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# INSTALLMENT LAND CONTRACTS & LOW-INCOME HOMEBUYERS IN CHICAGO: A CALL FOR LEGISLATIVE REFORM

## INTRODUCTION

Numerous homebuyers around the country are entering into a form of financing that critics refer to as “a predatory agreement that combine[s] all the responsibilities of homeownership with all the disadvantages of renting—while offering the benefits of neither.”<sup>1</sup> This type of agreement is known as an installment land contract.<sup>2</sup> These contracts are often the only option for hopeful homebuyers blocked out of the traditional mortgage market.<sup>3</sup> Installment land contracts create opportunities for exploitive sellers to take advantage of vulnerable homebuyers.<sup>4</sup> The installment land contract became a popular substitute for mortgages during the twentieth century.<sup>5</sup> However, the use of these financing agreements increased after the mortgage crisis and the Great Recession,<sup>6</sup> and has renewed concerns for vulnerable homebuyers.<sup>7</sup>

The use and impact of installment land contracts is particularly important in Chicago, Illinois, in light of the city’s extensive history of housing discrimination, predatory lending, and redlining.<sup>8</sup> This issue

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1. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (Oct. 31, 2016, 8:50 AM), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

2. Lisa Danielson, Note, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, 1986 U. ILL. REV. ONLINE 91, 91–92 (1986). Depending on the jurisdiction, installment land contracts are also referred to as a “contract for deed,” “installment sale contract,” “long-term land contract,” or “bond for deed.” See Grant Nelson, *RESTATEMENT OF MORTGAGES SYMPOSIUM: The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, BYU L. REV. 1111, 1112 (1998).

3. Danielson, *supra* note 2, at 91–92; see also Martha Neil, *Predatory Land Contracts Take Advantage of Low-Income Homebuyers*, NY Times Says, ABA JOURNAL (May 2, 2016), [http://www.abajournal.com/news/article/after\\_the\\_mortgage\\_meltdown](http://www.abajournal.com/news/article/after_the_mortgage_meltdown).

4. See Coates, *supra* note 1; see also Neil, *supra* note 3.

5. *Id.*

6. Jeremiah Battle et al., *Toxic Transactions: How Land Installment Contracts Once Again Threaten Communities of Color*, NATIONAL CONSUMER LAW CENTER (July 2016) at 2, <http://www.nclc.org/images/pdf/pr-reports/report-land-contracts>; see also Neil, *supra* note 3. The Great Recession began in December 2007 and ended in June 2009. See Tom Murse, *A Brief History of American Recessions*, ABOUT NEWS, <http://usgovinfo.about.com/od/moneymatters/a/When-Did-The-Great-Recession-End.htm> (last visited Jan. 18, 2017).

7. Nelson, *supra* note 2, at 1112; Neil, *supra* note 3. See also Battle, *supra* note 6, at 1.

8. Coates, *supra* note 1.

carries additional significance because homeownership is an important way for low-income families to accumulate capital and wealth—installment land contracts target and destroy this opportunity.<sup>9</sup> Despite this growing problem, Illinois (along with several other states) has failed to meaningfully address the problem.<sup>10</sup> While Illinois has taken some significant steps to protect consumers generally, homebuyers remain vulnerable as the underlying problems remain unsolved.<sup>11</sup>

Some states have responded to these problems by enacting legislation.<sup>12</sup> For example, Texas recently passed extensive legislation that safeguards those purchasing homes with this financing method.<sup>13</sup> Additionally, the Consumer Financial Protection Bureau (CFPB) voiced its concerns and considered issuing federal regulations for installment land contracts.<sup>14</sup> These developments reflect a growing national concern and suggest the need for Illinois to further protect homebuyers, especially those in the Chicago area.<sup>15</sup>

This Comment examines the rise of installment land contracts among low-income homebuyers in the aftermath of the mortgage crisis. It analyzes the impact of installment land contracts in Chicago and explores how low-income communities and neighborhoods are disproportionately impacted. This Comment then explores the relevant Texas legislation and major actions taken in other states. Finally, this Comment recommends ways for Illinois to address problems inherent in installment land transactions. If Illinois fails to address these issues, this Comment recommends the CFPB regulate these contracts nationwide.

Part II provides relevant background information that contextualizes the characteristics and purposes of installment land contracts, and

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9. *Id.*; see also Christopher Herbert, et. al., *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households? (Was it Ever?)*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (September 2013), <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/hbtl-06.pdf>.

10. Neil, *supra* note 3.

11. 735 ILL. COMP. STAT. 5/15-1106 (2016); see also Amy Bullock, *Installment Contracts*, ATTORNEY'S TITLE GUARANTY FUND, INC. (Oct. 31, 2016), <https://www.atgf.com/tools-publications/pubs/may-2002-atgarticlesinstallment-contracts>.

12. Heather Way, *Property Ownership and Economic Stability: A Necessary Relationship? Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 140–41 (2009).

13. TEX. PROP. CODE ANN. § 5.062(a)(2) (West 2016); see also David Willis, *Executory Contracts in Texas Real Estate*, LONE STAR LAND LAW (2016), <http://www.lonestarlandlaw.com/Executory.html>.

14. Matthew Goldstein & Alexandra Stevenson, 'Contract for Deed' Lending Gets Federal Scrutiny, N.Y. TIMES (May 10, 2016), [http://www.nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html?\\_r=0](http://www.nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html?_r=0).

15. Battle, *supra* note 6, at 3–4.

details their history in Chicago. Additionally, it describes the steps Illinois and other states have taken to address consumer protection problems. Part III of this Comment explores what steps should be taken by the Illinois legislature or the CFPB to protect homebuyers in the post-recession housing market. Part IV of this Comment discusses the impact of implementing these protections.

## II. BACKGROUND

This Part provides a detailed description of the mechanics of installment land contracts, comparing and contrasting the installment land contract with the traditional mortgage. Next, this Part highlights the advantages and shortcomings of these contracts from the perspective of both parties to the transaction. This Part further contextualizes these contracts by discussing the connection between homeownership and wealth accumulation. It then provides an overview of the historic use of installment land contracts in Illinois, the increased use of these contracts since the Great Recession, and noteworthy post-recession reform. Finally, this Part provides an overview of relevant Illinois legislation to date, Illinois case law, and significant approaches in other states.

### A. *Installment Land Contracts and Traditional Mortgages*

Installment land contracts are a form of seller financing governed by contract law in which the buyer makes installment payments to the seller over an extended period of time.<sup>16</sup> Homebuyers unable to qualify or obtain a traditional mortgage often utilize this method of financing.<sup>17</sup> After the buyer makes all the required payments under the contract, which often takes as long as thirty years, the seller finally conveys legal title of the property to the buyer.<sup>18</sup> If the buyer defaults at any moment before paying the full contract price, the seller generally has the ability to cancel the contract, keep all payments, and immediately regain possession of the property.<sup>19</sup>

Installment land contracts differ from traditional mortgages in terms of the protections available to the buyer and the remedies available to the seller.<sup>20</sup> Mortgage laws protect defaulting borrowers in

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16. Danielson, *supra* note 2, at 91–92.

17. *Id.*

18. *Id.*; see also Nelson, *supra* note 2, at 1112.

19. Battle, *supra* note 6, at 1. While this is the general result after the buyer defaults, some states have laws that protect buyers meeting specific requirements. See e.g., 735 ILL. COMP. STAT. 5/15–1106 (2016).

20. Danielson, *supra* note 2, at 93–94.

various ways, but these protections are largely absent from transactions that utilize an installment land contract as a mortgage substitute.<sup>21</sup> First, state mortgage laws generally protect defaulting borrowers by providing a statutory right of redemption, which gives the defaulting borrower an opportunity to “redeem” the property within a specific timeframe.<sup>22</sup> In Illinois, the redemption period for residential real estate mortgages is the later of seven months from the date of service of the foreclosure complaint or three months from the date the judgment of foreclosure is entered.<sup>23</sup> During this period, the borrower can “redeem” the amount secured by the mortgage by paying the remaining balance, interest, fees, costs, and other court authorized amounts.<sup>24</sup> Second, mortgage laws protect borrowers by providing a statutory right of reinstatement, which gives defaulting borrowers an opportunity to cure the default.<sup>25</sup> The mortgage reinstatement period begins when the lender files legal foreclosure proceeding documents in court and ends at the conclusion of the legal proceedings.<sup>26</sup> During this time, the borrower can make payments to make the loan current, including legal fees and late charges, and effectively stop the foreclosure process.<sup>27</sup> Finally, mortgage foreclosure laws require the lender to submit to a structured and lengthy foreclosure process and ultimately sell the property at a public sale to recover the remaining loan balance.<sup>28</sup>

After the lender sells the property at a public sale to satisfy the debt, mortgage laws allow the defaulting buyer to retain any sale proceeds exceeding the mortgage loan balance if no other liens encumber the property.<sup>29</sup> Because mortgage foreclosure laws require lenders to resort to a structured and lengthy foreclosure process in the event of a default, defaulting buyers have procedural protections and a timeframe to remedy the default.<sup>30</sup> In addition to state laws, federal laws and regulations also govern the mortgage lending process with the goal of protecting mortgage borrowers and monitoring mortgage

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21. *Id.*

22. *Id.*

23. 735 ILL. COMP. STAT. 5/15-1603(b)(1) (2016).

24. *Id.*

25. Danielson, *supra* note 2, at 94.

26. 735 ILL. COMP. STAT. 5/15-1603(b)(1) (2016).

27. *Id.*

28. *See generally* 735 ILL. COMP. STAT. 5/15-1101 (2016).

29. Danielson, *supra* note 2, at 94–95; *See e.g.*, *Shillaber v. Robinson*, 97 U.S. 68, 77 (1877).

30. 735 ILL. COMP. STAT. 5/15-1101.

lending institutions.<sup>31</sup> Pursuant to these goals, the Truth in Lending Act (TILA) provides certain written disclosure requirements and rescission rights for consumers.<sup>32</sup>

Installment land contracts differ from traditional mortgages in the remedies available to the seller and the lack of protections available to the buyer.<sup>33</sup> Installment land contracts provide security to a real estate seller financing the amount of the purchase price to the buyer. However, the seller does not have to worry about repayment for a traditional mortgage because the buyer obtains financing through a third party.<sup>34</sup> Both of these transactions allow the buyer to take physical possession of the property and make monthly installment payments of the principle amount plus interest until the contract price is fully satisfied.<sup>35</sup> However, installment land contracts notably differ as the seller maintains legal title to the property during the duration of the contract while the buyer is generally responsible for obligations imposed upon mortgage borrowers such as maintaining casualty insurance, paying real estate taxes, and completing necessary repairs.<sup>36</sup>

While installment land contracts eliminate the protections afforded to buyers with traditional mortgages, installment land contracts provide a variety of remedies to the seller that are not afforded to lenders in traditional mortgage transactions.<sup>37</sup> The most noteworthy remedy available to the seller is the forfeiture clause.<sup>38</sup> In installment land contract transactions, forfeiture is fast and inexpensive compared to the lengthy and costly foreclosure process required under mortgage law.<sup>39</sup> When the buyer is in default, forfeiture clauses allow the seller to void the contract and retain the buyer's interest in the property, including the down payment and any installment payments.<sup>40</sup> Without legislative intervention, any buyer forfeiture entitles the seller to keep all prior payments, regardless of the amount, and to immediately acquire possession of the property.<sup>41</sup> In conjunction with the forfeiture

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31. See generally 15 U.S.C. 41 § 1601 (1969). See also *Mortgage Laws and Regulations to Protect the Consumer*, CITY TOWN INFO (Oct. 31, 2016), [http://www.citytowninfo.com/mortgage-articles/mortgage-process/mortgage\\_laws\\_and\\_regulations\\_to\\_protect\\_the\\_consumer](http://www.citytowninfo.com/mortgage-articles/mortgage-process/mortgage_laws_and_regulations_to_protect_the_consumer).

32. See 15 U.S.C. 41 § 1601. TILA requires express disclosures regarding terms and costs to inform and protect consumers.

33. Danielson, *supra* note 2, at 95–96; see also Neil, *supra* note 6.

34. Nelson, *supra* note 2, at 1112.

35. *Id.*

36. *Id.*

37. *Id.* at 1112–13; see also Bullock, *supra* note 11.

38. Danielson, *supra* note 2, at 96–97.

39. *Id.*; see also Bullock, *supra* note 11.

40. Danielson, *supra* note 2, at 96–97.

41. *Id.*

clause, installment land contracts generally have a “time-is-of-the-essence” clause.<sup>42</sup> This clause provides that a party must perform its obligations under the contract within a specific timeframe and failure to perform in a timely manner is a material breach of the contract.<sup>43</sup> The time-is-of-the-essence clause notifies the buyer that timely performance of contractual obligations is material and allows the seller to enforce the forfeiture clause in the event of a default.<sup>44</sup> The forfeiture clause and time-is-of-the-essence clause provide sellers with useful remedies, incentivizing sellers to enter into these transactions.<sup>45</sup>

Despite the shortcomings of installment land contracts from the buyer’s perspective, they are appealing to certain buyers.<sup>46</sup> Installment land contracts allow buyers blocked out of the mortgage market to obtain financing, which increases homeownership opportunities.<sup>47</sup> Accordingly, installment land contracts are often the only option for buyers unable to qualify for financing through a traditional mortgage lender.<sup>48</sup> These contracts also attract buyers due to the minimal down payment requirements and low closing costs.<sup>49</sup>

Conversely, installment land contracts are attractive to sellers because the terms and remedies shift risk to the buyer.<sup>50</sup> Without lengthy foreclosure proceedings, sellers can reclaim the property in a cheap, timely manner in the event of a default.<sup>51</sup> In the event of forfeiture, the seller can terminate the contract and retain the borrower’s interest in the property.<sup>52</sup> The seller is also not required to resell the property at a public sale upon the borrower’s default to satisfy the outstanding loan balance.<sup>53</sup> If the seller does decide to sell the property, the later sale is not judicially supervised.<sup>54</sup> Further, the seller is

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42. *Pannett v. Schnitz*, 365 N.E.2d 191, 193–94 (Ill. App. Ct. 1977).

43. *Id.*

44. *Id.*

45. *Id.*; Danielson, *supra* note 2, at 96–97.

46. Danielson, *supra* note 2, at 124.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 96–97; Bullock, *supra* note 11.

51. Danielson, *supra* note 2, at 124.

52. *Id.*

53. *Id.* at 96–97.

54. *Id.* In Illinois, lenders must go through the judicial foreclosure process. Judicial foreclosure requires the court to enter a final judgment of foreclosure and sell the property in a publicly noticed sale. The borrower has a right to redeem the property before the court enters a final judgment. Additionally, the borrower has a right to any surplus proceeds if the property sells for more than the outstanding loan balance. See generally *Illinois Mortgage Foreclosure Laws*, FORECLOSURE.COM, [https://www.foreclosure.com/statelaw\\_IL.html](https://www.foreclosure.com/statelaw_IL.html) (last visited Jan. 27, 2017).

entitled to retain any sale proceeds that exceed the borrower's loan balance, which allows the seller to profit from the buyer's default.<sup>55</sup>

*B. Homeownership & the Accumulation of Wealth*

Because homeownership is vital to the wealth accumulation of low-income individuals, regulating the use of installment land contracts is particularly important as opportunistic sellers often exploit these buyers, destroying their chance of becoming homeowners.<sup>56</sup> Homeownership is an essential steppingstone to accumulating wealth because it encourages savings, protects buyers from rising costs, and allows buyers to enjoy tax benefits and appreciation.<sup>57</sup> Homeownership plays an essential role in financial security for low-income individuals and families. For instance, studies demonstrate the relationship between homeownership and the success and long-term well-being of families.<sup>58</sup>

A basic historical understanding of wealth accumulation and homeownership in the United States contextualizes how installment land contracts threaten low-income homebuyers.<sup>59</sup> Racial barriers historically limited wealth accumulation and complicated homeownership for Blacks throughout the history of the United States.<sup>60</sup> Melvin Oliver and Thomas Shapiro's research focuses on the relationship between private wealth and racial inequality in the United States.<sup>61</sup> They use the concept of the "racialization of state policy" to demonstrate the role state policies play in promoting homeownership and asset accumulation for some sectors of society to the exclusion of others.<sup>62</sup> Oliver and Shapiro use the "racialization of state policy" to explain how various institutions in the United States have historically

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55. Danielson, *supra* note 2, at 96–97.

56. Herbert, *supra* note 9, at 1; *see also* Coates, *supra* note 1.

57. Jonathan Smoke, *How Homeownership Serves as a Steppingstone to Wealth*, REALTOR.COM (Dec. 5, 2014), <http://www.realtor.com/news/how-homeownership-serves-steppingstone-wealth/>.

58. Herbert, *supra* note 9, at 1. Studies show that "[h]omeownership has been central to Americans' ability to amass wealth; even with the substantial decline in wealth after the housing bust, the net worth of homeowners over time has significantly outpaced that of renters, who tend as a group to accumulate little if any wealth." *See Homeownership and Wealth Creation*, N.Y. TIMES (Nov. 29, 2014), [https://www.nytimes.com/2014/11/30/opinion/sunday/homeownership-and-wealth-creation.html?\\_r=3](https://www.nytimes.com/2014/11/30/opinion/sunday/homeownership-and-wealth-creation.html?_r=3).

59. MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (Taylor & Francis Group, L.L.C. 2006).

60. *Id.* at 4.

61. *Id.* at 2. Oliver and Shapiro are sociology scholars and researchers who focus on public policy and racial inequality.

62. *Id.* at 4.



hindered Black wealth accumulation.<sup>63</sup> They argue the historic exclusion from state-sponsored opportunities that promoted homeownership and wealth accumulation placed low-income communities at an economic disadvantage and created racial wealth inequality—specifically in the Black community.<sup>64</sup> To address this disparity, Oliver and Shapiro accentuate the importance of implementing policies aimed at closing the wealth gap and allowing those at the bottom of the social ladder to accumulate wealth by acquiring assets.<sup>65</sup>

Installment land contracts fit into Oliver and Shapiro's equation as these transactions impact homeownership and wealth accumulation.<sup>66</sup> Because installment land contracts are often used by homebuyers unable to qualify for a traditional mortgage and the forfeiture remedy causes the buyer to lose all equity in the home upon any default, these contracts have the potential to render a major source of wealth precarious for low-income homebuyers.

#### *D. The Origin of the Federal Housing Administration & Historic Use of Installment Land Contracts*

Chicago's extensive history of housing discrimination, predatory lending, and redlining practices can serve as a useful case study of installment land contracts.<sup>67</sup> From 1934 until 1968, Black communities in Chicago and throughout the United States were blocked out of the traditional mortgage market.<sup>68</sup> As racist lending practices prohibited Blacks from securing traditional mortgages in certain neighborhoods, the federal government perpetuated these efforts through the creation of the Federal Housing Administration (FHA).<sup>69</sup> The FHA was created in response to the Great Depression with the goal of increasing home buying and lending through mortgage insurance and interest rate regulation.<sup>70</sup> The FHA insured private mortgages, using

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63. OLIVER & SHAPIRO, *supra* note 59, at 4.

64. *Id.*

65. *Id.* at 9–10.

66. *Id.* at 18.

67. Coates, *supra* note 1; *see also* ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO 1940-1960 32–33 (1983).

68. Coates, *supra* note 1; *see also* Alexis Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>; Keeanga-Yamahtta Taylor, *Dreams Shattered in Black America*, SOCIALIST WORKER (Mar. 15, 2010), <https://socialistworker.org/2010/03/15/dreams-shattered>.

69. HIRSCH, *supra* note 67, at 10–11.

70. David Wallechinsky, *Federal Housing Administration*, ALLGOV.COM, (Oct. 31, 2016), <http://www.allgov.com/departments/department-of-housing-and-urban-development-hud/federal-housing-administration?agencyid=7411>.

a system that rated the financial stability of neighborhoods.<sup>71</sup> While the FHA was praised for increasing White homeownership after the Great Depression by guaranteeing their loans, the FHA refused to guarantee loans for Black communities.<sup>72</sup> The FHA explicitly denied and limited financial services to neighborhoods based on racial composition, rather than on the residents' credit or other relevant qualifications—this process was known as “redlining.”<sup>73</sup>

The FHA denied mortgages based on race, which segregated neighborhoods in Chicago and around the country.<sup>74</sup> The FHA's system rated affluent, in-demand neighborhoods with an “A” and labeled these areas green because it considered these neighborhoods desirable prospects for secured mortgages.<sup>75</sup> The system rated Black neighborhoods with a “D” and labeled these areas red, rendering these neighborhoods ineligible for FHA insured private mortgages.<sup>76</sup> As Black homebuyers were denied mortgages in White neighborhoods and were unable to secure traditional mortgages in Black neighborhoods, installment land contracts filled this gap.<sup>77</sup> Studies estimate that eighty-five percent of all properties purchased by Blacks in Chicago between 1934 and 1968 were purchased using installment land contracts.<sup>78</sup> Exploitation often accompanied these agreements—sellers sold homes for inflated prices, collected down payments and monthly installments, then forfeited the buyer's rights to their interest in the property the moment they were unable to make payments.<sup>79</sup> Decades of redlining, exploitation, and economic stigma preceding the Fair Housing Act of 1968 profoundly shaped Chicago neighborhoods such as Lawndale, Englewood, and Austin.<sup>80</sup>

Redlining and exploitation through installment land contracts significantly disenfranchised Black homebuyers in Chicago and hindered their homeownership opportunities.<sup>81</sup> Oliver and Shapiro describe the devastating impact these exploitive transactions had on Black families:

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71. Coates, *supra* note 1.

72. Madrigal, *supra* note 68.

73. *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts*, THE FAIR HOUSING CENTER (Oct. 30, 2016), <http://www.bostonfairhousing.org/timeline/1934-1968-FHA-Redlining.html>.

74. *Id.*; Madrigal, *supra* note 68.

75. Coates, *supra* note 1.

76. *Id.*

77. *Id.*; Taylor, *supra* note 68.

78. HIRSCH, *supra* note 67, at 32–33.

79. Coates, *supra* note 1.

80. *Id.*; Taylor, *supra* note 68.

81. Coates, *supra* note 1; *see also* Taylor, *supra* note 68.

[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history, African Americans who desired and were able to afford home ownership found themselves consigned to central-city communities where their investments were affected by the ‘self-fulfilling prophecies’ of the FHA appraisers: cut off from sources of new investment . . . their homes and communities deteriorated and lost value in comparison to those homes and communities the FHA appraisers deemed desirable.<sup>82</sup>

While White homebuyers had access to the more secure, government supported, traditional mortgage industry, Black communities were systematically forced to turn to alternative financing arrangements that placed their assets and wealth at risk.<sup>83</sup> Because Black communities relied on installment land contracts for wealth accumulation, the aforementioned exploitation significantly impacted low-income families, perpetuated wealth inequality, and systematically segregated Chicago’s neighborhoods.<sup>84</sup>

### *E. The Mortgage Crisis and Renewed Concerns*

The federal government finally responded to the exploitive lending practices and underlying racism of the FHA with the Fair Housing Act of 1968. Both federal and state legislation now protect against the exploitive predatory lending and redlining practices.<sup>85</sup> Despite legislation, installment land contracts continue to present an inherent risk of exploitation when used in a residential context.<sup>86</sup> Recently, the subprime mortgage crisis created a climate that made homebuyers particularly vulnerable to installment land contracts.<sup>87</sup> Subprime lending refers to loans made to individuals with low Fair Isaac Corporation (“FICO”) scores who may have difficulties with repayment.<sup>88</sup> Higher interest rates accompany subprime mortgages as they present a greater risk for the lender.<sup>89</sup> In 2006, the majority of subprime mort-

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82. OLIVER & SHAPIRO, *supra* note 59, at 18; *see generally* Coates, *supra* note 1.

83. OLIVER & SHAPIRO, *supra* note 59, at 18.

84. Coates, *supra* note 1; *see also* Taylor, *supra* note 68.

85. *E.g.*, 42 U.S.C.A. § 3601–3631 (1968) (prohibiting discrimination concerning the sale, financing, and rental of housing based on race, nationality, sex, and religion); 310 ILL. COMP. STAT. 65 (2003) (providing new ways to create affordable housing in communities where less than ten percent of housing is affordable to working class families). *See generally* Coates, *supra* note 1.

86. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

87. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

88. *Subprime Mortgage*, INVESTOPEDIA (Oct. 30, 2016), [http://www.investopedia.com/terms/s/subprime\\_mortgage.asp](http://www.investopedia.com/terms/s/subprime_mortgage.asp).

89. *Id.*

gages issued were adjustable rather than fixed rate mortgages.<sup>90</sup> Housing prices peaked in early 2006 before the housing bubble burst, causing the interest rates of adjustable rate mortgages to substantially increase, rendering borrowers unable to pay their mortgage.<sup>91</sup> This triggered defaults on these mortgages and the collapse of the housing market, causing property values to plummet.<sup>92</sup>

While installment land contracts have historically exploited buyers, the increased use of these contracts since the Great Recession presents renewed concerns that warrant further scrutiny.<sup>93</sup> First, post-recession investors seized the opportunity to purchase homes with cash intending to resell them on installment land contract terms.<sup>94</sup> Second, the use of installment land contracts increased as many homebuyers were no longer able to qualify for traditional mortgages.<sup>95</sup> The Dodd-Frank Act, passed after the Great Recession, requires lenders to verify a buyer's ability to repay the mortgage, resulting in more stringent requirements and the highest average FICO scores for mortgages in history.<sup>96</sup> Simultaneously, foreclosures hurt the credit scores of those defaulting on their mortgages, placing a black mark on the credit reports of approximately 556,000 individuals for seven years.<sup>97</sup> As a result, installment land contracts became the only option for those unable to secure traditional mortgage financing.<sup>98</sup>

#### *F. Post-Recession Reform: The Dodd-Frank Act & the Consumer Financial Protection Bureau*

In response to the devastating impact of the Great Recession, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) into law in 2010.<sup>99</sup> As

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90. Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011), <http://www.forbes.com/sites/stevedenning/2011/11/22/5086/#27b345555b56>.

91. Kimberly Amadeo, *Subprime Mortgage Crisis: Effect and Timeline*, THE BALANCE (Sept. 8, 2016), <https://www.thebalance.com/subprime-mortgage-crisis-effect-and-timeline-3305745>.

92. *Id.*

93. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

94. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

95. Diana Olick, *How Dodd-Frank Changed Housing, for Good and Bad*, CNBC (July 16, 2015), <http://www.cnn.com/2015/07/16/how-dodd-frank-changed-housing-for-good-and-bad.html>

96. *Id.*; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1376 (2010). A FICO score is a credit score used by lenders to assess a borrower's credit risk and determine whether to extend credit.

97. Olick, *supra* note 95.

98. Battle, *supra* note 6, at 1-3; Neil, *supra* note 3.

99. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1376.

the most significant financial regulatory reform since the Great Depression, the legislation aimed to promote financial stability, improve accountability of financial industries, create transparency, and protect consumers from exploitive financial service practices.<sup>100</sup> This legislation also created the CFPB, an executive agency responsible for consumer protection in the financial sector, including mortgage servicing operations, foreclosure relief services, debt collectors, banks, credit unions, and other financial companies.<sup>101</sup> Title XIV of the Dodd-Frank Act provided extensive changes to consumer protection laws governing residential mortgage loans; the CFPB was the implementing agency.<sup>102</sup>

While the extensive mortgage regulations in the Dodd-Frank Act apply only to actual mortgage transactions, the CFPB could potentially regulate installment land transactions and provide nationwide protections for consumers.<sup>103</sup> The CFPB has not issued federal regulations that directly address installment land contracts; however, the CFPB has the authority to regulate these transactions under section 129(p) of the TILA.<sup>104</sup> TILA is a federal law adopted in 1968 that requires creditors to make certain disclosures to consumers regarding terms and costs in order to foster informed credit use.<sup>105</sup> This provision mandates the CFPB address practices that are (1) unfair or deceptive in the mortgage marketplace or (2) seeking to evade TILA's regulation.<sup>106</sup> The financial regulatory reform that grew out of the Great Recession creates an opportunity to address installment land contract issues through federal regulation if necessary. This would fill a void in states that have failed to take effective legislative action to protect consumers of installment land transactions.<sup>107</sup>

### G. Illinois Legislation to Date

In 1986, Illinois took steps to protect buyers in installment land transactions.<sup>108</sup> Legislative changes in Illinois' mortgage foreclosure law offered installment land contract buyers the most significant pro-

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100. *Id.*

101. *See* 12 U.S.C. § 5511 (2011).

102. *Dodd-Frank Mortgage Regulations*, CONSUMER COMPLIANCE OUTLOOK (Nov. 1, 2016), <https://consumercomplianceoutlook.org/2013/fourth-quarter/dodd-frank-mortgage-regulations/>.

103. *See* Battle, *supra* note 6.

104. 15 U.S.C. § 1639 (1969).

105. *Id.*

106. *Id.* at § 1601.

107. Battle, *supra* note 6, at 1–3.

108. 735 ILL. COMP. STAT. 5/15–1106 (2016).

tection.<sup>109</sup> Illinois mortgage foreclosure law requires actual foreclosure proceedings in order to terminate certain residential installment land contracts.<sup>110</sup> This provision applies to installment land contracts that meet three requirements: (1) the parties entered into the installment contract on or after July 1, 1987; (2) the contract provides that the purchase price will be paid in installment payments lasting at least five years or more; and (3) the buyer has paid at least twenty percent of the purchase price to the seller, including principal and interest payments.<sup>111</sup> The provision further allows sellers to elect foreclosure proceedings even if the transaction falls outside the scope of the aforementioned requirements.<sup>112</sup> However, this election is limited to the seller; the buyer is unable to elect foreclosure proceedings if the three statutory requirements are not satisfied.<sup>113</sup> Access to foreclosure proceedings grants the buyer the right of reinstatement and the right of redemption.<sup>114</sup> These rights are supplied by mortgage law and are not typically provided to buyers through contract law in installment land transactions.<sup>115</sup>

#### H. Noteworthy Case Law

In addition to the aforementioned legislative changes, Illinois courts have attempted to take steps to protect buyers and address the inequitable results of enforcing installment land contract terms. Illinois courts primarily addressed installment land contract issues through forfeiture clauses, attempting to prevent inequitable results. However, courts have also attempted to level the playing field in many different ways.<sup>116</sup> First, Illinois courts require strict compliance with contract provisions in order for sellers to declare forfeiture.<sup>117</sup> Second, courts further protect defaulting buyers by finding that the seller waived the right to timely payments if they repeatedly accepted late payments.<sup>118</sup> Finally, Illinois courts used the “election of remedies” doctrine to provide modest protections to buyers by prohibiting sellers from claiming they have unsatisfied debt after they recover the prop-

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109. *Id.*; see also Bullock, *supra* note 11.

110. *Id.*

111. 735 ILL. COMP. STAT. 5/15-1106(a)(2) (2016).

112. *Id.* at 5/15-1106(c)-(d).

113. *Id.*

114. 735 ILL. COMP. STAT. 5/15-1602 (2016); 735 ILL. COMP. STAT. 5/15-1603 (2016).

115. Bullock, *supra* note 11.

116. Danielson, *supra* note 2, at 100-02.

117. *Id.* at 103-04; Bocchetta v. McCourt, 450 N.E.2d 907 (Ill. App. Ct. 1983); see also Bullock, *supra* note 11.

118. Kirkpatrick v. Petreikis, 358 N.E.2d 679 (Ill. App. Ct. 1976); see also Danielson, *supra* note 2, at 105-06.

erty.<sup>119</sup> The election of remedies doctrine requires the seller to select a theory of recovery when two or more remedies exist for the same wrongdoing by the opposite party.<sup>120</sup> In this context, the seller must elect to reclaim the property or sue for the remaining debt.<sup>121</sup>

Although, Illinois courts have worked within their means to provide protections to buyers, addressing the inherent problems of installment land contracts through the judiciary is limited and ineffective.<sup>122</sup> While the judiciary plays a vital role in mitigating problems overlooked or unaddressed by the legislature, their solutions fail to address the underlying problems.<sup>123</sup> Illinois courts tend to provide unreliable protection through waivers and strict compliance requirements rather than providing clear, dependable protections for buyers.<sup>124</sup> Further, these efforts ultimately weaken the effectiveness of installment land contracts as they overburden sellers without adequately protecting buyers.<sup>125</sup> The following cases demonstrate Illinois courts' attempts to address installment land contract issues through common law.<sup>126</sup>

*Bocchetta v. McCourt* illustrates how Illinois courts attempt to protect buyers by reasoning that forfeiture provisions must be "strictly and narrowly construed."<sup>127</sup> In *Bocchetta*, the plaintiff failed to make timely payments due under the contract, which contained a forfeiture clause.<sup>128</sup> The defendant sold the property to a third party and kept the plaintiff's forfeited payments.<sup>129</sup> While the court found that the defendant had a right to declare a forfeiture, the defendant did not adhere to the procedural steps outlined in the parties' contractual agreement.<sup>130</sup> Specifically, the defendant did not file a notice of forfeiture in the recorder's office pursuant to the contract.<sup>131</sup> Forfeiture clauses in installment land contracts generally outline the procedure

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119. Danielson, *supra* note 2, at 106–07. *But see* *Cala v. Gerami*, 484 N.E.2d 1199 (Ill. App. Ct. 1985).

120. *Id.*

121. *Id.*

122. Danielson, *supra* note 2, at 108–09.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See generally* *Bocchetta v. McCourt*, 450 N.E.2d 907 (Ill. App. Ct. 1983); *Kirkpatrick v. Petreikis*, 358 N.E.2d 679 (Ill. App. Ct. 1976); *Cala v. Gerami*, 484 N.E.2d 1199 (Ill. App. Ct. 1985).

127. *Bocchetta*, 450 N.E.2d at 909.

128. *Id.* at 908.

129. *Id.*

130. *Id.* at 909–10.

131. *Id.* at 910.

the seller must follow in order to actually forfeit the contract.<sup>132</sup> The court held that in order to uphold a forfeiture clause, the seller must strictly follow these procedures.<sup>133</sup> The seller's deviation from these procedures constituted insufficient notice of forfeiture.<sup>134</sup> Thus, the seller's "sale of the property [to a third party] while the agreement remained in effect constituted an abandonment or offer to rescind the agreement."<sup>135</sup>

*Kirkpatrick v. Petreikis* illustrates how Illinois courts use waiver of timely payments to protect defaulting buyers.<sup>136</sup> In *Kirkpatrick*, the seller regularly accepted late payments, however, the buyer made a late payment that the seller then used as the basis for enforcing the contract's forfeiture clause.<sup>137</sup> The court found that the buyer was not in actual default after failing to make a timely payment.<sup>138</sup> While the contract contained a forfeiture clause and a "time-is-of-the-essence" clause, the seller routinely accepted late payments throughout their contractual relationship.<sup>139</sup> The court held the seller's regular acceptance of late payments effectively waived the right to timely payments.<sup>140</sup> Because the seller did not exercise the "time-is-of-the-essence" clause by providing the buyer with notice that strict compliance was expected going forward, the buyer had no warning of strict compliance and therefore the seller could not immediately declare forfeiture.<sup>141</sup> For sellers to elect to forfeit installment land contracts that are not encompassed by the Illinois mortgage foreclosure law, two conditions must be met: (1) a valid contract with a forfeiture clause and (2) a buyer in actual default.<sup>142</sup> The court held that the buyer was not in actual default because the seller waived the right to timely installment payments.<sup>143</sup>

While the election of remedies doctrine forces the seller to elect to reclaim the property or sue for the remaining debt, Illinois weakened the protection this doctrine provides to buyers in *Cala v. Gerami*.<sup>144</sup> In *Cala*, the buyer provided the seller with a promissory note as pay-

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132. *Bocchetta*, 450 N.E.2d at 909.

133. *Id.* at 910.

134. *Id.*

135. *Id.*

136. *Kirkpatrick*, 358 N.E.2d at 680.

137. *Id.* at 680–81.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Kirkpatrick*, 358 N.E.2d at 680–81.

142. *Id.* at 680; see also *Bullock*, *supra* note 11.

143. *Kirkpatrick*, 358 N.E.2d at 680–81.

144. *Danielson*, *supra* note 2, at 107-08.



ment under the installment land contract.<sup>145</sup> The court held that the promissory note imposed an additional obligation apart from the contract and construed the promissory note separately.<sup>146</sup> While the seller could not recover a deficiency judgment because of the election of remedies doctrine, the court found that the seller could nonetheless collect the amount provided by the promissory note.<sup>147</sup> Because the promissory note constituted a separate agreement outside the scope of the installment land contract, the promissory note was not subject to the election of remedies rule against collecting damage judgments from forfeited installment land contracts.<sup>148</sup> Accordingly, Illinois weakened the protection the election of remedies doctrine provided to buyers by providing the seller with an additional way to recover damages from the buyer.<sup>149</sup>

### *I. Noteworthy Legislation & Approaches in Other States*

In 2005, Texas addressed installment land contract problems through legislation that provided extensive protections for buyers and eliminated most incentives for sellers.<sup>150</sup> As a result of these substantial changes and extensive conditions, the use of installment land contracts in a residential context is nearly extinct in the state.<sup>151</sup> Installment land contracts are considered “executory contracts” subject to regulation under the Texas Property Code if they extend beyond 180 days.<sup>152</sup> The 2005 legislative changes impose several ongoing requirements upon the seller, allow the buyer to rescind the contract, and enable the buyer to receive a full refund of all payments if the seller violates such requirements.<sup>153</sup> Additionally, the buyer can make a claim under the Deceptive Trade Practices-Consumer Protection Act (DTPA).<sup>154</sup> Executory contracts fully shift the risk to sellers, eliminating all useful defenses and benefits previously available to them.<sup>155</sup>

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145. *Cala v. Gerami*, 484 N.E.2d 1199, 1201 (Ill. App. Ct. 1985).

146. *Id.* at 1202.

147. *Id.* at 1203.

148. *Id.*

149. *Id.*

150. Willis, *supra* note 13.

151. *Id.*

152. TEX. PROP. CODE ANN. § 5.062(a)(2) (2016); Willis, *supra* note 13.

153. TEX. PROP. CODE ANN. § 5.069(d)(2); *see also* Willis, *supra* note 13.

154. TEX. PROP. CODE ANN. § 5.069(d)(1); TEX. BUS. & COM. CODE § 17.41–63 (2016).

155. Willis, *supra* note 13.

While the forfeiture remedy available in traditional installment land contracts attracts sellers to these transactions,<sup>156</sup> this legislation substantially limits the seller's ability to pursue forfeiture.<sup>157</sup> When the buyer is in default, the seller is unable to immediately terminate the contract.<sup>158</sup> The seller must provide the defaulting buyer with a default notice followed by a letter to ensure that the buyer has sufficient notice and time to cure the default.<sup>159</sup> The buyer then has an unconditional thirty day right to cure period.<sup>160</sup> If the buyer has paid over forty percent of the purchase price or made forty-eight or more monthly installment payments, the seller must provide the defaulting buyer with a sixty day notice and a traditional foreclosure process if the default remains uncured.<sup>161</sup>

In addition to addressing forfeiture issues, Sections 5.069 and 5.070 of the Texas Property Code outline other requirements imposed on the seller when an installment transaction is regarded as an executory contract.<sup>162</sup> Section 5.069 provides title protections to the buyer, which require the seller to notify the buyer that there are no "restrictive covenants, easements, or other title exceptions or encumbrances."<sup>163</sup> The seller is further required to supply the buyer with copies of restrictive covenants, liens, and easements impacting the title.<sup>164</sup> In addition to title protections, the legislation also imposes disclosure requirements upon the seller.<sup>165</sup> Disclosure requirements include: whether the property is in a recorded subdivision; the availability of water, sewage removal, and electricity; and whether the property is located on a floodplain.<sup>166</sup> The seller is also required to provide a tax certificate to the buyer.<sup>167</sup> Finally, the legislation requires recordation of the contract, including the disclosure statement, within thirty days after execution of the contract.<sup>168</sup>

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156. Richard Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 550–52 (1965).

157. TEX. PROP. CODE ANN. § 5.073(a)(4); Willis, *supra* note 13.

158. TEX. PROP. CODE ANN. § 5.073(a)(4); Willis, *supra* note 13.

159. TEX. PROP. CODE ANN. § 5.063; TEX. PROP. CODE ANN. § 5.064; Willis, *supra* note 13.

160. TEX. PROP. CODE ANN. § 5.065.

161. *Id.* § 5.066(a).

162. *Id.* § 5.069, § 5.070.

163. *Id.* § 5.069(a)(1).

164. *Id.* § 5.069(a)(2).

165. *Id.* § 5.069(b).

166. TEX. PROP. CODE ANN. § 5.069(c).

167. *Id.* § 5.070(a)(1).

168. *Id.* § 5.076(a).

However, other states have different approaches to installment land contract issues.<sup>169</sup> Some states deal with problems inherent in installment land contracts by treating the contract like a mortgage, which eradicates forfeiture issues altogether.<sup>170</sup> For example, Oklahoma views all installment land contracts as mortgages by statute, which restricts the seller's remedies to judicial foreclosure.<sup>171</sup> Maryland takes a similar approach in the residential context.<sup>172</sup> In Maryland, installment land contracts are treated like mortgages requiring judicial foreclosure, but this treatment is restricted to defaulting non-corporate buyers.<sup>173</sup> This treatment reflects the Restatement (Third) of Property's approach, which plainly states that "a contract for deed creates a mortgage" governed by mortgage law.<sup>174</sup>

While treating installment land contracts as mortgages seems like a logical solution, this approach has drawbacks.<sup>175</sup> First, it eliminates use of these contracts as a separate, distinct financing option for both buyers and sellers.<sup>176</sup> Second, this approach fails to effectively address title concerns and other problems that could arise prior to the buyer's default, simply because mortgage law protections only go into effect after the buyer defaults.<sup>177</sup> In order to maintain the benefits of installment land contracts as a separate form of financing and to mitigate the potential for exploitation, legislation should balance and allocate the risks between the seller and buyer.<sup>178</sup>

### III. ANALYSIS

This Part discusses the need for reform in Illinois considering the impact of the post-recession housing market, exploring what steps should be taken by the Illinois legislature and, alternatively, the CFPB. This Part suggests the following changes be adopted by the Illinois legislature: requiring recordation of the contract, providing a right to cure period, requiring the title to be marketable upon signing the contract, and providing information regarding home mortgage interest deductions. This Part further suggests that the CFPB should

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169. See Okla. Stat. tit. 16; MD. REAL PROP. CODE ANN. § 10-101.

170. Nelson, *supra* note 2, at 1125-27; Danielson, *supra* note 2, at 110-111.

171. OKLA. STAT. tit. 16; Danielson, *supra* note 2, at 110.

172. MD. REAL PROP. CODE ANN. § 10-101; Danielson, *supra* note 2, at 110.

173. MD. REAL PROP. CODE ANN. § 10-101.

174. Restatement (Third) of Prop. Mortgages § 3.4(b) (Am. Law Inst. 1997).

175. Danielson, *supra* note 2, at 111.

176. *Id.*

177. *Id.*

178. *Id.*

consider regulating installment land contracts to address problems both in Illinois and nationwide.

Though Illinois has made significant efforts to address problems related to installment land contracts since the 1980s, the rise of this method of financing after the Great Recession presents renewed concerns and a need for reform.<sup>179</sup> The weakness of the economy and the housing market after the Great Recession left homebuyers particularly vulnerable to the exploitive terms of installment land transactions for multiple reasons.<sup>180</sup> The financial regulations passed in the aftermath of the recession made it more difficult for homebuyers to qualify for a traditional mortgage.<sup>181</sup> Additionally, these more stringent qualification standards particularly affected homeowners impacted by the recession's rampant foreclosures and short-sales.<sup>182</sup> This damaged homeowners' and buyers' credit ratings and hindered their ability to satisfy higher qualification standards.<sup>183</sup> As a result, the increased number of homebuyers unable to qualify for a mortgage caused an increase in the use of installment land transactions in the residential context.<sup>184</sup> Because installment land contracts have once again become the only feasible path to homeownership for some homebuyers, the post-recession market presents a renewed need for consumer protection.<sup>185</sup> Due to the exploitive history of installment land transactions in Chicago and the number of Chicago homeowners devastated by the recession, Illinois must take steps to provide additional protection to consumers.<sup>186</sup>

#### A. *Needed Illinois Reform: Required Recordation of Contract*

Because installment land contracts are often not recorded,<sup>187</sup> Illinois should consider requiring recordation of land contracts to adequately protect the buyer's interest in the property.<sup>188</sup> Recordation protects the buyer because it places a cloud on the property's title, giving notice of the buyer's interest in the property to potential subsequent purchasers and rendering the title unmarketable.<sup>189</sup> Because a

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179. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

180. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

181. Olick, *supra* note 95.

182. *How Much Will a Foreclosure Hurt My Credit Score?*, FINANCIAL SAMURAI (2016) <http://www.financialsamurai.com/how-much-will-a-foreclosure-short-sale-hurt-credit-score/>.

183. *Id.*

184. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

185. Battle, *supra* note 6, at 3-4.

186. Coates, *supra* note 1.

187. 765 ILL. COMP. STAT. 70/2 (2016); BATTLE, *supra* note 6, at 8.

188. Battle, *supra* note 6, at 8-11; *see also* Bullock, *supra* note 11.

189. Battle, *supra* note 6, at 8-11; *see also* Danielson, *supra* note 2, at 97-98.

recorded contract renders the title unmarketable, the seller is unable to easily convey the property.<sup>190</sup> A recorded installment land contract encumbers the property's title until a recorded notice of the buyer's forfeiture effectively reflects the buyer's interest has been terminated.<sup>191</sup> This encumbrance preserves and protects the buyer's interest in the property in the event the seller files for bankruptcy, neglects to pay taxes or liens, or attempts to sell the property, because recordation provides notice of the buyer's interest to the public.<sup>192</sup>

Nevertheless, unless the buyer takes the initiative, installment land contracts often go unrecorded as this decreases the burden on the seller.<sup>193</sup> The seller desires a quick, efficient way to clear title to the property in order to resell the property if needed.<sup>194</sup> If the buyer's interest in the property is reflected through a publically recorded contract, the seller must take additional steps to clear title to the property.<sup>195</sup> Specifically, the seller has the burden of obtaining and recording a judicial declaration of forfeiture to effectively terminate the buyer's interest in the property and obtain a marketable title.<sup>196</sup>

To preserve and protect the buyer's interest in the property, Illinois should expressly require the recordation of installment land contracts.<sup>197</sup> Currently, Illinois law states that such contracts "may be recorded or registered," but this language does not require the seller to record these contracts.<sup>198</sup> This statute further provides that any contractual provision that prohibits or penalizes the buyer for recording an installment land contract is void, which protects buyers from a potentially exploitive contractual provision and preserves their right to record the contract.<sup>199</sup> This provision provides buyers with minimal protection. Illinois law should take this protection a step further and expressly require that all installment land contracts be recorded.<sup>200</sup>

### *B. Needed Illinois Reform: Right to Cure Period*

Installment land contracts leave buyers unprotected by shifting the risk to the buyer and offering the seller the remedy of forfeiture

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190. Battle, *supra* note 6, at 8–11; *see also* Danielson, *supra* note 2, at 97–98.

191. Battle, *supra* note 6, at 8–11; *see also* Danielson, *supra* note 2, at 97–98.

192. Battle, *supra* note 6, at 11.

193. Battle, *supra* note 6, at 8–11; *see also* Danielson, *supra* note 2, at 97–98.

194. Danielson, *supra* note 2, at 97–98.

195. *Id.*

196. *Id.*

197. Battle, *supra* note 6, at 8–11.

198. 765 ILL. COMP. STAT. 70/2 (2016).

199. *Id.*

200. *Id.*

through the contract's forfeiture clause.<sup>201</sup> Traditionally, forfeiture clauses in installment land contracts allow the seller to terminate the contract, regain possession, and retain all installment payments upon default by the buyer.<sup>202</sup> This remedy could potentially devastate a buyer as they risk losing everything upon the moment of default, including any existing equity in the home.<sup>203</sup> While the buyer bears this great risk, the seller has an efficient, straightforward remedy that saves the time and expense of foreclosure.<sup>204</sup>

Illinois law protects a defaulting buyer's interests if they meet the specific qualifications under 735 ILCS 5/15-1106. This statute forces the seller to use the foreclosure process governed by mortgage law if the transaction satisfies the following requirements: (1) the parties entered into the installment land contract on or after July 1, 1987; (2) the contract provides that the purchase price will be paid in installment payments lasting at least five years or more; and (3) the buyer has paid at least twenty percent of the purchase price to the seller, including principal and interest payments.<sup>205</sup> If these requirements are met, the seller must use remedies available through mortgage law rather than contract law.<sup>206</sup>

This statute provides qualifying installment land contracts the protection of the traditional foreclosure process, which is judicial foreclosure under Illinois law.<sup>207</sup> Judicial foreclosure requires the court to issue a final judgment of foreclosure before the property is sold at a public sale.<sup>208</sup> The defaulting buyer has the opportunity to redeem the property by paying the amount owed plus any interest and fees within the right of redemption period.<sup>209</sup> Illinois provides a right of redemption period either seven months from the time the foreclosure complaint is filed in court or three months from the time the court enters a final foreclosure judgment.<sup>210</sup> This provides the buyer with extensive time to cure the default, especially considering that an uncontested judicial foreclosure process takes at least nine months.<sup>211</sup>

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201. Danielson, *supra* note 2, at 124.

202. *Id.*

203. *Id.* at 124–25.

204. *Id.*

205. 735 ILL. COMP. STAT. 5/15-1106(a)(2).

206. *Id.*

207. *Id.* Judicial foreclosure involves litigation and a public sale. *Illinois Foreclosure Laws*, FORECLOSURE.COM (2016) [https://www.foreclosure.com/statelaw\\_IL.html](https://www.foreclosure.com/statelaw_IL.html).

208. 735 ILL. COMP. STAT. 5/15-1106(a)(2).

209. *Id.* at 5/15-1603.

210. *Id.*

211. *Mortgage Foreclosure (Lawyer Manual)*, ILLINOIS LEGAL AID ONLINE (2016) <https://www.illinoislegalaid.org/legal-information/mortgage-foreclosure-lawyer-manual>.

Additionally, if the proceeds from the public sale exceed the amount of debt, the buyer receives this surplus.<sup>212</sup>

While this provision protects buyers with more equity from forfeiture, current Illinois law leaves buyers that are outside the scope of this provision under-protected and subject to immediate forfeiture.<sup>213</sup> Illinois should pass legislation that protects all buyers from the inequitable results of forfeiture at the onset of the transaction.<sup>214</sup> The Illinois legislature should consider providing a statutory “right to cure” period similar to the Texas legislation.<sup>215</sup> Sellers should be required to provide notice of default to the buyer followed by a thirty-day right to cure period.<sup>216</sup> This would provide buyers with the ability to protect existing equity against sellers pursuing forfeiture.<sup>217</sup> However, limiting the period to thirty days protects the seller and contrasts with the lengthy, expensive alternative of the foreclosure process.<sup>218</sup> This approach more effectively balances the risk between the buyer and seller compared to the approach that treats installment land contracts as mortgages requiring foreclosure under mortgage law.<sup>219</sup> A specified right to cure period gives the buyer notice and time to cure the default without immediate forfeiture, but also allows the seller to enforce the forfeiture clause after the specified period rather than resort to the judicial foreclosure process.<sup>220</sup>

### C. *Needed Illinois Reform: Marketable Title upon Contract Signing*

Installment land contracts leave buyers vulnerable to title problems.<sup>221</sup> Because installment land contracts generally do not require the seller to convey a marketable title until the buyer pays the final installment, title problems often surface during the course of these transactions.<sup>222</sup> Additionally, title problems can arise before the execution of the contract if the seller fails to disclose preexisting encumbrances.<sup>223</sup> Title problems can also arise during the duration of the contract if the seller takes out another mortgage or otherwise en-

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212. 735 ILL. COMP. STAT. 5/15–1512.

213. *Id.* at 5/15–1106.

214. Danielson, *supra* note 2, at 124.

215. TEX. PROP. CODE ANN. § 5.065.

216. *Id.*

217. Battle, *supra* note 6, at 11; *see also* Danielson, *supra* note 2, at 94–95.

218. Eric Freyfogle, *Vagueness & the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609, 651–52 (1988).

219. *Id.*

220. *Id.*; *see also* Danielson, *supra* note 2, at 94–95.

221. Battle, *supra* note 6, at 8.

222. Danielson, *supra* note 2, at 96.

223. Battle, *supra* note 6, at 8.

cumbers the property.<sup>224</sup> The creation of this third-party interest creates additional risk for the buyer, particularly if the buyer continues to make installment payments.<sup>225</sup>

The Illinois legislature and judiciary have failed to adequately protect buyers from title problems.<sup>226</sup> Illinois law currently provides buyers with protection against title encumbrances “arising after the parties have executed the contract, and then only to the extent of the payments the [buyer] made before the encumbrance arose.”<sup>227</sup> Illinois law does not protect buyers from preexisting liens that encumber the property, regardless of the lienholder’s knowledge of the contract.<sup>228</sup> Even if the lien holder receives the buyer’s installment payments through the seller, the buyer lacks protection against the encumbrance.<sup>229</sup> Additionally, no existing laws protect buyers from liens arising after execution of the contract if they continue to make payments to the seller.<sup>230</sup> This lack of legal protections places the buyer in a vulnerable situation as they will forfeit the contract if installment payments are made directly to the lienholder. Yet, “the [buyer] risks losing all future payments that are made to the [seller] if the lien holder subsequently forecloses the lien.”<sup>231</sup> Illinois law also does not extend protection to buyers continuing to make installment payments pursuant to the contract if a subsequent lien encumbers the property.<sup>232</sup> This encumbrance places the buyer at risk of losing the property if the lien holder has priority and the ability to foreclose on the lien.<sup>233</sup>

In order to solve title problems that arise in installment land transactions and adequately protect buyers, Illinois law should require the seller to obtain a marketable title within a specified period of time shortly after the execution of the contract.<sup>234</sup> If the seller fails to obtain a marketable title within the period specified by the statute, the buyer should be allowed to rescind the contract and recover any payments made.<sup>235</sup> This right would give the seller sufficient time to resolve existing title defects and give the buyer protection if the title

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224. Danielson, *supra* note 2, at 99.

225. *Id.* at 96.

226. *Id.* at 109.

227. *Id.* at 119–120.

228. Danielson, *supra* note 2, at 119–120.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Danielson, *supra* note 2, at 119–120.

234. Battle, *supra* note 6, at 10.

235. *Id.*



problem is too risky or irremediable.<sup>236</sup> In addition, it would ensure buyers receive a marketable title at the time of contract formation by requiring sellers to clear preexisting encumbrances.<sup>237</sup>

*D. Needed Illinois Reform: Information Regarding  
Home Mortgage Interest Deductions*

Installment land contracts also trigger tax considerations, particularly home mortgage interest deductions.<sup>238</sup> The IRS allows taxpayers to deduct the interest portion of home mortgage payments as an itemized deduction.<sup>239</sup> Though the buyer in an installment land contract transaction does not have legal title to the property, the IRS nonetheless permits the buyer to deduct the interest paid under installment land contracts as an itemized deduction.<sup>240</sup>

While the IRS allows taxpayers to take advantage of the home mortgage interest deduction, buyers in installment land contract transactions struggle to calculate the interest portion of their payments and prove this deduction to the IRS.<sup>241</sup> Because sellers in these transactions are not required to provide buyers with a statement explaining their payments and the amount that constitutes interest, buyers need to maintain detailed records in order to accurately calculate this amount at the end of the year.<sup>242</sup> In order to address this information disparity, Illinois should consider requiring the installment land contract seller to provide a year-end statement to the buyer showing the principal and interest amounts paid during the calendar year.<sup>243</sup> This solution shifts the burden to the party with access to the information and allows the buyer to take advantage of the home mortgage interest deduction.<sup>244</sup>

*E. Needed Federal Regulation by the Consumer  
Financial Protection Bureau*

In the event the Illinois legislature fails to act, the CFPB should provide installment land contract buyers with more comprehensive

236. *Id.*

237. *Id.*

238. Cynthia Myers, *Can I Claim Home Mortgage Interest Deductions on a Contract for Deed?* ZACKS (Feb. 2, 2017), <http://finance.zacks.com/can-claim-home-mortgage-interest-deductions-contract-deed-2131.html>.

239. See IRC § 163(h)(3) (2016).

240. Myers, *supra* note 238.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

protections.<sup>245</sup> The CFPB has the authority to address installment land contract problems nationwide.<sup>246</sup> Due to the history of exploitation of vulnerable buyers, and in the aftermath of the subprime mortgage crisis and Great Recession, a nationwide solution is necessary.<sup>247</sup>

The TILA provides the CFPB with authority to regulate installment land contracts.<sup>248</sup> In 2013, the CFPB issued loan originator compensation requirements under TILA to protect consumers.<sup>249</sup> These requirements aim to ensure loan originators are qualified and diminish incentives to guide consumers into accepting loans with certain terms.<sup>250</sup> These regulations consider anyone performing activities that deal with the origination of residential mortgage loans a “mortgage originator.”<sup>251</sup> However, some sellers are exempt from the regulations if certain criteria are met.<sup>252</sup> First, sellers who finance only one property within a one-year period are exempt from this regulation.<sup>253</sup> Further, under this exemption the seller is not required to assess and determine the buyer’s ability to repay the loan.<sup>254</sup> Second, sellers who provide financing for the sale of three properties or less within a twelve-month period are exempt, so long as the seller makes a determination that the buyer has the ability to repay the loan.<sup>255</sup> The Dodd-Frank Act provides federal oversight to certain installment land transactions, but the CFPB should extend this oversight to all residential installment land transactions. The CFPB could then provide buyers with protections such as required recordation of the contract, specified right to cure period, and required marketable title upon execution of the contract as this Comment suggests.<sup>256</sup>

Despite the CFPB’s current authority to provide solutions to the nationwide problems presented by installment land contracts, the 2016

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245. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

246. Battle, *supra* note 6, at 1; Neil, *supra* note 3.

247. Battle, *supra* note 6, at 1; Coates, *supra* note 1.

248. *Truth in Lending Act*, CFPB LAWS & REGULATIONS, (Apr. 2015) [https://s3.amazonaws.com/files.consumerfinance.gov/f/201503\\_cfpb\\_truth-in-lending-act.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf), at 3.

249. Public Law 111–203; *Land Contract Sales (Seller Financing) After Dodd-Frank*, NAT’L L. REV., <https://www.natlawreview.com/article/seller-financing-after-dodd-frank> (last visited Jan. 23, 2018).

250. Public Law 111-203.

251. *Id.*

252. *Land Contract Sales (Seller Financing) After Dodd-Frank*, *supra* note 249.

253. *Id.*

254. *Id.*

255. *Id.*

256. *See generally* Battle, *supra* note 6.

presidential election makes the future of the CFPB uncertain.<sup>257</sup> The new administration's agenda includes dismantling and replacing the Dodd-Frank Act, which created the CFPB and provided the bureau with regulatory authority.<sup>258</sup> The Trump campaign criticized the extensive regulations created by the Dodd-Frank Act and argued that "bureaucratic red tape and Washington mandates are not the answer."<sup>259</sup> Additionally, Republicans have extensively criticized the CFPB and aim to either abolish the agency or decrease its oversight capabilities.<sup>260</sup> The D.C. Circuit recently held that the structure of the CFPB was unconstitutional because it does not allow the president to remove the bureau's director.<sup>261</sup> Unless the Supreme Court reviews this ruling, President Trump can appoint a new CFPB director and work with Congressional Republicans to diminish the oversight and protection the CFPB provides to consumers.<sup>262</sup>

Because the future of the CFPB is uncertain there is an urgency for Illinois and similarly situated states to take legislative action to protect consumers from exploitive installment land contracts.<sup>263</sup>

#### IV. IMPACT

This Part explores the potential impact of the recommended changes detailed in this Comment, exploring the advantages and disadvantages of this legislation in Illinois. This Part concludes by assessing the likelihood of these changes on both a state and federal level.<sup>264</sup>

##### A. *Advantages: Striking a Balance between Consumer Protection & Freedom of Contract*

The primary advantage of adopting the aforementioned legislative changes is that such changes more effectively balance buyer and seller interests.<sup>265</sup> The proposed legislation addresses current gaps in con-

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257. Dave Boyer, *Consumer Financial Protection Bureau in Jeopardy under Donald Trump*, WASH. TIMES (Nov. 29, 2016) <http://www.washingtontimes.com/news/2016/nov/29/consumer-financial-protection-bureau-in-jeopardy-u/>.

258. Marilyn Geewax, *Trump Team Promises to 'Dismantle' Dodd-Frank Bank Regulations*, NPR (Nov. 10, 2016) <http://www.npr.org/sections/thetwo-way/2016/11/10/501610842/trump-team-promises-to-dismantle-dodd-frank-bank-regulations>.

259. *Id.*

260. *Id.*

261. C. Ryan Barber, *Donald Trump's Richard Cordray Problem*, NAT'L L.J. (Nov. 28, 2016) <http://www.nationallawjournal.com/id=1202773254026/Donald-Trumps-Richard-Cordray-Problem?slreturn=20161128182350>.

262. *Id.*

263. *Id.*

264. *Id.*

265. Danielson, *supra* note 2, at 11.

sumer protection and provides necessary protection to vulnerable homebuyers.<sup>266</sup> Additional consumer protections would provide stability for vulnerable homebuyers and protect their primary source of capital and wealth.<sup>267</sup>

Introducing more stability in this form of homeownership is particularly important considering the post-recession market context.<sup>268</sup> The federal regulation passed after the recession made it more difficult for homeowners to qualify for a traditional mortgage—increasing the use of installment land contracts as an alternative means of financing.<sup>269</sup> While the use of installment land contracts expands access to the housing market, particularly for individuals impacted by the recession, expansion without regulation can frustrate the social and economic benefits of homeownership.<sup>270</sup> Unregulated homeownership expansion sparked the recession because individuals defaulted on their subprime mortgages, even though critics described them as “a financial instrument designed to spread homeownership among the poor.”<sup>271</sup> The social benefits of homeownership such as promoting stable neighborhoods, encouraging political participation, and increasing children’s educational success are meaningless without stability.<sup>272</sup> Similarly, the economic benefits of homeownership disappear if the underlying asset is unstable.<sup>273</sup> Homeownership is a vital way for families to accumulate wealth as it creates an additional method of saving.<sup>274</sup> Protecting the social and economic benefits of homeownership through increased consumer protections in installment land contracts will provide homeowners security and simultaneously stimulate the housing market.<sup>275</sup>

In addition to providing necessary protections for homebuyers, the approach outlined in this Comment balances consumer protection considerations by maintaining installment land contracts as a distinct financing option. Rather than making these transactions subject to

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266. See Battle, *supra* note 6.

267. *Id.*; see also Herbert, *supra* note 9.

268. Neil, *supra* note 4.

269. *Id.*; see also Olick, *supra* note 95.

270. *Shelter, or Burden?*, THE ECONOMIST (Apr. 16, 2009), <http://www.economist.com/node/13491933>.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*; see also OLIVER & SHAPIRO, *supra* note 59, at 18.

275. George McCarthy et al., *The Economic Benefits & Costs of Homeownership: A Critical Assessment of the Research* (May 2001), <https://www.mba.org/news-research-and-resources/research-and-economics/research-institute-for-housing-america/published-reports/2002-2000/the-economic-benefits-and-costs-of-homeownership-a-critical-assessment-of-the-research>, 1–5.

mortgage law, this approach primarily subjects installment land contracts to contract law. With certain mortgage law protections in situations where consumers are particularly vulnerable, such as when the buyer has a certain amount of equity in the home, mortgage law will provide much needed elevated protection.

Considering the impact of the Great Recession and the stringent post-recession federal regulations, other financing options are needed to provide more avenues to homeownership.<sup>276</sup> In order to simultaneously maintain installment land contracts and decrease exploitive lending practices, the aforementioned changes are necessary to balance the incentives and risks between the buyer and seller.<sup>277</sup>

*B. Disadvantages: Disincentivizing Sellers from Utilizing Installment Land Contracts*

Though the changes suggested in this Comment attempt to balance the interests of both the buyer and the seller, these suggestions could disincentivize sellers from utilizing this financing method.<sup>278</sup> Sellers often use installment land contracts to balance the risk associated with less financially stable buyers, providing sellers with an efficient, harsh remedy in the event of default.<sup>279</sup> Because the changes proposed by this Comment provide additional protection to buyers and consequently diminish the effectiveness of sellers' forfeiture remedy, these changes will cause sellers to reconsider using installment land contracts with riskier buyers.<sup>280</sup> At least, sellers are likely to engage in these transactions with a smaller pool of buyers, such as less risky buyers or perhaps family members.<sup>281</sup> Alternatively, sellers could reserve installment land contracts for commercial rather than residential transactions. In order to preserve the benefits provided to sellers and promote freedom of contract, the changes suggested in this Comment do not fully transfer installment land contracts into the realm of mortgage law. However, providing additional safeguards for installment land contract buyers does reduce the seller's incentive to engage in these transactions and must be acknowledged.<sup>282</sup>

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276. Olick, *supra* note 95.

277. Danielson, *supra* note 2.

278. *Id.*

279. *Id.*

280. *See generally* Battle, *supra* note 6.

281. *Id.*

282. *Id.*

C. *The Increased Need for Illinois to Take Legislative Action Due to Federal Inaction*

While the Illinois legislature needs to take steps to address this issue, especially considering the current political climate and state of the CFPB, installment land contract issues are likely to remain unaddressed.<sup>283</sup> Illinois' budget problems dominate the attention of the legislature.<sup>284</sup> Due to the budget crisis in Illinois and slow legislative process, the State's installment land contract issues will likely remain unaddressed for some time.<sup>285</sup>

While installment land contracts are not currently a priority of the Illinois legislature, there is an increased need for action due to the current political climate and economic policies of President Trump.<sup>286</sup> President Trump promised to cut seventy-five percent of business regulations, in part by targeting the CFPB.<sup>287</sup> The CFPB plays a crucial role in consumer protection, returning an estimated \$11.8 billion to approximately 20 million consumers since its creation in 2011.<sup>288</sup> The uncertain future of the CFPB and the Trump administration's deregulation priorities make it increasingly unlikely that the federal government will address consumer protection issues arising from installment land contracts in the next four years.<sup>289</sup>

While the priorities of the Trump Administration will likely hinder federal consumer protection, states with existing protections for homebuyers will remain unaffected as installment land contracts are a matter of state law.<sup>290</sup> Accordingly, states are more likely to provide solutions to installment land contract issues in the near future.<sup>291</sup>

## V. CONCLUSION

Installment land contracts have historically allowed for the exploitation of buyers, and the increased use of installment land contracts after the Great Recession makes this issue particularly concerning.<sup>292</sup>

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283. Dave McKinney, "Illinois Starts 2017 with No State Budget" ST. LOUIS POST-DISPATCH (Jan. 1, 2017), [http://www.stltoday.com/business/local/illinois-starts-with-no-state-budget/article\\_f95f6eb1-9b6f-5674-8994-33efd5820030.html](http://www.stltoday.com/business/local/illinois-starts-with-no-state-budget/article_f95f6eb1-9b6f-5674-8994-33efd5820030.html).

284. *Id.*

285. *Id.*

286. Lucinda Shen, *Donald Trump is Targeting an Agency that has Recovered \$11.8 Billion for Consumers*, FORTUNE (Jan. 27, 2017), <http://fortune.com/2017/01/27/donald-trump-cfpb-consumer-protection-financial-bureau-elizabeth-warren/>.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*; Danielson, *supra* note 2, at 91–92.

291. *See generally* Shen, *supra* note 286.

292. Battle, *supra* note 6, at 2; *see also* Neil, *supra* note 3.

The use and impact of installment land contracts is especially important in Chicago in light of the city's extensive history of housing discrimination, predatory lending, and redlining.<sup>293</sup> In conjunction with Chicago's history, this issue carries additional significance because homeownership is an important means for low-income families to accumulate capital and wealth, and installment land contracts potentially threaten this capital.<sup>294</sup> While Illinois has taken some significant steps to protect consumers over the years, homebuyers remain vulnerable as underlying problems remain unsolved.<sup>295</sup> Legislative changes are needed in Illinois to protect buyers from exploitive terms of installment land contracts, while simultaneously balancing the interests of sellers providing financing.<sup>296</sup>

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293. Coates, *supra* note 1.

294. *Id.*; see also Herbert, *supra* note 9.

295. Coates, *supra* note 1; Herbert, *supra* note 9.

296. Coates, *supra* note 1; Herbert, *supra* note 9.

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