*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/what-legal-aid [https://perma.cc/K6CX-4TCS] ("Nearly a million poor people who seek help for civil legal problems are turned away because of the lack of adequate resources. The justice gap represents the difference between the level of civil legal assistance available and the level that is necessary to meet the legal needs of low-income individuals and families. According to LSC's 2022 report The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans, of the estimated 1.9 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1.1-1.3 million (63%-70%) did not receive any or enough legal assistance. Among all civil legal problems by low-income Americans, we estimate that 92% do not get any or enough legal assistance. State studies consistently show a higher percentage (80%) of the civil legal needs of the eligible population are not being met.").

in class action cases, but otherwise, consumer lawyers generally can only take paying clients.[94] In turn, this means that only the wealthier group is able to seek legal redress. This disparate availability of counsel results in another disparate loss of trust. The erosion of trust that occurs in this context fits squarely into the broader erosion of trust occurring across the board.

IV. REGULATION AND ITS EFFECTS ON INCREASING CONSUMER TRUST

We are now in an era of increased regulation, as compared to the neoliberal period of deregulation beginning around 1980.[95] The most prominent example of increased federal regulation following the Great Recession and the Financial Crisis was the Dodd–Frank Act of 2010 which, among other things, imposed additional oversight of lenders and created the Consumer Financial Protection Bureau (CFPB).[96] The CFPB is the first federal agency whose only purpose is to regulate consumer financial products and services.[97] It enforces federal consumer protection legislation and has the power to prohibit unfair, deceptive, or abusive practices. Along with the FTC, the CFPB oversees nonbank financial institutions.[98] Its purposes also include supervising nonbank financial institutions,

---

94 Some law school clinics and other nonprofits partially fill in the gap. My own work and that of Judith Fox at Notre Dame provide examples. *See also* Hilary Hurd Anyaso, *Northwestern Legal Clinic and Reverend Robin Hood Partner to Represent Mortgage Fraud Victims*, NW. NOW (Jan. 22, 2019), https://news.northwestern.edu/stories/2019/01/northwestern-legal-clinic-and-reverend-robin-hood-partner-to-represent-mortgage-fraud-victims/ [https://perma.cc/Q4NP-8UAR].

95 *See* Ed Burmila, *Is the Neoliberal Era Over Yet?*, NEW REPUBLIC (June 15, 2022), https://newrepublic.com/article/166742/neoliberal-era-end [https://perma.cc/S77K-NY35]; Jonathan D. Ostry, Prakash Loungani & Davide Furceri, *Neoliberalism: Oversold?*, FIN. & DEV., June 2016, at 38, 38. The Supreme Court is currently taking an increasingly hard stance on regulation. A prominent example of the current Court's mistrust of regulation appears in American Hosp. Ass'n. v. Becerra, 142 S. Ct. 1896, 1903 (2022). As the *Harvard Law Review* explains in its Administrative Law Leading Case section: "Though [*Becerra*] did not upset existing precedent, it portends a shift in doctrine that could redefine the contours of administrative law." *Social Security Act—Administrative Law—*Chevron *Deference—*American Hosp. Ass'n v. Becerra, 136 HARV. L. REV. 480, 480 (2022).

96 The Act is entitled the Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641. Section 5481 of the Consumer Financial Protection Act creates the CFPB and enumerates its powers.

97 CONSUMER FIN. PROT. BUREAU, FINANCIAL WELLNESS AT WORK: A REVIEW OF PROMISING PRACTICES AND POLICIES 2 (2014), https://files.consumerfinance.gov/f/201408_cfpb_report_financial-wellness-at-work.pdf [https://perma.cc/SEH9-X64Z].

98 *See Consumer Finance*, FTC, https://www.ftc.gov/news-events/topics/consumer-finance [https://perma.cc/2S38-SCV2]; *What Laws Does the CFPB Enforce?*, CFPB, (Dec. 15, 2021), https://www.consumerfinance.gov/ask-cfpb/what-laws-does-the-cfpb-enforce-en-2121/ [https://perma.cc/PNV8-SKTJ].

rulemaking, collecting data, and producing educational materials.[99] The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) complements Dodd–Frank by requiring mortgage brokers to be licensed and providing federal oversight for the first time.[100] The loss of trust occasioned by subprime lending was one factor leading to the creation of the CFPB's authority to regulate nonbank lenders and mortgage brokers.[101] While the CFPB has not yet promulgated regulations governing land contracts, it filed and settled an enforcement proceeding against Harbour Portfolio Advisors, the most prominent player in the area.[102]

I expect that the Dodd–Frank regulations and CFPB oversight have helped increase overall trust in consumer financial markets since the last financial crisis. Because the increased federal regulation cannot be separated from all other economic and social variables, empirical proof of increased

---

[99] *See* Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After the Global Financial Crisis*, 107 GEO. L.J. 813, 818–19 (2019); Alexander Foxx, *The Legal Mandate of the CFPB*, U. CINCINNATI L. REV. BLOG (Aug. 29, 2018), https://uclawreview.org/2018/08/29/the-legal-mandate-of-the-cfpb/ [https://perma.cc/5RYN-PT5B].

[100] Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. § 5101; *see also Secure and Fair Enforcement of Mortgage Licensing Act Summary*, CFPB, https://files.consumerfinance.gov/f/documents/102012_cfpb_secure-fair-enforcement-for-mortgage-licensing-safe-act_procedures.pdf [https://perma.cc/V73T-FF5N].

[101] *See* Steve Antonakes & Peggy Twohig, *The CFPB Launches Its Nonbank Supervision Program*, CFPB (Jan. 5, 2012), https://www.consumerfinance.gov/about-us/blog/the-cfpb-launches-its-nonbank-supervision-program/ [https://perma.cc/X7G6-DSFW]; *The CFPB Finalizes Rule to Increase Transparency Regarding Key Nonbank Supervision Tool*, CFPB (Nov. 10, 2022), https://www.consumerfinance.gov/about-us/blog/the-cfpb-finalizes-rule-to-increase-transparency-regarding-key-nonbank-supervision-tool/ [https://perma.cc/5WU7-42LC].

[102] *See Consumer Financial Protection Bureau Settles with Contract for Deed Companies for Engaging in Deceptive Acts and Practices and Violating Credit Reporting Rules*, CFPB (June 23, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-settles-companies-engaging-deceptive-acts-practices-violating-credit-reporting-rules/ [https://perma.cc/PL3G-L2AD]; *see also* Sarah Mancini & Margot Saunders, *Land Installment Contracts: The Newest Wave of Predatory Home Lending Threatening Communities of Color*, BOS. FED. RSRV. BANK (Apr. 13, 2017), https://www.bostonfed.org/publications/communities-and-banking/2017/spring/land-installment-contracts-newest-wave-of-predatory-home-lending-threatening-communities-of-color.aspx [https://perma.cc/6K9D-W6DL] ("Federal regulation would provide the most efficient way to protect consumers in states that permit land installment contracts. . . . Here, we outline a comprehensive regulation the CFPB could put in place to protect buyers . . . : 1. Require independent inspections, appraisals, and disclosure of the true cost of credit. . . . 2. Require settlement of property taxes and liens at sale. Sellers should be required to pay all past due assessments prior to signing the contract. 3. Require recordation. The seller should be required to record the land contract . . . . 4. Provide protections upon default . . . . If the buyer defaults and the seller attempts to cancel the contract based on the default, the buyer should have the option to demand the return of all amounts paid under the contract, plus amounts expended for necessary repairs, property taxes, and insurance, minus the fair market rental value . . . . This provision avoids the punitive forfeiture of all amounts paid . . . . If the seller fails to comply with its obligations . . . the buyer should be entitled to a full refund . . . .").

consumer trust is limited.[103] Nevertheless, regulation has the potential to increase the perceived trustworthiness of these lenders, reduce the perception of risk, and may even have reduced risky lending itself. For example, the CFPB has been active in enforcement actions, which can deter questionable lending practices. Banks returned to great profitability after the crisis, as did financial markets, reducing the perception of risk. But consumer trust nonetheless remains shaky: people have not yet forgotten their experiences during the last crisis and other factors such as the pandemic, inflation, recent bank failures, and the overall decline of trust in institutions are in play as well.[104] People are less willing, for example, to borrow against their home equity.[105]

CONCLUSION

In the foregoing analysis, this Essay has offered evidence via examples that the harms of consumer fraud in the lending context tend to fall more heavily on groups with fewer resources, such as people with lower incomes and no college degree, who are disproportionately people of color. Those who are deceived, manipulated, and defrauded—whether intentionally or not—may lose their homes or suffer other severe losses. It is not at all surprising that experiencing such schemes corrodes consumers' trust in our financial institutions and system. That has certainly occurred for many of my foreclosure and predatory lending clients over the past two decades. Our task

---

[103] As with any agency, the CFPB's actions have been subject to some extent to the political changes in administrations. *See, e.g.*, Harrison H. Baker, *Enforcement by the Consumer Financial Protection Bureau: An Empirical Analysis of Director Kraninger's Leadership*, 28 WIDENER L. REV. 65, 68 (2022) (analyzing and evaluating actions of directors appointed by different administrations).

[104] *See supra* text accompanying note 59; *see also* Caitlin Cahalan, *Data Drop: Banking Crisis Likely to Cause a Decline in Consumer Confidence, But Trust in Banks Remains Steady for Now*, INSIDER INTEL. (Mar. 24, 2023), https://www.insiderintelligence.com/content/data-drop-banking-crisis-likely-cause-decline-consumer-confidence-trust-banks-remains-steady-now [https://perma.cc/EU75-95EX]; Forrester Research, *How Will Consumer Behavior Change in 2023?*, FORBES (Nov. 3, 2022), https://www.forbes.com/sites/forrester/2022/11/03/how-will-consumer-behavior-change-in-2023/?sh=69598e9b143f [https://perma.cc/G38J-7XUN]; *Banking Consumer Study: Making Digital More Human*, ACCENTURE (Dec. 8, 2020), https://www.accenture.com/gb-en/insights/banking/consumer-study-making-digital-banking-more-human [https://perma.cc/SRJ9-FNJ5] ("[Consumer] trust in banks is failing. It was declining even before COVID-19, but the pandemic has made things worse. 29% of respondents trust their banks to look after their long-term financial wellbeing, compared with 43% two years ago."); Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/ [https://perma.cc/T2ZX-LU9N].

[105] *See* MICHELLE PARK LAZETTE, THE CRISIS, THE FALLOUT, THE CHANGE: THE GREAT RECESSION IN RETROSPECT 7 (2017), https://www.clevelandfed.org/-/media/project/clevelandfedtenant/clevelandfedsite/multimedia-stories/recession-retrospective/the-great-recession-pdf.pdf [https://perma.cc/KK2W-E6A9].

is to determine how to regain that trust. The Dodd–Frank Act and CFPB have the potential to build trust through oversight and enforcement actions. Reducing the incidence of frauds and providing redress to those who have been wronged are steps in the right direction.