RECENT DEVELOPMENT

FEES FROM MARS: WHY THE FTC NEEDS TO REGULATE MORTGAGE ASSISTANCE RELIEF SERVICES (MARS) FEES

ALEXANDER LUTCH*

TABLE OF CONTENTS

Introduction 646
I. The FTC Acts to Prevent Abusive MARS Practices but Does Not Go Far Enough 649
A. The Context in Which Consumers Use MARS Justifies Regulation 649
B. The FTC Rule is an Attempt to Remedy the Problems in the MARS Industry 651
II. The FTC Should Limit Fees to a Percentage of the Reduction in Payments from Modification 653
A. The FTC Needs to Limit MARS Fees to Protect Consumers 653
B. The FTC Has the Authority to Regulate MARS Fees to Avoid Unfair Practices 656
1. Excessive Fees Cause Substantial Injury 657
2. The Benefits from Unregulated Fees are Insufficient to Overcome the Injury to Consumers 659
3. Consumers are Unable to Avoid the Injury from Excessive Fees 660
C. The FTC Should Adopt a Hybrid of the Illinois and Maine Approaches to Fee Regulation 663
Conclusion 666

* J.D. Candidate, May 2012, American University Washington College of Law; B.A. Economics, 2009, Vassar College.

INTRODUCTION

The recent financial crisis has had far-reaching consequences—particularly for homeowners, who have felt the effects of falling real estate values and high unemployment.[1] In response to the difficulties that these homeowners have faced in keeping current with their mortgage payments, the government has provided free services to help those struggling to obtain loan modifications.[2] The government has also offered incentives for creditors to work with borrowers to avoid foreclosure.[3] Despite these efforts, however, 2.9 million properties entered the foreclosure process in 2010,[4] and over 2.7 million loan payments were more than sixty days past due nationwide in the first quarter of 2010.[5] Many have criticized the government's efforts as being incapable of achieving lasting results and having helped far fewer homeowners than originally intended.[6] Within this

1. For a discussion of the causes and effects of the financial crisis, see generally BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS (2010) (tracing the causes of the financial crisis to securitization of mortgages, aggressive mortgage origination practices, and insufficient investigation of the quality of securitized loans).

2. The government, through the U.S. Department of the Treasury (Treasury) and the U.S. Department of Housing and Urban Development (HUD), encouraged the creation of the "HOPE NOW" alliance, which provides outreach services and operates a hotline to advise homeowners. *See generally* HOPE NOW: SUPPORT AND GUIDANCE FOR HOMEOWNERS, http://www.hopenow.com (last visited Aug. 1, 2011).

3. As part of the Troubled Asset Relief Program (TARP), Treasury created the Home Affordable Modification Program (HAMP), which gives incentives for servicers to reduce the proportion of a borrower's loan payments to monthly income. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-787, HOMEOWNERSHIP PRESERVATION: FEDERAL EFFORTS TO COMBAT FORECLOSURE RESCUE SCHEMES ARE UNDER WAY, BUT IMPROVED PLANNING ELEMENTS COULD ENHANCE PROGRESS 4–5 (2010), http://www.gao.gov/new.items/d10787.pdf; *see also* Edmund L. Andrews, *Mortgage Plan Targets up to Four Million Homeowners*, N.Y. TIMES, Mar. 5, 2009, http://www.nytimes.com/2009/03/05/business/economy/05loan.html (explaining the incentives offered by HAMP, such as money from the government for reducing homeowners' payments to no more than 38% of a household's gross monthly income).

4. Janna Herron, *Banks Repossessed Million Homes in 2010*, WASH. TIMES, Jan. 13, 2011, http://www.washingtontimes.com/news/2011/jan/13/banks-repossessed-1-million-homes-2010. In Nevada, the state with the greatest number of homes entering foreclosure, one in every eleven homes entered the foreclosure process in 2010. *Id.*

5. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 3.

6. *See, e.g.*, Robbie Whelan & Anthony Klan, *Banks Boost Mortgage Assistance*, WALL ST. J., Feb. 1, 2011, at A5 (comparing the roughly 2 million permanent loan modifications resulting from direct bank negotiations with borrowers to the 521,630 homeowners who had received help from HAMP); Alan White, *Latest HAMP Report: Treasury Program a Failure*, CONSUMER L. & POL'Y BLOG (Feb. 17, 2010, 10:49 PM), http://pubcit.typepad.com/clpblog/2010/02/latest-hamp-report-treasury-program-a-failure.html (describing statistics from Treasury as showing the HAMP program's failure, particularly because of the

context of high demand for assistance in avoiding foreclosure, the number of mortgage foreclosure rescue and modification services has increased dramatically.[7]

Mortgage assistance relief service (MARS) providers offer to help struggling homeowners avoid foreclosure by negotiating with creditors on their behalf, usually for loan modifications.[8] These providers charge a fee for their services and often require payment before concluding successful negotiations on the homeowner's behalf.[9] Thus, even if the provider fails to avoid foreclosure or negotiate a modification, it will still charge the homeowner—despite the fact that the homeowners who use the services are those who are often already on the verge of bankruptcy.[10]

The Federal Trade Commission (FTC) adopted a rule, pursuant to the 2009 Omnibus Appropriations Act[11] and Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act),[12] which bars MARS providers from making certain false or misleading claims,[13] institutes certain disclosure requirements relating to these services,[14] and prohibits companies from charging up-front fees.[15] The rule became effective on December 29, 2010.[16]

Section 322.5 of the FTC's rule, which prohibits MARS providers from charging up-front fees, will likely have a substantial effect on the industry

---

temporary nature of the achieved modifications). Part of the reason for HAMP's ineffectiveness is that it does not directly target redefault rates, which are a key element of servicers' calculations in assessing proposed modifications. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 77–78 (2011).

7. NAT'L CMTY. REINVESTMENT COAL., FORECLOSURE RESCUE SCAMS: A NIGHTMARE COMPLICATING THE AMERICAN DREAM 4 (2010), http://www.ncrc.org/images/stories/pdf/research/foreclosure%20rescue%20scams%20-%20%20nightmare%20complicating%20the%20american%20dream.pdf. For example, the Federal Trade Commission (FTC) received 7,927 complaints about Mortgage Assistance Relief Services (MARS) in 2009, compared to 1 in 2008. *Id.* at 28.

8. Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,093 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322).

9. *Id.* at 75,114.

10. *See infra* note 79 and accompanying text (noting MARS consumers' desperation by the time they engage such services).

11. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 626(a), 123 Stat. 524, 678 (2009).

12. Credit Card Accountability Responsibility and Disclosure (Credit CARD) Act of 2009, Pub. L. No. 111-24, § 511(a), 123 Stat. 1734, 1763–64 (2009).

13. Mortgage Assistance Relief Services, 16 C.F.R. § 322.3 (2011).

14. *Id.* § 322.4.

15. *Id.* § 322.5.

16. Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,092 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322). With respect to charging up-front fees, the rule became effective on January 31, 2011. 16 C.F.R. § 322.5.

and its customers.[17] Specifically, this section of the rule prohibits any MARS provider from "collecting any fees until the provider negotiates, and the consumer executes, a written agreement for mortgage relief with the lender or servicer."[18] The rule requires providers to give borrowers a written description of the differences between their current situations and the proposed modifications and to notify consumers that they can accept or reject the proposed modifications.[19] Thus, a borrower must accept the modification before she will owe any fees.

The FTC's rule will hopefully curb the most abusive practices of MARS providers. The requirement that MARS providers present borrowers with a new payment plan before they can charge fees should stop these companies from taking money without ever contacting lenders—a practice which has been unfortunately common.[20] Further, the requirement that borrowers actually agree to the new arrangement, by giving the borrower the ability to reject a modification and avoid paying the MARS provider, should provide some incentive for MARS providers to negotiate an arrangement that will result in a material change for the borrower.

The rule as enacted, however, does not fully protect borrowers from all abusive practices. As the FTC notes in its Statement of Basis and Purpose, MARS consumers are generally inexperienced with such services.[21] While the prohibition on advance fees goes a long way toward solving consumers' problems, this inexperienced group of consumers needs further protections to ensure that MARS providers do not trick them into accepting modifications that leave them no better off—or potentially even worse off—than if they had not used such services. Given the numerous claims that the FTC has made against MARS providers for fraud and deception under

---

17. *See, e.g.*, Comments of the National Consumer Law Center, Notice of Proposed Rulemaking: Mortgage Assistance Relief Services, at 3 (Mar. 29, 2010), http://www.ftc.gov/os/comments/mars-nprm/546727-00049.pdf ("The single most important provision is section 322.5 . . . . Requiring [MARS] providers to earn their fee before being paid will rid the market of those who specialize in nothing more than 'take the money and run.'"). *But see* Comments of 1st American Law Center, Inc., Need to Protect Flaws in FTC Proposed Rule for Mortgage Assistance Services from Worsening Foreclosure Crisis, at 2 (Mar. 25, 2010), http://www.ftc.gov/os/comments/mars-nprm/546727-00032.pdf (arguing that the prohibition of up-front fees is one of the "largest flaws" in the proposed rule).

18. Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,114.

19. 16 C.F.R. § 322.5(b)–(d).

20. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,116 (justifying the rule change because this abusive practice "causes or is likely to cause substantial injury to consumers").

21. *Id.* at 75,119.

the existing regulatory framework,[22] it is clear that such providers often leave consumers worse off for having used their services.

Thus, this Recent Development argues that, while prohibiting MARS providers from charging up-front fees is a step in the right direction, the FTC should go further and require that fees be tied to the amount of savings the providers obtain for borrowers. This requirement would protect borrowers from paying a MARS provider more for its services than they end up saving. Such a fee structure would strengthen the resulting arrangement: a borrower will be in a better position after using MARS than before negotiating with a lender, making the borrower less likely to default. If a MARS provider fails to negotiate a beneficial modification, at least the borrower will not have given the provider any money that might otherwise have been used to pay down the borrower's debt.

Part I of this Recent Development describes the context of desperation in which MARS providers operate and outlines the components of the FTC's rule. Part II explains the insufficiency of the FTC's rule as adopted because it allows MARS providers to appropriate borrowers' savings from modifications, shows that the FTC has the authority to regulate fees, and suggests that the FTC adopt a fee regulation that is a hybrid of the regulations currently in place in Maine and Illinois. Without such regulation, there is a danger that MARS consumers who manage to obtain modifications will nevertheless redefault, making MARS effectively useless.[23]

I. THE FTC ACTS TO PREVENT ABUSIVE MARS PRACTICES BUT DOES NOT GO FAR ENOUGH

A. The Context in Which Consumers Use MARS Justifies Regulation

The MARS industry has been plagued by abusive practices. In addressing the need for MARS regulation, FTC Chairman Jon Leibowitz noted that "scammers, often armed with official looking documents and false claims of connection to government programs for homeowners, sell legal services they can't—and don't deliver," and that, "[h]undreds of thousands of consumers have lost hundreds of millions of dollars this

22. The Statement of Basis and Purpose notes: "The FTC and state law enforcement agencies have collectively filed over two hundred cases against MARS providers." *Id.* at 75,116.

23. *See infra* Part II.A. (explaining that factors such as the typical MARS consumer's frail financial situation and desperation make disclosure-based regulation insufficient to ensure the usefulness of MARS services); *infra* note 33 and accompanying text (noting that many borrowers have redefaulted on loans following modifications).

way."[24] The roots of this situation parallel those of the mortgage crisis that led to such high demand for MARS. In the case of the mortgage crisis, borrower ignorance about loan terms led to a situation in which many borrowers were not able to afford their mortgages and thus defaulted on their payments.[25] This operated in conjunction with questionable mortgage-origination practices through which lenders pushed borrowers into loans that were often not appropriate for them.[26] Many of the individuals previously involved in mortgage origination are now offering MARS.[27] Given that disclosure requirements at the lending stage failed to prevent the current foreclosure crisis,[28] it seems unlikely that disclosures at the modification stage will fare significantly better.

While the MARS industry has been defrauding consumers, servicers have been largely unwilling to modify loans.[29] This is in part because of

---

24. *Bogus Mortgage Relief Schemes Targeted by FTC*, BANKING & FIN. SERVS. POL'Y REP., Jan. 2011, at 19.

25. *See* Debra Pogrund Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL'Y & L. 85, 88 (2010) ("The continued governmental policy of relying upon disclosure laws as the primary means to protect homeowners from predatory loans was based on the notion that with such laws a properly functioning mortgage market could be maintained . . . . This notion was proven to be false in light of the massive scale of predatory home lending that contributed to the high level of foreclosures . . . ."). Many homeowners also took out adjustable rate mortgages, meaning that their monthly payments would increase substantially once rates reset, in hopes of higher income in the future; many of these homeowners ended up defaulting when their rates reset. *See, e.g.*, Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 987–88 (2010) (describing homeowners' "optimistic overconfidence" in taking out adjustable rate mortgages).

26. *See generally* MCLEAN & NOCERA, *supra* note 1 (tracing the causes of the financial crisis to, among others, cut throat mortgage-origination practices at subprime lenders). *See also* Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 773–74 (2010) (noting that some mortgage originators misstated mortgage payments and then disclosed the true payments at closing, at which point borrowers were less likely to walk away from a mortgage).

27. *See* LAUREN K. SAUNDERS ET AL., NAT'L CONSUMER LAW CTR., DESPERATE HOMEOWNERS: LOAN MOD SCAMMERS STEP IN WHEN LOAN SERVICERS REFUSE TO PROVIDE RELIEF 12–13 (2009), http://www.nclc.org/images/pdf/foreclosure_mortgage/scam/loanmodscamsreport0709.pdf (describing connections between former subprime lenders and MARS providers and also giving examples of job postings by MARS providers explaining desirability of mortgage experience); Comments of 1st American Law Center, Inc., *supra* note 17, at 10 ("Traditionally [MARS providers] will focus on the hiring of underwriters, processors, and forensic loan auditors.").

28. *See, e.g.*, Sovern, *supra* note 26, at 773–76 (arguing that ineffective disclosures required by the Truth in Lending Act contributed to the foreclosure crisis).

29. *See, e.g.*, Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008*

poorly structured incentives for servicers, who often make more money through foreclosure than modification.[30] Further, even when borrowers do manage to obtain modifications, these are often insufficient.[31] This shows the importance of the National Consumer Law Center's plea that the rule "require the modification to be *affordable* . . . . A modification that lowers the consumer's payments but is still unaffordable does not provide a genuine benefit to the homeowner."[32] Further validating this concern is the number of borrowers who have redefaulted after obtaining loan modifications.[33] Thus, there is a great need for MARS regulation.

B. The FTC Rule is an Attempt to Remedy the Problems in the MARS Industry

In response to this need for regulation, Congress included in the Omnibus Appropriations Act of 2009 the requirement that ninety days after its enactment, "the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans . . . ."[34] With the Credit CARD Act, Congress amended this directive to explain, "such

---

Voluntary Mortgage Contract Modifications, 41 CONN. L. REV. 1107, 1117 (2009) ("Modifications for [November 2008] ranged from a negligible fraction of none for forty-seven [of eighty] servicers to 35% of all mortgages in foreclosure for one servicer.").

30. *See* Levitin & Twomey, *supra* note 6, at 69–71 (describing servicers' fee structures and explaining why these make servicers unwilling to negotiate modifications, particularly those that reduce mortgage principal).

31. *See* White, *supra* note 29, at 1124 ("[T]he typical voluntary modifications of 2008 were not unlike the subprime loan originations they were meant to resolve: borrowers were kept in debt exceeding home values and exceeding their ability to amortize, with deferrals of interest, balloon payments, and temporary low interest rates."). Such insufficient modifications have led to high redefault rates, exacerbating the problem of servicers' unwillingness to offer affordable modifications. *See id.* at 1124, 1129 (noting high redefault rates and explaining that servicers' models for assessing the costs of modifications account for redefault rates, where higher redefault rates suggest that a modification will be more expensive to the servicer).

32. Comments of the National Consumer Law Center, *supra* note 17, at 18.

33. *See* Charles Duhigg, *Fighting Foreclosures, F.D.I.C. Chief Draws Fire*, N.Y. TIMES, Dec. 11, 2008, at A1 ("This week, the Office of the Comptroller of the Currency reported that more than half of at-risk borrowers whose loan terms were changed this year by banks . . . had already redefaulted on their payments.").

34. Omnibus Appropriations Act, 2009, Pub. L. No. 111–8, § 626(a), 123 Stat. 524, 678 (2009). In directing that rules be promulgated in accordance with 5 U.S.C. § 553 (2006), the Act allows for a faster rulemaking process than typical under the Magnuson–Moss procedures set forth in 15 U.S.C. § 57a (2006). *See Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 113 (2009) [hereinafter *Hearing*] (prepared statement of the FTC) ("This new legislation allows the FTC to use the relatively streamlined notice and comment rulemaking procedures under Section 553 of the Administrative Procedure Act (APA) in promulgating these rules . . . .").

rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services."[35] In response, the FTC adopted its rule regulating MARS, in which it defines a mortgage assistance relief service as:

> [A]ny service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented . . . to assist or attempt to assist the consumer with . . . [n]egotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees.[36]

The rule regulates MARS providers in three important ways. It (1) sets forth a list of prohibited representations[37] and required disclosures;[38] (2) prohibits advance fees;[39] and (3) imposes recordkeeping requirements.[40]

The rule addresses some significant problems with the MARS industry,[41] and the prohibition on advance fees is likely to curb some of the industry's most abusive practices.[42] Further, not only does this section of the rule

35. Credit CARD Act, Pub. L. No. 111–24, § 511(a), 123 Stat. 1734, 1763–64 (2009).

36. 16 C.F.R. § 322.2(i)(2) (2011).

37. *Id.* § 322.3. Significantly, this section of the rule prohibits a MARS provider from "[r]epresenting . . . that a consumer cannot or should not contact or communicate with his or her lender or servicer." *Id.* § 322.3(a). This is meant to address the situation in which the MARS provider tries to hide its failure to provide any service to a borrower by cutting the borrower off from her servicer. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,106 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322) (explaining that the harm from such an instruction is the deprivation of information about "whether the provider is actually performing"). The rule also prohibits providers from "[m]isrepresenting . . . [t]he likelihood of negotiating, obtaining, or arranging any represented service or result." 16 C.F.R. § 322.3(b)(1).

38. 16 C.F.R. § 322.4. Providers must disclose that a borrower may discontinue the use of the MARS provider's service at any time, that a borrower may accept or reject an offer from her lender, and that if she rejects it, she will not have to pay for the provider's services. *Id.* § 322.4(b)(i).

39. *Id.* § 322.5(a).

40. *Id.* § 322.9. These requirements are meant to aid in regulating the industry and investigating providers for legal compliance. Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,134.

41. For example, the restrictions on representations should help avoid situations in which MARS providers promise to achieve results and then leave borrowers worse off when they fail to do so because of the time wasted while borrowers assumed that the provider was achieving results. *See* Allison D. Matthews, Comment, *To Stop a Predator: Is a Complete Ban on For-Profit Foreclosure Rescue Operations the Best Way to Prevent Equity Stripping?*, 20 LOY. CONSUMER L. REV. 477, 487 (2008) ("Even if a consumer may never have to pay the consultant if service is not rendered . . . the foreclosure consultant still has wasted the homeowner's valuable time, which could have been spent seeking legitimate guidance and aid.").

42. *See supra* note 17 and accompanying text (describing the importance of an up-front

prohibit charging fees up-front, but it also requires the execution of a modification before a MARS provider can charge fees.[43] Thus, in theory, an informed MARS consumer should not pay a MARS provider who does not perform a beneficial service. The FTC declined, however, to impose any restrictions on the magnitude of the fees that MARS providers can charge.[44] This lack of regulation regarding the MARS fees themselves limits the effectiveness of the rule because it allows providers to continue to provide services that are worth less than the fees they charge.[45]

II. THE FTC SHOULD LIMIT FEES TO A PERCENTAGE OF THE REDUCTION IN PAYMENTS FROM MODIFICATION

A. The FTC Needs to Limit MARS Fees to Protect Consumers

The FTC rule relies on mandatory disclosures to keep MARS providers from continuing their prior unfair practices.[46] The disclosures required in conjunction with execution of a modification may be insufficient to avoid situations in which consumers do not benefit from MARS.[47] One concern is that consumers may not fully process these disclosures and therefore may be willing to agree to a modification that is insufficient to achieve a lasting solution.[48] At the loan-origination stage, one author found that "brokers

---

fee ban to ensure that providers do not take fees up-front and then fail to provide any services).

43. 16 C.F.R. § 322.5(a). By making payment contingent upon execution of a modification, the rule avoids some disputes over what a MARS provider has actually represented that it will accomplish, since a borrower can theoretically reject a proposed modification if the provider fails to achieve the promised results.

44. Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,122. The FTC only explains why it did not adopt a static fee cap, not why it declined to adopt a dynamic cap such as this Comment proposes. *Id.*

45. *See infra* Part II.A. (outlining the need for regulation of MARS fees to ensure that such services provide value to consumers).

46. In particular, the rule requires disclosures about MARS generally and disclosures associated with executing a modification and charging of fees upon execution. 16 C.F.R. §§ 322.4, 322.5(b).

47. The disclosures required under the Real Estate Settlement Procedures Act (RESPA) in the context of mortgage settlement fees provide a cautionary example of the limits of disclosures. *See, e.g.*, Elizabeth Renuart & Jen Douglas, *The Limits of RESPA: An Empirical Analysis of the Effects of Mortgage Cost Disclosures* 1, 13 (Albany Law Sch., Research Paper No. 10-13, 2010), *available at* http://ssrn.com/abstract=1635841 (describing RESPA's goal of "rais[ing] market efficiencies and price competition by creating savvy shoppers" but finding that mortgage closing costs nevertheless increased dramatically in the decades following RESPA's enactment).

48. There is a growing literature on the ineffectiveness of disclosures. *Cf.* William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the*

were virtually unanimous in saying that borrowers never withdrew from a loan after reading the final disclosures at the closing, and never used those disclosures for their stated purpose of comparison shopping for loans."[49] This is of particular concern in the loan-modification context, since borrowers are unlikely to have experience modifying loans or evaluating services that help them do so, meaning that disclosures are likely to be less effective.[50] Further, MARS is an "experience good"—a good whose quality a consumer cannot ascertain until after purchasing it—and is one for which repeat customers are unlikely.[51] Where this is the case, a service provider has a reduced incentive to provide services that are satisfactory in the long term.[52]

In addition to the difficulties in relying on disclosure, MARS providers do not have appropriate incentives to ensure that a borrower only accepts a worthwhile modification under the FTC's rule. The rule requires that, for a MARS provider to receive payment, the consumer must receive and execute a modification.[53] The rule does not, however, refer to the terms of

---

Economic and Psychological Dynamics of the Home Sale and Loan Transaction, 70 VA. L. REV. 1083, 1086 (1984) (positing that "[f]ederally mandated disclosures do little to protect many homebuyers" in the context of loan origination). *See generally* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899 (2006) (examining difficulties with ensuring that credit card disclosures create informed consumers); Florencia Marotta-Wurgler, *Does Disclosure Matter?* (NYU Sch. of Law, NYU Ctr. for Law, Econ. and Org., Law & Econ. Research Paper Series, Working Paper No. 10-54, 2010), *available at* http://ssrn.com/abstract=1713860 (finding that increased accessibility of contract terms does not increase readership and that consumers are likely to purchase products regardless of the terms).

49. Sovern, *supra* note 26, at 779.

50. *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* 62 (Univ. of Mich. Law Sch. Empirical Legal Studies Ctr., Working Paper No. 9, 2010), *available at* http://law.bepress.com/umichlwps/empirical/art9 (surveying the pitfalls of disclosures but acknowledging, "Where people make a decision regularly, they become expert at making those decisions"). *Cf.* Eskridge, *supra* note 48, at 1086 ("The typical homebuyer is not very knowledgeable about the market for homes, financing, and settlement services and tends to defer to more sophisticated intermediaries . . . who are more interested in closing transactions than in obtaining the best deal for the buyer.").

51. Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 48–49 (noting that with "experience goods . . . the consumer learns the actual quality of the good after buying and using it"). It is difficult and troubling to imagine repeat MARS customers, given the dire circumstances that lead borrowers to use MARS.

52. There are few consequences for providers of experience goods that operate in a context where repeat customers are rare. The lack of repeat customers eliminates much of the incentive to satisfy customers, since there is no realistic threat that dissatisfied customers will take their business elsewhere in the future. *See id.* at 61 (differentiating between the effectiveness of this threat for various products, but noting that the ability of consumers to punish sellers by taking their business elsewhere is nonexistent for some experience goods).

53. 16 C.F.R. § 322.5(a) (2011).

the executed modification.[54] Thus, MARS providers' incentives are to obtain *any* modification, not the best modification possible.[55] Once providers negotiate for a modification from servicers, they can use their role as counselors to pressure consumers to execute the modification. If, on the other hand, the regulations required fees for MARS to relate to the modification achieved, then the provider would have an incentive to achieve the greatest savings possible for the borrower.

Such a contingent fee structure would be somewhat similar to that generally used by real estate brokers.[56] Real estate brokers receive a commission that is a predetermined percentage of the sale price of the property. This practice arose as a result of market conditions, not regulation.[57] Some have argued that this arrangement favors the seller, since higher sales prices result in higher commissions.[58] With MARS, however, tying fees to the modification obtained would align the provider's and borrower's interests while not harming the counterparty—i.e., the servicer—because unlike the broker, the provider only represents the borrower.

Arguments regarding the insufficiency of disclosure in informing consumers' decisions also explain why allowing a borrower to reject a proposed modification and avoid paying for MARS is insufficient. Many borrowers will not know whether they are getting a modification that justifies the cost of MARS and thus will be unable to make an informed choice.[59] Requiring that fees be based on the results achieved with a modification, however, ensures that even after accounting for MARS fees

---

54. Anecdotal information from before the rule's enactment suggests that MARS providers generally do not charge an outcome-based fee, and there is no reason to believe that this aspect of the industry's model will change after the rule's implementation. *See, e.g.*, SAUNDERS ET AL., *supra* note 27, at 10–11 (listing examples of fees determined up-front that borrowers paid to MARS providers).

55. This is particularly the case because, unlike some other service providers, MARS providers face a low likelihood of having repeat customers given the remedial nature of their services. *See supra* note 52 and accompanying text.

56. *See* GEORGE LEFCOE, REAL ESTATE TRANSACTIONS, FINANCE, AND DEVELOPMENT 42–43 (6th ed. 2009) (explaining that brokers generally operate on a contingent fee basis, where compensation is calculated as a fixed percentage of the selling price of property).

57. *Id.*

58. Patricia A. Wilson, *Nonagent Brokerage: Real Estate Agents Missing in Action*, 52 OKLA. L. REV. 85, 104 (1999) (suggesting that there is an "inherent conflict of interest, which tends to favor the seller" under the standard broker's contingent fee arrangement).

59. *See supra* note 48 and accompanying text (describing the inadequacy of disclosure at ensuring rational decisionmaking).

the borrower will still receive a benefit from the modification. Moreover, such regulation of fees would fall within the FTC's authority to adopt regulations regarding unfair mortgage practices.[60]

B. The FTC Has the Authority to Regulate MARS Fees to Avoid Unfair Practices

A MARS regulatory regime like the FTC's that does not limit the fees that providers charge leaves consumers in danger of paying fees unjustified by the services they receive.[61] Regulation of fees is within the scope of the FTC's authority to regulate unfair practices since the agency can declare a practice unlawful if it finds "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[62] Thus, fee regulation would need to pass a three-prong test to fall within FTC authority: (1) it must regulate a practice that causes substantial injury;[63] (2) the practice must not have countervailing benefits;[64] and (3) the injury caused by the practice must not be reasonably avoidable by consumers.[65] The FTC addressed the concept of a fee cap in its Statement of Basis and Purpose, suggesting that it may not have the authority to enact such a cap.[66] However, in addressing the issue, the FTC described the downsides of a static cap on fees,[67] which is significantly different from requiring that fees be proportional to the outcome achieved.[68] The following discussion shows that the FTC does, in fact, have the authority to regulate fees.

60. Credit Card Accountability Responsibility and Disclosure (Credit CARD) Act of 2009, Pub. L. No. 111-24, § 511(a), 123 Stat. 1734, 1763–64 (2009).

61. *See supra* Part II.A. (outlining the risk that MARS providers' fees will exceed the savings achieved by a modification).

62. 15 U.S.C. § 45(n) (2006).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,122 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322) (finding that the market should control MARS, and "the Commission's role is to remove obstacles to consumers making the informed choices that are necessary to a properly functioning market").

67. *See id.* at 75,122 n.351 (defending the decision not to adopt a fee cap by referring to disadvantages associated with "fixed maximum fee[s]," without weighing the costs and benefits of dynamic fee regulations).

68. The Statement of Basis and Purpose refers to a concern that "changes in market conditions and technologies render the fixed maximum fee too low . . . or too high." *Id.* A dynamic cap, such as one tied to the amount of savings that a borrower receives, has the advantage of adapting to changing circumstances.

1. Excessive Fees Cause Substantial Injury

A fee cap is necessary to avoid substantial injury. MARS providers' high-pressure sales tactics leave consumers vulnerable to agreements that involve excessive fees.[69] In enacting its prohibition on advance fees, the FTC tried to avoid the situation in which MARS providers charge up-front fees and do not provide the promised services.[70] This alone does not fully address the problem with MARS fees. It is likely—given that the rule does not regulate fees beyond banning up-front payments—that MARS providers will insist on a flat fee, with the amount determined up-front, for the provision of their services.[71] While it is possible that a borrower might refuse to execute the modification if the predetermined fee is greater than her savings from the proposed modification, the borrower will only refuse if she actually understands that this is the case. If the borrower does not adequately understand the modification, she will likely focus on the fact that the modification has some initial reduction in payments. It is not unlikely, given the circumstances, that the borrower will end up executing the modification before realizing that the MARS provider's fee leaves her worse off.[72]

Another FTC rule and the litigation surrounding it are instructive in evaluating the injury from excessive MARS fees. The consumer injury from the absence of a fee cap parallels the injury at issue in the adoption of the Credit Practices Rule, which survived challenge in *American Financial Services Ass'n v. FTC*.[73] That rule regulates six types of creditor remedies, including wage assignments and security interests in household goods.[74] In adopting its rule, the FTC determined that security interests in household goods and wage assignments constituted "unfair" trade practices.[75] The American Financial Services Association and South Carolina Department of Consumer Affairs challenged these parts of the rule, arguing that they exceeded the FTC's unfairness authority "because in the absence of seller

69. *Cf. id.* at 75,116 ("Consumers in financial distress suffer monetary harm . . . when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results.").

70. *Id.* at 75,120.

71. This type of arrangement would make sense for a MARS provider, given that it will incur costs largely unrelated to its level of success and thus will want to know that it will recoup these costs upon execution of a modification.

72. *See supra* Part II.A. (arguing that disclosures alone do not ensure informed consumers).

73. 767 F.2d 957, 962 (D.C. Cir. 1985).

74. *Id.* at 963. The rule also regulates confessions of judgment, waivers of exemption, pyramiding of late charges, and cosigner liability. *Id.*

75. *Id.* at 964.

overreaching in the form of deceit, coercion or nondisclosure of material information, the FTC may not intercede in the market as an 'invisible hand' to obtain 'better bargains' for consumers."[76] In upholding the rule, the court acknowledged the relevance of consumers' already distressed circumstances in determining the injury resulting from such practices.[77] The MARS consumer's circumstances are not unlike the debtor's situation that the court describes, because in both cases the consumer is "most likely already enmeshed in a financial crisis."[78] Homeowners who use MARS are generally unable to keep up with their mortgage payments.[79] If a MARS provider charges an excessive fee, the borrower, despite obtaining a modification, will likely still be unable to make her mortgage payments after paying the MARS provider's fee and will end up losing her home.

The MARS consumer is also similar to the consumer protected by the Credit Card Practices Rule because both consumers may lose items with greater value to them than others. In *American Financial Services*, the court noted that when creditors seize household goods, "the replacement cost to the consumer is substantial, not to mention the sentimental value of the possessions and psychological impact of the loss on the consumer."[80] The loss of a house through foreclosure similarly involves the forfeiture of a possession with a high replacement cost, particularly given the unique nature of real property.[81] The fact that many homeowners attach great sentimental value to their homes and associated memories compounds this loss.[82]

Finally, the MARS consumer is in a time-sensitive position that heightens the need for fee regulation rather than the rule's up-front fee ban. If the MARS consumer avails herself of her right to reject the modification

---

76. *Id.*

77. *Id.* at 973 (comparing the minimal value of household items seized to the creditor with the consumer's financial and psychological loss).

78. *Id.*

79. Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,117 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322) ("MARS providers direct their claims to financially distressed consumers who often are desperate for any solution to their mortgage problems and thus are vulnerable to the providers' purported solutions.").

80. *Am. Fin. Servs. Ass'n*, 767 F.2d at 973.

81. *See, e.g.*, 1 JAMES C. BONBRIGHT, THE VALUATION OF PROPERTY 66 (1937) (pointing out that valuing a home at what the owner might receive as payment from someone else for it will not account for the full value of the home to the owner); ALFRED A. RING & JAMES H. BOYKIN, THE VALUATION OF REAL ESTATE 66 (3d ed. 1986) (noting the distinct valuation issues pertaining to real estate because of uniqueness and immovability).

82. *See, e.g.*, John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 791–92 (2006) (arguing that just compensation for homes in eminent domain cases should be higher than market value and listing ways that homeowners attach personal, nonmonetary value to their homes).

that a provider obtains and thus avoids paying the provider,[83] she has nonetheless lost the time required to negotiate the modification. Given that the borrower is already in a time-sensitive position when enlisting a MARS provider's assistance, the lost time itself constitutes a significant injury to the borrower.[84] Thus, the MARS consumer's precarious financial position, the nature of the property MARS consumers stand to lose as a result of excessive fees, and the time-sensitive position of the MARS consumer mean that excessive MARS fees cause substantial injury to consumers.

2. The Benefits from Unregulated Fees are Insufficient to Overcome the Injury to Consumers

While excessive MARS fees cause substantial injury to consumers, allowing providers to determine fees without any government regulation provides little benefit. The potential harm of regulating the fees that MARS providers charge is that providers will cease to exist.[85] One must assess this harm with an awareness of the broader context in which MARS providers operate. The government provides free services to help borrowers negotiate modifications with their lenders.[86] A borrower can also attempt to negotiate on her own behalf.[87] Further, the FTC has noted

83. *See* Prohibition on Collection of Advance Payment and Related Disclosures, 16 C.F.R. § 322.5(b) (2011).

84. *See supra* note 41 (noting the time-sensitive nature of the typical MARS consumer's circumstances).

85. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,115 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322) (referencing comments in response to the proposed advance-fee ban in which MARS providers claimed that such a ban would drive providers out of business). There are reasons to encourage legitimate MARS providers, particularly because government-sponsored services have not been sufficient to help every borrower who needs assistance. *See, e.g.*, *Hearing*, *supra* note 34, at 84 (prepared statement of Lauren Saunders, Managing Att'y, National Consumer Law Center) ("Though the free services offered by HUD-approved housing counseling agencies are unquestionably the first and best option for struggling homeowners, these counselors are overwhelmed and some homeowners report difficulties in getting through to them. For some homeowners, it would be well worth $2,000 or $3,000 to obtain an affordable modification . . . ."); Andrews, *supra* note 3 (describing how various classes of borrowers are ineligible for government-sponsored help).

86. *See supra* notes 2–3 (discussing government-sponsored efforts, such as HAMP, which are meant to help borrowers struggling with their mortgage payments).

87. *See Hearing*, *supra* note 34, at 55 (prepared statement of Martha Coakley, Att'y Gen. of the Commonwealth of Massachusetts) (testifying that "most homeowners should be able to obtain a loan modification without having to hire someone to assist them"). *But cf.* Paul Kiel, *Borrowing Trouble: Some Lenders are Modifying Mortgages Only After Homeowners Waive Their Right to Sue*, SLATE, May 9, 2011, http://www.slate.com/id/2293391/pagenum/all/ (describing servicers' efforts to force borrowers to waive their rights, such as the right to sue for faulty documentation, in order to obtain modifications and thus highlighting borrowers'

that MARS rarely result in modifications.[88] These factors lessen the overall benefit derived from the MARS industry.

In addition to the fact that the MARS industry is not essential, the most extreme consequences of regulating fees are only likely to occur where the benefits of MARS are minimal. In assessing the harm of providers no longer offering MARS in the context of the advance fee ban, the FTC decided that the harm was not sufficiently significant to outweigh the benefits of the advance fee ban.[89] While there is a greater possibility that fee regulation would cause MARS providers to disappear, since the ban only deals with the timing rather than the amount of the payment, MARS is only valuable where a borrower obtains a beneficial loan modification. A modification will not be beneficial, and thus will not justify using MARS, where the fee charged leaves the borrower still unable to make her mortgage payments. Thus, even if a fee cap like the one this Recent Development argues for[90] would drive MARS providers out of business, this is no great harm.

3. Consumers are Unable to Avoid the Injury from Excessive Fees

The final prong of the test for an FTC unfairness action requires that consumers be unable to reasonably avoid the injury from a practice.[91] The direct injury to consumers from excessive fees for MARS is the money they lose to such fees. Given the frail financial status of the typical MARS consumer, however, this money will often mean the difference between being able to remain current on mortgage payments and defaulting.[92] Thus, the real injury from excessive fees is magnified in many cases beyond the excess money paid to also include default on the consumer's mortgage payments and the concomitant consequences. Given the nature of MARS, disclosure of fees is insufficient to aid consumers in avoiding excessive fees for three reasons: (1) MARS providers have a history of high-pressure sales tactics; (2) MARS consumers generally agree to fees upon contracting with providers even though results come later; and (3) MARS consumers are unlikely to respond to disclosures.

---

need for assistance in negotiating for modifications).

88. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,118 ("[T]he rulemaking record demonstrates that the vast majority of consumers fail to receive successful loan modifications or other forms of mortgage assistance promised.").

89. *Id.* at 75,118–19.

90. *See infra* Part II.C. (proposing that fees be restricted to 15% of the borrower's savings and thus tying the fees to the modification obtained).

91. 15 U.S.C. § 45(n) (2006).

92. *See supra* note 79 and accompanying text (explaining the financially vulnerable position of the typical MARS consumer).

First, MARS providers' history of deception and high-pressure sales tactics lowers the likelihood that their customers will adequately evaluate the terms of the contract they enter into with the provider.[93] For example, in a complaint against a MARS provider, Illinois Attorney General Lisa Madigan alleged that the provider targeted Polish consumers who did not speak English and then asked them to sign contracts written only in English.[94] These high-pressure tactics operate in addition to MARS consumers' already vulnerable psychological position.[95]

In prior rulemakings, the FTC has found this consumer vulnerability relevant to determining whether consumers can reasonably avoid an injury, and courts have upheld rules based on such findings. For example, the court in *Pennsylvania Funeral Directors Ass'n v. FTC*[96] evaluated the FTC's ban on "casket handling fee[s]" in the funeral services industry.[97] The FTC issued the ban because funeral service providers were charging fees to consumers who bought caskets from third parties in order to discourage them from doing so.[98] In assessing whether consumers could reasonably avoid the injury from such fees, the court stressed that "the FTC promulgated the original Funeral Rule . . . because of the particular vulnerability of funeral service consumers . . . [who] often do not have the time to 'shop around.'"[99] The court found this argument persuasive in showing that consumers could not reasonably avoid the injury caused by the fees.[100] Just as funeral service consumers are in a time-sensitive position that makes it difficult for them to compare prices, so too are MARS consumers, who must act quickly to avoid losing their homes.

---

93. *See, e.g.*, *Hearing*, *supra* note 34, at 51 (prepared statement of Martha Coakley, Att'y Gen. of the Commonwealth of Massachusetts) (describing aggressive advertising strategies employed by MARS providers, including "unsolicited telephone calls"); Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,116 (referring to consumer injury resulting from "sales pitches frequently characterized by high pressure and deception"); NAT'L CMTY. REINVESTMENT COAL., *supra* note 7, at 26 (stating that "many law firms, former subprime lenders and other real estate professionals have diverted their talents to foreclosure assistance services"); SAUNDERS ET AL., *supra* note 27, at 8–9 (describing MARS providers' sales tactics, including the use of pressure and deceit).

94. Complaint for Injunctive and Other Relief at 6–7, People v. Ill. Loan Modification, LLC, No. 2010-CH-48287 (Ill. Cir. Ct. Nov. 9, 2010).

95. *Cf.* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 974 (D.C. Cir. 1985) (describing various ways in which borrowers faced with threats upon default on consumer debts are particularly vulnerable because they are seeking any suggested "ways out" of debt).

96. 41 F.3d 81 (3d Cir. 1994).

97. *Id.* at 82.

98. *See id.* at 84 (describing how funeral homes began charging casket handling fees in reaction to increased competition in casket sales).

99. *Id.* at 91–92.

100. *Id.*

Second, because MARS consumers are particularly vulnerable, MARS providers will continue to insist upon a predetermined fee in the absence of regulation to the contrary, making it difficult for consumers to avoid excessive fees. Lenders and servicers have been unwilling to agree to significant modifications, such as reductions in loan principal.[101] Thus, a MARS provider will want to protect itself against the probability that it will not achieve a modification worthy of a high fee by charging a fee unrelated to the modification achieved. Until the borrower has received a modification offer, however, she cannot determine whether this fee will be justified.[102] Requiring that fees be assessed in relation to the terms of the modification executed would ensure that the borrower did not owe the MARS provider more than she had saved through using the provider. It would also save consumers from gambling on whether their MARS provider would end up obtaining modifications that justified the provider's fees.

Finally, disclosure is an ineffective way to aid consumers in avoiding harm.[103] The FTC dealt with the concept of consumer ability to avoid injury in the seminal case of *In re International Harvester Co.*[104] That case involved a company that made tractors with fuel-cap issues that occurred very infrequently but with potentially drastic consequences.[105] In explaining that consumers could not reasonably avoid injury, the FTC noted that the concept "depends, not just on whether people know the physical steps to take in order to prevent [the injury], but also on whether they understand the necessity of actually taking those steps."[106] Applying this logic to MARS, in order for consumers to be able to avoid the injury from excessive fees, they not only need to know that excessive fees will harm them, but also need to know how to identify and avoid excessive fees. To the extent that disclosures do not succeed in informing MARS consumers of the need to demand lower fees, disclosure alone will leave consumers unable to avoid the injury from excessive fees.

---

101. *See, e.g.*, White, *supra* note 29, at 1127 (describing servicers' failure to agree to adequate modifications).

102. Further, the borrowers who use MARS are in a time-sensitive position and thus cannot afford to wait until the provider has obtained a modification offer in order to determine whether to accept the offer (in which case they will need to pay the provider's fee) or reject it. *See supra* note 41 (explaining the time-sensitive position of the typical MARS consumer).

103. *See supra* note 48 and accompanying text (discussing the ineffectiveness of relying on disclosures to ensure that consumers understand the terms of modifications).

104. 104 F.T.C. 949 (1984).

105. *Id.* at 1051.

106. *Id.* at 1066 (citation omitted).

C. The FTC Should Adopt a Hybrid of the Illinois and Maine Approaches to Fee Regulation

Given the abusive practices prevalent in the MARS industry and the inability of the FTC rule to fully address them, it is helpful to look at state efforts to regulate MARS for guidance on how to improve the rule. At least twenty-four states and the District of Columbia have laws regulating MARS.[107] Of the states that regulate MARS, both Maine and Illinois have specifically attempted to regulate the fees that providers can charge.[108] In 2009, Illinois enacted a statute that limits the fees that "distressed property consultants" can charge.[109] For modifications that reduce payments for five years or more, a consultant cannot charge more than "the lesser of the homeowner's: (1) existing monthly principal and interest mortgage payment; or (2) total net savings derived from the lowered monthly principal and interest mortgage payment over the succeeding 12 months."[110] For modifications that do not last as long, fees cannot exceed "50% of the owner's existing monthly principal and interest mortgage payments."[111]

Thus, fees in Illinois are limited in accordance with a borrower's circumstances. Further, a consultant cannot "claim, demand, charge, collect, or receive any compensation until after the distressed property consultant has fully performed each service the distressed property consultant contracted to perform or represented he or she would perform."[112] This means that a consultant cannot charge up-front fees.[113]

---

107. *See* SAUNDERS ET AL., *supra* note 27, at 20 (listing the various ways different states have regulated MARS).

108. Neither statute uses the *MARS* terminology, but each attempts to regulate a largely similar set of service providers.

109. 765 ILL. COMP. STAT. ANN. 940/70 (West 2009). The statute defines a "distressed property" as "residential real property . . . that is in foreclosure or at risk of loss due to nonpayment of taxes, or whose owner is more than 30 days delinquent on any loan that is secured by the property." *Id.* 940/5. Thus, the statute does not appear to apply to consultants' activities where a homeowner is not already behind on her mortgage payments.

110. *Id.* 940/70.

111. *Id.*

112. *Id.* 940/50(a)(1).

113. The Illinois prohibition on up-front fees, however, provides less protection than the FTC rule. The Illinois statute requires that a consultant complete the service she represented that she would perform before receiving payment. *Id.* This prohibition acts in conjunction with the borrower's right to rescind her contract with the consultant "at any time until after the distressed property consultant has fully performed each service the distressed property consultant contracted to perform or represented he or she would perform." *Id.* 940/15(a). The FTC rule, on the other hand, prohibits payment until the borrower has executed a modification, thus distancing the payment contingency from performance of represented services and making payment effectively depend instead on

The limitation on fees when the modification does not last for five years, however, is unrelated to the savings achieved by the modification. Given the difficulty borrowers have had in obtaining lasting modifications,[114] this aspect of the statute is significant. Despite the statute's shortcomings, Illinois Attorney General Lisa Madigan has used the statute to aggressively address unfair MARS practices.[115]

Maine adopted its Debt Management Services Act in 2007.[116] Under the Act, a "debt management service" includes one that is "[a]cting or offering to act as an intermediary between a consumer and one or more creditors of the consumer for the purpose of adjusting, settling, discharging, reaching a compromise on or otherwise altering the terms of payment of the consumer's obligation."[117] The Act limits fees so that a provider can charge a "one-time initial or set-up fee" of at most seventy-five dollars[118] and a "reasonable fee not to exceed 15% of the amount by which the consumer's debt is reduced as part of each settlement."[119] Maine, like Illinois, has used its statute to combat unfair MARS practices in conjunction with other state and federal actions.[120]

Having seen that the FTC has the authority to regulate MARS fees, it is helpful to look to the Illinois and Maine statutes for guidance regarding how the FTC ought to regulate such fees. The Illinois statute bans up-front

borrower satisfaction (assuming that a borrower will not execute a modification that she is not satisfied with). *See supra* note 43 and accompanying text.

114. *See supra* note 31 (explaining difficulties homeowners have encountered in trying to obtain modifications).

115. *See, e.g.*, Press Release, Ill. Attorney Gen. Lisa Madigan, Madigan Files Two Mortgage Rescue Fraud Lawsuits, Seeks Immediate Ban on Companies' Operations (April 6, 2009), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2009_04/20090406.html (describing fees of MARS providers targeted by complaint and noting past judgments against providers of over $1.8 million); *see also* Mary Ellen Podmolik & Katherine Skiba, *Feds Crack Down on Mortgage Rescue Fraud*, CHI. TRIB., June 18, 2010, at Sec. 1-31 (describing federal crackdown on MARS fraud as part of "Operation Stolen Dreams" as well as cases Attorney General Madigan filed in conjunction with federal efforts).

116. 2007 Me. Legis. Serv. 60 (West).

117. ME. REV. STAT. ANN. tit. 32, § 6172(2)(D) (2009). The statute includes an exemption for a "person admitted to the practice of law in this State as of the effective date of this chapter, except to the extent that debt management services constitute the exclusive activity of that attorney." *Id.* § 6172(3)(C).

118. *Id.* § 6174–A(1).

119. *Id.* § 6174–A(2)(B).

120. *See, e.g.*, Press Release, Office of the Me. Attorney Gen., Attorney General Sues Unlicensed Foreclosure Rescue/Mortgage Modification Companies (Nov. 24, 2009), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=85238&v=article (alleging that certain MARS providers violated the state's fee restrictions and noting that the Bureau of Consumer Credit Protection had recovered over $25,000 in restitution from providers).

fees entirely,[121] while the Maine statute allows for a nominal initial fee.[122] The FTC has banned up-front fees entirely, and this seems sensible given the low probability of achieving a successful modification and already cash-strapped nature of MARS consumers.[123] The Maine statute provides a preferable approach to the extent that it ties a MARS provider's maximum fee to a borrower's actual savings rather than her monthly payment.[124] This ensures greater adaptability of the fee regulation to a borrower's unique position. Further, this means that the MARS provider will attempt to achieve the greatest savings for the borrower, because greater savings mean a higher fee. Thus, the FTC should retain the rule's absolute ban on up-front fees, but should couple this with a ban on fees that exceed 15% of the savings achieved.

It is true that regulation of fees is more intrusive than disclosure requirements and even the prohibition on up-front fees because it gets to a fundamental element of the agreement between the consumer and the provider. Thus, such regulations as Illinois and Maine have adopted and this Recent Development has argued for may strike some as unneeded interference with consumer choice. According to such an argument, consumers should have the option of paying as much as they are willing to pay for services, without government interference. The FTC itself noted, "The purpose of the FTC's unfairness doctrine is not to allow the Commission to obtain better bargains for consumers."[125] A static, fixed price cap might well fit this description of excessive government intervention because such a cap ignores the individual characteristics of a transaction and needs frequent reassessment to ensure continuing applicability.[126] This is significant with MARS because the initial monthly payment and modification achieved will vary widely among different borrowers.[127] However, dynamic caps on MARS fees such as those in

121. 765 ILL. COMP. STAT. ANN. 940/50(a)(1) (West 2009).

122. Tit. 32, § 6174–A(1).

123. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75116 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322) (noting that the majority of borrowers do not receive modifications even when they use MARS and pointing out that MARS consumers already tend not to have enough money to pay all of their bills).

124. Tit. 32, § 6174–A(2)(B).

125. Mortgage Assistance Relief Services, 75 Fed. Reg. at 75,122 n.350.

126. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

127. Further, such a price cap would need constant revisiting to determine its continued reasonableness. *See id.* at 398 (noting that inflexible price-fixing agreements in the antitrust context require "ascertaining from day to day whether [they have] become unreasonable through the mere variation of economic conditions").

Maine and Illinois have the benefit of adapting to each case because fees are determined in reference to the borrower's unique circumstances. When market conditions suggest a likelihood of unfairness and deception such as in the circumstances surrounding MARS, a dynamic fee cap may be both reasonable and necessary.[128]

CONCLUSION

In the wake of a financial crisis that has left millions of homeowners unable to make their monthly mortgage payments,[129] a for-profit industry has grown to meet these homeowners' demand for services to help avoid foreclosure. The industry has been plagued by scams and the absence of federal regulation has frustrated efforts to combat these scams. Fortunately, Congress has recognized the need for regulation and has given the FTC the authority to issue rules regulating this industry. The FTC has issued a rule in its effort to curb these practices, and this rule goes a long way toward protecting homeowners from fraud, thus helping them avoid foreclosure. It is imperative that the FTC, now armed with regulation specifically addressing the MARS industry, continue its aggressive enforcement efforts.[130]

The FTC now has help enforcing the MARS rule. On July 21, 2011, the FTC began sharing its enforcement authority with the Consumer Financial Protection Bureau.[131] The Bureau also assumed the FTC's authority to prescribe rules and issue guidelines on that date.[132] This Recent Development argues for the extension of the prohibition on advance fees for MARS to the establishment of regulations that require fees to be determined in accordance with the results that MARS providers achieve for borrowers. If the FTC does not adopt such regulations, then the Consumer Financial Protection Bureau ought to do so pursuant to its new rulemaking authority.

---

128. *See infra* Part II.A. (describing the market for MARS and showing the insufficiency of disclosures to combat unfair practices).

129. *See supra* note 4 and accompanying text (noting the staggering number of foreclosures in 2010).

130. Even before issuing its MARS rule, the FTC brought over thirty cases against providers under its general consumer protection authority. Press Release, FTC, FTC Issues Final Rule to Protect Struggling Homeowners from Mortgage Relief Scams (Nov. 19, 2010), *available at* http://www.ftc.gov/opa/2010/11/mars.shtm.

131. Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092, 75,092 (Dec. 1, 2010) (codified at 16 C.F.R. pt. 322).

132. *Id.*